STUDY PACK

ON

ELEMENTS OF NIGERIA'S BUSINESS LAW AND LEGAL SYSTEM

FOUNDATION

ELEMENTS OF NIGERIA'S BUSINESS LAW AND LEGAL SYSTEM

FOUNDATION

FOURTH EDITION

CHARTERED INSTITUTE OF PERSONNEL MANAGEMENT OF NIGERIA

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FOREWORD

This fourth edition of the CIPM study pack is one of the learning resources recommended to persons preparing for certification through professional examinations. It is uniquely prepared to meet the knowledge standards of HR certification bodies and/or degree awarding institutions. The study pack is highly recommended to researchers, people managers and organisations responsible for human capital development in its entirety.

Each chapter in the text has been logically arranged to sufficiently cover all the various sections in this subject as itemised in the CIPM examination syllabus. This is to enhance systematic learning and understanding of the users. The document, a product of in-depth study and research, is practical and original. We have ensured that topics and sub-topics are based on the syllabus and on contemporary HR best practices.

Although concerted effort has been made to ensure that the text is up to date in matters relating to theories and practices of contemporary issues in HR, nevertheless, we advise and encourage students to complement the study text with other study materials recommended in the syllabus. This is to ensure total coverage of the elastic scope and dynamics of the HR profession.

Thank you and do have a productive preparation as you navigate through the process of becoming a seasoned Human Resources Management professional.

Olusegun Mojeed, FCIPM, fnli
President & Chairman of the Governing Council

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CHAPTER ONE: DEFINITION AND NATURE OF LAW

1.0 INTRODUCTION

To define 'law' is a most difficult task. Attempts in the past at defining law have been, at best, descriptive. Law is better understood when viewed as a system with many components, which could then be taken apart and examined individually, as we shall attempt to do in this chapter.

1.1 LEARNING OBJECTIVES

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

i. The meaning of law and its functions in the society
ii. The major theories of law
iii. The concept of a legal system
iv. The features of the Nigerian Legal System
v. The sources of Nigerian law
vi. The nature and structure of the court system in Nigeria
vii. The various personnel of court
viii. The nature and function of the law under the military

1.2 MEANING OF LAW

The term 'law' has been defined by various scholars and with varying degree of success. However, no adequate or satisfactory definition of law has evolved.
Law has been defined as a body of rules and regulations that is accepted as binding by the society, which guide human conduct and are enforced directly by the state; a breach of which exposes the lawbreaker to punishment in form of fines, imprisonment, death or redress of any wrong done to another by way of damages or other forms of relief.
Simply put, law may be defined as a body of rules and regulations by which an organized society is governed, a breach of which carries specific sanctions. Law is therefore normative in character in the sense that it prescribes rules and seeks to regulate human behaviour in the society.

1.3 THEORIES OF LAW

In a quest to understand the meaning, essence and functions of law in the society, philosophers have from time immemorial developed different theories of the law. Although there are many theories, we shall deal with the five major ones. These are Natural, Positive, Marxist, Realist and Historical Law theories.

1.3.1 NATURAL LAW THEORY

Natural law theory is the earliest of all these theories. The major contributors are Heraclitus, Socrates, Plato, Aristotle, Gaius and Cicero. Later adherents include Aquinas, Gratius, Hobbes, Locke, Rousseau, Kant and Hume. In their studies of the relations between nature and society, they concluded that two types of law govern social relations. The first is made by the person in charge, to control relationships within a society; the methods, type and level of control varies from one polity to the other and over time within a given polity. The other, is immutable, unchanging, fixed and all-encompassing and should be the basis of evaluating the laws made by human beings. The former laws were tagged **positive laws** and the latter **natural law** or eternal law or principles of natural justice**.**

The Romans used it to develop their laws as *jus civile,* laws governing Roman citizens, and *jus gentium,* laws governing all their colonies and foreigners.

The Pope became despotic in the Middle Ages due to the teachings of Thomas Aquinas that natural law is the law of God to the people and that the Pope as the representative of God on earth was to enforce the laws on the Kings and their subjects. This made later naturalists, Locke, Montesquieu and others to postulate that everyone is created free, equal and independent, thus re-modeling the concept of Natural law as the individual right to life, liberty, and security. Similarly, Rousseau's teachings of individual's right to equality, life, liberty, and security were based on natural law. The English Revolution of 1888, the American Declaration of Independence and the French Revolution of 1789 were also based on Natural law theory.

Despite its contribution, however, the positions of the proponents are as diverse as their number. Thus, it was subjected to criticisms by scholars such as John Austin and others who rejected this theory and later developed the positive law theory.

1.3.2 POSITIVE LAW THEORY

Positive (imperative or analyst) law theory refers to the law that is actually laid down by separating what law 'is' from what it 'ought' to be. It stated that law is the rule made and enforced by the sovereign and there is no need to use reason, morality or justice to determine the validity of law.

This theory maintained that; rules made by the sovereign are laws irrespective of any other considerations. Law is a command of the sovereign to his/her subjects and there are three elements in it: command, sovereign and sanction. Command is the rule given by the sovereign to the subjects or people within the jurisdiction of the sovereign. Sovereign refers to a person or a group of persons who hold supreme power or authority and whose decision is binding upon all citizens. Sanction is the penalty that follows violations of the rule enacted by the sovereign.

The proponents include Austin, Kelsen, Bentham and H.L.A Hart. There are as many sub-divisions in this school of thought as in the naturalist school. This theory was criticized by scholars for defining law in relation to sovereignty or state because law is older than the state historically and that law exists in the absence of state. Thus, primitive law (a law at the time of primitive society) serves the same function as mature law.

On the issue of sanction as a condition of law in positive law, it is criticized that the observance of many rules is secured by the promise of reward rather than imposition of sanctions. Even though sanction plays a role in minority of the populace who are reluctant to obey, but the law is obeyed because of communal acceptance and a desire to enjoy the benefits that obedience brings.

Another main criticism of positive law theory is that it is superficial to regard the command of the sovereign as the real source of the validity of law. It is argued that many regard law as valid because it is the expression of natural justice or the embodiment of the spirit of people.

1.3.3 MARXIST LAW THEORY

Marxists believed that private property is the basis for the existence of society; and that property creates classes in the society. Those who have the means of production exploit those who do not have these means by making laws to protect the private property. The foundation of the postulations above was rooted in the writings of Karl Marx and Friederich Engels which is termed dialectic materialism. Marxists maintained that there was neither law nor state in primitive society for there was no private property. The theory asserts that perfect equality could be attained when society transcends capitalism through socialism to communism; at this stage there would be no private property, no state and no law. This is an ideal that is impracticable in reality. Nevertheless, this theory is a challenging and intellectually stimulating one.

1.3.4 REALIST THEORY OF LAW

It focused on the actual working of the law rather than its definitions. It provides that law is the pronouncements of the judges; rules must be used to solve practical cases, if not they are not laws but mere words. The words of law gain life only when applied in reality (when judges decide on it). Therefore, it is the decision of the judges, not the legislators that is considered as law. The proponents of this theory include Justice Homes, Lawrence Friedman, John Chapman Gray, Jerom Frank and Karl N. Lewelln.

This theory has its basis in the common law legal system in which decisions previously given by a court are considered as precedent to be used as law to decide future case with similar facts. This is not applicable in civil law legal system, as a result this theory has been criticized by scholars from civil law jurisdictions, where there is no precedent.

1.3.5 HISTORICAL SCHOOL

To the historian, law develops from customs generally accepted by the society, such as the common law, which originated from the general custom of the ancient peoples of England. Most of the indigenous Nigerian customs have become notorious and judicially noticed by the courts.

1.4 FUNCTIONS OF LAW IN THE SOCIETY

(i) Instrument of social change and control
(ii) Maintenance of law and order
(iii) Instrument of social engineering and economic development
(iv) Instrument of social justice and social equilibrium
(v) Instrument of class abridgement e.g. tax laws
(vi) Settlement of disputes
(vii) Instrument of stability
(viii) Law confers legitimacy on a government.

1.5 LEGAL SYSTEM

A legal system may be defined as the rules that guide inter-relationship among the citizens of a society, the administrative structure and the machinery for the establishment and enforcement of those rules. This includes the court system, the police, the prison system, etc. Simply put, it means the laws, courts, personnel of the law and the administration of justice system in a particular jurisdiction.

1.5.1 FEATURES OF THE NIGERIAN LEGAL SYSTEM

(i) It is influenced and fashioned along the British legal system, due to the colonial relationship Nigeria had with Britain.

(ii) Multiplicity of legal system: Islamic, Customary and English Laws coexisted and apply to the appropriate persons in Nigeria. This feature is a reflection of the diversity of Nigeria. Nigeria is a federation of 36 States and the Federal Capital Territory. The federal and the state governments are empowered to make their own laws. Within each State, apart from the various local government councils which are empowered to make bye-laws, there are many ethnic groups and sub-groups, each having her own indigenous customary law.

1.5.2 SOURCES OF NIGERIAN LAW

The sources of Nigerian law include the following:

1.5.2.1 THE RECEIVED ENGLISH LAW: This is a major source of Nigerian law, and a reflection of the colonial relationship Nigeria had with Britain. A substantial part of the Nigerian law is derived from the English statutes. This process is called legal transplantation. It refers to the reception of foreign legal system into a local or indigenous legal system. The received English law is made up of the following:

(a) **The Common Law**: This is the earliest system of law in England. It is common to the whole of England. Common law is a very rigid system of law. It is not enacted but developed by

the English judges. The common law courts include the King's Court, the Court of Exchequer and the Court of Common Pleas. The common law remedy is basically award of damages, i.e. financial compensation for a wrong. The major defects of the common law include the following:

i. Access to court was based on the existence of standard writs. The writ system was slow to respond to the increasing number of new causes of action. Where no suitable writ is available, an injured party is denied a remedy.
ii. The writ system was rigid and complicated and a trivial error could defeat the entire claim.
iii. Common law is also associated with the problem of inadequacy of remedy. The only common law remedy was award of damages. Damages refer to financial compensation given by court.

(b) **The Doctrines of Equity**: The rigidity of common law and the inadequacy of her remedies led to the emergence of the rules of equity. Equity came to mitigate the rigidity of common law and also provided additional and enhanced remedies. The court of equity (Court of Chancery) followed no established procedure in dealing with cases before it. Its intervention was based primarily on the ground of conscience.

The introduction of equity into English law led to an unhealthy rivalry between the Common Law Courts and the Court of Chancery. The Common Law Courts alleged that the Court of Chancery was frustrating their decisions and that equity came to replace common law. This conflict was referred to King James I, who ruled that whenever there is conflict between common law and equity, the rules of equity should prevail.

The improvements made by equity are as follows:

(i) Recognition of new rights such as the trust concept and the principle of equity of redemption.
(ii) Introduction of better and additional remedies such as equitable remedies which include:
    a. Injunction: This is an order of court compelling or restraining the doing of a particular act. It could be interim, interlocutory or perpetual injunction.
    b. Specific Performance: This refers to an order of court compelling a party to carry out his contractual obligations.
    c. Rescission: This is a remedy for a breach of contract, restoring a party to his pre-contract position.
    d. Rectification: Where a transaction has been reduced to writing and the document is such that do not reflect the true intention of the parties, the court may, in her equitable jurisdiction, rectify the document with a view to making it reflect the true intention of the parties.
    e. Restitution is an order directing a party to return to the true owner or the appropriate authority, a wrongfully acquired property.
    f. Other useful concepts developed by equity are the doctrine of promissory Estoppel and part performance.

In 1873, the Judicature Act was enacted, which amalgamated the administration of common law and equity. Thus, this led to the emergence of a single court with power to administer both the

common law and equity. The Judicature Act established the Supreme Court of Judicature to replace the separate common law courts and the courts of chancery.

(c) **Statutes of General Application**: Statutes made in England on or before January 1, 1900 are applicable in Nigeria, as statute of general application e.g., Sale of Goods Act (1873), Infants Relief Act (1874), Partnership Act (1890), Wills Act (1837), Status of Fraud (1677), via local statutes such as Ordinance No. 3 of 1863.

1.5.2.2 CUSTOMARY LAW: This refers to native laws, principles, norms, notions, rules, institutions and customs. Customary law is a body of rules and norms by which the indigenous communities are governed and generally accepted by members of a local community as binding on them.

Section 2 of the Evidence Act defines custom as a rule which in a particular district has, from long usage, obtained the force of law. In the case of ***Owoniyin v. Omotosho*** (1961) 1 All NLR 304 at 309, Bairamaian F.J. defined customary law as a mirror of accepted usage. See also ***Bilewu Oyewumi v. Amos Owoade Ogunesan*** (1990) 3 NWLR (Pt. 196) 182.

1.5.2.2.1 Features of Customary Law

(i) It must have been in existence at a relevant point in time and enjoy popular acceptance by the community.

(ii) Flexibility: Customary law is flexible and changes with time- see ***Lewis v. Bankole*** (1909) NLR 100-101. The flexibility of customary law was also demonstrated in the case of ***Damole v. Dawodu*** (1958) 4 FCS 46, where the court had to determine whether *idi igi* (that is, the estate of a deceased person with four wives for instance, will be divided into four equal parts and given to children of each wife) system of distribution of the estate of a person who died intestate under the Yoruba native law and custom has given way to *Ori-Ojori* (equal share by the children).

