



# **CORPORATE AND BUSINESS LAW (CBL)**

**STUDY TEXT**

THE INSTITUTE OF  
CHARTERED ACCOUNTANTS  
OF NIGERIA



**CORPORATE AND  
BUSINESS LAW (CBL)**

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## Foreword

As the global economy continues to evolve, the importance of accounting professionals with strong technical skills, professional competence and ethical awareness cannot be overstated. The swift transformation in the business world, driven by globalisation, technological advancements and sustainability considerations, have significantly impacted the finance function and the skills required by professional accountants.

To remain relevant, the Institute's syllabus and training curriculum are designed to equip students with the knowledge and competencies required to succeed in the dynamic fields of accounting and finance. These are regularly reviewed and updated to reflect current trends and future needs of users of accounting and related services.

The Institute of Chartered Accountants of Nigeria (ICAN) is committed to ensuring that its syllabus and training curriculum remain current and relevant. To achieve this, ICAN undertakes a comprehensive review of these documents every three years, supplemented by annual updates to reflect emerging trends and developments in the national and global accountancy profession. Following a rigorous process, the Syllabus Review, Professional Examinations, and Students' Affairs Committees have developed a new 3-level, 15-subject syllabus. As approved by the Council, the new syllabus will be implemented starting with the November 2025 examination diet.

The publication of the Study Texts has consistently accompanied syllabus reviews, yielding notable improvements in the performance of professional examination candidates. To further enhance student success rates, the Council has approved the development of new learning materials (Study Texts) for all the subjects. This sixth edition, incorporates significant updates, including IT and soft skills, thereby enhancing the contents, innovation, and quality. This edition has taken into consideration all requirements of the International Panel on Accountancy Education (IPAE).

The Institute engaged renowned writers and reviewers, comprising esteemed scholars and practitioners with extensive experience in their areas of specialisation, to develop high-quality learning materials. The 15 subjects include:

1.	Business Environment	A1
2.	Financial Accounting	A2
3.	Management Accounting	A3
4.	Corporate and Business Law	A4

Skills Level		
5.	Financial Reporting	B1
6.	Audit, Assurance and Forensics	B2
7.	Taxation	B3
8.	Performance Management	B4
9.	Financial Management	B5
10.	Public Sector Accounting and Finance	B6

Professional Level		
11.	Strategic Business Reporting	C1
12.	Advanced Audit, Assurance and Forensics	C2
13.	Strategic Financial Management	C3
14.	Advanced Taxation	C4
15.	Case Study	C5

A rigorous quality control process was implemented, featuring a detailed and comprehensive review of the materials developed by the writers and reviewers by the Study Texts Review Technical Subcommittee.

These Study Texts will be valuable resources, not only for our candidates but also for students of other professional bodies, tertiary institutions, and finance and management practitioners, providing valuable resources for their studies and practices.

**Chibuzor Noel Anyanechi, (Chief) BSc, MBA, FCA**  
**Chairman, Syllabus Review Committee**



## Acknowledgement

The Institute expresses its heartfelt appreciation to the following Syllabus Review Committee members, writers, reviewers, and editorial board members for their invaluable contributions, expertise, and scholarly dedication that enabled the successful production of these new Study Texts: They are:

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# Contents

TABLE OF CONTENTS .....	viii
<b>SYLLABUS</b> .....	xvi
1. The Nigerian legal system .....	2
1.0 Learning objective .....	2
1.1 Learning outcomes .....	2
1.2 Introduction.....	2
1.3 Law and its sources.....	2
1.4 Sources of Nigerian law.....	2
1.5 Common law .....	3
1.6 Doctrines of equity.....	3
1.7 Statutes of general application (SOGA) .....	4
1.8 Nigerian legislation .....	5
1.9 Customary law.....	6
1.10 Judicial precedent or case law.....	8
1.11 Hierarchy of courts .....	10
1.12 International law .....	13
1.13 Legislative process .....	13
1.14 Division of legislative powers between the Federal Government and State Government.....	14
1.15 Distinctions between criminal law and civil law .....	14
1.16 The application of virtual evidence in the Nigerian judicial system .....	15
1.17 The governing principles of the Nigerian Data Protection Regulation, 2019.....	16
1.18 Chapter review .....	17
1.19 Worked examples.....	17

2	Company law:.....	22
2.0	Learning objective .....	22
2.1	Learning outcome.....	22
2.2	Introduction.....	22
2.3	Types of Business Organisation.....	22
2.4	Registration of business name.....	32
2.5	Distinction between a partnership and a company.....	33
2.6	Company.....	34
2.7	The Corporate Affairs Commission.....	34
2.8	Administrative proceedings committee (administrative committee).....	35
2.9	Functional classification of companies.....	35
2.10	Private company.....	35
2.11	Public company .....	36
2.12	Small company.....	36
2.13	Promoters.....	36
2.14	Pre-incorporation contract .....	38
2.15	Procedure for formation of a company.....	38
2.16	Documents of incorporation (Sections 36-40, CAMA).....	39
2.17	Registration and grounds upon which the CAC may refuse to register the documents of a proposed company .....	40
2.18	Consequences of incorporation .....	40
2.19	Lifting the veil of incorporation .....	43
2.20	Chapter review .....	43
2.21	Worked examples.....	44
3	Floatation and management of company.....	56
3.0	Learning objective .....	56
3.1	Learning outcomes.....	56
3.2	Introduction.....	56
3.3	Exercise of management powers.....	56
3.4	The powers of the board of directors .....	56
3.5	The powers of the general meeting .....	56
3.6	Meetings of a company and notices of meeting .....	57
3.7	Types of meeting .....	57
3.8	Annual returns of companies .....	60
3.9	Appointment, status and duties of company directors.....	61
3.10	Company audit .....	72
3.11	Company capital and securities.....	75
3.12	Maintenance of capital.....	79

3.13	The rule against payment of dividends out of capital .....	80
3.14	The rule on acquisition of own share by a company or share buy back .....	81
3.15	Debentures.....	82
3.16	Winding up of a company .....	83
3.17	Administration of companies.....	85
3.18	Chapter review .....	86
3.19	Worked examples.....	86
4.	Insolvency law.....	92
4.0	Learning objective .....	92
4.1	Learning outcomes .....	92
4.2	Introduction.....	92
4.3	Meaning and types of insolvency .....	92
4.4	Receivership.....	93
4.5	Schemes of arrangement, compromise, and netting.....	99
4.6	Fixed and floating charge .....	100
4.7	Chapter review .....	105
4.8	Worked examples.....	105
5	Criminal law .....	109
5.0	Learning objective .....	109
5.1	Learning outcomes .....	109
5.2	Introduction.....	109
5.3	Criminal law, ethics and ethical codes .....	109
5.4	Elements common to sections 98 and 116 of the Criminal Code .....	113
5.5	Money laundering.....	113
5.6	Electronic evidence .....	116
5.7	Chapter review .....	121
5.8	Worked examples.....	121
6	Law of contract .....	125
6.0	Learning objective .....	125
6.1	Learning outcomes .....	125
6.2	Introduction.....	125
6.3	Definition and elements of a contract.....	125
6.4	Privity of contract.....	132
6.5	Terms of contract.....	132
6.6	Exemption clauses in contract .....	133
6.7	Vitiating elements in a contract.....	134
6.8	Discharge of contract.....	136
6.9	Remedies for breach of contract.....	136

6.10	E-contract.....	137
6.11	Chapter review .....	139
6.12.	Worked examples.....	139
7	Agency .....	143
7.0	Learning objective .....	143
7.1	Learning outcomes .....	143
7.2	Introduction.....	143
7.3	Effects of agency.....	143
7.4	Agency distinguished from other similar relationships.....	143
7.5	Capacity .....	144
7.6	Classes of agent.....	144
7.7	Creation of agency .....	144
7.8	Forms of authority.....	145
7.9	Rights and duties of parties in agency relationship .....	146
7.10	Effects of contracts made by the agents .....	147
7.11	Termination of agency.....	147
7.12	Chapter review .....	147
7.13	Worked examples.....	148
8	Law of torts .....	152
8.0	Learning objective .....	152
8.1	Learning outcomes.....	152
8.2	Introduction.....	152
8.3	Classification of torts .....	152
8.4	Capacity in torts.....	153
8.5	Forms of liability in torts.....	153
8.6	Negligence .....	154
8.7	Product liability .....	156
8.8	Chapter review .....	156
8.9	Worked examples.....	157
9	Sale of goods .....	161
9.0	Learning objective .....	161
9.1	Learning outcomes.....	161
9.2	Introduction.....	161
9.3	Goods defined .....	161
9.4	Sale of goods distinguished from other forms of contract.....	162
9.5	Elements of sale of goods contract.....	162
9.6	Transfer of property .....	164
9.7	Property and possession .....	164

9.8	Reservation of right of disposal.....	165
9.9	Consequences of sale .....	165
9.10	Transfer of title .....	165
9.11	Performance of the contract .....	166
9.12	Rights of a seller.....	167
9.13	Rights of a buyer .....	167
9.14	Chapter review .....	168
9.15	Worked examples.....	168
10	Hire purchase .....	172
10.0	Learning objective .....	172
10.1	Learning outcomes .....	172
10.2	Introduction.....	172
10.3	Nature of hire purchase .....	172
10.4	Elements of a hire purchase agreement .....	173
10.5	Passing of ownership .....	173
10.6	Relevant proportion principle .....	173
10.7	Duties and rights of parties to a hire purchase contract .....	174
10.8	The third party in a hire purchase contract.....	175
10.9	Rights of owner and hirer against third party.....	175
10.10	Termination of hire purchase agreement.....	175
10.11	Remedies for breach of hire purchase agreement .....	176
10.12	Chapter review .....	176
10.13	Worked examples.....	176
11	Insurance .....	180
11.0	Learning objective .....	180
11.1	Learning outcomes .....	180
11.2	Introduction.....	180
11.3	Insurance distinguished from assurance.....	180
11.4	Marine insurance .....	180
11.5	Insurable interest.....	182
11.6	Subrogation .....	183
11.7	Indemnity.....	183
11.8	Double insurance and contribution .....	184
11.9	Assignment of insurance policy .....	184
11.10	Chapter review .....	186
11.11	Worked examples.....	186
12	Banking .....	191
12.0	Learning objective .....	191

12.1	Learning outcomes .....	191
12.2	Introduction.....	191
12.3	Bank and the banker .....	191
12.4	Banking business .....	192
12.5	Bank customer .....	192
12.6	Rights of a bank .....	194
12.7	The Central Bank of Nigeria .....	196
12.8	Chapter review .....	198
12.9	Worked examples.....	198
13	Negotiable instruments.....	202
13.0	Learning objectives.....	202
13.1	Learning outcomes.....	202
13.2	Introduction.....	202
13.3	Types of negotiable instrument .....	202
13.4	Endorsement of a bill.....	206
13.5	Negotiation of a bill .....	207
13.6	Capacity and liability of parties to a bill .....	207
13.7	Signatures .....	208
13.8	Holder of a bill of exchange .....	208
13.9	Discharge of a bill .....	209
13.10	Dishonour of a bill.....	209
13.11	Chapter review .....	210
13.12	Worked examples.....	210
14	Cheques.....	214
14.0	Learning objectives.....	214
14.1	Learning outcomes.....	214
14.2	Introduction.....	214
14.3	Parties to a cheque.....	214
14.4	Differences between a cheque and other bills of exchange .....	215
14.5	Types of cheque .....	215
14.6	Types of crossing.....	216
14.7	Material alteration .....	217
14.8	Forged cheque .....	217
14.9	Promissory note .....	217
14.10	Holder.....	218
14.11	Countermand of payment .....	218
14.12	Chapter review .....	219
14.13	Worked examples.....	219

15	Employment law .....	223
15.0	Learning objective .....	223
15.1	Learning outcomes .....	223
15.2	Introduction.....	223
15.3	Meaning of employment .....	223
15.4	Formation of contract of employment.....	224
15.5	Forms of contract.....	225
15.6	Duties of an employee.....	225
15.7	Duties of employer.....	226
15.8	Termination of employment contract .....	227
15.9	Chapter Review .....	228
15.10	Worked examples.....	228
16	Administration of estates and trusts .....	233
16.0	Learning objective .....	233
16.1	Learning outcomes .....	233
16.2	Introduction.....	233
16.3	Wills.....	233
16.4	Trusts.....	237
16.5	Chapter review .....	245
16.6	Worked examples.....	245
17	Alternative Dispute Resolution (ADR).....	249
17.0	Learning objective .....	249
17.1	Learning outcomes .....	249
17.2	Introduction.....	249
17.3	Alternative Dispute Resolution (ADR).....	249
17.4	Arbitration .....	252
17.5	Limitations to the adoption of ADR mechanisms .....	254
17.6	Chapter review .....	255
17.7	Worked examples.....	255
18.	Application of information technology in business.....	259
18.0	Learning objective .....	259
18.1	Learning outcomes .....	259
18.2	Introduction.....	259
18.3	Laws governing electronic transactions .....	259
18.4	Laws protecting e-commerce activities in Nigeria .....	260
18.5	Electronic contracts: click-wrap and shrink-wraps agreements .....	264
18.6	Jurisdictional issues in electronic contracts.....	265
18.7	The place of electronic evidence in the Nigeria Legal System .....	266

18.8	Chapter review .....	266
APPENDIX I .....		269
Questions and answers.....		269
Effective study .....		270
Examination technique.....		271
APPENDIX II .....		274
Bibliography.....		274

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## SYLLABUS

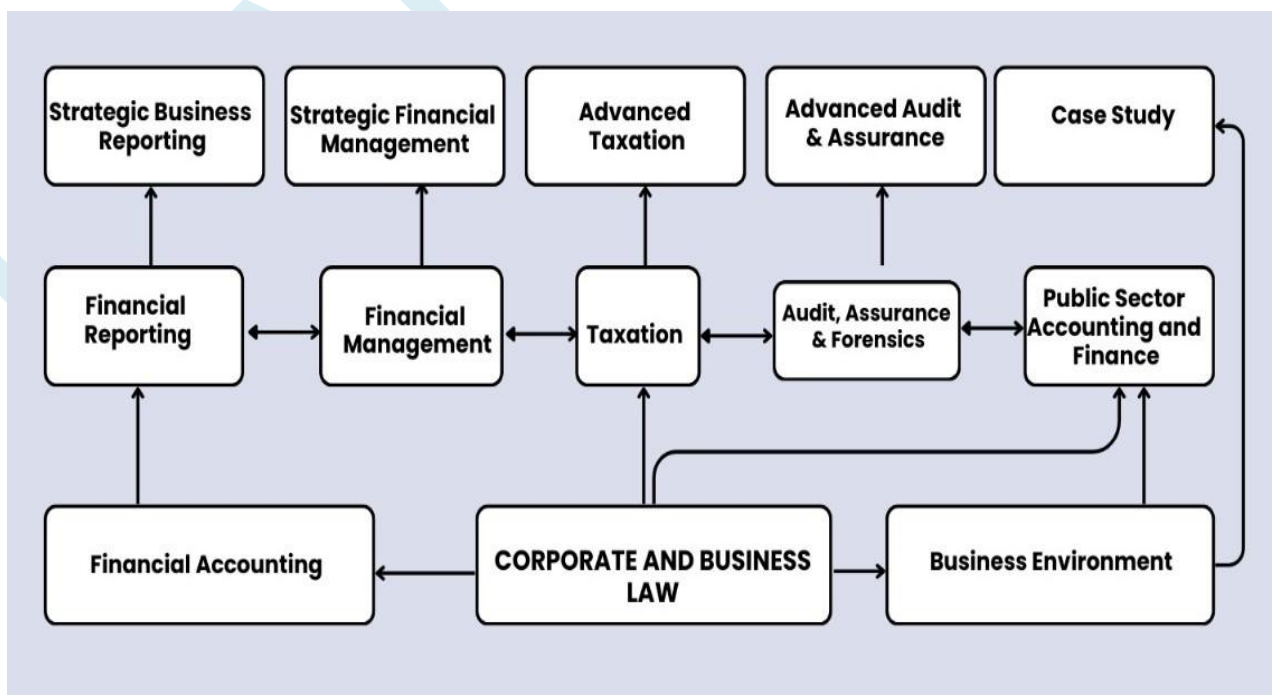
### SYLLABUS

#### Aim

To equip candidates with understanding and knowledge of law relevant to business and its operations. As professional accountants, there is need for a strong background in corporate and business law, particularly, the laws that regulate business organisations, commercial activities, employment relations, as well as those that are relevant to public sector entities.

#### Linkage with other related subjects

This diagram depicts the relationship between this subject and other related subjects.



## Foundation Level

### Main competencies

On successful completion of this paper, candidates should be able to:

- a. understand the nature, components and sources of Nigerian law, as well as the court system in hierarchical order;
- b. understand the law on the nature, formation and management of partnerships and companies;
- c. compare and contrast law and ethics;
- d. explain law of contracts, including e-contract;
- e. explain law of agency: types, duties and rights, negligence and vicarious liability in professional practice, as well as types of goods, duties and rights of sellers and buyers of goods, formation of hire purchase contracts and the duties of parties thereto;
- f. understand the key principles of insurance contract, negotiable instruments and the legal position of the parties to them;
- g. explain the basic law on banking, including the functions and duties of the Central Bank of Nigeria, other banks and financial institutions under the Central Bank Act 2007 and Banks and Other Financial Institutions Act 2020 (as amended); and
- h. understand alternative dispute resolution (ADR) mechanisms.

Content and competences – Overview	
Grid	Weighting %
The Nigerian Legal and Court Systems	5
Partnership, Company and Insolvency Laws	35
Criminal Law	10
Law of Commercial Transactions	35
Employment Law	5
Law of Trusts and Administration of Estate	5
Alternative Dispute Resolution Mechanisms	5
<b>Total</b>	<b>100</b>

## Detailed syllabus

Content and competences			Chapter	Weighting
<b>A</b>	<b>The Nigeria Legal and Court Systems</b>			5%
	a)	Identify and explain sources of Nigerian law.	1	
	b)	Outline the distinction between civil law and criminal law.	1	
	c)	Differentiate between case law and statutes	1	
	d)	Explain the hierarchy of courts in Nigeria.	1	
	e)	Explain virtual evidence in Nigerian judicial system.	1	
	f)	Explain key provisions of the Nigerian Cybercrime Act 2015.	1	
	g)	State the governing principles of the Nigerian Data Protection Regulation 2019.	1	
<b>B</b>	<b>Partnership, Company and Insolvency Laws</b>			35%
	<b>1</b>	<b>Partnership law</b>	2	
	a)	Explain the nature as well as types of, and the difference between a partnership and a company.	2	
	b)	Describe types of business organisation, types of partnership including limited partnership and limited liability partnership, how they may be formed, including the preparation of relevant documents; and registration of business name.	2	
	c)	Identify the procedures for management of partnerships, including the rights and duties of partners, their relationship <i>inter se</i> and with third parties.	2	
	d)	Describe when and how partnerships may be dissolved and the effects and differentiate partnerships from companies.	2	
	<b>2</b>	<b>Company law</b>	2	
	a)	Outline the functions of the Corporate Affairs Commission (CAC), and the composition as well as functions of the Administrative Proceedings Committee of the CAC.	2	
	b)	Describe types of company and the procedure for incorporation of a company, pre-incorporation contracts, promoters, their duties and remedies for breach thereof.	2	
	c)	Explain the consequences of incorporation and lifting the veil of incorporation.	2	
	d)	Describe the contents of a memorandum and articles of Association and how each can be amended.	2	

Content and competences			Chapter	Weighting
	e)	State the procedures for issue of shares and debentures (corporate bonds).	2	
	f)	Identify and explain ways in which the capital of a company is maintained and protected including laws relating to distribution of profits.	2	
	g)	State how directors may be appointed, re-appointed, removed or in any other way cease to hold office.	3	
	h)	Outline the duties of directors including fiduciary and other duties.	3	
	i)	Explain appointment, qualification, status, duties, powers of directors, removal of directors, and single and multiple directorship.	3	
	j)	State the consequences of a breach of duty by a director and enforcement of the duties, majority rule and minority protection.	3	
	k)	State the requirements for share transfer and disclosure of ownership.	3	
	l)	Explain how shareholders can influence the composition of the board, strategy or decisions of a company.	3	
	m)	Describe how meetings of shareholders can be requisitioned and how voting operates.	3	
	n)	Identify the rights of shareholders to challenge the management of a company.	3	
	o)	Explain issues bordering on appointment, powers, functions and removal/resignation of a company secretary.	3	
	p)	Distinguish types of meeting (statutory annual general meeting, extraordinary general meeting), virtual meeting, and company that need not hold meetings, notices required and resolutions.	3	
	q)	Explain company secretary's appointment, qualifications, dispensation in private company, status, duties, removal and resignation.	3	
	r)	Differentiate between ordinary and special resolutions.	3	
	s)	Describe statutory books and practical issues that relate to record keeping and filing.	3	
	t)	Explain the duties, powers and responsibilities of a company auditor, outlining the basic steps of appointment, removal and resignation.	3	
	u)	Explain raising of company capital through shares and debentures and maintenance of the capital.	3	
	v)	Explain how a company may be wound up and	3	

Content and competences				Chapter	Weighting
			preferential payments in winding up.		
		w)	Explain company administration, appointment and functions of administrator, and effect of administration.	3	
	<b>3</b>	<b>Law of Insolvency</b>		4	
		a)	Describe and distinguish types of insolvency, receivership appointment, duties, liability and powers of receivers, taking into consideration the rights of creditors and shareholders, realization of debenture holder's securities.	4	
		b)	Outline the consequences of insolvency.	4	
		c)	Explain scheme of arrangement, compromise and netting	4	
		d)	Explain the nature of and differences between fixed and floating charges.	4	
<b>C</b>	<b>Criminal law</b>				10%
		<b>Criminal law regulating to businesses and professional accountancy practice</b>			
		a)	Distinguish among laws, ethics and ethical codes.	5	
		b)	State the basic laws relating to theft, fraud and deception.	5	
		c)	State the basic laws relating to bribery.	5	
		d)	State the basic laws relating to money laundering.	5	
		e)	Explain the basic laws relating to negotiable instruments.	5	
		f)	Identify situations relating to data protection and computer misuse.	5	
		g)	Outline electronic evidence.	5	
		h)	Explain the role of an accountant as an expert witness in fraud cases including computer fraud.	5	
<b>D</b>	<b>Law of commercial transactions</b>				35%
	<b>1</b>	<b>Law of contract</b>			
		a)	Explain the nature, framework and types of contract.	6	
		b)	Describe how a contract may be made emphasizing the elements of a valid contract and how it can be enforced.	6	
		c)	Explain vitiating elements and how a contract may be terminated as well as the remedies for breach of contract.	6	

Content and competences			Chapter	Weighting
	d)	Describe the nature of e-contracts and outline how they can be enforced.	6	
<b>2</b>	<b>Agency</b>		7	
	a)	Explain the nature of an agency relationship.	7	
	b)	Identify situations where agency exists.	7	
	c)	Explain the duties, rights and legal capacity of an agent.	7	
<b>3</b>	<b>Law of torts</b>		8	
	a)	Describe negligent actions or omissions and outline their consequences.	8	
	b)	Explain vicarious liability and passing off.	8	
<b>4</b>	<b>Sales of goods</b>		9	
	a)	Define goods.	9	
	b)	Explain passing of property.	9	
	c)	State the duties, rights and remedies of a seller and buyer.	9	
	d)	Explain the duties and rights of a seller and buyer as well as elements of passing off in sale of property.	9	
<b>5</b>	<b>Hire Purchase</b>		10	
	a)	Distinguish hire purchase from similar contracts.	10	
	b)	State the mandatory contents of a Memorandum of hire purchase.	10	
	c)	Explain the rights, duties and remedies of parties to a hire purchase contract.	10	
<b>6</b>	<b>Insurance</b>		11	
	a)	Explain the nature of insurance contract, insurable interest, subrogation and contribution as well as assignment of policy.	11	
<b>7</b>	<b>Insurance</b>		12	
	a)	Explain the duties of banks and other financial institutions.	12	
	b)	Describe the powers and duties of the Central Bank of Nigeria (Reference to Central Bank Act as well as Banks and Other Financial Institutions Act).	12	
<b>8</b>	<b>Negotiable instruments</b>		13	
	a)	Explain types of negotiable instrument and the duties and liabilities of parties to a bill.	13	
	b)	Define bill of lading and explain its nature and operation.	13	
	c)	Describe letter of credit and letter of comfort.	13	

Content and competences				Chapter	Weighting
	<b>9</b>	<b>Cheques</b>		14	
		a)	Name parties to a cheque.	14	
		b)	Differentiate between a cheque and other bills of exchange.	14	
		c)	State types of cheque.	14	
		d)	Define promisory notes.	14	
<b>E</b>	<b>Employment law</b>				5%
		a)	Identify situations that give rise to employment contracts.	15	
		b)	State the law relating to employment, including employment contracts, duties and rights, dismissal, unfair dismissal and other claims of the employee.	15	
<b>F</b>	<b>Law of trusts and administration of estate</b>			16	5%
		a)	Explain creation of trust, the duties, powers, rights and accounts of trustees as well as the rights of beneficiaries.	16	
		b)	Explain the investments authorised by the Trustees Investments Act.	16	
		c)	Differentiate between executors and administrators and explain their duties.	16	
<b>G</b>	<b>Alternative dispute resolution mechanisms</b>			17	5%
		a)	Define alternative dispute resolution (ADR) mechanisms.	17	
		b)	Explain the nature, operation, advantages and disadvantages of alternative dispute resolution mechanisms as against court-adjudicated disputes.	17	

# THE NIGERIAN LEGAL SYSTEM

## Contents

- 1.0 Learning objective
- 1.1 Learning outcomes
- 1.2 Introduction
- 1.3 Law and its sources
- 1.4 Sources of Nigerian law
- 1.5 Common law
- 1.6 Doctrines of equity
- 1.7 Statutes of general application (SOGA)
- 1.8 Nigerian legislation
- 1.9 Customary law
- 1.10 Judicial precedent or case law
- 1.11 Hierarchy of courts
- 1.12 International law
- 1.13 Legislative process
- 1.14 Division of legislative powers between federal and state government
- 1.15 Distinctions between civil law and criminal law
- 1.16 The application of virtual evidence in the Nigerian judicial system
- 1.17 The requirements of the Nigerian Cyber Security Act, 2015
- 1.18 The governing principles of the Nigerian Data Protection Regulation, 2019
- 1.19 Worked examples



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## **1. The Nigerian legal system**

### **1.0 Learning objective**

This chapter introduces readers to the Nigerian legal system, including the sources of Nigerian law, and the court system.

### **1.1 Learning outcomes**

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

- (a) define law;
- (b) explain the purpose of law;
- (c) identify the laws applicable in Nigeria;
- (d) state and explain the forms of legislation in Nigeria;
- (e) differentiate between criminal and civil proceedings;
- (f) explain the role of courts in the administration of justice;
- (g) identify the classification of courts;
- (h) explain the jurisdiction and composition of each of the courts;
- (i) explain the process of commencement and enforcement of action;
- (j) differentiate between criminal and civil law;
- (k) explain the application of virtual evidence in the Nigerian judicial system;
- (l) explain the requirements of the Cybercrimes (Prohibition, Prevention, etc) Act, 2015; and
- (m) explain the governing principles of the Nigerian Data Protection Regulation, 2019.

### **1.2 Introduction**

In reality, the law covers an enormous range of situations and the legal system in Nigeria has a variety of courts and methods for dealing with different types of cases. The purpose of this chapter is to explain what the law is and its role in the society as well as its various sources. The chapter also examines the various ways by which the laws are interpreted to give meaning to them.

### **1.3 Law and its sources**

#### **1.3.1 Meaning of law**

Many scholars in law have defined law, but there is no single meaning of law that is universally accepted.

John Salmond defines law as “the body of principles recognised and applied by the state in the administration of justice.” Law can also be described as a formal mechanism of social control. It is formal because its rules could be enforced through the courts and legal system, while in a broad sense all laws could be said to be involved in some area of social control.

### **1.4 Sources of Nigerian law**

Source of law means (i) the origin of law, and (ii) where law could be found. The sources of Nigerian Law are the Received English Law (consisting of the Common Law of England, Doctrines of Equity and Statutes of General Application), Nigerian Legislation, Customary Law, Judicial Precedents or Case Law, and International Law (Treaties, Conventions and Protocols).

Secondary/subsidiary sources of law include law reports, law textbooks, learned works, etc.

English law is a major source of law by virtue of the fact that Nigeria was colonised by England. English law was first introduced to then Lagos Colony by virtue of Ordinance 3 of 1863 and later made applicable to the whole of Nigeria. The English law that applies in Nigeria consists of the Common Law of England, the Doctrines of Equity and Statutes of General Application.

## **1.5 Common law**

Common law may be described as the law that was common to the whole of England as opposed to customs, which were local, peculiar or limited to a particular area. A more appropriate meaning of the common law is a law that developed from decided cases based on customs that were uniform or general to the people of England. The phrase 'common law' is still used to distinguish laws that have been developed by judicial decisions, from laws that have been created by statute or other legislation.

### **1.5.1 Nature and development of common law**

Common law was introduced into England after the Norman Conquest in 1066. The first Norman King, William the Conqueror, set up the *Curia Regis* (the King's Court) and appointed his own judges. Persons who had disputes were encouraged to apply to have the king (or his Judges) decide the matter. In addition to the central court, the judges were sent to major towns to decide all the important cases.

Initially, the judges applied the local customs or the old Anglo-Saxon laws to decide cases, but over a period of time, the judges adopted the practice of returning to Westminster in London to discuss with each other the laws or customs they had applied and the decisions they had reached. Gradually, the judges selected the best customs, which they then applied to cases throughout the country. This practice had the effect of making the law uniform or 'common' throughout the whole country, and it is from there that the phrase 'common law' evolved.

The common law later became a rigid system, which made it difficult to obtain justice from the courts. Plaintiffs began actions at Common law through the issue of a writ. However, the writs that were available covered only a few cases, and where there was 'no writ', there was 'no remedy'.

The law was also very technical as if there was an error in the formality (writ) the person making the claim would lose the case.

Another major problem was the fact that the only remedy the common law courts could give was damages, that is, an order that the defendant pay a sum of money to the plaintiff (now claimant) by way of compensation. However, damages were unsuitable as a remedy in some cases. For example, in a case of trespass to land, an injunction would be more appropriate and compensatory.

## **1.6 Doctrines of equity**

### **1.6.1 Meaning, nature and development of equity**

Equity, in a broad sense, means fairness or whatever is just and ethical. However, in a technical sense, equity is the branch of law, administered by the Court of Chancery before the passing of the Judicature Acts of 1873-75, with a view to supplementing the common law rules by alleviating their harsh effect. Equity developed to address the harshness of the common law system.

Aggrieved persons who could not obtain justice in the common law courts appealed directly to the King. Most of these cases were referred to King's Chancellor, who was a lawyer, a priest, and the "keeper of the king's conscience." This was because the Chancellor based his decisions on principles of natural justice and fairness. He also developed new remedies, which were able to compensate claimants more adequately than the common law remedy of damages.

### **1.6.2 Equitable remedies**

The main equitable remedies are:

- (a) Injunction: This is an order to one of the parties involved in a case to do something or not to do something;
- (b) Specific performance: This is an order that a contract should be carried out as agreed;

- (c) Rescission: This is a remedy in contract cases the purpose of which is to return the parties as far as possible to their pre-contract position; and
- (d) Rectification: This is an order of court to rectify a document so as to reflect the intentions of the parties to an agreement. The court makes the order where they have made a mistake in the document so that the contents do not reflect their true intentions.

### 1.6.3 Remedies developed recently

In the twentieth century the courts established additional equitable remedies. Notable is the freezing order (known as a **Mareva Injunction**) and the search order (known as an **Anton Piller Order**).

The court may make a freezing order when there is a risk that one party to a case will move all their assets out of the jurisdiction of the court before the case is tried.

The search order allows the claimant to search the defendant's premises and remove any documents or other materials that could help the claimant to prove his case.

All equitable remedies are discretionary remedies.

It is important to note that whenever there is a conflict between the common and equity, equity prevails. This was decided in the **Earl of Oxford's case** (1615).

### 1.6.4 Maxims of equity

The exercise of equitable jurisdiction by the Court of Chancery was based upon certain general principles, many of which are now embodied in the maxims of equity. These maxims have played an important part in the development of equity. There are twelve of such maxims, and they are as follows:

- (a) Equity will not suffer a wrong to be without a remedy;
- (b) He who comes to equity must come with clean hands;
- (c) He who seeks equity must do equity;
- (d) Where the equities are equal, the first in time prevails;
- (e) Equity follows the law;
- (f) Delay defeats equity, or equity aids the vigilant and not the indolent;
- (g) Equality is equity;
- (h) Equity looks at the intent (substance) not the form;
- (i) Equity looks on that as done which ought to be done;
- (j) Equity imputes an intention to fulfill an obligation;
- (k) Where the equities are equal, the law prevails; and
- (l) Equity acts *in personam* (against the person).

## 1.7 Statutes of general application (SOGA)

These are the laws of general application that were in force in England on or before 1 January 1900. These laws became part of the laws of Nigeria by virtue of the various adaptation laws. They remain laws in Nigeria until repealed by a particular Nigerian legislation on the particular subject matter. Examples of such laws are the Infant Reliefs Act 1874, Partnership Act 1890, Sale of Goods Act 1893, Wills Act 1837, Bill of Exchange Act 1882, Conveyancing Act 1881 and Statutes of Frauds 1677 and so on. Statutes of general application are not applicable when there is a local statute on the subject.

### 1.7.1 English laws extending to Nigeria

These are laws made specifically for Nigeria by English Parliament between 1900 and 1 October 1960. Examples of these laws are the Copyright Act 1911 (later repealed by the Copyright Decree 1970), the Criminal Code, the Penal Code, and the Independence Act 1960.

## 1.8 Nigerian legislation

Nigerian pieces of legislation include the Constitution of the Federal Republic of Nigeria, Acts, Laws, Decrees and Edicts (in military regimes) and Bye laws.

### 1.8.1 The Constitution

The Constitution of the Federal Republic of Nigeria is the supreme law of the land. To this effect, any law that contradicts the Constitution is null, void and of no effect to the extent of the contradiction or inconsistency.

The Constitution has the following characteristics:

- (a) **Supremacy:** This has three aspects that are as follows:
- (i) Section 1 of the Constitution provides that the Constitution shall be supreme, and its provisions shall have binding force on all authorities and persons through the Federal Republic of Nigeria.
  - (ii) No part of the Federal Republic of Nigeria shall be governed except in accordance with the Constitution,
  - (iii) Sub-section 3 states that if any other law is inconsistent with this Constitution, the Constitution shall prevail and that other law shall to the extent of its inconsistency be null, void and of no effect;
  - (iv) **Writing and rigidity:** It is a written Constitution and the procedure for its amendment is so special that it is not easy to amend. The 1999 Constitution can only be amended by two-third majority of the National Assembly supported by at least two-third majority of the state Houses of Assemblies, thus making the Constitution a rigid Constitution whose amendment is cumbersome.
- (b) **Federalism:** It is a Federal Constitution that divides the powers of government between the Federal Government and the States of the Federation. The Federal Government has the power to legislate on the matters in the Exclusive Legislative List of the Constitution, while both the Federal and the State governments may legislate on the matters on the Concurrent Legislative List. Federal laws are called Acts while States' are called Laws. If a State Law contradicts a Federal Act on the same subject, the Federal Act prevails;
- (c) **Separation of powers:** To avoid arbitrariness, the Constitution separates the powers of government among the three branches of government namely, the Executive, Legislative and Judicial branches. None of these branches may exercise the powers of the others. Conversely, they act as checks and balances to each other.
- (d) **Rule of law:** The Constitution has governance according to law as one of its cardinal characteristics and principles. This prohibits arbitrariness. The principle of rule of law has two broad aspects (i) *Nemo iudex in causa sua* – a person shall not be the judge in his own case, and (ii) *Audi alteram partem* – a person shall not be condemned without hearing.
- (e) **Fundamental human rights:** Chapter IV of the Constitution makes provisions for fundamental rights which every Nigerian citizen is entitled to enjoy, some of these rights which include:
- (i) 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 thought, 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; and
- (x) Right to freedom against discrimination.

Any citizen whose right is infringed upon can approach either a State High Court or the Federal High Court for redress under the fundamental rights enforcement procedure rules.

#### Acts

These are laws passed by the National Assembly consisting of the Senate and the House of Representatives in a democratic government.

#### Decrees

These are enactments made by the Federal Military Government during Military regime.

### 1.8.2 Laws

These are laws enacted by the House of Assembly of a State in a democratic government.

#### Edicts

These are laws made by the military government of a State during a military regime.

#### Bye Laws

These are laws made by the Local Government Councils during democratic and military regimes.

## 1.9 Customary law

### 1.9.1 Meaning, characteristics, validity and proof of customary law

Customary law can be described as a body of rules regarded as obligatory by members of a particular community. Customary law varies from one community to another.

There are two types of customary law namely: (i) Ethnic customary law, which is indigenous and is applicable to members of a particular ethnic group or community, and (ii) Islamic customary law, which is based on the Islamic faith and is applicable to members of the Islamic faith.

Customary law has the following characteristics:

- (a) It is largely unwritten (with the exception of Islamic law);
- (b) The 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 court to be judicially noticed; and
- (d) It is largely flexible. As Osborne C. J. observed in the case of **Lewis v Bankole**, "one of the most striking features of customary law is its flexibility." Customary law appears to subject itself to the motive of expediency without losing its character as a custom.

### 1.9.2 Validity of customary law



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The courts do not recognise and enforce a custom automatically. Before they recognise a custom as law, it must pass the validity tests laid down by law. These are the:

**a. Repugnancy test**

Every applicable customary law must not be repugnant to natural justice, equity and good conscience. The term natural justice in a broad sense means 'justness'. Equity in a broad sense means 'fairness'.

Any customary law that is barbaric and falls below civilized standard of behaviour would be held invalid as contrary to natural justice. The repugnancy test has been applied in a number of cases such as: **Edet v Essien**, (1932).

In that case, Essien married 'X' after paying dowry on her. Later X deserted Essien and (without a refund of the dowry paid by Essien) married Edet. Two children were born out of the relationship between X and Edet. Essien claimed those children as his on the basis of an existing custom that provided that as long as the dowry paid on a woman had not been refunded, any children born by that woman belonged to the former husband whose dowry had not been refunded. The court held that such a custom was unenforceable because it was repugnant to natural justice, equity and good conscience.

See also **Re: Effiong Attah**, where the court held that a custom whereby the former owner of a servant was entitled to administer the personal property of the deceased servant would fail the repugnant test not only because it was unfair to the biological children of the servant, but also because of the institution of slavery which it adjudged barbaric and not civilised.

**b. Incompatibility test**

Every applicable customary law must not be incompatible either directly or by implication with any law for the time being in force. As such, a rule of customary law which conflicts with an existing law would not be enforced. For example in **Adesubokan v Yunusa** (1971), the court refused to enforce an Islamic rule on inheritance because in that particular case, it conflicted with an existing law i.e. the Wills Act 1837.

**c. Public policy test**

Section 14(3) of the Evidence Act provides that every applicable customary law must not be contrary to public policy. From the authority of decided cases such as **Alake v Pratt** (1955) and **Cole v Akinyele**, the courts have refused to enforce certain rules of customary law because, in the opinion of the court, they would encourage promiscuity, which is contrary to public good. An example is the practice of legitimation of a child born outside wedlock by acknowledgement of his paternity by the father.

**1.9.3 Proof of customary law**

Custom is a question of fact. As such, it must be proved by anyone alleging its existence. In the alternative, the courts would take judicial notice of a custom that been in use or so cited to have attained the status of notoriety. The law in this regard is stated in **Angu v Atta** (1916) P.C. 1874-1928, 43 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".

The existence of customary law may be proved in any of the following ways:

- (a) Direct oral evidence: This involves calling as witnesses persons, such as chiefs, elders, etc., that the court considers to be custodians of the particular custom in issue so as to be knowledgeable in the custom.
- (b) Documentary evidence: This involves tendering of evidence, such as books, manuscripts, or research findings of people who are considered experts and knowledgeable in the custom intended to be proved.
- (c) Judicial notice: In trying to prove a custom by judicial notice, a person is simply asking the court to accept the custom as existing because a higher or coordinate court had in previous proceedings repeatedly accepted the custom as existing.

## 1.10 Judicial precedent or case law

Judicial precedent refers to a decision of a court that establishes a principle of law. This source of law is also known as case law. Judicial precedent is an application of the principle of *stare decisis* which, loosely translated, means 'stand by what has been decided and do not unsettle the established'. In other words, lower courts are bound to follow the decisions of superior courts in cases that have similar facts. This promotes certainty of law, among other advantages.

Ratio decidendi and obiter dictum

It is not all parts of a past decision that constitute a precedent. Only the material facts plus the decision thereon (*ratio decidendi*) constitute a precedent. The remainder of a past decision, which does not constitute a precedent and need not be followed, is known as the *obiter dictum*. This is a statement by the way or other remarks that the court made in the course of the proceedings.

### 1.10.1 Types of precedents

There are three types of precedent, namely; (i) original precedent; (ii) binding precedent; and (iii) persuasive precedent.

#### (a) Original precedent

If the point of law in a case has never been decided before, then whatever the judge decides forms an original precedent for future cases to follow.

#### (b) Binding precedent

A binding precedent emanates from the decision of a superior court that a lower court must follow when the facts of the cases are similar.

#### (c) Persuasive precedent

This type of precedent is not binding but persuasive on other courts. It may operate between two courts of coordinate jurisdiction. For example, the decision of the High Court of the Federal Capital Territory is of persuasive authority to the High Court of Rivers State. In other words, the latter is not bound to, but may, follow it. Persuasive precedents also arise from other sources such as *obiter dicta*, dissenting judgments, and decisions of courts in other common law jurisdictions or countries.

### 1.10.2 Terminologies in precedents

#### (a) Distinguishing

This is a method that a judge adopts to avoid following a past decision that he could have been bound to follow. It means that a judge finds that the facts of the case he is deciding are materially and sufficiently different for him to draw a distinction between the present case and the previous precedent. He is then

not bound by the previous case.

**(b) Overruling**

This is the nullification of a previous decision by the same court, a superior court, or a statute. This is followed by the making of a new rule.

**(c) Reversing**

This happens when a higher court in the hierarchy of courts overturns the decision of a lower court on appeal in the same case. For instance, the Court of Appeal may reverse a decision of a High Court in the same case on appeal.

**(d) Per incuriam**

This is a description of a decision made in error or by mistake. It is one of the reasons for which a court would overrule its previous decision.

**1.10.3 Advantages of judicial precedent**

- (a) It makes law certain as it enables people to know the law on a particular subject matter and how it may affect them;
- (b) It makes law consistent and fair since similar cases are decided similarly; and
- (c) It saves the time of the court.

**1.10.4 Disadvantages of judicial precedent**

- (a) It may make law rigid and mechanical since lower courts must follow the decisions of higher courts;
- (b) It may lead to loss of initiative, especially on the part of lower court judges since they are bound by the decisions of higher courts;
- (c) The use of distinguishing to avoid past decisions can lead to illogical distinctions;
- (d) It is not always easy to find the relevant case law as well as distinguish the ratio of a case from an obiter dictum; and
- (e) It may lead to slow development of the legal system as the appeal process may be long and the applicable law may not be clear quickly.

**1.10.5 Application of the doctrine of judicial precedent within the Nigerian court system**

For an effective operation of the doctrine of precedent, two essential conditions must be satisfied namely: (a) a settled and good hierarchy of courts; and (b) a good law reporting system.

Judicial power is conferred on courts in Nigeria by chapter VI of The Constitution of the Federal Republic of Nigeria. The courts are the main formal institutions responsible for conflict resolution and the interpretation of laws. In Nigeria, there is a settled hierarchy of courts with a clear line of appeal from the lowest court up to the highest court.

**1.10.6 Classification of courts**

**Courts in Nigeria may be classified as follows:**

**(a) Court of records and courts other than courts of records**

Courts of records are courts that have records of their proceedings while courts other than court of records are those that do not have or keep records of their proceedings. However, virtually all courts in Nigeria now have records of their proceedings. The main distinction between these courts is that, courts of records



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have the power to punish for contempt committed both within and outside of the court while courts other than courts of record could punish only contempt committed within the court.

**(b) Superior courts and inferior courts**

Superior courts are courts of records with unlimited Jurisdiction. The superior courts consist of the Supreme Court, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, the State High Court, the Customary Court of Appeal, the Sharia Court of Appeal and the National Industrial Court. The inferior courts, on the other hand, consist of Magistrates Court, District Court, Area Court, the Juvenile Court and such other lower courts as parliament may by law establish.

**1.11 Hierarchy of courts**

This is the order of superiority of the courts within the judicial system. This is important because appeals from a lower court go to the higher court in the hierarchy. In addition, the decision of a higher court on the same subject matter binds the lower court, but the decisions of courts that are on the same level, that is of coordinate jurisdiction (for example, the Federal High Court, High Court of a State, Sharia Court of Appeal and Customary Court of Appeal) do not bind one another but are of persuasive effect only.

The courts of the Federal Republic of Nigeria in order of superiority are as follows:

**1.11.1 The Supreme Court of Nigeria**

This is the highest and the final court in the hierarchy. The decision of this court constitutes a binding precedent on all other courts below it in the hierarchy. The Supreme Court is not bound by its own previous decision, although the court usually follows its previous decision on the same subject matter and similar facts.

The Supreme Court may depart from its previous decision in the following circumstances:

- (a) Where the previous decision was reached per incuriam; and
- (b) Where there are two conflicting past decisions of the court, in which case the court overrules one and follow the other.

**1.11.2 The Court of Appeal**

This court is next to the Supreme Court in the hierarchy. The court is bound by the decisions of the Supreme Court, while the decisions of the Court of Appeal must be followed by other courts below it. In the case of young v **Bristol Aeroplane (1944)**, the court held that the Court of Appeal is bound by its previous decisions subject to the following except where the past decision was reached per incuriam.

Where there are conflicting decisions of the Court of Appeal, the court could choose which one it will follow and which to reject.

**1.11.3 Federal High Court**

This court was known as the Federal Revenue Court. It was established in 1973 but renamed as the Federal High Court in 1976 and retained by section 249 of the Constitution. According to section 250 of the Constitution, the Federal High Court has exclusive original Jurisdiction in all matters pertaining to:

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- (a) The revenue of the government of the federation;
  - (b) The taxation of companies and of persons that are subject to federal taxation;
  - (c) Customs and excise duties;
  - (d) Banking, banks and other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria;
  - (e) Any admiralty matter;
  - (f) Diplomatic, consular and trade representation;
  - (g) Citizenship, naturalisation, extradition, passports and visa;
  - (h) Bankruptcy and insolvency;
  - (i) Aviation and safety of aircrafts;
  - (j) Arms, ammunitions and explosives;
  - (k) Drugs and poisons;
  - (l) Weight and measures;
  - (m) Administration, management and control of the Federal Government or any of its agencies; and
  - (n) Treason.

In addition to the matters stated in the Constitution, certain statutes, including the Economic and Financial Crimes Commission (EFCC) Act, Independent Corrupt Practices Commission (ICPC) Act and National Drug Law Enforcement Act (NDLEA) Act confer exclusive original jurisdiction on the Federal High Court in respect of certain offences.

#### **1.11.4 State High Court**

Section 225 of the 1999 Constitution established a High Court for the Federal Capital Territory Abuja and section 270 of the constitution provides for each state of the Federation, a State High Court. A state High Court is a court of records with unlimited original jurisdiction in both civil and criminal cases and can exercise appellate Jurisdiction on decisions of inferior courts such as Magistrates Court, District Court and so on. The court is basically a court of first instance.

Original jurisdiction of the court in respect of civil cases include any matter relating to the determination of title/ownership to land, divorce petition in respect of statutory marriage and any other civil matter other than those under the exclusive jurisdiction of the Federal High Court. Original jurisdiction of the court in respect of criminal cases include felony and offences such as murder, armed robbery, rape, theft, fraud, corruption and so on. The court has the power to impose any punishment up to the maximum death sentence as the case may be.

#### **1.11.5 Sharia Court of Appeal**

Section 260 of the 1999 constitution establishes for the Federal Capital Territory Abuja, a Sharia Court of Appeal. Section 275 of the Constitution also provides that “there shall be for any state that requires it, a Sharia Court of Appeal for that state”.

The court exercises appellate and supervisory jurisdiction in civil proceedings. These are in areas involving questions of Islamic personal law coming on appeal from the Area Court, for example, matters relating to marriage, succession, and guardianship of infants under Islamic law.

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### **1.11.6 Customary Court of Appeal**

Section 280 of the 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 the proceeding coming on appeal from the Customary Court on question of customary law such as inheritance and marriages under customary law.

### **1.11.7 National Industrial Court**

The National Industrial Court was first established by the Trade Disputes Act 1976 to serve as the final arbitral court in labour and industrial relations dispute. Before the enactment of the National Industrial Court Act, 2006, which gave the court the status of a superior court of records, matters could only reach the court through referral by the minister of labour and employment either directly or on the rejection of the award of arbitration tribunal. The current National Industrial Court Act, 2006 has remedied that fundamental anomaly. Aggrieved parties can now take their complaints directly to the National Industrial Court without prior reference to or by the minister.

Federal High Court, State High Court, National Industrial Court, Customary Court of Appeal and Sharia Court of Appeal as Courts of coordinate jurisdiction

It is important to note that all the courts under this head are on the same level in the hierarchy of courts. That is, they are courts of coordinate jurisdiction. As such, the decision of one of these courts is not binding on the other, but is a persuasive precedent that may or may not be followed by any of the courts on the same level. However, they must follow the decisions of the Supreme Court and the Court of Appeal while their decisions must be followed by the Magistrates Courts and District courts.

It is also important to note further that decisions of courts outside Nigeria do not constitute a binding precedent on any Nigerian court; rather they are persuasive precedents.

### **1.11.8 Magistrates/District Courts**

These courts must follow the decisions of all the courts above them. However, their decisions are not binding on the courts below, such as Customary courts, Area courts, Sharia courts, as the doctrine of precedent is not applicable in these courts that are meant simply to observe the principles of natural justice.

### **1.11.9 District Courts**

Some states in the former Northern Region of Nigeria have courts known as District courts. A single judge constitutes this court. A District court is a court of civil jurisdiction. It is the equivalent of a Magistrates court in any of the Southern States sitting in the exercise of its civil jurisdiction. The jurisdiction of the District court is similar to the civil jurisdiction of the Magistrates court in the southern states.

### **1.11.10 Customary Courts/Area Courts**

These courts handle essentially matters of customary law. While Customary Courts are found in the South of the country, Area courts are their equivalent in the North.

Each State has its own Customary Court or Area court law that defines the jurisdiction, composition and procedures of the respective courts.

For example, the Customary Court Law of Lagos State provides that subject to the approval of the Governor of the State, the Attorney-General may establish such number

of Customary courts, Grade “A” and “B” as he may think fit.

Such Customary Courts shall be composed of “a President and at least 2 or 3 members as the case may be”. The State Judicial Service Commission is vested with powers to appoint, dismiss, and to exercise disciplinary control over the members of the Customary Courts.

A Customary Court in Lagos State has civil jurisdiction over, *inter alia*, matrimonial causes in relation to marriage contracted under customary law, guardianship or custody of children under customary law. The court’s criminal jurisdiction includes contempt of court committed in the face of the court; offences against the rules and by-laws made by a local government council; and any offence against the provision of an enactment, which expressly confer jurisdiction on the court.

## 1.12 International law

Bilateral and multilateral treaties, conventions as well as global and regional charters form part of the Nigerian law once the National Assembly passes an enabling statute to the effect (section 12(1), 1999 Constitution) – **The Registered Trustees of National Association of Community Health Practitioners of Nigeria and Others v. Medical and Health Workers Union of Nigeria (2008)**.

The case of Inspector General of Police v All Peoples Party (2007) held that the African Charter on Human and People’s Rights applies in Nigeria by virtue of the African Charter on Human and People’s Rights (Ratification and Enforcement) Act 1990.

## 1.13 Legislative process

**1.13.1** The legislative process in a democratic government usually starts with the introduction of a Bill into either of the two Houses of the National Assembly that is, the Senate and the House of Representatives at the Federal level, or the House of Assembly of a state.

A Bill is a proposal that is intended to become a law if it is duly passed. There are two types of Bill, namely: (i) Public Bill; and (ii) Private Bill.

A Public Bill is one that deals with matters affecting the interest of the public such as security, education, housing, health, etc.

A Private Bill on the other hand deals with matters affecting the interests of a group, locality, region or profession.

Before a Bill becomes an Act or Law respectively, it must pass through the following stages:

### 1.13.2 First reading

This is a formal procedure where the name and main aims of the Bill are read out. Usually, no discussion takes place at this time, but there will be a vote on whether the House wishes to consider the Bill further or not.

### 1.13.3 Second reading

This is the stage at which the House debates the principles behind the Bill. The debate usually focuses on the main principles rather than the details. At the end of this, a vote is taken, and there must be majority votes in support of the Bill for it to progress any further.

### 1.13.4 Committee stage

At this stage, a detailed examination of each clause of the Bill is undertaken by a select committee, a Standing Committee chosen specifically for that Bill.

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For Finance Bills the whole House will sit in committee.

#### **1.13.5 Report stage**

At the committee stage amendments to various clauses in the Bill may have been voted on and passed. Therefore, at the report stage, the committee reports back to the House on those amendments and further amendment may be made to the Bill.

#### **1.13.6 Third reading**

Whenever there is a request from a certain number of members according to Rules of the House, this stage, which is almost a formality, will take place. It is to take a final look at the Bill and take a final vote on it.

#### **1.13.7 President's assent**

The Bill is sent to the President of the Federal Republic of Nigeria to be signed into an Act. The President may exercise his veto power by refusing to sign the Bill into law, but this power can only last for thirty days. The President's veto may be defeated if a joint session of the two Houses of the National Assembly passes the Bill with not less than two-third majority votes, and the Bill becomes an Act without the President's signature. This is in line with the principle of checks and balances.

The same procedure as above is followed at the state level until the Bill receives the assent of the governor.

### **1.14 Division of legislative powers between the Federal Government and State Government**

**1.14.1** Under the 1999 Constitution, legislative powers between the National Assembly (Federal) and the (State) Houses of Assembly are divided into three lists namely;

#### **1.14.2 Exclusive legislative list**

This list contains matters on which only the National Assembly (Federal) could make laws to the exclusion of any of the states. They include defence, currency, immigration, foreign affairs, citizenship, aviation, armed forces, maritime, customs and excise.

#### **1.14.3 Concurrent legislative list**

This list contains matters on which both the National Assembly and the State Houses of Assembly could make laws side by side, for example, education, housing, taxation, tourism, agriculture, sports, works and so on. It should be noted, however, that whenever there is a conflict between an Act of the National Assembly and a Law made by a State House of Assembly on the same matter, the Act shall prevail and the State law shall to the extent of the inconsistency be null and void and of no effect.

#### **1.14.4 Residual legislative list**

This list contains matters on which only the House of Assembly of a State could make laws to the exclusion of the National Assembly. Thus, the residual list is exclusive to a State House of Assembly. For example, local government administration, chieftaincy matters, market administration and so on.

### **1.15 Distinctions between criminal law and civil law**

There are a number of differences between civil and criminal law which are as follows:

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- 1.15.1** Criminal law creates offences: An offence is any act or omission that is punishable by a statute. Civil law on the other hand guards the rights and interests of citizens in their interpersonal relationships.
- 1.15.2** The aim or purpose of the criminal law is the punishment of an offender either by way of imprisonment or imposition of fine or both. Conversely, the aim of civil law is the compensation of the injured or aggrieved party;
- 1.15.3** In criminal law, the standard of proof is proof beyond reasonable doubt, but in civil law, the standard of proof is preponderance of evidence or balance of probabilities.
- 1.15.4** In criminal cases, there is no limitation of time during which a defendant could be prosecuted for the offence he has committed, but in civil cases the time limit within which a plaintiff must institute an action against the defendant ranges from six to twelve years after which the case is statute- barred;
- 1.15.5** The decision to prosecute a person in a criminal matter is taken by the State that prosecutes the offender on behalf of the victim, but the decision to sue in civil cases is to be made by the injured or aggrieved party;
- 1.15.6** In a criminal case, where the case is proved against the accused person, he is found guilty, convicted and sentenced to a custodial/non-custodial punishment, whereas in civil cases where a plaintiff has proved his case against the defendant, the defendant is found liable and made to pay damages/ compensation to the plaintiff or subjected to equitable orders such as injunction or specific performance; and
- 1.15.7** The parties to criminal proceedings are the State and the Accused/ Defendant, but the parties to civil proceedings are the Plaintiff and the Defendant.

## **1.16 The application of virtual evidence in the Nigerian judicial system**

Virtual evidence is given by witnesses from remote locations through the use of technology. It occurs in proceedings of online courtrooms, which are conducted in three ways, namely:

- (a) Audio hearing through audio conferencing technology;
- (b) Video or virtual hearing through video conferencing technologies such as Zoom, Skype, Teams, Webex, and Duo; and
- (c) Paper hearing through submission and exchange of electronic writings online, delivery of judgment through the same means.

Virtual hearing became compelling with the coming of the COVID -19 pandemic and the attendant lockdown. The Nigerian Evidence Act allows the admissibility of electronic evidence on some conditions, but it has not responded to virtual court proceedings. However, the courts, beginning with the Supreme Court at their apex, now give practice directions allowing virtual proceeding and evidence.

### **1.16.1 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



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- fine of ₦5 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 ₦ 5 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 authorisation, which is punishable by a term of imprisonment for not more than 7 years, or a fine of not more than ₦ 7 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 ₦ 5 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 ₦ 1million, or both - Section 32;
  - g. deliberate and malicious spreading of viruses or any malware (ransomware, 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 ₦ 1million, 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 ₦ 7 million, or both – Section 28(1);
  - i. cyber-stalking and cyber-bullying, punishable with a fine of not more than 7 million or imprisonment for a term of not more than 3 years, or to both such fine and imprisonment - Section 24; and
  - j. 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 term or a fine of not more than ₦ 5 million or both such fine and term of imprisonment – Section 25(1).

## 1.17

### **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:  
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

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- 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;
    - i. Adequate, accurate and without prejudice to the dignity of human person;
    - ii. Stored only for the period within which it is reasonably needed; and
    - iii. Secured against all foreseeable hazards and breaches, such as theft, cyberattack, 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.”

### 1.18 Chapter review

The chapter, which is foundational to the understanding of corporate and business law, covers the sources of Nigerian law, the Nigerian court system, and cybersecurity, as well as data protection **regulations**.

### 1.19 Worked examples

#### 1.19.1 Multiple-choice questions

1. The powers conferred on Courts to hear and determine cases is called
  - A. Competence
  - B. Jurisdiction
  - C. Right
  - D. Authority
2. A statement made by the way by a judge while delivering a judgment is called
  - A. Ratio decidendi
  - B. Stare decisis
  - C. Obiter dictum
  - D. Res judicata
3. The aim of criminal law is to
  - A. Award damages to victims
  - B. Appease the injured party
  - C. Persecute the offender
  - D. Punish the offender
4. The court that has jurisdiction over cases relating to arms, ammunitions and explosives is
  - A. Supreme Court



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- B. State High Court
  - C. Federal High Court
  - D. National Industrial Court
5. Which of the following is not a fundamental human right under the constitution of the Federal Republic of Nigeria
- A. Right to dignity of human person
  - B. Right to state indigeneship
  - C. Right to private and family life
  - D. Right to freedom of movement

#### 1.19.2 Open-ended questions

- 1 (a) The sources of Nigerian law include English law, and judicial precedent.

**Required:**

Explain the operation of judicial precedent in the Nigerian court system.

- (b) John sued Femi at the Chief Magistrate Court, Yaba, in Lagos claiming ₦500,000:00 for breach of contract, John lost the case and has filed an appeal at the Federal High Court, Lagos.

**Required:**

Advise John on the chances of success of his appeal.

- 2 (a) The courts will only apply a customary law in Nigeria, where it passes certain tests required for its validity.

**Required:**

Explain the tests.

- (b) Aliyu Johnson qualified as a legal practitioner in 2016. In 2024 he was nominated for appointment as a Justice of the Court of Appeal by his uncle who was the Governor of his state, the appointment was rejected by the National Judicial Council.

**Required:**

Give your legal opinion on the matter.

- 3 The cybercrimes prohibition statute of Nigeria prescribes cyber offences and the penalties for them.

**Required:**

Explain the following offences and state the penalty for each:

- (a) Phishing
- (b) Cybersquatting

#### 1.19.3 Suggested solutions to multiple-choice questions

1. B
2. C
3. D
4. C
5. B

#### 1.19.4 Suggested solutions to Open-ended questions

- 1(a) The doctrine of judicial precedents provides that a court must follow the decision laid down in a previously decided case in which the facts were similar. Thus, a lower court must follow a previous decision of a superior court in the hierarchy when the facts of the cases or issues are similar.

In Nigeria a previous judgment by the Supreme Court binds all other courts, while the judgment of the Court of Appeal is binding on every court below it in the hierarchy. However, the judgments of the Federal High Courts, State High Courts, Sharia Courts of Appeal, Customary Court of Appeal, and the National Industrial Court are not binding upon one another but persuasive to one another. This is because they are courts of co-ordinate jurisdictions.

The decisions of Magistrates, District, and Customary or Area Courts constitute no precedents because they are inferior courts (and not courts of records). It is only the decisions of the superior courts of records that form precedents.

- (b) An appeal from a decision of a Magistrates court on a breach of contract cannot go successfully to a Federal High Court because the latter is a court of limited and special jurisdictions, which do not include cases of breach of contract.

The appeal in this hypothetical case ought to have been filed at the High Court of Lagos. Therefore, John's action will fail.

- 2(a) The Tests of validity that a customary law must pass before it is applicable are:

**The repugnancy test** provides that the customary law must not be repugnant to natural justice, equity, and good conscience, that is it must not be unfair, unjust, or barbaric.

**Incompatibility test** provides that the customary law must not be incompatible or inconsistent with any existing statute currently in force.

**Public policy test** requires that the custom must satisfy the moral standards acceptable to the members of the community concerned.

- (b) For a person to qualify for appointment as a justice of the Court of Appeal he/she must have qualified as a legal practitioner in Nigeria for not less than twelve years. In this case Aliyu Johnson is not qualified, since he is only qualified for eight years as at the time of his nomination. The National Judicial Council was right in rejecting his nomination.

- 3(a) Phishing is the offence of obtaining sensitive information such as usernames, passwords, or credit card details by pretending to be a

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trustworthy entity in electronic communications.

This is punishable with a term of 3-year imprisonment or a fine of N1million, or both.