(iii) Customary law is largely unwritten. Its source is essentially the recollection of elders and others whose traditional roles enable them to have good knowledge of the customs and tradition of their place.

(iv) It must enjoy general acceptability among the people as binding on them; and not be a custom that should be observed at will.

1.5.2.2.2 Validity Tests of Customary Law

Before a customary law can be enforced by a court of law, such customary law must pass 3 tests, namely:

(i) **Repugnance Test**: The custom must not be repugnant to natural justice, equity and good conscience. It means the custom in question must be fair and produce reasonable result. The custom must not offend the rules of natural justice or be barbaric. In the case of ***Edet v. Essein*** (1932) II NLR 47, the Plaintiff paid dowry on a girl while she was a child. The girl subsequently married another man and had two children. The plaintiff claimed that under the applicable

customary law, he was the father of the children on the ground that the bride price he paid had not been refunded to him. Carey J., was not satisfied that such a custom existed and that even if it indeed existed, he could not have applied it since he considered it repugnant to natural justice, equity and good conscience.

Similarly, in the case of ***Re: Effiong Okon Attakpan v. Henshaw & Anor*** (1930) 10 NLR 65 at 66, the court held that a custom which allows the property of a former slave upon his death to be administered by his master to the exclusion of the slave's child is not only contrary to the provisions of the Slavery Abolition Ordinance No. 35 of 1916, but also contrary to natural justice. Also, in the case of ***Meribe v. Egwu*** (1976) 6 ECSLR 274, the Supreme Court held, *albeit obiter*, that woman to woman marriage was repugnant to natural justice, equity and good conscience. See also ***Mariamo v. Sadiku Ejo*** (1961) NLR 18; ***Lawaoye v. Oyetunde*** (1944) AC 170.

(ii) **Incompatibility Test**: A rule of customary law must not be incompatible either directly or by implication with any law for the time being in force in Nigeria. Direct incompatibility arises where a statute is obviously meant to displace or modify a customary law. For instance, the Slavery Abolition Ordinance No. 35 of 1916 was enacted with the object of abolishing slavery. The status of "Osu" in the Eastern Nigeria was also abolished by the Abolition of Osu System Law No. 13 of 1956 of Eastern Nigeria. It is also a criminal offence to claim that someone has the power of witchcraft and the killing of witches is murder- see sections 207 – 211 of the Criminal Code.

(iii) **Public Policy**: For a customary law to be enforced by the court, it must not be contrary to public policy. A custom would be declared contrary to public policy where it promotes immorality and promiscuity. In the case of ***Cole v. Akinyele*** (1960) 5 FSC 84, a rule of customary law to the effect that a child born outside wedlock, during the subsistence of the marriage and whose paternity is accepted becomes a legitimate child and can share equally with the children of the marriage has been declared contrary to public policy on the ground that such custom promotes promiscuity. A similar decision was held in ***Alake v. Pratt*** (1955) 15 WACA 20. These decisions would have been different now with the enactment of section 42(1) & (2) of the 1999 Constitution which prohibits discrimination of any form based on the circumstances of a person's birth.

1.5.2.2.3 Proof of Customary Law

Customary laws are treated as questions of fact and as such, can be proved by the following means:

(i) Judicial Notice: according to section 17 of the Evidence Act, 2011 '*A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction.'* Simply put, judicial notice of a custom may be taken by a court where the custom has been applied or enforced severally by courts in the same area.

(ii) By oral testimony: involves bringing witnesses to court to give evidence in support of a custom.

(iii) Expert Opinion: This involves bringing to court experts in native law and customs, to give evidence in support of a custom.

(iv) Assessors: Where the question on customary law is involved and the court is of the opinion that it will not be competent to decide the said question; the court may claim the assistance of experts known as assessors.

(v) Textbooks and manuscripts written by respected authorities on customary law are widely used as proofs.

1.5.2.3 NIGERIAN LEGISLATION: This refers to laws made by the law-making organs in the state. It comprises of the followings:

a. **Ordinances:** These are laws passed by the Nigerian central legislature before October 1954. There was only one legislative council in Nigerian then and the laws for the whole country were uniform.

b. **Acts:** These are the legislations made by the Federal Legislature in a civilian regime; i.e., Acts of National Assembly.

c. **Laws:** are enactments made by the legislature of a region (now state) in a civilian regime, e.g., Laws passed by the Abia State House of Assembly

d. **Decrees:** These are laws made by the Federal Military Government in exercise of its legislative powers.

e. **Edicts:** These are enactments made by the military government of a state.

f. **Bye Laws:** These are laws made by the local government councils in a military or civilian dispensation.

g. **Subsidiary or Delegated Legislation:** These are laws made by administrative bodies, ministries or agency in accordance with enabling law.

1.5.2.4 ISLAMIC LAW: This is sometimes referred to as Sharia Law. Islamic law is a source of Nigerian law, though its operation is limited to Northern Nigeria; and applicable to the adherents of the Muslim faith.

The sources of Islamic law include the Quran, the sayings of Prophet Mohammed (*Sunna*), the consensus of Islamic Scholars (*Ijima*) and reasoning by analogy (*Kiyas*). It is made applicable by the High Court Laws of Northern States of Nigeria (Section 28 of Cap. 49, Laws of Northern Nigeria 1963).

The version of Islamic law in Nigeria in force is the Moslem law of the Maliki school of thought. Other schools of thought are *Hanafi, Hambali* and *Shafi'i.* Islamic law governs matters relating to inheritance, marriage, divorce, legitimacy and custody of children, e.t.c.

1.5.2.4.1 Features of Islamic Law

(i) It is based on Islamic faith.

(ii) It is a written law.

(iii) It applies only to members of Islamic faith.

(iv) There are different schools of Islamic law. In Nigeria, the application of Sharia law varies from one community to another- see ***Tapa v. Kuka*** (1946) 18 NLR 5.

1.5.2.5 CASE LAW/JUDICIAL PRECEDENT: the doctrine of judicial precedent (otherwise called stare decisis) is an old common law doctrine by which the lower courts are obliged to follow or adopt the reasoning of higher courts when faced with similar facts. Case laws are therefore laws found on judicial reasoning.

By the application of this doctrine, the decisions of superior or higher courts are binding on the lower courts when faced with similar facts except when the case at hand can be distinguished. Note that a Judge's decision is made up of Ratio Decidendi and an Obiter dictum.

Ratio Decidendi: This is the reason for the decision. It is a rule of law upon which a decision is founded or with which a judge rationalizes his decision. It is only a ratio decidendi in a decision that constitutes a binding precedent. This implies that it is not everything said by a judge in his judgement that constitutes a precedent. A good law-making reporting system is a *sine quo non* (indispensable) to the operation of the doctrine of judicial precedent.

Obiter Dictum: it means statements made by the way. It is the personal opinion of the judge. Obiter dictum does not constitute a precedent and are therefore not binding. They may however, be of persuasive authority.

However, a lower court may refuse to follow a binding precedent where the present case can be distinguished from the precedent case. A judge may refuse to adopt or follow a binding precedent on the ground that the facts of the precedent case and the present case are not entirely identical to justify the adoption of the precedent; for example, where a material fact in the case at hand is not found in the precedent case.

Overruling must also be distinguished from reversing. A precedent is overruled when a judge, in a present case states that, the previous case was wrongly decided. It is however, only a higher court or a court of co-ordinate jurisdiction that is capable of overruling a precedent. A decision is said to be reversed when it is altered on appeal by a higher court.

Operation of the Doctrine of Judicial Precedent: The Supreme Court is bound by her previous decisions but may depart from it in any of the following circumstances:

(i) Where the decision is inconsistent with the provision of the constitution.
(ii) Where the decision is reached *per incuriam* (i.e., wrongly decided).
(iii) Where the decision perpetuates hardship and considerable injustice- see ***Johnson v. Lawanson*** (1971) 1 All NLR 56. ***Awojugbagbe Light v. Industries v. Chinukwe*** (1995) 4 NWLR (pt.390) 379.

The Court of Appeal is bound by the decision of the Supreme Court. When a Court of Appeal is faced with two conflicting decisions of the Supreme Court, it would normally follow the later in time. See ***Yusuf v. Egbe*** (1987) 2 NWLR 341 at 354.

The Court of Appeal would normally be bound by her previous decisions and that of abolished courts of equal status, e.g., the West African Court of Appeal (WACA).

The Court of Appeal is entitled and bound to decide which of her conflicting decisions it will follow. The Court of Appeal would however, depart from her previous decisions where it is satisfied that the decision was given *per incuriam* or the decision conflicts with a decision of the Supreme Court.

Advantages of the Doctrine

(i) It promotes certainty of law.
(ii) It creates an environment for the progressive development of law.
(iii) The doctrine provides guidance and direction to the lower courts.
(iv) It saves the time of the courts as the judges are spared the task of re-examining rules of law and principles in each case.
(v) It promotes justice as litigations are treated equally.
(vi) The doctrine promotes respect for the higher authority and this is compatible with the ethics of legal profession.
(vii) It enhances uniformity in the application of the rule of law.
(viii) It introduces stability, certainty and calculability into judicial awareness.
(ix) It helps to guide against arbitrariness of judges.
(x) It is of tremendous assistance to lawyers in advising their clients.

Disadvantages of the Doctrine

(i) Rigidity: Once rules are laid down in case law, it becomes binding until it is overruled.
(ii) The doctrine is capable of slowing down the development of the law. Since the level of litigation is very slow, especially in a predominantly illiterate and uninformed society like ours, case law may not grow fast enough to meet the changing trends in the society.
(iii) It may be difficult to identify a *ratio decidendi* in a case and a case is capable of having more than one *ratio decidendi*.
(iv) It may be difficult to have a precedent with the same facts with the case at hand.
(v) A judge may be compelled to apply an established rule, contrary to his personal convictions- see ***Savannah Bank v. Ajilo*** (1988) 1 NWLR (pt.97) 305; ***Awojugbagbe Light Industries v. Chinukwe*** supra

1.5.2.6 INTERNATIONAL LAW: is a body of rules that govern the relationship between sovereign states. The sources of international law include treaties, (conventions) customary international law, case law, e.t.c. When Nigeria is a signatory to any treaty or convention, the provision of such treaty becomes a part of Nigeria law once it has been ratified by the National Assembly under section 12 of the 1999 Constitution. An example of an international treaty is the African Charter on Human and Peoples Right.

1.6 CLASSIFICATIONS OF LAW

Law may be broadly classified as follows:

(i) Criminal and Civil Law
(ii) Public and Private Law
(iii) Substantive and Procedural Law
(iv) Municipal and International Law

Criminal and Civil Law: Criminal law is the law of crime. It defines offences and prescribes punishments. Civil law deals with the relationship among individuals, groups and institutions. It aims at compensating individuals for loss suffered as a result of the wrongful conduct of others. Civil law comprises of law of contract, property law, law of trust, law of torts, e.t.c. Other distinctions between criminal and civil law include the following:

(i) The plaintiff/claimant in a civil case is usually an individual(s) (the aggrieved or victim) while criminal cases are generally prosecuted by the State except in exceptional circumstances where the right of private prosecutor may be recognized.
(ii) Civil actions can be settled out of court and the court may even assist in this regard while criminal cases cannot be settled out of court.
(iii) The standard of proof in civil cases is based on balance of probabilities or preponderance of evidence, while criminal cases must be proved beyond reasonable doubt.
(iv) Upon conviction in criminal cases, the possible sanctions include terms of imprisonment, fine and death penalty (capital punishment), while civil remedies include award of damages, an order of injunction, specific performance, rectification, restitution, e.t.c.
(v) Judgement in criminal cases are enforced by the State while in civil cases, it is the duty of the successful party to enforce the judgement although he may be assisted by the court on his application.

Public and Private Law: Public law deals primarily with the rules and regulations affecting the state, her organs and institutions. It deals with the maintenance of public order, the institution of the state, the administration of government, the police and public revenue. It comprises of Administrative Law, Constitutional Law, Criminal Law, Criminal Procedure Law, Civil Procedure Law, Mass Media Law, Law of Evidence e.t.c.

Private law on the other hand is concerned with the regulations of the relationship among individuals. It comprises of the law of contract, law of torts, family law, law of insurance, credit sales e.t.c.

Substantive and Procedural Law: Substantive law defines the right, powers and privileges possessed by a person whose status is recognized by the corresponding duties, obligations and disabilities. It means actual law.

Procedural (Adjectival or remedial) Law is the law of procedure. It is the law that regulates how legal actions are commenced and conducted. It is the law which provides for the application and enforcement of substantive law. Examples are Civil Procedure Law and Criminal Procedure Law.

Municipal and International Law: Municipal law refers to the law which operates within a given country, for example Laws of Nigeria; while international law regulates the relationship between sovereign States.

1.7 LAW AND MORALITY

Law and morality are both systems of rules regulating human conduct in a society. Law differs from morality in that:

a) The law is a coercive order while morality is persuasive;
b) Rules of law are enforced by forces external to the person required to obey, while moral rules are enforced by the individual's internal forces i.e. his conscience.