- (b) Cybersquatting is the offence of 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.

## COMPANY LAW: TYPES AND FORMATION OF BUSINESS ORGANISATION

### Contents

- 2.0 Learning objective
- 2.1 Learning outcomes
- 2.2 Introduction
- 2.3 Types of business organisation
- 2.4 Registration of business name
- 2.5 Distinction between a partnership and a company
- 2.6 Company
- 2.7 The Corporate Affairs Commission
- 2.8 Administrative Proceedings Committee (Administrative Committee)
- 2.9 Functional classification of companies
- 2.10 Private company
- 2.11 Public company
- 2.12 Small company
- 2.13 Promoters
- 2.14 Pre-incorporation contract
- 2.15 Procedure for formation of companies
- 2.16 Documents of incorporation (Sections 36-40, CAMA)
- 2.17 Registration and grounds upon which the CAC may refuse to register the documents of a proposed company
- 2.18 Consequences of incorporation
- 2.19 Lifting the veil of incorporation
- 2.20 Chapter review
- 2.21 Worked examples

## **2 Company Law: Types and Formation of Business Organisation**

### **2.0 Learning objective**

This chapter introduces readers to the types of business organisation that the Companies and Allied Matters Act and partnership laws respectively authorize, and the procedure for forming them.

### **2.1 Learning outcomes**

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

- (a) identify forms of business organisation;
- (b) explain the procedure for formation of partnerships and a company;
- (c) state and explain the classification of companies;
- (d) explain the management and winding up of a partnerships;
- (e) explain the functions of the Corporate Affairs Commission;
- (f) explain the status, duties and liability of promoters;
- (g) explain pre-incorporation contract and its implication;
- (h) explain incorporation and its consequences; and
- (i) explain grounds for incorporation veil lifting.

### **2.2 Introduction**

A promoter, that is, a person that takes part in forming a company and raising capital for it, may choose from three business organisation forms. These are a sole proprietorship, a partnership and an incorporated company. The choice, if rational, should be informed by the scope of the proposed business, the available capital, managerial staff and the requirements of the law or regulation on that particular business, among other factors.

The choice of business organisations, their formation, floatation, management and winding up are determined largely by the Companies and Allied Matters Act, 2020, the Partnership Act, which is a Statute of General Application that is applicable in the States of the Federation that have no locally enacted law on partnership, and the Partnership Law of each State that has enacted one (e.g. Partnership Law of Lagos State).

### **2.3 Types of Business Organisation**

The law recognises three broad types of business organisation as follows:

#### **2.3.1 Sole proprietorship**

A sole proprietorship is otherwise known as a one-person business. The business is the same as the owner. In other words, the owner is responsible for the debts and other obligations of the business without any limit.

A sole proprietorship may not be registered with the Corporate Affairs Commission (CAC), if the business is carried on in the true surname of the proprietor with his first name or initials only. However, the business must be registered if it is carried on under an assumed name, e.g. ABC Ventures.

#### **2.3.2 Partnerships**

A partnership is an association of at least two persons for the purpose of business, profit making and profit sharing.

Keep in mind that A partnership must be registered under the Business Names provisions (Part E – sections 811-822) of the Companies and Allied Matters Act 2020 (CAMA) if it is not carried on in the true forenames (or initials) and surnames of the partners without any addition thereto.

### a. Rules for determining the existence of partnerships in general

From the definition above, a partnership must have the following elements, which constitute the rules for determining the existence of a partnership:

- i. **There must be a business:** The Partnership Act/Laws define business' to include "trade, vocation, and profession."  
The business must be carried on by, or on behalf of, the partners (S.24(1) Partnership Act).

The Supreme Court of Nigeria held in the case of **Ikpeazu v A.C.B. (1965) N.M.L.R 374** that mere participation of a person in the running of a firm is not conclusive evidence of his membership of the partnership. The Court added that it was not "proved on the balance of the evidence on which it can rely that [the person] was a partner in fact or by representation."

the person in question was a solicitor to African Continental Bank (ACB) from which one William Emordi, a customer of the bank who was carrying on business in the name of "Emordi Brothers", had taken a loan. William Emordi defaulted in the repayment of the loan. At the instruction of the bank, the solicitor entered into an agreement by deed with William by which the solicitor was to supervise the management of Emordi Brothers and pay the profits from the daily proceeds of the business to the bank. William began to prove difficult, and the solicitor pulled out of the management agreement. The bank then sued William and joined the solicitor as a partner in the firm of Emordi Brothers. The Supreme Court held that the solicitor was not a partner.

- ii. **There must be profit Making and Profit Sharing:** Note that in the absence of an agreement to the contrary, sharing of profits means sharing of profits equally. the same goes for capital contribution to the business by the partners.

In the case of **Ugoji v Uzoukwu (1975) 1 All NLR 289**, the Supreme Court interpreted "sharing of profits." In that case, two persons had an agreement by which they contributed ₦500 each as deposits for the purchase of books from Oxford University Press (OUP). By the agreement, the books received from the press were to be shared equally. Thereafter, the defendant went to the OUP and brought back books worth ₦3,200.

The plaintiff wanted the books to be shared equally on the ground, as argued by him, that a partnership existed between them. He also demanded an account from the defendant of 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 circumstances, no partnership existed between the parties.

### b. Relationships that are Similar to Partnership but are not Partnerships

In the light of the elements for determining the existence of a partnership, it is important to note that there are legal relationships that have some of the characteristics of a partnership but are not partnerships. some of them, in fact, involve sharing of profits, but the law does not recognise them as partnerships. The relationships are stated under **section 2(3) of the Partnership Act** as follows:

- i. The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business;
- ii. Payment of remuneration out of profits to an employee or agent of the company;
- iii. Payment of annuity to the widow or child of a deceased partner from a portion

- of the profits made in a business in which the deceased person was a partner;
  - iv. Payment of annuity or otherwise from a portion of the profits of a business in consideration of the sale by a person of the goodwill of a particular business;
  - v. Joint tenancy, tenancy-in-common or part ownership of property or common ownership of property, whether the tenants or owners do or do not share any profits made by the use of the property; and
  - vi. The sharing of gross returns, which does not of itself create a partnership, whether the persons sharing such returns do not have or have a joint or common right or interest in any property from which the returns are derived.
- c. Formation of partnership:** partnership may be formed through an agreement with or without formality. It may also be formed by default, that is, through the fact of holding out persons as if they were partners. Where there is an agreement, it may be oral or written or under seal. The ordinary rules of contract would apply to determine if there is a valid partnership agreement. A written partnership agreement is called the articles of partnership or partnership deed, if it is under seal. The agreement may be varied by subsequent agreements, express or implied, between the parties, depending on the nature of the original agreement.
- d. A partnership deed** is a formal agreement (under seal) that contains the terms of the partnership. A partnership deed should have the following minimum contents:
- i. The name of the partnership;
  - ii. The parties to the partnership;
  - iii. The general nature of the partnership business;
  - iv. The rights and duties of the partners *inter se*, that is, amongst themselves, and with third parties as well as the firm;
  - v. The mode of admission of new partners;
  - vi. retirement of partners;
  - vii. partnership assets;
  - viii. Partnership accounts and audit; and
  - ix. dissolution of the partnership.

Keep in mind that where a partnership agreement is inadequate in scope and contents, its terms may be supplemented by the provisions of the general law on partnership, that is, the **Partnership Act 1890** or the **Partnership Law** of the State of the Federation in which the partnership has its registered office. The general laws will regulate a partnership that has no written agreement.

Section 19 of the CAMA limits the membership of a partnership for trading or other general purposes to a minimum of 2 and a maximum of 20 members. Any such purported partnership with more than the maximum membership of 20 is an illegal association (**Akinlose v. African Industries and Timber Company (1961) WNLR 213**). However, the following associations may each have more than 20 members and still be legal partnerships:

- A cooperative society duly registered in Nigeria;
- A partnership for the purpose of law practice by persons of whom are qualified legal practitioners; and
- A partnership formed by qualified accountants for the purpose of practicing their profession.

A minor may enter into a partnership and the contract is binding on him unless he repudiates it before or within a reasonable time of his attaining full age. If he repudiates it, he is not liable for partnership debts contracted while he was a minor.

#### **e. Types of partnership**



General partnership: A partnership is said to be a general partnership if all the partners are involved in the management of the partnership business. In this situation, there is no distinction for all purposes between the partners and the business. In other words, the partnership is not a legal person and does not have perpetual succession, and the death of a partner dissolves the partnership automatically. The partners are liable for all the debts and other obligations of the partnership without any limit to their liability.

The relationship, rights and duties of general partners

- i. Every partner is an agent of all other partners so that every act and representation by him in the ordinary course of the partnership business binds the other members of the firm (**Section 5, Partnership Act/Section 6 Partnership Law – ACB v Ndoma Egba (2005) 14 NWLR (pt. 944) 79**).

Keep in mind, however, that where the partner so acting has no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows or ought reasonably to know that he lacks authority to act for the firm, or that he is not a partner in the firm, neither the other partners nor the firm are bound by his act.

- ii. The relationship between the partners depends ordinarily on their mutual agreement. Otherwise, the applicable general statute will regulate their relationship. The rules on the interests and duties of partners are stated in details in the Partnership Act/Law, particularly sections 24, 25, 28, 29 and 30. The major ones are summed up as follows:
- iii. All the 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 (section 24(1), Partnership Act).

In the case of **Chidiak v. Laguda (1954) 1 All NLR 160**, the partnership firm appointed the appellant as its Managing Director “with full powers on the question and nature of staff and general business administration.”

The firm incurred a lot of debts and the other partners sought to repudiate their liability for the debt to the detriment of the Managing Director. The Supreme Court held that in the absence of any proven allegation of misappropriation against or by the Managing Director, the other partners were bound to contribute to the loss sustained by the Managing Director in the course of managing the business of the partnership.

- iv. The firm must indemnify every partner in respect of payment made and personal liability incurred by him;
  - In the ordinary and proper conduct of the business of the firm; or
  - In or about anything necessarily done for the preservation of the business or property of the firm (section 24(2), Partnership Act);
- v. A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of the capital contribution which he has agreed to make, is entitled to interest at the rate of 5% per annum from the date of the payment or advance (section 24(3);
- vi. A partner is not entitled to interest on the capital subscribed by him before the ascertainment of profits (section 24(4);
- vii. Every partner may take part in the management of the partnership business (section 24(5);



- viii. No partner shall be entitled to remuneration for acting in the partnership business except by express agreement (section 24(6)). Note that where a partner is made the managing partner or director, common business sense requires that he be paid remuneration, but it is best based on an agreement;
- ix. No person may be introduced as a partner without the consent of all the existing partners (section 24(7));

- x. Any difference arising as to 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 the existing partners (section 24(8));

Keep in mind that where some partners have contravened this provision, the other partners may apply to court that the business of the partnership be wound up;

- xi. The partnership books and accounts are to be kept at the place of the business of the partnership (or the principal place of business, if there are more than one place), and every partner may, when he thinks fit, have access to, inspect as well as copy them (section 24(9)); and
- xii. No majority of the partners can expel any partner unless the power to do so has been conferred by an express agreement between the partners (section 25).

#### **f. Dissolution of general partnership**

A partnership may be dissolved by order of the court, but there are some situations when dissolution may occur without any court order.

Dissolution may occur without any order of the court in the following situations:

- i. Expiration or Notice: Subject to any agreement between the partners, a partnership is dissolved -
  - if entered into for a fixed term, by the expiration of that term;
  - if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;
  - if entered into for an undefined term, by any partner giving notice of dissolution to the others;
- ii. by bankruptcy or death: Subject to any agreement between the partners, a partnership is dissolved by the death or bankruptcy of any partner;
- iii. by charge: If one partner suffers his share to be charged for his separate debt, the others have the option of dissolving the partnership; or
- iv. by illegality: A partnership is dissolved if an event occurs, which makes it unlawful for the business of the firm to be carried on by the members.

#### **g. On an application by a partner, the court may decree dissolution when -**

- i. a partner becomes a lunatic by inquisition;
- ii. a partner, other than the partner suing, becomes in any other way permanently incapable of performing his duties under the contract of partnership;
- iii. a partner, other than the partner suing, has been guilty of a conduct calculated to prejudicially affect the carrying on of business;
- iv. a partner, other than the partner suing, willfully or persistently commits a breach of the partnership agreement or otherwise so conduct himself that it is not reasonably practicable for the other partners to carry on the business in

partnership with him;

- v. the partnership business can only be carried on at a loss; or
- vi. whenever the court thinks it just and equitable to dissolve the partnership.

#### **h. Effect of dissolution of general partnership**

Dissolution basically revokes the power of each partner to bind the firm. However, the partners may complete transactions begun but not finished at the time of dissolution and do what may be necessary to wind up the partnership business.

#### **i. Application of partnership property on dissolution**

On dissolution each partner is entitled to have the partnership property, including the goodwill, sold and the proceeds applied in payment of the debts and liabilities of the firm.

The Partnership Act/Law provides that in settling accounts, if the 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 the order of:

- i. out of profits;
- ii. out of capital; and
- iii. by the partner individually, in the proportion in which they were entitled to share profits.

Aside from this, the assets, including any sums contributed by the partners to make up the losses or deficiencies of capital, are applied in the order of:

- paying the debts and liabilities of the firms to persons who are not partners;
- paying the debts and liabilities of the firm to persons who are partners;
- paying each partner proportionately what is due to him in respect of capital; and
- the ultimate residue, if any, being divided among the partners in the proportion in which profits are divisible.

#### **j. Partners as agents**

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership. Thus, a partner, as an agent, has the duties, which are incorporated into the Partnership Act (sections 28-30), unlike in traditional agency where such duties arise at common law, to:

- i. render true accounts and full information to any partner in all things affecting the partnership;
- ii. not to make secret profits. Thus, he must account to the firm for any benefit derived by him from his use of the partnership property; and
- iii. not to compete with the firm.

- k. Limited partnership (LP):** One or more of the members may opt for limited liability, desiring to invest in the partnership without taking part in its management. The partnership is then a limited partnership, and the liability of the limited partners is limited to the quantum of their investment in the partnership. If any of the limited partners takes part in managing the business, he becomes a general partner without any limit to his liability. A limited partnership must be created formally by drawing up a partnership deed, that **is, an agreement in writing and under seal. All other partnerships may be created** informally.

Significantly, since 2020, Part D (sections 795-801) of the Companies and Allied Matters Act, 2020 regulate limited partnership. In addition are the Laws of the States (Lagos, Ogun, Oyo, Osun, Ondo, Ekiti, etc.) that have provisions on it, except to the extent of their inconsistency with the provisions of the CAMA.

## **I. Features of limited partnership**

- i. A limited partnership shall not consist of more than 20 persons (section 795(2), CAMA).
- ii. A limited partner is liable only to the extent of his contribution or agreement to contribute to or invest in the business of the partnership. Importantly, however, he must “at the time of entering the partnership contribute, or agree to contribute, thereto a sum or sums as capital or property valued at a stated amount” (section 795(4), CAMA).
- iii. A limited partner shall consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons called limited partners (section 795(3), CAMA).
- iv. A limited partner shall not, during the subsistence of the partnership, withdraw part or all of his contribution, unless as agreed otherwise in writing by the partners. If he makes a withdrawal, he will be liable for the debts and obligations of the partnership to the extent of the amount so withdrawn or received back (section 795(5)).
- v. An individual or body corporate is eligible to be a limited partner, if he has not been certified to be of unsound mind by a court in Nigeria or elsewhere, or he is not an undischarged bankrupt.
- vi. A limited partner cannot bind the firm.
- vii. A limited partner cannot take part in management of the partnership, but he may give advice and inspect the books of the firm by himself or his agent. If he takes part in management, he shall be liable for all debts and obligations of the firm during the period as though he were [not] a limited partner (section 806(1)).
- viii. The death, lunacy, or bankruptcy of a limited partner shall not be a ground upon which the court will dissolve the partnership, unless the share of the lunatic partner is unascertainable or unrealisable otherwise (section 806(2), CAMA).
- ix. Subject to an agreement, express or implied, between the partners, matters of partnership business differences may be resolved by a majority of the general partners (section 806(4)(a), CAMA).
- x. A limited partner may assign his share with the other partners’ consent so as to make the assignee become a limited partner with all the rights of the assignor, subject to an agreement, express or implied, between the partners (section 806(4)(b), CAMA).
- xi. A limited partnership shall not be dissolved because a limited partner has charged his share for his individual or separate debt (section 806(4)(c), CAMA).
- xii. A person may be introduced as a partner without the consent of the existing limited partners (S. 806(4)(d), CAMA).
- xiii. A limited partner cannot dissolve the firm by notice. (section 806(4)(e), CAMA).
- xiv. “The name of a limited partnership must end with the words “limited partnership” or “LP” (upper or lower case, or any combination of them (section 802, CAMA).

**Note:** On the contrary, a general partner is an active member of the firm with the right to participate in the management of the firm.

## **m. Limited liability partnership (LLP)**

“The Laws of Lagos State of Nigeria, 2009” was the first to introduce registration of a limited liability partnership in Nigeria. In addition, and for the Federal Republic of Nigeria, Part C, Chapters 1 -11, of the CAMA (sections 746 -794) provide the law on limited liability partnership.

The CAMA allows two or more persons who intend to carry on business for profit

making to subscribe to and file incorporation documents with the CAC, paying incorporation fees as the latter may prescribe from time to time.

**n. Documents of incorporation**

**The CAC prescribes the form of the documents of incorporation, which shall state the:**

- i. Name of the limited liability partnership;
- ii. Proposed business of the partnership;
- iii. Address of the registered office;
- iv. Name and address of each partner;
- v. Names and addresses of the designated partners on incorporation; and
- vi. Other information on the limited liability partnership as the CAC may require.

**o. Nature of limited liability partnership**

- i. A limited liability partnership is a body corporate and a separate legal entity from the partners.
- ii. It has perpetual succession so that a change in the membership does not affect its existence, rights, or liability.
- iii. It must have at least two partners and two designated partners, provided that the two partners could also be the designated partners. However, where all the partners are bodies corporate, at least two of their nominees or at least two individual partners must act as designated partners.
- iv. One of the designated partners must be resident in Nigeria.
- v. Its name must end with the words "Limited Liability Partnership" or "LLP".
- vi. It may sue and be sued in its name.
- vii. It may acquire, hold and dispose properties of any nature of its own.
- viii. It may have a common seal if it is so willing.
- ix. It may do or suffer to be done anything that a body corporate may do.
- x. If a limited liability partnership carries on business with less than two partners for more than six months, the only partner who is aware of that fact shall be liable for all the debts and other obligations of the limited liability partnership.
- xi. A body corporate may also be a partner.

**p. Designated partner and his liability**

The documents of incorporation must specify the designated partners whose particulars and change therein must also be filed with the CAC. To a designated partner, a person must have given his consent. If he ceases to be a partner, he ceases also to be a designated partner.

Section 750 of the CAMA provides that except as provided otherwise by the CAMA, a designated partner shall be:

- i. Responsible to do all acts, matters and things that the CAMA requires a limited liability partnership to do to comply with it, "including filing of any document, return, statement and other report" either pursuant to the Act or the limited liability agreement; and
- ii. Liable to all penalties as may be imposed by the Act on the limited liability partnership for its violation.

**q. Name and publication of limited liability name**

- i. The name of a limited liability partnership must end with the words "limited liability partnership" or "LLP".
- ii. It shall not be registered with a name that the CAC considers undesirable or identical to, or nearly resembles the name of another partnership, business name, limited liability partnership, body corporate, or registered trademark.
- iii. Its name, address of registered office, and registration number must be

published on its invoices, official correspondences and publications, which must also bear a statement that it is registered as a limited liability partnership.

**Non-compliance with this, subjects every partner to a penalty for every day of the violation.**

**r. Relationship of limited liability partners**

Except as may be provided by the CAMA, the limited liability partnership agreement governs the mutual rights and duties of the partners *inter se*, or between the limited liability partnership and its partners.

The limited liability partnership has the obligation to file the limited liability partnership agreement or any changes thereto with the CAC and pay the fees prescribed by the Commission.

**s. Pre-incorporation agreement**

“An agreement in writing made before the incorporation of a limited liability partnership between the persons who subscribe their names to the incorporation documents may impose obligations on the limited liability partnership if that agreement is ratified by all the partners after incorporation” – (CAMA, section 762(3).

In the absence of any such agreement, the provisions of the Fifteenth Schedule to the CAMA shall govern the relationship of the partners.

**t. Cessation of limited liability partnership membership**

A person may cease to be a member of a limited liability partnership in accordance with his agreement with the other partners. In the absence of such an agreement, he is obligated to give at least a thirty-day notice in writing to the effect. It is important to note, however, that a person shall cease to be a member:

- i. On the person's death;
- ii. On the dissolution of the partnership;
- iii. When declared to be of unsound mind by a Court of competent jurisdiction; or
- iv. If after applying to Court to be so adjudged, he has been declared insolvent.

It is important to note that cessation of membership shall not nullify the person's obligation to the partnership, the other person, or any other person.

**u. Entitlement of limited liability partner on cessation of membership**

On cessation of membership for reasons that include death and insolvency, the former partner is entitled to his share in the partnership and to receive:

- i. An amount to his actual capital contribution to the **partnership**;
- ii. A share in the accumulated profits of the limited liability partnership less accumulated losses as at the date of cessation of membership; and
- iii. Provided that a former member or a person that is entitled to the share **of a** former partner as a result of his death or insolvency is not entitled to interfere in the management of the partnership.

**v. Limit to the liability of a limited liability partnership**

A limited liability partnership is not liable for an act of a member towards a third party if:

- i. The partner lacks the authority to act for the limited liability partnership; and
- ii. The third party is aware of the lack of authority or does not know or believe that he is a partner in the limited liability partnership (section 766, CAMA).

If a limited liability partner is liable to a third party for a wrongful act or omission in the course of the partnership business or with the partnership's authority, the limited liability partnership bears the liability (section 769, CAMA).

Keep in mind that the limited liability, and not the partners, bears its own contractual or other obligation, and the liability shall be satisfied from the property of the partnership.

The liability of the limited liability partners and the partners who acted shall be



unlimited where the partnership has acted with intent to defraud creditors of the partnership or any other person, or for fraudulent purpose (section 769(1)).

**w. Limited liability partner as agent of the partnership**

In a limited liability partnership, a partner is an agent of the limited liability partnership, but not for other partners, for the business of the partnership (section 765, CAMA).

**x. Liability for being held out**

A person who allows himself to be held out as a limited liability partner is liable to a third party who believes in the fact of holding out. However, the limited liability partnership is liable if it received credit for the holding out (section 768, CAMA).

**y. Maintenance of accounts and other records**

The CAMA requires a limited liability partnership to maintain proper books of account on its affairs for each year "on cash basis or accrual basis according to double entry system of accounting and at its registered office. It shall also prepare a statement of account and solvency six months from the end of the financial year, which it shall file with the CAC). Its accounts shall be audited as may be prescribed by the Minister of Trade, Industry and Investment (section 772, CAMA).

**z. Annual returns**

It is mandatory for a limited liability partnership to file annual returns with the CAC 60 days after the closure of the financial year in the form and with the payment of fee as the Commission may prescribe, failing which the limited liability partnership and designated partners shall pay penalties as specified by the CAC (section 773, CAMA).

**aa. Investigation of the affairs of limited liability partnership**

The CAC may appoint inspectors to investigate the affairs of a limited liability partnership pursuant to an order of court.

**In addition, the CAC may appoint investigators:**

- i. On the application of one-fifth of the members of the limited liability partnership;
- ii. On the application of the firm itself;
- iii. If the CAC is of the opinion that the business of the firm "is being or has been conducted with an intent to defraud its creditors or any other person, or otherwise for fraudulent or unlawful purpose; or
- iv. That the affairs of the firm are not being conducted in compliance with the CAMA; or
- v. "That, on the receipt of a report of the [CAC] or any other investigating or regulatory agency, there are sufficient reasons to show that the affairs of the limited liability partnership ought to be investigated" (section 775, CAMA).

An application for investigation must be supported by credible evidence, and the CAC may require the applicant to give security in the prescribed sum of money for the investigation.

A body corporate, firm or other association shall not be appointed as an inspector.

**ab. Foreign limited liability partnership**

The CAMA allows a foreign limited liability partnership to incorporate its business in Nigeria without which it shall not have a registered office in or carry on business in Nigeria, but it may receive notices or other documents.

**Winding up and dissolution of limited liability partnership**

Under Section 790 of the CAMA, a limited liability partnership may be wound up and dissolved subsequently either voluntarily or pursuant to an order of Court. The Court may wind up the firm if:

- i. all the partners decide that it be wound up;
- ii. the number of partners has fallen below two for more than six months;
- iii. the limited liability partnership is unable to pay its debts;
- iv. the firm has acted against the sovereignty, integrity and security of Nigeria, or public order;
- v. the firm has defaulted for ten consecutive financial years to file its Statement of Account and Solvency for annual returns with the CAC; or
- vi. the court is of the opinion that it is just and equitable that the limited liability partnership be wound up.

## **2.4 Registration of business name**

Section 814 of the CAMA, 2020, requires individuals, firms or corporation that have a place of business in Nigeria where they carry on business under a business name to register the name under Part E of the Act if:

- (a) it is a firm, the name is not the true surnames and forenames or initials of all the partners;
- (b) in the case of an individual, the name does not consist of her true surname and forenames or initials; or
- (c) in the case of a company, the name does not consist of its corporate name without an addition.

However, registration shall not be required if the addition to the names simply indicates that the business is carried on in succession to a former owner of the business.

### **2.4.1 Procedure for registration**

An individual, firm, or company that the CAMA requires to register shall deliver to the registry of business names in the State of the principal place of business within 28 days of commencement of business a written statement in the form prescribed by the CAC, signed as specified containing the following particulars:

- (a) The business name(s);
- (b) The general nature of business;  
The full postal address of the principal place of business;
- (c) The full postal address of every other place of business;
- (d) The present forenames and surname, any former forenames or surname, nationality, age, gender, usual residence and any other business occupation of the individuals that are the partners;
- (e) The corporate name and registered office of a company that is a partner;
- (f) Where a company is to be registered the name and registered office of the company;
- (g) The names, nationality and usual residence of each individual on whose behalf the business is carried on;
- (h) The date of commencement of business;
- (i) [2] copies of passport photograph of each of the individuals that are partners; and
- (j) a statement furnished by an individual to be signed by him, and that furnished by a company to be signed by a director or secretary.

### **2.4.2 Effect of registration**

Upon satisfactory receipt of the registration documents, the Registrar of Business Names shall cause the name to be entered in the register of business name of the individual, company or firm, and he shall add to the name the identification letters of the State in brackets at the end of the name, which forms part of it.

The Registrar shall also issue a certificate in the prescribed form containing the

business name of the individual, firm or corporation.

Where there is more than one place of business for the business name, the original certificate shall be exhibited in the principal place while a copy certified by the Registrar shall be exhibited in each of the other places, subject to penalties for non-compliance (sections 816 & 817, CAMA).

In addition, the business name must be published accurately and legibly on all documents issued on its behalf.

### **2.4.3 Tax-specific registration**

Each partnership is required to register, upon request, a copy of its Articles of Partnership (if any) or submit to a local tax authority a written summary of its agreement in accordance with the income tax laws. Capacity to enter into a partnership is governed by the ordinary law of contract.

## **2.5 Distinction between a partnership and a company**

- (a) A partnership (except a limited liability partnership) is not a legal person. Thus, there is no distinction between the firm and the partners as they are treated in law as one and the same person. It is for this reason that the partners in a general partnership are held fully liable for the debts and other obligations of the partnership. Conversely a company is a legal person and is separate and distinct from its members.
- (b) A general or limited partnership that is not a cooperative society, or for the practice of accounting or law, must not exceed the maximum membership of 20. Conversely, a private company may have up to 50 members (excluding members who are or were employees of the company), and there is no limit to the membership of a public company.
- (c) A company has perpetual succession and a change in its membership does not terminate its life. On the other hand, a partnership (except a limited liability partnership) may be dissolved automatically by a change in its membership. For instance, the death of a general partner automatically dissolves the partnership. However, the death of a limited partner does not.
- (d) The properties of a company belong to it and are available for the satisfaction of its debts and obligations. Properties in partnership (except limited liability partnership) belong to the partners.
- (e) Every company must be registered before it operates. On the other hand, not all partnerships must be registered. For example, a partnership in the true surnames and forenames of the partners need not be registered.
- (f) Every partner is an agent of the partnership as well as the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way a business of the kind carried on by the firm of which he is a member bind the firm and the partners (S. 5, Partnership Act/S. 6 Partnership Law). On the other hand, a member of a company is not an agent of the company unless he is also an officer of the company.
- (g) A general partner requires the unanimous consent of the other partners to transfer his interest in the partnership. Conversely, a shareholder of a company



does not need such consent. It must be noted however that the shares of a private company are not freely transferrable to the members of the public.

- (h) A company may borrow money and create a floating charge on its property in security for the loan. On the contrary, a partnership must not create a floating charge on property.
- (i) All the members of a partnership are entitled to take part in the management of the partnership business except the partnership is a limited partnership. On the contrary, the management of a company is vested in the company's board of directors.
- (j) Much formalities and publicity accompany the formation and management of a company, especially if the company is a public company. On the other hand, the formation and running of a partnership, other than a limited liability partnership, do not involve much formality and publicity.

## **2.6 Company**

A company is an association of persons, which is registered as a separate person from its members and known by a name. That association operates as a unit in all matters, owns properties of its own, and may allow its members to limit their liability by so indicating when the company is being incorporated.

Limitation of liability is a means by which the members of a company may hedge against business risk. By it, they know the extent of their liability in advance since they are not liable for the debts and other liabilities of the company beyond their subscription in the company.

## **2.7 The Corporate Affairs Commission**

The Corporate Affairs Commission (CAC) is the body established by section 1 of the Companies and Allied Matters Act (CAMA) to register and incorporate companies in Nigeria, among other functions. It is a body corporate with perpetual succession and a common seal. It is capable of suing in its corporate name and may own as well as dispose of properties to facilitate its operations.

### **2.7.1 Functions of the Corporate Affairs Commission**

Section 8 of the CAMA provides that the functions of the CAC shall be to -

- (a) administer the CAMA, including the registration, regulation and supervision of:
  - (i) the formation, incorporation, management, striking off and winding up of companies,
  - (ii) business names, management and removal of names from the register, and
  - (iii) the formation, incorporation, management and dissolution of incorporated trustees;
- (b) establish and maintain company's registry and office in each State of the Federation, suitably and adequately equipped to perform its functions under this Act or any other law;
- (c) arrange or conduct an investigation into the affairs of any company, incorporated trustees, or business names where the interest of the shareholders, members, partners, or public so demands;
- (d) ensure compliance by companies, business names and incorporated trustees with the provisions of this Act and such other regulation as may be made by the [CAC];
- (e) perform such other functions as may be specified in this Act or any other law; and

- (f) undertake such other activities as are necessary or expedient to give full effect to the provisions of this Act.

The functions of the CAC shall not affect “the powers, duties or jurisdiction of the Securities and Exchange Commission under the Investments and Securities Act as may be amended or reenacted.

## **2.8 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 compliance department of the Commission; and
- (b) a representative of the Federal Ministry of Industry, Trade and Investment of at least the grade of director.

### **2.8.1 Functions of the Administrative Committee**

The Administrative has the functions to:

hear persons alleged to have violated the provisions of the CAMA or its regulation;

- (a) resolve disputes and grievances that arise from the implementation of the CAMA or its regulation; and
- (b) impose administrative penalties for the violation of the provisions of the CAMA or its regulation 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.

## **2.9 Functional classification of companies**

Under section 21 of the CAMA, there are public companies and private companies both of which could be a/an company limited by shares, that is, a company whose memorandum of association limits the members’ liability to the amount of money, if any, that is unpaid on the shares respectively held by them. The company must end its name with “Ltd.” or Plc. depending on whether it is privately held or publicly held); or

**2.9.1 Company limited by guarantee**, that is, a company whose memorandum of association limits the members’ liability to the amount of money that the members have undertaken to contribute to its assets in the event of its winding up. (A not-for-profit-sharing company that must apply its profits, if any, to its authorised objects, and end its name with “Ltd./Gte.”); or

**2.9.2** unlimited liability company, **having members with unlimited liability, and ending its name with “U ltd.”**

## **2.10 Private company**

A private company has the following characteristics under the CAMA:

- (a) It is stated as a private company in its memorandum of association;
- (b) Its articles of association may restrict the transfer of its shares and also provide that:
  - (i) The company shall not, without the consent of all its members, sell assets of a value that is more than 50% of the total value of the company’s assets;
  - (ii) A member is prohibited from selling his shares in the company to a non-member without first offering those shares to co-members; and

- (iii) A member, or a group of members acting in unison, are prohibited from selling or agreeing to sell more than 50% of the shares in the company to a person who is a non-member unless the latter has offered to buy all of the existing member's interest on the same terms;
- (c) Its maximum membership is, by section 22(3), limited to 50, excluding the members who are at the same time employed in the company or who had been members and employees, but have ceased to be employees, but still remain members of the company. Keep in mind that where two persons jointly own a share, they are reckoned as one member.
- (d) The company shall not, unless authorised by law, invite the public to:
  - (i) subscribe for any share or debenture of the company; or
  - (ii) deposit money for fixed periods or payable at call, whether at an interest rate or not;
- (e) The name of the company must end with the word "Limited" or "Ltd", or "Ltd/Gte" as the case may be;
- (f) Its minimum issued share capital shall be at least N100, 000; and
- (g) One person may form and incorporate a private company (section 18(2)).

## 2.11 Public company

A public company has the following attributes:

- (a) Minimum issued share capital requirement of at least N2,000,000 (section 27(2)(a), CAMA);
- (b) A minimum membership of 2 and an unlimited maximum membership;
- (c) A name ending with "Public Limited Company" or "Plc.";
- (d) The capacity to invite the members of the public to subscribe for its shares; and
- (e) It must hold a statutory meeting within six months of its incorporation.

## 2.12 Small company

A small company has the following attributes under section 394 of the CAMA:

- (a) It is a private company;
- (b) Its turnover is not more than N120,000,000 or such sum of money as the CAC may fix from time to time;
- (c) Its net assets value is not more than N60, 000,000 or such sum as the CAC may fix from time to time;
- (d) None of its members is an alien;
- (e) None of its members is a government, government corporation or agency or its nominee; and
- (f) Where the company has share capital, the directors must hold at least 51% of its equity share capital between themselves.

## 2.13 Promoters

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..." (Section 85, CAMA).

Keep in mind that any person that acts strictly in a professional capacity (as a solicitor, accountant or in any other similar capacity) in forming a company is not a promoter.

### 2.13.1 Duties of a promoter

- (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 any 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;
  - (ii) All the members of the company (where it is possible to do so without a meeting; or
  - (iii) The company in a general meeting at 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).

### **2.13.2 Remedies for breach of promoter's duties**

Depending on the situation, a company may, where the promoter has breached his duty, sue for recovery of the secret profit, or for compensation, or damages, or for rescission of the contract.

#### **(a) Rescission of contract**

Where a promoter has breached any of his duties, the company may avoid or rescind the contract in question and recover any money expended in the transaction. Rescission is done on the principles governing normal rescission of contract namely:

- (i) the company must not have done anything to show an intention to ratify the contract after discovering the anomaly (breach of duties) involved; and
- (ii) *restitutio in integrum* must still be possible. That is, it must be possible to restore the parties to their pre-contract positions. For example, a third party must not have acquired right to the property, subject matter of the transaction.

#### **(b) Recovery of secret profit**

The company may also recover the secret profit made by the promoter. This remedy would be available where the promoter was under a duty to acquire the property subject matter of the transaction for the company, for example, where the promoter acquired the property after becoming a promoter with a view to reselling to the company. (See section 86(2) of CAMA) This remedy is without prejudice to the power of the company to rescind the contract.

#### **(c) Recovery of damages**

The promoter may also be liable in damages to a subscriber for fraud if the promoter has been a party to a willful false statement made in a prospectus inducing subscription.

#### **(d) Compensation**

Compensation is recoverable in all cases of lack of utmost good faith, for example, where the promoter has failed to supply any information that is required

by the CAMA to be contained in a prospectus.

Keep in mind that a period of limitation shall not apply to any proceeding of the company to enforce the duties of promoters. However, upon terms, including lapse of time, as the Court may deem equitable it may relieve a promoter from liability wholly or partly (section 86(4), CAMA).

## **2.14 Pre-incorporation contract**

This is a contract entered into by a promoter on behalf of the proposed company. Such a contract is usually entered into by promoters to acquire properties, rights, or interests 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 as stated in 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 and Anor v Erostrate Ltd (2002))**.
- (b) Prior to the ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement on the contrary, be personally bound by the contractor other transaction and entitled to the benefits thereof.

## **2.15 Procedure for formation of a company**

**2.15.1** Any two or more persons may form a company by complying with the provisions of CAMA (S.18, CAMA). However, one person may form and incorporate a private company by so complying.

Section 20 of CAMA disqualifies from joining in the formation of a company a person under 18 years of age, a person found by a Court to be 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.

The promoters have to engage the services of a certified professional (a legal practitioner, chartered accountant, chartered secretary, etc) to incorporate the company.

The professional must first file with the CAC in the prescribed CAC form, two alternative proposed names of the proposed company for approval (if available for use) and reservation.

If available and approved by the CAC, the latter reserves the proposed name(s) for 60 days, after which the approval lapses.

The professional engaged for the incorporation then prepares the memorandum and articles of association, together with the other documents of incorporation by way of prescribed forms purchased at the CAC's office.

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 to the Commissioner of Stamp Duties (a Federal official) so that she may assess the stamp duties payable on the share capital. The professional pays the duties and, the Commissioner stamps the documents

The professional files the documents of incorporation with the CAC on payment of the prescribed filing fees.

## **2.16 Documents of incorporation (Sections 36-40, CAMA)**

The documents of incorporation are:

- (a) the memorandum and articles of association stamped by the Commissioner of Stamp Duties;
- (b) the application for registration, which shall state:
  - (i) the company's proposed name;
  - (ii) the registered office and, if different from it, the head office;
  - (iii) whether the liability of the members is to be limited and if limited by shares or guarantee; and
  - (iv) whether the company is to be a private or public company;
- (c) the name and address of the agent, if the application for registration is being delivered by an agent for registration;
- (d) the particulars of the directors with their consent to serve in the prescribed form signed by all the directors and countersigned by at least one director;
- (e) a statement of the proposed registered office of the company;
- (f) a copy of the proposed articles of association of the company if the company is not relying by default on the model articles as may be prescribed by the Minister of Industry, Trade and Investment;
- (g) a statement of the initial issued share capital and initial shareholding in the company, if the company has a share capital;
- (h) a statement of guarantee, if the company is limited by guarantee;
- (i) a statement of compliance with the provisions of the CAMA filed by the applicant or his agent, and the CAC may accept that statement of compliance as sufficient evidence of compliance.

Note that the CAC may instead accept a statutory declaration signed by the legal practitioner engaged in the incorporation and attested before the Commissioner for Oaths or notary public; and
- (j) any other document that the CAC may require pursuant to any law relating to formation of a company (S.35, CAMA).

### **2.16.1 Memorandum of association**

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:

- (a) name of the company;
- (b) registered office of the company;
- (c) businesses or objects for which the company is registered;
- (d) nature of the company, that is, "private" or "public";
- (e) nature of the liability of the company;

- (f) statement of the authorised share (or guaranteed) capital of the company; and
- (g) subscription clause and table.

#### **2.16.2 Articles of association**

**The articles 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).

A company is required to file articles of association together with other documents of incorporation, but if it does not, it will be bound by default by the model articles prescribed by the Minister of Industry, Trade and Investment.

### **2.17 Registration and grounds upon which the CAC may refuse to register the documents of a proposed company**

According to the CAMA, upon being satisfied with the filed documents, the CAC shall register the memorandum and articles of association and issue a certificate of incorporation under the hand of the Registrar-General, which is, *prima facie*, evidence of compliance with the CAMA.

The CAC may, however, refuse to register the documents of a proposed company if in its opinion:

- (a) they do not comply with the provisions of CAMA;
- (b) any of the businesses that the company is to carry on, or the objects for which it is formed is illegal;
- (c) any of the subscribers to the memorandum is incompetent or disqualified from being a member of a company under section 20 of 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 trademark or business name registered in Nigeria.

#### **2.17.1 Effects of the registered documents**

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).

### **2.18 Consequences of incorporation**

As from the date of incorporation, mentioned in the certificate of incorporation, the subscribers 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 and common seal, 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 is mentioned in [CAMA] (Section 42, CAMA).

Flowing from the provisions immediately above are the following consequences of incorporation:

#### **a. Corporate personality**

Corporate personality means that on incorporation, a company becomes a legal entity distinct from its members. Corporate personality is essentially a

device to protect the creditors and other persons dealing with the company by pre-determining the entity to hold responsible for the company's obligations.

The court stated its basic implication in the case of *Salomon v. Salomon & Co. Ltd* (1897 A.C. 22), which is the *locus classicus* or foremost authority on the principle. In that case, Salomon, who had for many years carried on a prosperous boot and leather trade, decided to form a limited liability company. He sold his business to the company who, as consideration, allotted him 20,001 shares of one pound each out of the company's issued shares of 20,007. Ten thousand pounds of the purchase money was paid to Salomon by way of secured debenture and the balance was paid in cash. The remaining six of the company's issued shares were held by Salomon's five children and his wife who were also his nominees. The company later had financial difficulties and had to wind up. It had some unsecured creditors whose claim the company could not pay after paying off Salomon's secured debentures.

On the question of who to be held responsible for the debts of the company, the court held that the company should be held responsible because Salomon was different from the company as a person notwithstanding the fact that he held almost all the shares of the company and the other members were nominal shareholders only.

**b. Limitation of liability**

When obligations are incurred on behalf of an incorporated company, the company is directly liable, although it may thereafter be able to obtain contribution from its members or shareholders. In the case of a company registered under CAMA, there is no complete absorption from liability.

Under section 21, the liability of a company is either limited by shares or by guarantee. Where liability is limited by shares, the shareholders are called upon to pay whatever remains unpaid out of the nominal value of the shares held by them whenever the company is in need of capital. In the case of a company limited by guarantee, the members of the company are called upon to pay the sum of money they have undertaken to pay in the event of the company winding up or if the winding up takes place within a year after they have ceased to be members of the company.

Note however that there are unlimited liability companies the members of which are the personal guarantors of the company's debt without any limit to their liability.

In the case of unincorporated associations, the association, not being a legal person, may not be held liable. However, the actual officials who act on its behalf or the individual members who have actual or apparent authority to bind the association are normally held liable, and the liability is usually unlimited. They remain liable to the extent of their property, unless liability is expressly or impliedly restricted to the extent of the assets of the association. The position of members of partnership is the same. Each member is an agent of all the others, and acts done in carrying on, in normal way, the business of the kind carried on by the firm bind the partners. Other members are absorbed from liability only if the creditor knows of the limitation placed on the acting partners' authority.

**c. Property**

The property of an incorporated business association belongs to it and not to the members. The company does not hold such property as a trustee or an agent for its members, and the latter, in turn, have no proprietary interest in the property of the company. Hence the property of the company is available for the satisfaction of its obligations. Note that unlike a partnership where a change in membership may cause a division of its assets among its members, the property of a company is not affected by a change in its membership. The shares of the



outgoing members may be transferred.

**d. Suing and being sued**

A company, being a legal person, may sue in its name to enforce its legal rights and be sued for a breach of its legal duties. A company therefore is subject to contractual, tort and criminal liabilities. In the same vein, a company may enter into contract in its own name. It should be noted that the law has made it possible for a partnership to sue and be sued in its name in a limited number of cases. Even in the case involving a partnership, it may be desirable to join the members or its agents who are not easy to ascertain. Usually, agents of such unincorporated bodies enter into legal processes via “representative actions” but the procedure is not without problems of its own. With companies, problems do not arise as the company may be sued directly in its own name.

It is important to note that a limited liability partnership (LLP) is a body corporate and may sue and be sued in its corporate name once incorporated.

**e. Perpetual succession**

An incorporated body continues in existence and may exist perpetually even in spite of a change in its membership. A limited liability partnership (LLP) shares this attribute with the company once it is incorporated. Since a company is created by law, it could be put out of existence only by the law through the process of winding up as provided by CAMA. Thus, the life of a company is not dependent on the lives of its members. For instance, during World War II, all the members of one private company were killed in a general meeting by a bomb, but the company continued in existence. Usually, the personal representatives of the deceased members replace them. In the alternative, if they do not want to become members, they may realise the value of the shares held by the deceased members by selling the shares.

Note that in a limited partnership arrangement, partners who put money into the venture without taking part in management have their liability limited to their financial contribution, while the managing partners are subject to unlimited liability.

**f. Borrowing**

A company may borrow money in its own name unlike an unincorporated body whose members have to borrow money in their personal capacities. Since the incorporated body is more able to provide collateral security for debts, it is easier for it to borrow huge sums of money. Thus, more often than not, a businessman incorporates his business to be able to borrow a substantial sum of money and give the creditor a (floating) charge on its assets.

**g. Transfer of shares**

Membership of a company may depend on ownership of shares in it (because not all companies have share capital). These shares are generally freely transferable in the absence of any express provision or regulation to the contrary (such as in the case of private limited company where the members must not transfer shares to the members of the public). Where shares are transferred, the transferor is released from further liabilities on the shares. Conversely, the transfer of his shares by a partner does not automatically operate to divest him of his status and liability as a partner. It merely gives the transferee the right to receive whatever the firm distributes in respect of the transferring partner's shares. The transferee could only be admitted into the partnership in place of the transferor only if the other partners concur, and the transferor will only be relieved of his existing and further liabilities as a partner only if the creditors agree expressly or impliedly to release him.

## 2.19 Lifting the veil of incorporation

This phrase is also known as piercing the veil of incorporation. It refers to situations in which the Court will disregard the distinction between the personality of the company and the personalities of its members. This is done to hold the members of the company liable for the debts and other obligations of the company or to allow the members to reap the benefits that ought ordinarily to be due to the company. The Court will lift the veil of incorporation:

- i. **when it discovers that the company has been formed so as to avoid a legal obligation:** In the case of **Jones v Lipman (1962) 1 All ER 442**, Jones had agreed to sell a parcel of land to Lipman. In order to avoid that contractual obligation, he formed a company and transferred the parcel of land to it. The court found that the members of that company were Jones and a clerk of his solicitor only. The court then disregarded the incorporation and separate personality of the company and compelled the company to transfer the land to Lipman, treating Jones and the company as one and the same person;
- ii. **Where a company carries on business with less than the minimum membership of two:** Here, by virtue of section 118 of the CAMA, "If a public company or a company limited by guarantee carries on business or its objects, without having at least two members and does so for more than six months, every director or officer of the company, during the time that it so carries on business with only one or no member, is liable jointly and severally with the company for the debts of the company contracted during that period."
- iii. **Where the name of the company has been misstated or the company has been misdescribed on a document:** For instance, in the situation where an officer of the company issued a bill of exchange on which the name of the company was not properly written, the officer shall be personally liable for the value of the bill if the company fails to pay it.
- iv. **Fraudulent trading: Section 506(1) of the CAMA imposes the liability** of the company on the persons that are responsible if in the course of winding up of the company, it appears that the business of the company has been carried out in a reckless manner or with intent to defraud the creditors of the company or any other person;
- v. **Determination** of residence of company: The court may disregard the separate personality of the company to know the nationalities of its controlling members so as to determine the character of the company. For instance, where it is suspected that the company is an alien enemy depending on the relationship of the host company with the nations that the controlling members come from, the court will lift the veil of incorporation;
- vi. **Holding** company/subsidiary relationship: The court may also lift the veil of incorporation that separates a holding company from a subsidiary so as to allow the one to bear the liability of the other or reap the benefit that ought ordinarily to belong to the other. For the holding company to be treated this way, it must be in *de facto* or effective fervent control of the subsidiary beyond that envisaged by law. An example is where the staff of the holding company are also the staff of the subsidiary.

Section 381 of the CAMA defines a holding company as a company that controls the composition of another company's board of directors or holds more than half in the nominal value of the equity share capital of that other company. That other company is a subsidiary of the holding company.

## 2.20 Chapter review

This chapter appraises forms of business organisation, the procedure for formation of partnerships and companies, as well as the classification of companies. It explains the management and winding up of a partnership as well as the functions of the Corporate

Affairs Commission. It explains the status, duties and liabilities of promoters, as well as pre-incorporation contract and its implication. It also explains incorporation and its consequences, as well as, the grounds for lifting the veil of incorporation.

## 2.21 Worked examples

### 2.21.1 Multiple-choice questions

1. A company in which the liability of its members is limited to the amount the member undertakes to contribute in the event of its being wound up is called a/an
  - A. Company limited by shares
  - B. Unlimited liability company
  - C. Company limited by guarantee
  - D. Private company
2. A partner in a general partnership has implied authority to bind the firm by any of the following transactions, **except**
  - A. Purchase goods necessary for the business of the firm
  - B. Employ workers for the firm
  - C. Borrow money for the firm and pledge the credit of the firm
  - D. Employ a solicitor to defend the firm in court
  - E. Execute a deed on behalf of the firm
3. The following clauses must be contained in the memorandum of association of a company, **except**
  - A. The name of the company
  - B. That the company is a private or public company
  - C. The name of the secretary and auditors
  - D. That the registered office of the company shall be situated in Nigeria
  - E. That the liability of members is limited by shares or guarantee or unlimited
4. Which of the following indicates a partnership?
  - A. Joint tenancy
  - B. Tenancy in common
  - C. Receipt of annuity
  - D. Sharing of profits
  - E. Sharing of gross returns
5. The statutory body that is responsible for the registration of companies in Nigeria is the
  - A. Registrar of Companies
  - B. Corporate Affairs Commission
  - C. Business Registration Bureau
  - D. Nigerian Investment Promotion Commission
  - E. Ministry for Trade and Industry

### 2.21.2 Open-ended questions

1. Sagoe, Tamuno and Dike are partners in a transportation business. Sagoe, a civil servant, elected not to participate in the management of the partnership.

However, he provided the bulk of the money required to operate the business Tamuno and Dike, therefore, manage the business on day-to-day basis.

**Required:**

- (a) Explain the type of partnership Sagoe, Tamuno and Dike have under the arrangement and the reasons.
  - (b) Explain the nature of the liability of each of the partners (Sagoe, Tamuno and Dike) if the firm winds up.
  - (c) Explain the effect of the death of one of the partners on the continued existence of the partnership.
  - (d) Explain the maximum number of partners that they could admit for that purpose, assuming that the partners desire to bring in more partners to strengthen the firm.
- 2 Katako intends to incorporate his business as a private company limited by shares. He has approached you to learn of the consequences of his proposal.

**Required:**

Explain the consequences of incorporation to Katako.

- 3(a) Daniel (35 years old), Thomas (17 years), Richard (12 years), James (22 years), John (16 years), Jennifer (18 years) and Joseph (15 years) have all subscribed to a memorandum of association so as to form a public company. The Corporate Affairs Commission has refused to register the company on the grounds that:
- (i) there are too many minors as subscribers; and
  - (ii) the numbers of the qualified persons are below seven.

**Required:**

Advise the incorporators.

- (b) State **five** grounds upon which the Corporate Affairs Commission may refuse to register the documents of a proposed company.

**2.21.3 Suggested solutions to multiple-choice questions**

- 1. C
- 2. C
- 3. C
- 4. D
- 5. B

**2.21.4 Suggested solutions to open-ended questions**

- 1. (a) The partners have a limited partnership by their arrangement because one of the partners, Sagoe, is not participating in the management of the firm. Tamuno and Dike are general partners because they are saddled with the management of the firm.
- (b) The liability of Sagoe, the limited partner, will be limited to the sum of money he has contributed to the capital of the partnership. Tamuno and Dike who are general partners will be personally liable for all the debts and obligations of the firm without any limit.
- (c) If Sagoe, the limited partner dies, this should not lead to the dissolution of the

partnership.

The death of either Tamuno or Dike shall automatically lead to the dissolution of the partnership because they are general partners.

- (d) The maximum number of partners that could be admitted is 17 in order not to exceed the statutory maximum of 20 partners.

## **2 The consequences of incorporation are as follows:**

### **(a) Corporate personality**

Corporate personality means that on incorporation, a company becomes a legal entity distinct from its members. Corporate personality is essentially a device to protect the creditors and other persons dealing with the company by pre-determining who to hold responsible for the company's obligations.

The court stated its basic implication in the case of *Salomon v Salomon & Co. Ltd* (1897 A.C. 22), which is the *locus classicus* (foremost authority) on the principle. In that case, Salomon, who had for many years carried on a prosperous boot and leather trade, decided to form a limited liability company. He sold his business to the company who as consideration allotted him 20,001 shares of one pound each out of the company's issued shares of 20,007. Ten thousand pounds of the purchase money was paid to Salomon by way of secured debenture and the balance was paid in cash.

The remaining six of the company's issued shares were held by Salomon's five children and his wife who were also his nominees. The company had some other unsecured creditors.

On the question of who to be held responsible for the debts of the company, the court held that the company should be because Salomon was different from the company as a person notwithstanding the fact that he held almost all the shares of the company and the other members were nominal shareholders only.

### **(b) Limitation of liability**

When obligations are incurred on behalf of an incorporated company, the company is directly liable, although it may thereafter be able to obtain contribution from its members or shareholders. In the case of a company registered under CAMA, there is no complete absorption from liability. Under section 21, the liability of a company is either limited by shares or by guarantee. Where liability is limited by shares, the shareholders are called upon to pay whatever remains unpaid out of the nominal value of the shares held by them whenever the company is in need of capital. In the case of a company limited by guarantee, the members of the company are called upon to pay the sum of money they have undertaken to pay in the event of the company winding up or if the winding up takes place within a year after they have ceased to be members of the company.

Note however that there are unlimited liability companies where the members are the personal guarantors of the company's debt without any limit to their liability.

In the case of an unincorporated association, the association, not being a legal person, may not be held liable. However, the actual officials who act on its behalf or the individual members who have actual or apparent authority to bind the association are normally held liable, and the liability is usually unlimited. They remain liable to the extent of their property, unless liability is expressly or impliedly restricted to the extent of the assets of the association. The position of members of partnership is the same. Each member is an agent of all the others, and acts done in carrying on, in normal way, the business of the kind carried on by the firm bind the partners. Other members are absorbed from liability only if the creditor knows of the limitation placed



on the acting partners' authority. Note however that under the limited partnership concept, partners who put money into the venture without taking part in management have their liability limited to their financial contribution, the managing partners have unlimited liability.

**(c ) Property**

The property of an incorporated business association belongs to it and not to the members. It does not hold such property as a trustee or an agent for its members who in turn have no proprietary interest in the property of the company. Hence the property of the company is available for the satisfaction of its obligations. Note that unlike a partnership where a change in membership may cause a division of its assets among its members, the property of an incorporated company is not affected by a change in membership. At best the shares of outgoing members may be transferred.

**(d) Suing and being sued**

An incorporated company, being a legal person, may sue in its name to enforce its legal rights and be sued for a breach of its legal duties. The same goes for an incorporated limited liability partnership (LLP). A company therefore is subject to contractual, tort and criminal liabilities. In the same vein, a company may enter into contract in its own name. Note that the law has made it possible for a partnership to sue and be sued in its name in a limited number of cases. Even in the case of partnership it may be desirable to join the members or its agents who are not easy to ascertain. Usually, agents of such unincorporated bodies enter into legal processes via "representative actions" but the procedure is not without problems of its own. In the case of the registered company problems do not arise as the company may be sued directly and in its own name.

**(e) Perpetual succession**

An incorporated body continues in existence and may exist perpetually even in spite of a change in its membership. Since a company is created by law, it could only be put out of existence by the law, through the process of winding up as provided by CAMA. Thus, the life of a company is not dependent on the lives of its members. For instance, during the Second World War, all the members of one private company were killed in a general meeting by a bomb, but the company continued in existence. Usually the personal representatives of the deceased members replace them. In the alternative, if they do not want to become members, they may realise the value of the shares held by the deceased members by selling the shares.

**(f) Borrowing**

An incorporated company may borrow money in its own name unlike an unincorporated body whose members have to borrow money in their personal capacities. Since the incorporated body is more able to provide collateral security for debts, it is easier for it to borrow huge sums of money. Thus more often than not, a businessman incorporates his business to be able to borrow a sizable sum of money and gives the creditor a (floating) charge on his assets.

**(g) Transfer of shares**

Membership of a company may depend on ownership of shares in it (because not all companies have share capital). These shares are generally freely transferable in the absence of any express provision or regulation to the contrary (such as in the case of private limited company where the members must not transfer shares to the members of the public). Where shares are transferred, the transferor is released from further liabilities on

the shares. Conversely, the transfer of his shares by a partner does not automatically operate to divest him of his status and liability as a partner. It merely gives the transferee the right to receive whatever the firm distributes in respect of the transferring partner's shares. The transferee could only be admitted into the partnership in place of the transferor only if the other partners concur, and the transferor will only be relieved of his existing and further liabilities as a partner only if the creditors agree expressly or impliedly to release him.

**(h) Publicity, expense and accounts**

The affairs of the proposed company will have to be publicised. The company has to file diverse returns with the Corporate Affairs Commission, and an interested member of the public may inspect the filed documents of the company on payment of a nominal fee. Thus, the company has no privacy. It is more expensive to run a company than to run a partnership. The duties of the company also include the keeping of books and accounts that must be audited and filed with the Corporate Affairs Commission.

- 3**
- (a)** The issues in this question are the minimum number of persons required for the formation of company generally and formation of a public company in particular, the minimum age of the subscribers and how many of them are required to be of the minimum age.
- (i) The Companies and Allied Matters Act (CAMA) requires that so long as at least two of the subscribers are at least 18 years of age, others who are below that age could join in forming the company;
  - (ii) The minimum number of persons of at least 18 years of age required for the formation of a public company is two. Therefore, the Corporate Affairs Commission (CAC) is wrong to have refused to register the proposed company.
- (b)** The CAC may refuse to register the documents of a proposed company if:
- (i) they do not comply with the provisions of CAMA;
  - (ii) any of the business that the company is to carry on or the objects for which it is formed is illegal;
  - (iii) any of the subscribers to the memorandum is incompetent or disqualified from being a member of a company under section the CAMA;
  - (iv) there is non-compliance with the requirements of any other law as to the registration and incorporation of the company; or
  - (v) the proposed name of the company conflicts or is likely to conflict with an existing trade mark or business name registered in Nigeria.



## FLOATATION AND MANAGEMENT OF A COMPANY

### Contents

- 3.0 Learning objective
- 3.1 Learning outcomes
- 3.2 Introduction
- 3.3 Exercise of management powers
- 3.4 The powers of the board of directors
- 3.5 The powers of the general meeting
- 3.6 Meetings of a company and notices of meetings
- 3.7 Types of meetings
- 3.8 Annual returns of companies
- 3.9 Appointment, status and duties of company directors
- 3.10 Company audit
- 3.11 Company capital and securities
- 3.12 Maintenance of capital
- 3.13 The rule against payment of dividends out of capital
- 3.14 The rule of acquisition of own share by a company or share buy back
- 3.15 Debentures
- 3.16 Winding up of a company
- 3.17 Administration of companies
- 3.18 Chapter review
- 3.19 Worked examples

### **3 Floatation and management of company**

#### **3.0 Learning objective**

This chapter offers for the reader's understanding the basic law on raising and maintenance of capital by a company as well as corporate **management and** winding up.

#### **3.1 Learning outcomes**

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

- (a) explain the types, powers, duties and procedures of the general meeting;
- (b) explain the status, powers, duties, proceedings and liability of the board of directors;
- (c) explain company record keeping, filings and returns as well as other secretarial obligations;
- (d) state and explain raising and maintenance of capital; and
- (e) explain the types of, and procedure for, winding up.

#### **3.2 Introduction**

The company is an artificial person. Therefore, it must function and run through natural persons. Two important groups of persons constitute the organs of the company. They are the members in general meeting and the directors acting as a board. The general meeting (of members) is the primary and policy making organ of the company. The board of directors is the secondary and policy implementing organ of the company. Individual directors could be agents of the company, and the company may function also through other agents specifically appointed to do so. The Managing Director (Chief Executive Officer) oversees the day-to-day running of the company while the board of directors meets periodically, that is, intermittently.

#### **3.3 Exercise of management powers**

The organs of the Company are the general meeting of members and the board **of directors**. Therefore, a company shall act through its members in general meeting or its board of directors or through officers or agents, appointed by, or under authority derived from, the members in general meeting or the board of directors (section 87(1), CAMA).

#### **3.4 The powers of the board of directors**

- a. The board of directors shall manage the business of the company and exercise such powers of the company that CAMA and articles do not reserve for the general meeting (section 87(3), CAMA).
- b. Unless the articles shall otherwise provide, the directors, when acting within their powers and in good faith, shall not be bound to obey, or take instructions from, the members in general meeting (section 87(4), CAMA).
- c. The board may act through a committee of its members or through the Managing Director.
- d. "Officer" in relation to a body corporate includes a director, manager, and secretary.
- e. "Management" means either the board of directors vested with management powers or top-level managers acting for the board.

#### **3.5 The powers of the general meeting**

- a. The general meeting of the members of the company makes policies for the company and appoints the officers of the company, including the directors.
- b. The members in general meeting may act in any matter if the directors are disqualified or are unable to act because of deadlock on the board or otherwise. For example, the general meeting may act on matters in which the directors have personal interest.
- c. The general meeting may also institute legal proceedings in the name of the company if the directors fail or neglect to do so.
- d. They may make recommendations to the board of directors regarding an action to be taken by the board (section 87(5), CAMA).
- e. The general meeting could also remove any director of whose action they do not approve.

### 3.6 Meetings of a company and notices of meeting

- a. CAMA provides for the general meeting of the members and the meeting of the board of directors.
- b. The general meeting may be the annual general meeting (A.G.M.), or extraordinary general meeting, or statutory meeting (once in the lifetime of a public company).
- c. Every meeting requires a notice of 21 days from the date on which the company sends out the notice, but the members may waive this requirement (section 241, CAMA).
- d. Every member, every person upon whom the ownership of a share devolves by being a legal personal representative, receiver or trustee in bankruptcy, every director, auditor and secretary of the company as well as the CAC (in the case of a public company) is entitled to receive the notice of meeting that must state the place, date, time and purpose of the meeting (section 244, CAMA).
- e. Failure to give notice of meeting invalidates the purported meeting unless the failure is an accidental omission on the part of the person giving the notice (section 245(1), CAMA).
- f. Quorum shall be one-third of the total number of the members of the company or twenty-five members (whichever is less) present in person or by proxy.

### 3.7 Types of meeting

The meetings of the company are of three types.