Law and morality overlap or sometimes constitute different normative orders as depicted below:

a) Certain rules are prescribed by morals only, not the law- injunction to love one's enemies, to respect animals' rights, not to allow a person make a bad bargain e.t.c.
b) Certain rules are prescribed by legal orders only, with no reference to morality. These include:

I) **Amoral Rules:** neutral rules where morality is not essential, as it is made for convenience, expediency or public policy only. e.g. traffic rules- keeping right or left.
II) **Immoral Rules**: rules that are simply opposed to morality e.g. legalizing prostitution, lesbianism, marijuana, law forbidding woman and non-initiates from coming out during certain festivals.
III) **Rules common to both moral and legal order**- rule prohibiting theft, rape, suicide e.t.c.

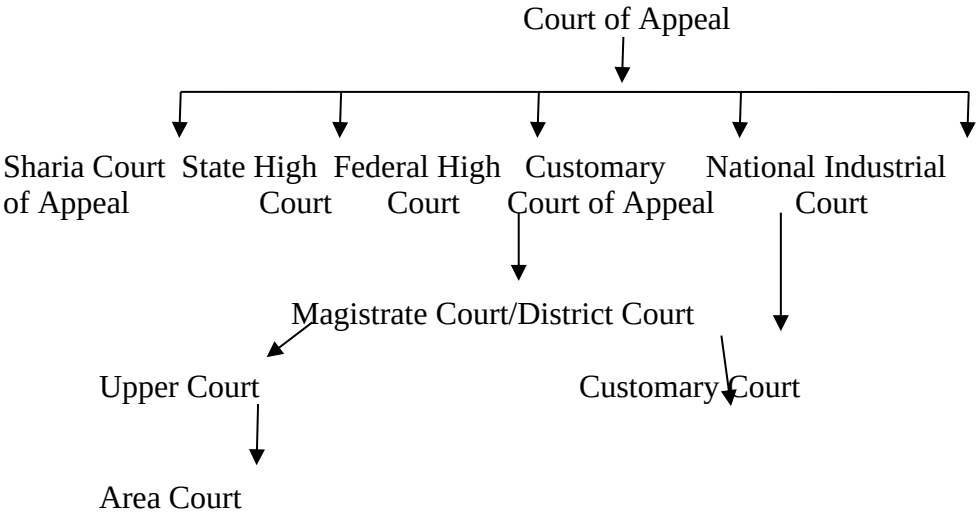
However, morality is relative. Gay marriages are legal in most western nations such as USA, UK, and Germany, even in South Africa, but repugnant and unacceptable, even criminal in most African nations such as Nigeria and Zimbabwe. A decided case illustrates this relativity. In ***Mohammed v. Knott*** (1969), 1QB, a Nigerian Muslim aged 23, married a Nigerian girl, aged 13 according to Muslim rites. The couple left Nigeria for England where they cohabited. The police in England brought the child-bride before the Juvenile Court alleging that a married child of 13 was exposed to moral danger, lack of appropriate care and guidance. The Court held that child marriage was repugnant in any decent society. However, such marriage was/is not prohibited especially under Islamic law practised in Northern Nigeria.

1.8 COURTS IN NIGERIA

The court system is responsible for the administration of justice in Nigeria.
The diagram below shows the hierarchy of courts in Nigeria.

HIERARCHY OF COURTS

Supreme Court



1.8.1 SUPREME COURT

This is the apex court in the hierarchy of courts in Nigeria. The Court was first established by the 1963 Constitution as the Federal Supreme Court. Section 230 (1) of the 1999 Constitution retained the court but removed the word "Federal". The Court exercises both civil and criminal jurisdiction. The decision of the Court is final. Without prejudice to the exercise of power of prerogative of mercy by the President of Nigeria and State Governors, no appeal shall lie to any other body, person or authority from the determination of the Supreme Court (Section 235 of the 1999 Constitution). The Supreme Court has pronounced on the finality of her decision in the case of ***Adigun v. A.G (Oyo)*** **State** (1987) 2 NWLR (Pt. 56) 197 at 124 in the following words: "*The decision of the Supreme Court is final; final in the sense of real finality, in so far as the particular case before that court is concerned. It is final forever, except there is legislation to the contrary and it has to be legislation ad-hominem. The Supreme Court is under the Constitution a superior court, deliberately meant and made to be so by the organic law and the justices of that court, now only to that extent of their decisions, are supermen meant to be so and so made by the constitution*."

Composition: The Supreme Court consists of the Chief Justice of Nigeria (CJN) and other justices of the Supreme Court, not exceeding twenty-one. The Supreme Court shall be properly constituted if not less than 5 justices of the court sit. However, where the issue before the court relates to the interpretation of the Constitution, determination of civil disputes between States and Federal Government or decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of the Constitution (dealing with fundamental human rights) has been, is being or is likely to be contravened in relation to any person, the Supreme Court shall be properly constituted when at least 7 Justices of the Court sit- see section 234 of the 1999 Constitution.

Appointment: The Chief Justice of Nigeria and other Justices of the Supreme Court are appointed by the President of the Federal Republic of Nigeria based on the recommendation of the National Judicial Council, subject to confirmation by the senate.

Qualification: To be qualified for appointment as the Chief Justice of Nigeria or a Justice of the Supreme Court, one must have been a legal practitioner of not less than 15 years, with good character, must be above board and must be a fit and proper person.

Jurisdiction: This is also referred to as the powers of the Supreme Court. The Supreme Court has both original and appellate jurisdiction. The Court has original jurisdiction in any dispute between the Federal and State governments or between State governments. It shall also have original jurisdiction as may be conferred upon it by any Act of the National Assembly.
The original jurisdiction conferred on the Supreme Court, however, only applies to disputes between States and the Federal Government or between two or more states government in their corporate or public capacity. The Supreme Court interpreted her original jurisdiction in the case of ***A.G Federation v. A.G Imo State*** (1982) 12 S.C 274. Therefore, no state can bring a matter directly to the Supreme Court on behalf of its individual citizens against another in any dispute which benefits will go to the individuals and not the State or where an agency of the federal government is involved.

Appellate Jurisdiction: The Supreme Court has exclusive jurisdiction to hear and determine appeals from the Court of Appeal. The Supreme Court stated in the case of ***Olabanji v. Olofin*** (1996) 2 SCNJ 243 that there is no other way of invoking her supervisory jurisdiction except through appeals from the Court of Appeal. There are two ways of appealing from the Court of Appeal to the Supreme Court, namely: appeal as of right and appeal with leave or appeal not as of right.

Appeal as of Right: Appeal is said to be as of right when the appellant need not comply with any condition precedent to file the appeal. Appeal from the Court of Appeal to the Supreme Court shall be as of right in any of the following circumstances: (Section 233 (2) of the 1999 Constitution).

i. Where the grounds of appeal are on a question of law alone.
ii. Where the appeal relates to the interpretation or application of the Constitution of Nigeria.
iii. Questions as to whether any of the provisions of Chapter IV of the 1999 Constitution has been, is being or likely to be contravened in relation to any person.
iv. Decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death.
v. Questions as to the validity of election of the President, and Vice President of Nigeria.
vi. whether the term of office of the President or Vice President have ceased or whether their term of office have become vacant; and
vii. Such other cases as may be prescribed by an Act of the National Assembly.

Appeal with Leave: Appeal is said to be with leave when the appellant need to obtain the leave (permission) of the court (either that of the Court of Appeal or the Supreme Court) to file an appeal. Where thus, an appeal involves a matter not covered by the provisions of Section 233 (2) of the 1999 Constitution, enumerated above, such appeal must be with leave of court.

1.8.2 COURT OF APPEAL

The Court of Appeal is next in the hierarchy of courts in Nigeria. It is provided for by virtue of Section 237 of the Constitution of Nigeria, 1999. It has its headquarters in Abuja; and judicial divisions in Benin, Enugu, Kaduna, Lagos, Port Harcourt, Ibadan, Jos, Ilorin, Kaduna, Calabar, Akure, Owerri, Yola, Sokoto, and Makurdi, for administration convenience and to bring justice nearer to the litigants.

Composition: The Court of Appeal consists of a President and such number of Justices, not less than 49, of which not less than 3 members each shall be learned in Islamic personal law and customary law.

Appointment: The President and the Justices of the Court of Appeal are appointed by the President of the Federal Republic of Nigeria based on the recommendation of the National Judicial Council. While the appointment of the President of the court is subject to the confirmation of the Senate, the appointment of the Justices of the Court is not-S.238 (1) & (2) of the Constitution of Nigeria, 1999.

Qualification: To be qualified for appointment as a President or Justice of the Court of Appeal, one must be a Legal Practitioner of not less than 12 years standing, with good character and must be above board and must be a fit and proper person.

Jurisdiction: The Court of Appeal has both original and appellate jurisdiction under the 1999 Constitution.

Original Jurisdiction: Unlike under the previous Constitution, the Court of Appeal is now vested with original jurisdiction under section 239 (1) of the 1999 Constitution. The Court now has original jurisdiction to the exclusion of all other courts to hear and determine any question relating to:

(a) The validity of election to the office of the President or Vice President.
(b) Whether the term of the office of the President or Vice President has ceased.
(c) Whether the office of the President or Vice president has become vacant. See ***Chief Olu Falae v. INEC & ors*** (1999) 4 NWLR (pt. 598) 476

In the exercise of its original and appellate jurisdiction, the Court of Appeal shall be duly constituted if it consists of 3 Justices sitting at the same time; provided however, that when hearing appeals from Sharia and Customary Courts of Appeal, the Court of Appeal shall be properly

constituted with not less than 3 Justices learned in Islamic law or customary law, as the case may be-S.247 of the Constitution of Nigeria, 1999.

Appellate Jurisdiction: The Court of Appeal has exclusive jurisdiction to hear and determine appeals from the Federal High Court, State High Court, High Court of the FCT, Sharia Court of Appeal, Customary Court of Appeal and decision of the Court Martial or other tribunals as may be prescribed by an Act of the National Assembly.
Appeals to the Court of Appeal can also be either as of right or with the leave of court, that is, appeal not as of right.

Appeal as of Right: Appeal to the Court of Appeal shall be as of right in any of the following circumstances:

(a) Final judgement and decisions of the Federal or State High Courts in any civil or criminal proceedings.
(b) Where the ground of appeal involves questions of law alone.
(c) Appeals relating to the application or interpretation of the Constitution.
(d) Decisions in any civil or criminal proceedings as to whether any provisions of Chapter IV of the Constitution have been, is being or likely to be contravened in relation to any person.
(e) Decisions in any criminal proceedings in which the lower court has imposed a sentence of death.
(f) Where the liberty of a person or the custody of an infant is concerned.
(g) Where an injunction or the appointment of a receiver is granted or refused.
(h) In the case of a decision determining the case of a creditor, the case of contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise.
(i) In the case of a decree nisi in a matrimonial cause or a decision in an admiralty action determining liability.
(j) Such other cases as may be prescribed by any law in force in Nigeria- see Section 241 (1) of the 1999 Constitution.
(k) Decisions of the Sharia Court of Appeal, Customary Court of Appeal Code of Conduct Tribunal and Election Petition Tribunals.

Apart from the circumstances enumerated in Sections 240 and 241 of the 1999 Constitution, all other appeals from the Federal and State High Courts shall be with leave of either the lower court or that of the Court of Appeal.

1.8.3 FEDERAL HIGH COURT

The Federal High Court was initially known as Federal Revenue Court and created by the Federal Revenue Court Act, No. 13 of 1973. Under the 1979 and 1999 Constitution, the Court is renamed Federal High Court. It is established by section 249 of the 1999 Constitution.

It is a superior court of record and at the same level with the State High Courts, National Industrial Court, Sharia Court of Appeal and Customary Court of Appeal, in the hierarchy of Courts in Nigeria.

There is only one Federal High Court but with divisions in Lagos, Ibadan, Ilorin, Lafia, Enugu e.t.c. to provide for administrative convenience and reduce the cost of justice. In the case of ***Abiola v. Federal Republic of Nigeria*** (1995) 7 NWLR pt. 409 the court held, *inter alia*, that there is only one Federal High Court in Nigeria and that judicial divisions are created for administrative convenience.

Composition: The Federal High Court consists of the Chief Judge and such number of judges of the Federal High Court as may be prescribed by an Act of the National Assembly.

Appointment: The Chief Judge of the Federal High Court is appointed by the President on the recommendation of the National Judicial Council, subject to the confirmation of the Senate. The Justices of the Federal High Court are also appointed by the President, but with no requirement for confirmation by the Senate.

Qualification: To be qualified for appointment as a Chief Judge or a Judge of the Federal High Court, one must have been qualified as a Legal Practitioner for a period of not less than 10 years, must be of good character and must be a fit and proper person.

Jurisdiction: The Federal High Court has both civil and criminal jurisdiction. The extent of jurisdiction of the Federal High Court, until recently was a subject of controversy. This is because the court was initially conceived as a federal revenue court to deal with issues affecting the revenue of the Federal Government. The exclusive jurisdiction of the Federal High Court is as provided under section 251(1) (a)-(s) of the 1999 Constitution. The Federal High Court exercises exclusive jurisdiction on matters relating to revenue of the federal government, taxation of companies, customs and excise, banking, banks and other financial institutions, coinage, legal tender, bills of exchange, letters of credit, companies and allied matters, copyright, patent, designs, trademarks, passing off, industrial designs, admiralty, citizenship, naturalization, aliens, deportation, bankruptcy, insolvency, aviation, arms, ammunition and explosives, drugs and poisons, mines, minerals, weights and measures, e.t.c. in the case of ***University of Abuja v. Prof. K. O. Ologe*** (1996) 4NWLR (pt. 445)706 the court held that the jurisdiction of the Federal High Court was to the exclusion of other courts.