#### 3.7.1 Statutory meeting (S. 235, CAMA)

- (a) A **public company** must hold this meeting within six months from the date of incorporation (section 235(1), CAMA).
- (b) The court may wind the company up for failing to hold the meeting, or extend the period for holding the meeting at the pain of a penalty.
- (c) The directors of the company must send to the members at least 21 days before the meeting a **statutory report** that contains pre-incorporation issues including floatation, the capital raised and, the particular of the directors as well as the auditors.
- (d) An auditor must certify the report as it relates to the shares allotted and the cash received in respect of those shares (section 235(5), CAMA).
- (e) The directors shall promptly cause the certified report to be delivered to the CAC.
- (f) Members may propose any resolution at the meeting after they have given 21 days' notice after receiving the statutory report.

- (g) The company and officers that fail to hold the statutory meeting as stipulated shall be guilty of an offence and liable to a fine in such amount as the CAC may by regulation specify for every day during which the default continues (section 236, CAMA). In addition, the court may order that the company be wound up for failing to hold the meeting within time or failing to deliver the statutory report to the CAC (section 571(b), CAMA).

### **3.7.2 Annual general meeting (S. 237-238, CAMA)**

- (a) Annual general meeting (A.G.M.) is to hold once a year in addition to any other meeting in that year.
- (b) Not more than fifteen months shall elapse between the date of one A.G.M. and the next.
- (c) Except for the first, the CAC may extend the time for holding an A.G.M. by three months.
- (d) So long as a company holds its first A.G.M. within 18 months of incorporation it need not hold it in the year of incorporation or the next.
- (e) All the businesses, apart from the **ordinary businesses**, transacted at an A.G.M. shall be deemed **special businesses**. The **ordinary businesses** are 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 the remuneration of the auditors, the appointment of the audit committee, and disclosure of remuneration of managers.
- (f) There are penalties as the CAC may determine on the company and every officer that default in holding the A.G.M. (section 237(5), CAMA).

### **3.7.3 Extraordinary general meeting (EGM) (section 239, CAMA)**

- (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 at that time sufficient directors within Nigeria capable of forming 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 in the case of a company that has no share capital, representing not less than one-tenth of the voting rights of all the members having voting rights 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.
- (d) The requisitions may then recover from the company any reasonable expenses incurred by them due to the directors' failure.
- (e) The length of notice to be given to members for an extraordinary general meeting is 21 days.
- (f) All statutory and general meetings shall be held in Nigeria.

### **3.7.4 Persons entitled to notice of a general meeting**

The persons who shall be entitled to receive notice of a general meeting are:

- (a) every member;
- (b) 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;
- (c) every director of the company;
- (d) every auditor for the time being of the company;
- (e) the company secretary; and
- (f) the CAC, in the case of a public company (section 243(1), CAMA).

### **3.7.5 Modes of giving notice**

A notice may be given by the company to any member:

- (a) personally;
- (b) electronically;
- (c) by post to him or his registered address; or
- (d) by sending it to him at the address he gave the company, if he has no registered address in Nigeria.

(CAMA, 2020 section 244(1) as amended by the Business Facilitation (Miscellaneous Provisions) Act 2023 (section 12, Part I of the Schedule)

### **3.7.6 Virtual meeting**

Section 240(2) of the CAMA, 2020 (as amended by the Business Facilitation (Miscellaneous Provisions) Act 2023 (section 11, Part I of the Schedule) permits all companies, not private companies only, to hold general meetings virtually or electronically, provided that they do so in compliance with their articles of association.

### **3.7.7 Voting at meetings**

A resolution put to vote at a general meeting shall be decided on a show of hands or electronic voting, except a poll is (before or on the declaration of the result of the show of hands) demanded by:

- (a) the chairman, where he is a shareholder or a proxy;
- (b) at least three members present in person or by proxy;
- (c) a member or members of the company present in person or by proxy who constitute not less than one-tenth of the total voting rights of all the members that have the right to vote at the meeting; or
- (d) any member(s) that hold shares in the company that give the right to vote at the meeting, which shares are paid up to the value of not less than one-tenth of the total sum of money paid up on all the shares that confer such voting right; and
- (e) When there is equality of votes on a show of hands or on a poll, the chairman at the meeting is entitled to a second or casting vote (sections 248 & 250, CAMA).

### **3.7.8 Company that need not hold general meeting**

A single-member private company and a small company need not hold annual general meetings (section 237(1), CAMA).

### **3.7.9 Ordinary resolution and special resolution**

#### **(a) Ordinary resolution - section 258 (1)**

This is passed by a simple majority of the votes cast by the members of the company that are entitled to vote in person or by proxy at a general meeting.

**An ordinary resolution is required for:**

- (b) all matters classified as ordinary business of the company;
- (c) increase of the capital of the company; and

(d) removal of directors.

**(b) Special resolution - section 258 (2)**

This is passed by not less than 75% of the votes cast by the members of the company that are entitled to vote either in person or by proxy at the meeting of the company of which 21 days' notice had been given of the intention to propose and pass the resolution as special resolution.

Keep in mind that a majority holding of at least 95% in the nominal value of the shares or representing at least 95% of the total voting rights may move that a resolution be proposed and passed as a special resolution with less than 21 days' notice.

**A special resolution is required for:**

- i. alteration of the business or object clause;
- ii. change of the company's name;
- iii. alteration of any provision of the memorandum of association;
- iv. reduction of capital;
- v. change in the liability of the directors from limited to unlimited;
- vi. winding up of the company (voluntary winding up);
- vii. re-registration of a private company as public company;
- viii. alteration of the articles of association; and
- ix. creation of capital reserve.

In most cases, the Corporate Affairs Commission must be notified of the resolution of the company. This is the task of the company secretary and directors of the company.

**3.7.10 Statutory books and record keeping**

The statutory books, which the company must keep at its registered office, include the:

- (a) register of members;
- (b) register of directors;
- (c) register of secretaries (to be kept by public companies only); and
- (d) register of charges.

**3.8 Annual returns of companies**

- a. Companies shall make and deliver to the CAC once every year a return containing the matters specified in sections 418, 419 or 420 of the CAMA as may be applicable.
- b. A newly incorporated company may not make and deliver annual returns to the CAC in the year of incorporation.
- c. A company shall complete its annual returns within 42 days after its A.G.M. for the year and forward to the CAC a copy signed both by a director and the secretary of the company (section 421, CAMA).
- d. Section 375 specifies the documents that the company must annex to the annual returns – certified balance sheet as well as profit and loss account laid before the A.G.M, auditors' report, directors' report, etc.
- e. Filing fees and penalty for late filing are payable to the CAC.  
A private company shall attach to its annual returns a certificate signed by a director and secretary that it has not invited members of the public to subscribe for its shares in the period covered by the returns (section 423(1)).
- f. A small company shall, in addition to the certificate, send another certificate signed by a director and a secretary that:
  - (i) it is a private company limited by shares;
  - (ii) its turnover is not more than N120,000,000 or such other sum of money as the CAC may fix;



- (iii) it has no alien member;
- (iv) it has no member that is a government, a government agent or nominee; and
- (v) the directors among themselves hold at least 51% of the equity share capital of the company (section 423, CAMA).

### **3.9 Appointment, status and duties of company directors**

#### **3.9.1 Appointment of directors**

Section 271 of the CAMA provides that every company, not being a small company (including a single member company), must have at least two directors. In a situation that the number of the directors falls below two (and the company is not a small company), the company must appoint new director(s) within a month or cease to carry on business thereafter until it makes the appointment.

A director or member of a company, not being a small company, who knows that a company carries on business after the number of directors has fallen below two for more than 60 days shall be liable for all the debts and other liabilities that the company incurs during that period (section 271(3), CAMA).

The subscribers of the memorandum of association determine in writing the number and names of the first directors. In the alternative, the directors may be named in the articles of association of the company.

The general meeting may re-elect or reject directors subsequently and appoint new ones.

The board of directors shall have power to appoint new directors to fill casual vacancies on the board arising from death, resignation, retirement, or removal of a director.

The general meeting that follows the filling of the casual vacancy may approve the appointment, but the person so ceases to be a director immediately if the meeting does not approve his appointment.

If all the directors and shareholders die, any of their personal representatives may apply to the Federal High Court for an order to convene a meeting of the personal representatives of the shareholders that would have been entitled to attend and vote at a general meeting to appoint new directors. If they do not, the creditors of the company may meet and appoint new directors for the company.

The board of directors may add to the number of existing directors but not beyond the maximum stipulated by the articles of association.

The general meeting has the general power to increase or reduce the number of directors and determine the order in which they shall retire, however, the fact that a director is removed shall not invalidate his previous act.

Section 275(3) of the CAMA defines an independent director as a person who, in addition to the general basic qualification of directors, or whose relatives on their own, or together with the director, in the course of the immediate two years preceding his appointment as director:

- (i) “was not an employee of the company;
- (ii) did not –
  - a. make to or receive from the company payments of more than ₦20,000,000, or
  - own more than a 30% share or other ownership interest, directly or indirectly, in an entity that made to or received from the company payments of more than [₦ 20,000,000] or act as a partner, director or officer of a partnership or company that made to or received from the company payments of more than such amount;



- a. did not own directly or indirectly more than 30% of the shares of any type or class of the company, and
  - b. was not engaged directly or indirectly as an auditor of the company.”
- Section 13 of Part I of the Schedule to the Business Facilitation (Miscellaneous Provisions) Act amended section 275(1) of the CAMA to provide that a minimum of one-third of the directors of a **public company** must be independent directors. Significantly, subsection (2) requires that any person that nominates directors, who shall constitute a majority of the board must also nominate the minimum of one-third that will be **independent directors**.

A director may be appointed for life but shall be removable under section 288 of the CAMA.

“Subject to the provisions of the CAMA, a person may be appointed a director of a public company notwithstanding that he is 70 years or more of age but special notice shall be required of any resolution appointing or approving the appointment of such a director..., and the notice given to the company and by the company to its members shall state the age of the person to whom it relates” (section 283, CAMA).

No shareholding qualification shall be required of directors unless it is provided for in the company’s articles of association.

The act of a person not duly appointed as a director does not bind the company, and the person shall be personally liable thereof, but the company shall be bound by his act if it held him out as a director.

A person who is at least 70 years of age shall disclose his age to the general meeting (at the pain of a penalty to be fixed by the CAC) when he is appointed or it is proposed to appoint him as director of a public company.

A person that is proposed to be appointed a director of a public company but holds multiple directorship (of other companies) must disclose his multiple directorships to the meeting at which he is to be appointed (at the pain of a penalty to be fixed by the CAC).

The board may appoint one of its numbers as the Managing Director (MD) and Chief Executive Officer (CEO). However, by virtue of the CAMA and Principle 2.7 of the Nigerian Code of Corporate Governance 2018 as well as the SEC Code of Corporate Governance for Public Companies in Nigeria 2011, one person is forbidden from holding the offices of MD/CEO and Chairman at the same time. Principle 5.1(b) of the latter provides that for all public companies with securities listed on the stock market, the positions of the Chairman and the MD/CEO shall be separate and held by different individuals, so as to avoid the over-concentration of powers in one individual, which may rob the board of the required checks and balances in the discharge of its duties.

The board may delegate any of its powers to the Managing Director or a committee of the board.

### **3.9.2 Persons disqualified from being directors**

Section 283 of the CAMA disqualifies from being a director of a company:

- (a) an infant, that is a person under the age of 18;
- (b) a lunatic (mentally challenged person) or person of unsound mind;
- (c) a person that is removed under section 288 of the CAMA, where such removal was on the grounds of fraud, dishonesty or unethical conduct;
- (d) a person who is disqualified under sections 279, 280, and 284 of the CAMA (being an insolvent person, that is, a person who has become bankrupt or has made an arrangement or composition with his or her creditors, a person convicted by a High Court of fraud in connection with promotion, formation management, or in the course winding up of a company (the prohibition may be total or for a period not more than 10 years); and
- (e) a corporation other than its accredited representative on the board of

directors for a given term.

### **3.9.3 Multiple directorships (section 307, CAMA as amended by section 16, Part I of the Schedule to the Business Facilitation (Miscellaneous Provisions) Act, 2023)**

The CAMA recognises multiple directorship, provided always that the person that is a director to more than one company, shall perform all his fiduciary duties. Those duties include the prohibition of the use of the corporate property, opportunity, or information gotten from one company for the benefit of the other, or to his or another's advantage or benefit.

It is important to note that as a general rule, no person shall be a director in more than five public companies. A person that was a director in more than five public companies must have resigned from the directorship of all the public companies that were in excess of the maximum five, not later than the next annual general meeting of the companies, not beyond two years after 8th February 2023.

Non-compliance with the limiting provisions above subjects the person in violation to a daily penalty as the Corporate Affairs Commission may specify in its regulation in addition to a refund of his earnings from being a director of those companies.

### **3.9.4 Remuneration of directors**

As a general rule, directors (especially outside directors who are not at the same time employees of the company) are not entitled to remuneration. However, by virtue of section 293 of the CAMA, the company may fix directors' remuneration in general meeting. In the alternative, the remuneration may be as fixed by the company's articles of association. Keep in mind that once the remuneration is fixed, only the general meeting of the company could alter it by passing a special resolution.

As has been observed, a company shall not be bound pay remuneration to directors. However, once the company has agreed to pay the remuneration, it shall be payable out of the funds of the company, that is out of profits and capital (section 293(4) of the CAMA; and *Buschoeck Proprietary v Fuke* (1923) 1 Ch. 148).

In *Re Consolidated Nickel Mines* (1940) 1 Ch. 883, the court held that a mere resolution by directors who are entitled to remuneration that they would forgo future remuneration is not binding on the directors, but if the company was a party to the agreement, then it becomes binding.

### **3.9.5 Remuneration of the Managing Director**

The Managing Director, as an executive director, and other executive directors, are appointed on the basis of their skills and entitled to remuneration, which include stock options, bonuses and participation in profits. They are appointed under a 'Director Service Contract', which fixes the terms and conditions of their appointment.

Section 294 of the CAMA authorises the remuneration of a Managing Director, and it may be by way of salary, commission, participation in profits, or a combination of the modes, as the directors may decide.

### **3.9.6 Legal position or status of directors**

Section 309(1) of the CAMA provides that, "Directors are trustees of the company's money, properties and their powers and as such shall account for all the money over which they exercise control, refund any money improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not in their own or sectional interests".

Directors are agents of the company when they act within the scope of their authority and the powers of the company (section 309(2), CAMA).

The directors are agents of the company with powers to bind the company in all matters of management. As agents, they are fiduciaries towards the company. The position is the same even when they are acting as agents of a particular shareholder, or without being an agent of the shareholder, the latter or other person is dealing with the

company's securities (contra. *Allen v Hyatt* (1914)). Fiduciaries are persons that occupy positions of trust particularly in financial matters.

### **3.9.7 Vacation of directors from office**

A director must vacate office under section 284 of CAMA if he:

- (a) Fails to hold his qualification shares when so required by the articles;
- (b) Becomes bankrupt or makes any arrangement or composition with his creditors;
- (c) Is found guilty of fraud or any offence under sections 280 and 281 of the CAMA;
- (d) Becomes of unsound mind;
- (e) Has resigned his office by notice in writing to the company; or
- (f) 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 given to the director and he is accorded fair hearing.

### **3.9.8 Removal of directors**

A company may remove a director 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 given to the director and he is accorded fair hearing.

The director that is proposed to be removed may make his representation in a reasonable length of writing, which the company will circulate to the members unless it is received too late for a meeting. In the latter situation, or where the company has defaulted to send the representation to the members, the representation or defence may be read out at the meeting, without prejudice to the right of the director to make oral defence at the meeting.

The company may not send out the representation or read it, if it is established in court, on the application of the company or any member, that the right to make the representation is being abused for unnecessary publicity or defamation.

### **3.9.9 Proceedings of directors (section 289, CAMA)**

The directors may meet from time to time to transact official business. They have an absolute discretion to regulate their meetings or proceedings. The first meeting of the directors must be held not later than 6 months from the date of the company's incorporation.

Keep in mind also that except as otherwise provided by the articles of the company, matters at any meeting are to be decided by a simple majority of votes, provided that where there is a tie, the chairman shall have a second or casting vote.

Any director of the company may requisition a meeting of the board, and the company secretary shall summon the meeting accordingly. A 14-day notice of such a meeting must be given to all the directors concerned unless the articles of association provide to the contrary.

The directors have the prerogative to elect a chairman of their meeting and determine his tenure. Where there is no standing chairman, the directors may elect one of their numbers as the chairman and determine his period of office. Where the chairman is not present within 5 minutes after a meeting is due to commence, the directors could choose one of their numbers to act as the chairman.

According to subsection (5) of section 289, the directors may delegate any of their powers to the Managing Director or to committees of the board (including a committee of one person) who shall follow any regulation of the board. A committee of the board has the same power to elect its chairman as the board itself.

A committee of the board may meet and adjourn its proceedings as it deems proper, and matters before the committee are determinable with like manner of votes as matters before the board.

Importantly, each director is entitled to a vote in all meetings of the board or its committee.

Importantly, section 289(8) provided that, "A resolution in writing, signed by all the directors for the time being entitled to receive notice of a meeting of the directors, is as valid and effectual as if it had been passed at a meeting of the directors duly convened and held." This provision imports the **unanimity rule** into the proceedings of the board of directors.

### 3.9.10 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 it or on its behalf (section 305(1), CAMA);
- (b) act at all times in what they believe to be in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purpose for which the company is formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances (section 305(3), CAMA, **Re: Smith and Fawcett Ltd.** (1942) Ch. 304,306);
- (c) have regard to the interests of the company's employees and members in the performance of their duties (section 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 – The power to issue shares is to raise capital and not merely to destabilise an existing majority). If the directors exercise their powers for proper purpose, it is immaterial that the interest of the members is adversely affected (section 305(5), CAMA) – Note that by virtue of section 149(1) of the CAMA (as amended by section 5 of Part I of the schedule to the BFA), the directors have capacity to allot the shares of the company only when the authority to do so have been given them by the –
  - company in general meeting; or
  - articles of the company;
- (e) not fetter their discretion to vote in a particular way (section 305(6), CAMA);
- (f) not delegate their powers in such a way as to abdicate their duties (section 305(7), CAMA);
- (g) not accept a bribe, gift or commission from outsiders in any transaction that involves the company;
- (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) (section 306(1) & (2),CAMA);

- (i) account to the company for any secret profit, or disclose a possible profit before they make it so that the general meeting may approve it (section 306(3) & (6) CAMA);
- (j) exercise the powers and discharge the duties of their office honestly, in good faith and in 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 (section 308(1),CAMA);
- (k) pay attention to the affairs of the company and be responsible for the actions of the board in which they participate so that only justifiable absence from the board's deliberations shall relieve them from such responsibility (section 308(3), CAMA); and
- (l) exercise care towards the company; and the CAMA prescribes the same standard of care for both executive and non-executive directors (section 308(4), CAMA).

Executive directors may, by virtue of contract of employment, have additional liability and benefit under the master and servant law,

The inability or unwillingness of a company to do any business shall not be an excuse for directors to breach their duties (section 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.

The duty not to misuse corporate information and opportunities does not cease with a director's resignation from office (S. 306(5), CAMA).

A director is responsible for the actions of the board in which she participated, and only justifiable absence from the board's deliberations shall relieve her from such responsibility (section 308(3),CAMA).

There are other ancillary duties of disclosure under CAMA relating to property interest of the directors, age, interest in a contract or proposed contract with the company.

#### **3.9.11 Enforcement of duties of directors or intervention in case of breach of their duties**

As a general rule, the company has the responsibility to enforce that the directors perform their duties. This is because when a wrong is done to the company, the proper plaintiff is the company itself. This time-hallowed rule was laid down in the case of *Foss v Harbottle* 67 ER 189, which deals with majority rule. However, because the directors who are the alleged wrongdoers are the ones in control of the company, it is usually not easy for the company to enforce their duties against them.

The usual procedure of enforcing the directors' duties is to remove them under section 288(1) of the CAMA by way of ordinary resolution of which a special notice is given, notwithstanding anything to the contrary in the company's articles of association or any agreement between the company and the directors. However, in several companies, the directors' hold on the company would make it difficult, if not impossible, to remove them. In such a situation, the shareholders could avail themselves of any of the following remedies:



- (a) They may petition for winding up of the company on the ground that it is just and equitable that the company should be wound up, and the court would wind it up if it is of that opinion (section 571 (f) of the CAMA);
- (b) The shareholders may seek relief on the ground that the affairs of the company are being conducted in a manner that is illegal or oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or some members of the company or all the members (sections 353 and 354 of the CAMA). In *Ogunade v Mobile Films (W.A) Ltd* (1976) 2 FRCR, Karibi-Whyte, J., as he then was, explained the nature of oppression and fraud that would support minority action for relief in the following words: "The oppression or fraudulent conduct of the majority must be harsh, burdensome and wrong, and must represent a consistent conduct over a period of time. Thus, negligence in conducting the affairs of the company, or lack of business ability or inefficiency will not be sufficient....";
- (c) The shareholders may rely on misfeasance proceedings brought by the official receiver, liquidator, creditor or contributory under section 674(1) of the CAMA in the process of winding up. This section provides a remedy against the unlawful acts of directors or other officers of misapplying or wrongfully retaining the money or property of the company. Here, the court could order that the money be repaid or the property be restored; and
- (d) The shareholders could ask that the affairs of the company be investigated by the CAC under sections 357 & 358, 359-363, CAMA. Keep in mind that the application by the members to the CAC shall be supported by such evidence as the CAC may require for the purpose of showing that the applicant or applicants have good reason(s) for requiring the investigation.

Keep in mind that, the procedure that must be followed in the case of an action against the company or by the company is in sections 341 - 351 CAMA; 364-365) of the CAMA.

### **3.9.12 Majority rule and minority protection (The rule in Foss v Harbottle)**

As a general rule, the company has the responsibility of enforcing its own rights. The case of *Foss v Harbottle* held that when a wrong is alleged to have been done to a company, the company, but not its individual shareholders, is the proper plaintiff. In addition, where it is alleged that something has been done irregularly by or on behalf of a company, which the company could regularize or do regularly, there is no use having a suit on it, but all that need be done is for the majority to do regularly what has been done irregularly. Therefore, the rule in Foss v Harbottle is known also as the *Internal Management Rule* or *Indoor Management Rule*. Thus, the rule lays down the majority rule and it is found on the rationale that to allow individual shareholder's suits or actions for wrongs done to the company would hamper the specific objectives of the company. Such would manifest as multiplicity of actions which would be expensive, time wasting, blackmailing and inhibiting to the attainment of the corporate goals so much so that it would be tedious for the company to keep on as a going concern.

In the case of *Foss v Harbottle*, two shareholders brought an action on behalf of themselves and all the other shareholders, except the defendants, accusing the latter as promoters and directors of the company of selling certain property at an undisclosed profit. They contended that the defendants' action caused the company some losses.

Wigram, V.C. dismissed the action remarking that,  
"Whilst the supreme governing body, the proprietors at a special general meeting assembled, retained the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators (shareholders) to sue in the moment proposed by the plaintiff...."

Section 341 of the CAMA has enacted what used to be the rule in *Foss v Harbottle* as follows:

"Subject to the provisions of this Act, where irregularity is made in the course of a company's affairs or any wrong is done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct."

Overtime, case law developed certain means of giving the rule a realistic treatment through specific means of protecting minority shareholders against the illegal and oppressive conduct of the majority. The means were classified as case law exceptions to the rule in *Foss v Harbottle*. However, these exceptions could hardly and properly be understood as such, but are better accepted as the means of protecting the minority through action suits for the protection of their personal rights as members of the company. They are enacted as section 343 of the CAMA.

According to the latter section, a member of a company may "[w]ithout prejudice to the rights of members under sections 346 - 351 and sections 353-355 ... or any other provisions of this Act..." exercise the right to sue for an injunction or a declaration to restrain the company from the following actions:

- a. **An action that is illegal or ultra vires (section 343(a):** (See *Cotter v National Union of Seamen* (1929) 2 Ch. 58). Under this exception, an individual shareholder could bring an action against the company to restrain it from a proposed ultra vires act. However, it is doubtful that such an individual could come under the exception so as to obtain a real redress or remedy where the ultra vires act has been completed;
- b. **Purporting to do by ordinary resolution any act which by [the company's] constitution or the Act is required to be done by special resolution (section 343(b):** This could also be stated as violation of a special procedure. (See *Edwards v Halliwell* (1950) 2 All ER 106;
- c. **Any act or omission affecting the applicant's individual rights as a member of the company (section 343(c):** These personal rights, which are the benefits of being a member of a company, include the rights to receive notices of company meetings, attend such meetings, vote at such meetings, receive dividends when declared, buy or subscribe shares on rights issues (preemptive right to shares), and other membership rights under the articles of association of the company. As could be noticed, these



rights are personal to the shareholders, not the company, by their very nature and essence. (See *Pender v Lushington* (1877) 6 Ch.D. 70). In that case, the court held that a member of the company had the right to vote at the company's meeting and to have the vote recorded whether he voted with the majority or the minority, otherwise he would be eligible to institute legal proceedings to compel the company to record his votes.

- d. Committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done (section 343(d): The shareholders could also sue individually to prevent a company from committing fraud on the company itself or on the minority shareholders, and when a company has done so. This is allowed where the directors have failed to take an appropriate action for redress. In the case of *Yalaju Amaye v A.R.E.C. Ltd* (supra) the court defined 'fraud' as follows: "[A]ny act which may amount to an infraction of fair dealing, or abuse of confidence, or unconscionable conduct, or abuse of power as between a trustee and his shareholders in the management of a company, is fraud."
- e. Where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to a minority shareholder (section 343(e);
- f. Where the directors are likely to derive a profit or benefit, or have profited or benefited from their own negligence or from their breach of duty (section 343(f); and
- g. For any other act or omission, where the interest of justice so demands (section 343(g).

### **3.9.13 Company Secretary and company secretarial obligations**

Section 330(1) of the CAMA provides that all companies except a small company must have a secretary. A company that had 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" (section 332, CAMA).

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 authorised by the directors may act as secretary (section 330(3), CAMA).

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 (section 330(4), CAMA).

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 (section 331, CAMA).

### **3.9.14 Qualifications of 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
- (c) Membership of any professional body of accountants established from time to time by an Act of the National Assembly; or
- (d) 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
- (e) A body corporate or firm consisting of the professionals in (a), (b), or (c).

#### **3.9.15 Duties of company secretary**

The secretary shall owe fiduciary duties to the company only when he is acting as its agent.

In fiduciary capacity, he shall be liable to the company for making secret profits; conflict of duties with personal interest; and use of confidential information for his own benefit (section 334, CAMA).

The secretary has (ostensible) authority to bind the company in all matters of administration. In **Panorama Developments (Guildford Ltd) v Fidelis Furnishing Fabrics Ltd (1971)**, the company secretary hired luxury cars, giving the impression that they were for the use of the company, but he used the cars for his own purpose. The court held that the company was bound to pay for the use of the cars.

Section 335(1) of the CAMA provides the specific duties of a secretary to 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 regulation;
- (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 authorises, the secretary shall not exercise any powers vested in the directors.

**See and master also Principle 8 of the Nigerian Code of Corporate Governance 2018.**

#### **3.9.16 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.

### **3.9.17 Company record keeping and filing**

#### **(a) Financial statements**

- i. A company shall keep accounting records in accordance with section 374 of the CAMA.
- ii. The records shall disclose accurately the financial position of the company and enable the directors to ensure compliance with CAMA.
- iii. Every public company must keep its audited accounts displayed or posted on its website (section 374(6), CAMA).
- iv. The accounting records shall be at the company's registered office or such other place in Nigeria as the directors think fit, and shall be open to inspection by the officers of the company (section 375(1), CAMA).
- v. The company shall preserve the accounting records for 6 years from the date the company made them, subject to any direction on disposal of records under winding up rules made pursuant to CAMA (section 375(2), CAMA).
- vi. An officer of a company that fails to comply with the accounting records provisions commit an offence punishable with a fine a the CAC may specify, "unless he shows that he has acted honestly, and that in the circumstances in which the business of the company was carried on, the default was excusable" (section 376, CAMA).

#### **(b) Duty of directors to prepare annual accounts**

The directors of every company shall prepare financial statements for every year (section 377, CAMA).

The financial statements shall include:

- i. the statement of accounting policies (not for a private company);
- ii. the balance sheet as at the last day of the year;
- iii. a profit and loss account, or in the case of a company not trading for profit, an income and expenditure account for the year;
- iv. notes on the account;
- v. the auditors' reports;

- vi. the directors' report;
- vii. a statement of source and application of funds or statement of cash flow (of a public company);
- viii. a value-added statement for the year (of a public company);
- ix. a five-year financial summary (of a public company);
- x. in the case of a holding company, the group financial statements; and
- xi. such other matters as are required in accordance with the applicable accounting standards:
  - The forms and contents of company individual and group financial statements are in sections 378-380 of CAMA with provisions for additional disclosures in section 382; and
  - The year end for all subsidiaries shall coincide with that of their holding (parent) company except the directors decide otherwise for a good reason.

### **(c) Directors' report**

The directors shall prepare in every year a report giving a fair view of the company's business, the proposed dividends, the names of the directors of the company during the year, the financial activities of the company (and its subsidiaries) and any significant change in those activities during the year. Generally, the report shall state the matters specified in Parts I, II and III of the Fourth Schedule to the CAMA (section 385).

### **(d) Directors' duties to lay and deliver financial statements before the general meeting**

Section 388 of the CAMA provides that the directors shall lay the financial statements before the general meeting within 18 months of incorporation and subsequently once at least every year.

The report of the auditor on the financial statements shall be read before the company in general meeting and may be inspected by any member of the company.

Together with a completed form of annual returns signed by a director and the secretary, the company shall deliver to the CAC, in respect of every year, a copy of the balance sheet, the profit and loss account and the notes on the statements laid before the general meeting and pay the filing fee.

If in a year a company fails to lay the report before the annual general meeting or deliver the annual returns together with a copy of the balance sheet, the profit and loss account and the notes on the statement, which were laid before the general meeting, to the CAC for filing, every person who was a director immediately before the end of that period is liable to a penalty as the Commission shall specify (section 389, CAMA).

## **3.10 Company audit**

### **Appointment of auditor**

Auditing is at the core of a company's internal control. Section 89(1) of the Investments and Securities Act (ISA), 2025 provides that, "A public company shall establish a system of internal controls over its financial reporting and security of its assets, and the board of directors shall ensure the integrity of the company's internal controls and reporting."

The penalty for failing to comply with the provision above and other provisions of the section is a penalty of not less than ₦ 5,000,000 and a further penalty of ₦50,000 per day for every day of continuing violation (section 89(4)).

- (a) Every company shall appoint an auditor or auditors at each annual general meeting to audit its financial statement and hold office from the conclusion of that annual general meeting until the next (section 401(1), CAMA).

- (b) A retiring auditor shall be re-appointed without the company passing any resolution at any annual general meeting unless:
  - (i) He is not qualified for re-appointment;
  - (ii) The company has passed a resolution appointing a replacement or stating expressly that he must not be re-appointed; or
  - (iii) He has notified the company in writing of his unwillingness to be re-appointed.
- (c) If the company fails to appoint or re-appoint auditors at an annual general meeting, the directors may fill the vacancy after notifying the CAC of the intention to exercise the power, so that the company and every of its officers may avoid liability for the penalty that the Commission shall specify.
- (d) The directors have the power to fill casual vacancy in the office of auditor, and until they do that, the surviving or continuing auditor(s), if any, may act in that capacity.
- (e) No person shall audit a public company, unless the person is registered with the Securities and Exchange Commission (SEC) on such terms and conditions as the Commission may prescribe from time to time (section 90, ISA, 2025).
- (f) Non-registration of the person immediately above subjects the company investigated to a penal fine of ₦5,000,000 and, the auditor to a fine of ₦1,000,000 as well as a further penalty of ₦50,000 for every day of violation for both the erring company and auditor (section 91(1) & (2), ISA, 2025).

By virtue of section 403(1) of the CAMA, "The provisions of nay Act establishing a body of accountants shall have effect in relation to any investigation or audit for the purpose of this Act."

### **3.10.1 Persons disqualified from being company auditor**

Section 403 of the CAMA disqualifies the following persons from being auditor:

- (a) An officer or servant of the company;
- (b) A body corporate, unless all the partners are qualified to be appointed as auditors of a company;
- (c) A person disqualified from appointment as auditor of any other body corporate or would have been disqualified if the body corporate were a company, in which case he is to vacate his office if the disqualification occurs during his term;
- (d) A debtor in the amount that exceeds N500,000 to the company or related company by virtue of share interest;
- (e) A shareholder or spouse of a shareholder of a company whose employee is an officer of the company;
- (f) A person who or whose partner, employee or employer is responsible for the keeping of the register of holders of the company's debentures; or
- (g) An employee of, or consultant to the company for more than one year who maintains any of the company's financial records or preparation of its financial statements.

### **3.10.2 Audit committee and auditors' report**

Every public company shall set up an audit committee. The committee shall consist of five members, two of whom shall be non-executive directors. Section 404 of the CAMA requires all the members to be financially literate and at least one of them to be a member of a professional accounting body in Nigeria established by an Act of the National Assembly.



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 a general meeting during the term of the auditor. The audit committee shall examine the auditors' report and make recommendations on it to the annual general meeting as it may deem fit.

### **3.10.3 Objectives and functions of audit committee**

The audit committee has the objectives and functions, subject to the provisions of the articles of the company, to:

- (a) Determine if the accounting and reporting policies of the company comply with the requirements of law and agreed ethical practices;
- (b) Review the scope and planning of audit requirements;
- (c) Review the findings on management matters in conjunction with the external auditor and departmental responses thereon;
- (d) Keep under review the effectiveness of the company's system of accounting and internal control;
- (e) Make recommendations to the board of directors on the appointment, removal and remuneration of the company's external auditors; and
- (f) Authorise the internal auditor to carry out investigations of any activities of the company which is of interest or concern to the committee. (Section 404(7), CAMA).

### **3.10.4 Removal of auditors**

A company may remove an auditor before the expiration of his tenure of office by passing an ordinary resolution, regardless any agreement between the parties. The company must then give notice of the removal to the CAC within 14 days of passing the resolution. Failure to do so imposes a penalty on the company and each of its officers. The removed auditor may still be entitled to compensation or damages payable to him in respect of his appointment as auditor. (Section 409, CAMA).

### **3.10.5 Resignation of auditors**

An auditor may resign his office by notice in writing deposited at the registered office of the company. The notice becomes effective if and only if it contains:

- (a) A statement that no circumstances connected to his resignation exists that he should bring to the notice of the members or creditors of the company; or
- (b) A statement of the circumstances that warrants his resignation.  
The company is obliged to send a copy of the notice to the CAC and every person entitled to be sent copies of its financial statements, subject to a court order obtainable on the ground that the notice is defamatory or purposed towards needless publicity (section 412, CAMA).

### **3.10.6 Duties and powers of auditors**

The auditors shall exercise reasonable care, diligence and skill in the performance of their duties (section 415(1), CAMA).

In performing their duties, they shall have unrestricted access to the company's books, accounts, and vouchers.

They shall also have the power to require from the company's office further information and explanations as they may consider necessary.

Specifically, the duties of the auditors are to investigate and form an opinion on

whether or not:

- (a) 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, and if not, state the fact in their report;
- (b) The company's balance sheet and (if not consolidated) its profit and loss account agree with the accounting records and returns, and if not, state that fact in their report;
- (c) The company has complied requirements of Part V and VI of the Second Schedule and Parts I and II of the Third Schedule in the accounts, and if not, state that fact in their report; and
- (d) The information in the directors' report for the accounting year is consistent with those in the accounts, and if not, state that fact in their report.

### **3.10.7 Liability of auditor**

An auditor is liable for loss or damage to the company arising from her negligence (section 415(2), CAMA). If the company fails to sue, a member may sue the auditor 30 days thereafter.

### **3.10.8 Exemption from audit**

A company that has not carried on business in a financial year and a small company within the meaning of the CAMA are exempt from the audit requirements of the Act.

## **3.11 Company capital and securities**

The CAMA, section 27(2)(a), provides that the memorandum of every company shall state, among other things the amount of the minimum issued share capital, not being less than ₦100,000 in the case of a private company and ₦2,000,000 in the case of public company, with which a company proposes to be registered, and the division of the share capital into shares of a fixed amount.

Keep in mind that, the subscribers of the memorandum shall take among them, a total number of shares of a value not less than 25% of the authorised share capital. The implication of this is that, at least 25% of the company's stated or authorised share capital must be subscribed by its members at all times.

Keep in mind also that, a subscriber becomes a member of the company, by taking up shares and signing its memorandum of association in the presence of at least one witness who shall attest the signature. In practice, the signature is appended by each subscriber against the number of shares written against his name in the memorandum of association.

The memorandum of association shall be stamped as a deed. This is done at the stamp duty office of the Federal Inland Revenue Service Office, after the company has paid stamp duty calculated according to the value of its share capital. There is currently a stamp duty office at the CAC.

### **3.11.1 Definition of share capital**

The expression share capital has two key words, namely, share and capital. For our purpose we define capital first and share thereafter. Generally, capital has been defined as "the total property of the company in money or money's worth, which is invested in the company's commercial operations."

Capital may also be defined as; "the net worth of the company's business". It is in this sense that capitalism is understood as capital formation, that is, the postponement of consumption because of productive purpose or for productive end.

For our purpose, capital means "the total sum of money which a company may offer to its proprietors or to the members of the public for subscription as shares". See **No 7**



### 3.11.2 Definition of securities

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 or digital assets;
- (d) commodities, futures, contracts, options and other derivatives; or
- (e) 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.”

Keep in mind that the ISA, 2025 recognises and provides regulations for the first time on digital assets, examples of which are cryptocurrencies, **including, Bitcoin**. Consequently, the Securities and Exchange Commission has power under the Act to make regulations on these and other securities.

For our purpose we focus on shares and debentures as two of the means by which a company raises capital.

### 3.11.3 Definition of share

Section 868 of the Companies and Allied Matters Act 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.”

In the case of **Burland’s Trustees v Steel Brothers & Co. Ltd.** (1901) 1 Ch. 279, 288 Farwell J, referred to ‘share’ as, “representing a unit of the ‘bundle of rights’, which a shareholder has in a company”. In his words, “A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first instance, and of interest in the second but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*....”

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.”

From the definition above, 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.

Conversely, shareholding imposes a liability on the shareholder to pay calls on the shares until the nominal value is fully paid up.

### 3.11.4 Types or classes of share

Section 143 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 share:

#### (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 distribution of assets 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 the ordinary

shareholders. If the money available for the payment of dividends is exhausted after paying the preference shareholders, the ordinary shareholders 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 authorised 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 authorises 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 a 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 increases its share capital, it shall, within 15 days after the passing the resolution authorising 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:

- i. at least 25% of the share capital, including the increase has been paid up; and
- ii. 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.

### **3.11.5 Minimum issued share capital**

To recapitulate, if a company has share capital, the CAMA prescribes the minimum issued share capital of a company. A private company must have a minimum of ₦100,000 issued share capital, while a public company must have a minimum of ₦2,000,000 – section 27(2)(a). While the issued share capital of a company may exceed this minimum, it must not be below the minimum authorised share capital – section 124(2) & (4). At the commencement of the Act, every company with less than the minimum issued share capital was required to issue shares up to the minimum issued share capital within a period of not later than six months (section 124(3), CAMA).

The penalty for operating with a share capital that is less than the minimum issued share capital is:

- (a) a fine as the CAC may prescribe by regulation; and
- (b) a daily default fine as the Commission shall specify by regulation for everyday during which the non-compliance continues – section 124(5).

### **3.11.6 Increase of issued share capital**

A company that has a share capital has the power to increase its issued share capital through the allotment of new shares of such value that it considers appropriate:

- (a) in a general meeting; or
- (b) by a resolution of the Board of Directors, subject to the provisions of the articles of the company or the direction of its general meeting.

### **3.11.7 Transfer of shares**

“The shares or other interests of member in a company are personal property transferable in the manner provided by the articles of association of the company” (section 139, CAMA).

### **3.11.8 Capacity to transfer shares**

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 together with the instrument of transfer must be authenticated by and filed with the company.

### **3.11.9 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 person only 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 recognised and registered and the instrument of transfer shall 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.

#### **3.11.10 Transmission of shares**

Section 179 of the CAMA provides that where a member of a company dies, the survivor or survivors or legal personal representatives of the deceased shall be the only persons to be recognized 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.

Keep in mind also that, the survivors or personal representatives may elect either to dispose of the shares or, in the alternative, have themselves registered with the company as the holders of those shares. See 179(2) & (3) for the procedure to be followed.

#### **3.11.11 Entitlement to dividends and other advantages on transmission of shares**

By virtue of section 179(5) of the CAMA, a person to whom shares have been transmitted by reason of the death or bankruptcy of the holder is entitled to the dividends and other membership advantages of the original holder of the shares but only after being registered as a member of the company in respect of the shares, except the company's articles otherwise provide.

Keep in mind, however, that the directors of the company may give notice to such a person to elect to be a member of the company or transfer the shares within 90 days, failing which the directors may withhold all dividends, bonuses, or other money payable on the shares until the person complies.

### **3.12 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 share capital preserved and not dissipated. In addition, the investors (shareholders) in the company are also entitled to see that the money is applied judiciously to the business of the company. Therefore, the CAMA as well as judicial decisions have laid down specific rules for the preservation of the capital of the company. Four of those rules are as follows:

### **3.12.1 The rule against reduction of capital**

section 130 of the CAMA makes a general rule, with an exception, against reduction of company capital. It provides in subsection (1) that, "Except as authorised by this Act, a company having a share capital shall not reduce its issued share capital."

The rule had been in existence at common law for centuries. In the case of *Trevor v Whitworth & Whitworth* (1887) 12 App Cas 409, 423, Lord Watson remarked as follows:

"In my opinion, the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the court has sanctioned the transaction.... Paid-up capital may be diminished or lost in course of the company's trading; that is a result which no legislation can prevent; but persons who deal with and give credit to a limited company; naturally relying upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for capital remaining at call... are entitled to assume that no part of the capital which has been paid to the coffers of the company has been subsequently paid out, except in the legitimate course of its business."

### **3.12.2 Capital reduction permitted by the CAMA**

Sections 131 & 132 permit a company to reduce its share capital:

- (a) If so authorised by its articles of association;
- (b) By passing a special resolution; and
- (c) by obtaining the confirmation of the Federal High Court (S. 132).

The reasons or purposes for which a company may reduce its share capital 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 those situations (reducing the share capital of the company), the company must amend its memorandum of association to reflect the reduction.

### **3.12.3 Treatment of creditors**

In applying for reduction of share capital, the company must ensure that it will still be able to pay off its creditors. As a matter of fact, the court would not approve a reduction that would make it impossible for the company to meet its obligation.

To ensure that no creditor is left out, section 136 of the CAMA imposes liability by way of a fine for commission of an offence on an officer of the company who:

- (a) Wilfully conceals the name of a creditor that is entitled to object to do the reduction of capital;
- (b) Or wilfully misrepresents the nature or amount of the debt or claim of any creditor; or
- (c) Aids, abets or is privy to any concealment of misrepresentation.

## **3.13 The rule against payment of dividends out of capital**

Section 433 of the CAMA prohibits the payment of dividends out of capital. This is



because such a payment automatically reduces the capital of the company. Dividends is payable only out of the profits of the company after due allowance is made for taxation of the company's profit under the Companies Income Tax Act (CITA).

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."

See also section 105 of the CAMA

### 3.14

#### **The rule on acquisition of own share by a company or share buy back**

As a general rule, the law initially did not allow a company to acquire its own shares. The rationale for this general rule was 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 acquired, it automatically diluted the value of the existing shares.

Over time, the CAMA (section 184) allows a company to acquire its own shares, including redeemable shares, on the condition that:

- (a) it so permitted by its articles of association;
- (b) the purchase is authorised by the shareholder's special resolution;
- (c) the company shall within seven days of the special resolution cause to be published in two national newspapers;
- (d) the purchase is only of fully paid up shares of the company;
- (e) the terms of purchase must provide for payment of the shares (and the payment must be from the company's distributable profits – section 185 of the CAMA);
- (f) within 15 days after the publication in two national newspapers, the directors of the company shall file a statutory declaration of solvency with the Corporate Affairs Commission to the effect that the company is able to pay its debts as they fall due after the purchase;
- (g) within six weeks of the publications, company creditors and dissenting shareholders may apply to court for an order to cancel the resolution; and
- (h) the company may proceed with the share buyback only on the order of the court, where applicable.

##### **3.14.1 Persons from who shares could be bought back**

Under the repealed Companies and Allied Matters Act, 2004, the reasons for which a company could acquire its own shares were limited to:

- (a) settling or compromising a debt or claim asserted by or against the company;
- (b) eliminating fractional shares;
- (c) complying with the terms of an agreement by which the company has an option or is obliged to purchase the shares owned by an officer or an employee of the company;



- (d) satisfying the claim of a dissenting shareholder; or
- (e) complying with a court order.

Significantly, however, section 186 of the CAMA 2020 provides only for the category of persons from whom a company may buy back its shares from:

- (a) the existing shareholders or security holders on a proportionate basis;
- (b) the existing shareholders in a manner permitted pursuant to a scheme of arrangement sanctioned by the court;
- (c) the open market; and
- (d) the purchasing of the securities issued to employees of the company pursuant to a scheme of stock option or any other similar scheme.

To the extent that 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 company's capital.

#### **3.14.2 Prohibition of financial assistance by company for acquisition of its shares**

It is unlawful for a company to give financial assistance directly or indirectly to a person that intends to acquire its own shares. Financial assistance means "a gift, guarantee, any form of security or indemnity, a loan or any form of credit or any other financial assistance given by a company, the net assets of which are thereby reduced by up to 50%, or which has no net assets" (section 183, CAMA).

#### **3.14.3 The rule on prohibition of payment of commissions, discounts and allowances out of shares or capital**

This rule in section 155(1) of the CAMA prohibits a company from applying "... any of its shares or capital money...in payment of any commission, discount or allowance to any person in consideration of his subscribing or agreeing to subscribe,, for nay share in the company, or procuring or agreeing to procure subscriptions...for any share in the company...."

Keep in mind that the exceptions to this prohibition are in sections 155(2) and 156 of the Act (to be studied as incorporated by reference). By these exceptions:

- (a) a company may pay any brokerage or agency fees agreed upon by the company and a broker or agent of the company for services provided in those capacities;
- (b) it may also pay commission to a person in consideration of subscribing or agreeing to subscribe and procuring or agreeing to procure subscription for shares if the commission is authorised by the articles;
- (c) the commission to be paid does not exceed 10% of the price of the shares or the rate authorised by the articles, whichever is lesser;
- (d) the percentage rate of the commission to be paid on shares offered to the public is disclosed in the prospectus; or
- (e) in the case of shares not offered to the public, the rate is disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed like a statement in lieu of prospectus and delivered to the CAC for registration; and
- (f) the number of shares on which commission is to be paid for subscription is disclosed in like manner.

Provided always that where the company defaults in delivering the required document to the CAC, the company and every officer in default shall pay penalty for every day of the default as the CAC may determine by regulation.

### **3.15 Debentures**

Section 191 of the CAMA provides that a company may borrow money for the purpose of its business or objects and mortgage or charge its undertaking, property and uncalled capital or any part thereof, and issue debentures, debentures 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. The debenture must be under the common seal of the company and delivered to the debenture holder within 60 days of its creation – section 192(1).

A debenture has been defined as,

“An instrument issued by the company, normally, but not necessarily, called on the face of it a debenture and providing for the payment of, acknowledging the indebtedness in, a specified sum.... at a fixed date, with interest thereon. It usually- but not necessarily- gives a charge by way of security, and is often – though not invariably – expressed to be one of a series of like debentures” – *Palmer's Company Law*, Para.42 – 02 p. 672.

### 3.15.1 Types of debenture

Debentures may be of the following types:

**(a) Perpetual debentures – S. 196**

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 – S.197**

These debentures are issued upon the terms in lieu of redemption or repayment and may, at the option of the holder or creditor of the company, be converted into shares in the company upon such terms as may be stated in the debentures;

**(c) Secured or unsecured debentures – 198**

A secured debenture is that which is charged for repayment from a particular property of the company. Keep in mind that, the debentures 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 debentures 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 naked debenture is that a 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. In the same vein, a fixed charge is superior to a floating charge;

**(d) Redeemable debentures – S.199**

As the *name* suggests, a redeemable debenture may be redeemed at the option of the company at anytime, that is, as the company may decide.

## 3.16 Winding up of a company

This is the legal way of terminating the life of a company or dissolving the association. According to section 564 of the CAMA, winding up may be:

- (a) by the Federal High Court;
- (b) voluntarily by the company; or
- (c) subject to the supervision of the court.

### 3.16.1 Winding up by the Federal High Court

The Federal High Court 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 570 of CAMA, the court may wind up a company if the:

- (a) company has decided by a special resolution that the court should wind it up;
- (b) 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 the last day on which the meeting ought to have been held;
- (c) number of the members of the company has fallen below two if it is a company with more than one member;
- (d) company is unable to pay its debts;
- (e) condition precedent to the operation of the company no longer exists; or
- (f) court is of the opinion that it is just and equitable that the company be wound up.

### **3.16.2 Who may petition the court for winding up?**

By virtue of section 573(1) of the CAMA, a petition to Court for winding up under this head may be presented by:

- (a) the company or a director, following a special resolution;
- (b) a creditor, including a contingent or prospective creditor of the company;
- (c) a contributory, in the case of a company limited by guarantee;
- (d) a trustee in bankruptcy to, or a personal representative of, a creditor or contributory;
- (e) the CAC under section 366 of the CAMA (if, considering the report of an inspector, it appears expedient in the interest of the public that the company be wound up);
- (f) a receiver, if authorised by the instrument of appointment; or
- (g) all or any of the preceding parties, jointly or separately.

### **3.16.3 Voluntary winding up**

According to section 620 of the CAMA, the company may wind up voluntarily:

- (a) when the period for its duration by its articles of association expires, or the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved, and the company passes an ordinary resolution requiring the company to be wound up voluntarily; or
- (b) If the company resolves by special resolution that it be wound up voluntarily.

Keep in mind that voluntary winding up could take the form of members' voluntary winding up, or creditors' voluntary winding up.

Members' voluntary winding up occurs where the company has made a declaration of solvency and delivered, the declaration to the CAC.

Keep in mind that the directors or majority of the directors of the company are duty bound under section 625 to make a statutory declaration, at least 5 weeks before the passing of the winding up resolution, that they have made full inquiry into the affairs of the company and are of the opinion that the company would be able to pay its debts in full, within the period specified in the declaration or, not later than 12 months.

After the declaration, a general meeting of the company is called for the purpose of passing the appropriate resolution.

Creditors voluntary winding up occurs where no declaration of solvency has been made by the company and filed with the CAC (section 625(4), CAMA).

Keep in mind that separate meetings of creditors and of members must be held so as to resolve to wind up the company. Then an Extraordinary General Meeting is called to pass a resolution for winding up in accordance with section 457 of the CAMA. (See also sections 635- 641 of the CAMA.

### **3.16.4 Winding up subject to the supervision of the court**

By section 649 of the CAMA, when a company is being voluntarily wound up following a special resolution to the effect, the court may, on petition, order that the voluntary winding up shall continue, but subject to such supervision of the court and with such liberties for creditors, contributories, or others to apply to the court, and generally on such 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 would have supervisory jurisdiction (section 650, CAMA).

### **3.16.5 Priority of payments in winding up**

In the process of winding up, priority must be given to local rates, charges and assessed taxes, deductions that the company made from its employees' remuneration, contributions under the Pension Reform Act as well as contributions and obligations of the company under Employees' Compensation Act. In addition, the company's "debts shall:

- (a) rank equally among themselves after the expenses of the winding up and shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and
- (b) if the assets of the company available for the payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge."

Keep in mind that secured creditors shall take priority over all other claims, including the preferential payment, other debts and the expenses of winding up.

The equity or ordinary shareholders shall rank last as the residual claimants on the company's assets (section 657, CAMA).

## **3.17**

### **Administration of companies**

A person may be appointed as an administrator of a company by:

- (a) A Court order of administration under section 449 of the CAMA;
- (b) The holder of a floating charge under section 459 of the CAMA; or
- (c) The company or its directors under section 459 of the CAMA. (Section 443, CAMA.

A court may order the appointment of an administrator on being satisfied that a company is likely to become unable to pay its debts; and administration order is likely to achieve the purpose of administration.

It is important to note that a company or its directors may appoint administrators out of court.

In addition to the foregoing, on the application of a holder of floating charge, the court may order the appointment of an administrator:

- (a) whether or not it is satisfied that the company is or likely to become unable to pay its debts; and
- (b) only if it is satisfied of the ability of the holder of floating charge to appoint an administrator under section 450 of the CAMA.

#### **3.17.1 Functions of an administrator**

Section 444(1) of the CAMA provides that, "The administrator of a company may do all such things as may be necessary for the management of the affairs, business and property of the company, and shall perform his functions with the objectives of:

- (a) rescuing the company, the whole or part of its undertaking, as a going concern;
- (b) achieving a better result for the company's creditors as a whole than would be

- likely if the company were wound up, without first being in administration; or
- (c) realising property so as to be able to make a distribution to one or more secured preferential creditors.

### **3.17.2 Effect of administration**

An administration order shall dismiss a pending petition for winding up. While the company is in administration following an appointment of an administrator on an application by the liquidator, the winding up process is suspended.

## **3.18 Chapter review**

This chapter explains the division of the powers of the company between the general meeting and the board of directors as well as the exercise of those powers.

It also discusses company capital and securities, corporate restructuring, and winding up, the appointment, duties powers, and removal of company secretary and external auditor.

## **3.19 Worked examples**

### **3.19.1 Multiple-choice questions**

1. The secretary of a public company must be any of the following **except** a
  - A. Chartered Accountant
  - B. Chartered Secretary and Administrators
  - C. Legal Practitioner
  - D. Chartered Insurer
2. The appointment of a director of a company at a general meeting is by
  - A. Extra-ordinary resolution
  - B. Ordinary resolution
  - C. Special resolution
  - D. Director resolution
3. Within what period after incorporation is a public company required to hold its Statutory Meeting?
  - A. 1 month
  - B. 6 months
  - C. 12 months
  - D. 18 months
4. The remedies for breach of fiduciary duties by a company director include the following EXCEPT:
  - A. Accounting to the company for any gain made
  - B. Action for negligence
  - C. Imprisonment
  - D. Removal from office
5. Winding up of a company may take any of the following forms except
  - A. Creditors' winding up

- B. Members' winding up
- C. Winding up subject to supervision by the court
- D. Winding up at the complaint of the liquidator

### 3.19.2 Open-ended questions

1. (a) As fiduciaries, directors owe the company certain duties that have their roots in case law and the provisions of the Companies and Allied Matters Act.

**Required:**

Explain **five** of the duties of the directors.

- (b) A human resource consultancy firm has consulted you to advise it on the qualifications of prospective candidates for the position of the company secretary of a public company.

**Required:**

Advise the firm.

- (c) The general meeting of Akad PLC is of the view that the board of directors is not exercising some management power because the exercise would work against the board. They have approached you to advise them on their right to intervene in the exercise of management powers.

**Required:**

Advise the general meeting.

2. Akilo is a member of Kamuku PLC. He holds five percent of the shares of the company. In 2011, he borrowed a sum of N3 million from Ahmed. Ahmed has demanded repeatedly for the repayment of the loan from Akilo. Unable to repay the loan, Akilo has agreed with Ahmed to transfer three percent of his shares in Kamuku PLC to Ahmed in repayment of the outstanding loan. Akilo executed the necessary share transfer documents and deposited them with the company secretary of Kamuku PLC five months ago. Akilo has complained to you of the company's refusal to transfer the shares.

**Required:**

Advise Akilo on the company's refusal to transfer the shares.

- 3 (a) State **five** categories of persons that are disqualified from being directors of a company.

- (b) Ade is the Managing Director of Akad PLC ("Akad"). He assumed office six months before the company began to have financial difficulty due to trade deficits. The company met and decided that Ade will have to waive his right to remuneration because the company has ceased to make profit.

Last month, Akad won a contract to rehabilitate all the roads in Nicamania Local Government Area. The company has tried unsuccessfully to secure a loan to perform the road rehabilitation contract. But prior to that, it had done all the preliminary work and completed all the paper works for the contract. What remained was to mobilise the workers and equipment to site.

Following the development, Ade formed another company to take over the road rehabilitation contract. The company is mobilising its workers and equipment to site tomorrow. By chance, Ade met you at the Tennis Club and has informed you of the situations.

**Required:**

Advise Ade on the issue of remuneration and the road rehabilitation contract.



### 3.19.3 Suggested solutions to multiple-choice questions

1. D
2. B
3. B
4. C
5. D

### 3.19.4 Suggested solutions to open-ended questions

1(a) As fiduciaries, the directors owe the company the duty to:

- i. observe utmost good faith towards the company in any transaction with it or on its behalf;
- ii. act at all times in what they believe to be in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purpose for which the company is formed, and in such manner as a faithful, diligent, careful and ordinarily skilful directors would act in the circumstances (s. 279(3), CAMA, **Re: Smith and Fawcett Ltd.** (1942) Ch. 304, 306);
- iii. have regard to the interests of the company's employees and
- iv. members in the performance of her duties;
- v. 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 directors exercise their power for the proper purpose, it is immaterial that the interest of the members is adversely affected;
- vi. not fetter their discretion to vote in a particular way;
- vii. not delegate their powers in such a way that as to abdicate their duties;
- viii. not to accept a bribe, gift or commission from outsiders in any transaction that involves the company;
- ix. 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);
- x. account to the company for any secret profit, or disclose a possible profit before she makes it so that the general meeting may approve it; and
- xi. exercise the powers and discharge the duties of their 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.

(b) The secretary must have the requisite knowledge and experience to perform the functions of her office.

In addition, the secretary of a public company must be of any of a:

- (i) chartered accountant; or
- (ii) legal practitioner; or
- (iii) chartered secretary and administrator; or

- (iv) body corporate or firm consisting of the professionals listed herein; or
  - (v) person who has been a company secretary for three out of the five years immediately preceding his appointment in a public.
- (c) As the general rule, the board of directors shall manage the business of the company and exercise such powers of the company that the CAMA and articles do not reserve for the general meeting.

Unless the articles shall otherwise provide, the directors, when acting within their powers and in good faith, shall not be bound to obey or take instructions from the members in general meeting.

The general meeting of the members of the company makes policies for the company and appoints the officers of the company, including the directors.

However, the general meeting may interfere in management by:

- (i) acting in any matter if the directors are disqualified, or are unable to act because of deadlock on the board or otherwise;
- (ii) instituting legal proceedings in the name of the company if the directors fail or neglect to do so;
- (iii) making recommendations to the board of directors regarding an action to be taken by the board; or
- (iv) removing any director of whose action they do not approve.

## 2. Kamuku PLC may refuse to register the transfer of shares if:

- (a) the share is not fully paid up;
- (b) the company does not approve of the transferee (usually in the case of a private company); or
- (c) the company has a lien on the shares, for example, when the transferor had offered the shares as security for a loan from the company.

Importantly, where the articles confer on the directors the discretion to refuse to register a transfer of shares, the directors must exercise that power bona fide, that is, in good faith. 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 Pavillion Ltd** (1924) 1 Ch. 2076, the court 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, and a mere failure to pass a resolution was not a formal exercise of the right to decline the transfer.

- (d) If a company refuses to register a transfer of any shares, it shall within 2 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 one of its officers who is in default shall be liable to a fine.

## 3(a) The persons who are disqualified from being company directors are

a/an:

- (i) person under the age of 18;
  - (ii) insolvent person;
  - (iii) person certified as insane;
  - (iv) person convicted by the High Court of an offence in connection with promotion, formation, or management of a company; and
  - (v) corporation other than its accredited representative.
- (b) The right of the Managing Director to remuneration is guaranteed by section the CAMA. The remuneration may be by way of salary, commission or participation in the profits of the company. It is also payable out of the capital of the company. If he has rendered some services without a contract, he shall be entitled to payment on *quantum meruit*.

The remuneration of a director, once fixed by the general meeting or articles of association, shall be payable out of the funds of the company that is, out of profits and capital.

In the case of **Re Consolidated Nickel Mines (1940)** 1 Ch. 883, the court held that that a mere resolution by the directors who were entitled to remuneration that they would forgo future remuneration is not binding on the directors, but if the company was a party to the agreement, then it became binding.

The inability or unwillingness of a company to do any business shall not afford a director a defense for breach of duties. 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.

The duty not to misuse corporate information and opportunities does not cease with a director's resignation from office.

# INSOLVENCY LAW

## Contents

- 4.0 Learning objective
- 4.1 Learning outcomes
- 4.2 Introduction
- 4.3 Meaning and types of insolvency,
- 4.4 Receivership
- 4.5 Scheme of arrangement, compromise and netting
- 4.6 Fixed and floating charges
- 4.7 Chapter review
- 4.8 Worked examples

## **4 Insolvency law**

### **4.0 Learning objective**

This chapter explains succinctly insolvency and the consequence, as well as charges and corporate restructuring.

### **4.1 Learning outcomes**

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

- (a) identify the different types of insolvency and the consequences of insolvency;
- (b) explain meaning and types of insolvency, receivership, appointment of receiver and manager, duty, power, and liability of receiver, and insolvency practice;
- (c) explain schemes of arrangement, compromise and netting; and
- (d) explain the differences between a fixed and floating charge.

### **4.2 Introduction**

One of the consequences of incorporation is that a company enjoys perpetual succession. Where an individual director or shareholder dies, the company remains in existence and is free to continue to trade. However, it is possible for a company to enter insolvency and subsequently 'die' or have its life terminated. In this chapter, we shall examine the process of insolvency and its impact on the company. We shall also examine some alternatives to liquidation, such as receivership and administration.

### **4.3 Meaning and types of insolvency**

Insolvency occurs where a company is unable to pay its debts. There are two types of insolvency, namely: corporate insolvency and personal insolvency. A company's insolvency may lead to its demise through the process of liquidation where its assets are distributed to meet claims of its creditors.

Where a company or a limited liability partnership fails, the company or the limited liability partnership, and not the members of the entity, becomes insolvent.

#### **4.3.1 Tests for insolvency in Nigeria**

The tests for insolvency in Nigeria recognised by the Companies and Allied Matters Act are:

- (a) a company's inability to pay its debts, as the CAC regulations may determine, within three weeks after a demand for payment has been made;
- (b) a wholly or partially satisfied court process issued in respect of a judgment debt;
- (c) A court's determination after taking into account any contingent or prospective liability of the company that the company is unable to pay its debts; and
- (d) A situation in which the company's liabilities exceed its assets.

#### **4.3.2 Main types of survival options available to companies in financial difficulties in Nigeria**

The formal options available to companies in financial difficulties in Nigeria are: receivership, schemes of arrangement, netting, compromise, or winding up. While the previous chapter has a comment on winding up, the other options are presented here.

## **4.4 Receivership**

This is an alternative to liquidation where a company is in financial difficulty. It is the right of a secured creditor to appoint a receiver to manage the company's assets that are the subject matter of the creditor's security. Receivership involves appointing a person to either sell or collect any income arising from the assets subject to the charge in order to satisfy the outstanding debt owed to the creditor.

### **4.4.1 Appointment of receiver by the court and out of court**

The Court has the power to appoint an official receiver on behalf of the debenture holder or other creditors of a company that is being wound up on an application to it. The court may appoint a receiver or receiver and manager of the property or undertaking of a company if the principal money that the company borrowed or the interest thereon is in arrears; or security or property of the company is in jeopardy. A receiver so appointed is an officer of the Court (section 552, CAMA).

A receiver or manager of the property or undertaking of the company may also be appointed pursuant to the instrument of indebtedness. Such a receiver is an agent of the person(s) on behalf of whom he is appointed. If he is appointed manager of the whole or part of the company's property, he stands in fiduciary relationship to the company and must observe utmost good faith towards it in all transaction with it or on its behalf (section 553, CAMA).

Where a receiver or manager has been appointed, he must give notice of his appointment to the Corporate Affairs Commission within 14 days indicating the terms of the appointment and remuneration. Thereafter, every invoice, order for goods or business letter by or on behalf of the company, shall contain a statement that a receiver has been appointed.

The receiver also, upon his appointment, must send notice forthwith to the company. Care should be taken not to confuse the term receiver with the office of the official receiver who is a court appointed official with the function of protecting all the company's assets during the time between a petition for winding up and the granting of a winding-up order. Once a receiver has been appointed, the powers of the directors and shareholders to deal with the assets over which the receiver was appointed ceases and same is vested in the receiver and if a receiver is also appointed manager, he has power in law to carry on and manage the business of the company although the directors remain in office and shareholders are unaffected.

### **4.4.2 Duty of a receiver**

When a person is appointed as a receiver of the company's property, he shall, "subject to the rights of prior encumbrances, take possession of and protect the property, receive rents and profits and discharge all out-goings in respect thereof and realise the security for the benefit of those on whose behalf he is appointed, but unless he is an appointed manager, he does not have the power to carry on any business or undertaking" (section 556(1), CAMA).

A person that is appointed manager of the whole or part of the company's undertaking must manage it so as to realise the security of those on whose behalf he has been appointed (section 556(2), CAMA).

### **4.4.3 Liability of receivers and managers on contracts**

A receiver is liable personally on any contract that he enters into to the extent that the contract provides expressly. If he enters into the contract in the performance of his duty, he is entitled to indemnity for the liability incurred out of the property over which he is receiver or manager.



#### 4.4.4 When a company is placed in receivership

Depending on the terms of the agreement between the company and its debenture holder, a company may be placed into receivership where:

- (a) the principal sum borrowed by the company or the interest is in arrears;
- (b) the security or property of the company is in jeopardy. The security of the debenture holder shall be in jeopardy if the court is satisfied that events have occurred or is about to occur which renders it unreasonable in the interest of the debenture holder that the company should retain the power to dispose of its assets;
- (c) the company fails to fulfill any of the obligations imposed on it by the debentures or debentures trust deed;
- (d) any circumstance occurs which by the terms of the debentures or debenture to realise his security;
- (e) the company is being wound up;
- (f) any creditor of the company issues a process of execution against any of its assets;
- (g) the company ceases to carry on business; or
- (h) the creditors amounting to more than one-half of the total amount owing in respect of a class of outstanding debentures apply to court for receivership.

A receiver of the whole of a company's undertakings has the power to borrow money, and may do so if the need arises. The lenders or creditors invoking these insolvency procedures may also provide the fund required.

A receiver appointed under these procedures has no obligation to retain the employees of an insolvent company. Where the employees are disengaged, he has a duty under the Act to settle all wages and salaries in respect of the services rendered to the company in priority to all other debts.

Also the commencement of the receivership exercise does not in any way affect the contracts of the company. The power of the company to continue to deal with the contract relating to the undertaking or property over which receiver or manager has been appointed ceases from the date of his appointment. He may decide to either carry on with the contract or terminate it.

A receiver who is also appointed a manager has a statutory duty not only to realise the assets of the company, but also manage the affairs of the company in the best interest of the company so as to preserve its assets, further its business and promote the purposes for which it was formed. A debt/equity swap may achieve this.

#### 4.4.5 Powers of a receiver/manager

The powers vested in an appointed receiver/manager by law depend on the real nature of the appointment as construed from the debenture deed, where such appointment is made out of court, or in accordance with the court's directive or order where appointment is made by the court.

In law, a receiver, *simpliciter*, has the power to stop the business, collect debts and realise the assets of the company. Pursuant to these general powers, and subject to any order made by the court, the receiver is statutorily empowered to take possession of the assets subject to the mortgage, charge or other security and sell those assets and, if the mortgage, charge or other security extends to such property, to collect debts owed to the company, to enforce claims vested in the company, to compromise settle and enter into arrangements in respect of claims by or against the company, or the

company's business with a view to selling of on the most favourable terms, to grant or accept leases of land and license in respect of patents, designs, copyright or trademarks, and to recover any instalment unpaid on the company's issue shares. These powers are given by CAMA in addition to, and not in substitution for, any other powers conferred on the trustee of the debenture trust deed or on the holders of the debenture by the instrument and may be altered or excluded by the security instrument.

It is worthy of note however that although a person appointed a receiver of any property of a company shall, subject to the rights of prior encumbrances, take possession of and protect its property, receive rents and profits, discharge outgoings and realise the security for the benefit of those on whose behalf he is appointed, he shall not have power to carry on any of the company's business or undertaking unless he is appointed a manager.

Where a person is appointed a receiver and manager, he has, in addition to the foregoing powers, the power to manage, control and carry on with the company's business or undertaking. Consequently, the management functions of the company's directors terminate and become vested in the receiver in so far as they relate directly to the management of the company or its charged assets or undertaking.

To enable the receiver or manager realise the property and carry on the business of the company for this purpose, CAMA provides a long list of powers in the Eleventh Schedule which, except in so far as they are inconsistent with any provision of the debenture, are deemed to be included in the powers conferred on the receiver or manager by the debenture. According to the Eleventh Schedule, they are the power to:

- (a) 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;
- (b) sell or otherwise dispose of the property of the company by public auction or private contract;
- (c) raise or borrow money and grant security therefore over the property of the company;
- (d) appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;
- (e) bring or defend any action or other legal proceedings in the name and on behalf of the company;
- (f) refer to arbitration any question affecting the company;
- (g) effect and maintain insurances in respect of the business; and property of the company;
- (h) use the company's seal;
- (i) do all acts, and to execute in the name as well as on behalf of the company any deed, receipt or other document;
- (j) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
- (k) 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;
- (l) do all such things (including the carrying out of works) as may be necessary for the realisation of the property of the company;

- (m) make any payment which is necessary or incidental to the performance of his functions;
- (n) carry on the business of the company;
- (o) establish subsidiaries of the company;
- (p) transfer to subsidiaries of the company the whole or any part of the business and property of the company;
- (r) grant or accept a surrender of a lease or tenancy of any of the property required or convenient for the business of the company;
- (s) make any arrangement or compromises on behalf of the company;
- (t) call up any uncalled capital of the company;
- (u) rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company, receive dividends, and accede to trust deeds for the creditors of any such person;
- (v) present or defend a petition for the winding up of the company;
- (w) change the situation of the company's registered office; and
- (x) do all other things incidental to the exercise of the foregoing powers.

Since the foregoing powers are implied in any debenture in which a receiver and manager is appointed for the whole or substantially the whole of a company's property, it is incumbent on parties to such debentures who are desirous of excluding all or any of such powers to do so expressly, and any such express exclusion shall be valid in law.

However, while it would appear that a receiver and manager could exercise any of the implied powers (except expressly excluded), the same cannot be said of a receiver *simpliciter*. For example, while the power to borrow money to carry on the company's business as well as charge the assets of the company may be exercised by the receiver and manager, the powers of a receiver *simpliciter* are limited to the collection and realisation of the company assets and the distribution of same in accordance with the terms of the instrument appointing him.

#### **4.4.6 Agency of the receiver**

At common law, a receiver/manager appointed by the mortgagee is deemed to be the agent of the mortgagor so that the mortgagee may sue the mortgagor for any loss resulting from the negligent act or omission of the receiver.

The negative effect of this anachronistic and unjust principle on the mortgagor has been cushioned in recent times by the rule in **Medforth v Blake**, which imposes on the receiver/manager a duty of care in equity. The Companies and Allied Matters Act has no room for this anachronistic common law principle. This is because not only is the receiver/manager deemed to be an agent of the person on whose behalf he is appointed, i.e., the agent of the debenture holder or mortgagee, the applicable statute imposes specific duties on the receiver/ manager in the overall interest of the mortgagor-company.

Where a receiver is appointed by the court, he shall be deemed to be an officer of the court, and must act in accordance with the directions and instructions of the court.

#### **4.4.7 Duties of a receiver/manager**

It is a primary duty of the receiver/manager to take possession of and protect the

property, receive the rents as well as profits, discharge all outgoings therefrom, and manage same with a view to the beneficial realisation of the security.

A receiver that is appointed the manager of the whole or any part of the undertaking of a company is deemed to stand in a fiduciary relationship to the company, and shall observe a duty of utmost good faith towards it in any transaction with it or on its behalf.

A duty of care is imposed on the receiver/manager in managing the business of the mortgagor-company. He is expected to act at all times in what he believes to be in the best interest of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed as well as in such manner as a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances.

In considering whether a particular transaction or cause of action is in the best interest of the company as a whole, regard may be had to the interest of employees as well as members of the company in taking decisions on the course of action to take or the option to exercise in any transaction.

The CAMA ensures that the obligation imposed on the receiver/manager towards the preservation of the company's property is not eroded by providing that nothing in the articles of association or resolution of the company or in any contract shall relieve the receiver/manager from the duty imposed by the Act or relieve him from any liability incurred as a result of any breach of such duty.

In ensuring that the receiver/manager is prudent in managing the property or undertaking of the company, the CAMA provides that except otherwise provided, he shall be personally liable on any contract entered into him and may be indemnified only where he entered into the contract in the proper performance of his functions statutory or otherwise, or with the express or implied authority of the appointor, subject to the rights of prior encumbrances.

#### **4.4.8 Preparation and filing of accounts**

A receiver or manager appointed under a debenture secured by a floating charge in respect of the whole or substantially the whole of the property of the company shall send an abstract in the prescribed form showing his receipt and payments to the Corporate Affairs Commission; any trustees for the debenture holders of the company on whose behalf he was appointed; the company; and (so far as he is aware of their addresses) all debenture holders, within:

- (a) two months or such longer period as the court may allow after the expiration of a period of twelve months from the date of this appointment, and or every subsequent period of twelve months; and
- (b) two months or such longer period as the court may allow after he ceases to act as the receiver or manager of the property.

The abstract shall cover the period of twelve months from the date of the appointment of the receiver/manager and any other subsequent period of equal duration. Where he ceases to act before the expiration of any period of twelve months, the abstract shall relate to all receipts and payments during all preceding period since his appointment.

In all other cases where the receiver/manager is appointed under the powers contained in any instrument, he shall forward the abstract within one month (or such longer period as the Corporate Affairs Commission may allow) after the expiration of the period of six

months from the date of appointment or of every subsequent period of equal duration. Where he ceases to act before the expiration of any period from the end of the last preceding abstract to the date of his so ceasing to act, and the aggregate amount of his receipts and of his so ceasing during all preceding periods since his appointment.

Any receiver or manager who makes default in filing the abstract as prescribed by law shall be guilty of an offence and liable to a fine of ₦25.00 for every day during which the default continues.

#### **4.4.9 Realisation of debenture holder's security**

A receiver or manager appointed under an instrument may realise the debenture holder's security by selling off the assets of the company. The assets may be sold by auction or by private treaty but must not be fraudulently sold at undervalue. The duty of care required of him under the CAMA must be seen to be exercised in selling the assets, and the receiver will be liable for any negligent act or omission resulting in losses to the company.

Keep in mind that section 656 of the CAMA empowers a secured creditor to realise or otherwise deal with his security during the winding up of an insolvent company registered in Nigeria.

Where the court appoints a receiver or manager, he shall exercise his power of sale only with the directives, order or approval of the court either as contained in the instrument appointing him originally or by way of an application. A legal estate may be conveyed in the case of land, either by the person authorized to do so or by the concurrence of the company and existing encumbrancers otherwise, an order perfecting the sale may be made by the court upon receiver's application.

#### **4.4.10 Distribution of proceeds**

All moneys realised from sale of assets, rents and/or general debts shall be distributed by the receiver in accordance with his instrument of appointment in the case of appointment out of court. Where the receiver or manager is appointed by an order of court, an application shall be brought for an order setting out the manner of distribution amongst various claimants. Except otherwise expressly provided or ordered by the court, the moneys in the hand of the receiver may be applied in the settlement of the:

- (a) cost of realising the security;
- (b) other expenses of the receiver and manager including remuneration and costs;
- (c) costs, exchanges, other outgoings and the expenses of trustees under a debenture trust deed if any, including their remuneration;
- (d) cost of debenture holder's action (if any);
- (e) preferential debts out of the property subject to a floating charge in priority to the claims of the debenture holders'; and
- (f) debenture debt with interest accruing thereon up to the date of payment.

#### **4.4.11 Institution of proceedings**

To enable the receiver/manager to achieve the desired goals of taking possession of the secured assets, realising proceeds there from or recovering debts due to the company, the law empowers him to bring and defend actions in the name and on behalf of the company. Since the legal personality of the company remains unaltered despite the appointment of a receiver/manager, the latter cannot bring an action in his name. But he need not obtain the leave of court to be able to bring or defend such action neither is the concurrence of the shareholders required.



## **4.5 Schemes of arrangement, compromise, and netting**

### **4.5.1 Arrangement**

Sections 710-717 of the CAMA, 2020 regulate arrangements and compromise.

“Arrangement” means “any change in the rights or 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 provision of [the CAMA] or by the unanimous agreement of all parties affected (section 710, CAMA.”

A special resolution is required resolving that the company be put into member’s voluntary winding up and that the liquidator be authorised to sell the whole or part of its undertaking or assets to another body corporate.

### **4.5.2 Compromise**

Where a compromise is proposed between a company and its creditors, the court may order that a meeting of the creditors or a 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 or arrangement and make a written report thereon within a time specified by the court.

If the court is satisfied as to the fairness of the compromise or arrangement it will be sanctioned 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 court, a certified true copy of the order must be delivered by the company to the commission 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 or 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.

### **4.5.2 Netting**

By virtue of section 718 of the CAMA, netting occurs on:

- (a) “termination, liquidation or acceleration of 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 entitlement or group of obligations or entitlements terminated, liquidated or accelerated under paragraph (a);
- (c) conversion of any values calculated or estimated under paragraph (b) into a single currency; and
- (d) determination of the net balance of the values calculated under paragraph (b) as converted under paragraph (c), whether by operation of set-off or otherwise.

### **4.5.3 Insolvency practice and practitioner**

The CAMA, 2020 provided for the categories of person that could be insolvency practitioners. However, the Business Facilitation (Miscellaneous Provisions) Act (BFA), 2023 (section 21, Part I, Schedule of the Act) has deleted that provision, which was in section 868, CAMA. Having done so, it is expected that the CAC will, from time to time, issue guidelines on who may be an insolvency practitioner.

Notably, the BFA leaves untouched the provisions of sections 705 and 706 of the CAMA.



#### **4.5.4 Qualifications of insolvency practitioner**

A person is qualified to be an insolvency practitioner, if he:

- (a) holds a degree in law, accountancy or other relevant discipline from a recognised university or polytechnic;
- (b) has a minimum of five years post qualification experience in matters of insolvency;
- (c) is so authorised to be by virtue of certification by Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) or is a member of any other professional body recognised by the CAC; and
- (d) holds an authorisation of the CAC or other additional qualifications as the CAC may prescribe by its regulation (section 705, CAMA).

#### **4.5.5 The power of the CAC to recognise a professional body as insolvency practitioner**

The CAC has the power to recognise a professional body as a body whose rules provide that its members:

- (a) are permitted to be insolvency practitioners;
- (b) are fit and proper persons to so act; and
- (c) meet the specified requirements of education as well as practical training and experience (section 706, CAMA).

### **4.6 Fixed and floating charge**

#### **4.6.1 Background**

At common law, a trading company has implied power to borrow money for the purpose of executing its objects unless prohibited from doing so by its memorandum or articles of association or by statute. Such trading company may also give security for loans and advances by creating a mortgage of charge over all or any of its property including its uncalled capital.

The power to borrow and create debentures secured by a charge is now vested in companies by the Companies and Allied Matters Act. Section 199 of the Act gives a registered company the power to “borrow money for the purpose of its business or objects and may mortgage or charge it undertaking, property and uncalled capital, or any part thereof and to issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or party.

It usually, but not necessarily, gives a charge by way of security and is often though not invariably expressed to be one of a sense of like debentures.

#### **4.6.2 Charges securing debentures**

Although a debenture is generally an acknowledgement of the company's indebtedness, it is unlikely that creditors would accept naked debentures, and more often than not, the company is required to charge its assets as security. A secured debenture is that which is secured either by a fixed charge on a specific or ascertainable company properties, or by a floating charge over the whole or a specified part of the company's undertaking and assets or both.

#### **4.6.3 Fixed charge**

At common law, a fixed charge is a charge over specific property of a company, which fastens to the property when the charge is created.

A fixed charge attaches to a particular piece of property when the charge is created and the identity of the property does not change (though it may be extended) during the subsistence of the charge. It is not necessary that the company should be the owner. However, the property or the class of assets to which it belongs should be

sufficiently defined in the instrument creating the charge so that there can be no doubt whether the property is caught by the charge when it comes into existence or when the company acquires it.

Section 204 of the CAMA provides that, “A fixed charge on any property shall have priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibits the company from granting any later charge having priority over the floating charge and the person in whose favour such later charge was granted had notice of that prohibition at the time when the charge was granted to him....”

Section 207(4) of the CAMA (as amended by section 9, Part I of the Schedule to the BFA, 2023) provides that, *“Notwithstanding the provisions of this Act or any other law to the contrary and without prejudice to the provisions of section 204, the holder of a fixed charge shall have priority over other debts of the company including preferential debts.”*

When a charge is fixed, the asset is appropriated to the satisfaction of the debt immediately or upon the debtor acquiring an interest in it in the case of future or after-acquired property.

It follows from the foregoing description of a fixed charge that it may be created mainly over specific or ascertainable assets of the company present or future, e.g., land, buildings, trade machineries and other fixed capital of the company) to the exclusion of the shifting assets such as book debts, stock in trade, raw materials and goods in process and this view is not without foundation. The provision of the CAMA which provides that “debentures may be secured by fixed charge on certain of the company’s property” as opposed to” a floating charge over the whole or a specified part of the company’s undertaking and assets...” appears to give comfort to that view.

However, this traditional method of classifying a fixed or floating charge may turn out to be of little significance in ascertaining the real nature of the charge in practical terms. Assets over which a fixed charge may be created are not necessarily those physically attached to premises and have been held to cover book debts as well as future and after acquired property. Also, the possibility of creating a fixed charge coupled with a licence, or to deal with, or dispose of the charged assets in the ordinary course of business, informs the better view that the important factor in determining whether a fixed charge can be created on shifting assets e.g. stock in trade, raw materials etc. is not the nature of the assets as such but the fact that the debtor’s freedom to manage the assets in the ordinary course of business is restricted. Thus, the distinguishing feature of a fixed charge is in the restriction of the debtor company’s freedom to manage its assets in the ordinary course of business as opposed to the nature of the assets as to being fixed or shifting.

A debenture secured by a fixed charge takes the form of a mortgage, legal or equitable, with the attendant rights and obligations of the parties similar to those in ordinary mortgage involving an individual.

A fixed charge is usually created in the same way as other mortgages, i.e by the transfer of proprietary interest of the company in the fixed assets as security for a loan subject to ceasing on redemption.

A fixed charge expressed by way of a deed is a legal mortgagee and the charge has the rights of a legal mortgagee.

An equitable mortgage may also be created for example, where the charger deposits titles deeds with the charge so that the charge has the right of an equitable mortgagee, but such rights may be postponed to those of a bona fide purchaser for value of the legal estate in the property mortgaged without notice.

In the case of series of debentures issued and secured by a fixed charge, it is necessary

to have a trust deed appointing trustees and vesting the fixed charge in them.

The effect of creating this security is that the mortgage fastens at once on the property and binds it in the hands of third parties who take it from the company. The fixed charge prevents the charger from disposing of the property subject to the charge without the consent of the charge. (The CAMA sets out the events under which a fixed charge may be realised as well as the remedies available to the fixed charge).

From the point of view of the charge, the advantage of a fixed charge lies in the availability of a particular asset or group of assets to satisfy the creditor upon default by the debtor-company and in the priority of the charge over any floating charge created or subsequent to the fixed charge unless the earlier floating charge contained a negative pledge clause.

A fixed charge however has a major disadvantage for the chargee. This is because the assets subject of security are already chosen and ascertained, the chargee is confined to the particular assets charged in the event of enforcement of the security even where they are depreciating in value and/or insufficient to meet company's debt, and is precluded from having recourse to other free assets of the company.

#### 4.6.4 Floating charge

A floating charge is an equitable charge on all or any of the company's property or assets, the constituent items of which are constantly changing. It is an invention of equity dictated by the business exigencies of the times and its course has been influenced by the ingenuity of draftsmen and statutory provisions.

Lord Macnaghten stated the nature of a floating charge in **Illingworth v Houldsworth** as follows:

*"A floating charge... is ambulatory and shifting in its nature, hovering with the property which it is intended to affect, until some event occurs or some act is done which cause it to settle and fasten on the subject of the charge within its reach and grasp."*

The Supreme Court, in the case of **Intercontractors Nigeria Ltd v UAC**, adopted the common law definition and pronounced thus:

*"A floating charge, ... is ambulatory and floats over the property until the event indicated in the debenture deed happens which causes it to settle, remain fixed and crystallise into a fixed charge"*.

The nature of a floating charge is such that it creates an immediate security over all company's assets or undertaking or a particular category of them but without attaching to any until crystallisation. As Buckley L.J. succinctly put it in **Evans v Rival Granite Quarries Ltd**:

*"A floating security is not a future security. It is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him."*

*The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets plus a licence to the mortgagee to dispose of them in the course of his business, but is a floating mortgage applying to every of them comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security"*.

Section 203(1) of CAMA defines a floating charge as,

*"An equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until:*

- (a) the security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the same, appoints a receiver or manager or enters into possession of such assets; or
- (b) the court appoints a receiver or manager of such assets on the application of the holders; or
- (c) the company goes into liquidation”.

The foregoing provision of CAMA on the definition of a floating charge is an amplification of the common law position on the nature and consequences of a floating charge created over all assets of the company.

A floating charge is characterised by three main features as:

- (a) a charge on a class of assets both present and future;
- (b) a charge in which the class of assets is one, which in the ordinary course of business of the company, would be changing from time to time; and
- (c) a charge in which it is contemplated that until the charge attaches to assets by crystallisation, the company may dispose of or deal with the assets in the ordinary course of business. The expression “ordinary course of business” is construed widely to cover a sale of the whole undertaking including payment of its unsecured creditors and the power to grant mortgages on the same property unless it is otherwise provided in the charge instrument.

#### **4.6.5 Advantages of the floating charge**

The floating charge is advantageous in that, among other things, it:

- a) is a valuable means whereby the company operating as a going concern could raise money on the security of its assets while preserving intact the power of the company to deal with them in the ordinary course of business;
- b) offers the most convenient way of creating security over company’s assets where the company has little or no fixed assets but carries a large and valuable stock in trade. The peculiarity of the stock in trade on assets to be turned over in the course of business has made the creation of a fixed charge impracticable, since the consent of the fixed chargee would have to be sought and obtained to be able to sell any asset and a new charge would have to be entered into when new stocks are acquired;
- c) enables the stocks to be turned over in the ordinary course of the company’s business and “attaches to whatever it is converted into and to whatever new stock is acquired” without any difficulty;
- d) affords protection against an unsecured creditor upon crystallisation. It gives the floating chargee a measure of control over the company for, not only would the company report regularly to the charge if the company gets into financial difficulties, the chargee may be privy to management decisions; and
- e) an incentive to creditor to give larger credit to a going concern as it expands with the consequent accrued profits from interests to the creditor. The facts that the company can deal with the charged property in the ordinary course of business makes it possible to create a subsequent fixed legal or equitable charge over the floating charge unless the latter provides otherwise.

#### **4.6.6 Legal consequences of creating a floating charge**

The floating charge covers the whole undertaking or assets of the company. When created by sufficient and adequate words, it covers all company's assets, whether present or future, and affects the assets to the extent that any person purporting to acquire it takes it encumbered by the charge. The floating chargor remains free to deal with such assets in the ordinary course of business. When created, the floating charge gives an immediate charge over the assets but does not attach to any of the assets until crystallisation. Thus, while the charge floats, the charge cannot exercise proprietary or possessory rights over the assets either as against the company or as against third parties. The charge also has no *locus standi* to obtain an injunction against the company to restrain from dealing with its assets in the ordinary course of business where the dealings are in the breach of the debenture or subject to the creditor's veto and his security is not in jeopardy.

The charger-company can sell its property and pass a good title to the purchaser. The purchaser takes the property free from the charge, but the money paid becomes subject to the charge. Where the money is used to acquire an asset, the asset becomes subject to the charge but the vendor of the asset receives the purchase money free from the charge.

The chargee-company may grant a fixed charge over property comprised in the floating charge in the ordinary course of business and the fixed charge will have priority as to the assets on which it is fixed over the floating charge except there is a restriction clause prohibiting the company from creating any fixed charge over property comprised in the floating charge ranking either in priority to or *pari pasu* with the floating charge. This type of restriction is known as the **negative pledge clause**.

#### 4.6.7 Negative pledge clause

The negative pledge clause is a drafting device introduced into the institution of the floating charge to ameliorate its vulnerability. It is a special form invented to meet the difficulties created by the freedom to carry on the business of the company in the ordinary course.

The clause is in the form of a covenant binding the company not to, without the prior consent of the debenture holder, grant any subsequent security ranking in priority to or *in pari pasu* with the existing charge.

This covenant, when contained in a floating charge, limits the scope of the debtor company's dealing powers thereby, protecting the security while constituting an equity binding on third parties at common law.

The application of the negative pledge clause is contained in section 204 of CAMA, which provides as follows:

*"A fixed charge on any property shall have priority over a floating charge affecting that property, unless the terms on which the floating charge was granted prohibited the company from granting any later charge having priority over the floating charge and the person in whose favour the later charge was granted had actual notice of the prohibition at the time when the charge was granted to him."*

One significant feature of the provision above is the requirement of actual notice on the part of the later charges for the **negative pledge** to be effective. Thus, the **negative pledge** contained in a floating charge does not protect the charge against later fixed charge unless the later fixed charge had actual notice of such prohibition at the time when the charge was created.

#### 4.6.8 Power of court to appoint receivers or manager

The Court has the power to appoint a receiver, and in the case of a floating charge, a receiver or manager subject to a fixed or floating charge that has become enforceable. Even when a floating charge has not become enforceable, the Court may appoint a



receiver or manager if its is convinced that the security of the debenture holder is in jeopardy, that is “events have occurred or are about to occur which render it unreasonable in the interests of the debenture holder that the company should retain power to dispose of its assets.”

“A receiver or manager shall not be appointed as a means of enforcing debentures not secured by any charge” (section 205, CAMA).

#### 4.7 Chapter review

This chapter presents succinctly a basic overview of key aspects of the Nigerian law of insolvency. It also covers receivership, schemes of arrangement, compromise, administration, and netting as variants of corporate restructuring.

#### 4.8 Worked examples

##### 4.8.1 Multiple-choice questions

1. The court that has original jurisdiction to entertain a suit on matters relating to insolvency is
  - A. State High Court
  - B. Federal High Court
  - C. National Industrial Court
  - D. Customary Court of Appeal
2. Under the Companies and Allied Matters Act, the tests for insolvency do **not** include
  - A. Inability of a company to pay its debts three weeks after demand
  - B. A court ruling that the company is unable to pay its debts
  - C. The existence of company's liability in excess of its assets
  - D. Outstanding debts owed the company in excess of one billion naira
3. A charge created over the specific assets of a company is known as
  - A. Special charge
  - B. Fixed charge
  - C. Floating charge
  - D. General charge
4. The following are the major characteristics of a floating charge **except** that it is
  - A. Not attached to any particular asset or assets of the company
  - B. Attached to a particular asset or assets of the company
  - C. Ambulatory and shifting in nature
  - D. Equitable in nature



5. The holder of a floating charge may protect its priority by including in the terms a clause called
- A. Injunction clause
  - B. Negative pledge clause
  - C. Equitable clause
  - D. Positive pledge clause

#### 4.8.2 Open-ended questions

1. Insolvency may have different effects on a company experiencing financial difficulties.

**Required:**

Examine the effects of insolvency on a company.

2. There are various tests set by the Companies and Allied Matters Act to determine whether a business concern has become insolvent or not.

**Required:**

State the tests for insolvency in Nigeria.

3. Upon the insolvency of a limited liability company, the duties of the liquidator appointed to wind up the activities of the company include the payment of debts owed by the company in certain order.

**Required:**

State the order in which a liquidator must repay the company's debt.

#### 4.8.3 Suggested solutions to multiple-choice questions

- 1. B
- 2. D
- 3. B
- 4. B
- 5. B

#### 4.8.4 Suggested solutions to open-ended questions

1. Insolvency occurs when a company is no longer able to pay its debts. There are two types of insolvency namely, corporate insolvency and private insolvency.

When a corporate insolvency occurs, it leads to the winding up of the company through the process of liquidation and its assets are distributed to meet the claims of its creditors. It may also lead to a company going into receivership, whereby a receiver is appointed to manage the affairs of the company.

2. The tests for insolvency in Nigeria set by the Companies and Allied Matters Acts are as follows:

- (a) A company's inability to pay its debts within three weeks after a demand for payment has been made;
- (b) A wholly or partially satisfied court process issued in respect of a judgment debt;
- (c) A court's determination, after taking into account any contingent or prospective liability of the company, that the company is unable to pay its debts; and
- (d) The fact that the company's liability exceeds its assets.

3. The liquidator must repay debts in the following order:

- (a) fixed charge holders;
- (b) preferential creditors which includes all local rates and charges due from the company, all wages and salaries, and accrued holiday remuneration payable;
- (c) floating charge holders;
- (d) unsecured creditors ranked equally amongst themselves;
- (e) members' declared but unpaid dividends;
- (f) members' return of capital (in accordance with class rights); and
- (g) any surplus to be distributed to members.

## CRIMINAL LAW

### Contents

- 5.0 Learning objective
- 5.1 Learning outcomes
- 5.2 Introduction
- 5.3 Criminal law, ethics and ethical codes
- 5.4 Elements common to sections 98 and 116 of the Criminal Code
- 5.5 Money laundering
- 5.6 Electronic evidence
- 5.7 Chapter review
- 5.8 Worked examples

## 5 Criminal Law

### 5.0 Learning objective

This chapter offers key aspects of the Nigerian criminal law that should guide professional accountants in the practice of their profession.

### 5.1 Learning outcomes

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

- a) identify key aspects of criminal law that regulate businesses and professional accountants;
- b) identify and state the basic laws relating to theft, fraud and deception;
- c) identify the basic laws relating to bribery;
- d) identify and state the basic law relating to money laundering;
- e) understand the concepts of electronic evidence; and
- f) explain the role of an accountant as an expert witness in computer fraud cases.

### 5.2 Introduction

In Nigeria, the primary sources of criminal law are the criminal code that applies in the states of the southern part of Nigeria and the penal code that applies in the states of the northern part of Nigeria.

Criminal law sets out the types of behaviour that are forbidden at risk of punishment. A person who commits an offence does so against the state. Therefore, the state has the power to prosecute him. At the end of the trial, if the defendant is found guilty, the court may sentence the offender to custodial (imprisonment) or non-custodial (fine) punishment.

### 5.3 Criminal law, ethics and ethical codes

**Criminal law** is an aspect of public law that imposes criminal liability on conduct adjudged to be against the general interests of society. Conducts that are considered criminal vary from society to society. Before a defendant is found guilty of an offence, the two elements of an offence must be established. These are *mens rea* (guilty mind) and *actus reus* (guilty act).

**Ethics** consists of commonly acceptable mode of conduct or behaviour in a given society. It is a moral persuasion against wrongdoing or unacceptable conduct.

**Ethical codes** regulate the conduct of professionals, such as chartered accountants, legal practitioners, doctors, and engineers, in their dealings with clients. Ethical codes are set and administered by professional bodies. For example, the Institute of Chartered Accountants of Nigeria (ICAN) administers the ethical codes for accountants. The aim is to ensuring high standard of conduct by members in relationships with their clients who may be vulnerable in the face of the exercise of authority as well as power by persons with superior and professional knowledge occupying positions of trust.

#### (a) Theft

Section 390 of the criminal code creates the offence of stealing. According to section 383(1) of the code, a person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing.

#### (b) Taking

To constitute “taking”, it is not necessary for the thief to take the thing completely into

his physical possession. On the contrary, he is deemed to have taken a thing if he moves it or causes it to move.

### (c) Conversion

Unlike taking, the code does not say what constitutes “conversion”. It is suggested however, that the word “conversion” in section 383 has the same meaning that it bears at common law. Accordingly, to destroy, alter, sell, pledge or use property belonging to another person is to convert it. However, for the conversion to amount to stealing, it must be done with one of the fraudulent intents specified in section 383(2) of the criminal code. For instance, ‘A’ may merely use B’s car and redeliver it to him and not be guilty of stealing under criminal code because he did not do it fraudulently within the meaning of section 383(2). However, A’s act is conversion in tort. Conversely, a servant that receives money on behalf of his master and converts it is guilty of stealing.

### (d) Element of fraud

It is not every taking or conversion that will support a charge of stealing. In order to constitute stealing, there must be an element of fraud.

Section 383 of the criminal code sets out six intents, any one of which will make a taking or conversion fraudulent. In considering whether or not there exists one of these fraudulent intents, the test is what was the intent of the accused at the time of the taking or conversion? The intents are as follows:

- (i) An intent permanently to deprive the owner of the thing: This is the usual intent in cases of stealing. If the intent is merely to deprive the owner of it temporarily, it is not stealing unless there is also any of the other intents set out in section 383(2);
- (ii) An intent permanently to deprive any person who has any special property in the thing of such property: This provision protects the right of a person who, though not the owner of the property, has some special interest in it. This protects any right arising from or dependent upon holding possession of the thing in question;
- (iii) An intent to use the thing as a pledge or security;
- (iv) An intent to part with a thing on a condition as to its return, which the person taking or converting it may be unable to perform;
- (v) An intent to deal with a thing in such a manner that it cannot be returned in the condition it was at the time of the taking or conversion: The important point under this head is that the thing cannot be returned in substantially the same condition as it was when it was taken or converted; or
- (vi) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the money to the owner.

In **R v Onzu** (1954), the accused collected money from certain persons as deposits on his promise to send them to America on scholarship.

He did not send them and did not refund the money on demand or at a reasonable time thereafter. He was convicted of stealing.

Also in **State v Odimayo** (1967) N.M.L.R 92, the accused received a loan from a housing corporation to build a house on a piece of land which he mortgaged to the corporation. He expended the money instead on an election contest. He was rightly convicted of stealing because the money still belonged to the

corporation until he used it for the specific purpose for which he received it, and it made no difference that he might have intended to repay it afterwards.

**(e) Things capable of being stolen**

It is not everything that could be stolen. Section 382 of the Criminal Code contains a list of things capable of being stolen. Every inanimate thing whatever which is the property of any person and which is movable is capable of being stolen. An inanimate thing, which belongs to some person and is capable of being made movable is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it. Land cannot be stolen, and an ownerless property cannot be stolen. A thing may be ownerless because it is incapable of being owned at all or because it is abandoned.

**(f) Punishment**

Under section 390 of the Code, any person who steals anything capable of being stolen is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for three years. If the thing stolen is a testamentary instrument, whether the testator is dead or living, or if it is a postal matter or any chattel, money or valuable security, contained in any postal matter, the offender is liable to imprisonment for life.

**(g) Fraud**

The criminal code does not create a single general offence of fraud, but there are a number of offences that are fraud related. These include, false pretences, cheating, obtaining credit by fraud, forgery and fraudulent false accounting.

**(h) False pretences**

This offence is created by section 419 of the criminal code which provides that the felony of obtaining property by false pretences and with intent to defraud is committed if anyone obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen. It is immaterial that the thing is obtained, or its delivery is induced through the medium of a contract induced by false pretences.

For the offence to be committed there must be intent to defraud, though it is not necessary to allege intent to defraud any particular person. Intent to defraud is intent to induce another by deceit to act to his detriment or contrary to what would otherwise be his duty. It is immaterial that there is no intention to cause pecuniary or economic loss. It follows, that the offence is committed where a loan of money is obtained by a false pretence even if the money is repaid subsequently.

The pretence must have induced the owner to part with his property. If 'A' obtains goods from 'B' and then starts telling lies, the goods are not obtained by false pretences. It must be shown that the alleged representation weighed on the mind of the representee and caused him to part with his property.

**(i) Cheating**

Cheating is committed when a person, by means of any fraudulent trick or device, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device. The offence is a misdemeanour punishable with imprisonment for two years.

**(j) Obtaining property or credit by means of dishonoured cheque**



Where a person obtains property or credit by means of a cheque that is subsequently dishonoured because of insufficient funds, he is guilty of obtaining property by false pretences. This conduct is now made an offence by the Dishonoured Cheques (Offences) Act.

#### **(k) Forgery**

Under Section 465 of the criminal code, forgery is committed when a person knowingly makes a false document or writing with intent that it may in any way be used or acted upon as genuine, whether in Nigeria or elsewhere, to the prejudice of any person or with intent that any person may, in the belief that it is genuine, be induced to do or refrain from doing any act, whether in Nigeria or elsewhere.

Thus, to alter, or add to, the amount on a voucher or cheque is to make a false document. So is signing of a document in the name of another person, or of a non-existent person.

A document, as defined in section 463 of the criminal code, includes a register or register book, or part of either, and any paper, parchment or other material whatever used for writing or printing, which is marked with any letters or marks denoting words or with any other signs capable of conveying a definite meaning to persons conversant with them, but does not include trade marks on articles of commerce.

It is immaterial in what language a forged document or writing is expressed and it is also immaterial that the thing forged is incomplete or does not purport to be a document or writing which would be binding in law for any particular purpose, if it is so made and is of such a kind as to indicate that it was intended to be used or acted upon.

#### **(l) 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.

#### **(m) Bribery**

This is an offence relating to official corruption. The two sections of the criminal code relating to the offence of official corruption by bribery are section 98 and section 166. The essential difference between them is that in section 98 the duties of the public officer in question must not touch the administration of justice, whereas under section 116, he must be a peace officer (not acting judicially) or a public servant employed in any capacity (other than in a judicial capacity) for the prosecution or detention or punishment of offenders.

It seems that under section 116 the duties of the officer concerned will always touch on the administration of justice. The importance of the difference between them is that under section 98 the maximum punishment is seven years' imprisonment, but under section 116, since the corruption affects justice in some way, the offence is considered much more serious and the maximum punishment is 14 years.

### **5.4 Elements common to sections 98 and 116 of the Criminal Code**

- (a) In section 98(1) and section 116(1), it is sufficient for the guilty verdict if the public officer "corruptly asks, receives, or obtains, or he agrees or attempts to receive or obtain" the bribe. Thus, an offence may be committed in several different ways and mere request without receipt is enough. The fact that a public officer having asked for a bribe subsequently changed his mind and decided to do his duty will not affect his liability, though it might mitigate his punishment.
- (b) The guilty act must be done corruptly. The bribe must be given or taken with intent either on the part of the offeror, or of the taker, or both, that the public officer should be deflected from his duty.
- (c) There should be offered, demanded or received "any property or benefit of any kind for himself (the public officer) or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done by him. The act in question must have been done or to be done by the public officer himself and not by a third party. It is important to note that in section 98 the offeree or receiver of the bribe must be employed in public service.

Public servants include civil servants, members of the armed forces and employees of local authorities. Under section 116 the bribe may be for (a) a peace officer (which includes a magistrate and any police officer of or above the rank of assistant superintendent not acting judicially; or (b) a person employed in the public service in any capacity not judicial for the prosecution or detention or punishment of offenders. The section therefore is of limited application. It would not, for instance, apply to a court registrar who asks for bribe in order to show favour.

It is important to note also that the Independent Corrupt Practices and Other Related Offences Commission (ICPC) is now vested with powers to investigate and prosecute cases of official corruption in Nigeria by virtue of the ICPC Act, 2003.

### **5.5 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:

- i. ₦5,000,000 or its equivalent, in the case of an individual,
- ii. ₦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 Nigeria 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:

- i. identify a customer by means of identification documents as may be prescribed by regulations made pursuant to money laundering prohibitions;
- ii. identify the customer by independent source documents, data or information;
- iii. identify the beneficial owner through reliable sources such as a financial institution or designated non-financial business and profession; and
- iv. act reasonably to ascertain that a person acting purportedly for a customer has the requisite authority.

Financial institutions and designated non-financial businesses and professions have the obligation to take customer due diligence measures:

- in establishing business relationships;
- in carrying out occasional transactions, whether once or linked, that exceed the authorised thresholds;
- when, even without exceeding the authorised threshold, there is suspected money laundering or terrorist financing; or
- there is suspicion about the veracity or adequacy of the customer identification data obtained previously
- 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.

**(c) Special surveillance of certain transactions**

Section 7 (1) of the Money Laundering (Prohibition) Act provides that where a transaction:

- i. involves a frequency which is unjustifiable or unreasonable;
- ii. is surrounded by conditions of unusual or unjustified complexity;
- iii. appears to have no economic justification or lawful objective;
- iv. is inconsistent with the known transaction pattern of the account or business relationship, or
- v. 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,
- vi. 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 -

- 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;
- take appropriate action to prevent the laundering of the proceeds of a crime or an illegal act; and
- report the suspicious transaction and actions to the Nigerian Financial Intelligence Unit.

**5.5.1 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, lodgement 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 which the contravention continues.

#### **5.5.2 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, 2004 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.

#### **5.5.3 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 to 22 of the Act.

The Federal High Court located in any part of Nigeria has jurisdiction over the offences.

### **5.6 Electronic evidence**

#### **5.6.1 Background**

Before the enactment of the Evidence Act 2011, the admissibility of computer and electronically generated evidence was very difficult and almost impossible in Nigerian courts, owing to the absence of specific provisions in the repealed Evidence Act regulating this important aspect of business and personal life.

With the enactment of the 2011 Act, computer evidence is admissible subject to the conditions named in the various sections of the Act dealing with the subject matter.

**5.6.2 Admissibility of statement in documents produced by computers** Section 258(1) of the Evidence Act provides that “computer” means any device for storing and processing information, and any reference to information being derived from it by calculation, comparison or any other process.”

Section 84 of the Act contains provisions and conditions for the admissibility of computer and electronically generated evidence thus:

- a. In any proceeding, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible if it is shown that the conditions in subsection of this section are satisfied in relation to the statement and computer in question.
- b. The conditions referred to in subsection (1) of this section are that:
  - The document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process



information for the purposes of any activities regularly carried on over that period, whether for profit or not by anybody, whether corporate or not, or by any individual;

- (i) Over that period, there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
  - (ii) Throughout the material part of that period, the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
  - (iii) The information contained in the statement reproduced is derived from information supplied to the computer in the ordinary course of those activities.
- c. Where, over a period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) was regularly performed by computers, whether:
  - (i) by a combination of computers operating over that period;
  - (ii) by different computers operating in succession over that period;
  - (iii) by different combinations of computers operating in succession over that period; or
  - (iv) in any other manner involving the successive operation over that period, in whatever order of one or more computers and one or more combinations of computers, and
  - (v) all the computers used for that purpose during that period shall be treated "for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.
- d. In any proceeding where it is desired to give a statement in evidence by virtue of this section a certificate:
  - (i) identifying the document containing the statement and describing the manner in which it was produced;
  - (ii) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer:
    - Dealing with any of the matters to which the conditions mentioned in subsection (2) above relate;
    - Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and
    - For the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.
- e. For the purpose of this section:
  - i. Information shall be taken to be supplied to a computer if it is supplied



- to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;
- ii. Where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for course of those activities, that information, if duly
  - iii. supplied to that computer, shall be taken to be supplied to it the course
  - iv. of those activities; and
  - v. A document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

### **5.6.3 Admissibility of documents generated by e-mail**

Computers are generally used to generate, store and dispense or circulate e-mails. Therefore, all that have been said above generally on the admissibility of computer-generated evidence apply to admissibility of e-mail.

The admissibility of e-mail also depends upon the purpose for which the e-mail is offered.

An e-mail offered for reasons other than the truth of its contents (e.g. notice, state of mind, motive) will be admissible.

An exchange of e-mails that forms the parties' contract constitutes legally operative facts and thus is not hearsay.

An e-mail message could be authenticated by:

- (a) The testimony of the author; or
- (b) Comparing the e-mail message with other self-authenticating email messages, or
- (c) Some peculiar features of the very disputed e-mail message such as the existence of an e-mail address on the print out;
- (d) A witness who has knowledge of the exchange of e-mail, just as if he had knowledge of exchange of written letters;
- (e) Oral evidence of the recipient of the e-mail that he actually received the disputed mail; or
- (f) Evidence that the message in the e-mail tallies with other admitted telephone discussions involving that party.

### **5.6.4 Admissibility of evidence from website posting and webpages**

It could be said that evidence generated from websites are also computer or electronically generated evidence that share similar prerequisites for admissibility. The admissibility of information found on websites will depend upon who the author of the site is and the purposes for which the evidence is offered. Web pages certainly do not qualify as the business records of the Internet Service Provider (ISP) who merely hosts website on its server.

On the other hand, the internal records of an ISP regarding a customer's activity online at the ISP's business records can be admitted if properly authenticated. However, anonymous statement posted on a websites may be inadmissible, even if the party offers a witness who can testify that he used software to trace the internet protocol (IP) address of the anonymous poster and that the address belongs to the defendant.

### **5.6.5. Admissibility of evidence from GSM telephone**

Another form of computer or electronic evidence is evidence generated from

Global System for Mobile communication (GSM) phone. Since mobile phones are also computers, the principles applicable to computer printouts are applicable to messages generated by or from GSM phones. A GSM gadget or telephone itself, if it contains valuable information, could be tendered in evidence together with whatever message or information stored therein, as documentary evidence. The only duty of the tendering party is to read it and demonstrate its contents in open court in the similitude of reading ordinary documentary evidence when admitted in evidence and taken as read.

It is important to note that evidence generated by a GSM computer enjoys dual status of both ordinary and computer-generated evidence.

The legal consequence of this is that evidence generated by a GSM telephone or device can become admissible either as an ordinary documentary evidence or as computer evidence, in which case the provisions of section 84 or section 153(2) of the Evidence Act 2011, will apply.

#### **5.6.6 Admissibility of evidence from Automated Teller Machine (ATM)**

Evidence generated from an ATM of a bank is also a computer or electronically generated evidence. Modern ATMs are complex machines that not only dispense cash, but also take record of their operations and including video evidence of transactions and by whom conducted. When an ATM system records by means of a video an operation conducted or carried out by any person on it, such a video is admissible in evidence by the court. Thus, in **R v Magoulas** (2003), the ATM was said to have recorded appellant's identity and the time he operated it. The court held that although the accuracy of the clock on ATM systems sometimes do have errors, this might be an insignificant errors, and the evidence produced is admissible in evidence and could be relied upon.

#### **5.6.7 E-signatures**

An electronic signature or e-signature is any electronic means that indicates either that a person adopted the contents of an electronic message or, more broadly, that the person who claims to have written a message is the one who wrote it and that the message received is the one that was sent. By comparison, a signature is a stylised script associated with the person.

In commerce and the law, a signature on a document is an indication that the person adopts the intention recorded in the document. It is comparable to a seal.

An electronic signature is further defined as an electronic sound (e.g., audio files of a person's voice), symbol (e.g., a graphic representation in JPEG file), or a process (e.g., a procedure that conveys assent), attached to or logically associated with a record, and executed as well as adopted by a person with intent to sign the record. An electronic signature is easy to append, since something as simple as a typed name can serve as one.

#### **5.6.8 Proof of electronic signatures**

The provisions of section 93(3) of the Evidence Act are very wide in nature, not only by the use of the phrase "may be proved in any manner", but also the word "including", both of which are open ended. This means all lawful or legal means of proof of such signatures are permissible. Thus, in **Sea-Land Service Inc. v Lozen International, LLC**, (2002), it was held that a company's internal e-mail was an admissible evidence of electronic signature. Also in **Moore v Microsoft Corp.** (2002), it was held that by clicking the "I agree" icon, the terms of the end user license agreement were valid and binding on the person that clicked the icon. This process is called a **Click-Wrap** agreement.

#### **5.6.9 Admissibility of tapes and other sound recordings**

It should be noted that section 258(1) of the Evidence Act has defined a “document” to include both video and audiotapes. The rules on admissibility of documentary evidence will, therefore, apply to admissibility of visual and audio recordings. In **Maduekwe v Okoroafor** (1992), the Court of Appeal held that for a tape-recorded speech, audio or video, to be admissible in evidence, it must not only be pleaded, it must in addition to being relevant, satisfy the provisions of section 91 of the Evidence Act. This means that a proper foundation must be laid for the source of the recorded speech, and the mode of obtaining it must be established.

The first thing to be done so as to lay the foundation for the admissibility of a tape-recording in evidence is to prove the time, place and accuracy of by a competent witness. In, addition, the voices inside the tape recording must be properly identified. If the person that allegedly uttered it admits the voice in the tape, admissibility becomes less difficult. But if he denies it, then a comparison of the same becomes inevitable before admissibility.

Thus, laying of proper foundation for the admissibility of tape-recording be by a showing:

- (a) that the recording device was or is capable of recording testimony;
- (b) that the operator of the device was competent;
- (c) that the recording is authentic and correct;
- (d) that changes, additions or deletions have not been made;
- (e) of how the recording was/has been preserved;
- (f) through identification of the persons whose voices are captured by the recording; and
- (g) that the testimony recorded or elicited was voluntarily made without any kind of inducement.

The question of admissibility of video-records, on the other hand, involves a slightly different procedure, since in this case, not only are the voices of the persons recorded and captured, but their images are also always captured.

A videotape is admissible in Nigeria by virtue of section 258(1) of the Evidence Act either as a primary or secondary document. It is important to note that if the broadcasting house is established by statute and therefore is a public body, it is either the original of any such recording or a certified true copy thereof that would be admissible in evidence. Thus, in **INEC v Action Congress** (2009), the Court of Appeal held that since the Nigeria Television Authority (NTA) was established by the NTA Act, it qualified as an official body under section 109(a)(11) of the Evidence Act. Hence, only a certified copy of the broadcast was admissible.

It is the law, however, that video recording and the evidence of persons that had watched it while it was played both constitute primary evidence and is admissible as such.

#### **5.6.10 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:

- a. 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;
- b. Satisfy the Court that the document is either the original or certified true copy of the document generated from the computer; and
- c. 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.

## **5.7 Chapter review**

This chapter covers key aspects of criminal law that regulate businesses and professional accountants, particularly the basic laws relating to theft, fraud, deception, bribery, money laundering and the concepts of electronic evidence. It also explains the role of an accountant as an expert witness in computer fraud cases.

## **5.8 Worked examples**

### **5.8.1 Multiple-choice questions**

1. The physical element of an offence is known as
  - A. Intention
  - B. Actus reus
  - C. Strict liability
  - D. Mens rea
2. The intentions of the Money Laundering (Prohibition) Act is specifically achieved by provisions which include 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
3. Under the provision of the Criminal Code, a person who fraudulently takes anything capable of being stolen, commits the offence of
  - A. Fraudulent false accounting
  - B. Stealing
  - C. Forgery
  - D. Money laundering
4. 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

### 5.8.1 Open-ended questions

1. Fraud is an element of the offence of stealing,

**Required:**

List three of the intents which are regarded as fraudulent.

2. Electronic evidence is admissible in Nigeria under the provisions of the Evidence Act 2011.

**Required:**

List four ways in which e-mail messages could be authenticated.

3. Criminal law seeks to impose criminal liability on conducts prejudicial to the interest of society; and it is imposed by the state.

**Required:**

Explain the aim of objectives of Ethical Codes and the authority that enforces it.

### 5.8.2 Suggested solutions to multiple-choice questions

1. D
2. D
3. B
4. C

### 5.8.3 Suggested solutions to open-ended questions

#### 1. Intents which are regarded as fraudulent

- (a) An intent to permanently deprive the owner of the thing.
- (b) An intent to permanently deprive and person who has any special property in the thing of such property.
- (c) An intent to use such thing as a pledge or security.
- (d) In the case of money an intent to use it at the will of the person who takes it, although he may intend to refund it to the owner afterwards

#### 2. Ways in which e-mail messages could be authenticated

- (a) By the testimony of the author
- (b) By checking some peculiar features of the e-mail, such as the email address on the printout.
- (c) Oral evidence of the recipient of the e-mail that he actually received the e-mail.

#### 3. Aim of objectives of Ethical Codes and the authority that enforces it

Ethical Codes, aims at ensuring high standards of conduct by members of recognized professional bodies in relation to their clients who may be vulnerable to abuses by such professional because of their superior knowledge and often because they occupy a position of trust. Ethical Codes are enforced by professional bodies through its disciplinary or ethical committees.

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# LAW OF CONTRACT

## Contents

- 6.0 Learning objective
- 6.1 Learning outcomes
- 6.2 Introduction
- 6.3 Definition and elements of contract
- 6.4 Privity of contract
- 6.5 Terms of contract
- 6.6 Exemption clauses in contract
- 6.7 Vitiating elements in a contract
- 6.8 Discharge of contract
- 6.9 Remedies for breach of contract
- 6.10 E-contract
- 6.11 Chapter review
- 6.12 Worked examples

## 6 Law of contract

### 6.0 Learning objective

This chapter presents to the reader succinctly the meaning, terms, vitiating factors, discharge, and breach of a contract as well as the rights and obligations parties thereto.

### 6.1 Learning outcomes

At the end of this chapter, readers should have a working understanding of the:

- (a) meaning and formation of a contract;
- (b) elements of contract and capacity to contract;
- (c) terms of a contract and vitiating factors in contractual relationship;
- (d) ways of discharging and terminating a contract;
- (e) rights and remedies of parties where there is a breach of contract; and
- (f) workings of e-contracts and their enforceability.

### 6.2 Introduction

This chapter presents to the reader a brief background of the law of contract, its nature, description, types as well as the rights, duties and remedies of the parties to contracts under the law.

The law of contract evolved out of the translation of a publication on law of obligations that was written originally in French by a French jurist named Ponthier in 1806. It evolved from agreements reached between individuals concerning their various undertakings. Contract law was not originally formulated by Parliament as with other laws but developed out of the everyday interactions of mankind.

Simple everyday events, such as boarding the bus and purchase of goods from a shop are actually contractual, and knowledge of the law of contract would help the reader appreciate these transactions better. The law of contract is also quite unique as the parties are at liberty to formulate the terms of their agreement, and the law of contract forms the basis of most other branches of mercantile law.

### 6.3 Definition and elements of a contract

#### 6.3.1 Definition of contract

A contract cannot be defined in exact terms, and it is best described according to its features or component parts. This is so because of the broad scope of the activities that may be categorised as contractual.

A contract could be described as an agreement which creates obligations under the law and gives rise to enforceable rights. A contract may also be described as a voluntary agreement between two or more persons, which confers legally enforceable rights, duties and liabilities on parties. It may also be described as a promise or set of promises which, if not fulfilled, may be enforced by law.

Two principal elements are common to the various attempts to define or describe a contract. These are (a) an agreement, and (b) a legal obligation or a duty enforceable by law.

In the case of ***Orient Bank (Nig) Plc v Bilante Int'l*** (1997), Niki Tobi JCA (as he then was) amplified and harmonised the various descriptions of contract as follows:

“A contract is an agreement between two or more parties which creates reciprocal legal obligation or obligations to do or not to do a particular thing. For a valid contract to be formed there must be mutuality of purpose and intention. The two or more minds must meet at the same point, event or incident. They must not meet at different points, events or incidents. They must be saying the same thing at the same time. They must not be saying different things at different times. Where or when they say different things at

different times, then they are not 'ad idem' and thereby no valid contract is formed. The meeting of minds of the contracting parties is most crucial and overriding factor in the law of contract. The minds must be *ad idem* or *ad idem facit*."

In **Okubule v Oyegbola** (1990), the Supreme Court held that an agreement will not be binding on the parties to the contract until their minds are at one both upon matters which are cardinal to the species of agreement in question, and also upon matters that are part of the particular bargain."

### 6.3.2 Elements of a contract

A valid contract must have certain key elements. There must be:

- (a) an offer;
- (b) an acceptance;
- (c) consideration;
- (d) an intention to create legal relations; and
- (e) capacity to enter into the contract.

There must be an offer by one of the parties to the proposed contract called the offeror. That offer must be accepted by the person to whom it is addressed, that is, the offeree. The acceptance of the exact term(s) of the offer creates a *consensus ad idem*, that is meeting of the minds of the parties to the contract. The relationship is entered into for the sake of a promise or consideration. The parties must intend that their relationship will have legal consequences, for instance, that of enforceability. In addition, the law requires that the parties must have the legal capacity to enter into a contract and the purpose of the contract must be legal or in line with public policy.

### 6.3.3 Offer and acceptance

#### (a) Offer

An offer is made when a person proposes terms to another person and makes communication to the effect that if the person accepts those terms, he is willing and ready to contract with him. The said proposed terms constitute the offer.

An offer is the definite, clear, and final proposition made by an offeror to an offeree with the clear intention to be bound by it if accepted. An offer is the final proposal that transforms the offeror's promise into a contractual obligation when accepted by the offeree.

Explaining this in **Orient Bank (Nig) Plc v Bilante Int'l** (1997) 8 N.W.L.R (Pt 515) 37 Niki Tobi, JCA (as he then was) stated that

"An offer is a proposal which emanates from the offeror to the offeree to enter into an agreement to do or not to do a particular thing.... A valid offer must be precise, and unequivocal, giving no room for speculation or conjecture as to the real content in the mind of the offeree. The offer must place at the doorsteps of the offeree a clear intention, a desire to enter an agreement with the offeree on clearly defined terms, the expectation of acceptance on the terms as defined on a possible counteroffer, which could be a basis for further negotiation. Of course, the offeree has the third option of outright rejection of the offer".

Also, in **Union Bank of Nigeria Ltd v Saw Nig Ltd & Ors** (1994) 8 N.W.L.R (pt. 361) 150 at page 168, Iguh, JSC said an,

"....offer capable of being converted into an agreement by acceptance must consist of a definite promise to be bound provided that certain specific terms are accepted. The offeror must have completed his own share of the formation by which the court may finally decide on his own readiness to undertake an obligation upon certain conditions leaving to the offeree the option of acceptance or refusal".

An offer must be definite, it must be made with the intention that it shall be binding once accepted and must be directed to an individual, a group or the world at large. If the offeree is ignorant of the offer, the offer fails. An offer must however be distinguished from an invitation to treat and from counter-offers.

**i. Invitation to treat - Distinguished from an offer**

An invitation to treat has been described as an invitation to negotiate. It is communication that invites the other party to make an offer. These negotiations between parties may or may not lead to the making of an offer by the interested party, an offer is definite and may be followed by acceptance, but an invitation to treat may only lead to an offer, if the other party responds to it.

- **Examples of invitation to treat include:**

- **Advertisement** - an advertisement does not constitute an offer but an invitation to treat. In the case of **Partridge v Crittenden** (1968), an advertisement was put in a periodical *Case and Aviary Birds*, which stated 'Bramble finch Cocks, Bramble finch hens, 25 shillings each. A reader wrote in for a hen, which Mr. Partridge sent to him. The appellant was charged with unlawfully offering for sale a wildlife bird contrary to the Protection of Birds Act. The Divisional Court quashed Mr. Partridge's conviction on the ground that he made no offer for sale, but merely invited interested parties to negotiate.

There is however, an exception to the rule of adverts not being offers as decided in the case of **Carlil v Carbolic Smoke Ball Company Ltd** (1892). In the said case, the company advertised that it would give £100 to anyone who contracted influenza after using its products (Smoke Ball) in a prescribed manner. Carlil used the product in the prescribed manner and still caught influenza. The court held that the advert was a valid offer duly accepted by Carlil when he purchased the product.

The distinction to be made between the two cases is that in the case of Partridge, the advert was bilateral whilst in the case of Carlil, the advert was considered unilateral. In addition, the acceptance of the offer in the case of Carlil could be of no other form than by using the product.

Note: The case of Carlil is an authority for the fact that an offer could be made to the whole world, but a contract is made with only the parties that fulfil the terms of the offer. It is also an authority for unilateral contract in which only one party is left to fulfil his obligation.

- **invitation of tenders** - a statement calling for tenders or that goods would be sold by tender does not constitute an offer in law.
- **auction sale** - the advertisement of an auction is not an offer to hold the auction, neither does the act of auctioneer constitute an offer; it is an invitation to treat. The auctioneer has the right to withdraw the lot before the buyer accepts the bid or before the fall of the hammer.
- **goods on display** – display of goods in shop windows or on shop shelves with prices affixed are not on offer. The display of the goods amounts only to an invitation to treat.
- **passenger tickets/transport** - passenger tickets or tickets for public transportation cases have always been difficult to categorise as offers or invitations to treat. The position of the law is, however, dependent on whether the ticket is considered a contractual document or not. In cases where the ticket is a contractual document, the request for the ticket is regarded as an offer and

the issuance of the ticket is the acceptance.

## ii. Counteroffer

A valid offer is made upon certain terms that must be clear and final. These terms must be accepted for the offer to crystallise into a contract. Where the person to whom the offer is made responds by varying or modifying the terms, the initial offer is vitiated, and the modified offer becomes a counteroffer. In the case of **Okubule v Oyagbola** (1990), Agbaje, JSC, adopting the principle from *Chitty on contract* (23rd Edition), stated that, a counter-offer has a triple significance, amounting to:

- a rejection of the offer;
- destruction of that offer so that it cannot subsequently be accepted; or
- a new offer by the offeree, which may be accepted by the initial offeror

As a general rule, an offer may be revoked at any time before it is accepted. An offer may lapse or expire or be terminated by the following circumstances:

## iii. Termination of offer

As a general rule, an offer may be revoked at any time before it is accepted. An offer may lapse, expire, or be terminated by:

- the death of either party to the contract;
- non-acceptance of the offer within the timeline or effluxion of time;
- a counter offer;
- revocation before it is accepted;
- express rejection of the offer by the offeree;
- intervening incapacity of one of the parties;
- supervening illegality; or
- failure of a condition precedent.