The Federal High Court shall be duly constituted if it consists of at least one Judge of that Court.

1.8.4 THE NATIONAL INDUSTRIAL COURT OF NIGERIA

The National Industrial Court of Nigeria (NICN) is an offshoot of the National Industrial Court (NIC), which was established pursuant to the Trade Disputes Decree No. 7, 1976 (later enacted as the Trade Disputes Act). The Court, as presently constituted, was re-established as the National Industrial Court of Nigeria (NICN) by the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010- see Section 254C (1) & (2) of the 1999 Constitution (as amended). President Olusegun Obasanjo signed into law the National Industrial Court Act 2006 on the 14th day of June 2006. Section 6 of the 1999 Constitution was altered to include the NICN in the list of superior courts of record, which means that it can now exercise all the powers of a superior court of record- See Section 6(5)(c)(c) of the 1999 Constitution.

The main function of the court is to prevent and settle employment, industrial relations, and trade disputes in Nigeria in order to enable the economy run smoothly. Section 254C (1) of the 1999 Constitution provided that the NICN shall have jurisdiction in all matters connected and incidental to labour law, trade disputes and industrial relations. Section 254(C) grants exclusive jurisdiction to the NICN on labour, trade dispute and other ancillary matters, which hitherto had been within the confines of the concurrent jurisdiction of the State and Federal High Courts. Furthermore, appeals from the criminal causes or matters that arise from any cause or matter of which jurisdiction is conferred on the National Industrial Court of Nigeria shall lie as of right to the Court of Appeal. See Section 255(C) (6) of the 1999 Constitution. In addition, the NICN has criminal jurisdiction over employment matters with criminal flavour or upon the commission of any crime that is employment related. See section 254C (5) of the Constitution of the Federal Republic of Nigeria, 1999 as altered.

1.8.5 STATE HIGH COURT

There exists a High Court for each State in the Federal Republic of Nigeria. It is established by section 270(1) of the 1999 Constitution. The State High Court shall consist of a Chief Judge and such number of Judges of the High Court as may be prescribed by the Laws of the State House of Assembly. There is only one State High Court in each state of the Federation, but there are divisions for administrative convenience and to improve access to justice. For instance, in Lagos State, the High Court of Lagos State is divided into Epe, Ikorodu, Lagos, Badagry and Ikeja divisions.

The Chief Judge of a State High Court is appointed by the Governor of the State on the recommendation of the National Judicial Council (NJC), subject to the confirmation of that State House of Assembly. A Judge of the High Court is appointed by the Governor of the State on the recommendation of the NJC but with no requirement for confirmation by the State House of Assembly- see section 271 of the 1999 Constitution. To be eligible as a Judge of the State High Court, one must have spent 10 years at the bar, must be of good character and must be a fit and proper person.

The State High Court has original, appellate and supervisory jurisdiction. It hears and determines appeals from the Magistrate Court and Upper Area Court, as the case may be and also supervise these inferior courts.
Section 272(1) of the 1999 Constitution provides for the general jurisdiction of the court. It States that: "Subject to the provision of section 251 and other provisions of this constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue."

It follows from this provision that the State High Court cannot entertain matters in respect of which the Federal High Court or National Industrial Court are respectively vested with exclusive jurisdiction under sections 251 and 254C (1) of the 1999 Constitution or in respect of which any other court is vested with exclusive jurisdiction under the Constitution.
By virtue of section 273 of the 1999 Constitution, a High Court of a State shall be duly constituted if it consists of at least one judge at a sitting.

It is finally submitted that, it is doubtful whether the National Industrial Court can entertain cases that bother purely on enforcement of fundamental human rights as contained in the Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 as altered. This is because the Fundamental Rights Enforcement Procedures Rules, (FREP) 2009 which repealed that of 1979 did not mention National Industrial Court of Nigeria as one of the Courts to approach. It is hopeful that the FREP Rules should be amended to accommodate the National Industrial Court

1.8.6 SHARIA COURT OF APPEAL
The Sharia Court of Appeal is a specialized court and it is only found in the Northern States of Nigeria. The 1999 Constitution provides that the establishment of the Sharia Court of Appeal shall be at the discretion of each state- section 275(1) of the 1999 Constitution. The Sharia Court of Appeal shall consist of a Grand Kadi and such number of Kadis of the Court as may be prescribed by a Law of the State House of Assembly- see section 275(2) of the 1999 Constitution.

The Grand Kadi and Kadis are appointed by the Governor of the state on the recommendation of the NJC and subject to the confirmation of that State House of Assembly in the case of the Grand Kadi. Other Kadis of the court are appointed by the Governor on the recommendation of the NJC with no requirement for confirmation by the State House of Assembly.

The qualification for the appointment as a Grand Kadi or Kadi of the Sharia Court of Appeal is 10 years post call experience, in addition to a qualification in Islamic law from a recognized institution and acceptable to the NJC. A person who either has a considerable experience in the practice of Islamic law or a distinguished Islamic law scholar is also eligible.

The Sharia Court of Appeal has original, appellate and supervisory jurisdiction over matters of Islamic Law including marriage, validity or dissolution of marriage, guardianship of infants; wills and succession to intestate property of a deceased Muslim. The Court can also determine questions of Islamic personal law regarding an infant, a prodigal or a person of unsound mind who is a Muslim, and also maintenance and guardianship of a physical or mentally challenged Muslim- see section 277 (2) of the 1999 Constitution.
The Sharia Court of Appeal shall be duly constituted when at least 3 Kadis of the Court sit at the same time.

1.8.7 CUSTOMARY COURT OF APPEAL
Any state of the federation that desires a Customary Court of Appeal may establish it -see section 280(1) of the 1999 Constitution. The Customary Court of Appeal shall consist of a President and such number of Customary Court of Appeal judges as may be prescribed by the House of Assembly of a State. The President of the Customary Court of Appeal is appointed by the Governor of a State on the recommendation of the NJC, subject to the confirmation of the House of Assembly. Judges of the court are appointed by the Governor on the recommendation of the NJC with no requirement for confirmation by the House of Assembly.

Subject to whatever additional requirement the House of Assembly may impose, a person shall be qualified to be appointed President of the Customary Court of Appeal if he has been qualified as a legal practitioner in Nigeria for not less than 10 years and in the opinion of the NJC, has considerable knowledge and experience in the practice of customary law in addition to being of good character and must be a fit and proper person. The court shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law- see section 282(1) of the 1999 Constitution & ***Usman v. Umar*** (1992) NWLR (Pt. 254) 377 at 400. The Customary Court of Appeal shall be duly constituted if it consists of 3 judges of the Court sitting at the time.

1.8.8 Election Tribunals
These are specialized courts with jurisdiction over electoral matters. The Constitution of the Federal Republic of Nigeria (1999) makes provision for the establishment of one or more election tribunals. There are two of them, namely: the National Assembly Election Tribunal, which has original and exclusive jurisdiction to hear and determine election petitions as to whether any person has been validly elected as a member of the National Assembly or whether the term of office of such a person has ceased or whether the seat of any member of the National Assembly has become vacant - see section 285(1) of the 1999 Constitution.

There is also in each state of the federation, one or more election tribunals called the Governorship and Legislative Houses Election Tribunals. This tribunal shall, to the exclusion of any other court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has

been validly elected to the office of a Governor or Deputy Governor or as a member of any legislative house- see section 285(2) of the 1999 Constitution.

Composition of the Tribunals: The National Assembly and the Governorship and Legislative Houses Elections Tribunals shall consist of a chairman and four other members. The Chairman shall be a Judge of the High Court and the four other members shall be appointed from among judges of the High Courts, Kadis of the Sharia Court of Appeal, Judges of the Customary Court of Appeal and other members of the judiciary, not below the rank of a Chief Magistrate. The Chairman of the tribunal and other members of the tribunals shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of a State, Grand Kadi of the Sharia Court of Appeal of a State and the President of the Customary Court of Appeal, as the case may be.

An election tribunal shall be properly constituted when a Chairman and 2 other members are sitting at the same time- see section 285(4) of the 1999 Constitution.

1.8.9 Magistrates/District Courts

Magistrate/District Courts are not directly created by the Constitution, but by the laws enacted by the House of Assembly of a State. They are inferior courts. Magistrate courts have both civil and criminal jurisdiction. Their jurisdiction can be found in the various magistrate courts law of the various States of the Federation. In Lagos State for instance, the magistrate court system is governed by the Magistrate Court Law 2009. Magistrate Courts are usually of grades and this varies from State to State. In the Northern States of Nigeria, it is called Magistrate Court when it is sitting over criminal cases and District Court when it is sitting over a civil matter. In the southern States of Nigeria, it remains magistrate court whether it is sitting over a civil or criminal matter.

1.8.10 Customary/Area Courts

The Customary Courts are successors to the old Native Courts, which existed during the colonial days in Nigeria. They are the lowest court in the judicial hierarchy. They are often classified into grades. Customary courts exercise jurisdiction over persons subject to customary law. They are often manned by people who are versed or skilled in native law and customs. They are always drawn from local Chiefs, Elders and Traditional Rulers. However, today, it is now common to find customary courts (especially those of high grades) been manned by qualified legal practitioners.
Customary Courts exercise jurisdiction on matters relating to native law and customs, especially on issues such as marriages, inheritance, e.t.c. Some also handle very minor offences and grass roots misdemeanour. Appeals from the decisions of the Customary Courts go to the Magistrate Courts.

Area Courts exist only in some parts of Northern Nigeria. The Area Courts were until the promulgation of the Area Courts Edicts in 1978 generally referred to as Alkali Courts. Area Courts exercise both civil and criminal jurisdiction on matters relating to Islamic personal law, especially

on issues such as marriage, divorce and inheritance. They are also classified into grades, i.e. Upper Area Court, Area Court Grade I, Area Court Grade II, and Area Court Grade III. The Area Court judges would normally be knowledgeable in Islamic personal law.
An Area Court shall consist of either an Area Court Judge sitting alone or an Area Court Judge sitting with one or more members. The court may also sit with Assessors.

1.8.11 Juvenile Courts

Juvenile Courts try only cases where children are involved except in cases of homicide or where the juvenile is charged jointly with an adult. Juvenile Court is provided for by the Children and Young Persons Law. In Lagos State for example, it is provided for by the Children and Young Persons Law Cap 10 Laws of Lagos State 2003.
The primary purpose of Juvenile Courts is not to punish the child offender. Instead, it aims at the welfare and rehabilitation of the young offender. A child offender may be put on probation, fined, given corporal punishment or committed to an approved institution by the court. Proceedings are held in camera (behind closed doors) while undue publicity is not permitted.
A Juvenile Court is usually composed of a magistrate and other lay members, including a woman, usually a social worker.

1.8.12 Coroner's Court

A Coroner Court is a special court established by the Coroner Law of the different States of the Federation. In Lagos State, the Coroner Court is established by the Coroner Law Cap C16 Laws of Lagos State 2003. A coroner inquest is usually constituted to carry out investigations into cases of mysterious, sudden, violent or unnatural death. Coroner inquest may also be carried out where a prison or an accused person suddenly dies in questionable circumstances or in police custody. It is a Magistrate that is usually appointed a Coroner.

1.8.13 Court Martial

These are military courts established by the Armed Forces Decree No. 105 of 1993, as amended. The Decree consolidates pre-existing legislations on Courts Martial, i.e., the Nigerian Armed Forces Act, Cap A20 LFN 2004.
Members of the armed forces are subject to the jurisdiction of the Court Martial for service related offences such as barracks revolt, insubordination, desertion, drunkenness, looting and aiding the enemy.
A Judge Advocate is usually appointed to sit with the military officers presiding over the proceedings in the court.

The rank of the presiding officers for a particular case would be determined by the rank or status of the accused officer(s). In line with military tradition, a junior officer does not sit over a case involving a senior officer.
Appeals against the decisions of a Court Martial shall lie to the Armed Forces Disciplinary Appeal Committee. Further appeals from the decision of the Appeal Committee shall lie to the Court of Appeal and finally to the Supreme Court.

1.8.14 Tax Appeal Tribunal

Tax Appeal Tribunal (TAT) was established pursuant to the provisions in section 59(1) and the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act 2007. TAT was formally inaugurated pursuant to the Tax Appeal Tribunals Establishment Order 2009 issued under the hand of the Minister of Finance, and published in the Federal Government Official Gazette No 296, Vol. 96 of 2nd December, 2009. TAT replaces the former Body of Appeal Commissioners (BAC) and Value Added Tax (VAT) Tribunals. TAT shall have the power to adjudicate on all tax disputes arising from operations of the various Tax Laws as spelt out in the Fifth Schedule to the FIRS (Establishment) Act 2007 which are Companies Income Tax Act, Personal Income Tax Act, Petroleum Profit Tax Act, Value Added Tax Act, Capital Gains Tax Act, or any other law made from time to time by the National Assembly.