## iv. Acceptance

Acceptance of an offer may be described as the assent of the offeree to the terms of the offer as stated by the offeror. An offer must be validly accepted before the transaction crystallises into a contract. An acceptance must be communicated to the offeror and cannot be inferred by silence on the part of the offeree. In the case of **Innih v Fernando** (1990), it was held that for an acceptance to be operative, certain conditions must be fulfilled. These include that the acceptance:

- must be **plain**;
- must be **unequivocal**;
- must be **unconditional**;
- must have no **variance** of any kind between it and the proposal (offer); and
- must be **communicated** to the other party without unreasonable delay”.

A **conditional acceptance** or the introduction of a fresh term by the offeree amounts to a **counter-offer**. This cannot give rise to a binding agreement between the parties as the effect of a counter-offer is to destroy the original offer made.

In the case of **Hyde v Wrench** (1840), 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.

The request for additional information, however, does not amount to a counter offer or to a rejection of the offer. The offer stands. In some circumstances, a party may include the expression '**subject to contract**' or a similar expression in their contract. In **UBA v Tejumola & Sons Ltd**, (1988) 2 NWLR (pt. 79) 622 at 679, it was held that the term 'subject to contract' would not render a contract unenforceable where the terms of the contract have been agreed upon. However, where the terms had not been negotiated and agreed upon, the term may render the contract unenforceable.

Acceptance must be communicated by an external manifestation of consent either by word said, or an act done by the offeree or his authorised agent, which in the eye of the law will amount to communication of the offeree's acceptance to the offeror's offer. Mental or internal assent, which is not apparent to the other party is not sufficient to constitute acceptance.

There are however a few exceptions to the rule of communication of acceptance. These include:

- v. **Communication by post** - The courts have held that where an offer is communicated by letter, the acceptance takes effect upon the posting of the letter of acceptance,. See **Adams vLindsell(1818)** 1 B &Ald 681, 683. To this rule there is a proviso as stated in the case of **Alhaji R. A. Afolabi (Trading as Ifelodun Bros) v Polymera Industries Nig. Ltd (1967) All NLR. 154**, that the mode of acceptance must be signified by the terms of the offer.
- vi. **Waiver** – Also parties may choose to waive the need for communication expressly or by implication, for instance, where the acceptance takes the form of an action, e.g. finding a lost dog.

#### (b) **Consideration**

The purpose of a contract is usually to gain some benefit. Consideration is therefore of essence in a contract. Something of value is exchanged for another thing of value. The thing exchanged could be an act, promise, forbearance or goods, detriment, loss or responsibility given. The most common example of valuable consideration is money or other property or a promise to pay or transfer same. A promise, which is not supported by consideration is gratuitous and cannot constitute a basis for an enforceable contract.

In **Anwasi v Chabasaya (2000) 6 NWLR (pt 681) 408 at 417, Muhammed JCA**, citing with approval the case of **Currie v Misa (1875) L.R. Ex.153**, explained that:

"A valuable consideration in the eye of the law may not exist [only] either in some right, interest, profit or benefit accruing to the other party, or some forbearance, defilement, loss or other responsibility given, suffered or undertaken by the other. Thus consideration does not only consist of profit by one party but do exist where the other party abandons some legal right in the present, or limits his legal freedom of action in the future as an inducement for the promise of the first, so it is irrelevant whether one party benefits but enough that he accepts the consideration and that the party giving it does undertake some burden or lose something which in contemplation of law may be of value".

The rules governing consideration include:



- (i) **consideration must move from the promisee:** A person with whom a simple contract has been made must have given the consideration to the promisor for the promise to be enforceable. There is however an exception to this rule involving bank guarantees which may move from the promisee but not necessarily to the promisor, but to the bank;
- (ii) consideration must be sufficient but does not necessarily need to be adequate. Consideration must be of some value in the eyes of the law.
- (iii) consideration must not be illegal, immoral or contrary to public policy;
- (iv) consideration may be executory (i.e. to be done in the future) or executed (present) but must not be past: However, what ordinarily would be past consideration becomes valid:
  - if the past act was ordered by the promisor;
  - if it was understood initially that payment would be made
  - for the services rendered;
  - when there is promissory estoppel; and
  - in the statutory exception under Section 27 of the Bills of Exchange Act that valuable consideration may be constituted by an antecedent debt or liability;
- (v) consideration must not be illegal, immoral or contrary to public policy;
- (vi) consideration must be definite not vague;
- (vii) consideration must not be something that the promisee is already bound, either by contract or public duty, to do or refrain from doing.

**(c) Legal capacity of the parties**

Parties entering into a contract must have the legal capacity to enter into a contractual relationship. Legal capacity relates to the ability of persons to acquire rights and incur obligations under the contract. Persons here refer to natural persons (human beings) or corporate persons such as companies.

Three categories of persons that may suffer disabilities to enter into contracts under the law are infants, drunken persons, and insane persons.

- i. **Infants:** An infant is a person of either sex who is under the age of twenty-one years. The law governing contractual capacity is borne out of a social need to protect infants and may not be considered legally rational.

Contracts made with infants may be classified into the following categories:

- i. **Contracts that are valid and binding on the infant:** These are contracts for supply of necessities - things reasonably required for the infant's condition in life; and contracts for the infant's education or apprenticeship which would necessarily be of benefit to him. Goods would not be considered necessities if the infant was already well supplied with such goods. In the case of **Nash v Inman (1908)**, the defendant, an undergraduate, bought 11 fancy waistcoats from the plaintiff who was a tailor. At the time of the purchase, he was well supplied with waistcoats. Therefore, the court held that the purchases were not necessities and the defendant was not liable to pay for them.

An infant is also bound in contract where he sells to another.

- ii. **Contracts that are voidable at the instance of the infant:** An infant is bound by a contract in which he acquires an interest of permanent or long-term nature in a subject matter and which imposes continuous rights and liabilities on the infant. Such contracts are voidable at the option of the infant and the infant must repudiate them within a

reasonable time after he attains majority. Otherwise, the contract would be binding on him.

However, repudiation of a voidable contract by an infant does not have retroactive effect.

- iii. **Contracts void against infants:** All contracts entered into by an infant for the repayment of money lent, or contracts for goods supplied where the goods are not necessary are void. A contract entered into in adulthood to pay a loan contracted during infancy is also void.

**(d) Contracts unenforceable against infants unless ratified:**

At common law, all contracts other than those already discussed above were not binding on an infant unless he ratified same when he attained majority.

- i. **Drunken persons:** A contract entered with a drunken person may be avoided by him provided he proves that at the time of the contract, he was so adversely affected by his condition as to lack the mental capacity to fully comprehend the full import of the contract. The state of drunkenness must be certifiable as such. However, a drunken person may ratify the contract upon becoming lucid or regaining sanity. A drunken person may, however, be compelled to pay a reasonable price for necessities supplied to him.
- ii. **Insane persons:** Insane persons are in the same category with drunken persons, and the same legal considerations apply to them.

**(e) Intention to create legal relations**

For there to be a legally binding contract between parties, there must be a clear intention on their part to be legally bound. The intention may be inferred from the subject matter of the agreement. The courts have developed a set of rules in determining whether or not parties intend to create legal relations by their agreement. The test is however, an objective one. There is a reasonable presumption that agreements of a social or domestic nature will not amount to contracts. In a commercial setting, however, there is a rebuttable presumption that parties intend to create legal relations.

- i. **Domestic and social agreements:** Domestic agreements are made between husbands and wives, parents and their children and such other family and social relationships. Arrangements made between these people do not result in contracts because the parties never intended that the contracts would have legal consequences.

In **Balfour v Balfour (1919)**, it was held that a written agreement between the husband and wife is not enforceable as it was a domestic agreement.

Also, in **Jones v Padavatton (1969) 1 WLR 328** Mrs. Jones offered to provide her daughter, Mrs. Padavatton's, upkeep and give her a house if she returned to England to take the Bar examinations. When the mother and daughter lost the amity in their relationship, the courts held that Mrs. Jones was entitled to recover possession of her house as there was no stiff contractual obligation to be inferred from the relationship.

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

- ii. **Commercial agreements:** In commercial agreements, the courts would usually presume that there is an intention to create legal relations unless there is an express provision in the agreement to the contrary. Thus in **Rose**

*and Frank v Crompton Bros (1925) A.C 445* where the agreement between the parties contained an express exclusion clause that the 'arrangement is entered into, nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts of the United States or England ...'. The courts held that the agreement was not legally enforceable.

#### 6.4 Privity of contract

Privity is the relationship that exists between parties to a contract. This rule states that unless expressly stated, a person who is not a party to a contract cannot enjoy the benefits nor suffer the burdens of that contract. A stranger to a contract cannot sue or be sued on it.

This general rule was upheld in the case of *Dunlop Pneumatic Tyre Co Ltd v Selfridges & Co Ltd (1915) A.C. 847* where Dunlop sold tyres to X on terms that they would not sell above a certain price. Selfridges bought from X who agreed with X not to sell below Dunlop's price but breached that price agreement. Dunlop sued Selfridges and the courts held that there was no enforceable contractual relationship between Dunlop and Selfridges as no consideration passed between them.

##### 6.4.1 Exceptions to rule of privity of contract

To this general rule however, there are certain exceptions, which are:

- (a) **Insurance** - By virtue of the Motor Vehicles (Third Party Insurance) Act, Cap M22, Laws of the Federation of Nigeria 2004, a third party can sue in respect of a third party insurance contract. Under this law, where a third party is affected by the act of the insured, he is entitled to sue the insurance company as well as the insured upon giving of the requisite notice;
- (b) **Trust** - A trustee who holds property in trust for another can sue in respect of that property;
- (c) **Agency** - An agency occurs where someone appoints another to act on his behalf. The rights and benefits would normally accrue to the person who appoints the agent, but the agent, usually under a power of attorney, could sue and be sued on behalf of his principal;
- (d) **Restrictive covenants** - This covenant is often employed in land law, and where there is a restriction running on land as to the use to which it may be put, either between the original owner and the first purchaser, the subsequent purchaser would be bound by the said covenant; and
- (e) **Negotiable instruments** - Where a person stands as guarantor to another in a negotiable instrument, the guarantor becomes privy to the contract and a party by substitution.

#### 6.5 Terms of contract

The undertakings, promises or compromises made in the course of negotiating a contract and with which the parties intend to abide constitute the 'terms' of a contract. They must be certain and never vague. The discussions or negotiations during the formation of the contract are classified as representations whilst the agreed points become the terms. Terms of a contract are the legal contents of a contract, and they may be either 'express' or 'implied' terms.

- a. **Implied terms:** These are terms which, though not specifically stated in the contract, would be read into it as if the parties had agreed to it. Terms are implied into a contract by the:
  - (i) custom or usage prevailing in the particular trade, profession or locality;
  - (ii) provisions of law regulating the type of transaction;

- (iii) decisions of courts in previous similar cases; and
- (iv) as terms, which the court could read or introduce into the contract if not earlier agreed upon.

An implied term cannot override an express term except as expressly provided by statute.

- i. **Express terms:** These are terms agreed upon by the parties and expressly stated in the agreement.
  - ii. **Terms of contract may also be classified as either conditions or warranties.** They may also be further classified as innominate (intermediate) term and fundamental term.
- b. **Conditions:** These are terms which are considered very essential to a particular contract, the breach of which may empower the aggrieved party to consider himself discharged from his obligation under the contract, treating the contract as discharged, or to deem the contract as subsisting and thereby empowering him to seek redress by way of damages. Conditions could also be classified as promissory (promise to be fulfilled) and contingent.
  - c. **Warranties:** Unlike conditions, these terms are subsidiary or collateral to the contract. A breach of a warranty would not entitle the other party to repudiate the contract but only to damages.
  - d. **Innominate:** This term, at the inception of the contract, would not appear to be so essential as to qualify the innocent party to a right of repudiation, but subsequent events towards the performance of the obligations of parties may render it so.
  - e. **Fundamental terms:** This type of terms evolved out of case law in order to provide some remedy for wide exclusion clauses. In the case of **L'estrage v Graucob (1934) 2 K.B 394** the court held that liability for breach of a condition in a contract could be excluded by an exemption clause. It was to provide the other party with some remedy that this class of contractual terms evolved.

## 6.6 Exemption clauses in contract

An exemption clause or limitation clause is a term that exempts one party to a contract partially or totally from liability in the event of the occurrence of a certain event. The courts usually uphold exemption clauses except where they are against public policy or any known law.

Exemption clauses contained in a standard form contract, such as a passenger ticket or receipt for goods, must be brought to the notice of the other party for them to avail the seller or service company protection from liability. Where the clauses are in small prints behind the contract document and the attention of the other party is not drawn to it, the court rules the notice to be insufficient.

The rule of insufficient notice however has exceptions, which include the following:

- (a) In **Balfour v Balfour (1919)**, it was held that a written agreement between the husband and wife is not enforceable as it was a domestic agreement;
- (b) An exemption clause must be clear and unambiguous;
- (c) The clause must be brought to the attention of the other party to be bound by it in good time;
- (d) Where the parties append their signature, they are bound by the clause unless fraud can be proved;
- (e) Where a statute precludes a party from certain exemption clauses, the inclusion of the same in a contract will be void; and
- (f) The general rule is that an exemption clause may not exclude a

fundamental breach, so it does not provide an absolute defence.

## 6.7 Vitiating elements in a contract

The elements of a contract have been discussed extensively, but where all of the elements are present, it is still possible for a purported contract to be rendered invalid. Some of the factors that may render an otherwise valid and complete contract invalid are termed vitiating elements of a contract. They are as follows:

- (a) **Mistake:** It is possible for parties to operate under some mistaken assumption which maybe fundamental to the contract. This may relate to its subject matter or purpose. The mistake could be either of fact or of law. The general effect of mistake in a contract is to render the contract void. However, at equity, there are circumstances when mistake would not void the contract. There are many types of mistake in law of which we focus the following:

- i. **Common mistake**

This type of mistake arises where both parties have the same intention but share the same mistake. In other words, their belief are the same but mistaken. An example of such mistake is where the parties do not know that the subject matter of the contract no longer exists in fact or by operation of law. In the case of **Couturier v Hastie** (1856), 'A' agreed to sell his corn that was due to arrive in a ship to 'B', the parties believing that the corn was in existence. Conversely, prior to the agreement, but unknown to the parties, the corn had spoilt and the ship captain had thrown them into the sea. The court held that the parties could avoid the contract due to bilateral mistake and no compensation was recoverable under it.

- ii. **Mutual mistake**

This type of mistake arises where parties are both mistaken about the same material fact in their contract such as the ownership or quality of the subject matter. In the case of **Cox v Prentice**, the parties agreed to the sale of a silver bar believing that the bar was of a particular weight. The buyer collected the silver bar and discovered that it was of a different weight. The court decided that the parties were not bound by the contract.

- iii. **Unilateral mistake**

Here, only one party is under the mistaken belief and the contract could not be avoided once the other party was unaware of the mistake at the time of the contract. For example where 'A' intended to sell his car to 'B' for N5 million but gave the latter a price of N4 million, only to discover his mistake after the sale, the contract could not be avoided.

However, the contract could be avoided if the other party knew that the seller was making a mistake in selling to him. In **Lake v Simons**, a lady obtained some ornaments on credit after convincing the seller falsely that she was the spouse of a reputable person. The lady subsequently sold the ornaments to 'C' and went away. The court held that original seller could recover the ornaments from 'C' as the lady had no title to them and could not pass a better title than she had.

- iv. **Non est factum**

This mistake arises where a person was induced by a false statement of another to sign a document containing terms fundamentally different from what he thought he was signing. The person who was deceived could plead *non est factum* (it is not my deed) so as to avoid liability.

- (b) **Misrepresentation:** Misrepresentation in contract involves the making of a



statement, which is false to the other party with the intention that the same be acted upon by him to enter into a contract. It is therefore a good ground for avoiding a contract.

i. **Elements of misrepresentation:** For there to be a misrepresentation, the following must exist:

- there must be a statement of fact and not law;
- the statement must be false and known only to the maker;
- the statement must relate to a present or past event, but not to a future event;
- the statement must not be a statement of intention;
- the statement must be capable of vital proof; and
- generally, silence does not constitute misrepresentation.

In addition to the above, it is important to note that

- where an opinion is not actually held, or it is one of which the speaker is ignorant, his claim would be a misrepresentation;
- where an opinion is stated as a fact, it would amount to misrepresentation;
- misrepresentation could consist of both law and fact; and
- style word, nodding of the head, or smile could constitute misrepresentation if it induced another.

ii. **Types of misrepresentation**

There are three types of misrepresentation as follows:

- **Innocent misrepresentation** - This is a misrepresentation made by the maker unknowingly and without a dishonest intention. The statement may however have been made carelessly but without an intention to deceive.
- **Negligent misrepresentation** - This category of misrepresentation may occur only in contracts where a fiduciary relationship exists between the parties. Examples of this misrepresentation include cases where a party is misled by his solicitor, banker or doctor and incurs loss. The party will be entitled to damages.
- **Fraudulent misrepresentation** - Where the maker knows that the statement he is making is untrue then he is deemed to have made a fraudulent misrepresentation. If the party however does not know (whether stupid or credulous) he may not be liable.

(c) **Duress and undue influence:** It is generally presumed that parties to a contract have equality of status at the time of negotiation and agreement, but where one is made to contract by force or under some influence, such contract would be voidable.

Contracting under duress means entering into a contract under some threat. The threat may be to the party's person (physical), property or livelihood. Duress may also be defined as an unlawful pressure by threat which induces a party to enter into a contract because of fear that the threatened unlawful act will be carried out if he fails to enter into the contract, for example, making a man sign a contract whilst a gun is pointed at his head amounts to duress.

Undue influence on the other hand occurs where one party to the contract is at an advantage over the other party and therefore uses that position to influence the other to enter into the contract. Examples of such situations are cases of solicitor/client, parent/child, and religious adviser/member of congregation. A person who wishes to avoid such a contract must take steps to void the contract within a reasonable time of leaving the sphere of duress or



undue influence.

## 6.8 Discharge of contract

A contract could be discharged or determined by:

- a. **Performance:** This releases the parties from further obligation. However, the performance must be full and complete.
- b. **Operation of law:** A law could make the performance of an otherwise valid contract illegal, thereby discharging the parties.
- c. **Fundamental breach:** This may be due to a mistake of one or both parties. The breach goes to the root of the contract and renders it void;
- d. **Agreement:** This may be due to the operation of a condition precedent that is already written into the contract;
- e. **Frustration:** This is usually due to an act outside the control of the parties often referred to as force majeure. A contract is discharged through no fault of either party as the circumstances make it simply impossible for them to perform their contractual obligations under the contract.
- f. Frustration may occur by the destruction of the subject matter of the contract, death of one of the parties, unavailability of materials for the completion of the subject matter of the contract, cancellation of the event or where the performance of the contract now becomes illegal.

## 6.9 Remedies for breach of contract

A breach occurs when a party to a contract refuses to perform the obligations imposed on him under contract. A breach may occur when a party expressly repudiates his liability under the contract before the date fixed for performance or during performance or where he makes it impossible for himself to perform the contract. A breach does not discharge the contract but may entitle the aggrieved party to sue for damages. The remedies available for breach of contract are varied and are determined by the nature of the contract and the gravity or extent of the breach. The remedies available to the aggrieved party under a contract include the following:

### 6.9.1 Damages

A person can claim damages for breach of contract. Damages is the quantum of compensation the aggrieved party is considered entitled to meant to restore the party to the position he would have been if the breach had not occurred. The damages awarded by Nigerian courts are guided by the decision in **Kusfa v United Bawo Construction Co Ltd** (1994) 4 NWLR (Pt. 336) 1 at 11, relying on the case of **Hadley v Baxendale** (1843- 1860) All. E. R.461 at 465 that,

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it.

If special circumstances under which the contract was communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract which they reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which could arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

For, had special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to damages in that case; and of his advantage it would be very unjust to deprive them."

### **6.9.2 Rescission**

Rescission is an equitable relief available to an aggrieved party for a breach of condition or where there is mistake or misrepresentation. Sometimes also where the contract is executory in nature, parties may mutually agree to discharge each other from obligations of the contract. Rescission maybe expressed or inferred from the conduct of the parties.

### **6.9.3 Specific performance**

Where a breach of contract occurs, there are certain circumstances in which damages maybe inadequate. For instance, in land related matters, damages may not be adequate to compensate the aggrieved party.

This remedy is an equitable one and is often not available for breach of personal contracts. A party seeking specific performance must show that he has performed all conditions precedent to such performance of contract. This remedy will not be granted where it will cause the other party severe hardship nor will it be granted in vain.

### **6.9.4 Repudiation**

An injured party in contract is allowed to repudiate the contract in consequence of a breach by the other party. The injured party holds himself as no longer bound by the contract or to the other party who has breached the contract. The other party also has the option of accepting or refusing the repudiation.

### **6.9.5 Restitution**

This involves returning to the other party his goods, property or monetary equivalent in order to restore him to his former position.

### **6.9.6 Rectification**

There are cases where the terms of the contract may need to be rewritten to reflect the true intentions of the parties and thereby ordering them to proceed with the contract on the amended terms. This remedy appears limited to situations where there is a mistake at the negotiating stage and which is later discovered in the course of executing the contract. This remedy is available only to the extent that the contract document contains mistakes of the intention of the parties.

### **6.9.7 Injunction**

This is an equitable relief where the courts order the offending party to do or refrain from the doing of a certain act. An injunction maybe mandatory; where it compels the performance of an act or prohibitive; where it is to stop the doing or repetition of some acts.

### **6.9.8 Quantum meruit**

This is a part-performance of the contract where the aggrieved party claims 'as much as he deserves' based on his performance of the contract. This remedy is available where the contract is in partial performance especially where the contract is in stages or in sections.

## **6.10 E-contract**

An e-contract is a contract modeled, specified, executed and deployed by a software system. The concept of e-contract is very similar to traditional (paper

based) commercial contract. There usually are the offer, acceptance, consideration and intention to create legal relations. The other basic principles of contract as discussed earlier in this chapter also apply to e-contract. There are however a few peculiarities that distinguish an electronic contract from other species of contract and these are discussed in this section as follows:

#### **6.10.1 Offer**

The law recognises contracts formed using facsimile, telex and other similar technological means. An agreement between parties is legally valid if it satisfies the requirements of the law regarding its formation, i.e., if it shows that the parties intend to create a contract.

It has been argued whether or not an advertisement on the website is an offer or an invitation to treat. Due to the fact that it is targeted unspecified persons, it is probably an invitation to treat. The test of a party's intention in e-contract is whether by supplying the information, the person intends, in an online form built into the web page, to make an offer for the seller to be legally bound or not. The consumers, by responding through an e-mail or by filling, can accept this offer either by express confirmation or by conduct.

#### **6.10.2 Acceptance**

The offeree must accept the terms of the offer to create a valid e-contract. The critical issue in e-contracts is when acceptance takes effect so as to be able to determine where and when the contract comes into existence. The general receipt rule is that acceptance is effective when received. For e-contracts however, no conclusive rule is settled. The applicable rule of communication depends upon reasonable certainty of the message being received and the actual point of receipt of the acceptance.

#### **6.10.3 Consideration and performance**

Contracts result only when one promise is made in exchange for something in return. The present rules of consideration apply to e-contracts.

#### **6.10.4 Liability and damages**

A party that commits breach of an agreement may face various types of liability. However, due to the nature of the systems and the networks that businesses employ to conduct e-commerce, parties may find themselves liable for contracts that are deemed to technically originated with them due to programming error, employee's mistake or deliberate misconduct, or executed and released without the actual intent or authority of the liable party.

#### **6.10.5 Digital signatures**

A digital signature on electronic documents functions like a handwritten signature does for printed documents. The digital signature is an unforgeable piece of data that asserts that a named person wrote or otherwise agreed to the document to which the signature is attached. A digital signature actually provides a greater degree of security than a handwritten signature. Therefore, the recipient of a digitally signed message can verify that the message originated from the person whose signature is attached and that the message has not been altered either intentionally or accidentally since it was signed.

Furthermore, secure digital signatures cannot be repudiated. Thus the signer of a document cannot later disown it by claiming the signature was forged. In other words, digital signatures enable "authentication" of digital messages, assuring the recipient of a digital message of both the identity of the sender and the integrity of the message. The fundamental drawback of online contracts is that if there is no alternate means of identifying a person on the other side than digital signatures or a public key, it is

possible to misrepresent one's identity and try to pass off as somebody else.

#### 6.10.6 Types of e-contracts

Online transactions usually fall into three types of e-commerce contracts, and they are:

- a. **The click-through** contract generally requires a person to scroll through the terms and conditions of the agreement and indicate his acceptance to be bound by the enforceable contract by clicking on a button or ticking a box at the end of the agreement.
- b. **The “shrink wrap agreement”** refers to purchase agreements that are attached to shipped products, usually bound by shrink wrap (plastic wrapping) that contains its terms and conditions. Shrink wrap agreements may include terms such as licences, rights to fuse fees, payments forum clauses, warranties and limitations of liability.
- c. **Browse-wrap agreements** are contracts in which the terms of use are listed on a web site page. In such contracts, manufacturers presume to bind the user to the licence terms merely by their visit to the web site or downloading software from that site.

The issues of jurisdiction over cyberspace and the lack of any known law governing e-commerce in the Nigerian legal system have left the study of e-contracts undeveloped under Nigerian law.

#### 6.11 Chapter review

This chapter explains the basic principles of the law of contract and their application..

#### 6.12. Worked examples

##### 6.12.1 Multiple-choice questions

1. An agreement which an infant/minor can ratify on the attainment of majority is
  - A. Voidable
  - B. Void
  - C. Enforceable
  - D. Illegal
2. A term in a contract, the breach of which gives rise to an action for damages only is a
  - A. Condition
  - B. Innominate term
  - C. Exemption term
  - D. Warranty
3. A contract may be discharged through the following ways, EXCEPT
  - A. Refusal
  - B. Performance
  - C. frustration
  - D. Breach

4. A contract entered into in writing, which is signed by the parties and impressed with a seal is called
  - A. Parol Contract
  - B. Speciality contract
  - C. E- contract
  - D. Specialised contract
5. In commercial transaction, the presumption that parties intend consequences to flow from their actions is called
  - A. Consideration
  - B. Offer
  - C. Capacity
  - D. Intention to create legal relation

#### 6.12.2 Open-ended questions

1. James and Johnson inherited an old, dilapidated building from their uncle. James spent the sum of ten million Naira renovating the building, and thus attracted prospective tenants, before informing Johnson of what he had done. Johnson was pleased with James' action and promised to pay James five million Naira from his own share of the rents accruing from the property. Three years later, Johnson had failed to fulfill his promise to James. James intends to sue Johnson, and has consulted you for an advice on his chances of success.

**Required:**

Advise James.

2. An offer and an invitation to treat appear to be similar.

**Required:**

- (a) Explain an invitation to treat.
- (b) List **THREE** examples of invitation to treat.

3. (a) Despite the presence of all the essential elements of a contract, certain factors could render the contract invalid.

**Required:**

Explain the factors that could render a contract invalid.

- (b) If someone believes they are signing a guarantee for a loan but is actually signing a transfer of property, and they were misled or unable to understand the document, they might raise *non est factum* as a defense.

**Required:**

Explain *non est factum* plea.

#### 6.12.3 Suggested solutions to multiple-choice questions

1. A
2. D

3. A
4. B
5. D

#### 6.12.4 Suggested solutions to open-ended questions

1. The issue involved is consideration, consideration is an essential element of a contract, but one of the applicable rules is that consideration must not be past.

A past consideration is one, which had been furnished before the promise sought to be enforced was made. In *Re Mc Ardle*, it was held that a past consideration is not sufficient to support a contract.

In this case, since James had already completed the renovation of the house before Johnson promised to pay the five million Naira. James would not succeed in an action against Johnson to enforce his promise to pay the money because the consideration is past.

2. (a) An invitation to treat is an invitation to negotiate, make an offer, or feel one's way towards a contract. The person making it is not making an offer but a preliminary negotiation. The person responding to it may make an offer, which the other party may accept or reject.  
 (b) Examples of an invitation to treat include
  - (i) advertisement;
  - (ii) invitation for tenders;
  - (iii) auction sales; and
  - (iv) display of goods for sale with price attached.
3. (a) Such terms are referred to as vitiating terms, and they are terms that make an otherwise valid contract void or voidable  
 Examples include:
  - i. mistakes
  - ii. misrepresentations
  - iii. duress and undue influence
 (b) *Non est factum* - This is a mistake relating to a document mistakenly signed. Where a person was induced by a false statement to sign a document containing terms that are different fundamentally from what he believed he was signing, provided he has not acted negligently, he may plead *non est factum* (It is not my deed), and such document would be declared void against him.



# **AGENCY**

## **Contents**

- 7.0 Learning objective
- 7.1 Learning outcomes
- 7.2 Introduction
- 7.3 Effects of agency
- 7.4 Agency distinguished from other similar relationships
- 7.5 Capacity
- 7.6 Classes of agents
- 7.7 Creation of agency
- 7.8 Forms of authority
- 7.9 Rights and duties of parties in agency relationships
- 7.10 Effects of contracts made by the agents
- 7.11 Termination of agency
- 7.12 Chapter review
- 7.13 Worked examples

## 7 Agency

### 7.0 Learning objective

This chapter is aimed at imparting basic knowledge of the law of agency, including the meaning of agency, types, formation, parties as well as their rights obligations.

### 7.1 Learning outcomes

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

- (a) have a working understanding of the nature and implication of agency relationship;
- (b) identify types of agency; and
- (c) identify the duties and rights of a principal and an agent.

### 7.2 Introduction

This chapter presents to the reader a brief background of the law of agency, its nature, description, rights, duties and the capacity of persons required for an agency relationship. Agency is an aspect of the law of contracts and it is considered an exception to the doctrine of privity of contract. An agency relationship is a consensual relationship between two persons, the principal and the agent. An agent is expressly or impliedly authorised by the principal to act on his behalf in dealings with third parties. Agency relationship may arise in any of the following ways, that is, by:

- a. the parties' agreement, whether contractual or not, express or implied;
- b. subsequent ratification by the principal of acts done on his behalf by the purported agent without antecedent authority; and
- c. operation of law under the doctrine of necessity.

### 7.3 Effects of agency

When an agent enters into a contract on behalf of his principal, two legal consequences result. Firstly, a relationship is created between his principal and the third party, and secondly, reciprocal rights and liabilities are created between the principal and the third party. In essence, although the agent is the contracting party by actions, he is not acting by himself but rather for and on behalf of his principal. It must be noted that the law of agency is not concerned about the contract entered into by the agent on behalf of his principal but rather with the relationship existing between the agent and the principal.

### 7.4 Agency distinguished from other similar relationships

- (a) **Trust:** A trustee is a person to whom legal title to a property has been transferred for the benefit of another. Although, like an agent, the trustee acts for someone else, i.e. the beneficiary, he is not an agent because the beneficiary is never privy to contracts entered into by a trustee.

Trusteeship also is more common in property matters, unlike agency that transcends most contractual relationships.

- (b) **Guarantor/Surety:** A guarantor or surety is a person who binds himself, usually by deed, to satisfy the obligation of another person. A guarantor stands in place of the beneficiary. But an agent is not a guarantor or surety and does not have direct responsibility for the assets or liability of his principal unless he is found to have exceeded his scope of authority.
- (c) **Bailment:** Bailment is the transfer of possession of goods to a bailee by a bailor who is the owner on the condition, expressed or implied, that the goods shall be returned as soon as the purposes for which the goods were transferred are fulfilled.

- (d) **Master/servant relationship:** Any person employed by another as an employee is not an agent simply because his work schedule involves bringing his employer into a contract situation with third parties. The employee/employer relationship remains so until otherwise stated.

## 7.5 Capacity

In the creation of an agency, there are two very important factors to be taken into consideration. The first is the capacity to act as the principal and the second is capacity of both parties to enter into a relationship. As a general rule, the liability of the principal or the agent to the third party will depend on the contractual capacity of the party against whom the action is brought. For instance, if the principal becomes insane or bankrupt, the agency will be terminated.

Also, a company cannot appoint an agent to act in respect of acts which are *ultra vires* its memorandum of association.

A person who lacks capacity to enter into a contract may, however, act as an agent for another. For example, an infant may act as an agent for a principal who is competent. A person with capacity may however not act as an agent for an infant and an insane person in respect of contracts they are not competent to enter into.

## 7.6 Classes of agent

There are three main classes of agents and the classification is dependent on their scope of authority or duties. A general agent is an agent with the authority to perform a series of transactions in the ordinary course of business, trade or profession usually of a continuous nature. Where the appointment of a general agent becomes unrestricted, such an agent is said to be a universal agent. An agent that is however, appointed for a special purpose or specific occasion is a special agent, and there are four main types of special agents as follows:

- (a) **Factor:** A factor is a mercantile 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 a brokerage;
- (c) **Auctioneer:** An auctioneer is a person licensed by law and authorized to sell the goods or property of another person at a public sale. An auctioneer 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 buyer; and
- (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. A del credere agent is a surety of the buyer.

## 7.7 Creation of agency

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

- (a) **Express appointment:** An agent may be appointed either verbally or in writing. There is no particular form for the express appointment of an agent but it may be by deed, in writing or even by word of mouth;
- (b) **Implied agency:** An implied agency is an agency created by inference. For example, in a firm of partners, a partner entering into a contract on behalf of the firm is assumed to be acting as agent on behalf of the other partners. An agency may be implied either by necessity or by estoppel;

- (c) **Agency of necessity:** This agency arises in emergency situations where a person is obliged to act to prevent irreparable loss to another. An agency of necessity can be implied where the following conditions exist. Firstly, it must be impossible or impracticable to communicate with the owner of the goods in order to get his instructions. Secondly, there must be real or imminent commercial necessity and thirdly, the agent must have acted in the best interest of the principal;
- (d) **Agency by estoppel:** It is a general principle of law that a person is not bound by the actions of another who acts without his written or oral authority. However, when the natural consequence of the party's conduct is to portray someone as his agent, and as a result of the portrayal an innocent third party enters into a contract with the agent, he will be prevented or stopped from denying the existence of an agency;
- (e) **Apparent agency:** This occurs when a principal has not taken due precaution to prevent a situation in which somebody portrays himself as having power to act as his agent; and
- (f) **Agency by ratification:** Strictly speaking, this is not a means of agency creation but rather a means by which agency may arise. Ratification is the affirmation by the principal of an act done by a person who as at the time of the act had not been appointed to so act. For agency by ratification to exist, the following conditions must be satisfied:
  - i. At the time of making the contract, the agent must purport to be acting on behalf of his soon to be principal;
  - ii. The principal must have been in existence and have capacity at the time the agent purported to act for him;
  - iii. The principal must be competent to act at both the date of the contract and the date of the ratification;
  - iv. The principal must have had full knowledge of all the material facts at the time of ratification or else be shown to manifest an intention to ratify the act, notwithstanding his ignorance of all the facts;
  - v. The contract must be a valid one, that is, not void ab initio; and
  - vi. Time is of essence for an agency to be created by ratification and so the principal must ratify the act within a reasonable time of doing the unauthorised act.

## 7.8 Forms of authority

Agency relationships are dependent on the nature of authority vested in the agent by the principal. The scope of the agent's authority is very important in determining the type of agency that exists between the principal and agent and accordingly agency relationships have been classified as follows:

- a. **Actual or express authority:** This refers to specific authorities given by the principal to an agent, orally, in writing and sometimes under seal;
- b. **Implied authority:** This refers to the ability or capacity of an agent to perform acts that are reasonably necessary to accomplish the purpose of the agency. This type of authority is not expressed or defined in writing. The authority normally flows from the agent's normal business activities for his principal. An agent has an implied authority to do acts that are incidental to the acts for which he has actual authority. The acts done by implied authority depend on the circumstances; and
- c. **Apparent authority:** This is sometimes called 'ostensible authority'. It arises when a third party believes that a person has the authority of the principal to act on his behalf either from the latter's carelessness or the fact that he held

the person out as having the authority to so act.

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 but in good faith the principal would be bound by the acts. An agent would however be personally liable if he had no authority at all to act on behalf of another, and would indemnify the third party in damages. An agent who is employed to act in the course of his work, or profession, or business has an 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 would he be remunerated for, or indemnified against, the illegal act committed by him.

## **7.9 Rights and duties of parties in agency relationship**

### **7.9.1 Rights of an agent**

Every agent has some rights in an agency relationship, which include the right to:

- (a) receive indemnity from the principal for any cost reasonably incurred in the course of the performance of his duty;
- (b) be paid the reward or commission for work done pursuant to the principal's authority;
- (c) have his lawful actions ratified by his principal;
- (d) have his disclosed principal assume responsibility and liability for his authorised acts;
- (e) enforce contracts arising from the agency against third parties; and
- (f) a lien over the goods of his principal for his unpaid commission as well as other monies due to him from the performance of his duties.

### **7.9.2 Duties of an agent**

Every agent owes his principal the duties to:

- (a) conduct the principal's business according to his directions or instructions;
- (b) not delegate his authority unless expressly so authorised by his principal;
- (c) act in good faith;
- (d) avoid conflict of interest and duty;
- (e) exercise due care and skill;
- (f) not make secret profit;
- (g) not disclose confidential information about his principal to third parties; and
- (h) render an account to his principal as and when due.

### **7.9.3 Duties of the principal**

The duties of the principal include to:

- (a) pay the agent's fees or commission;
- (b) indemnify the agent for all lawful acts done by the agent on his behalf;
- (c) ratify the acts of the agent as the case may be;
- (d) assume responsibility and liability for the authorised acts of the agent, if he is a disclosed principal; and
- (e) as a general rule, be liable to third parties under all contracts entered into by the agent under the agency, whether the principal is disclosed or not.

## 7.10 Effects of contracts made by the agents

Contracts made by agents have different legal consequences depending on whether the third party had knowledge that he was entering into a contract with a named principal or not, or whether the principal was disclosed by the agent at the time of contract. The effect of contracts entered into by agents with third parties may be classified under three headings as follows:

- a. **Named principal:** Where an agent contracts on behalf of a named principal, it is the principal alone who acquires rights and liabilities under the contract. The agent incurs neither rights nor liabilities.
- b. **Unnamed principal:** Where an agent acts for an unnamed principal, and provided he acts within the scope of his authority, only the principal acquires rights and liabilities under the contract.
- c. **Undisclosed principal:** In situations where the agent conceals both the identity and the fact that he is acting for somebody, the third party is at liberty to enforce the contract against either the agent or the principal where he discovers the principal.

## 7.11 Termination of agency

An agency relationship can be terminated in two main ways namely, by express acts of the parties or by operation of law.

### 7.11.1 Acts of the parties

An agency relationship may be terminated by mutual agreement of the parties. The principal or the agent may also unilaterally terminate the contract. The revocation of the contract by the principal/or the renunciation of authority by the agent is without prejudice to any rights or liabilities that may have been created between them.

### 7.11.2 Operation of law

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

- (a) Through the death of either party;
- (b) Where either party becomes insane;
- (c) Upon either party becoming bankrupt;
- (d) By frustration, that is, where the subject matter is no longer in existence.
- (e) If the subject matter of the agency is found to be illegal *ab initio*;
- (f) By expiration or effluxion of time; or
- (g) Subsequent illegality of either the transaction or of the status or capacity of either party;

## 7.12 Chapter review

This chapter gives an overview of the law of agency, its core principles, their application, and the liabilities that flow from them.



## 7.13 Worked examples

### 7.13.1 Multiple-choice questions

1. An agent whose authority is not limited and can do all acts on behalf of the principal in relation to his line of business is a
  - A. *Specific agent*
  - B. Special agent
  - C. General agent
  - D. Del Credere agent
2. An agent's usual authority is called
  - A. Implied authority
  - B. Special authority
  - C. Ostensible authority
  - D. Actual authority
3. An agent by estoppel has apparent authority to bind
  - A. The third party
  - B. Himself
  - C. The whole world
  - D. The Principal
4. What is the effect under agency law, where the Principal becomes insane
  - A. The third party will be indemnified
  - B. The agent will be liable
  - C. The agency contract will be terminated
  - D. The principal will be liable
5. Agency of necessity will be created in the following instances, except where
  - A. The agent acted in good faith in the best interest of the principal
  - B. It is not possible to communicate with the principal
  - C. There is real and commercial necessity
  - D. There is no viable market for the goods

### 7.13.2 Open-ended questions

1. Mr. Audu owns two apartment buildings at Victoria Island, Lagos. He lives in one and intends to let out the other one.

Alex an estate agent, who has not been instructed by Mr. Audu to let out the premises, had been bringing prospective tenants to inspect the vacant building with the knowledge of Mr. Audu, who did nothing to discourage him.

Alex eventually brought in a tenant, Mr. Wisdom, who paid the sum of N 2million as rent for two years to Alex, and Alex paid only N1million to Mr. Audu, being the rent for one year, and absconded with the balance.

Mr. Audu has insisted that Mr. Wisdom must pay another N1million for the second year, or move out of the premises since he did not authorise Alex to collect rent for two years.

**Required:**

Identify the relationship that exists between the parties and advise them accordingly.

2. Bayo owns a building named Joy Villa, which he intends to sell for ₦100million. He employed James an agent to sell the property at a 10% commission. Before James could get a buyer, Bayo became insane and was admitted into an assylum for treatment. James got Lawrence to buy the property for ₦ 100million from which he retained his 10% commission. Bayo eventually regained his sanity after the sale, but has refused to sign the document of sale to Lawrence.

**Required:**

Advise the parties.

3. Agency is a legal relationship in which one person (called the principal) authorises another (called the agent) to act on their behalf in dealings with third parties. This relationship allows the agent to create legal obligations for the principal through their actions.

**Required:**

Explain the maxim, *delegatus non potest delegare*, and list the exceptions to the rule, in relation to agency.

### 7.13.3 Suggested solutions to multiple-choice questions

1. C
2. D
3. D
4. C
5. D

### 7.13.4 Suggested solutions to open-ended questions

1. The agency relationship created in this case is agency by estoppel, where the natural consequence of a persons' conduct is to portray someone to a third party as his or her agent, and the third party relies on such impression in entering into a contract with the purported agent. Such person shall be

estopped from denying the existence of an agency relationship. In this case Mr. Audu by his conduct had portrayed Alex as his agent, a fact relied upon by Mr. Wisdom. Mr. Audu is bound by the contract between Alex and Mr. Wisdom for the two years and is estopped from denying the authority of Alex to collect the rent for two years.

Consequently, Mr. Wisdom is not bound to pay rent for another year.

2. Agency relationship would be terminated by the insanity of either the principal or agent.

In this case, the insanity of Bayo terminated the contract of agency between him and James. At the time James sold the building to Lawrence, James had no authority to bind Bayo. Lawrence cannot enforce the sale contract against Bayo. Bayo is entitled to refuse to sign the sale document.

3. The duty of an agent not to delegate his duty, or to act personally. It means a delegate cannot delegate his authority. Where the agent contravenes this duty, the principal is not bound by any contract entered into on his behalf by the sub-agent, and the agent will be liable for a breach of duty.

However, the duty is exempted in the following instances:

- (a) where the principal expressly or impliedly authorises delegation; and
- (b) where trade usage or custom or traditional practice of the trade allows delegation.

# LAW OF TORTS

## Contents

- 8.0 Learning objective
- 8.1 Learning outcomes
- 8.2 Introduction
- 8.3 Classification of torts
- 8.4 Capacity in torts
- 8.5 Forms of liability in torts
- 8.6 Negligence
- 8.7 Product liability
- 8.8 Chapter review
- 8.9 Worked examples

## **8 Law of torts**

### **8.0 Learning objective**

This chapter gives an insight into torts with emphasis on the one that a professional accountant should be mindful of.

### **8.1 Learning outcomes**

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

- (a) define and classify torts;
- (b) identify and explain negligent actions or omissions;
- (c) understand the consequences of negligent actions;
- (d) identify and explain vicarious liability; and
- (e) understand the law on product liability.

### **8.2 Introduction**

This chapter presents to the reader a brief background of the law of torts and explains negligent actions or omissions as well as their consequences. It also gives an overview of vicarious liability and discusses product liability.

A tort is a civil wrong. It may be described as an offence without criminal consequences. It is a actionable breach of duties towards persons fixed by law that gives rise to civil proceedings for damages and other remedies including injunction.

Whilst it is possible for an action to constitute both a crime and a tort, the remedies available in legal proceedings in either case are quite different. A person accused of a crime is prosecuted by the State and, if found guilty, sentenced to custodial punishment of imprisonment or non-custodial punishment such as a fine or rehabilitation. Conversely, the purpose of a civil action for tort liability is to provide a redress or relief for the person that is injured or whose interest is adversely affected by the defendant's wrongful action.

For a plaintiff to succeed in most tort actions, he must prove the injury he has suffered. However, there are a few torts where actual damage or injury need not be proved and all that the aggrieved person needs prove is an infringement of his legal right. For example, the tort of trespass to land is actionable per se, that is without proof of actual damage or injury.

### **8.3 Classification of torts**

Torts may fall into many categories amongst which are:

- a. torts affecting personal safety and freedom e.g. assault, battery, false imprisonment and negligence;
- b. torts affecting property e.g. trespass and nuisance;
- c. torts affecting reputation e.g. libel and slander, that is defamation;
- d. torts affecting economic interests e.g. deceit and passing-off, conversion and *detinue*; and
- e. torts involving interference with judicial process, e.g. malicious prosecution, maintenance and *champerty*.

Each class of torts has its own rules but the rules that are common in tort liability cases are:

- (a) the defendant will not be liable unless his action has caused actual harm to the plaintiff, except in torts that are actionable *per se*, such as trespass to land, and torts for the protection of a person's dignity;
- (b) some torts require the defendant to have been at fault either intentionally or negligently, but there are strict liability torts;
- (c) liability depends on the duty imposed on the defendant by the rule on the specific tort; and
- (d) tort consists of two main elements, namely the breach of a legal duty, and the resultant harm or damage.

#### 8.4 Capacity in torts

As a general rule, all persons of full age may sue or be sued in tort but special rules apply to:

- (a) the Head of State, or the King or Queen (of England), and other sovereigns, who cannot be sued in their private capacity whilst in office;
- (b) judges, who have judicial immunity for acts done in their judicial capacities;
- (c) companies, who may sue and be sued in their corporate names and could be held vicariously liable;
- (d) a person of unsound mind, who is not excused from liability for negligence;
- (e) an infant (person below 21 years of age), who is liable for his own tort;
- (f) a married woman, who is liable in tort as if she were a *feme sole*; and the husband, who may be sued jointly with the wife in all torts committed by her during coverture;
- (g) a husband and his wife as well as persons in master/servant relationship, who are presumed to be vicariously liable for the acts of each other and are not expected to sue each other.

#### 8.5 Forms of liability in torts

There are two broad types of liability under the law of torts namely vicarious liability and strict liability.

**8.5.1 Vicarious liability:** This is liability, which falls upon an individual without his fault. It is liability imposed upon a person by the actions of another person who is under his control. A good example is in master/servant relationship. There are some tests for determining if a relationship is a master/servant relationship to which vicarious liability applies, or it is a master and independent contractor relationship. These include:

- a. whether the employer is a master who shows the employee how to do his work, in which situation it is a master/servant relationship that distinguishes the servant from an independent contractor who is trained in his trade or profession and works without supervision;
- b. where one person pays the other wages and salaries, in which situation it is a master/servant relationship;
- c. where one person has power to hire and fire another, in which situation it is a



master/servant relationship;

- d. whether the employee is an integral part of the organisation, which makes him a servant, or not; and
- e. 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 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 courts 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 the fraud was for his benefit or not.

**8.5.2 Strict liability:** This type of liability is often referred to as the rule in **Rylands v Fletcher**. The rule simply means that liability attaches without fault. It is to the effect that where a person keeps for his own purpose a thing and the said thing escapes and causes mischief, whether the person acted with or without intention to cause harm, liability attaches.

To succeed in holding a person liable under this heading of liability, the plaintiff must establish that:

- (a) the damage was caused by the thing brought by the defendant;
- (b) the use of the 'thing' is a non-natural user of land, (something not usually there); and
- (c) its escape caused damage.

## 8.6 Negligence

Negligence simply means carelessness or inadvertence. An act is considered negligent where a person did not take necessary care to avoid the consequence of his act or the omission. No wrong or bad intention needs to be proved for liability to attach in negligence.

Negligence has also been described as a breach of a legal duty to take care by the defendant, which results in damage to the plaintiff. For an act or omission to be declared negligent, the three elements that must be present are:

- a. a legal duty to take care by the defendant (duty of care) must exist;
- b. a breach of that legal duty; and
- c. a consequential damage to the plaintiff, which must have arisen from the breach.

Where the plaintiff failed to prove any of these three elements, his action would fail.

### 8.6.1 Duty of care

This ingredient of the tort of negligence is most aptly captured by Lord Atkins in the case of ***Donoghue v Stevenson (1932) A.C. 562*** that,

“The rule that you are to love your neighbours becomes in law, you must not injure your neighbor, and the lawyer’s question ‘who is my neighbour?’ receives a restricted reply; ‘you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour’.

Who then in law is your neighbour? The answer seems to be persons who are so closely and directly affected that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.”

This judgment has based the duty of care on reasonable foresight of the defendant. Thus, where the injury or damage is so remote that the defendant could not possibly foresee that his act or omission would cause injury to the plaintiff, then he would not be liable under the law.

### 8.6.2 Liability for negligent misstatements

The courts have always imposed a duty of care on individuals to avoid making careless statements, which may 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, which causes financial and economic loss. In cases of physical injury, it has been long 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 bankers’ 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 misstatement without fraud may give rise to an action for damages for financial loss suffered by a person who acted on the misstatements.

### 8.6.3 Breach of duty of care

Once the duty of care is established, the plaintiff must prove that the duty has been breached. In determining whether or not there has been a breach, the courts would consider whether the defendant acted in the way a reasonable man would have acted under the circumstances. There are certain risk factors, which the courts have developed to guide them in the applying the reasonable man’s test, which are:

- (a) considering whether the likelihood of the defendant’s conduct causing harm is higher than the amount of caution required of him;
- (b) the seriousness of the injury that was risked;
- (c) the importance or use of the defendant’s activity; and
- (d) the cost and practicability of measures to avoid the harm.

#### 8.6.4 Damage

Where a plaintiff has established that the defendant owes him a duty of care and that the duty has been breached, the third ingredient of negligence to be proved is the damage. This is because not all damages that occur where a duty exists would be proved as attributable to or caused by the breach of duty. A defendant would be liable for damages where there is 'causation in fact' and damage must not be too remote.

**Causation in fact:** A defendant is only liable for the damage that is the direct consequence of his tort. There must be a causal link between the breach of duty and the damage complained about. The defendant would be liable for an injury or damage only if it can be categorically stated that if not for the breach of duty, the damage would not have occurred.

**Remoteness of damage:** There is a limit to the extent of a person's liability for consequences of his negligence. The rule is that a person will be liable only for those consequences of his negligence that are not too remote in law. Consequences are considered too remote if a reasonable person could not reasonably have foreseen them.

**The eggshell principle:** A defendant takes his victim the way he finds him. The fact that the victim has a special weakness or condition that may have made the harm done to him more serious than if it were the next person would not absolve the defendant of liability.

***Novus actus interveniens*:** In situations where there is an intervening circumstance between the damage done by the defendant through the breach, which breaks the chain of causation, the defendant may be relieved from liability.

### 8.7 Product liability

The liability of a defendant who produces goods or chattels for sale to the public is dependent on whether the goods were dangerous per se or not. The courts were always ready to read a breach of duty of care into cases where the plaintiffs were injured by goods that were dangerous in themselves.

The rule of privity of contract had been a frustration to many plaintiffs in claims for product liability often because they did not buy from the producer of the goods directly. This rule of privity of contract as a limitation to the right of a plaintiff in a claim for harm caused by a third party's product was however, waived on terms in the case of ***Donoghue v Stevenson (1932)*** where 'C' drank the contents of a bottle of ginger beer produced by 'A' which 'B' bought from a retailer and gave to 'C'. The beer contained decomposed remains of a snail which could not be detected until a greater part of the beer had been consumed. As a result, 'C' suffered shock and gastro-enteritis. She sued 'A' as the manufacturer and the court laid down the new rules on product liability that "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

In essence, by this decision the court placed a duty of care on the manufacturer towards the protection of the ultimate consumer based on the fact that such defective goods or chattels are not normally subject to intermediate examination.

### 8.8 Chapter review

This chapter purposively deals with selected areas of the law of torts which should be of interest in the practice of accountancy, as it is a very wide subject. and

## 8.9

### Worked examples

#### 8.9.1 Multiple-choice questions

1. Which of the following is not a classification of torts?
  - A. Injury to government
  - B. Injury to reputation
  - C. Injury to economic Interest
  - D. Injury to personal safety
2. The major characteristic of a tort is that
  - A. It is an offence with criminal consequences
  - B. Its establishment in court requires proof beyond reasonable doubt
  - C. Redress for its breach lies in the prosecution and conviction of the offender
  - D. It is a breach of a personal duty that is fixed by law
3. A tort which is actionable *per se* is one which
  - A. Is a tort of strict liability
  - B. Is of vicarious liability
  - C. Requires no proof of damage or injury
  - D. Requires the defendant to be at fault
4. The principle of law that enables the plaintiff in negligence cases to shift the evidential burden of proof to the defendant is called
  - A. *Res ipsa loquitur*
  - B. *Novus actus interveniens*
  - C. *Volenti non fit injuria*
  - D. *Non est factum*
5. All the persons listed below are not liable in torts, **EXCEPT**
  - A. President of the Federal Republic of Nigeria while in office
  - B. Judges while performing their judicial duties
  - C. An infant
  - D. Legislators

#### 8.9.2 Open-ended questions

1. Explain vicarious liability and list the conditions which must exist for the liability to arise.
2. Liability attaches for tortuous acts.

#### Required:

Explain strict liability in torts.

3. Alabi & Co Ltd, a food processing company, applied to XeeCredit Ltd for credit facilities. XeeCredit was willing to give the credit but insisted on a letter of reference from Alabi & Co Ltd's bankers. The branch manager of Kowope Bank Ltd issued a letter of reference on Alabi & Co Ltd, describing the company as a good customer that is credit worthy up to a sum of ₦100million. XeeCredit Ltd, relying on the letter, gave credit to Alabi & Co Ltd to the sum of ₦50million. The statement in the reference letter turned out to be untrue, and XeeCredit Ltd incurred a loss of ₦30million on the credit granted to Alabi & Co Ltd. XeeCredit Ltd intends to sue Kowope Bank Ltd.

**Required:**

Advise the bank on its chances of success.

**8.9.3 Suggested solutions to multiple-choice questions**

1. A
2. D
3. C
4. A
5. D

**8.9.4 Suggested solutions to open-ended questions**

1. Vicarious liability arises, where a person is held liable for the tort committed by another. For this to exist, the following conditions must exist
  - a. There must be a master/servant relationship between the person been held liable and the tortfeasor. Thus the master is liable for the tort committed by his servant.

The servant must have committed the tort in the course or within the scope of his employment.

- b. The act of the servant must be one which has been expressly or impliedly approved or authorized by the master. It does not matter even if the servant has carried out the act in an unauthorised manner. The master shall still be liable. But the master is not liable for acts outside the scope of the servants duty.
2. Strict liability in torts, is one for which the plaintiff does not need to prove that he sustained any injury or loss, it is sufficient if he proves that the tort has been committed it is also no defence that the injury caused by the tortfeasor was neither intentional nor negligent. It is referred to as the rule in *Rylands v Fletcher*.
3. The issue in question is liability for negligent misstatement. This arises where a misleading statement is made by someone who rendered liable because of the special relationship existing between the maker of the statement and the person to whom it is made knowing that such statement will be relied upon,

even when no fiduciary or contractual relationship exist. This was laid down in Hedley Byrne & Co Ltd v Heller & Partners. In this case, Kowope Bank Ltd who issued the letter of reference relied upon by Xee credit Ltd, which turned out to be untrue shall be liable to be sued by Xee Credit Ltd for damages for the losses incurred by it as a result of the negligent misstatement given in the reference letter.

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## SALE OF GOODS

### Contents

- 9.0. Learning objective
- 9.1 Learning outcomes
- 9.2 Introduction
- 9.3 Goods defined
- 9.4 Sale of goods distinguished from other forms of contract
- 9.5 Elements of sale of goods contract
- 9.6 Transfer of property
- 9.7 Property and possession
- 9.8 Reservation of right of disposal
- 9.9 The consequence of sales
- 9.10 Transfer of title
- 9.11 Performance of the contract
- 9.12 Rights of a seller
- 9.13 Rights of a buyer
- 9.14 Chapter review
- 9.15 Worked examples

## 9 Sale of Goods

### 9.0 Learning objective

This chapter explains the formation and implementation of contracts of sale of goods as well as the rights and obligations of the parties.

### 9.1 Learning outcomes

It is expected that at the end of this chapter, readers should be able to:

- (a) identify goods;
- (b) explain the duties and rights of a seller and buyer;
- (c) understand how property, possession and title in goods are passed in a contract of sale of goods; and
- (d) identify the remedies that the law provides for breach of the parties' obligation.

### 9.2 Introduction

This chapter presents to the reader the legal meaning and implication of goods. It also treats the duties of buyers and sellers under sales of goods as well as passing of goods or property under the Sale of Goods Act.

The main law on contract of sale of goods in Nigeria is the Sale of Goods Act 1893, which is a statute of general application (S.O.G.A) in Nigeria. It must be noted that the Act applies only in the States of Nigeria that have not enacted their own laws on sale of goods. However, many states of the federation have enacted their own Sale of Goods Laws that are in substantial conformity with the 1893 Act. For ease of reference, this text cites the provisions of the Sale of Goods Act since the provisions of the state laws are similar to them.

In addition to statutes, common law principles apply to sale of goods contracts. A contract of sale of goods is defined in section 1 of the Sale of Goods Act as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a monetary consideration called the price."

Thus, apart from the well-settled elements of a valid contract, the elements of goods and monetary consideration must also be present. This means that there must be both an agreement to sell and a sale in a sale of goods transaction. A sale is a contract where the property in the goods is transferred from the seller to the buyer upon a money consideration called price. A sale cannot be by barter.

Where the transfer of property (ownership or title) in the goods is to take place at a future date/time or subject to certain conditions to be fulfilled thereafter, it is not a sale but an agreement to sell. When the time elapses or the conditions are fulfilled subject to which the title in goods is to be transferred, the agreement to sell becomes a sale. It is imperative that the seller at the time of sale, expressly or impliedly, has good title to sell.

### 9.3 Goods defined

Section 62 of the Sale of Goods Act, defines 'Goods' as "... all chattels personal other than *choses in action* and money." Goods also include things attached to land or forming part of land but which, according to the parties' agreement, will be severed before sale or under contract of sale.

Goods are classified into:

- (a) **existing goods:** goods owned and in possession of the seller at the time of the contract;

- (b) **future goods:** goods to be manufactured or acquired by the seller after the contract for sale has been formed;
- (c) **ascertained/specific goods:** defined by section 62 of the Sale of Goods Act as goods identified and agreed upon at the time the contract of sale was made; and
- (e) **unascertained goods:** goods that were not identified and agreed upon at the time of contract.

The preceding classification is significant in determining when property passes from the owner to the buyer and is relevant at the time of contract. Unascertained goods are not subject of a sale of goods contract as property in the said goods cannot pass until the goods are ascertained.

## 9.4

### Sale of goods distinguished from other forms of contract

#### 9.4.1 Contract of sale and hire purchase

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 instalment payment by the hirer in a hire purchase transaction, the relationship is terminated and the property reverts to the owner.

#### 9.4.2 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 a sale of goods, there is no absolute transfer of property in a pledge.

#### 9.4.3 Contract of sale and bailment

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.

#### 9.4.4 Contract of sale and mortgage

A mortgage is a transfer of property from the mortgagor to the mortgagee so as to secure a debt. The subject matter of the mortgage is redeemable upon payment of the debt unlike sale of goods contract, which permanently transfers the property.

## 9.5

### Elements of sale of goods contract

Certain elements must be present for there to be a sale of goods contract. The elements that are essential to a sale of goods contract are:

- (a) a contract between the parties, which may be by words of mouth, in writing, or partly written and partly oral;
- (b) a price fixed or left to be fixed in a manner to be agreed upon between the parties;
- (c) capacity of the parties to contract as required in any standard contract (the rules governing contracts entered into by infants as well as drunken and insane persons also apply to contracts for sale of goods entered into by them also; and
- (d) conditions and warranties as parts of contracts of sale of goods. Whether a term is a condition or warranty would depend on the construction of the contract. In certain cases a condition is used interchangeably with a warranty. However, a condition is a fundamental term, which goes to the root of the contract and entitles the aggrieved party to a rescission of the

contract. A warranty on the other hand entitles the aggrieved party to claim damages only, or in the case of goods, to reject the goods and treat the contract as repudiated. Also, under the Sale of Goods Act, conditions and warranties in a contract could be implied or express.

#### 9.5.1 Implied terms of contract of sale of goods

The express terms of a contract of sale of goods are usually stated by the parties to the transaction and need no exposition in this text. The implied terms are however assumed or presumed in contracts to sell and the actual sale and are considered as follows:

- (a) **Title:** According to Section 12 (c) of the Sale of Goods Act, there is an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and in the case of an agreement to sell, he will have a right to pass property at the time the interest is to pass. There is also the implied warranty that the goods sold are free from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer would enjoy quiet possession.
- (b) **Description:** Where goods are to be sold by description under a sale of goods contract, there is an implied condition that the goods supplied must correspond with the description. If the sale is by sample and by description, the goods must correspond with both the sample and the description.
- (c) **Sample:** Where there is a sale 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 of comparing the sample and 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 a satisfactory quality and are fit for the purpose for which they are intended. Under this head, there are two subheads concerning the quality of the goods namely, merchantable quality and fitness for purpose.
- (e) **Merchantable quality** refers to the quality of goods sold. Goods sold under a sale of goods contract must be of good quality but this implied condition would not apply if the defects in the goods could have been revealed by an examination of the goods by the buyer.
- (f) **Fitness for purpose** is an implied condition of a contract that where a buyer makes known to the seller the purpose for which he requires the goods and that he trusts in the seller's skill or judgment to buy, the seller is obliged to ensure that the goods fit the purpose for which they are bought. The buyer's reliance on the seller's skill or judgment need not be total or exclusive, but it must be substantial and effective. The goods to be sold under a contract of sale of goods must also not have perished or been destroyed either at the time of the agreement to sell or at the actual time of sale.

Also, under the Sale of Goods Act, there are prescribed customs and usage that should be complied with in the transaction; and the parties must adhere to them strictly. Any deviation from such prescription would amount to a breach of implied condition and warranty.

## 9.6 Transfer of property

In a sale of goods contract, property in the goods (i.e. ownership of the goods) is transferred to the buyer by virtue of the contract of sale without further need to execute an instrument of transfer. There are four elements of this transfer.

These are the:

- (a) distinction between property in and possession of goods;
- (b) rules governing the transfer of ownership of, or property in goods;
- (c) seller's right to defer the time of the transfer of title (i.e. reservation of right of disposal; and
- (d) consequences of sale, e.g., transfer of benefits or risk in respect of the goods.

## 9.7 Property and possession

Property in goods means ownership of or title to the goods. On the other hand possession, as a general rule, is the physical control or custody of goods. The transfer of property in goods is not dependent on the transfer of possession.

It is therefore possible for one person to have possession whilst another has property in goods.

### 9.7.1 Transfer of ownership or property in goods

In sale of goods contract, the transfer of property in goods is fundamental, especially where after an agreement to sell has been entered into and the goods are seized or destroyed. The Sale of Goods Act lays down rules for determining the exact time at which the property in the goods pass. These rules under the Act are however dependent on whether the goods are unascertained or specific.

- (i) **Unascertained goods:** Where the goods sold are unascertained at the time of sale, ownership in them does not pass to the buyer until the goods are ascertained. If there is something that needs to be done before the goods are delivered, property in the goods would not pass until the goods are ascertained and the thing that needs to be done is done.
- (ii) **Specific goods:** Property in the goods in a contract for sale of specific or ascertained goods passes from the seller to the buyer at such time (if any) as the parties may have agreed expressly or impliedly. However, where the parties fail to stipulate the time at which the property is to pass, then recourse must be made to certain rules laid down by the Act for ascertaining the time at which property passes. The Rules are:

**Rule 1 -** Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property passes when the contract is made, irrespective of the time of payment. The operative words are 'unconditional contract' and 'deliverable state';

**Rule 2 -** Where the contract is for specific goods and the seller is bound to do something to the goods to put them into a deliverable state, the property does not pass until this has been done and the buyer has notice;

**Rule 3 -** Where specific goods are in a deliverable state but the seller still has to do some act such as weighing, measuring or testing the goods, the property does not pass until the act is done and the buyer has notice of it;

**Rule 4 -** Where the goods are delivered on approval or on sale or return basis, the property passes to the buyer:

- (a) When the buyer communicates his acceptance or approval to the seller or does something to adopt the transaction; and
- (b) If the buyer retains the goods beyond a fixed or reasonable time without giving notice of rejection; and

**Rule 5 -** In a contract for unascertained or future goods sold by description, the ownership of the goods passes to the buyer when the goods of that description that are in a deliverable state are unconditionally appropriated by either party with express or implied assent of the other. Also, a seller who delivers goods to the buyer or to a carrier for transmission, without reserving a right of disposal, is deemed to have unconditionally appropriated the goods to the contract.

## 9.8 **Reservation of right of disposal**

In a contract for the sale of specific goods or a subsequent appropriation of unascertained goods to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until the fulfillment of certain conditions. In such a case, notwithstanding the delivery of the goods to the buyer or to the carrier, the ownership of the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. The two circumstances in which a seller is deemed to reserve the right of disposal are where:

- a. a seller ships goods and by the bill of lading the goods are deliverable to the order of the seller or to his agent, the seller is deemed to reserve the right of disposing of the goods; and
- b. a seller sends a bill of exchange for the price of the goods to the buyer with a bill of lading for the latter's acceptance, if the buyer does not accept the bill of exchange, he must return the bill of lading as well.

## 9.9 **Consequences of sale**

On the completion of a contract of sale, all the rights and liabilities in respect of the goods are transferred to the buyer as the new owner of the goods. In other words, all benefits and losses accrue to the buyer. Therefore, unless otherwise agreed between the parties, the risk of loss or damage to the goods is borne by the seller until the ownership of the goods is transferred to the buyer. Where delivery is delayed through the fault of either of the parties, then, the risk is upon the party at fault as regards any loss especially if the loss would not have occurred but for such fault.

## 9.10 **Transfer of title**

As a general rule, only the owner of goods, or a person acting with the authority or consent of the owner of goods, can give good title. Thus, a seller with no title or with defective title who acts without the authority of the true owner can only pass the same defective interest to a buyer. To this rule, the following exceptions exist:

- (a) **Market overt:** Where goods are sold in a marketplace according to the usage of the market, the buyer acquires good title notwithstanding that the seller neither owns nor has the authority to sell the goods. The buyer must however buy in good faith and without notice of the defect in title. Where it turns out that the goods are stolen goods, the goods revert to the original owner if the thief is prosecuted and convicted of stealing the goods;



- (b) **Sale under a voidable title:** Where the seller of goods has a voidable title, (i.e. a title gained by fraud, misrepresentation or fundamental mistake), the buyer acquires good title provided he acquired them in good faith and without notice of the seller's defective title. If the seller's title is however void, the buyer acquires no title to the property as the doctrine of *nemo dat quod non habet* (you cannot give what you do not have) would apply;
- (c) **Estoppel:** A sale of goods by a person who is neither the real owner of the goods nor the one authorised to sell them may, nevertheless, confer a valid title to a *bona fide* buyer if the true owner either by words or conduct gave the buyer reason to believe that the seller was either the owner or had authority to sell;
- (d) **Sale by a seller in possession:** Where a seller is in possession of goods or documents relating to goods, the transfer by him of such goods or documents of title under a sale, pledge or other disposition to a person receiving them in good faith without notice of the previous sale shall be valid;
- (e) **Sale by a buyer in possession:** Where a buyer who has bought or who has agreed to buy goods obtains possession of the goods or documents and delivers same or transfers the goods either by sale or other disposition to some other person who receives same in good faith and without notice of the right of the original seller, the sale is valid and the new buyer obtains good title;
- (f) **Sale by mercantile agents:** Where a mercantile agent disposes, in the ordinary course of his business, of goods or documents of title to goods entrusted to him to a bona fide third party for sale, such disposition shall be binding and valid notwithstanding that the disposition may have been done without the authority of the principal; and
- (g) **Sale under common law or statutory powers:** A person to whom goods have been pledged may sell the goods pledged. A Sheriff of a court may also sell goods seized by virtue of an order of court and pass valid title.

#### 9.11 Performance of the contract

It is the duty of a seller to deliver the goods and the duty of the buyer to accept and pay for the goods under a sale of goods contract. Delivery and payment ought to run concurrently, and the buyer must be willing as well as able to pay the price in exchange for possession and ownership of the goods.

Delivery has been defined as the voluntary transfer of possession from one person to another and covers the symbolic as well as the physical transfer. Delivery may be made by the seller doing an act which puts the goods in the custody or under the control of the buyer or his authorised agent, or by the seller transferring the means of control over the goods to the buyer or his authorised agent.

## 9.12 Rights of a seller

A seller of goods is deemed to be an unpaid seller when the whole or part of the price remains unpaid, or when the cheque, bill of exchange or negotiable instrument has been received but value has not been received in respect of same. The unpaid seller has two classes of rights, (a) rights against the goods, and (b) rights against the buyer.

- (a) **Rights against the goods:** A seller has the following rights against the goods:
- i. **Right of lien:** A seller's right of lien is a right in equity to withhold goods until the price is paid. This right only exists when the seller has actual possession of the goods either as principal or as agent. This right can be exercised when the goods are sold without any stipulation as to credit, or the terms of credit have expired or the buyer has become insolvent. This right is lost where the goods have been delivered to a carrier for onward transmission to the buyer, or the buyer or his lawful agent is in possession or by waiver of the right by the seller;
  - ii. **Right of withholding delivery:** A seller may withhold delivery of the goods where neither ownership nor possession has passed to the buyer; and
  - iii. **Stoppage of goods in transit:** An unpaid seller has the right to stop goods in transit before they are actually received by the buyer. The seller may exercise this right where the consideration remains unpaid, the buyer is insolvent, and the goods are actually in the course of transit. This right is however defeated if any person to whom a document of title to goods has been lawfully transferred further transfers the goods to a third party.
- (b) **Rights against the buyer:** In addition to rights against the goods, an unpaid seller has other rights against the buyer. The unpaid seller may sue for the price of the goods sold or for damages for non-acceptance of the goods.
- i. **Action for recovery of price:** As a general rule and in the absence of any contrary agreement, the seller's obligation to deliver the goods runs concurrently with the buyer's obligation to pay the price. Where property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods, the seller may sue him for the price.
  - ii. **Action for damages:** Where a buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract. Special damages may also be recoverable by the seller from the buyer not only for the buyer's refusal to accept the goods the seller was willing to deliver which the buyer refused to collect, but also for the cost of care and warehousing of the goods.

## 9.13 Rights of a buyer

Under a sale of goods transaction, the buyer has rights, which include:

- a. **Action for damages for non-delivery:** Where a seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may bring an action against the seller for non-delivery of the goods. The measure of damages will be the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. The buyer is however, under an obligation to minimise his loss arising from the non-delivery of the goods;
- b. **Specific performance:** Where the seller fails to deliver specific or ascertained goods, the buyer may apply to court for an order of specific performance of the contract. If this remedy of specific performance is granted, the seller cannot withhold the goods with the hope of paying damages but must deliver the goods to the buyer;
- c. **Action in tort:** A buyer under a sale of goods contract to whom property in the goods has passed may sue the seller in tort for detainment or conversion if the goods are not delivered;
- d. **Repudiation:** Where there is a breach of a condition of the sale of goods contract, a buyer may reject the goods and refuse to pay. This act of rejection of the goods for breach of a condition is known as repudiation of the contract;
- e. **Action for breach of warranty:** Where there is a breach of warranty by the seller, or where the buyer is compelled to treat a breach of condition as a breach of warranty, the buyer is entitled to:
  - i. reject the goods totally;
  - ii. institute an action against the seller for extinction or diminution of the price; or
  - iii. institute an action against the seller for breach of the warranty.

## 9.14 Chapter review

This chapter has reviews, defines and explains a sale of goods transaction, contrasting it with similar legal concepts.

## 9.15 Worked examples

### 9.15.1 Multiple-choice questions

1. Which of the following is **not** an implied term in a sale of goods contract?
  - A. The goods corresponding with the description
  - B. The sample of goods corresponding with the bulk
  - C. The goods being of satisfactory quality
  - D. The government being informed about the transaction
2. In sale of goods, the price is referred to as the
  - A. Income
  - B. Consideration
  - C. Profit

- D. Title
3. Goods, which are owned and in possession of the seller at the time of sale are
- A. Existing goods
  - B. Manufactured goods
  - C. Ascertained goods
  - D. Intellectual property
4. In a sale of goods transaction sale is the transfer of
- A. Possession
  - B. Possession and property
  - C. Property
  - D. Bailment
5. Section 62 of the Sales of Goods Act describes goods to include things attached to land or forming part of it except
- A. Hats
  - B. Books
  - C. Computer software
  - D. Choses in action and money

#### 9.15.2 Open-ended questions

1. Explain sale of goods contract.
2. Bright has recently acquired a water-packaging factory in Eputu, Lagos State. In order to raise money to rehabilitate the factory, he has invited water vendors and retailers in the area to come and purchase sachet water at a discount by advance deposit of money. Festus who sells sachet water in Sangotedo has made a deposit for twenty bags of water. During the production of the sachet water, Bright got a contract for bottled water and decided to buy bottles and produce only table water. Festus is displeased with the change of plan by Bright as bottled water is not viable as a product at the motor park. Festus is at a loss as to how to deal with Bright and has asked for your opinion on the matter.

#### Required:

Advise Festus.

3. Explain the term 'goods' under a sale of goods contract.

#### 9.15.3 Suggested solutions to multiple-choice questions

- 1. D
- 2. B

3. A
4. B
5. D

#### 9.15.4 Suggested solutions to open-ended questions

1. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a monetary consideration called the price.
2. Festus would be referred to as an unpaid seller under a sale of goods Act. The rights of an unpaid seller such as, Festus who has made a deposit for the goods would be of two classes:
  - (a) Rights against the goods; and
  - (b) Rights against the buyer.

The rights against goods include a right of lien, the right to withhold delivery of the goods, and stoppage of goods in transit.

The rights against the buyer include an action for recovery of price and an action for damages. In this case, unless Festus has goods belonging to Bright within his control, he cannot exercise most of the rights under rights against the goods. He would however be able to sue to recover the price he has paid and damages for breach of the contract of sale.

3. Goods under the sale of goods Act maybe described as all chattels personal other than choses in action and money. Goods include things attached to land or forming part of land but which the parties have agreed will be severed before sale. Goods can be classified as existing goods, future goods, ascertained or specific goods and unascertained goods.

## HIRE PURCHASE

### Contents

- 10.0 Learning objective
- 10.1 Learning outcomes
- 10.2 Introduction
- 10.3 Nature of hire purchase
- 10.4 Elements of a hire purchase agreement
- 10.5 Passing of ownership
- 10.6 Relevant proportion principles
- 10.7 Duties and rights of parties to a hire purchase contract
- 10.8 The third party in a hire purchase contract
- 10.9 Rights of owner and hirer against third party
- 10.10 Termination of hire purchase agreement
- 10.11 Remedies for breach of hire purchase agreement
- 10.12 Chapter review
- 10.13 Worked examples



## **10 Hire Purchase**

### **10.0 Learning objective**

This chapter teaches concisely the meaning and law on formation of a contract of hire purchase as well as the duties and rights of the parties to it.

### **10.1 Learning outcomes**

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

- (a) explain hire purchase;
- (b) understand the elements of a hire purchase contract under the Common Law and under the Hire Purchase Act; and
- (c) understand the obligations and rights of the parties to a hire purchase contract as well as how the contract could be terminated.

### **10.2 Introduction**

This chapter presents the reader with a brief historical background of hire purchase in Nigeria. The concept of hire purchase is explained and the rights and obligations of parties under a hire purchase contract are also discussed. The circumstances under which a contract of hire purchase may be terminated are stated.

### **10.3 Nature of hire purchase**

A contract of hire purchase is a contract in which the owner of goods transfers possession of the goods to the hirer in consideration of the payment of a certain amount periodically, which gives the hirer an option to purchase the goods at the end of the period or after payment of the agreed instalments. Put more succinctly, it is a contract of hire of goods with an option to purchase it. Until the hirer exercises the option to purchase, however, he has not bought the goods. All payments made by the hirer are rental payments and even though the hirer may refuse to exercise his option to purchase, the owner cannot refuse to sell the goods once the hirer has paid all the instalments due.

Hire purchase is distinguishable from other forms of sale such as agreement to sell, credit sale, conditional sale, contract of sale, purchase agreement, mortgage, or sale of goods because it is a contract which starts off as a lease but has the potential to crystallise into an outright purchase. In addition, in the course of the hire, either party is at liberty to terminate the agreement.

Andrew Hicks in his book, ***Nigerian Law of Hire Purchase***, gave an appropriate illustration of hire purchase transaction thus:

“A person entering into a hire-purchase agreement for the acquisition of a car may imagine that he is buying the car that it becomes his as soon as he takes delivery and begins to pay instalments. The legal nature of the agreement is very difficult, however, as he is in law not purchasing the car but is only hiring it while the instalments are being paid. Furthermore, he does not become the owner of the car until payment is complete. In one type of hire-purchase agreement, the car becomes his when, having paid off the instalments, he exercises an ‘option to purchase’ contained in the agreement, by paying a small option fee. In the other type of agreement, he may at any time terminate the hiring, but if he does not do so, the car becomes his when he actually completes the instalmental payments.

If the option to purchase is not genuinely optional or if there is no right to terminate prematurely the hiring and repayment, the transaction is not a hire-purchase as there is effectively an obligation to buy”

In summary, a hire purchase is distinguishable from a sale by the fact that the hirer does not legally set out to buy but to hire goods. The incident of purchase only comes at the end of the instalmental payments if the hirer opts to buy. This position accounts for the reason the parties are referred to as hirer and owner and not buyer and seller.

The law on hire purchase grew out of the common law with the aim of meeting the shortfalls or inadequacies in the Factors Act and Sale of Goods Act concerning contracts of hire. The injustice suffered by many hirers at the hands of owners encouraged this growth. Whilst the common law gave an outline of the principles guiding hire purchase, the Hire Purchase Act (Cap H4) Laws of the Federation of Nigeria 2004 advanced the cause of the hirer. This Act provides definitions, form, and contents of hire purchase transactions.

The three reasons that have been advanced for the adoption of the hire purchase system are:

- a. it allows credit to someone who is unable to pay cash for the goods he wants, for which he would be glad to pay some deposit and thereafter pay the balance instalmentally at a stipulated rate of interest;
- b. it is a third-party transaction that is not subject to the rules of privity of contract is created. A third party who is neither the owner nor the producer of the goods or chattel but who has the credit to put up agrees to enter into a hire purchase agreement with the hirer; and
- c. it makes possible an evasion of the money lenders law.

#### **10.4 Elements of a hire purchase agreement**

Major elements of a hire purchase agreement as stated in the Hire Purchase Act (Cap H4) Laws of the Federation of Nigeria 2004 include that:

- a. the owner must state in writing to the prospective hirer a price at which
- b. the hired goods may be purchased in cash;
- c. the amount of instalments must be stated in the agreement;
- d. the memorandum containing the cash price must be signed by the hirer
- e. and the owner or his duly authorised representative;
- f. any term in the agreement that entitles the owner to enter the premises of the hirer to repossess the goods is void (section 3);
- g. information on the parties when required under the agreement (section 7); and
- h. the hirer has the power to determine the hire purchase agreement at any time before the final instalment and return the goods, otherwise the owner may recover the goods by court action.

#### **10.5 Passing of ownership**

Passing of property refers to the point in time title in a property or goods moves away from the owner to the purchaser. However, since a hire purchase is not a sale ab initio (from the beginning), the issue of passing of property does not arise until if, and when, the hirer exercises his option to purchase.

#### **10.6 Relevant proportion principle**

The Hire Purchase Act sanctions the seizure of hire purchase goods without an order of court if it can be ascertained that a “**relevant proportion**” of the price had been paid.

Section 9(4) of the Hire Purchase Act defines “relevant proportion” as:

- (a) in the case of goods other than motor vehicles, half of the price;

- (b) in the case of motor vehicles, three fifths of the total hire purchase price. The hirer however, has the right to terminate the hire purchase agreement at any time before the final payment.

Concerning motor vehicles, section 9(5) of the Act provides that if the hirer owes three or more instalments, the owner is at liberty to remove the vehicle to any premises under his control pending the determination of any action on the subject matter. It is important to note, however, that the owner shall be liable to the hirer for any loss or damage arising from the removal.

## **10.7 Duties and rights of parties to a hire purchase contract**

Parties to a hire purchase contract owe mutual duties to each other and enjoy rights there under.

### **10.7.1 Duties of the owner**

The duties of the owner under the Hire Purchase Act, which constitute implied terms of the contract are to:

- (a) disclose the cash price (value) of the goods to the hirer at the inception of the contract;
- (b) valid title in the goods subject matter of the contract;
- (c) give the hirer quiet possession of the goods;
- (d) deliver the goods to the hirer;
- (e) accept instalmental payments;
- (f) deliver the exact quantity of goods agreed upon; and
- (g) repossess goods subject of hire purchase, except in accordance with the provisions of the Hire Purchase Act.

### **10.7.2 Rights of the owner**

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

- (a) information about the goods from the hirer;
- (b) re-possess the goods where the agreement is determined by the hirer by court action; and
- (c) repossess 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.

### **10.7.3 Duties of the hirer**

The duties of the hirer under the hire purchase contract include:

- (a) accepting the goods, subject matter of the contract;
- (b) taking reasonable care of the hire purchase goods;
- (c) paying the instalments as and when due; and
- (d) disclosing information about the goods to the owner as and when required by the owner.

#### 10.7.4 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 instalments to be paid and the cash price of the goods; and
- (d) choose the insurance and the garage to maintain the goods or motor vehicle.

#### 10.8 The third party in a hire purchase contract

As a general rule, there is no privity of contract between the parties to a hire purchase agreement and third parties. As such, the hirer cannot pass valid title in the goods, subject matter of the hire purchase until he has purchased them. There are however, certain exceptions to this rule. These include situations in which the:

- a. hirer sold the goods and immediately paid off the outstanding instalments, thereby exercising his option to purchase, since this validates what would have become a defective transfer of title;
- b. sale is by court order in execution of a writ of fieri facias (*fi. fa.*);
- c. purchase was made in market overt, i.e. a public and legally
- d. constituted market; or
- e. owner is stopped by his conduct from denying the seller's authority to sell, especially under the provisions of the sale of goods law.

#### 10.9 Rights of owner and hirer against third party

The rights that the owner may exercise against a third party who has acquired no good title to the goods are:

- a. recovery of the goods through peaceful means or by an action for *detinue*, that is, a demand for its return and subsequent refusal to do so by the third party;
- b. recovery of the goods or a right to sue for conversion or damages as the case may be;
- c. damages for conversion of the goods where the third party has interfered with the owner or the hirer's possession or use of the goods; and
- d. an action by the owner for negligence against the third party and consequent recovery damages.

#### 10.10 Termination of hire purchase agreement

A hire purchase agreement may be terminated by:

- a) a mutual agreement of the parties to rescind the agreement;
- b) the performance of all the obligations under the agreement;
- c) a provision in the agreement which allows the hirer to terminate the contract at any stage of the agreement without prejudice to his option to purchase the goods;
- d) supervening circumstances like fire, destruction, act of God and other similar circumstances outside the control of the parties;
- e) Repudiation by an aggrieved party since the aggrieved party may sue for the breach of an express or implied term and may in addition repudiate such agreement; or

- f) an order or judgment of court for conversion or detinue, which may in effect bring the agreement to an end.

## **10.11 Remedies for breach of hire purchase agreement**

The remedies available to parties under a hire purchase agreement are usually determined by the terms of the agreement itself.

### **10.11.1 Remedies available to the owner**

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.

### **10.11.2 Remedies available to the hirer**

Where the owner breaches the hire purchase agreement, the hirer shall have the following remedies against the owner:

- (a) The hirer may repudiate the contract; and
- (b) Where the breach is as a result of defect in the owner's title, the hirer can sue for damages and recover his deposit.

## **10.12 Chapter review**

This chapter provides an overview of the law relating to hire purchase contracts. The position of third parties in hire purchase contracts is also explained.

## **10.13 Worked examples**

### **10.13.1 Multiple-choice questions**

1. A contract for hire purchase is not a sale contract because it gives the hirer the
  - A. Option to renew
  - B. Right to sell
  - C. Power to withhold
  - D. Option to purchase
2. The hirer in a hire purchase contract has the following rights **except** the right to
  - A. Use the goods
  - B. Quiet possession of the goods
  - C. Know the exact instalments to be paid
  - D. Repossess the goods
3. The owner of the goods on hire purchase owes the hirer a duty

to disclose the terms of the contract EXCEPT the

- A. Amount of money to be paid
  - B. Number of instalments to be paid
  - C. Lump sum
  - D. Premium
4. A hire purchase agreement may be terminated by all of the following, except
- A. A mutual agreement of the parties to rescind the agreement;
  - B. The performance of all the obligations under the agreement;
  - C. Supervening circumstances
  - D. Government
5. The remedies of a hirer against an owner for breach of the agreement include
- A. Repudiation
  - B. Subrogation
  - C. Incantation
  - D. Adoption

#### 10.13.2 Open-ended questions

1. A Hire purchase transaction is not a contract of sale.

**Required:**

Explain a hire purchase contract by contrasting it with a sale of goods contract.

2. Andrew has taken a popcorn machine on hire purchase from Felix. Andrew uses the machine to make popcorn in the premises of Elewa Polytechnic on a monthly instalmental payment of ₦1,000. Andrew has not paid the instalments for the past two months as polytechnics have been closed due to an industrial action by polytechnic lecturers. Felix is threatening to repossess the popcorn machine. Andrew is of the view that since he has paid a substantial part of the price, Felix cannot repossess the machine.

**Required:**

Advise the parties of their rights under the hire purchase law.

3. There are various duties of the hirer under a hire purchase agreement.

**Required:**

Explain **three** of these duties.

#### 10.13.3 Suggested solutions to multiple-choice questions

1. D



2. D
3. D
4. D
5. A

#### 10.13.4 Suggested solutions to open-ended questions

1. A hire purchase contract is a contract in which the owner of goods transfers possession of the goods to the hirer in consideration of the payment of a certain amount periodically and which gives the hirer an option to purchase the goods at the end of the period or after payment of the agreed instalments. It may also be described as a contract of hire with an option to purchase attached. A contract for hire purchase can be distinguished from a sale of goods contract by the fact that the parties to the hire purchase agreement do not intend to buy or sell but to hire or lease on terms.
2. Andrew is a hirer under a hire purchase contract and he has certain rights under the hire purchase law. He has paid some part of the hire purchase price and should be entitled to some reliefs. The doctrine of relevant proportion under the hire purchase law is a relief from seizure of hire purchase goods (except by order of court) available as a remedy to the hirer against the owner under the Hire purchase Contract if it can be ascertained that a 'relevant proportion' of the price had been paid. Andrew has a right to resist the repossession of the popcorn machine under this relevant proportion rule.
3. The duties of the hirer under the hire purchase contract include:
  - (a) accepting the goods, subject of the contract;
  - (b) taking reasonable care of the hire purchase goods;
  - (c) paying the instalments as and when due; and
  - (d) disclosing information about the goods to the owner as and when required by the owner.

# INSURANCE

## Content

- 11.0 Learning objective
- 11.1 Learning outcomes
- 11.2 Introduction
- 11.3 Insurance distinguished from assurance
- 11.4 Marine insurance
- 11.5 Insurable interest
- 11.6 Subrogation
- 11.7 Indemnity
- 11.8 Double insurance and contribution
- 11.9 Assignment of insurance policy
- 11.10 Chapter review
- 11.11 Worked examples

## **11 Insurance**

### **11.0 Learning objective**

This chapter presents in basic form the law of insurance, explaining its nature and guiding principles.

### **11.1 Learning outcomes**

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

- (a) meaning of insurance and the nature of insurance contracts; and
- (b) principles of insurable interest, subrogation and contribution in insurance as well as assignment of insurance policy.

### **11.2 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.

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.

### **11.3 Insurance distinguished from assurance**

'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.

#### **11.3.1 Formalities**

Although no strict formalities are required for the formation of an insurance contract, it is required that the elements of a contract, to wit, offer, acceptance, consideration and intention to create legal relations, must be present before a valid insurance can come into place.

In practice, the proposed insured person makes an offer to the insurer by completing what is known as a proposal form. The contract is formed when the insurer unconditionally assents to the proposal form as completed by the proposed insured. If the insurer assents to the offer with a condition, for example, that the contract would be subject to the prior payment of premium, then it is said that the insurer makes a counter-offer, in which case the tendering of the premium becomes the acceptance.

The insurance contract comes into being and is evidenced by what is generally referred to as the insurance policy.

### **11.4 Marine insurance**

Although writing is inevitable in the formation of insurance contracts, it is not a legal requirement except in the formation of marine insurance as is required by virtue of Section 24(1) of the Marine Insurance Act, Cap M2, Laws of the Federation of Nigeria, which provides that, "Subject to the provisions of any statute, a contract of marine insurance shall not be admissible in evidence unless it is embodied in a marine policy in accordance with the form in the First Schedule to this Act or to the like effect".

#### 11.4.1 The proposal form

Insurance contracts differ from all other contracts in some unique respects. One of such vital characteristics of insurance contracts is that they are contracts of utmost good faith. This means that the contract of insurance depends heavily on trust and truthfulness. Under this characteristic, parties (especially the insured) are expected to make full disclosures of all material facts to each other.

Section 58 of the Insurance Act 2004, Laws of the Federation of Nigeria makes express provision on the use of the proposal form and the elicitation of material facts. By the provision, "where an insurer requires an insured to complete a proposal form ... for insurance, the form shall be drawn up in such manner as to elicit all such information as the insurer considers material in accepting the application for insurance of the risk; and any information not specifically requested shall be deemed not to be material".

Furthermore, the section requires that the proposal form shall be printed in easily readable letters and must state conspicuously on its front page, a note declaring that where an insurance agent assists the applicant in completing the proposal form, the agent shall be deemed the agent of the applicant.

When the insurer gives the proposal form to the applicant to complete, the insurer is then said to make to the applicant an invitation to treat. When the applicant completes and submits the proposal form to the insurer, the applicant is said to make an offer for insurance contract to the insurer. If the insurer rejects the offer as contained in the proposal form, there is no contract. But if the insurer accepts it, then a contract of insurance comes into being. If however the acceptance by the insurer contains a stipulation that there is no cover until the first premium is paid, then the contract is not effective until such payment of premium is made.

#### 11.4.2 Utmost good faith

A contract of insurance is an example of contracts in which, by their nature, only one party thereto has knowledge of all the material facts so that such a party is required by law to disclose all such material facts in utmost good faith. This is a fundamental requirement of the contract of insurance. 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. See Lord Mansfield in **Carter v Boehm** where he demonstrated that, Insurance is a contract upon speculation where the special facts upon which the contingent chances is to be computed lie generally in the knowledge of the assured only, so that good faith requires that he should not keep back anything which might influence the insurer in deciding whether to accept or reject the risk.

This is the old common law position whereby every fact was material which would guide a prudent insurer whether he will take the risk and, if so, at what premium and on what conditions and it was irrelevant that the materiality of a fact was not appreciated by the insured or that the non-disclosure led to a loss or not.

The Insurance Act by its Section 58 quoted above has modified this common law position especially where a proposal form is employed by the insurer in the processes leading to the formation of the insurance contract. The position now is that where a proposal form is used by the insurer, 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.

#### 11.4.3 Material facts

Generally, what is material fact depends on the particular 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.

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 be 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.

#### 11.5 Insurable interest

Another fundamental principle of the insurance contract is the principle of insurable interest by which it is required that an insured person must have some legal relationship with the subject matter of insurance worthy of preservation otherwise the contract would be void. This is a statutory requirement since the enactment of the Life Assurance Act of 1774 and not a common law requirement. The requirement is still statutorily retained in Nigeria, and by Section 56 (1) of the Insurance Act, Laws of the Federation of Nigeria 2004, it is expressly declared that:

A policy of insurance made by a person on the life of any other person or on any other event whatsoever shall be null and void where the person for whose benefit, or on whose account the policy of insurance is made has no insurable interest in the policy of insurance or where it is made by way of gaming or wagering.

A person will have an insurable interest in another person or in a thing or an event if the person will benefit from the continued existence of the other person, thing or event and will be prejudiced by the loss. "[A] person has an insurable interest in property if he has some kind of interest in it, such as absolute interest, partial interest, defeasible interest or voidable interest". See Ezejiofor, Okonkwo & Ilegbune (1982) *Nigerian Business Law* (Sweet & Maxwell Ltd.) London) p. 343.

By Section 56 (2) of the Insurance Act, a person is deemed to have an insurable interest in the life of any other person or in any other event where he stands in any legal relationship to that person or other event in consequence of which he may benefit by the safety of that person or other event or be prejudiced by the death of that person or the loss from the occurrence of the event. A person has an insurable interest in his own life and the life of his spouse without special proof of pecuniary interest.

However, it has been held, based on the principle of separate personality of a company, that a shareholder has no insurable interest in the assets of the company the shares of which he holds and therefore cannot insure them (**See *Macaura v Northern Assurance Co. Ltd.* (1925) AC 619.**

Also, a creditor has an insurable interest in the life of his debtor to the extent of the debt but, generally, has no insurable interest in the property of his debtor.

A surety has an insurable interest in the principal debtor's life. An employee engaged for a term of years has an insurable interest in his employer's life while the legal owner of a property will have an insurable interest in his property. A vendor, purchaser, a mortgagee, mortgagor, a trustee and a bailee all have insurable interest in the property that is the subject matter of their respective transaction.

### 11.6 Subrogation

Subrogation is a fundamental doctrine of insurance whereby no one is allowed to profit from his loss. The doctrine is better explained with illustrations of an insured person who suffers a loss as a 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 financial position than he was before the loss occurred.

### 11.7 Indemnity

Generally, an insurance contract is one of indemnity. This means 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. This however does not apply to contingency insurance such as 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.

Since insurance is about indemnity, the doctrine of subrogation allows an insurer to step into the legal position of the insured in relation to a negligent third party against whom the insured has rights. Where an insured person has rights both against an insurer and a third party with respect to the same loss and the insurer pays the insured for the loss, by the doctrine of subrogation, the insurer steps into the rights of the insured against the third party with a view to recovering from the third party. The insured will be precluded from recovering from both the third party and the insurer since to do so will enable the insured recover more than the loss sustained and thereby encourage fraud and defeat the insurance doctrine of indemnity (See **Castellain v Preston** (1183) 11 Q.B.D. 560).

The rights to which the insurer steps into include the right of action.

The doctrine of subrogation is also provided for by statute in section 80 of the Marine Insurance Act 2004 as follows:

Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he shall thereupon become entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and shall thereby be subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

The right to subrogation in favour of the insurer does not arise unless the insurer has admitted the claim of the insured and has paid the sum payable under the policy. See **British India General Insurance Co. Ltd v Kalla** (1965) NMLR 347.

Also, an insurer, in exercising his right of subrogation cannot recover more than the amount he has paid to the insured in respect of the loss. See **Yorkshire Insurance Co. Ltd v Nisbet Shipping Co. Ltd** (1961) 2 All ER 487.

Where an insured receives further compensation from a third party after having



been indemnified by the insurer, the insured shall hold the additional compensation in trust for the insurer.

### **11.8 Double insurance and contribution**

There is no rule of law prohibiting a person from contracting more than one insurance policy in respect of the same subject matter or risk. In this respect, the general rule of law permits an individual to take out as many insurance policies and with as many insurers as he chooses. This is known as double insurance and it is provided for at Section 33(1) of the Marine Insurance Act as follows:

Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

The fact of the insured being over-insured does not however entitle him to recover more than an indemnity as subsection (2) (a) to the above section further provides that, "Where the assured is over-insured by double insurance, the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he shall not be entitled to receive any sum in excess of the indemnity allowed ...".

Where only one or only a number of the insurers can satisfy the claim of the insured, he shall be free to make his claim on that insurer or those insurers who cannot protest the claim on the ground that there are other insurers covering the risk.

But the insurer or insurers who have settled the claim of insured shall have rights to contribution from the other insurers whose policies cover the risk. It is known as the right of contribution whereby an insurer who has paid under a policy to call upon other insurers equally liable for the same insured risk to contribute to the payment. This right is founded upon equity but is also provided for at Section 81 (1) of the Marine Insurance Act that, "where the assured is over-insured by double insurance, each insurer shall be bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable ...".

For contribution to take place there must be:

- a. the risk which occurred must be common to both policies;
- b. the insurances having a common subject matter;
- c. the policies covering the same interest, i.e. all the policies must be in
- d. protection of the same interest of the insured;
- e. each policy being enforceable as at the date of loss (an invalid policy as the time of the loss cannot give rise to a claim of contribution); and
- f. the policy not excluding contribution.

### **11.9 Assignment of insurance policy**

An insurance policy creates rights enforceable in law in favour of the parties. Such rights are recognisable in law as choses in action. A chose in action is a right enforceable in law and is different from a chose in possession, which is a tangible property. Tangible properties are easily transferable from one to another e.g. by sale and delivery.

However because of the intangible nature of choses in action, transferring them from one person to another can only be achieved by way of assignment. An assignment in law is the transfer of a chose in action from one person known as the assignor to another known as the assignee.

The rights created under a contract of insurance are choses in action and are

assignable but because the rights under the insurance contract are personal rights, it must be pointed out that a transfer of the subject matter of insurance does not run with the rights under a subsisting policy of insurance. This is because of the doctrine of privity of contract, which will preclude the transferee of the subject matter of the insurance policy from acquiring rights and duties under the contract of insurance.

The provisions of Sections 51 and 52 of the Marine Insurance Act explain effectively the law regulating assignment of insurance policies generally. Subsection (1) of Section 51 thereof provides the general rule on assignment of policies and this is that, *“a marine policy shall be assignable unless it contains terms expressly prohibiting assignment, and a marine policy may be assigned either before or after loss”*.

This means that every insurance policy is assignable except where the policy expressly provides that it shall not be assignable.

Where a policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy shall be entitled to sue on the policy in his name. The defendant also shall be entitled to make any defence arising out of the contract, which he would have been entitled to make if the action had brought in the name of the person who effected the policy.

By Section 63 of the Insurance Act, a person to whom a policy has been assigned and is thereby or by other derivative title entitled to a policy of life insurance shall be entitled to sue in the name of the assignor but the assignee shall not have a better title than the insured.

#### **11.9.1 Legal and equitable assignment**

An assignment of an insurance policy could either be equitable or legal. An equitable assignment requires no particular form so long as there is a declared intention to assign. But an assignment will be a legal assignment where the fact of the assignment is endorsed on the policy itself or a separate instrument is put in place declaring the fact of the assignment. Subsection (3) of Section 51 of the Marine Insurance Act provides that *“a marine policy may be assigned by endorsement thereon or in other customary manner”*.

#### **11.9.2 Notice of assignment**

Generally, a policyholder can assign his interest in the policy without the consent of the insurer except where the policy expressly so provides but, for the assignment to be legal assignment and not take effect only as an equitable assignment, it is required that notice of the assignment be given to the insurer. Where notice to the insurer is required but not given, payment of the assured money to the assignor notwithstanding the assignment shall be good and effective discharge on the part of the insurer.

Section 64 of the Insurance Act expressly requires that in the case of a life insurance, notice of an assignment must be given to the insurer otherwise the assignment shall confer no right of action on the assignee. Subsection (1) of the section provides that *“no assignment of a policy of life insurance shall confer on the assignee or his personal representative any right to sue for the amount of the policy or the insured money, unless and until a written notice of the date and purport of the assignment is given to the insurer liable under the policy at his principal address of business”*.

The notice to the insurer is essentially of the date of the assignment as it is the date that regulates priority of all claims under the assignment of the policy and any payment made by the insurer in good faith in respect of the policy before notice of the date of an assignment is received by the insurer is valid against the assignee. See Section 64 (2) and (3) of Insurance Act.

### 11.9.3 Acknowledgement of notice

An insurer is required by the law to acknowledge the receipt of a notice of date of assignment duly given and such acknowledgement shall be conclusive evidence of receipt of the notice as against the insurer.

## 11.10 Chapter review

This chapter gives a working summary of the law and practice of insurance. It examines its core principles, including insurable interest, indemnity, materiality of facts, subrogation and contribution, as well as assignment of insurance policies.

## 11.11 Worked examples

### 11.11.1 Multiple-choice questions

1. A person who will benefit from the preservation of the subject matter of insurance is said to have \_\_\_\_\_ interest in the subject matter
  - A. Indemnifiable
  - B. Policy
  - C. Insurable
  - D. Insured
2. What is the insurance principle by which an insured is restored to his actual position before the occurrence of the loss insured against?
  - A. Utmost good faith
  - B. Restoration principle
  - C. Indemnity
  - D. Subrogation
3. Michael negligently drove his car against Angela's car worth ₦3.5 million, damaging it beyond repairs. Luckily, Angela's car has a comprehensive insurance cover and she recovers ₦3.5 million on the policy. Michael also pays Angela ₦2 million for the damage. Which principle of insurance will prevent Angela from benefiting from both the insurer and Michael?
  - A. Utmost good faith
  - B. Insurable interest
  - C. Subrogation
  - D. Indemnity
4. It is the position of the law that no one has an insurable interest in
  - A. His own life
  - B. The life of his spouse
  - C. The assets of a company in which he is a shareholder
  - D. An event the loss of which will prejudice him
5. Which principle of law precludes rights under an insurance contract

from running with the subject matter of an insurance contract?

- A. Assignment
- B. Double insurance
- C. Equity
- D. Privity of contract

#### 11.11.2 Open-ended questions

1. Uchenna invested the bulk of his retirement benefits in the shares of Heavensway Ltd, which he subsequently insured with Easyway Insurance Plc to ensure that nothing happens to his investment.

Heavensway Ltd recently suffered very bad trading season which has drastically affected the value of its shares on the stock exchange that the company has decided to voluntarily wind up.

Uchenna has filed a claim against Easyway Insurance Ltd to recover the insured sum in respect of his investment in Heavensway Ltd.

**Required:**

Advise Uchenna.

2. Explain the meaning of the following insurance terms:
  - (a) Utmost good faith
  - (b) Subrogation
  - (c) Indemnity
3. Explain the liability of an insurance agent who assists an applicant for insurance policy to complete a proposal form in the event of a refusal to pay a claim on the ground of non-disclosure.

#### 11.11.3 Suggested solutions to multiple-choice questions

1. C
2. C
3. C
4. C
5. D

#### 11.11.4 Suggested solutions to open-ended questions

1. This question raises the issue of insurable interest in insurance contracts.  
The position of the law is that nobody can insure a thing or the life of another unless he has an interest to protect in the subject matter of the contract of insurance. By Section 56 (1) of the Insurance Act, Laws of the Federation of Nigeria, 2004 “a policy of insurance made by a person on the life of any other person or on any other event whatsoever shall be null and void where the person for whose benefit, or on whose account the policy of insurance is made has no insurable interest in the policy of insurance or where it is made by way of gaming or wagering.”  
This means that an insured person must have some legal relationship with

the subject matter of insurance worthy of preservation otherwise the contract would be void.

In ***Macaura v Northern Assurance Co. Ltd.***, it was held that a shareholder has no insurable interest in the assets of the company the shares of which he holds and therefore cannot insure them.

Accordingly, in the instant case, Uchenna cannot be said to have an insurable interest in the shares of Heavensway Ltd to entitle him to have insured the shares of the company. The contract is void and Uchenna cannot claim under it. He is accordingly so advised.

- 2(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 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) **Subrogation** is a fundamental doctrine of insurance that prohibits an insured from profiting from his loss. It is an off-shoot of the principle of indemnity which is that an insured is only put back to the financial position he was before the occurrence of the event that has caused him a loss.

Therefore, subrogation allows that where an insured has rights against another person with regards to the subject matter of an insurance contract and such rights have been met, he cannot again benefit from the insurance company for the same loss.

Where an insurer has paid for the loss, the law will not permit the insured to retain both the compensation from a negligent third party and the payment under the insurance contract who shall be entitled to be subrogated, i.e. substituted to the rights of the insured against the negligent third party.

Since insurance is about indemnity, the doctrine of subrogation allows an insurer to step into the legal position of the insured in relation to a negligent third party against whom the insured has rights. Where an insured person has rights both against an insurer and a third party with respect to the same loss and the insurer pays the insured for the loss, by the doctrine of subrogation, the insurer steps into the rights of the insured against the third party with a view to recovering from the third party. The insured will be precluded from recovering from both the third party and the insurer since to do so will enable the insured recover more than the loss sustained and thereby encourage fraud and defeat the insurance doctrine of indemnity.

- (c) **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.

Doctrine applies to policies where actual compensation can take 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. An agent, under general agency laws, will have authority to bind his principal. So that where a person employs an agent to assist him to complete an insurance contract proposal form, such an agent will be taken as representing the legal interests of his principal so that he is able to bind the principal in completing the proposal form. Therefore, where the agent fails to disclose material facts in completing the proposal form, the principal will be liable under general agency laws.

This position of the law is now statutory in that Section 58 of the Insurance Act now expressly provides that where an insurance agent assists the applicant in completing the proposal form, the agent shall be deemed the agent of the applicant.

However, the said Section 58 of the Insurance Act, Laws of the Federation of Nigeria, 2004 also expressly provides that where an insurer requires an insured to complete a proposal form, the form shall be drawn up in such manner as to elicit all such information as the insurer considers material in accepting the application for insurance of the risk and that any information not specifically requested shall be deemed not to be material. In effect, an insurance agent completing a proposal form cannot be personally liable for non-disclosure but may make his principal liable for misrepresentation where he completes the form with falsehood.



# BANKING

## Contents

- 12.0 Learning objective
- 12.1 Learning outcomes
- 12.2 Introduction
- 12.3 Bank and the banker
- 12.4 Banking business
- 12.5 Bank customer
- 12.6 Rights of a bank
- 12.7 The Central Bank of Nigeria
- 12.8 Chapter review
- 12.9 Worked examples

## 12 Banking

### 12.0 Learning objective

This chapter focuses basic law of banking, including banking business as well as the duties and powers of a bank and its customer.

### 12.1 Learning outcomes

At the end this chapter is to explain the:

- (a) meaning of banks and other financial institutions;
- (b) duties of banks and other financial institutions;
- (c) the duties of bank customers; and
- (d) the powers, objects and duties of the Central Bank of Nigeria.

### 12.2 Introduction

This chapter discusses the meaning and functions of banks and considers the place of financial institutions as forms of banks. The Central Bank of Nigeria is also in focus in this chapter especially with regards to its duties and powers.

### 12.3 Bank and the banker

The terms 'bank' and 'banker' could be very difficult to define. The Bills of Exchange Act, 1882, which is a Statute of General Application, defines 'bank' as "anybody of persons, whether incorporated or not, who carry on the business of banking". It is now settled law by virtue of Section 131 of the Banks and Other Financial Institutions Act (BOFIA), 2004 that in Nigeria, a "bank" means, "a bank licensed under [the] Act", and that includes:

- a) **Commercial banks** - which transact banking business through the acceptance of deposits and payment of money through cheques and cash. A commercial bank is engaged more in every day, retail banking business than wholesale banking;
- b) **Merchant bank** - which means a bank whose business includes receiving deposits on deposit account, provision of finance, consultancy and advisory services relating to corporate and investment matters, making or managing of investment on behalf of any person; and
- c) **Specialised banks** - which "include Bank of Industry, Bank of Agriculture, Development Bank of Nigeria, Nigerian Export Import Bank, The Infrastructure Bank, Federal Mortgage Bank of Nigeria, Nigeria Mortgage Refinancing Company, primary mortgage banks, micro-finance banks, non-interest bank and such other banks as may be designated from time to time by the [Central] Bank.

The BOFIA also authorises the establishment of "**other financial Institution**" which is "any individual, body, association or group of persons, whether corporate or unincorporated, other than the banks licensed under [the] Act which, carry on the business of a discount house, finance company, money brokerage, authorised buying of foreign exchange, international money transfer services, mortgage refinancing company, mortgage guarantee company, financial holding company or payment service providers, regardless of whether such businesses are conducted digitally, virtually or electronically only and companies whose objects include factoring, project financing, equipment leasing, debt administration, fund management, private ledger services, investment management, local purchases order financing, and such other business as the [Central] Bank [of

Nigeria] may from time to time designate, regardless of whether such businesses are conducted digitally, virtually or electronically only” (Section 131, BOFIA).

Section 2(1) of BOFIA prohibits the carrying on of banking business in Nigeria by any person who is not a company duly incorporated in Nigeria holding a valid banking licence issued by the Central Bank of Nigeria under this Act.

Any person that violates that provision is liable on conviction to –

- (a) imprisonment for a term of not less than five years;
- (b) a fine of not less than ₦50,000,000;
- (c) two times the cumulative deposits or other amount collected; or
- (d) both imprisonment and fine.

## **12.4 Banking business**

Section 131 of BOFIA, 2020 defines “banking business as the business of:

- a. receiving deposits on current account, savings deposit account or other similar account;
- b. paying or collecting cheques drawn by or paid in by customers;
- c. provision of finance consultancy and advisory services relating to corporate and investment matters;
- d. making or managing investments on behalf of any person whether such businesses are conducted digitally, virtually or electronically only; or
- e. such other business as the Governor of the Central Bank of Nigeria may, by order published in the [Federal Government] Gazette, designate as banking business.

## **12.5 Bank customer**

A bank customer is any person who has an account in his name with a bank. He becomes a customer of the bank when an account is opened in his name by the bank. The fundamental principles of an offer by the prospective customer to have an account opened for him and the acceptance by the bank to open the account are the determining factors, as in all contractual relationships. Therefore, only the person whose name appears in the books of a bank as holding an account is a customer of the bank.

### **12.5.1 Duties of bank to customer**

As with every contractual relationship, the contract between a bank and its customer raises a number of obligations, rights and duties on the parties. Accordingly, the bank owes its customers a duty to:

- (a) collect its customer’s cheques, cash and other payable instruments by the customer;
- (b) abide strictly by the mandate of the customer, including the duty to honour the customer’s cheques and other written demand to pay provided always that:
  - (i) the customer’s account is in fund; or
  - (ii) credit arrangement with the bank has been agreed to;
  - (iii) the customer’s mandate (e.g. cheque) is regularly drawn; and
- (iv) there is no legal impediment against repayment.

- (c) operate the customer's account with requisite confidentiality and secrecy, subject only to established legal exceptions, which are:
  - (i) where disclosure is under compulsion of law;
  - (ii) where there is a public duty to disclose;
  - (iii) where disclosure is in the interest of the bank; and
  - (iv) with the customer's consent.
- (d) give reasonable notice to the customer before closing the account;
- (e) 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) provide the customer with regular updates and statements of account;
- (g) keep the customer's accounts separate, except there is an agreement with him to the contrary (See **British & French Bank v Opaleye** (1962) 1 All NLR 26;
- (h) not to pay out the customer's money upon a validly countermanded cheque. The bank will be liable to the customer, if it pays upon a stopped cheque or one validly countermanded;
- (i) not charge unreasonable interest on loans and overdraft facilities. See **Barclays Bank DCO v Hassan** (1961) All NLR 836; and
- (j) take reasonable care in opening accounts for new customers by obtaining adequate information regarding the customer's standing, as failing to do this might prevent the bank from claiming the protection in Section 82 of the Bills of Exchange Act relating to payment of crossed cheques (See **United Nigeria Insurance Co. v Muslim Bank** (1972) 4 SC 68).

The latter duty also requires that where the new customer is a limited liability company, the bank shall take up references on the company's directors and demand the memorandum and articles of association. See (**Bewac Ltd v African Continental Bank Ltd** (1973) NCLR 352).

Further, beyond the duty of care, the bank is under a duty to show skill in dealing with the customer's banking affairs. This duty of care and skill extends over the whole range of the customer's banking transactions with the bank (See **Agbanelo v Union Bank of Nig. Ltd. (2000)** NWLR (t. 666) 534).

### 12.5.2 Duties of customer to the bank

The bank customer owes the following duties to the bank:

- (a) draw his cheque with care and diligence, with a view to protecting his account from fraudulent dealings and to discourage fraud and all forms of unauthorised transactions;
- (b) give instructions in writing to the bank when withdrawing his money;
- (c) notify the bank promptly of any knowledge of suspicious dealings on his account as may come to his knowledge, e.g. a missing cheque book or a cheque leaf or forgery of his signature; and
- (d) pay appropriate bank charges, such as commissions and interests on loans.

## 12.6 Rights of a bank

Under banker/customer contractual relationship, the bank has the right to:

- a) charge reasonable interest on credits and commission on turnover;
- b) use moneys deposited with it by the customer, without recourse to or approval from the customer;
- c) close the account upon reasonable notice to the customer;
- d) exercise a right of lien on the customer's properties in its possession in appropriate circumstances;
- e) refuse payment on an improperly drawn cheque or other instruments;
- f) recall overdraft on current account in appropriate circumstances;
- g) exercise right of set off as may permitted under law; and
- h) obtain reimbursements on expenses reasonably incurred on behalf of the customer.

### 12.6.1 Statutory duties of licensed bank

Apart from the above conventional duties of a bank, the BOFIA makes provisions for statutory duties of licensed banks. These duties are in sections 15 to 22 of the BOFIA and are as follows:

- (a) **Maintenance of reserve fund:** Every bank has a duty to maintain a statutory reserve fund. The bank shall, out of its annual net profits for each year after due provision has been made for taxation and before any dividends are declared. Where the amount of the reserve fund is - less than the paid-up capital, transfer to the reserve fund a sum not less than 30% of its net profits; or equal to or in excess of the paid-up share capital, transfer to the reserve fund a sum not less than 15%.  
Non-compliance with this duty attracts a fine.

- (b) **Restriction on dividends:** Every bank owes a duty not to pay any dividend on its shares without first writing off all its operational expenses, such as, preliminary expenses, organisational expenses, shares selling commission, brokerage, losses incurred, and other capitalised expenses, not represented by tangible assets.

Also, no bank shall pay any dividend on its shares until it has made adequate provisions to the satisfaction of the Central Bank of Nigeria for its actual and contingent losses on risk assets, liabilities, off-balance sheet commitments and such earned incomes as are derivable therefrom.

A bank must also comply with any capital ratio requirement as specified by the Central Bank of Nigeria pursuant to section 13, before it pays any dividend.

Any director or officer that violates any of the requirements above is liable on conviction to a term of imprisonment of not less than three years or to a fine of not less than ₦2,000,000 or to both (section 16, BOFIA).

- (c) **Disclosure of interest by officers:** It is the duty of every bank to ensure that none of its directors, managers and other officers in any manner whatsoever, either directly or indirectly, has any personal interest in any advance, loan or credit facility without disclosing or declaring the nature of his interest to the bank. This duty is directed more at the officers of the bank than to the bank and any such officer who contravenes this provision of subsection (1) of Section 17 of BOFIA is guilty of an offence

and liable to imprisonment for not less than three years or a fine of ₦5,000,000 or both and in addition, forfeiture to the Federal Government of Nigeria of any gains or benefits from the contravention.

**(d) Prohibition of appointment of certain persons as directors:**

A bank shall not:

- i. employ or continue to keep in its employment any person that is, or has been, adjudged bankrupt or has suspended payment to or has compounded with his creditors or who is or has been convicted by a court for an offence involving fraud, or dishonesty or professional misconduct;
- ii. be managed by a management agent not approved by the Central Bank of Nigeria;
- iii. without the approval of the Central Bank of Nigeria, have as its director any person that is a director of any other bank, or any entity that has significant influence on the bank

**Provided that** a financial holding bank may have an aggregate number of directors from its subsidiaries and associates up to 30% of its board members, and the board of a subsidiary may also have directors from its holding company up to the same percentage (section 18, BOFIA).

**(e) Restriction on certain banking activities**

A bank has a duty not to grant:

- i. to any person, without the prior approval in writing of the Central Bank of Nigeria, an advance, loan or credit facility or give any financial guarantee or incur any liability so that the total value of the advance, loan, credit facility, financial guarantee, etc. is at any time more than 20% of the shareholders' fund (in the case of a merchant bank, not more than 50% of its shareholders' fund); or
- ii. any advances, loans, or credit facilities against the security of its own shares or any unsecured advances, loans or credit facilities unless authorised in accordance with the bank's rules and regulation;

**(f) Unsecured advances:** In addition, a bank shall not, without the prior approval in writing of the Central Bank of Nigeria permit to be outstanding, unsecured advances, loans or unsecured credit facilities, of an aggregate amount in excess of ₦1,000,000 to:

- i. its directors or any of them, whether such advances, loans or credit facilities are obtained by its directors jointly or severally; or
- ii. any firm, partnership or private company in which it or any one or more of its directors is interested as director, partner, manager or agent or any individual firm, partnership or private company of which any of its directors is a guarantor; or
- iii. any public company or private company in which it or anyone or more of its directors jointly or severally maintains shareholding of not less than five per cent, either directly or indirectly (section 19 of BOFIA);

**(g) Restrictions on operations of merchant banks:** A duty is placed on merchant banks not to:

- i. accept any deposit withdrawable by cheque; or



- ii. accept any deposit below an amount which shall be prescribed, from time to time, by the Central Bank of Nigeria; or
  - iii. hold for more than six months any equity interest acquired in a company, while managing an equity issue, except as stipulated in section 20 of this Act. A breach of the provisions relating to the above restrictions of the operations of merchant banks attracts, upon conviction, a fine not exceeding ₦20,000,000 and an additional penalty of ₦500,000 for each day during which the offence continues.
- (h) **Display of interest rates:** A duty is placed on every bank to display at its offices its lending and deposit interest rates and shall render to the Central Bank of Nigeria information on such rates as may be specified, from time to time, by the Central Bank of Nigeria.  
The penalty for a violation of this provision is a fine of not less than ₦5,000,000 and an additional penalty of ₦100,000 for each day during which the offence continues.

## 12.7 The Central Bank of Nigeria

The Central Bank of Nigeria Act, 2007, section 1, establishes the Central Bank of Nigeria (CBN) as a body corporate with perpetual succession and a common seal that may sue and be sued in its corporate name.

### 12.7.1 Objects of the Central Bank of Nigeria

The Central Bank has five principal objects under section 2 of the CBN Act to:

- (a) ensure monetary and price stability;
- (b) issue legal tender currency in Nigeria;
- (c) maintain external reserves to safeguard the international value of the legal tender currency;
- (d) promote a sound financial system in Nigeria; and
- (e) act as banker to the Federal Government of Nigeria, provide it economic and financial advice.

### 12.7.2 Statutory powers of the Central Bank of Nigeria

The Central Bank Act and the BOFIA confer on the bank certain statutory powers all of which are exclusive to the bank. These powers include:

- (a) **Sole right of issuing notes and coins:** The Central Bank of Nigeria has the sole right of issuing currency notes and coins throughout Nigeria. Because of the exclusivity of this power, neither the Federal Government nor any State Government nor any Local Government nor any other person or authority can issue currency notes, bank notes or coins or any documents or tokens payable to bearer on demand being documents or tokens which are likely to pass as legal tender (See Section 17 CBN Act);
- (b) **Power to print notes and mint coins, etc.:**
  - (i) arrange for the printing of currency notes and the minting of coins;

- (ii) issue, re-issue and exchange currency notes and coins at the Bank's offices and at such agencies as it may, from time to time, establish or appoint;
  - (iii) arrange for the safe custody of un-issued stocks of currency notes and for the preparation, safe custody and determination of plates and paper for the printing of currency notes and disc for the minting of coins; and
  - (iv) arrange for the destruction of currency notes and coins withdrawn from circulation under the provisions of section 20(3) of this Act or otherwise found by the Bank to be unfit for use (See Section 18 CBN Act).
- (c) **Power to buy and sell Nigerian currency:** The bank shall issue and redeem on demand at its head office, Nigerian currency against other currencies eligible for inclusion in the reserve of external assets (See Section 26, CBN Act).
- (d) **General powers:** Apart from the above exclusive powers, the Central Bank of Nigeria exercises powers in relation to treasury, credit and general banking operations such as powers to:
  - i. issue demand drafts and effect other kinds of remittance payable at its own offices or at the offices of agencies or correspondents;
  - ii. open accounts for and accept deposits from the Federal, State and Local Governments, and from funds, institutions and corporations of all such Governments, banks and other credit or financial institutions;
  - iii. maintain accounts with central banks and other banks outside Nigeria;
  - iv. act as correspondent, banker or agent for any central bank or other monetary authority established under government auspices; and
  - v. accept from customers, for custody, securities and other articles of value; and undertake on behalf of customers and correspondents, the purchase, sale, collection and payment of securities, currencies and credit instruments in Nigeria or abroad and the purchase or sale of gold or silver (section 27, CBN Act).
- (e) **Incidental powers:** By the provisions of the above subsections of the Central Bank Act, the Bank has powers to conduct business as a bank and to do all such things as are incidental to the exercise of its other powers or the discharge of its duties including, but not limited to, powers to carry out open market operations for the purpose of maintaining monetary stability in the economy and the issuing, placing, selling, repurchasing, amortisation or redemption of securities to be known as "stabilisation securities" (sections 32 and 30, CBN Act).
- (f) **Power to require certain information:** In addition to the above powers, the Central Bank also has powers to require persons and institutions having access thereto, at all reasonable times, to supply, in such forms as the Bank may from time to time, direct information relating to or touching or concerning matters affecting the economy of Nigeria and to exercise all those powers as contained in Section 33, CBN Act.

## 12.8 Chapter review

This chapter gives an overview of banking business and the law on its establishment, as well as operations. It examines the objects, powers, and functions of the Central Bank of Nigeria as the apex regulatory organisation of banks other non-bank financial institutions in Nigeria.

## 12.9 Worked examples

### 12.9.1 Multiple-choice questions

1. The objects of the Central Bank of Nigeria include the following **except**
  - A. Monetary and price stability
  - B. Issuing of legal tender
  - C. Maintenance of external reserves
  - D. Banker to the ECOWAS
2. Banking business includes the
  - A. Purchase of bills and cheques
  - B. Purchase of interest
  - C. Thrift arrangement
  - D. Money brokerage
3. Which of the following is not a duty of a bank?
  - A. Collection of customer's cheques
  - B. Payment of customer's cheques
  - C. Publication of customer's account details
  - D. Abiding strictly by customer's mandate
4. Which of the following is unlawful for a bank?
  - A. Using the deposits it receives from its customers without the customers express approval
  - B. Closing a customer's account without prior notice to the customer
  - C. Has the right to charge a reasonable commission on turnover
  - D. Refusing payment on an improperly drawn cheque
5. A bank prohibited by law from accepting deposits withdrawable by cheque is a/an
  - A. Quasi bank
  - B. Merchant bank
  - C. Micro-finance bank
  - D. Commoners bank

### 12.9.2 Open-ended questions

- (1) (a) Explain **two** objects for which the Central Bank of Nigeria is established.
- (b) Michael is a dynamic leader of a community union in Nigeria. As part of his empowerment programmes to assist

members of his community, he set up a committee, which receives deposits from the public and grants loans to members of the public at very low interest rates.

**Required:**

Comment on the legality or otherwise of Michael's activities in relation to the meaning of bank and banking business.

- (2) (a) Explain the main difference between a commercial bank and a merchant bank.
- (b) Explain what an individual must do to make him a bank customer.

**12.9.3 Suggested solutions to multiple-choice questions**

1. D
2. A
3. C
4. B
5. B

**12.9.4 Suggested solutions to open-ended questions**

- 1 (a) By the provisions of Section 2 of the Central Bank Act, the Central Bank has the objects to:
- i. ensure monetary and price stability within the Nigerian economy.
  - ii. issue legal tender currency in Nigeria;
  - iii. maintain external reserves so as to safeguard the international value of the legal tender currency;
  - iv. promote a sound financial system in Nigeria; and
  - v. act as banker to the Federal Government of Nigeria, providing it economic and financial advice.
- (b) This question raises the issue of who can transact banking business in Nigeria. The Banks and Other Financial Institutions Act provides that only a person who is duly incorporated as a company and is in possession of a banking licence can carry out banking business, which is defined to include the acceptance of money deposits from the public and the granting of loans.