A person shall not be appointed as Tax Appeal Commissioner (TAC) unless he is knowledgeable about the laws, regulations, practice and operations of taxation; and persons who are experts in the management of trade or business or retired public servants versed in tax administration. The TAT consists of five members (TAC), one of which is the chairman, appointed by the Minister of Finance. The Chairman for each zone of the tribunal shall be a legal practitioner admitted to practice law for not less than 15 years with cognate experience in tax matters and legislation. The Chairman shall preside at every sitting of the tribunal or in his absence the members shall appoint one of them to preside. The quorum at any meeting shall be three members. A TAC shall hold office for a term of three years, renewable for another term of three years or until he attains the age of 70 years whichever is earlier. Appeals from TAT lie with the Federal High Court.

1.8.15 The Investments & Securities Tribunal

The Investments & Securities Tribunal (IST) is a specialized civil court established pursuant to section 274 of the Investments & Securities Act No. 29, 2007 (ISA) for the resolution of disputes in the Nigerian Capital Market and interpretation of any rule thereof. The jurisdiction conferred on the IST to determine all the issues listed in Section 284 of the ISA remains exclusive and cannot be shared with any other court as decided by the Supreme Court in ***Mufutau Ajayi v. SEC*** (SC/314/2007); LPELR-59729(SC); see also section 294 of ISA. The parties may also avail themselves with the services of IST Alternative Dispute Resolution (ADR) Centre in order to facilitate amicable and timely resolution of disputes. IST has both original and appellate jurisdictions. First, the SEC channels any complaint by an aggrieved party/parties to its Administrative Proceedings Committee ("APC"), and those disagrees with the APC's decision could lodge an appeal at the IST. Second, original jurisdiction of IST could be invoked by a direct application to the Tribunal. Section 293(3) of ISA provides that "an award or judgement of the Tribunal shall be enforced as if it were a judgement of the Federal High Court upon registration of a copy of such award or judgement with the Chief Registrar of the Federal High Court by the Tribunal". Appeal against the decision of the IST lies with the Court of Appeal – section 295 of Investment & Security Act (ISA).

1.8.16 The Code of Conduct Tribunal

The Code of Conduct Tribunal is a quasi-judicial body created under the 5th Schedule Part I of the Constitution of the Federal Republic of Nigeria, 1999. The Tribunal shall consist of a chairman and two other members. The chairman shall be a person who has held or is qualified to hold office as a Judge of a superior court of record in Nigeria- section 20 of the Code of Conduct Bureau and Tribunal Act, No. 1 of 1989, C15 LFN, 2004 (the Act). The chairman and other members of the Tribunal shall be appointed by the President on the recommendation of the National Judicial Council. The chairman and members of the tribunal shall hold the office, subject to good behaviour, until the attainment of the age of seventy years.

The Tribunal deals with complaints of corruption against public officers for the breaches of its provisions. The Tribunal is empowered to impose any of the following punishments:

i. Vacation of office or seat in any Legislative house;
ii. Disqualification from membership of a legislative house and from the holding of any public office for a period not exceeding ten years; and
iii. Seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

The Act defines a public officer in 2nd Schedule to the Act, to include member of the executive, legislative, judiciary and government agencies. The Act prescribes acceptable code of conduct for these officers; the spouses and children could also be investigated for the alleged corruption of a public officer. Appeals on the decisions of the tribunal lie as of right from such decision or from any punishment imposed on any person to the Court of Appeal- section 23(4) of the Act.

1.9 PERSONNEL OF THE COURTS

The personnel of the Court consist of officers who are responsible for the day-to-day administration of the court system or judiciary. We shall examine the duties of the court personnel in turn.

a). **The Judge: A** judge is the primary judicial officer. He hears and determines cases submitted for adjudication. He is expected to be an impartial referee. The Judge constitutes what is often referred to as the Bench. In the Magistrate court, they are addressed as "Your Worship" except in Lagos where they are addressed as "Your Honour". In the State High Courts, Federal High Court and Customary Court of Appeal, they are called "Judges" and addressed as "My Lord" or "My Lady" (for female Judges). They are referred to as "*Kadis*" in the Sharia Court of Appeal and "Justices" in the Court of Appeal and Supreme Court. Judges at all levels of the judiciary must be treated with respect and utmost courtesy.

When a judge enters a court room, all persons including the legal practitioners must rise and remain standing. Before he takes his seat, he bows to the Bar and the Bar bows too in acknowledgement.

Similarly, when the judge rises for the day or at intervals, every person in the court room will rise and remain standing until the Judge leaves the courtroom.

Functions of the Judge/Court

i. Settlement of disputes between individuals as well as governments.
ii. Interpretation of law and the constitution.
iii. The courts upon conviction punish offenders thereby regulating human conduct.
iv. Advisory functions: the courts may also occasionally advise the government, e.g. in obiter dicta or by way of who is to be elevated to the bench.
v. Judges also do sometimes make laws, i.e. case laws.

b). **Legal Practitioners:** legal practitioners are collectively referred to as the Bar. Legal Practitioners are also officers of the court and ministers in the temple of justice. The Bar consists of lawyers in private legal practice and law officers in the state and federal ministries of justice.

The Attorney General of the Federation is the official leader of the Nigerian Bar. Legal Practitioners in Nigeria are entitled to practice as Barristers and Solicitors. This implies that legal practice is fused in Nigeria, unlike in England where one practices either as Barrister or a Solicitor and not both at the same time.

A Barrister is an advocate who pleads clients' cases in court. A Solicitor on the other hand sits in his office to receive instructions from clients, offer advice and draft legal documents.
When a legal practitioner has been qualified for a period of not less than 10 years and has distinguished himself in the legal profession, he may be appointed a Senior Advocate of Nigeria (SAN), an equivalent of Queen's Counsel (QC) in England. The award is conferred by a body called the Legal Practitioners Privileges Committee.

c). **The Chief Registrar/Registrars:** he is the Chief Administrative Officer of the judiciary and co-ordinates the administrative activities of the court system. He is assisted by the Deputy Chief Registrar (DCR). The Chief Registrar and the DCR are usually qualified legal practitioners. Other employees of the registry include Registrars and court clerks. Their principal functions are:

i. They call cases in court.
ii. They prepare a cause list for the court and keep the court diary.
iii. All correspondence to the court is addressed to the Registrar of the Court.
iv. They assist the judge on administrative matters.
v. Administration of oaths on the witnesses.
vi. They are responsible for the arrangement, proper and safe custody of suit filed.
vii. They ensure that the court process filed at the Registry enter the suit file for the Judge's attention.

d). **Assessors:** There are instances whereby a court may be faced with conflicting questions or issues on customary law in a matter before it. In other to ensure that justice is done, the court in

such a case may obtain the assistance of experts known as assessors. Such assessors must be knowledgeable in the customary practice in question.
A panel of Assessors or list of persons qualified to do so act is kept by the court and when the need to use any of them arises such experts are called upon to sit with the judge over the matter so as to enable the experts listen to the parties and advice the judge if requested to do so. The advice or opinion of the Assessor is not binding on the judge.

e). Sheriff/**Bailiff:** The functions of the Sheriff/Bailiff as provided for in the Sherriff and Civil Processes Act, Cap. S6, LFN 2004, includes the service of court processes on the parties, execution of court judgements and the *fifa* of judgement debtors' properties.

1.10 COMMENCEMENT OF CIVIL PROCEEDINGS IN THE HIGH COURT

There are three kinds of High Courts in Nigeria, namely, State High Courts, Federal High Court, and High Court of the Federal Capital Territory. Commencement of civil proceedings in any of the High Court is governed by the Civil Procedure Rules of the High Court in question. The rules are similar; we shall however confine our discussion to the High Court of Lagos State (Civil Procedure) Rules, 2012. Order 3 of the High Court of Lagos State (Civil Procedure) Rules, 2012 provides for two modes by which an action can be commenced in the High Court of Lagos State. These are by *Writ of Summons* and *Originating Summons*.

ACTIONS COMMENCED BY WRIT OF SUMMONS

This is the most important mode of commencement of action in the High Court. The Writ of Summons is used in commencing every suit that involves contentious issues. Accordingly, it was held in ***Doherty v. Doherty*** (1968) NMLR 241 that where there is uncertainty as to what mode of commencement should be used, such actions are commenced by writ of summons. Order 3 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 2012 provides that subject to the provisions of the rules or any applicable law requiring any proceedings to be begun otherwise than by Writ, a Writ of Summons shall be the form of commencing all proceedings:

(a) where a Claimant claims:
  (i) any relief or remedy for civil wrong or;
  (ii) damages for breach of duty, whether contractual, statutory or otherwise, or
  (iii) damages for personal injury to or wrongful death of any person, or in respect of damage or injury to property;
(b) where the claim is based on or includes an allegation of fraud, or;
(c) where an interested person claims a declaration.

All civil proceedings commenced by Writ of Summons shall be accompanied by the following documents:

(a) a Statement of Claim;
(b) a list of witnesses to be called at the trial;
(c) written statements on oath of the witnesses except witnesses on subpoena;
(d) copies of every document to be relied on at the trial; and

(e) Pre-action Protocol Form O1 ('Pre-action Protocol' means the steps that parties to the suit has undertaken to have the matter resolving amicably before proceeding to court.)

Compliance with the above requirements is mandatory. The Registrar is empowered to reject a Writ of Summons presented for filing at the court registry for failure to comply with the above requirements. This requirement of filing the Statement of Claim together with all other documents along with the Writ of Summons is commonly referred to as the '*front-loading system*.'

The Writ of Summons shall be issued by the Registrar or other officer of court empowered to issue summonses, on application. The application is normally by filing Form 1 to the Appendix to the Rules. The Writ is deemed issued once sealed by the court's Registrar. The Writ of Summons essentially commands the defendant to enter appearance to the action instituted against him/her at the instance of the claimant, with a warning that should he fail to enter an appearance within 42 days, the claimant shall proceed to enter judgement against him/her.

Every Writ of Summons issued by the High Court bears the following endorsements:

i. The heading of the suit showing the Judicial Division of the High Court in which the action is brought.
ii. The names and description of the parties.
iii. The address of the defendant with the jurisdiction of the court.
iv. The nature of the claim by the claimant against the defendant, with an endorsement at the back or reverse side of the writ.
v. The name and address of claimant's lawyer, if he has any within jurisdiction of court.
vi. The address of the claimant within jurisdiction.

Apart from the requirement as to endorsement of claim which has been held by the courts to be a fundamental defect, other defects may be treated as mere irregularities that may be rectified by amendments. A civil action, commenced by Writ of Summons, is therefore deemed to have commenced once the Writ is filed by a litigant, i.e., once it is signed and received by the Registrar.

ACTIONS COMMENCED BY ORIGINATING SUMMONS

Order 3, Rule 5 of the High Court of Lagos State (Civil Procedure) Rules 2012 provides that an action may commence by Originating Summons where the sole or principal question in issue is, or is likely to be one of construction of a written law or any instrument made under any written law, or of any deed, will, contract or other document or some other question of law; or there is unlikely to be any substantial dispute of fact.

The advantage of an action commenced by Originating Summons is that such action is faster since there are no facts in dispute, pleadings, discoveries, interrogatories and other similar interlocutory applications that tend to delay proceedings commenced by Writ of Summons.

The Rules provide that an Originating Summons shall be accompanied by:

i. an affidavit setting out the facts relied upon;
ii. all the exhibits to be relied upon;
iii. a written address in support of the application; and

iv. Pre-action Protocol Form O1.

Where the action involves contentious issues and hostile proceedings, an Originating Summons is not allowed- see ***Doherty v. Doherty*** (supra). Other than the requirements as to their nature and content, the procedure for filing of an Originating Summons is the same with a Writ of Summons.

1.11 NIGERIAN LEGAL SYSTEM UNDER THE MILITARY RULE

The first mutiny in Nigeria occurred on the 15th January 1966 when the Nigeria Armed Forces took over and ruled from 1966-1979. They also toppled the democratically elected government of Alhaji Shehu Shagari (October 1 1979-31 December 1983) on December 31, 1983 and the military ruled effectively till 1999 except for a brief period when the military administration of Ibrahim Babangida experimented with diarchy (January 1992- November 1993) and the Earnest Shonekan led interim government (26 August 1993-17 November 1993). The military effectively took over again on 17 November 1993 under Gen Sanni Abacha and ruled till 1999 when it handed over to the civilians. Thus, Nigeria has operated under five constitutions, namely the Independence Constitution (1960-1963), the Republican Constitution (1963-1966), the Second Republic Constitution (1979-1983), the Third Republic Constitution (January 1992- 17 November 1993) and the Fourth Republic Constitution (1999-Date). A national catastrophe, when the Eastern region attempted unsuccessfully to secede from the Nigerian federation after three years armed struggle between Nigeria and Biafra (1967-1970). Similarly, after the first coup of January 1966, there were several bloody and bloodless coup d'état and counter coup, some were successful while others were unsuccessful. The reward for the participants in unsuccessful coup d'états in Nigeria is death by firing squad.

"Military Government" is a government, which acquires the power to govern as a result of force of arms rather than the will of the governed usually through successful revolutions or coup d'état. Revolution is a phenomenon that brings about an abrupt, fundamental and significant change in the existing government and the society. It involves a complete overhaul of the entire state machinery and the replacement of the political elites. It is usually accompanied by cruelty, violence and bloodshed. The French revolution of 1789, the Russian Proletariat revolution of 1917, and the Iranian revolution of 1979 are examples.