The activities of the committee set up by Michael in receiving deposits from the public and granting of loans amounts to banking business. The committee is not an incorporated company and it is not in possession of a banking licence. Therefore, its activities are illegal.

- 2 (a) The main difference between a commercial bank and a merchant bank is that whereas a commercial bank transacts its banking business through the acceptance of deposits and payment of money through cheques and cash, a merchant bank does not accept deposits withdrawable by cheque as it engages in the business of wholesale banking.
- (b) A bank customer is defined as any person who has an account in his name with a bank. Therefore, for an individual to be a bank

customer, he must have an account in his name with the bank. He becomes a customer of the bank when an account is opened in his name by the bank.

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## NEGOTIABLE INSTRUMENTS

### Contents

- 13.0 Learning objective
- 13.1 Learning outcomes
- 13.2 Introduction
- 13.3 Types of negotiable instruments
- 13.4 Endorsement of a bill
- 13.5 Negotiation of a bill
- 13.6 Capacity and liability of parties to a bill
- 13.7 Signatures
- 13.8 Holder of a bill of exchange
- 13.9 Discharge of a bill
- 13.10 Dishonour of a bill
- 13.11 Chapter review
- 13.12 Worked examples



## 13 Negotiable Instruments

### 13.0 Learning objectives

This chapter offers readers basic knowledge of the law on key financial instruments that parties use in commercial transactions.

### 13.1 Learning outcomes

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

- (a) explain negotiable instruments and their types; and
- (b) identify parties to a bill as well as explain their duties and liabilities.

### 13.2 Introduction

A negotiable instrument is a financial instrument, the full title to which is transferable by mere delivery (in case of a bearer instrument) or by endorsement completed by delivery (in case of an order instrument) or with the effect that its complete ownership and legal property passes free from equities to the transferee provided he takes the instrument complete and regular on the face of it, before it is overdue, in good faith and for value.

Because it is an instrument, it is usually in writing. Negotiable instruments are like substitutes for money as they are a medium of exchange in commercial transactions.

Negotiable instruments are also types of choses in action like copyright, patents, shares, and trademarks because the property in them cannot be physically possessed but the rights to them can only be enforced by action in court.

Negotiable instruments are an exception to the general common law rule of *nemo dat quod non habet* which means that no one can give that which he has not got. This is because a thief in possession of a negotiable instrument can pass the title thereto validly to a third party who will acquire a good title provided he takes it in good faith, without notice and for value.

### 13.3 Types of negotiable instrument

Types of negotiable instruments are:

- (a) bills of exchange;
- (b) cheques;
- (c) promissory notes;
- (d) bearer bonds;
- (e) treasury bills; and
- (f) dividend warrants.

#### 13.3.1 Attributes of negotiable instruments

The attributes of a negotiable instrument are:

- (a) title in the instrument passes by mere delivery. where it is a “bearer” instrument; and
- (b) where the instrument is an “order” instrument, title thereto would pass by endorsement and delivery :
  - i. **a bearer instrument** is an instrument drawn and payable to bearer, and where no directive is given as to who is to receive payment, such instrument is negotiable by delivery. The instrument does not need endorsement by the person delivering it (transferor); and
  - ii. **an order instrument**, on the other hand, is an instrument drawn or endorsed to a named person or his order (i.e. someone chosen by the

named person) in this case, to effect bona fide transfer, the instrument must be delivered to the drawee (who is ordered to pay) and then the payee endorses the instrument at the back;

- iii. no notice of the transfer of title is required to be given to persons liable on the before the transferee establishes his title;
- iv. a transferee taking such an instrument in good faith, without notice and for value can acquire a better title than that possessed by his transferor and he is not affected by prior equities. (See section 92 of the Bills of Exchange Act, Cap B8, Laws of the Federation of Nigeria, 2004, which provides that, “A thing is deemed to be done in good faith within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.”)  
That means that the transferee must have acted with all honesty and without knowing about the defective title of the transferor. For example, if a transferee receives an instrument from someone, he knows to be of questionable character who is unlikely to be able to afford such instrument, such a transferee cannot claim to have received the instrument in good faith. His knowledge of the kind of person from whom he has received the instrument ought to put him on notice as to ignore such facts will be fatal to his claim to good faith);
- v. transfer must take place before the instrument is overdue. An instrument becomes overdue after maturity;
- vi. a holder of a negotiable instrument can sue in his own name. For example, if Newton Michael negotiates a financial instrument drawn on Angela Bank to Christopher Blessing in settlement of his debt, but at maturity Angela Bank refuses to pay, Blessing can sue Angela Bank in her own name to recover the face value of the instrument without recourse to Newton Michael;
- vii. there must be no indication on the face of the instrument making negotiability impossible, e.g. a cheque specially marked, “Not Negotiable” is not a negotiable instrument; and
- viii. if there is a restriction on transferability on the face of the instrument e.g. a cheque marked, “Account Payee Only”, it cannot be a negotiable instrument, as negotiability requires transferability.

### **13.3.2 Definition of bill of exchange**

A bill of exchange is a type of negotiable instrument. Section 3 of the Bills of Exchange Act, 2004 defines a bill of exchange as,

“... an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer”.

The following shows how a bill of exchange looks like:

.....  
Lagos  
September 20, 2014.

**₦5,000,000** = Three months after date pay Angela or order Five million Naira only  
for value received.

Signed

Michael

**To:**

Christopher  
2 Bank Lane  
Abuja  
.....

The above specimen meets the definition of a bill of exchange in that:

- (a) it contains an unconditional order i.e. an order to pay the **₦5 million** without conditions;
- (b) it is in writing. This can be typewritten or handwritten in ink. It could be in print on paper or any other writing material;
- (c) it is addressed by one person (Michael) to another (Christopher);
- (d) it is signed by the person giving it that is the drawer has signed the bill before it was sent to the payee;
- (e) it is payable on demand or a fixed or determinable future time. In the specimen, the bill is payable three months after the date on the bill which is a determinable future date. A date such as "pay Angela after her marriage" is not a determinable date, as Angela may never get married;
- (f) the amount payable is 'a sum certain in money', i.e. **₦5 million** stated clearly both in words and figures;
- (g) the payment must be to the order of a specified person or to bearer. In our specimen, the bill is an order bill, made payable to Angela; and
- (h) 'value received' which indicates the purpose for the payment i.e. the consideration for which payment is being made. These words are usually added to a bill of exchange since for there to be a valid contract, there must be valuable consideration.

### 13.3.3 Parties to a bill of exchange

The three parties to a bill of exchange are:

- (a) **the drawer:** This is the person who draws and signs the bill i.e. the person giving the order to the drawee to pay;
- (b) **the drawee:** This is the person who is ordered to pay. He is the person who is liable to pay the face value of the bill upon maturity; and
- (c) **the payee:** This is the person who is entitled to receive the face value of the bill, i.e. the person who is to receive the ascertained sum in money.

### 13.3.4 Distinction between order and bearer bills

#### a. Order bill

According to section 8 (4) of Bills of Exchange Act 2004, an order bill is a bill which is expressed to be so payable or which is expressed to be payable to a particular person without words prohibiting transfer or indicating an intention that it should not be transferable. It can be negotiated by endorsement followed by delivery. Therefore, a bill is an order bill if:

- (i) the word “order” is specifically written on its face, or
- (ii) it is payable to a specified particular person without further words prohibiting transfer thereof.

#### b. Bearer bill

The bearer bill is a bill which is expressed to be payable to the bearer i.e. the person who is in possession of the bill. It is transferable by mere delivery. Where the only or last endorsement on a bill is an endorsement in ‘blank’ (i.e. endorsement to no named person or a mere signature of the endorser, the bill is a bearer bill. See Section 8 (3) of the Bills of Exchange Act.

### 13.3.5 Acceptance of a bill

An acceptance of a bill of exchange is the signification or indication by the drawee of his assent to the order of the drawer, see Section 17 (1) Bills of Exchange Act. The acceptance of a bill is also a promise made by the acceptor to the payee and every subsequent lawful holder of the bill to pay the face value of the bill according to the terms of the acceptance.

Accepting a bill could be by writing the word “accepted” by the drawee on the face of the bill, and signing his usual signature, or just signing his signature across the bill. Acceptance may be “general” or “qualified”.

#### 13.3.6 General acceptance

A general acceptance occurs when the drawee as sends a bill to the order of the drawer without conditions. A general acceptance is a confirmation that the drawee is in agreement with the terms of the bill as drawn.

#### 13.3.7 Qualified acceptance

This occurs when the acceptance is made subject to certain conditions. The effect of such acceptance varies the terms of the bill as drawn. Acceptance of a bill is said to be qualified:

- (a) when it is made subject to the fulfilment of certain conditions;
- (b) where the acceptor varies the place of payment;
- (c) where the acceptor agrees to pay only part of the face value of the bill; and
- (d) where some, and not all the drawees, accept the bill.

#### 13.3.8 Examples of qualified acceptance are:

- (a) “accepted payable when goods are finally sold by Ojo”;
- (b) “accepted payable six months after date” (as against 3 months on the face of bill); and
- (c) “Accepted ₦ 3,000,000 only” (as against the face value of ₦5,000,000).

### 13.3.9 Presentation for acceptance

Section 39 of the Bills of Exchange Act provides three circumstances in which a bill must be presented for acceptance as:

- (a) where it is expressly stipulated on the bill that it shall be presented for acceptance; and
- (b) when a bill is payable after 'sight', then presentation for acceptance is necessary so as to fix the maturity of the instrument; and where a bill is payable elsewhere than at the place of business of the drawee; or his place of residence, then it must be presented for acceptance before it can be presented for payment.

Section 40 (1) Bills of Exchange Act provides that a bill payable after sight must be presented for acceptance within reasonable time and if not presented, the drawer and all prior parties to the bill are discharged from liability.

Generally, it is essential, albeit not mandatory, that a bill of exchange be presented to the drawee for acceptance without delay because until the drawee has accepted it, he is not liable to the holder.

This is also necessary because the maturity date is counted from the date of the acceptance. If acceptance is refused by the drawee, the drawee cannot be liable on the bill. The drawer and subsequent endorser, if any, become liable to the holder. For the holder to sustain this right, he must give notice of dishonour.

## 13.4 Endorsement of a bill

A bill is said to be endorsed when the holder of the bill places his signature on the back of the bill. The effect of endorsement is to transfer title in the bill from the endorser (person who endorsed the bill) to the endorsee person to whom the bill is transferred). Endorsement may be in ink, print or any other indelible substance. Every signature written on the back of such an instrument is an endorsement even if placed there for the purpose of identification or as a receipt. Its ordinary legal meaning is the signing of a name on the back of an instrument *animus indorsandi*, that is with the intention of endorsing the liability of an endorser.

### 13.4.1 Requisites of a valid endorsement

The requirements of a valid endorsement of a bill of exchange so as to operate as a negotiation as provided by Section 32 of the Bills of Exchange Act are that:

- (a) the endorsement must be written on the bill itself and signed by the endorser (and the simple signature of the endorser on the bill, without any additional words, is sufficient);
- (b) an endorsement written on an 'allonge' or on a "copy" of a bill issued or negotiated in a country where copies are recognised is deemed to be written on the bill itself;
- (c) an endorsement must be an endorsement of the entire bill. A partial endorsement, that is to say, an endorsement, which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally does not operate as a negotiation of the bill;
- (d) if a bill is payable to the order of two or more payees or endorsees who are not partners, all must endorse, unless the one endorsing has authority to endorse for the others; and
- (e) an endorsement may be made in blank (to no named person) or special (to a named person) and may also contain terms making it restrictive.

A bill endorsed in blank, becomes payable to bearer while a special endorsement

specifies the person to whom or to whose order the bill is to be payable. An endorsement is restrictive where it prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill a thereby directed and not a transfer of the ownership thereof. For example, if a bill is endorsed "Pay D. only" or "Pay D for the account of X" or "Pay D. or order for collection".

### 13.5 Negotiation of a bill

A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill, i.e. by delivery of a bearer bill, or by delivery after endorsement of an order bill. See Section 31 (1), Bills of Exchange Act.

A bill ceases to be transferable (and thus non-negotiable) when it contains words prohibiting transfer or indicating that it should not be transferred, e.g. when a cheque is marked "Pay B only" or "Not Transferable", it ceases to be transferable.

A bill ceases to be negotiable where it bears evidence that destroys negotiability, e.g. where a cheque is crossed with the words, "Not Negotiable".

However, a bill marked "Not Negotiable" may still be transferred, that is endorsed to another person, but the person cannot get a better title than the transferor. The meaning of this is that if the transferor has a defective title, the transferee's title is also defective.

### 13.6 Capacity and liability of parties to a bill

Capacity to incur liability as a party to a bill is the same with the capacity of an individual to contract. See Section 22 (1) Bills of Exchange Act.

A corporation will not be liable on a bill either as a drawer or acceptor or endorser unless it is legally competent to draw, accept or endorse the bill. If a bill is drawn or endorsed by an infant or by a corporation having no capacity to incur liability on the bill, the drawing or endorsement entitles the holder to receive payment of the bill and to enforce it against any other party except the infant and the corporation. In this case an endorser on a bill drawn by an infant will be liable on it if dishonoured although the infant or the corporation will not.

#### 13.6.1 Liability of the parties

The liabilities of a drawer of a bill include:

- (a) **promise of acceptance:** The drawer of a bill is deemed to have given a promise that it will be accepted on due presentment, and if it is not, then the drawer is liable to the holder for the amount of the bill, though the holder must give him notice of dishonour in order to render him liable -  
a bill puts no liability on its drawee until he has accepted it, but the acceptor of a bill, by accepting it, undertakes that he will pay it according to the tenor of his acceptance; and
- (b) **promise of payment:** The drawer is also deemed to have promised that the bill will be paid on due presentment. Non-payment of an accepted bill may render both drawer and acceptor liable. However, the drawer is liable only if the bill is duly presented for payment and notice of dishonour is given to him, whereas an acceptor is liable as soon as the bill becomes due, whether or not it is actually presented to him then.
- (c) **Endorser's liability:** An endorser is deemed to have given the same promises as the drawer. Like the drawer, an endorser is liable only if there is due presentation and notice of dishonour is given to him. An endorser's position is rather like that of a guarantor. An endorser who has to pay a dishonoured bill has a right to be compensated by the drawer or by an earlier endorser and this right may be enforced against an earlier endorser who did not himself have a good title to the bill.



## **13.7 Signatures**

A person is not liable on a bill if he has not signed it, or has not authorised someone else to sign on his behalf. Where a person signs a bill in a trade name or an assumed name, he is liable on the bill as if he had signed it in his own name.

Also, the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm. See Section 23 of the Bills of Exchange Act.

### **3.7 1 Forged signatures**

A signature on a bill is forged where it is placed there on without the authority of the person whose signature it purports to be. A forged or unauthorised signature is wholly inoperative. No rights could be acquired or enforced against any party under this signature. See Section 24 Bills of Exchange Act.

## **13.8 Holder of a bill of exchange**

A holder is defined by the Bills of Exchange Act as "... the payee or endorsee of a bill or note who is in possession of the bill or the bearer thereof".

He is the person who is in possession of the bill or bearer thereof with the belief that the property in it passed to him.

### **13.8.1 Rights of a holder**

The holder of a bill has the rights in respect of the bill to:

- (i) sue on the bill in his own name;
- (ii) sue anybody who might have signed the bill prior to him; and
- (iii) if he is a holder in due course, to hold the bill free from any defect of title of prior parties.

### **13.8.2 Holder for value**

Section 27 (2) of the Bill of Exchange Act defines a holder for value as a holder of a bill for which value at any time has been given as regards the acceptor of the bill and all parties to the bill who became parties prior to such time.

This implies that the current holder of the bill need not be the person to have given value for the bill but provided that someone in the chain of transfer has given value.

The main disadvantage of a holder for value is that he cannot acquire a better title than the transferor had. According to Section 27 (1) of the Bills of Exchange Act, value could be any consideration sufficient to support a simple contract and any antecedent debt or pre-existing debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

### **13.8.3 Holder in due course**

A holder in due course is in a paramount position. He holds the bill free from all defects and could enforce payment against all parties liable on the bill.

### **13.8.4 Meaning of a holder in due course**

A holder in due course is a holder who has taken a bill:

- (a) complete and regular on the face of it;
- (b) before it was overdue;
- (c) without notice of previous dishonour;
- (d) in good faith;
- (e) for value; and
- (f) without notice of any defect in the transferor's title.

However, there can be no holder in due course where a bill:

- (a) is marked, "Not Transferable";
- (b) bears, "Pay Brown Only"; or
- (c) carries the forgery of an essential signature.

The right of a holder in due course shall be forfeited by forgery. Also, a payee cannot be a holder in due course because the bill is issued to him and not negotiated.

### 13.9 Discharge of a bill

A bill is discharged when all rights of action on it are extinguished by:

- (a) payment in due course by or on behalf of the drawee or acceptor. "*Payment in due course*" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective. See Section 59 (1) Bills of Exchange Act;
- (b) the acceptor becoming the holder of it in his own right at or after its maturity;
- (c) a holder renouncing his rights against the acceptor absolutely and unconditionally at or after the maturity of the bill and either in writing or by delivering the bill to the acceptor. This operates as a waiver;
- (d) intentional cancellation of the bill by the holder or his agent. But a cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative. Where a bill appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority; and
- (e) material alteration being made to the bill such as a change of the date or the amount payable without the assent of all parties liable on the bill, by which all parties liable prior to the alteration will be discharged but not those liable by negotiation after alteration.

### 13.10 Dishonour of a bill

A bill is dishonoured when:

- (a) the order of the drawer is not carried out by the drawee by non- acceptance when it is duly presented for acceptance i.e. when acceptance is refused or cannot be obtained. When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance, and the holder has a right of recourse against the drawer and endorsers; or
- (b) the order of the drawer is not carried out by the acceptor by non- payment of the face value of the bill on the due date when it is duly presented for payment, the bill becomes dishonoured. When a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder. See Section 47 (2) Bills of Exchange Act.

### 13.10.1 Notice of dishonour

When a bill has been dishonoured by non-acceptance or non-payment, the holder who presented it must give notice of the dishonour to the drawer and to each endorser. Any drawer or endorser to whom such notice of dishonour is not given is discharged, section 48 BEA, 1990.

If a bill has been dishonoured by non-acceptance and the required notices of dishonour have been given then it is not necessary to give notice of subsequent non-payment unless the bill was accepted in the meantime.

### 13.10.2 Noting and protesting

This is also known as a note of protest by which a solicitor makes a note on a negotiable instrument stating that the instrument has been dishonoured by non-acceptance or non-payment.

The aim of noting a bill is to secure official evidence that it has been dishonoured. When a bill is to be noted, the holder applies for the services of a solicitor (usually a notary public) who will then represent the bill for acceptance or payment as the case may be.

If the drawee still refuses to accept or pay, then the solicitor will minute on the dishonoured bill the date, his charges and his initials. This constitutes the noting and it must be done on the day of the dishonour. The protest and a copy of the noted bill are then sent by the holder of the bill to the person or persons he intends to make liable.

Noting and protesting are only required in the case of foreign bills but optional in inland bills.

## 13.11 Chapter review

This chapter examines the various aspects of a negotiable instrument, alongside the rights and duties of parties to them.

## 13.12 Worked examples

### 13.12.1 Multiple-choice questions

1. When every right of action on a bill of exchange has been extinguished, the bill is said to be
  - A. Extinguished
  - B. Negotiated
  - C. Discharged
  - D. Notarised
2. The following are the only parties to a cheque
  - A. The bank and its customer
  - B. The drawer and the drawee
  - C. The bank, drawee and payee
  - D. The drawee, payee, and drawer
3. An open cheque is one which

- A. Can be cashed across the counter
  - B. Is undated
  - C. Unsigned
  - D. Bears no payee's name
4. A cheque may be crossed either specially or
- A. Generally
  - B. Specifically
  - C. Materially
  - D. Restrictively
5. The person on whom a bill of exchange is drawn is called
- A. Drawer
  - B. Payee
  - C. Drawee
  - D. Payer

#### 13.2.2 Open-ended questions

- (1) Explain negotiable instruments.
- (2) Explain the circumstances in which a person becomes a holder in due course of a bill of exchange.
- (3) Explain what amounts to a discharge of a negotiable instrument.

#### 13.2.3 Suggested solutions to multiple-choice questions

1. C
2. D
3. A
4. A
5. A

#### 13.2.4 Suggested solutions to open-ended questions

- (1) A negotiable instrument is a financial instrument, usually in writing, title to which is transferable by mere delivery (in case of a bearer instrument) or by endorsement completed by delivery (in case of an order instrument). Negotiable instruments are like substitutes for money as they are a medium of exchange in commercial transactions. A negotiable instrument is also a type of "chose in action" in that the property in it cannot be physically possessed but the rights to it are enforceable by court actions. Examples of negotiable instruments are bills of exchange, cheques, promissory notes, bearer bonds, treasury bills and dividend warrants.
- (2) A holder in due course is one who holds a bill of exchange free from all defects and can enforce payment against all parties liable on the bill. He is a person who takes a bill that is complete and regular on its face before the bill becomes stale and without any notice that the bill has been previously dishonoured. He is a person who takes the bill of exchange in good faith for value without notice

of any defect in the transferor's title.

- (3) A negotiable instrument is discharged when all rights of action on it are extinguished. This is achieved when:
- (a) the obligation to pay or accept has been met by the person on whom the instrument is drawn;
  - (b) an acceptor of the instrument becomes the holder of it in his own right upon maturity;
  - (c) a holder waives all his rights on the instrument by renouncing his rights against the acceptor absolutely and unconditionally upon maturity;
  - (d) the instrument is intentionally cancelled by its holder or his agent; or
  - (e) there has been a material alteration to the instrument such as a change of the date or the amount payable without the assent of all parties liable on it.

CHAPTER  
**14**

# CHEQUES

## Contents

- 14.0 Learning objective
- 14.1 Learning outcomes
- 14.2 Introduction
- 14.3 Parties to a cheque
- 14.4 Differences between a cheque and other bills of exchange
- 14.5 Types of cheque
- 14.6 Types of crossing
- 14.7 Material alteration
- 14.8 Forged cheque
- 14.9 Promissory note
- 14.10 Holder
- 14.11 Countermand of payment
- 14.12. Chapter review
- 14.13 Worked examples



## **14 Cheques**

### **14.0 Learning objectives**

This chapter focuses on the legal characteristics of cheques and the uses to which they could be put.

### **14.1 Learning outcomes**

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

- a) explain the meaning of cheques and their types; and
- b) identify parties to a cheque as well as explain their duties and liabilities.

### **14.2 Introduction**

Cheque is one of the commonest type of bills of exchange and is defined by Section 73 of the Bills of Exchange Act, 2004 as “a bill of exchange drawn on a banker payable on demand”.

In other words, set against the definition of bills of exchange, a cheque is “an unconditional order in writing addressed by one person (the drawer) to a banker (drawee), signed by the person giving it (drawer), requiring the banker (drawee) to pay on demand a sum certain in money to or to the order of a specified person or bearer (payee).”

From these definitions, a cheque:

- (a) must carry a positive order;
- (b) must be directed at a bank;
- (c) must be to pay a liquidated sum of money on demand;
- (d) must state the amount payable, which must be a liquidated sum certain;
- (e) must be drawn by a person who must be a current account holder with the bank, for his instructions to be carried out on the basis that he has enough money in his account; and
- (f) be signed by the person giving the order.

### **14.3 Parties to a cheque**

There are three parties to a cheque, and they are the same as the parties to a bill of exchange. They are:

- a) the drawer, who is the person who draws and signs the cheque, that is the person giving the order to the drawee (i.e. the bank) to pay;
- b) the drawee (in this case, the bank) is the person who is ordered to pay; that is the person who is liable to pay the face value of the cheque upon presentment; and
- c) the payee (the beneficiary of the proceeds of the cheque, i.e. the person who will receive the face value of the cheque).

#### 14.4 Differences between a cheque and other bills of exchange

The differences between a cheque and other bills of exchange are that:

- a. no acceptance of a cheque is required. The banker (as drawee) must honour the cheque if:
  - (i) it appears to be in order;
  - (ii) it is received in the ordinary course of business;
  - (iii) the drawer has sufficient funds in his account or an authorised overdraft on the account;
- b. if a cheque is dishonoured, the banker has no obligations as drawee of the cheque because he had not accepted it. However, a banker may be liable, if he wrongfully dishonours a cheque, thereby causing damage to his customer. In that situation, the liability may be to the drawer and the holder;
  - i. although cheques and bills could be endorsed in various ways, only cheques could be crossed;
  - ii. a cheque is drawn only on a banker, while a bill could be drawn on any person;
  - iii. a banker, unlike the drawee of a bill, is protected against forged or unauthorised endorsement under the Bills of Exchange Act;
  - iv. subject to certain conditions, the Bills of Exchange Act protects a collecting banker when collecting cheques from customers. There is no such protection for a bank that collects the proceeds of bills of exchange; and
  - v. a cheque is commonly used in domestic trade while a bill of exchange is commonly used in international trade;

#### 14.5 Types of cheque

There are basically four types of cheques, namely a/an

- (a) bearer cheque;
- (b) order cheque;
- (c) crossed cheque; and
- (d) open (uncrossed) cheque.

##### 14.5.1 Bearer cheque

This is a cheque drawn and made payable to the bearer or endorsed in blank. A cheque payable to an unnamed person is regarded as a bearer cheque.

For example, a cheque drawn and made payable to 'cash' (i.e. pay cash) is a cheque payable to an unnamed person.

Although a bearer cheque is transferable by mere delivery without any endorsement, in practice, bankers still ask for endorsement in evidence that the bearer actually received the proceeds of the cheque.

##### 14.5.2 Order cheque

This is a cheque drawn and made payable to a named person or his nominee or endorsed payable to a named person or to his nominee. Order cheques need endorsement (signing at the back of the cheque) before they are transferred or payment on them is made.

### 14.5.3 Crossed cheque

According to Section 78 (1) Bills of Exchange Act 2004, a cheque is crossed when it bears across its face an addition of the words “and company” or any abbreviation thereof between two parallel transverse lines with or without the words “not negotiable”. A crossed cheque cannot be cashed at a bank “over the counter” but must be paid into a bank account for the proceeds to be collected for the credit of that account. Thus, crossed cheques are safer to handle than open cheques, proceeds of which could be collected in a bank over the counter. A thief who has stolen a crossed cheque cannot cash it. He is compelled to pass it through an account. As a result, it is usually easy to trace him.

### 14.5.4 Open cheque

On the other hand, an open cheque neither bears across its face two transverse lines nor words such as “and company”, “not negotiable”, etc.

## 14.6 Types of crossing

Crossing may either be general or special in nature.

a) **General crossing:** A general crossing consists of two parallel transverse lines drawn across the face of the cheque either with or without the words:

- i. “And company” or its abbreviation “& Co”; and
- ii. “Not negotiable” written between or near the lines.

Examples of general crossing are as follows:

- “And Company” or “& Co”;
- “& Co. Not Negotiable”; and
- “Not Negotiable, Account Payee Only”.

Any of the above crossings on a cheque imposes on the paying banker a preclusion from paying the cheque over the counter. The banker must pay the proceeds of such a cheque only to a collecting banker for the credit of an account of the payee.

b) **Special crossing:** A special crossing consists of the name (with or without the address) of a banker written (or stamped) across the face of a cheque, and with or without:

- i. parallel transverse lines; and/or
- ii. the words ‘Not negotiable’; and/or
- iii. the words ‘ & co’, or ‘and company’; and/or
- iv. the words ‘account payee only’.

The effect of a special crossing is that the paying banker must pay the cheque only to the collecting banker named on the crossing or its agent.

Note very carefully the meaning of the words used in connection with each crossing:

- The words describing the bank named in a special crossing signify that the cheque must be passed through that bank. Very often, the bank named is the one holding the account of the payee;

- The words “Account payee” do not concern the paying banker but are a directive to the collecting bank (e.g. the bank holding the account of the payee of the cheque); and
- The words ‘Not negotiable’ on a cheque destroy the cheque’s negotiability but not its transferability. As a result, no person can become a holder in due course of a cheque marked ‘not negotiable’.

The title of a holder of a cheque crossed “Not negotiable” is as good as the title of any of its previous holders. This is because section 83 of the Bills of Exchange Act 2004 provides that “where a person takes a crossed cheque which bears the words ‘not negotiable’, he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had”.

#### **14.6.1 Effect of a “not negotiable” crossing**

A cheque drawn payable to bearer or order and bearing a genuine endorsement in blank would, if passed on by a thief, vest a good title in a holder in due course. If, however, the cheque was crossed, ‘not negotiable’, the holder could only obtain as good a title as the thief had, that is, no title at all.

#### **14.6.2 Effect of an “account payee only” crossing**

This has no statutory authority, and does not concern the paying banker, nor affect the negotiability of the cheque. However, it is well recognised by the courts that the crossing is directed to the collecting banker to collect the proceeds of the cheque for the credit of the account of the named payee. If a collecting banker credits the proceeds of such a cheque to a different account other than that of the payee, he will be liable for negligence and will have to compensate the true owner(s) for the amount of the cheque.

### **14.7 Material alteration**

Where a cheque is materially altered, then all parties cease to be liable on it, with the exception that a party remains liable if he:

- altered, assented to or authorised the alteration of the cheque; or
- became an endorser of the cheque subsequent to the alteration.

Note that alteration of date, amount, payee’s name, or any crossing on a cheque would be deemed as material.

Where a crossed cheque is opened to enable its value to be paid in cash to the payee (or his known agent), or the words “or order” have been altered to read “bearer”, then the full signature of the drawer is normally required to the alteration.

### **14.8 Forged cheque**

Section 23 of the Bills of Exchange Act provides that any forged signature of the drawer is wholly inoperative except by the doctrine of estoppel. The legal effect is that if a signature on a customer’s cheque is forged, the value of such cheque cannot be debited to the account of the purported drawer because a forged signature is not the mandate of the account holder.

A banker has no mandate of the customer to pay a forged cheque. Should the banker pay such a forged cheque, the banker shall be liable thereon and the money paid shall be re-credited to the customer’s account. But if the payment is made in “good faith, without negligence and in the ordinary case of business”, and the fund is still in the possession of the collecting banker, the paying banker can still recover the money, which had been paid by mistake.

### **14.9 Promissory note**

Section 85(1) Bills of Exchange Act defines a promissory note as an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.

#### **14.9.1 Distinctions between a promissory note and a bill of exchange**

**The distinctions are:**

- a) unlike a bill of exchange, a promissory note has two parties: a drawer or maker; and the payee;
- b) acceptance of a note is not necessary since there is no drawee;
- c) the maker/drawer is the person to pay in a promissory note; whereas for a bill, the drawer is only liable to pay if the drawee defaults;
- d) a promissory note is a promise to pay while a bill is an order to pay; and
- e) a bill may be treated as a promissory note where the:
  - (i) drawer and drawee are the same person; or
  - (ii) the drawee is fictitious or lacks capacity.

#### **14.10 Holder**

Section 2 of the Bills of Exchange Act defines a holder as:

“the payee or endorsee of a bill or note who is in possession of it or the bearer thereof”. Note that a person holding a bill or note, under forgery or one who has stolen a bill payable to order of another person is not a holder, but a wrongful possessor.

#### **14.11 Countermand of payment**

Section 75 of the Bills of Exchange Act provides that, “The duty of and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment.”

A countermand of payment is an order or instruction by the customer directing the bank not to pay a cheque that he had earlier issued. The drawer of a cheque is entitled to stop the payment of his cheque before such a cheque is paid by the bank.

Subject to statutory protection, estoppel or adoption, a banker who pays a cheque in contravention of the customer’s order of countermand must not debit the customer’s account with the amount.

A countermand is deemed to be given if the customer gives it in writing signed by him in his usual signature as contained in his mandate and in a clear and unambiguous term. But because of development in means of communication, customers now use faster means, such as the telephone, telex, fax and email, to countermand payments but only as a means to putting the bank on notice to suspend payment pending the receipt of a written confirmation.

For a countermand to be effective, the notification of the countermand must be served on the branch where the account is kept and notice must actually reach the bank’s hand (the officer that will effect the stop order).

The correct description of the cheque - number, name of the payee, date of the cheque, amount, etc., must be given to the bank to enable the bank identify the cheque, otherwise the bank will not be held liable.

##### **14.11.1 Who may countermand payment of a cheque?**

The following may validly countermand a cheque, depending on the type and nature of the account:

- (a) **Joint, trustee, executors, and partnership accounts:** A bank may honour a stop order on cheque drawn by any one of several trustees, executors, partners or joint account holders, provided the authority to stop a cheque is signed in accordance with the account mandate.
- (b) **Company account:** The company secretary could stop a cheque, but in accordance with the mandate of the company account.
- (c) **Private account:** Only the drawer of a cheque is entitled to stop a cheque drawn on his private account. However, the bank would delay payment of a cheque if the payee has reported that the cheque is stolen or lost. The payee may then contact the drawer to stop the cheque.

In conclusion, while the bank must honour a 'stop order' on a cheque, a customer who countermands the payment of his cheque is liable to a holder in due course, unless the cheque is crossed "not negotiable".

## 14.12 Chapter review

This chapter has examined in some detail the unique nature of a cheque as a medium of exchange in an economy. The various types of cheques and how they are crossed with the effect of their crossing have been also been discussed. The reader is left with an understanding of the internal workings of the cheque system, especially the liability and rights of parties to a cheque.

## 14.13 Worked examples

### 14.13.1 Multiple-choice questions

1. What is the legal definition of a cheque under Nigerian law?
  - A. A promissory note
  - B. A bill of exchange drawn on a banker and payable on demand
  - C. A loan agreement
  - D. A deposit slip
2. The following are the only parties to a cheque
  - A. The bank and its customer
  - B. The drawer and the drawee
  - C. The bank, drawee and payee
  - D. The drawee, payee, and drawer
3. Who is a "holder in due course" of a cheque?
  - A. Any person who writes a cheque
  - B. A person who receives a cheque by endorsement or delivery for value without notice of defects
  - C. The drawee bank upon honouring the cheque
  - D. The payee only



4. A promissory note has only \_\_\_\_ parties
  - A. Two
  - B. Three
  - C. Four
  - D. One
5. A "special endorsement" on a cheque means:
  - A. The endorsee limits further negotiation to a specific person
  - B. The cheque becomes payable only at the Central Bank of Nigeria
  - C. The cheque is endorsed for deposit only
  - D. The cheque cannot be crossed

#### 14.13.2 Open-ended questions

- (1) Angela was issued a cheque crossed 'Account Payee Only', which she presented at New Style Bank Plc across the counter and was promptly paid cash.

**Required:**

- (a) Explain the effect of the crossing.
  - (b) Comment on the validity of the payment of the cheque across the counter.
- (2) Explain the essential differences between a cheque and other bill of exchange.
- (3) Explain the effect of a notice of countermand of a cheque, indicating what amounts to a valid countermand.

#### 14.13.3 Suggested solutions to multiple-choice questions

1. B
2. D
3. B
4. B
5. A

#### 14.13.4 Suggested solutions to open-ended questions

- (1)
  - (a) The cheque crossed 'account payee only' is specially crossed. This means that the cheque may be paid only into the account of the holder or his order. The crossing requires that the collecting banker pay the proceeds of the cheque to the account of the named payee.
  - (b) If the proceeds of such a cheque is paid across the counter or to a different account other than the account of the payee, the bank will be liable for negligence and will have to compensate the true owner for the amount of the cheque. Accordingly, the payment to Angela by New Style Bank of the crossed cheque across the counter is not valid but renders the bank liable in negligence.

- (2) The essential differences between a cheque and other bills of exchange include the following:
- (a) Whereas other bills of exchange require that they be accepted for payment, no acceptance of a cheque is required as the bank is under a duty to pay the value on the cheque upon presentment.
  - (b) A dishonoured cheque places no obligations on the drawee bank as no acceptance has been made by it.
  - (c) Although cheques and bills can be endorsed in various ways, only cheques can be crossed.
  - (d) A cheque is drawn only on a banker, while a bill may be drawn on anybody.
  - (e) A banker, unlike the drawee of a bill is protected against forged or unauthorised endorsement by the provisions of Section 60 of the Bills of Exchange Act.
  - (f) Subject to certain conditions, Section 77 (2) of the Bills of Exchange Act protects a collecting banker when collecting cheques from customers. There is no such protection for a bank that collects the proceeds of bills of exchange.
  - (g) A cheque is commonly used in domestic trade while a bill of exchange is commonly used in international trade.
- (3) By Section 75 of the Bills of Exchange Act, “the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment”. By this provision of the law, the drawer of a cheque is entitled to stop the payment of his cheque before such a cheque is paid by the bank. This is done by way of a countermand of payment, which is an order or instruction by the customer who drew the cheque directing the bank not to pay a cheque that he issued. A valid countermand must be in writing, signed by the countermander in his usual signature as contained in his mandate to the bank and must be in a clear and unambiguous term.
- For a countermand to be effective, actual notification of the countermand must be served on the branch of the bank where the account is kept. This means that the notice must actually come to the bank’s hand. The countermand must bear the correct description of the cheque – the number, name of the payee, date of the cheque, amount, etc, must be given to the bank to enable the bank identify the cheque.

## EMPLOYMENT LAW

### Contents

- 15.1 Learning objective
- 15.2 Learning outcomes
- 15.3 Meaning of employment
- 15.4 Formation of contract of employment
- 15.5 Forms of contract
- 15.6 Duties of an employee
- 15.7 Duties of an employer
- 15.8 Termination of contract
- 15.9 Chapter review
- 15.10 Worked examples

## **15 Employment Law**

### **15.0 Learning objective**

This chapter presents for the readers' understanding an introduction to the law on employment relations and the duties of the parties thereto.

### **15.1 Learning outcomes**

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

- (a) define employment;
- (b) distinguish contract of service from contract for service;
- (c) compare the rights of an employer with that of an employee;
- (d) discuss the duties of an employee;
- (e) explain the concept of termination and discuss its scope;
- (f) discuss redundancy; and
- (g) explain the remedies available.

### **15.2 Introduction**

Employment law is a branch of labour law that deals with the creation, regulation and formulation of a contract of employment between one person and another for the purpose of learning a trade or working for wages whether or not the contract is to be executed independent of control. It also determines all rights and duties incidental to that relationship under the common law and statute.

This chapter examines the nature of the contract between the employer and an employee as well as the rights and duties of the parties to a contract of employment and the remedies available in the event of a breach of the contract.

### **15.3 Meaning of employment**

A contract of employment is a voluntary agreement between a master (employer) and a servant (employee) under which the employee, for a money consideration or remuneration, promises to render services to the master.

It is important at this stage to distinguish between a contract of employment, that is a contract of service and from a contract for service, that is, one by virtue of which the service of an independent contractor is engaged. Although in both cases, a contract to do work is involved, the incidents attaching to the two contracts are different. For example, whereas in a contract of service, an employer may be liable for the tort committed by the employee, the employer may not be vicariously liable for the tort of the independent contractor unless the act is authorised expressly.

#### **15.3.1 Control test**

One test that has been used in distinguishing a contract of service from a contract for service is the control test. It is said that a servant is a person subject to the command of his master in the manner in which he should do his work. Thus, the contract between him and the employer is a contract of service. However, where the employer cannot control the manner in which the work is to be done, the employee is said not to be a servant but an independent contractor.

However, some cases have rendered the control test inapplicable. This is because going by the control test, all professionals would automatically be independent contractors. It has, however, been held that a consultant in a hospital is not an independent contractor but a servant so as to make the hospital liable for his negligence (**Cassidy v Minister of Health**).

In view of the inadequacy of the control test, some other tests have evolved to distinguish between a contract of service and a contract for service.

**Some of these tests are:**

- (a) **the organisation test:** The test was introduced by Lord Denning, MR in the **Macdonald Evan's case**, where he said, "one feather which seems to run through the instance is that, under a contract of service a man is employed as part of the business and his work is done as an integral part of the business whereas under a contract for service, such work, although is done for the business, is not integrated into it, but merely accessory to it." Going by this test, an engineer who works in the technical department of a company would be a servant of the company despite the fact that he is a professional, but if he was a contractor whose services the company has engaged in carrying out a particular project, he would be an independent contractor; and
- (b) **the circumstances of the case test:** Under this test what is to be done in determining whether a contract is one of service or for service is to consider all relevant and available factors.

Examples of these factors are:

- (i) whether or not the person performing the service is to provide his equipment;
- (ii) whether or not he is to hire his own helpers;
- (iii) the degree of financial risk he takes;
- (iv) the degree of responsibility for investment and management; and
- (v) the length of period of employment or the temporary or permanent nature of the job he is employed to do.

#### **15.4 Formation of contract of employment**

The capacity to enter into contract of service is largely the same as in the general law of contract. Concerning infants or young persons, section 9 of the Labour Act provides that a person below the age of sixteen years cannot validly enter into a contract of employment though, he may enter validly into a contract of training or apprenticeship. However, the Act provides that they 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 guardian notified orally or in writing to the employer.

Although women have the same capacity to enter into employment contract as men, they enjoy special protections under the Labour Act. Among the implied terms in their favour are:

- a) entitlement to maternity leave of six weeks before and six weeks after their delivery on the production of a medical certificate given by a qualified medical practitioner;
- b) right not to be given notice of dismissal during their absence on maternity leave, even if they remain longer than necessary due to illness; and
- c) right not be employed on night work or be employed in underground work in a mine, except those women holding position of management who do not perform manual labour as well as women employed in health and welfare services, as well as those who are not otherwise engaged in manual labour.

## **15.5 Forms of contract**

No particular form is required for a contract of employment. It may thus be oral, or in writing, or even by conduct, section 49 of the Labour Act however, stipulates that contract of apprenticeship or of assignment thereof shall be in writing. Where a contract is oral, terms are inferred from the circumstances of the relationship.

### **15.5.1 Terms of contract of employment**

The terms of employment of civil servants are usually contained in their conditions of service. In the private sector, the terms may be contained in a written document executed by both parties, or in the employee's letter of employment, and relate to issues such as duration, remuneration, fringe benefits, prerequisite of office, probationary period, duties, pension, termination, dismissal, redundancy, retirement notice, pension fund and worker's compensation.

Where a contract of employment is written, the court will apply and give effect strictly to the written terms and conditions of service of a servant. Thus, it has been held that where commission is payable entirely at the discretion of the master, the court will not pronounce on the amount of such commission.

Apart from written terms, some terms are implied by the common law and statutes (Labour Act and others).

### **15.5.2 Probationary period**

This is usually a period of trial for a new employee during which the employer takes the opportunity to study him as well as test his skill and suitability for the work of the employer. Due to the transit nature of this period, there are usually stipulations that make the relationship determinable at a short notice.

### **15.5.3 Duration**

The duration of master/servant relationship must be stated if the relationship is to be for a definite term, otherwise, it will be indefinite. The relationship may also be for a particular project in which case it will be determined upon the conclusion or realisation of the object.

The distinction between a contract for an indefinite period and one for a stated period lies, especially, on the mode of determining both contracts. While a contract of employment for an indefinite period could be terminated by reasonable notice or payment in lieu of notice, a contract for a term certain cannot be terminated until the expiration of the term. If the termination is wrongful, the servant will be entitled to all his earnings on the contract as if he had been allowed to run the full term.

## **15.6 Duties of an employee**

The duties of an employee to his employer include duty to:

- a. obey the employer's lawful orders that are within the terms of the contract of employment and not illegal nor contrary to public policy;
- b. exercise professed skill and diligence, but not to exercise more commitment than he has disclosed to his employer;
- c. do that for which he is employed or other closely related things;
- d. render personal service and not to delegate his duty without the consent of the employer;
- e. keep secret his employer's confidential information and trade secret; and
- f. serve the employer faithfully and not to put himself in a situation where his interest will conflict with that of the employer.



The remedies available to the employer for a breach of duty by an employee are to:

- (a) dismiss the employee without notice, for example where the servant has committed an offence;
- (b) suspend the employee for breach of duty or some defaults (section 16, Labour Act);
- (c) sue the employee for indemnity in respect of losses incurred as a result of the servant's negligence or default;
- (d) sue the employee in so as to enforce reasonable restraint of trade; and
- (e) terminate the employee's appointment.

### 15.7 Duties of employer

- a. To provide work for the servant, especially where the opportunity for work is in the contract of service.
- b. To pay wages or remuneration in legal tender such as cheque (section 1 of the Labour Act). The wages should also be paid regularly, that is weekly, fortnightly or monthly but not longer than monthly (section 9(4), Labour Act).
- c. To provide written statement of the terms of employment within 3 months after the servant has assumed duties.

The duty to provide a safe system of work, which entails:

- a) provision of proper appliances and plants for the use of the employee. It is the view of the law that if a servant is injured as a result of defects in the employer's materials and plants, the employer will be liable in negligence to the servant (**Latimer v. A. E. C (1935)**). However, if the employer took proper care, he may not be liable. Special provision should be made for handicapped and vulnerable employees;
- b) provision of competent staff: Where an employee is injured because of the incompetence of a colleague at work, the employer will be liable to the injured employee because it is the duty of the employer to employ persons who are sufficiently experienced to work and to put them in the right section;
- c) provision of a proper system of work and effective supervision: These include the physical layout of the job, the sequence in which the work is carried out, the provision of warning and notices and the issue of special instruction;
- d) payment of expenses reasonably incurred by the servant in the course of his duties: Traveling expenses, hotel bills and entertainment bills are to be met by the employers (section 13, Labour Act);
- e) payment of compensation under the Workmen's Compensation Act to injured workers or the relatives of deceased worker who have suffered mishap in the course of his duties;
- f) granting at least one work free day per week (section 12(7));
- g) granting periodic leave with pay to employees (section 17);
- h) granting maternity leave to women in employment – section 53;
- i) granting sick leave of up to 12 working days in one calendar year where the sickness is of a temporary nature (section 15); and when the sickness of a servant is serious and so protracted as to frustrate the purpose and objects for which he was engaged, the contract is discharged and the

employer is absolved from further liabilities without prejudice to the earned entitlement before the discharge;

- j) paying redundancy allowance where servants have to be discharged for reasons of redundancy owing to excess of manpower (section 19). The amount payable is normally as negotiated between the employer and trade union concerned;
- k) indemnifying the servant for losses lawfully and reasonably incurred in the course of performing his duties; and
- l) being vicariously liable for servant's torts committed in the course of carrying out the master's work. He may however, claim indemnity for the amount (**Lister v Romford Ice & Cold Storage (1957)**). It is no defence to the master that he warned the servant against committing such a tort (**Ayodele James v Mid- Motors Nig. Co. Ltd (1973)**).

## 15.8 Termination of employment contract

Contract of employment may be terminated by natural events, such as death, frustration, and operation of law. Broadly, the reasons for which a contract of employment could be terminated could be classified into two, namely voluntary and involuntary:

The voluntary reasons include:

- (a) resignation by an employee for diverse personal reasons; and
- (b) retirement from service by the employee when due for retirement.

**The involuntary reasons include:**

- i. compulsory winding up of the employer's company or dissolution of the business (partnership or sole proprietorship) of the employer, layoffs for economic factor, change of business strategy, or restructuring;
- ii. compulsory conscription of the employee during times of hostilities or war;
- iii. prolonged illness of the employee;
- iv. mutual agreement as when *ad hoc* job is completed, or the happening of an event, or contingency, or by effluxion of a term certain;
- v. termination of the employment by the employer for reasons that include (dismissal of the employee) for misconduct or poor performance on the job;
- vi. death of the employee, in case of contract of personal service;
- vii. by notice given by either party; or
- viii. where the contract of employment is not for a term certain, by the employer determining the contract in accordance with the terms of the contract.

These terms will usually include: giving of notice of a fixed time or reasonable time. Where no time is fixed, the notice will have to be in accordance with the terms of the contract. The notification should not state reasons, because if it does so, the court may look into the reason given and declare the termination wrongful.

In the alternative, the employer may pay salary in lieu of notice to cover the number of months or days that his notice must cover. This is more advisable and usually adopted because the commitment of an employee to his employer's work is likely to change for the worse after receiving such a notice and may create adverse consequences for the employer.

Where however, the employment is for a fixed term, the employer cannot determine the contract before the fixed duration and will be liable to the employee in damages for wrongful termination and not an order of reinstatement as the court have maintained that they will not force an employee on an employer.

### 15.8.1 The case of civil/public servants

Of recent, our courts have distinguished between a person in the civil/public service, whether of a State or of Federation, and a person employed by a private establishment.

Civil servants may have a right to work for the employer for life or until the normal period of retirement. The effect of this is that their employment cannot just be determined anyhow, and where it is wrongfully determined the court will order reinstatement.

### 15.8.2 Dismissal of an employee

Dismissal is the removal of an employee without formalities by the employer. A master may dismiss a servant for:

- (a) an act or conduct likely to bring the employer into disrepute;
- (b) the servant's practice or conduct that exposes the master to loss of public confidence;
- (c) gross immorality;
- (d) absenteeism without leave or permission, amounting to an abandonment of duties; or
- (e) gross misconduct, which may include insubordination, habitual drunkenness, gross negligence, wilful disobedience of lawful orders and soon.

It has been severally held by the courts that an employee cannot be dismissed without being heard, as that would be a breach of his fundamental right to fair hearing under section 33 of the Constitution (**Garba v University of Maiduguri; Olaniyan v University of Lagos**)

Where an employee is alleged to have committed an act that amounts to an offence, he must be charged to court and tried for the crime. So, where he is tried and found guilty by the employer's disciplinary committee, his dismissal will be wrongful and the court may order his reinstatement (if he is a civil servant) or order damages to be paid to him (if not a civil servant) **Garba v University of Maiduguri**.

### 15.8.3 Interdiction

This is the suspension of the employee pending the determination of a criminal charge against him. If at the end of the criminal trial, the employee is discharged and acquitted of the charge, he will be reinstated.

## 15.9 Chapter Review

This chapter explains employment succinctly. It gives an overview of types of employment relations, formation and terms of an employment contract.

## 15.10 Worked examples

### 15.10.1 Multiple-choice questions

1. The duties imposed on an employee includes the following, **except** duty of
  - A. Due care and diligence
  - B. Good faith
  - C. Delegation of duty
  - D. Obeying lawful orders

2. The duties of the employer include the following, **except** to
  - A. Pay wages or salary
  - B. Provide a reference to the employee.
  - C. Provide a safe system of work
  - D. Indemnify the employee for reasonable expenses
3. An involuntary and permanent loss of employment caused by an excess of manpower is referred to as
  - A. Constructive dismissal
  - B. Termination
  - C. Dismissal
  - D. Redundancy
4. A contract under which an employee is restricted from competing with the employer upon leaving the employers job is referred to as:
  - A. Restraint of trade contract
  - B. Specialty contract
  - C. Mutuality contract
  - D. Exclusion contract
5. A contract of service is between a/an
  - A. Master and servant relationship
  - B. Employer and independent contractor
  - C. Owner and servant
  - D. Principal and agent

#### 15.10.2 Open-ended questions

- (1) Differentiate between dismissal of an employee and termination of his appointment.
- (2) List five consequences of the distinction between a contract of service and a contract for service.
- (3) Alex was employed as a canvasser for Union Press Co. Ltd. His letter of appointment stipulated that he "shall not canvass for any other press company during the currency of his employment" and shall not upon termination of his appointment, solicit any of the customers of Union Press Co. Ltd for himself or any other press company.

**Required:**

Comment on the enforceability of the prohibitions against Alex

#### 15.10.3 Suggested solutions to multiple-choice questions

1. C

2. B
3. D
4. A
5. A

#### 15.10.4 Suggested solutions to open-ended questions

- (1)
  - (a) A dismissed employee is not entitled to any benefit, but upon termination of appointment, an employee is entitled to his accrued entitlement.
  - (b) The employer must give a reason for the dismissal of his employee but is not bound to give any reason for termination of appointment.
  - (c) The rules of fair hearing must be observed, otherwise a dismissal would be held to be unlawful, but that does not apply to termination of appointment, provided the necessary formalities (such as the applicable notice or payment in lieu of notice) have been followed.
- (2) The consequences of a contract of service which distinguishes it from a contract for service are:
  - (a) the employer in a contract of service is vicariously liable for torts committed by the employee, while the master in contract for service is not.
  - (b) The employees in contract of service receive statutory protection, which are not available to contract for service.
  - (c) The employer deducts P.A.Y.E tax from the employee's salary or wages in a contract of service, but the employee in a contract for service pays his own tax.
  - (d) Collective agreements entered into universally by labour unions are applicable to a contract of service, but not generally applicable to a contract for service.
  - (e) Upon the liquidation or insolvency of the employer, the employee is a preferential creditor in a contract of service, but not so in a contract for service.
- (3) The issue here the right of an employer to enforce the duties imposed upon the employee. Those duties include the duty to serve the employer faithfully and not allow his interest to conflict with that of the employer. In addition is the right of an employer to enforce reasonable restraint of trade against his employee.

Since Alex has a duty to serve the employer faithfully, the stipulation not to canvass for any other press company during the currency of his employment is enforceable against him.

The law allows employers to enforce restraints imposed upon employees, even after the termination of such employment, provided such restraints are reasonable and necessary to protect the interest of the employer.

In this case, the stipulation that Alex shall not upon termination of his appointment solicit any customer of his employer for himself or any other person may be enforced if, in the opinion of the court, it is reasonable and necessary to protect the interest of his employer.

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## ADMINISTRATION OF ESTATES AND TRUSTS

### Contents

- 16.0 Learning objective
- 16.1 Learning outcomes
- 16.2 Introduction
- 16.3 Wills
- 16.4 Trusts
- 16.5 Chapter review
- 16.6 Worked examples

## **16 Administration of Estates and Trusts**

### **16.0 Learning objective**

This chapter is to give a brief insight into administration of the estate of persons dying testate and intestate as well as disposition of property through trusts.

### **16.1 Learning outcomes**

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

- (a) explain the law relating to the administration of estates of deceased persons;
- (b) distinguish between executors and administrators;
- (c) explain the duties of executors and administrators;
- (d) explain the meaning of, and how trusts are created;
- (e) explain the duties, powers, rights and accounts of trustees;
- (f) explain the rights of beneficiaries under a trust; and
- (g) explain the investments authorised by the Trustee Investment Act.

### **16.2 Introduction**

The law relating to administration of estates is borne out of a reality of nature that everyone dies, and most persons die leaving property behind. The purpose of the law relating to administration of estates is to ensure that such property does not become a problem not only for the surviving relatives of the deceased but the society generally.

The problems that could arise include issues as to who is entitled to inherit the properties of the deceased, in what proportions should the beneficiaries inherit the properties, how to identify and put together the properties of the deceased as at the date of his death, which law governs the personal life of the deceased, the procedure for legally inheriting and vesting the properties in beneficiaries, and payment of the debts owed by the deceased in his lifetime.

Accordingly, the properties of every deceased person are subject to administration and distribution under the law. This is achieved through:

- a. disposition in the Will of the deceased person where he has made one;
- b. customary law - under the particular customary law to which the deceased was subject in his lifetime if he has died without leaving a Will (intestate);
- c. common law - under the common law rules on intestacy as applicable under the reception statutes where the deceased was domiciled in or originated from a state without a localised administration of estates statute, if he has died without leaving a Will, and he died not being subject to customary law; and
- d. administration of estates law applicable in the particular state of the federation.

The preceding, therefore, represent the sources of the applicable law on succession to the properties of deceased persons in Nigeria.

### **16.3 Wills**

This is a document made by a person referred to as a testator by which he appoints persons known as executors to manage his estate after his death and directing the manner in which the estate is to be distributed to named beneficiaries. It has been

described as “a testamentary and revocable document, voluntarily made, executed and witnessed according to law, by a testator with sound disposing mind wherein he disposes of his property subject to any limitations imposed by law and wherein he gives such other directives as he may deem fit to his personal representatives otherwise known as his executors, who administer his estate in accordance with the wishes manifested in the Will.” – Kole Abayomi, *Wills: Law and Practice*, (Lagos, Mbeyi & Associates Nig. Ltd, 2004) at p. 6.

A person who died leaving a Will is said to have died testate. A person who makes a Will is called a testator, while one named in the Will to implement it is called an executor (as a male) or executrix (as a female).

#### **16.3.1 Intestacy**

Many persons die without making Wills notwithstanding the advantages of Wills. A person who dies without leaving a Will is said to die intestate. Even if the person dies after writing a supposed Will, but the Will fails or is declared invalid for any reason, such a person is deemed to have died intestate.

One of the direct results of a person dying intestate is that his properties may be exposed to squander and sometimes beyond reach especially where there are no known persons entitled to inherit the estate. In some cases, the estate is taken over by the Administrator-General on behalf of the state since such estate may be treated as an ‘unrepresented estate’. See Section 2 of the Administrator-General Law.

#### **16.3.2 Letters of administration**

In order to avoid the squandering of the estate of a deceased person who has died intestate, there is a need for his personal representatives to procure Letters of administration for the purpose of legally and properly administering the intestate estate.

‘Letters of administration’ is a document issued from a court with requisite jurisdiction authorising specified persons known as administrators to manage the estate of an intestate person. It is the alternative to a Will where there is no Will or there has been a failure of a purported ‘Will’ for some reason.

#### **16.3.3 Need for letters**

The need for letters of administration arises where a person:

- (a) dies leaving a Will but fails to name an executor in the Will or named an executor who is unable or refuses to obtain probate (a certificate issued from the Probate Division of the High Court to the executors of a Will certifying that the Will is valid and that the executors are authorised to administer the estate of the deceased testator), or for any reason the named executor predeceases the testator.

In this kind of situation, the Will is annexed to the application for letters of administration which is then known as letters of administration *cum testamento annexo*, that is, letters of administration with the Will annexed;  
or

- (b) dies without making a Will at all; or
- (c) leaves a Will but nonetheless dies intestate as to some beneficial interests in his real or personal estate. In other words, some of his properties are not covered by his Will, and he is intestate in respect of them, that is partial Intestacy.

Letters of administration necessitated from any of the above situations are issued by the Probate Division of the High Court pursuant to the provisions of

the Administration of Estates Law of that State where such laws exist and their High Court Rules; and where the deceased was not subject to customary law as at the date of his death. Letters of administration confer legal authorisation on the persons specified therein not only to have access to the properties of a deceased person including funds and other choses in action but also to deal with same as every personal representative of a deceased person would. In other words, letters of administration legally confers on the persons specified therein the powers, functions and duties of personal representatives.

Funds and other assets belonging to a deceased intestate person in his lifetime but which are in the custody of banks, insurance companies and the benefits of company and co-operative society shares held in the name of the deceased intestate person cannot be lawfully accessed by his family or any person otherwise interested therein without the production of a valid letters of administration.

#### 16.2.4 Types of letters of administration

From the above, two types of letters of administration are available to the estate of a deceased intestate, namely:

- (a) Letters without a Will; and
- (b) Letters with Will annexed.

The two are provided for in the Administration of Estates Laws of the States of the Federation with such laws and, where applicable, the common law rules on intestacy.

- (c) There is also a third type of letters of administration, which may be described as customary letters of administration. These are issued from Customary Courts with requisite jurisdiction thereon e.g. as in Delta, Edo and Lagos States. This type is actually a sub type of type (a) above dealing with letters without a Will. What differentiates this third type of letters of administration is that they are issued by customary courts as opposed to letters of administration without a Will issued from the Probate Division of the High Court. Other types of letters include:
  - (i) Letters *ad colligenda bona* which is like an interim order authorising any person to deal with specified property being part of an estate pending a full and permanent grant of representation. Letters of administration *ad colligenda bona* is resorted to when the property to be dealt with is, for instance, in perishable state or where delay in dealing with it may expose the estate to loss. It may be granted to any suitable person who may not necessarily be a person entitled thereto;
  - (ii) Letters of administration *durante absentia* is one granted to an appropriate person in the absence of an executor who is abroad; and
  - (iii) Letters of administration *de bonis non administratis* which is one made to some new person where the person to whom a previous letters of administration was granted dies before completing the distribution of the estate.

#### 16.3.5 Administrators/administratrix

When a grant is made by virtue of the issuance of letters of administration, the persons to whom the administration is granted are known as administrators or

administratrix, if it is a woman.

Administrators therefore are persons appointed by the court to administer the estate of a deceased person by gathering and distributing the properties or assets and liabilities of the deceased person who has died intestate i.e. without leaving a Will, or has died leaving an invalid Will, or a Will without appointing executors, or where the executors appointed in the Will cannot act or have refused to act.

#### **16.3.6 Executor/executrix**

An executor/ executrix is a person appointed in a Will by a testator to administer the estate of the testator upon his death in accordance with instructions contained in the Will.

An executor/ executrix is, like an administrator, the personal representative of a deceased person. But while an administrator/administratrix is usually appointed by a court, the executor is appointed by the testator in his Will.

Generally, the position of the law is that upon the death of a person and prior to the grant of Probate or Letters, there devolves upon the beneficiaries of his estate the equitable interests thereof.

Where the deceased has left a Will, the legal interests will vest in his executors but where he has died intestate, the legal interest in respect of his estate will, upon grant of Letters, vest in his administrators.

In effect, an administrator does for an intestate estate what an executor does for a testate estate under a Will. Both are generically referred to as personal representatives.

If the testator creates a trust under his Will, the personal representatives will be under a legal duty to vest the trust property in the trustee. This is achieved by way of a vesting assent by deed, which in effect transfers the legal interest in the trust properties to the trustee. Where the personal representatives are also the trustees under the Will, the vesting of legal interests is implied.

Personal representatives exercise certain powers in respect of the estate they represent and are also subject to certain duties, obligations and rights.

#### **16.3.7 Duties and rights of personal representatives**

Personal representatives derive their powers to legally administer the estate of a deceased person only upon the grant of valid Letters of Administration or Probate to them. Probate is a legal recognition of the validity of a will and the title of the executor to the estate of the testator. It is also known as the official proving of the will. It is granted by the Probate Division of the High Court. Any person may oppose the grant of probate or Letters of Administration to the personal representative, by filing a "Caveat" which is a notice in writing to the registrar not to make a grant to the applicant(s) for Probate or Letters of Administration without giving the Caveator, the person opposing the grant a right to be heard in opposition. Without such grant, every act done in connection with the estate amounts to an intermeddling and such persons meddling, even when it is their customary law right to so do, cannot sue or be sued in respect of the estate.

In the same vein, a person will be without *locus standi* to defend an action if sued as an administrator or executor of an estate of a deceased person where such a defendant is not ascertained to have been appointed an administrator or executor by Letters or Probate as the case may be. Such a person is an "executor de son tort" an executor by his own wrong.

Upon their appointment following a grant of Letters of Administration or Probate, certain legal duties are attached to the personal representatives. These include:

- (a) **Gathering and realisation of assets:** The first duty of a personal representative, whether he is an administrator or executor, is to identify and define the estate by collecting together all the assets and liabilities of the estate. In other words, he takes an inventory of all the properties and assets in the estate as well as its debts and liabilities.