1.11.1 Legislative Authority

Upon assumption of power, the first action of the military authority is the promulgation of a decree to suspend and modify the Constitution, such as the Constitution (Suspension and Modification) Decree, No. 1 of 1966.

The decree provided that:
(a) Parts of the provisions of the Constitution of the Federation, including those dealing with democratic institutions are suspended.

(b) The provision of the Constitution, which is not suspended, shall have effect subject to the modifications specified in by the military authorities.
(c) The Federal Military Government shall have both legislative and executive powers.
(d) The Military Governor shall not have power to make laws with respect to any matter included in the Exclusive Legislative List and shall seek the consent of the Federal Military Government before making any law on matters in the concurrent legislative list.
(e) No question as to the validity of this or any Decree or any Edict shall be entertained by any court of Law in Nigeria. ('this is known as **ouster clause'**).
Ouster clauses are situations whereby courts are precluded from enquiring into the validity of any duly proclaimed decree or edict. Examples include the section 5 of the Constitution (Suspension and Modification) Decree 107 of 1993 and the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994.

The Constitution (Suspension and Modification) Decree No. 1 of 1984, the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the Federal Military Government (Suspension and Enforcement of Powers) Decree No. 12 of 1994 were replications of Decree No. 1 of 1966. These Decrees demarcated the existing constitution into three parts:
(i) The suspended part of the existing Constitution.
(ii) The unsuspended provisions of the existing Constitution which includes the chapter containing the fundamental rights provision, such as right to life, right to privacy, right of fair hearing e.t.c. and the chapter dealing with the establishment and the functions of the courts.
(iii) Modifications to the existing constitution by subsequent Decree.

The Military dismissed the extant legal order, the executive and legislative bodies, conferred wide powers upon the military authorities and limit the powers of the courts to entertaining certain cases. The Supreme Military Council (SMC) (or its equivalent) thereby assumed the power to make law vide Decrees for the whole country, while the states legislate by issuing Edicts subject to confirmation from the SMC.

1.11.2 Executive Authority

Under the Military, the executive powers of the republic are vested in the Head of the State and the Commander in Chief of the Nigeria Armed Forces. The Head of State and the Military Council appoint the members of Supreme Military Council, (consisting of members of the armed forces and the police) which made laws and the Federal Executive Council (consisting of members of the armed forces and civilians) who constitute the executive branch. Most members of the Supreme Military Council are also members of the Federal Executive Council.

1.11.3 Judicial Authority

The Supreme Military Council, after consultation with the Advisory Judicial Committee appointed judges of Superior Courts (i.e. The Supreme Court, the West State Court of Appeal, the Northern States Sharia Court of Appeal and the Court of Resolution and the High Courts of the Federation).

This procedure was further altered by the Constitution (Amendment) Decree No. 5 of 1972, which conferred on the Head of State, the power to appoint and dismiss the Chief Justice of the Federation. The Advisory Judicial Committee consists of the Chief Justice of Federation, Chief Justices of the Regions (later states), the Grand Kadi of the Sharia Court of Appeal and the Attorney-General of the Federation. The Solicitor-General served as its Secretary.

1.11.4 Legal Implication of Military Incursion into the Political Arena

The Military government derives its powers from its ability to coerce the populace by the use of force. It could abrogate, suspend and modify or re-enact the constitution and enact laws at its whims. Military government unlike its democratic counterpart passes decrees which have retroactive provisions. There are three schools of thought on the legitimacy of military administration supplanting their civilian masters, namely:

i. The school advocating that the military administration is an extension of the preceding civil dispensation, thus denying the alteration in the national legal order- ***State* v. *Nwoga & Okoye***, Suit No. E/34C/66; **Jackson v. *Gowan & Ors*** NBJ Vol. 8 (1967).
ii. The school that advocates that the military administration is revolutionary. See **Lakanmi *& anor. v. Attorney-General (WS) & ors.*** (1970), ***Ogunlesi & ors. v. Attorney-General (Federation)*** (1970); ***The Council of University of Ibadan v. Adamolekun*** (1967).
iii. The school which recognize the new order and maintained that the military administration, its agencies and functionaries are not above law.

1.11.4.1 Creation of Additional Courts

The military administration enacted Decrees to create additional and specialized such as:

i. Federal Revenue Court for Revenue matters (vide Federal Revenue Court Decree No. 13 of 1973) currently known as Federal High Court.
ii. Federal Court of Appeal to entertain appeals from Federal Revenue Court and the High Courts of the states. From this Court, appeals now lie to the Supreme Court. Currently known as the Court of Appeal.
iii. Armed Robbery Tribunal, a quasi-judicial body headed by a high court judge and assisted by two officers drawn from the Armed Forces and the Nigeria Police. The military governor exercised power to confirm or disallow sentence imposed by the Tribunal. (Abrogated under the current dispensation).
iv. Titles of Heads of Judiciary were restyled Chief Justice of Nigeria (Federation), Chief Judge (States). Retained in the current dispensation.

At independence, Nigeria had three regions- North, West and East. A fourth region, known as Mid-Western Region was created in 1963, out of the Western Region. The Military Administration of Gen. Aguiyi Ironsi vide the Constitution (Suspension and Modification) No. 5 Decree 1966 abolished Federalism, and the regions, renamed regions as provinces. After the counter coup of July 1966, under the military administration of Gen. Yakubu Gowon in 1967, Nigeria became a federation of 12. Under different military administrations the states were subdivided into 19

(Murtala-Muhammed/Obasanjo), 21 (Babangida), 30 (Babangida) and 36 (Abacha) in 1976, 1987, 1991 and 1996 respectively.

1.12 CONCLUSION

In this chapter, we have examined the meaning, theories and nature of law. We concluded that law is incapable of a definition that can command universal acceptance; it is made up of various components. Also, we have studied the term, 'legal system,' with emphasis on the Nigerian Legal System. We also examined the sources of Nigerian law, its various classes, and the nature and structure of the court system.

1.13 ILLUSTRATIVE AND PRACTICE QUESTIONS

i. Attempt a definition of law.
ii. Why is law necessary in society?
iii. Itemize the sources of Nigerian law known to you.
iv. What is the nexus between law and morality?
v. List at least 5 (five) items which are under the exclusive jurisdiction of the Federal High Court of Nigeria.
vi. What is meant by the term, 'Military Government'?
vii. Do you believe in the assertion in some quarters that 'the Military Government enjoys unlimited powers'?

MCQ

1. The laws made by the National Assembly in Nigeria is known as:
   A. Decrees
   B. Act
   C. Ordinances
   D. Edicts

2. This Court has original jurisdiction to settle disputes involving the federal and state governments.
   A. National Industrial Court
   B. Federal High Court
   C. Court of Appeal
   D. Supreme Court

3. The Head of Federal High Court is known as:
   A. Chief Justice of the Federal High Court
   B. Chief Judge of the Federal High Court
   C. Law Lord of the Federal High Court
   D. President of the Federal High Court

4. To be qualified for appointment as a Justice of the Court of Appeal in Nigeria, the appointee must have been a legal practitioner for a period of not less than:

A. 12 years
B. 25 years
C. 15 years
D. 10 years

5. Who of the following was NOT a proponent of natural law?
   A. Aristotle
   B. Jeremy Bentham
   C. St Augustine
   D. St Thomas Aquinas

1.14 CASE STUDY

Ibrahim Zango, 30 years of age, Hausa, Muslim; Olu Dende, 25 years old, Yoruba, Devotee of Osun goddess and Igwe Okafor, 26, years of age, Igbo, Christian were arrested by officers of the Nigerian Police Force for their complicity in the murder of Tsav Azar, 20 years of age, Tiv, Christian, on the 23rd of January, 2019, in Kanango Area, Kano, Kano State. The matter was investigated and the suspects were arraigned in the Kanango Upper Area Court I in Kano. After trial, lasting one month, the suspects were found guilty and sentenced to death by hanging. The senior brother of one of the convicts, Hyginus Igwe was disturbed and asked for your advice on whether his brother could be spared, or if his sentence could be reduced. Please advise him generally on the case at hand based on your knowledge of Nigerian Legal System.

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CHAPTER TWO

CHAPTER TWO: THE CONSTITUTION AND CANONS OF INTERPRETATION OF STATUTES

2.0 INTRODUCTION

Government comprises of the Executive, Legislature and the Judiciary. The legislature makes laws which are implemented by the executive, and interpreted by the Judiciary. It means therefore that the primary function of the judicial arm of government is that of statutory interpretation. Interpreting legislation is however, very tasking and requires special skills. We shall examine these skills in this chapter.

2.1 LEARNING OBJECTIVES

This chapter is designed to equip students with a basic knowledge of cannons of statutory interpretation, with emphasis on their application, merits and demerits of each of the cannons. The students are also expected to have learnt, at the end of this chapter, some basic constitutional concepts like the meaning and nature of a constitution, types of constitution and sources of constitution.

2.2 THE CONSTITUTION

A constitution may be defined as a body of fundamental rules, regulations and norms by which a given society is governed. It refers to a group of documents having a special legal sanctity and embodying a selection of the most important rules about the government of a country.
A constitution sets out the framework and the principal functions of the organs of government within the country, and declares the principles by which those organs must operate.

According to K. C. Wheare, a constitution refers to 'the whole system of government of a country, the collection of rules which establish and regulate or govern the government.' A constitution is the *grundnum*, the most superior law of the land on which the other laws depend and must not conflict with it.

2.2.1 SOURCES OF CONSTITUTION

1. **Constitutional Conference**: This is the modern source of constitution. It is a system whereby the representatives of the people are invited to make a constitution for a given society. In doing this, representatives are elected or selected to represent different political, social, economic and religious interest in the society to participate in the constitution making process. It is therefore an attempt to confer legitimacy and instil public confidence in the constitution. Constitutional conferences ensure that wide arrays of interests are represented in the constitution making process. This explains the reason for the composition of, a Constitutional Drafting Committee (CDC) of 50 members chosen from different geopolitical zones in the country to draft the 1979 Constitution of Nigeria.

2. **Conventions and Customs of the People**: This is another important source of constitution particularly in countries with unwritten constitution. In Great Britain, being a country with an unwritten constitution, conventions, therefore, serves an essential source of their constitution.

3. **Writings of Jurists**: Whenever a constitution is to be made for a country, writings of scholars and jurists may be consulted for assistance. The writings of John Locke and Montesquieu for instance greatly influenced the USA's Constitution.

4. **International Instruments**: International instruments on human rights such as Bills of Rights, Universal Declaration of Human Right (1947) e.t.c, could be an important source of a country's constitution. For instance, the whole of chapter 4 of the 1999 Constitution containing fundamental human rights is essentially a reproduction of the Universal Declaration of Human Rights (1947).

5. **Case Law**: Decisions of judges on constitutional matters could be found useful in the Constitution of a country.

2.2.2 TYPES OF CONSTITUTION

Written Constitution: A written constitution is one where the fundamental laws of the country are contained in a single document, e.g. the Nigerian and Canadian Constitutions.

Advantages of a Written Constitution

i. Ease of reference. Since the fundamental laws of the country are contained in a single document, reference to relevant provisions becomes easier.
ii. It is suitable for a heterogeneous society like Nigeria.
iii. Most written constitutions are rigid and therefore makes manipulations by the ruling government difficult.

Disadvantages of a Written Constitution

i. The provisions of a written constitution may become obsolete and devoid of contemporary relevance if not reviewed regularly.

Unwritten Constitution: The fact that a constitution is said to be unwritten does not mean that it is not written at all. It simply means that the fundamental laws of the State are not codified in a single document. Instead, they are contained in several statute books, e.g., Great Britain, Northern Ireland and New Zealand.

In Britain, there is no single document that can be referred to as the 'British Constitution.' The sources of unwritten constitutions include customs, conventions, e.t.c.

The major advantage of unwritten constitution is flexibility and therefore can be made to respond to the changing needs of the society. Its major demerit also lies in its flexibility. It is susceptible to manipulations by a powerful ruling government. The fact that it is largely unwritten also makes reference in court not very easy.

Rigid Constitution: This is a Constitution that requires a special procedure for its amendment. Note also that a particular provision of a constitution may be more rigid than others.
The Constitutions of Nigeria and France are rigid. The amendment of most provisions of the Nigerian Constitution requires the two-third vote of the joint session of the National Assembly, including the State's Houses of Assembly-see Sections 8 and 9 of the 1999 Constitution of Nigeria. The major merits of a rigid constitution lie in the fact that it is relatively difficult to manipulate by a ruling government for selfish consideration. It also promotes stability and certainty. The demerit is that its rigidity may render its provision obsolete and devoid of contemporary relevance. It may not be able to meet the changing needs of the society.

Flexible Constitution: A constitution is said to be flexible where its provisions can be amended with ease, i.e., where the mode of amending the constitution is the same as the ordinary way passing an ordinary law. The independence constitutions of Zambia and Ceylon (now Sri Lanka) are flexible.

Monarchical Constitution: This is a constitution that provides for hereditary head of State or Chief Executive (e.g. a King or Queen as in Britain, Swaziland, Lesotho and Japan).

Unitary Constitution: A unitary constitution is one which establishes a unitary system of government whereby all governmental powers are centralized. Example, Ghana and Namibia operate unitary constitutions.

Federal Constitution: This is a constitution that recognizes the division of powers between the Federal (Central) Government and the federating units. Example, in Nigeria, legislative powers is divided into 3 categories, namely, exclusive list, concurrent list and residual list.

The Exclusive Legislative List contains those subjects in respect of which only the National Assembly has legislative competence. e.g., defence, copyright, arms, ammunition and explosives, aviation, airports, bankruptcy and insolvency, customs and excise duties, state creation, deportation, drugs and poisons, currency, coinage and legal tender, citizenship, e.t.c. -see Part 1, Second Schedule to the 1999 Constitution of Nigeria.
Both the federal and State legislative houses have competence in respect of matters listed under the concurrent list. However, whenever there is a conflict between the federal and State governments in respect of exercise of legislative powers over matters listed under the concurrent list, the federal government shall prevail. Matters contained under the Concurrent Legislative List include collection of taxes, archives, electricity, university, technological and post primary education, exhibition of cinematograph films, scientific and technological research, statistics, agriculture, e.t.c. See Part II, Second Schedule to the 1999 Constitution of Nigeria.

Matters not expressly listed under the Exclusive Legislative List nor the Concurrent Legislative List is deemed to be under the residual list and is exclusively preserved for the state government.

The United States, Canada and Nigeria are good examples of countries with a federal constitution. The Nigerian Constitution is written, rigid and federal.

2.2.3 REASONS FOR HAVING A CONSTITUTION

A Constitution establishes the legal order for a country. Important contents of a Constitution include the following:

i. It states the political and economic system to be adopted by a country, i.e. it fashions out the political and economic ideology of a state.
ii. It defines and allocates the powers of each of the three organs of government. See Sections 4, 5 and 6 of the 1999 Constitution of Nigeria, which provides for legislative, executive and judicial powers respectively.
iii. It entrenches the fundamental human rights which are to be enjoyed by the people. See Chapter 4 of the 1999 Constitution of Nigeria.

A constitution being the fundamental laws of the land, gives mission, vision and direction to the government. The existence of a constitution therefore, may help checking the emergence of a dictator in the country, because it delineates and limits the power of the state. The constitution checks the excesses of the government. All governmental powers are derived from it and its exercise therefore must conform to the provisions of the constitution.

2.2.4 SUPREMACY OF THE CONSTITUTION

Supremacy of the constitution means that, the constitution is the supreme law of the land and binding on the government and the governed. A constitution is the most superior or the fundamental law of the land to which all governmental actions and laws must conform. Non-compliance with the provisions of the constitution renders those governmental actions and laws unconstitutional, null and void and of no effect. See also the cases of ***Tony Momoh v. Senate of the National Assembly*** (1981) 1 NCLR 21, ***Adewole & Ors. v. Lateef Jakande & Ors.*** (1981) 1 NCLR 26.

2.2.5 CONSTITUTIONAL DEMOCRACY

The term ‘constitutional democracy’ has been variously defined. It can be viewed as a system of government based on popular sovereignty in which the structures, powers, and limits of government are set forth in a constitution.

Democracy is government of, by, and for the people. It is government of a whereby all citizens, rather than favoured individuals or groups, have the right and opportunity to participate. In a democracy, sovereignty belongs to the people. The people are the ultimate source of authority.

In a constitutional democracy to prevent the tyranny of the majority certain safeguards is instituted in order to protect the rights of the vulnerable individuals and minorities. This is the form of democracy practised in Nigeria, Ghana, Benin Republic, France, the United States, and many other countries.

2.2.5.1 ESSENTIAL FEATURES AND PRINCIPLES OF CONSTITUTIONAL DEMOCRACY

Constitutional Democracy is the antithesis of arbitrary rule. It is the type of democracy characterized by the under-listed:

(a) **Popular Sovereignty**: The people are the ultimate source of the authority of the government which derives its right to govern from their consent via periodic elections.

(b) **Majority Rule and Minority Rights**: Although "the majority rules," the fundamental rights of individuals and the minority are protected.

(c) **Limited Government**: The powers of government are limited by law and a written or unwritten constitution which those in power obey.

2.2.5.1.2 INSTITUTIONAL AND PROCEDURAL LIMITATIONS ON POWERS

There are certain institutional and procedural devices which limit the powers of government. These may include:

i. **Separated and Shared Powers:** Powers are separated among different agencies or branches of government. Each agency or branch has primary responsibility for certain functions such as legislative, executive, and judicial functions. However, each branch also shares some of its functions with the other branches. e.g. delegated legislation.
ii. **Checks and Balances.** Different agencies or branches of government have adequate power to check the powers of other branches. Checks and balances may include the power of judicial review and the power of courts to declare actions of other branches of government to be contrary to the constitution.
iii. **Due Process of Law.** Individual rights to life, liberty, and property are protected by the guarantee of due process of law.
iv. **Leadership Succession through Elections.** Elections ensure contest at regular intervals for key positions in government and that the transfer of power and governmental authority is usually accomplished in a peaceful and orderly manner.

2.2.5.1.3 FUNDAMENTAL VALUES OF CONSTITUTIONAL DEMOCRACY

The fundamental values of constitutional democracy reflect a paramount concern with human dignity and the worth and value of each individual.

(a) **Basic Rights**: Protection of certain basic or fundamental rights is the primary goal of government. These rights may be limited to life, liberty, and property, or they may be extended to include such economic and social rights as employment, health care and education. Chapter Four of the 1999 Constitutional of the Federal Republic of Nigeria is entirely devoted to these rights.

(b) **Freedom of Conscience and Expression**: A constitutional democracy guarantees the protection of the freedom of conscience and expression of the populace. These freedoms have value both for the healthy functioning and preservation of constitutional democracy and for the full development of the human personality.

(c) **Privacy and Civil Society**: Constitutional democracies recognize and protect privacy and sanctity of social relationships comprising of family, personal, religious, and other associations

and activities. Unfair and unreasonable intrusion by government into private relationships is prohibited in a free society.

(d) **Justice**: A constitutional democracy promotes justice, which can manifest in three basic forms, namely, *Distributive Justice* – the fair distribution of the benefits and burdens of society; *Corrective Justice* – fair and proper responses to wrongs and injuries; and *Procedural Justice* – the use of fair procedures in the gathering of information and the making of decisions by all agencies of government and, most particularly, by law enforcement agencies and the courts.

(e) **Equality**: A constitutional democracy promotes equality, which can also manifest in any of the following forms: *Political Equality* – All citizens are equally entitled to participate in the political system; *equality Before the Law* – The law does not discriminate on the basis of unreasonable and unfair criteria such as gender, age, race, ethnicity, religious or political beliefs and affiliations, class or economic status. The law equally applies to the governors as well as the governed; *Economic Equality* – constitutional democracies have differing conceptions of the meaning and importance of economic equality. At the very least, they agree that all citizens should have the right to an equal opportunity to improve their material well-being. Some constitutional democracies also attempt to eliminate gross disparities in wealth through such means as progressive taxation and social welfare programs.

(f) **Openness**: Constitutional democracies are based on a political philosophy of openness or the free marketplace of ideas, the availability of information through a free press, and free expression in all fields of human endeavours.

2.3.5.1.4 SOME COMMON WAYS CONSTITUTIONAL DEMOCRACIES ARE ORGANIZED

A. Unitary, Federal and Confederate Systems: Unitary and federal systems are the most common ways of organizing constitutional democracies. There also are associations of States called confederations.

Unitary Systems: In a unitary system central government has full power, which it may delegate to subordinate governments.

Federal Systems: In a federal system power is shared between a central government which has full power over some matters and a set of subordinate provincial or State governments that have power over other matters.

Confederations: In a confederation, a league of independent states, which retain full sovereignty, agrees to allow a central government to perform certain functions, but the central government may not make laws applicable to individuals without the approval of the member states.

B. Parliamentary and Presidential Systems: Most systems of governments reflect the parliamentary, presidential or hybrid models. Under the Presidential system of government, the head of state of a country is also the head of government and all executive powers are vested in him. Parliamentary system of government occurs whereby the Prime Minister is the head of government and the leader of the party that has the majority in the legislature, but the executive

powers are vested in the cabinet. This system is characterized by the doctrine of collective responsibility. The hybrid type is an amalgam of the many systems.

Although the political system of Nigeria, the United States and others are referred to as presidential systems, but in reality, there are differences in the presidential system practiced in each country i.e. each polity has its own peculiar characteristics.

2.3 INTERPRETATION OF STATUTES/ CANON OF INTERPRETATIONS

The judiciary is the organ of government charged with the constitutional responsibility of interpreting the laws made by the legislature. The courts are therefore saddled with the arduous task of interpreting a law, which they did not make. In an attempt to discharge this duty, the courts have overtime evolved different rules of interpretation of statutes. These rules are called cannons of interpretation. They are as follows:

i. Literal/ Strict rule
ii. Golden/ Liberal rule
iii. Mischief rule

2.3.1 THE LITERAL / STRICT RULE OF INTERPRETATION

This is the primary rule of interpretation. According to this rule, where the wordings of a statute are clear, direct and unambiguous, then the court must accord it, it's plain, ordinary and grammatical meaning without recourse to any extraneous consideration and it is immaterial that the result will be contrary to the intention of the legislature or occasion hardship. The rationale behind this rule is that the duty of the court is to interpret the law as it is and not as it ought to be. Thus, the Supreme Court has held in the case of ***Ibrahim v. Mohammed*** **(**2003) 2 S.C 127 at 138, that "*where the words of a statute are plain, clear and unambiguous, it's not necessary to read anything into them than to apply their ordinary meaning"*. See also ***R. v. Bangaza*** (1960) FSC 1; ***Adegbenro v. Akintola & Ors*** (1963) 3 WLR 63; ***Bisi Onabanjo v. Concord Press; Banjo v. Abeokuta UDCC*** (1965) All NLR 509.

Merits of the Literal Rule

1. It strengthen the concept of separation of power and all that the doctrine entails.
2. It provides for uniformity and consistency in the interpretation of statutes.
3. It reduces the extent of judicial arbitrariness.

Demerits of the Literal Rule

1. The application of the literal rule may lead to absurdity in some circumstances in which case, we may have resort to the golden rule.
2. It is capable of producing hardship, miscarriage of justice or consequences not intended by the legislature.

3. It is very rigid, in the sense that it does not create room for a reasonable interpretation of statutes in appropriate situations.
4. It does not give room for liberal interpretation.

2.3.2 THE GOLDEN RULE OF INTERPRETATION

The Golden Rule is the second rule or cannon of interpretation. According to this rule, where literal interpretation of words will produce absurdity, the court is enjoined to adopt an interpretation which will avoid such absurdity and thereby giving effect to the intention of the legislature. The Golden Rule has some similarities with the Literal Rule in the sense that it requires the wordings of the statute to be interpreted and accorded its ordinary and natural meaning except where such natural meaning will produce absurdity or result in a contrary intention of the law maker. In a nutshell, the Golden Rule allows the meaning of the provisions of the statute to be varied or modified if it would produce absurdity or a result contrary to the intention of the legislature.

The Golden Rule was formulated by Parke B. in ***Beck v. Smith***, where he stated that the Golden Rule should be applied where the application of the literal rule will be *"....at variance with the intention of the legislature to be collected from the statute itself or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further*."

In the case of ***Re: Sigsworth*** (1935), the Golden Rule was applied to prevent a murderer from inheriting the intestate property of his victim although he was her only heir on a literal interpretation of the Administration of Estates Act (1925). See also ***Awolowo v. Federal Minister of Internal Affairs*** (1962) 1 NLR 178**;** ***Lee v. Knapp*** (1967) 2 QBD 442; ***R. v. Princewill*** (1963) All NLR 478; ***Council of University of Ibadan v. Ademolekun*** (1967) All NLR 213.

Merits of the Golden Rule

i. It enables the court to avoid absurdity by adopting an interpretation that will validate the intention of the parliament.
ii. It enables the court to adopt a reasonable and sensible interpretation.
iii. It enables the court to, on the ground of inexpediency, injustice and immorality, adopt an interpretation that will promote justice, law and order.
iv. It enables the court to correct a statute to properly reflect the true intentions of the legislature.
v. It prevents slavish adherence by the courts to the letters of the law, rather than focusing on its spirit and intent.

Demerits of the Golden Rule

i. It makes the courts to depart from the clear words of the statues.
ii. It can allow a court to correct a statute to the point of usurping the duties of parliament.
iii. It makes the court to go on a voyage of discovery and this can be tasking for the judge.
iv. It allows the judge a measure of discretion in the interpretation of a statute, which if not properly handled, may be abused.

2.3.3 THE MISCHIEF RULE OF INTERPRETATION

This rule is sometimes called the social policy rule. Under this rule, a statute should be interpreted in a way so as to correct the mischief which the statute is enacted to correct. The mischief rule enjoins the court to look at the purpose for which the statute was enacted and adopt the interpretation that will accomplish that purpose or correct the mischief in the previous position of the law. The rule therefore permits the court to undertake a historical investigation by taking into account the social circumstances which gave rise to the particular statute under consideration. Thus, where a statute has been enacted to remedy a weakness or wrong, the interpretation to be adopted should be one which will remedy that wrong or mischief.