A personal representative derives his powers to administer the estate only upon the grant of Probate or Letters of Administration.

- (b) **Application to court:** The personal representatives have a duty to apply to court for an order of court granting them powers to administer the estate of the deceased. This is important to give validity to all their acts respecting the estate since the death of the deceased.

This is more so as without a grant they may not be able to administer certain types of assets e.g. credit bank balances in favour of the estate, proceeds of insurance policies, company shares, interests in co-operative societies and such like assets which cannot be accessed without formal authorisation as by Probate or Letters.

- (c) **Payment of debts and liabilities:** Where the deceased was owing any debts as at the date of his death, the administrators of the estate are under a duty to pay such debts. The debts could arise from loans obtained by the deceased while alive and which remained unpaid as at the date of his death, rents, sundry bills e.g. electricity bills, bank overdrafts, taxes outstanding, interests due on loans, etc.

- (d) **Payment of estate tax:** Every estate of a deceased person is subject to a tax known as estate tax upon a grant of Probate or Letters. The estate tax is a form of indirect tax, which is imposed on the value of the property comprising the estate of a deceased person following the grant to his personal representatives of powers to administer the estate. It is the duty of the personal representatives to pay this tax.

- (e) **Accounts and records:** The personal representatives of an estate must keep clean and proper accounts and records of their administration. They are also entitled to reimbursement for all necessary and reasonable expense incurred by them in the course of their administration.

- (f) **Not to profit:** Personal representatives are under a general duty not to profit from the administration of the estate but will be entitled to reimbursement for all personal funds expended on the estate for purposes thereof.

- (g) **Right of action:** An administrator has the right to sue in relation to the estate that he administers and a duty to defend all suits on behalf of the deceased's estate. In this respect, only *actions in rem* are sustainable by or against the estate as a cause of *action in personam* (a personal right of action) dies with the person - "*action personalis moritur cum persona*".

- (h) **Distribution of estate:** The final duty of personal representatives with respect to the estate is the distribution of the remainder of the assets to persons entitled thereto i.e. the beneficiaries.

## 16.4 Trusts

The concept of trusts is derived from the attempt to avoid the hardships from the common law, especially the evasion of feudal incidents of land ownership. Trust is therefore part of the English doctrine of equity, which has come to permeate the idea of justice universally including Nigeria.

### 16.4.1 Definition of trust



The most acceptable definition of the concept of trust is as provided by Professor Keeton that, "trust is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal for the benefit of some persons (of whom he may be one) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust".

#### **16.4.2 Uses of trust**

Under a trust, the two different persons that could hold a property at the same are:

- (a) the trustee who is the legal owner but who does not enjoy the actual benefit of the property; and
- (b) the beneficiary who is the equitable owner and who enjoys the actual benefit of the property.

The trust is very useful in achieving the objects of:

- (a) enabling more than one person to own land;
- (b) facilitating the objectives of charitable purposes;
- (c) enabling property to be held for the benefit of persons who cannot hold the legal titles of property themselves for reasons of certain legal disabilities e.g. for being minors;
- (d) enabling property to be used to the benefit of persons in succession; and
- (e) helping in avoiding or minimising liability to various forms of taxation.

#### **16.4.3 Classification of trusts**

There are different types and classification of trusts depending as to the author. In the main however, there are two types of trusts, which are those expressly created (express trusts) and those that come into being by operation of law (implied trusts). These may be further classified to include:

- (a) private trusts; and
- (b) charitable or public trusts.

#### **16.4.4 Essential elements of an express private trust**

There are three essential elements of a trust. These are generally referred to as the "three certainties" of trusts (See Lord Langdale in *Knight v Knight* (1840) 9 L.J. Ch. 354.

These are:

- (a) **certainty of intention** by which the creator of the trust known as the settlor must by the words used by him show a clear intention to create a trust. In showing that clear intention, the words used by the settlor must indicate a positive and unambiguous command that something specific shall be done and a trust shall be created. The settlor must not equivocate and the words used by him must be precatory.

This element is applicable only to express trusts, and the consequence of a lack of certainty of intention is that the grantee takes the property absolutely.

- (b) **certainty of subject matter**, which is a reference to the specific property to

be dealt with under the trust created and the particular interest in the property that the beneficiaries are to take. An attempt, for instance, to create a trust in which the settlor conveys “some” of his houses to some persons and “the rest” to other persons will fail as a trust for failure of the exact subject matter to be taken by the beneficiaries. In this kind of situation, the attempt to create a trust fails and the trustees will take the property on a resulting trust; and

- (c) **certainty of objects** by which the settlor clearly identifies the beneficiaries under the trust. The objects i.e. the persons who are to benefit under the trust, must be ascertainable or capable of being ascertained from the words used by settlor. The failure of the objects of a trust is fatal to the trust, and where that occurs, the trustees shall take the property on a resulting trust for the settlor.

#### 16.4.5 Private trusts

A private trust is trust created by an individual either *inter vivos*, that is to take effect during the settlor’s lifetime, or by Will, i.e. to take effect after the death of the settlor. Private trusts could further be classified into:

- a) **express trust:** created deliberately and expressly by the settlor to take care of his personal and private interests. This is done either *inter vivos*, i.e. so as to take effect during his lifetime, or by Will, i.e. to take effect after his death;
- b) **implied trust:** resulting from the presumed intention of a settlor. Accordingly, most implied trusts are also known as **resulting trusts** in that where, for instance, a trust is created by a settlor conveying property to be held by trustees for the benefit of a particular person for the life of that particular person but does not state what happens to the property upon the death of the particular person, the property devolves on the trustees on a resulting trust for the settlor. In such a case where the property reverts to the settlor in equity, the legal title remains with the trustees while the equitable title reverts to the settlor; and
- c) **constructive trust:** one which is imposed on the parties by equity regardless of their intention. It is a trust designed to prevent persons from unlawfully benefiting from trust property. The general rule is that wherever a person who is clothed with a fiduciary character with respect to property and he gains some personal advantage by virtue of his relationship to the property he would be deemed a trustee of such advantage for the benefit of the beneficiaries. For instance, if a trustee in breach of his trust conveys trust property to another person who accepts the property in the knowledge of the breach of trust, he becomes a constructive trustee for the benefit of the beneficiaries whether or not he consents to being a trustee. A trustee who obtains personal benefit from trust property is a constructive trustee in respect of such benefit for the benefit of the beneficiaries.

#### 16.4.6 Public trusts

A public trust is, in some sense, the opposite of a private trust. This is because a public trust is mainly charitable in character, by which it is meant that they are trusts created to benefit the public generally, or a significant part of it.

For a trust to be public or charitable, the three essentials are:

- a) **benefit to the public:** The main intention of a charitable trust must be to benefit the generality of the people or a significant part of it. For instance, a purported trust designed to benefit the descendants of three named families has been held not to be charitable or public for lacking in the element of public benefit. See **Re Compton** (1945) Ch. 123. However, where the trust is for the relief of poverty, even if it is restricted to the relatives of the donor, it shall be

exempted from the requirement of public benefit.

- b) **wholly and exclusively charitable nature:** A trust created to benefit partly the general public as a charity and partly to non-charitable purposes will fail as a public or charitable trust. A charitable must be applicable only to charitable purposes in whole and exclusively.
- c) **charitable in law:** Although there is no statutory definition of charity, a charitable trust must be one which must be charitable in the legal sense and not necessarily in the ordinary context of the word. Accordingly, it has been held that a charitable trust must be one which is created for the:
  - i. relief of poverty;
  - ii. advancement of education;
  - iii. advancement of religion; or
  - iv. other purposes beneficial to the community, which may include trusts for welfare of animals, for the maintenance of museums, the promotion of efficiency in the police force and such like community interest purposes. See Lord Macnaghten in **Commissioners of Income Tax v Pemsel** (1891) AC 531, 583.

Trusts for the furtherance of political interests or of the interests of a political party are not legally charitable. A trust for the purpose of changing government policies, or to secure changes to the laws of the country is also not charitable.

#### 16.4.7 Creation of trusts

The concept of trusts is one developed in equity. Equity attaches itself more to substance than to form. Hence, except in certain situations regulated by statute, a trust does not require any particular form in its creation, generally speaking.

A valid trust would be created once the three certainties of intention, subject matter, and object are present.

However, section 7 of the Statute of Frauds 1677 (an English Statute of General Application that applied throughout Nigeria, except in the states of the old Western Region) provides that, "All declarations or creations of trusts or confidences of any land, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his Will in writing, or else they shall be utterly void and of no effect."

For states in the defunct Western Region, this provision was contained in Section 78 of Property and Conveyancing Law of 1958.

By this provision, creation of every express trust whose subject matter is land or an interest in land must be manifested and proved in writing signed by the maker. This is achievable by any form of writing inter vivos or by Will. The provision does not apply to non-land properties, e.g. shares and stocks, nor does it affect the creation of resulting or constructive trusts even if their subject matter is land or interest in land.

Accordingly, a valid trust could be created even by oral declarations provided that the subject matter is not land, which will require some form of writing in proof thereof. The writing that is required need not be in any particular form. Any form of written document signed by the owner of the land that is the subject matter of the trust and who effectively declares a trust therein will suffice. See Turner L.J. in **Smith v Matthews** (1841) E.R. 831 where he explained that when a court is called upon to establish or act upon a trust of lands by declaration or creation, the trust "must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust, that there is a trust, but it must also be manifested and proved by writing as required, what that trust is."

#### 16.4.8 Duties and powers of trustees

The office of trustee imposes on the trustee certain legal duties, that is, acts or things to which the trustee is obligated, the first of which is for him to ensure that the trust instrument and his appointment as trustee are regular and validly made since any defect may affect the powers of the trustee to act validly under the trust instrument. Other duties of the trustee include the following:

**Investment:** Trustees are under a duty to invest trust funds with a view to enhancing the value of the trust or at least prevent it from depreciating in value. A trust instrument may contain an investment clause that directs that certain investments could be made by the trustees. There are also investments that trustees could make by virtue of statute. Statutes on trust investments regulate even express investment clauses in trust instruments.

The principal statute that regulates the investment of trust funds in Nigeria is the Trustee Investments Act, Cap. T22, Laws of the Federation of Nigeria 2004. Under the Act, restrictions are placed on the type of investments trustees could make with trust funds.

By Section 3 of the Trustee Investments Act, without prejudice to the enabling provisions of any other law, a trustee may in his discretion invest in any of the securities listed in Section 2 thereof. The discretion of the trustee in choosing what investment he makes is however subject to any consent or direction contained in the trust instrument or contained in any law relating to the investment of trust funds.

A trustee is by virtue of the provisions of Section 2 of the Trustee Investments Act is allowed to invest only in:

- (a) securities created or issued by or on behalf of the Government of the Federation of Nigeria;
- (b) Securities of a State government declared to be securities in which a trustee can invest by the President of the Federation by notice published in the Federal Gazette;
- (c) securities created or issued by companies or corporations such as are listed in the schedule to the Act, that is:
  - (i) the Nigerian Coal Corporation;
  - (ii) the Nigerian Ports Authority; and
  - (iii) the Nigerian Railway Corporation, and which are by notice published in the Federal Gazette by the President of the federation to be securities in which trustees may invest.

(The above list of corporations and companies in whose securities a trustee may invest may be added to by the President of the Federal Republic of Nigeria, and a notice of such addition must be published in the Federal Gazette.

- (d) debentures and fully paid up shares of any company incorporated and registered under the Companies and Allied Matters Act provided that the company is not a private company. In other words, a trustee may only invest in the debentures and paid up shares of a public limited liability company. In addition, the shares and debentures must be quoted on the NGX PLC or similar exchanges.

With regards to shares, the nominal value of the fully paid-up shares issued by the company in question must not be less than one million naira. In addition, section 2(2)(c) of the Act stipulates that investment in shares must be on the condition that the company has paid dividends during each of the three years immediately preceding the current year on the shares at the aggregate amount of not less than five per cent of the nominal value of the shares for every year.

Trustees are prohibited from investing more than one third of the total value of a trust fund, and the value of the part of the fund so invested in the shares and debentures of a particular company must not be in excess of one-tenth the total value of the fund – S.2(3)(c).

In addition, the value of the part of the fund so invested in the shares of a particular company must not exceed one-twentieth of the total value of the fund- S. 2(3)(c).

- (b) **Non-delegation:** Trustees owe a duty not to delegate their duties under the trust to other persons. This is because a trustee is usually appointed by the settlor because of some confidence reposed personally in him by the settlor. It could be for reasons of some personal skill which the settlor knows the trustee has, or because the trustee has some personal knowledge concerning the settlor's family and affair. Therefore, a trustee is required to carry out the functions of his office personally and not delegate them.

"Trustees who take on themselves the management of trust property for the benefit of others have no right to shift their duty on other persons; and if they employ an agent, they remain subject to the responsibility towards the beneficiaries for whom they have undertaken the duty".

See **Turner v Turner** (1841) 49 E.R. 677.

Trustees may however appoint agents or the services of other persons out of necessity or in line with the general usage of mankind. In such situations, the trustee is still under duty to personally make the choice of agent and supervision of such agent.

- (c) **Impartiality:** In dealing with the beneficiaries under a trust, the trustee is expected to maintain an objective balance. He must not only be impartial as between the beneficiaries but must be seen to be impartial and must therefore not favour one beneficiary against another.
- (d) **No deviation from terms of trust:** Trustees must strictly carry out the functions of their office in strict compliance with the terms of the trust. A trustee is not allowed to permit his personal prejudices to becloud the clear directions in the trust instrument. The courts would always compel trustees to keep strictly to the terms of the trust just as the courts themselves will not permit themselves to alter the terms of a trust.

"It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt, and, if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary". See **Lord Simonds L.C. in Chapman v Chapman** (1954) 2 W.L.R. 723, 727.



- (e) **Loyalty:** A trustee owes the duty to be loyal to the terms of his trust. As a result, he is expected to be detached and dispassionate in handling trust transactions. He is not to be personally interested in trust property so as not to allow his personal interest to conflict with his duties as a trustee. If a trustee buys trust property from himself or from his fellow trustees, he will be in breach of his duty to be loyal to the trust. This is because, as a trustee, he owes fiduciary duties to the trust.

“It is a settled rule of equity that no one having duties of fiduciary nature to discharge shall be allowed to enter into engagements in which he has or can have personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. A trustee for sale may not purchase the trust property from himself (for) however honest and fair the sale may be, and even if it is made at a public auction, or for a price higher than that obtainable in the open market, any beneficiary has an absolute right to have the conveyance set aside”. See *Kolawole JCA in Okesuji v Lawal* (1986) 2 NWLR (Pt. 22) 417, 433.

- (f) **Account and information:** Trustees are under a duty to keep clean and accurate records and accounts of their dealings under the trust. Further, it is their duty to make the records available to the beneficiaries who have a right to see them.
- (g) **Acting gratuitously:** A trustee does not get paid for his services. This is because he owes a duty to act gratuitously. This duty is designed to prevent the trustee from placing himself in a position where his personal interests will conflict with his duties as a trustee.

However, the trust instrument may authorise payment to the trustee, then the trustee shall be entitled to remuneration in terms of the authorisation. The court may also order that trustees be paid some remuneration as appropriate to the nature of duty under the trust. The law also permits certain types of trustees e.g. the public trustee and the judicial trustee appointed by a court, to be remunerated.

Although he is not entitled to remuneration, a trustee is entitled to be reimbursed from the trust funds for all expenses reasonably incurred by him in the course of carrying out his duties under the trust. This is treated as a first charge on the trust fund over which the trustee has a right of lien and further even takes precedence over the interests of beneficiaries.

- (h) **Distribution of property:** A trustee is under a duty to distribute trust property to proper beneficiaries according to the directions contained in the trust instrument or according to law. Where the trustee is in doubt as to the proper beneficiaries, he may deposit the trust fund and title documents in his possession into court.

#### 16.4.9 Powers of trustees

The office of a trustee is not all about duties only. In order that the trustee will be able to efficiently administer the trust, he enjoys certain powers. Power in this respect is a legal discretion exercisable by the trustee with respect to the trust and its administration. Powers are different from duties in that whereas duties are imperatives, powers are discretionary.

Generally, a trustee is not under a duty to insure trust property unless there is an



express provision in the trust instrument to the contrary. But it is within his implied powers to so do if, in his discretion, he considers it profitable. Where he decides to insure, he shall be free to pay the premium from the trust fund or profits from the property so insured or income from any other property within the trust.

The defunct Western Region of Nigeria enacted a Trustees Law, which made provisions for trustees to insure trust properties against loss or damage by fire up to the full value of the trust property. Each of the states that comprised that defunct Western Region has its own laws that make provisions permitting trustees to exercise powers to compound liabilities, to give receipts for trust moneys received by them, and sell trust property by auction.

#### **16.4.10 Rights of beneficiaries under a trust**

As has been stated above, a trust allows more than one person to hold or have interest in the same property at the same time. These are the trustee, who is the legal owner of the property, and the beneficiary who is the equitable owner. The equitable owner who enjoys the actual benefit of the property is the beneficiary. It is he who has rights under the trust to ensure that the trustee complies with the trust terms strictly. According to Lord Brown-Wilkinson in **Target Holdings v Redferns** (1995) 3 AER 785, "The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust ... and the general law".

Accordingly, it is the right of the beneficiary under a trust to ensure that trustees do not dissipate trust funds or commit fraud upon the trust. This right includes the right of action for accounts and the right to compel tracing of trust property.

A beneficiary is entitled to an order of injunction in appropriate situations to restrain trustees from endangering the trust. An example is where there is evidence that the trustee is about to become bankrupt, or insolvent, or is dishonest. Where trust the property has been fraudulently transferred from the trust, the beneficiary has a right of personal action that the trust property be traced into the hands of whoever has the property. The right to trace trust property is available against a trustee who, in breach of trust, has converted trust property to his personal use and benefit or has mixed trust funds with his own fund to acquire assets for himself. A beneficiary could exercise the right of tracing also against a third party who takes trust property in breach of trust, provided that he is not a purchaser in good faith for value and without notice of the breach.

#### **16.4.11 Appointment of trustees**

Anybody of full capacity can be appointed a trustee. This includes corporations and even aliens. An infant may not however be appointed as a trustee. Where an infant is made a trustee, a court may appoint another with majority to act for the period during which the infant remains a minor.

A trust corporation that is appointed a trustee must have as one of its objects the power to be so appointed.

A public trustee may also be appointed as a trustee while a court may appoint trustees for a trust in appropriate cases. A trustee appointed by a court is known as a judicial trustee.

Trustees may be appointed at the inception of the trust. Such trustees are known as original trustees while new or additional trustees may subsequently be appointed where. Examples of the latter are when an original trustee is either dead, or remains outside of Nigeria for an uninterrupted duration of twelve months, or retires, or refuses to act' or desires to be discharged.

#### 16.4.12 Termination of trusts

A trust could be brought to an end in one of four ways to wit by the trustee disclaiming the trust or by his removal or by his retirement or by his death.

- a. **Disclaimer:** No one can be compelled to accept the office of a trustee. Accordingly, a person appointed as a trustee may reject the office or decline the appointment, thereby disclaiming the trust. This he can do by way of a deed expressly declining to accept the appointment or by some other form of writing. He could also decline orally by making verbal pronouncements to the effect or he could decline by conduct i.e. by simply refusing to act.
- b. **Removal:** A trustee may be removed, by which act the relationship of trusteeship is brought to an end. Trustees may be removed from office if they refuse to act, or are found to be unfit to act, or are incapable of acting or are outside of Nigeria for an unbroken period of 12 months.
- c. **Retirement:** A trustee who has accepted the trust office may subsequently wish to be discharged from the office and, since no one may be compelled to act as trustee, he may retire from the office by exploiting the retirement provisions in the trust instrument or under statutory powers. He may also apply to court for order retiring him from the trust or by the consent of the beneficiaries.
- d. **Death:** The death of a trustee naturally brings to an end his office as a trustee.

#### 16.5 Chapter review

This chapter discusses in basic form the law on administration of estates, highlighting the roles of executors, administrators, and trustees, the law on Wills, probate, and letters of administration as well as the duties of executors and administrators, respectively.

#### 16.6 Worked examples

##### 16.6.1 Multiple-choice questions

1. The property of a testator not covered specifically by his Will is known as
  - A. Unreal property
  - B. Intestate property
  - C. Residuary estate
  - D. Remainder estate
2. What is the legal term that describes an estate that has been unclaimed by anybody, which consequently belongs to the state?
  - A. Bequest
  - B. Devise
  - C. Residual estate
  - D. Intestate property

*E. Bona vacantia*

3. A person that is not appointed lawfully as a personal representative, but who intrudes into the administration of the estate of the deceased is known as an/a
  - A. Executrix
  - B. *Executor de son tort*
  - C. Administrator
  - D. Trustee
4. Who of the following may not be appointed as trustee?
  - A. A corporation
  - B. An infant
  - C. A widow
  - D. A beneficiary of the will
5. Which of the following is NOT the duty of a trustee?
  - A. Conversion of wasting assets
  - B. Investing surplus trust funds
  - C. Not to profit from the trust
  - D. Not to delegate his duties

**16.6.2 Open-ended questions**

- (1) A trustee is said to "give a labour of love".

**Required:**

Explain the meaning of this phrase and list 3 exceptions to the rule.

- (2) Enumerate the basic requirements for making a valid Will.
- (3) Upon the death of Marcus James, a wealthy merchant, it became necessary to identify his personal representatives.

**Required:**

State the types of personal representatives that may be appointed, and documents of appointment.

**16.6.3 Suggested solutions to multiple-choice questions**

1. C
2. E
3. B
4. B
5. B

#### **16.6.4 Suggested solutions to open-ended questions**

- (1) A trustee must act gratuitously, that is without entitlement to remuneration for his services, even when he acts in a professional capacity on behalf of the trust estate. He shall be entitled only to actual out of pocket expenses. The rule is however subject to the exceptions that:
  - (a) where the trust instrument expressly provides that the trustee be paid for his services;
  - (b) where the trustee is a trust corporation; and
  - (c) where a public trustee is appointed by the court.
- (2) Any person with the testamentary capacity that is, not an infant, or a certified lunatic or insane person, may make a valid Will to dispose of his or her property provided the Will is:
  - (a) in writing (not oral);
  - (b) signed at the end or foot thereof by or on behalf of the testator;  
and
  - (c) attested, that is signed or acknowledged by the testator or person making the Will, in the presence of at least two witnesses who shall be present at the same time and who shall also put their signatures unto the Will in the presence of the testator.
- (3) The two categories of personal representatives are executor/executrix (where the deceased died leaving a Will), and administrator/administratrix, where the deceased died intestate. The document appointing the executor is the Will of the testator, while the administrator is appointed by letters of administration granted by the Probate Division of the High Court.

## ALTERNATIVE DISPUTE RESOLUTION (ADR)

### Contents

- 17.0 Learning objective
- 17.1 Learning Outcomes
- 17.2 Introduction
- 17.3 Alternative Dispute Resolution (ADR)
- 17.4 Arbitration
- 17.5 Limitations to the advantages of ADR
- 17.6 Chapter review
- 17.7 Worked examples

## **17 Alternative Dispute Resolution (ADR)**

### **17.0 Learning objective**

This chapter explains types of alternative dispute resolution mechanism and compares the method with litigation.

### **17.1 Learning outcomes**

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

- (a) alternative dispute resolution (ADR) and the law relating to it;
- (b) types of ADR;
- (c) the advantages of ADR over litigation;
- (d) the role of ADR in resolution of commercial disputes; and
- (e) arbitral proceedings and conciliatory proceedings.

### **17.2 Introduction**

Over the years, litigation has dominated 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 trend presently in dispute resolution is to de-emphasize adjudicatory procedure. Instead more recourse is now being had to alternative dispute resolution methods. Thus, we intend to examine the meaning and purport of ADR, its types and hybrids as well as the advantages it has over litigation.

### **17.3 Alternative Dispute Resolution (ADR)**

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 proceedings. 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 generally are intended to mean 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 for ways to alleviate the burden on courts.

#### **17.3.1 Types of ADR**

There are varied and diverse ADR processes out of which disputants can choose. They include but are not limited to the following:

##### **(a) Negotiation**

Negotiation is a voluntary, unstructured and usually private process through which parties to dispute can reach a mutual gentlemanly agreement for the resolution of their disagreement. It is usually an informal dispute resolution process in which disputants has 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 arguments and lead evidence. They may or may not appoint individuals or professionals such as lawyers, etc. to represent their interests. The totality of the foregoing attribute of this dispute resolution hybrid has engendered the explanation of Negotiation as the fastest, least expensive, most private, least complicated and most party-control oriented process.

**(b) Mediation**

The Arbitration and Mediation Act, 2023 provides for mediation of the following types:

- (i) International commercial mediation;
- (ii) Domestic commercial mediation; and
- (iii) Domestic civil 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 decision 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 the 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, any such power would be contrary to the spirit of mediation, which is inherently consensual.

**(c) 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 settlements, 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 advisor 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 engender the disputants going into further confidential settlement negotiations in an attempt to reach a mutually acceptable agreement.

**(d) 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.

**(e) 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 of the Facilitator is to help bring the parties to consensus on a number of complex issues.

**(f) Fact-finding**

Fact finding as a dispute resolution process is often used mostly in the public sector collective bargaining. The Factfinder 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.

**(g) Med-Arb**

This is an innovation in dispute resolution processes. 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.

**(h) The multi-door court house**

The multi-door courthouse concept is the idea of an 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 two multi-door courthouses in Nigeria; the Lagos Multi-Door Court House and the Abuja Multi-Door Court House.

**(i) Conciliation**

The parties to any agreement may seek amicable settlement by way of conciliation. Proceedings can commence on the date set. Conciliation is characteristically non-adversarial as the ultimate objective is getting the matter resolved amicably.

Where a consensus has been reached at conciliation, parties shall appoint a body consisting of one or three conciliators as follows - in the case of one, jointly by the parties and in the case of three, one each by the parties and the third jointly by the parties. Parties may appear in person or through legal representation. Upon listening to the parties, the body shall submit its terms of settlement to the parties. After acceptance, the conciliation body shall draw up and sign a record of settlement. If parties disagree on the terms of settlement submitted, the dispute shall go to arbitration or the parties may resort to an action in the court as they may deem fit.

### 17.3.2 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 award comes within 90 days;
- e. ADR is much more given to privacy unlike the undue publicity, which might attend civil litigation and adversely affect adversely 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 and well-defined rules in arbitration that apply to specific situations, circumstances and 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.

## 17.4 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."

### 17.4.1 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 is void (section 1(3) of the Act).

#### **17.4.2 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 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.

An arbitral tribunal shall be competent to rule on questions that pertain to its own jurisdiction. The tribunal also has power to order interim measure of protection at the request of a party, that is, to preserve the subject matter of the dispute pending the determination of the arbitration process.

#### **17.4.3 Conduct of arbitral proceedings**

The parties shall be entitled to equal treatment, and they should be given opportunity to present their cases. The place of arbitration shall be determined by the tribunal with due regard to the matter and the convenience of the parties. The Tribunal also has power to appoint and expect to report on the matter before it while it could also order the attendance of a witness.

#### **17.4.4 Award**

Decision in respect of an award by an arbitral tribunal shall be by a majority. In the event of a mutual settlement before the arbitral proceeding is concluded, the arbitral proceedings shall be terminated. An award shall state the reasons, the date and the place it was made and be signed by the majority of arbitrators. However, 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*. An arbitral award shall be recognised as binding and shall, upon application in writing to the court, be enforced by the court. On the other hand, any aggrieved party may request the court to refuse recognition or enforcement of the award on ground of misconduct.

#### **17.4.5 Essentials of arbitration**

For a dispute to qualify for adjudication by a third party through arbitration procedure, it must possess the following essential characteristics:

- a. There must be a dispute between the parties concerning some disagreement over a point of law or fact;
- b. The dispute or difference must be justiciable.
- c. The parties must voluntarily agree to resolve the dispute through third party mediation;
- d. The agreement to submit to arbitration must not be illegal;

- e. The parties must have inserted the Scott v Avery Clause in the said agreement mandating them to submit to arbitration in the present or in the future;
- f. There must be a formal reference of the dispute to the decision of the third party;
- g. That third party must expressly or impliedly be required to decide according to law; and
- h. It must be a term of that contract that the award shall be final and binding and that the parties must act in good faith.

#### 17.4.6 Arbitration procedure

As aforementioned, the agreement signed by the parties must necessarily include an arbitral clause. This is the **Scott v Avery Clause** whereby the parties commit themselves in advance to submit any dispute that may occur to arbitration. Such clause will indicate the procedure for initiating the action and the rules, which shall be applicable. Guidelines will also be given about the appointment of the arbitration panelist. The initiative invariably comes from the claimant. It may also be necessary, in given cases, for the court to appoint an arbitrator for the disputing parties.

The Arbitrator commences business immediately. Procedural matters are outlined and agreed upon. Claims are made and filed while the respondent also gives his defence, which may or may not be accompanied by a counter-claim. In certain cases, it may be necessary for terms of reference to be drawn up and agreed upon by parties and the terms are expected to guide their operations throughout the arbitration without any deviation. Relevant documents may also be tendered and exchanged. The procedure is such that no party will be caught unawares.

Witness can be called or summoned by *subpoena*. Rules of evidence are followed only to the extent that they would not warrant injustice or miscarriage of justice. Preliminary objections may be raised and discharged in the course of proceedings. Parties are also allowed to address the Arbitrator. The award must be made within ninety days.

#### 17.4.7 Enforcement of an award

An award is the final decision of the Arbitrator. Like the judgment of a court, it is usually based on very sound premises and well-adduced reasons. Both the claimant and the defendant shall have copies of the Award, which is expected to be final and binding on the parties.

A party that is not satisfied with the award may go to court for redress. The court may order the award to be remitted back to the Arbitrator or may decide to set it aside as was held in **Governor of Niger State v Albishir**. Usually, it is the losing party that goes to court to ask for a setting-aside order. The court has no power to alter an award. The party that has won may also approach the court for an order to enforce the award.

Once an order is made for the enforcement of the award, the successful party may levy execution under the Sheriff and Civil Process Law. Where the award was made in a foreign country against any organisation or company in Nigeria, it must first be registered under the Reciprocal Enforcement of Judgment Act. An example is an award from a United Kingdom Arbitral Tribunal. Afterwards, application shall be made to the court for enforcement by way of originating summons.

### 17.5 Limitations to the adoption of ADR mechanisms



In spite of the advantages of ADR mechanisms, there are limitations to its desirability, which include the following:

- (a) Their enforceability may be limited.
- (b) The bargaining powers of the parties could be unequal, which makes 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 biased or prejudiced.

## 17.6 Chapter review

This chapter examines ADR as a dispute resolution mechanism in comparison with litigation. It appraises various types and advantages of ADR and their application to resolution of disputes generally and more particularly, those arising from commercial agreements and dealings. It also explains arbitral proceedings as different from conciliatory proceedings, as well as awards, enforcement of awards and recourse to court by dissatisfied parties.

## 17.7 Worked examples

### 17.7.1 Multiple-choice questions

1. An informal dispute resolution process through which parties can reach a mutual agreement in resolving their disagreement is
  - A. Facilitation
  - B. Mediation
  - C. Negotiation
  - D. Mini-trial
  - E. Med-Arb
2. The parties to an arbitration may opt for conciliation, the conciliation body is comprised of
  - A. One or two parties
  - B. One or three parties
  - C. Two or three parties
  - D. Only two parties
3. A party who is dissatisfied or aggrieved by an arbitral award must apply for it to be set aside within
  - A. 30 days
  - B. 2 months
  - C. 3 months
  - D. 6 months
  - E. 12 months
4. An arbitration which arises when the consent of one of the parties to the dispute is enforced by a statutory provision is called



- A. Minitrial
  - B. Mediation
  - C. Multi-door court house
  - D. Compulsory arbitration
5. The statute which regulates the practice and procedure of Arbitration in Nigeria is
- A. The UNCITRAL Arbitration rules
  - B. The convention on the settlement of investment disputes
  - C. The Arbitration and Mediation Act
  - D. The Trade disputes Act

#### 17.7.2 Open-ended questions

1. List **two** (2) essential elements for a dispute to qualify for arbitration.
2. Differentiate between negotiation and arbitration as alternative dispute resolution process.
3. 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.

**Required:**

Advise both parties on their rights.

#### 17.7.3 Suggested solutions to multiple-choice questions

1. C
2. B
3. C
4. D
5. C

#### 17.7.4 Suggested solutions to open-ended questions

1. Essential elements for a dispute to qualify for arbitration
  - (i) The dispute must be justiciable.
  - (ii) The parties must voluntarily agree or be compelled by statute to resolve the dispute through third party mediation.

- (iii) There must be a formal reference of the dispute to the decision of the third party.
  - (iv) There must be a term in the initial agreement that the arbitral award shall be final and binding, and that the parties must act in good faith.
2. A negotiation is an informal process of settling disputes by the parties to the dispute themselves, without involving a third party. The process is the fastest, most private and least expensive form of alternative dispute resolution. Arbitration on the other hand is the process of dispute resolution involving a neutral third party. The proceeding may be more expensive since the arbitrator may need to be remunerated. An arbitrator renders a decision after listening to the parties and has the power to bind the parties by his decision. Arbitration is not as private as negotiation for its services.
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 then appoint a third one jointly.

## APPLICATION OF INFORMATION TECHNOLOGY IN BUSINESS

### Contents

- 18.0 Learning objective
- 18.1 Learning outcomes
- 18.2 Introduction
- 18.3 Laws governing electronic transactions
- 18.4 Laws protecting e-commerce activities in Nigeria
- 18.5 Electronic contracts: Click-wrap and shrink-wraps agreements
- 18.6 Jurisdictional issues in electronic contracts
- 18.7 The place of electronic evidence in the Nigeria legal system
- 18.8 Chapter review
- 18.9 Worked examples

## **18. Application of Information Technology in Business**

### **18.0 Learning objective**

This chapter introduces readers to electronic commerce and transactions in Nigeria as well as their legal protection.

### **18.1 Learning outcomes**

At the completion of this chapter readers should have basic knowledge of

- (a) the laws governing electronic transactions;
- (b) laws protecting e-commerce activities in Nigeria;
- (c) types of electronic contract;
- (d) the law on protection of e-transactions in Nigeria
- (e) Court jurisdiction over electronic contract; and
- (f) The place of electronic evidence in Nigeria.

### **18.2 Introduction**

E-commerce refers to the general conduct of business on the Internet. The World-Wide-Web or the cyberspace, presents a number of commercially-enabled platforms, such as websites and online shops whereby organisations and individuals are availed the opportunities of consummating a variety of transactions with far-reaching legal implications, including breaches of various dimensions. Given the pervasive use of the Internet, parties to online transactions may find it difficult proving their legal rights, as the legal boundaries on the Internet appear very blurred and for the most part, difficult to establish jurisdictions without the introduction of new laws associated with electronic transactions in each jurisdiction.

This section of the study texts will examine some of the legal issues associated with e-commerce transactions and outline the rights and privileges of individuals and organisations conducting trades within the cyberspace. While this is not a comprehensive material on Internet or cyber law, students will find it useful in studying the text on business law.

### **18.3 Laws governing electronic transactions**

A number of business activities consummated on the Internet generally create legal obligations in the eyes of the law. The critical issues include, the determination of when and how online transactions crystallise into appropriate legal obligations. For example, under the common law rules, offers and acceptance are clearly delineated and methods of acceptance are also known to all parties. However, Internet “shops” or “malls” are non-physical in nature, likewise the displays of good or products, this makes it difficult to distinguish between real offers and acceptance in e-commerce transactions.

While the law views acceptance of offers in a general sense and therefore applicable under e-commerce, some inhibitions are noticeable. For example an offer communicated by email and received by the offeree would not constitute an acceptance of the terms and conditions of the offer under the law. Similarly, where the offeree receives such an email and duly replied stating his or her intention to communicate acceptance in due course would not also suffice as an acceptance (T. I. Akomolede, 2008).

Further, individual parties’ awareness and knowledge of the legal rights relating to e-commerce transactions appear very limited, with a large number of people falling victims to breaches without clear knowledge of remedies available to them. Similarly, the cyberspace is inundated with various kinds of fraud and criminal activities spanning the

range of social engineering schemes, virus infections, blended attacks, ransomware schemes, and cyberstalking. Other forms of malicious attacks, leading to financial losses and for the most part, damage to critical assets and sometimes, national critical infrastructures, include hacktivism and cyberwarfare by aggressive nations.

Policing and enforcing these legal rights associated with e-commerce requires some form of regulations and jurisdictional laws. In the United States (US) and other parts of the developed economies there are a good number of statutes and regulations checkmating the activities of cybercriminals. For example, in the US, some stringent laws and regulations have been put in place to enforce individual and collective legal rights under e-commerce and consequently, ensure recovery of damages occasioned by breaches. Some of these laws include the Federal Computer Fraud and Abuse Act (CFAA), usually cited as 18 U.S.C. s1030—this is the primary legislation providing for redress for both criminal and civil penalties.

This US code forbids, among other unauthorised access to a computer and obtaining national security information, computers used in interstate or foreign commerce, non-public computer used by US government, or knowingly and fraudulently accessing a secured computer without due authorisation. Other acts prohibited by this law include intentional recklessness, transmitting threats of extortion, cyber-extortion associated with the demand for money or property. Other laws include the Electronic Communications Protection Act (ECPA)—protecting electronic communication and its contents in transit. Such other laws also exist which prohibit denial-of-service attacks (DoS) phishing, identity theft, electronic theft or even the possession or use of hardware or related tools used to commit cybercrime.

#### 18.4 Laws protecting e-commerce activities in Nigeria

Nigeria is one of the sub-saharan African countries which have speedily embraced emerging technologies and the variants of electronic commerce components. In the cyberspace, Nigeria cannot be said to be missing or at large as there are multiplicities of e-commerce presence.



**Source:** <https://invoice.ng/blog/best-ecommerce-websites-in-nigeria/>

Players are equally in good numbers. Online shops, such as Konga, Jiji, Jumia, PayPorte, VConnect, Kara, Printivo Store, Obiwezy, Ajebomarket, Kusnap, etc. conduct varieties of e-commerce businesses in groceries, household merchandise, office equipment and even real estates. Also, electronic payment systems have enveloped the Nigerian e-commerce horizon, where card companies such as MasterCard, VISA, Verve, and switching

companies such as eTransact, Interswitch, etc. play huge roles in making it possible for all forms of electronic payments to be made in split seconds. The legal implications of the above scenarios are enormous, for example:

- (a) Validity of online purchase contracts;
- (b) Addressing payment defaults;
- (c) Data privacy violations; and
- (d) The incursion of online criminals.

In consequence of the above, the Nigerian government in 2015 enacted the first cybercrime law to regulate e-commerce business. Similarly, data privacy protection received a boost in Nigeria with the release of the first-ever regulation on data protection in 2019 by National Information Technology Development Agency (NITDA). Both of these legislations will be examined in the following sections:

#### **18.4.1 The Cybercrimes (Prohibition, Prevention, Etc.) Act 2015 (as amended by the Cybercrimes (Prohibition, Prevention, Etc.) (Amendment) Act, 2024)**

This law prohibits and encourages some acts in e-commerce transactions in Nigeria. Similar to the US code 18 U.S.C. s1030, the law is a unified legislation; elaborately providing for the prohibition, prevention, detection, prosecution and punishment of offenders in the e-commerce arena in the Nigerian cyberspace. Further, the law sets out the following provisions for the protection of:

- (a) National information infrastructure;
- (b) The promotion of cybersecurity;
- (c) Computers;
- (d) Communication networks;
- (e) Data; and
- (f) Intellectual property rights.

The summary of the relevant sections of the law is provided in the table below.

**Table 1.0 Summary of relevant provisions of the Cybercrime Act 2015**

S/N	Section of the law	Description of breach/offence	Penalty
1.	S.12(1)	Unlawful interception of electronic communications	2 years jail term or option of a fine not exceeding ₦5,000,000.00 or both
2.	S.13	Computer related forgery	3 years jail term or a fine of not less than ₦7,000,000.00 or both
3.	S. 14(1)	Computer-related fraud	3 years jail or a fine not less than ₦7,000,000.00 or both
4.	S.14(2)	Misrepresentation of facts with intent to defraud, causing loss of money or assets	5 years jail term or a fine not less than ₦10, 000,000.00 or both
5.	S.15(a)	Theft of financial institution/public infrastructure terminal	3 years jail term or a fine of ₦1,000,000.00 or both
6.	S.15(b)	Theft of electronic devices –ATM	7 years jail term or a fine not exceeding ₦10,000,000.00 or both



7.	S.16(1)	Unauthorised modification of computer systems, network data and system interference	3 years jail term or a fine not exceeding ₦7,000,000.00 or both
8.	17.(1)	Forgeries of electronic signatures	7 years jail term or a fine not exceeding ₦10,000,000.00 or both
9.	S. (18)	Cyber terrorism	Life imprisonment
10.	S.19	Where a financial institution authorises a person to give access to computer to one person, but the person gives access to other persons	7 years imprisonment or a fine of ₦10,000,000.00 or both
11.	S.20	Fraudulent issuance of e-instructions for debit or credit in a financial institution	7 years imprisonment
12.	S.22(1)	Identity theft offence	7 years imprisonment or a fine of ₦5,000,000.00 or both
13.	S.23(1)	Child pornography and related offences	10 years imprisonment or a fine of ₦20,000,000.00 or both
14.	S. 24(1)	Cyberstalking	3 years imprisonment or a fine of not more than ₦7,000,000.00.00 or both
15.	S. 29(1)	Breach of confidence by computer-based service providers	Not more than 7 Years imprisonment or a fine of not more than ₦5,000,000.00 or both (for a natural person), and for a corporate organisation a fine of ₦5,000,000.00 and forfeiture of further equivalent of the monetary value of the loss sustained by the consumer, as well as winding up of the organisation

#### 18.4.2 NITDA's Data Protection Regulation

The core element of the data protection was aptly captured in the English case of *R v Brown* where Lord Hoffman said,

"Vast amounts of information about everyone are stored on computers, capable of instant transmission anywhere in the world and accessible at the touch of a keyboard. The right to keep oneself to oneself, to tell other people that certain things are none of their business is under technological threat."

In essence, the emergence of e-commerce and all related technologies, such as cloud computing, that is, working with data and information anywhere, everywhere and anytime, has striped people and entities "naked" of their data privacy. You will notice that virtually every service on the cyberspace today, including purchases, would require you to complete a profile data form, which will for the most part capture all relevant data and records about the individual. In Nigeria, separate databases hold data and records of a large population of the citizenry, namely banks, immigration, the telcos, schools, hospitals, electoral agencies, licensing authorities, etc. Sometimes, this information is on multiplicity of

platforms and often, the entities or persons on whom data are captured (data subjects) do not have an idea of the purpose for the data capture or the usage by the data controllers.

According to World Wide Web Foundation 2018, a number of concerns are associated with persons' data collection by individuals and entities. These concerns are briefly discussed below:

- (i) **Purpose and usage “mismatch”**— This is a situation where the data controller collects data or profile of the data subject for some reasons adduced, however, in application, the data or profile is now put to a different usage, perhaps with fraudulent intentions. This happens more during social engineering, where the offender engages the data subject (now a victim) using a social media channel to collect vital information or data relating to the data subject, and later using the information to defraud the victim.
- (ii) **Limited rights and information privileges of the data subject** — In some cases, the data subject would have no idea of method of data collection, storage mechanism and whether appropriate security measures have been taken to secure such data. Where data have passed the holding period, disposal becomes an issue, the data subject often would have no control on that. For example, audit firms collect certain documents and data on their clients, and such records or data may be in their possession for as long as the ethical practice permits, however, the disposal of such data may become questionable, if the data subject is not a party to the disposal methods.
- (iii) **Lack of informed consent** — This is a basic requirement in academic research. Most institutional review boards (IRB) would require researchers in biomedical fields and off-course graduate students conducting research involving human beings are under obligation to furnish the IRB with informed consent letters prior to proceeding on data collection. This means that data subjects are entitled to give permission to data controllers before data can be collected on their persons. Similarly, in the electronic space and indeed in e-commerce, informed consent of the data subject has been found to be lacking.
- (iv) **Transparency associated with data processing and privacy breaches** —Again, data subjects, not being a party to the controllers' processing methods and the potential lack of duty of care on the part of the data controller, transparency and privacy breaches may ensue without the data subject having any handy remedy.
- (v) **Data subjects in vulnerable populations** — Underaged children such as those in junior secondary schools and senior secondary schools, whose data are collected from a variety of platforms become vulnerable to privacy violations since they, ab initio, lack the power to give informed consent authorisation to the data controllers. For example, during the pandemic lockdown, most schools, colleges and related educational institutions set up websites for purpose of e-learning. Profiles of pupils and college students were collected without duly signed informed consent. There is no guarantee that such data may not later be used for some fraudulent purposes by the data controllers.

Against the above background, more particularly with the data protection concerns as described above, the NITDA data protection regulation was released in 2019, and became operational immediately, save for the unhealthy intervention of COVID-19 pandemic. The regulation is structured into four (4) parts as follows:

- (i) Part 1 deals with the objectives and scope of the regulation, essentially providing for the safety or safeguard of data belonging to data subjects. The regulation covers all natural persons subject to data collection. This part has three sections with some key definitions;
- (ii) Part 2 with 12 sections describes the governing principles of the regulation, including procurement, informed consent, and exceptions with respect to data transfer to foreign countries;
- (iii) Part 3 has only one section dealing with individual rights of data subjects; and
- (iv) Part 4 with 3 sections discusses implementation plan, administrative redress and foreign cooperation issues.

A very interesting part of this regulation is that it has made organisations and institutions keeping data about data subjects liable to data protection audit annually. For this purpose, NITDA has licensed data protection auditors, who are to carry out annual data protection audit in companies and agencies of government. Every data controller that fails to submit an annual report of his data protection audit is liable to certain degrees of penalties depending on the number of data subjects in question.

Students are advised to obtain a copy of this regulation for an in-depth knowledge of the provisions of the NITDA data protection regulation and its application and business value for professionals.

### 18.5 **Electronic contracts: click-wrap and shrink-wraps agreements**

In commercial transactions, lack of trust between parties gives rise to various requirements to be fulfilled for a valid contract to be established under the law. Electronic transactions or e-commerce remains one of the untrusted business spaces requiring even greater detail of legal obligations to establish a valid transaction. In this sense, some ingredients of law are required in e-commerce transactions in order to establish a valid transaction. These are:

- (a) Offer for sale or contract;
- (b) Acknowledgement of the offer needs to be established;
- (c) A consideration must be furnished;
- (d) The presence of legal intention must not be in doubt;
- (e) Ability of the parties to enter into contract;
- (f) Consent to contract must not be in doubt; and
- (g) The subject matter must be legal.

To accomplish the above in an electronic contract, two variants of agreements exist, namely:

#### (i) **Click-wrap agreements**

This sort of agreement is obtainable in software licenses where the purchaser is presented with the agreement in an online format. The agreement would usually contain terms and conditions of purchase and use of the software. The consumer would be required to clip “Ok”, “I Accept”, or “I Agree” button on the screen to indicate acceptance of the terms and conditions of the contract of sale of the software. See the image below.



Source: <https://slideplayer.com/slide/9021781/>

One defect of this kind of agreement is the fact that the purchaser compromises his or her bargaining power. It is either you take it or leave it and nothing more. Additionally, sometimes, the purchaser would not exercise enough patience and time to examine and digest the agreement before executing it.

#### (ii) **Browse-wrap and shrink-wrap agreements**

These are terms used in the context of Internet law describing a contract or license agreement in respect of access and use of Website services or products. On the other hand, a shrink-wrap agreement is legally binding agreement once a purchaser or customer accepts the product in question. This is generally applicable in software end-user license agreement (EULA). The terms and conditions of usage of the product are usually specified as a plastic wrap enclosing the product with a clause stating that once the purchaser tears the wrap to view the product, he or she is then bound to accept and pay for the product—this is the basic ingredient of shrink-wrap agreement.

In practice, shrink-wrap agreement has been a controversial issue in law with respect to its enforceability. For example, while some courts would believe that once one has paid and taken possession of the product, you are bound by the agreement no matter what is contained therein. On the other hand, some courts would argue that one cannot be bound by the terms and condition simply because he or she has removed the plastic wrap on the product, when he has not had a chance of perusing the product and the associated terms and condition.

### 18.6 **Jurisdictional issues in electronic contracts**

The questions on jurisdiction over matters associated with online breaches and related offences have always been a vexed one. The ubiquitous nature of the Internet and the real-time manner of transaction consummations make it difficult for courts to assume ownership of matters, which are seen as foreign from the internet lenses. You will recall from the variants of e-contracts discussed above, that transactions which in the ordinary statute would require a meeting of minds, not only logically but also in a physical sense. They are now consummated only with the click of buttons without the parties even seeing or knowing each other for the most part. This makes the issue of jurisdiction a tough debate for the courts.

Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters' (available at <http://www.law.washington.edu/casrip/symposium/Number6/Brand.pdf>) provides further illumination on this matter. Students are advised to access additional material on this topic.

## **18.7 The place of electronic evidence in the Nigeria Legal System**

Prior to the enactment of the Nigeria Evidence Act of 2011, admissibility of electronic evidence was a near impossibility. However, the evidence Act of 2011 which repealed the evidence Act 2004 now makes it possible for electronic evidence to be admissible in courts. This Act also stipulates conditions under which such evidence should be accepted in courts.

## **18.8 Chapter review**

This chapter discusses:

- a. laws governing electronic processes including e-commerce transactions;
- b. perspectives of the Nigeria cyber security act 2015;
- c. the provisions of the Nigerian data protection regulation 2019;
- d. electronic contracts: the variants of click-wrap and shrink-wrap contracts;
- e. jurisdictional issues in electronic contracts; and
- f. the place of electronic evidence in the Nigerian legal system.

## **18.9 Worked examples**

### **18.9.1 Multiple-choice questions**

1. Which of the following is a cybercrime?
  - A. Cyber facilitation
  - B. Cyberaddiction
  - C. Cyberstalking
  - D. Cyberdating
2. Which of the following is a type of e-contract?
  - A. Click-wrap
  - B. Duality
  - C. Two-wrap
  - D. Front-wrap
3. Which agency makes rules for data protection in Nigeria?
  - A. DITDA
  - B. NITDA
  - C. CITDA
  - D. APDA
4. The punishment for cyber terrorism is
  - A. Life imprisonment
  - B. Mandatory retraction
  - C. 3-year imprisonment
  - D. 7-year imprisonment
5. The principal statute that regulates electronic evidence in Nigeria is

- A. The Electronic Evidence Act, 2011
- B. The Cyber Electronic Act, 2011
- C. The Computer Usage Act, 2011
- D. The Evidence Act, 2011

#### 18.9.1 Open-ended questions

1. Explain **TWO** types of e-contract.
2. State **FIVE** legal ingredients of a valid e-contract

#### 18.9.2 Solutions to multiple-choice questions

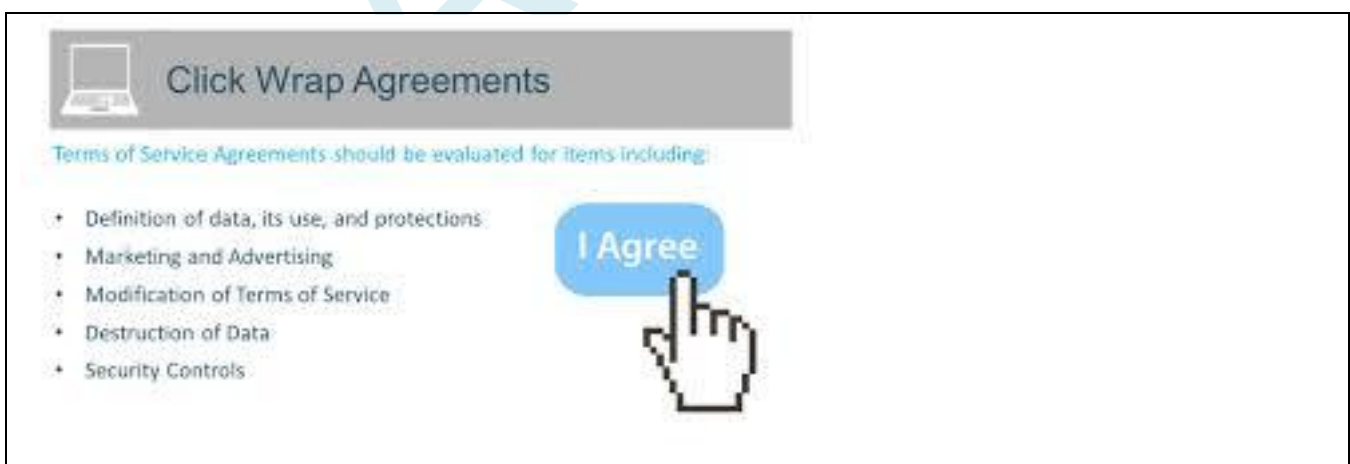
1. C
2. A
3. B
4. A
5. E

#### 18.9.3 Solutions to open-ended questions

1. Two variants of e-contract exist, namely:

##### (a) Click-wrap agreements

This type of agreement is obtainable in software licenses where the purchaser is presented with the agreement in an online format. The agreement would usually contain terms and conditions of purchase and use of the software. The consumer would be required to clip “Ok”, “I Accept”, or “I Agree” button on the screen to indicate acceptance of the terms and conditions of the contract of sale of the software. See the image below.



Source: <https://slideplayer.com/slide/9021781/>

One defect of this kind of agreement is the fact that the purchaser compromises his or her bargaining power. It is either you take it or leave it and nothing more. Additionally, sometimes, the purchaser would not exercise enough patience and time to examine and digest the agreement before executing it.



**(b) Browse-wrap and shrink-wrap agreements**

These are terms used in the context of Internet law describing a contract or license agreement in respect of access and use of Website services or products. On the other hand, a shrink-wrap agreement is legally binding agreement once a purchaser or customer accepts the product in question. This is generally applicable in software end-user license agreement (EULA). The terms and conditions of usage of the product are usually specified as a plastic wrap enclosing the product with a clause stating that once the purchaser tears the wrap to view the product, he or she is then bound to accept and pay for the product—this is the basic ingredient of shrink-wrap agreement.

In practice, shrink-wrap agreement has been a controversial issue in law with respect to its enforceability. For example, while some courts would believe that once one has paid and taken possession of the product, you are bound by the agreement no matter what is contained therein. On the other hand, some courts would argue that one cannot be bound by the terms and condition simply because he or she has removed the plastic wrap on the product, when he has not had a chance of perusing the product and the associated terms and condition.

**2. The ingredients of a valid e-contract are as follows:**

- (a) offer for sale or contract;
- (b) acknowledgement of the offer needs to be established;
- (c) a consideration must be furnished;
- (d) the presence of legal intention must not be in doubt;
- (e) capacity of the parties to enter into contract;
- (f) consent of the parties to contract must not be in doubt; and
- (g) the subject matter must be legal.



# Appendices

## APPENDIX I

### Study and examination techniques

This appendix contains notes on:

- (a) Using the questions and answers provided in the manual;
- (b) Effective study; and
- (c) Examination technique.

### Questions and answers

1. These questions are either
  - (a) Questions intended to test the understanding of the points arising out of the particular chapter; or
  - (b) Examination questions inserted at a stage where it is considered that the student will be best able to give a reasonable answer.
2. Most answers are given in outline, but some examination answers go a little further, in order to provide greater guidance and provide students with the basis for study.
3. When answers are comprehensive, you could not be expected to write them in the time allowed. Do not worry, if you feel you cannot write such answers, you are not expected to. But you must grasp the main points or principles involved, which will form the basis for good marks in an examination.
4. Do not worry, if your answer differs, there is often more than one approach. You must satisfy yourself however, that it is only the approach that differs, and that you have not missed the fundamental principles.

5. Authors' Comments. These have been included, to give additional points or elaborate on matters arising out of the subject covered by the question, to which it is felt, you should give some thought.

### **Using the answers**

6. Have a shot at each question yourself, before consulting the answer, you will achieve nothing if you do not do this. Write your answer out in full or jot down the main points. Do not hurry to the answer.
7. Look at the answer. (See para 5 in the case of examination answers). Study the particular area thoroughly now, making sure of your understanding. Repeat the process outlined in paragraph 7 and this paragraph, after a suitable interval. You must do this, to get any benefit at all. Make sure the main points stick.
8. Just browsing through the answers will really get you no where. You must test yourself, by writing down your version of the answer.

### **Effective study**

#### **Introduction**

1. These notes are intended for those who are new to studying for examination subjects, although those who are not may also benefit. They have been written in relation to study, involving the reading of textbooks, and they apply to all subjects. It is often very difficult to pick out the important principles from such books. Careful reading of these notes will be of benefit even in studying the manual.

#### **General**

2. Study, means more than just reading a piece of literature. It means, close concentrated reading, with a notebook at your side. Unless you are one of a few people who can absorb material by just one general read through it, do not kid yourself.
3. Read a small area, making notes as you go along. Then ask yourself– “what have I just learnt?” Write down what you think it was all about. Then look again and you may be surprised to find you have missed a key point or points – they must be down in your notebook and eventually in your head.

#### **Compilation of notebook**

4. A well-compiled NOTEBOOK is a must. Use block capitals or different colour inks, to headline the main areas and subdivisions of those areas. Notes made during lectures or private study, should not go straight into your NOTEBOOK. Take them down on a “rough” paper and write them in your NOTEBOOK, as soon as possible after the lecture or study period, thinking about what you are writing.

#### **Memory aids**

5. Mnemonics are very useful – if the sequence of points in the textbook is not significant, change it if it makes for a better mnemonic.

6. Association of the points with familiar objects, which will serve to recall them, is also useful.
7. Some people memorise things by saying them over and over out loud, others have to write them down time after time.
8. Many students have small blank cards and using one side of each card for each study area, put down the main points. They carry the cards everywhere with them and use every opportunity to study them. As they are small they are easily carried. It is surprising how much of your day can be utilised this way.

### **Programme**

9. Map out a programme for yourself; set targets and achieve them. One thing is certain, studying is not easy, but it is not too difficult, if you go about it in an orderly purposeful way. Many students fail their examinations through bad preparation. Tackle your studies as you would a project at work, systematically. Allocate a number of hours each week to each subject. Try fixing specific times for each subject, then keep to them, by refusing to let anything keep you from your planned task.

### **Revision**

10. Revise periodically. The nearer the examination gets, the more you should concentrate on the major headlines in your notebook and less with the supporting details.

## **Examination technique**

### **First impressions**

1. However well prepared you may be, you are still likely to look at the paper on the day and say to yourself, after a quick look at the questions, "There's not much here I can do".
2. The atmosphere of the examination room has something to do with this. Try to blot everything from your mind, other than the job in hand. Concentrate hard. If you feel a bit panicky (most people do – despite the apparent looks of serenity around you) grip the table, take a deep breath, and get on with it. Remember things are never as bad as they seem!

### **Time allocation**

3. Allocate each question time appropriate to the number of marks after first 15 minutes reading time of the questions, and set aside another 15 minutes for the final review of your answers. At the end of the allotted time for a question, go on to the next – remember, the first 5 or 10 marks on the new question are more readily picked up than the last 1 or 2 on the previous question.
4. The temptation will be to say "I'll write just one more sentence", but before you know where you are, you would have written several more and probably just managed to scrape another mark, whereas the same time on the next question, could have earned 5 or 6 marks. TIME ALLOCATION IS IMPORTANT.

5. Always leave some writing space, between your answers to each question, as you move on, because you may recall part of the answers to earlier questions, as you answer latter questions. Then you can quietly go back to update in the space reserved.
6. If you are running out of time write down the main headings first, leaving a few lines between each – at least the examiner will see that you had the overall picture. Then go back putting in as much supporting detail as you can.

### **General approach**

7. Read the instructions at the top of the paper.
8. Read the question paper once through. Make your choice of questions quickly. Pick the easiest (if one appears so) and get on with it.

### **Individual question**

9. Read the question again carefully. The question will involve a key principle or set of principles. What are they? It is so easy to make the wrong decision at this stage, so read the question, underlining what appear to be the key words. This should help you. Irrelevancy has been heavily criticised by examiners.
10. Do not rush into action with your pen yet. Jot down on a piece of scrap paper, the main headings you will use in your answer. All this will take time—about 5 minutes or more, but the careful thought and outline answer represent marks already earned.
11. If the question is set out in a particular sequence, that is:
  - a.....
  - b. ....
  - c. .... etc.

then answer it in that sequence or you'll have a hostile examiner to cope with.
12. Use the particular terminology used in the question, the examiner can then link the points in your answer, to the relevant parts of the question.
13. Assumptions are sometimes required (for example because of the lack of standardisation of terminology in this subject). Having stated your assumptions, make sure that what you write is consistent with them. Do ensure, however, that your assumptions are valid and are not just a device for changing the meaning of the question to suit your knowledge.
14. Tabulate where appropriate, using block capitals, for your main headings and underline sub headings. Underline words or phrases which require emphasis. Use a ruler.
15. Leave a line between your paragraphs and subparagraphs. This makes for a good layout. However, do not write one very other line within paragraphs, or on one side of the paper only – examiners are waste conscious!
16. Write out each word clearly, don't forget you are not the examiner reading your answers. In your hurry, be legible.

### **Layout of Answers**

17. Tabulate where appropriate, using block capitals for your main headings, and underline sub headings. Underline words or phrases, which require emphasis. Use a ruler.
18. Leave a line between your paragraphs and subparagraphs. This makes for a good layout. However, do not write on every other line within paragraphs, or on one side of the paper only - examiners are waste conscious!
19. The use of different colour pens, where appropriate, is useful but do not over do it. In fact one black and red felt-tip pen would be sufficient (use the felt-tip pens which have a fine point).

### **Charts and diagrams**

20. A descriptive heading or title must be given to each diagram (using the one in the question if indicated).
21. Do not squeeze a diagram into a corner – spread it out.
22. Do not clutter your diagram up with too much detail – this defeats the object, which should be clarity.
23. Give a key to the symbols and the different lines you have used, and again – use a ruler.

### **End of examination procedure**

24. Have a quick look at each answer, checking for grammatical errors and badly formed letters.
25. Ensure each answer sheet has your number on it and do not leave any lying on the table.

### **Conclusion**

- (i) Good technique plays a large part in examination success; this is a fact. Refuse to be panicked, keep your head, and with reasonable preparation you should make it.
- (j) Remember – you do not have to score 100% to pass.
- (k) A final point; once you are in the examination room, stay there and make use of every minute at your disposal.
- (l) Practise your technique, when answering the questions set in the manual.



## APPENDIX II

### Bibliography

#### APPENDIX II Bibliography

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## STUDY TEXT

**THE INSTITUTE OF CHARTERED ACCOUNTANTS OF NIGERIA**