The mischief rule of interpretation or construction of statutes was formulated by Lord Coke in the ***Heydon's Case*** (1584) 76 ER 638, where the Court held that in applying the Mischief Rule of interpretation, the court should consider and inquire into the following:

i. What was the position of the common law before making the Act which was sought to be interpreted?
ii. What was the mischief or defect for which the common law did not provide provided?
iii. What remedy had the Parliament appointed to cure the defect provided?
iv. The Judge should then interpret the statute with a view to suppressing the mischief and advancing the remedy.

Thus, in the case of ***Savannah Bank v. Ajilo*** (1989)1 SC (pt. II) 5, the Supreme Court observed that the primary purpose behind the enactment of the Land Use Act is to achieve uniformity in the Nigerian land tenure system and that the courts should have this in mind in giving effect to the provisions of the statute. See also ***Abioye v. Yakubu*** (1991) 5 NWLR (pt. 190) 130; ***Opeola v. Opadiran*** (1994) 5 NWLR (Pt. 344) 368;***Balogun v. Salami*** (1963) All NLR 129; ***Idehen v. Idehen*** (1991) 5 NWLR (pt. 198)382; ***Akerele v. IGP*** (1955) 21 NLR 37; ***Omoijuanfo v. Nigeria Technical Co. Ltd.*** (1976) All NLR 294; ***Kolawole v. Alberto*** (1989) 1 NWLR (Pt. 98) 382; ***Smith v. Hughes*** **(1960) 1 WLR**; and ***Wilson v. AG, Bendel*** (1985) 1 NWLR (Pt. 4) 573.

The major limitation or criticism of the mischief rule is that it proceeds on the assumption that legislation is enacted to correct a mischief; this is not always the case.

2.4.4 OTHER GENERAL PRINCIPLES OF STATUTORY INTERPRETATION

Apart from the major cannons of interpretation examined above, there are also some other subsidiary principles of interpretation of statutes. They are as follows:

(a) **The *Ejusdem Generis* Rule**: This rule is to the effect that where particular or specific words are followed by general words, the construction of the general words should be limited to the same kind as the particular words. As Farewell L.J. pointed out in ***Tillmanns & Co. v S. S. Knuts*** (1908) 2 K.B 385, there must first be a category before the presumption can arise. For instance, where a law provides that 'it shall be lawful for residents of the University Community to keep cats, fowls, dogs, rabbits and other animals'; the expression 'other animals' here will be construed to mean domestic animals and not wild animals such as lion, hyena, snakes, e.t.c.

(b) ***Espressio unis est exclusion alterius****:* This means that the express mention of a thing implies the exclusion of all other things not mentioned.

(c) ***Utres magis valeat quam pereat***: According to this rule, where a statutory provision is capable of two interpretations, the court should adopt the interpretation which is consistent with the smooth working of the system which the statute purports to be regulating- ***Shannon Realities Ltd. v. Ville de St. Michael*** (1924) AC 185.

2.4 CONCLUSION

As noted earlier, the judiciary is the organ of government entrusted with the constitutional responsibility of interpreting the laws made by the legislature. Courts are therefore saddled with the arduous task of interpreting a law, which they did not make. In an attempt to discharge this duty, courts have overtime evolved different rules of interpretation of statutes. These rules are called cannons of interpretation. Also treated under this chapter are some basic constitutional concepts like the meaning and nature of a constitution, types of constitution and sources of constitution.

2.5 ILLUSTRATIVE AND PRACTICE QUESTIONS

i. What are the sources of a constitution and what are the functions of a constitution?
ii. Discuss the literal rule of interpretation.
iii. What do you consider to be the merits of the golden rule of interpretation? Does the rule have any demerit?
iv. Discuss the advantages and disadvantages of the Mischief Rule of interpretation.
v. Apart from the three major cannons of interpretation, are there other aids to statutory interpretation? What are they?

MCQ

1. This is not a rule of interpretation of statutes.
   A. Golden Rule
   B. Mischief Rule
   C. Silver Rule
   D. *Esjudem Generis* Rule

2. This is the personal opinion of the judge which does not form part of judicial precedent.
   A. Obiter dictum
   B. Stare decisis
   C. Ratio Decidendi
   D. Case law

3. This country operates a rigid constitution.
   A. United Kingdom
   B. New Zealand

C. Nigeria
D. Israel

4. The Court of Appeal forms a quorum to hear a case with:
   A. 3 members
   B. 5 members
   C. 7 members
   D. 9 members

5. The highest court in the hierarchy of courts in Nigeria is .....
   A. Supreme Court
   B. High Court
   C. Federal Supreme Court
   D. Court of Appeal

2.6 CASE STUDY

Chief Offori-Attah is unlettered but extremely intelligent and street wise. He possesses a vast knowledge of the law of the Owhori people and he is the Judge of Owhori Customary Court. However, he is not oblivious of the rate at which the decisions of the customary courts are being overturned by the "modern courts" on appeal. He wants to be abreast of the trends in the modern world and have asked you, as someone who is educated and has vast knowledge of the Nigerian legal system to tutor him on the followings, so that his judgement would take cognisance of these 'new trends.' Please educate him.

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Part II
CHAPTER THREE

CHAPTER THREE: LAW OF CONTRACT

3.0 INTRODUCTION

The law of contract is unequivocally, the foundation of business law. All other branches of business law such as the law of insurance, banking, partnership, industrial and labour law, carriage of goods by air, sea or land e.t.c., apply the general rules and principles of the law of contract to these peculiar businesses/commercial transactions. It is incontrovertible that for any business transaction to take a form and be capable of execution, a valid contract must be in existence, therefore, it mandatory for students of business and allied disciplines to have a proper comprehension of this branch of the law.

3.1 LEARNING OBJECTIVES

To explicitly explain the principles, practices, forms and precepts which are necessary to create the types of agreement which are legally enforceable.

3.2 NATURE AND DEFINITION OF CONTRACT

The essence of a contract is to establish the agreement that the parties have made and to fix their rights and obligations in accordance with such agreement. The court is duty bound to enforce a valid contract as it is made, except where there are grounds that bar its enforcement.
Contract has been defined as follows:

i. As an agreement which is legally binding on the parties to it and which, if broken, may be enforced by action in the court against the defaulting party.
ii. As an agreement which the law recognizes as binding on the parties and which is enforceable in law.

3.3 ESSENTIALS OF A VALID CONTRACT

There are certain essential elements/ requirements which must be satisfied for any contract to be enforceable at law. Thus, a valid contract must contain these essential elements- offer, acceptance, consideration, intention to create legal relations and capacity.

One element which is common to the various definitions is the need for prior agreement between the contracting parties, which will give rise to enforceable rights and obligations. There must be a *consensus ad idem*, that is, the coming together of two minds with a common intention to create a legal relation.

Although every contract is an agreement, every agreement is not a contract, because, to constitute a contract, the agreement must be one which the parties intend to create legally enforceable rights and obligations. For instance, where A agrees to lend his car to B, his friend, but later refuses to let him have it, an action for damages will not lie against A, because both parties did not envisage when entering into the agreement, that it should be enforceable in law. The importance of the factors is brought to bear only upon the intervention of judicial authorities when a breach of terms compels the parties to seek legal interpretations- see ***David Ejiwuyi v. Amusa Adio*** (1993) NWLR (Pt. 305) 220 CA; ***Olaoran v. Obafemi Awolowo University*** (1997) 7 NWLR (Pt. 512) 204.

(a) Offer

Offer is a definite undertaking or promise made by one party, known as offeror with the intention that it shall become binding on the party making it as soon as it is accepted by the party known as offeree, to whom it is addressed. It is accepted that there is no limit to the number of people an offer can be addressed to, that is, an offer could be made to the whole world, in reward cases- ***Carbolic Smoke Ball Co. v. Carlill*** (1893) 1 Q.B 256. An offer can be made expressly or by conduct. An offer must be clear, precise and final to be capable of being considered for acceptance by the other party. If the offeror is at the material time merely initiating negotiations from which an agreement might or might not result then this is no offer at all. A valid offer may be terminated by revocation, lapse of time, the death of the offeror or offeree or by rejection. Another term used for offeror is promisor, while that of offeree is promisee.

A related factor to this fundamental element of contract is invitation to treat. Invitation to treat is not an offer. It is part of preliminary undertakings to the offer and therefore not capable of an acceptance. Examples of invitation to treat includes: auctions, display of goods in a shelf, invitation to tender, general advertising of goods in a brochure e.t.c. See *Patridge v. Crittenden* (1968)1WLR 1204.

(b) Acceptance

The final and unqualified expression of assent to the exact terms of an offer is regarded as an acceptance. It is the reciprocal action of the offeree to the offeror as conveyed to him by the offeror. An acceptance may be communicated in a number of ways. These include: by the conduct of the parties, by their words or by document passing between them.

To truly qualify as an acceptance, the expression of assent must be plain, unequivocal and unconditional i.e. strictly complies with the terms of the offer. Communication of the acceptance within a reasonable time frame is also very important.

A number of disparate reasons or circumstances invalidate an apparent acceptance of an offer by the offeree. A few of these are:

Counter-offer: upon the receipt an offer what the offeror expects and indeed requirement of the law of contract is either a total acceptance of the terms or an outright rejection of same. Any fresh term introduced to the offer by the offeree invalidates the offer and turns it into a counter offer- ***Innih & ors v. Ferado Agro & Consortium Ltd*** (1990) 5 NWLR (pt.152). A counter offer cannot give rise to a binding agreement between parties- ***Orient Bank v. Bilante International Ltd*** (1997) 8 NWLR (pt. 515). However, a counter offer may create a binding obligation if it is accepted by the offeree- ***Council of Yaba College Technology v. Nigerlect Contractors*** (1989) 1 NWLR (Pt. 95). In ***TOS Benson v. Nigerian Agip Oil Co. Ltd.,*** (Unreported) High Court of Lagos State Suit No. LD/22/74; the plaintiff made an offer to the defendant on his intention to let his house to them at a rate. The defendant accepted the offer subject to his putting a burglary proof and other adjustments. The defendant agreed and effected the repairs. He thereafter communicated the defendant, who asked for further modifications and installation and even went further to nominate their contractor for the job at the plaintiff's expense. The plaintiff complied and after all the modification had been effected, that defendants informed the plaintiff that they were no longer in need of such property. The plaintiff brought an action for damages for breach of contract. The defendant contended that their acceptance of the plaintiff's offer was conditional and made "subject to contract" and that there was no formal agreement. The court held however that the first and the counter offers given by the defendant were accepted by the plaintiff, thus there was a valid contract. See the case of ***Hyde v. Wrench*** (1840) EWHC J90.

Conditional Acceptance: In a situation where acceptance is predicated on conditions, there is no acceptance until that stated condition has been fulfilled- ***UBA v. Tejumola & Sons Ltd*** (1988) 2 NWLR (pt. 79) p. 662.

Cross offers: These occur when two offers identical in terms are sent by post and the offers cross en-route posting. Cross offers are incapable of acceptance.

Acceptance in ignorance offer

Acceptance must be effectively communicated in a manner that it points to no other fact but unreserved acceptance, except where communication is expressly or implicitly waived. Where method of acceptance is prescribed, it must be complied with otherwise the acceptance is invalid. Where no method of communication of acceptance is prescribed, the mode of communication will depend upon the nature of the offer and surrounding circumstances.

Acceptance of an offer by post takes effect the moment it is posted, irrespective of whether the offeror receives the letter or not. Exceptions to this rule do exist and it will be invoked where it is stated that acceptance must first reach the offeror before taking effect or where it will work inconvenience or create absurdity. See the case of ***Adams v. Lindsell*** (1818) 1 BSA 681.

(C) Consideration

A party to a contract must provide either a benefit or confer on the other party or someone else at the instance of that other party or suffer a detriment in the implementation or fulfilment of the terms of the contract. Consideration is the price which is paid for the promise of another. It is the contribution of a party to the contract and may be in the form of an act, a promise, forbearance, detriment or benefit. This is the simplest definition of what a consideration is. A party who has furnished no consideration in a contract cannot bring an action to enforce that contract- see ***Currie v. Misa*** (1875) LR 10 Exch. 153 at 162.

Executory, Executed and Past Consideration

When the offer and acceptance consist of promises, it is termed executory consideration, when, however, an act is performed in return for a promise, then the consideration is referred to as executed consideration.

The giving of a promise or the performance of the act stipulated for in the contract extinguishes the promise given in return to subsequent promise made by any of the party without furnishing fresh consideration, and it cannot be enforced. This is referred to in the law as past consideration ***Oba Akenzua II, Oba of Benin v. Benin Divisional Council*** (1959) W.R.N.L.R.

Adequacy of Consideration

It is the right of parties to a contract to determine the consideration for the contract and once the consideration is of some value in the eye of the law, even the court have no jurisdiction to determine whether it is adequate or inadequate. Therefore, it is generally accepted that, no consideration is too small or too much or unfair, thus the court will not aid a party who made a bad bargain- ***Falouhghi v. Faloughi*** (1995) 3 NWLR (Pt 384).

Sufficiency of consideration

Whilst consideration needs not be adequate, it must however have some value in the eye of the law. It must comprise some element which can be regarded as the price of the defendants promise. If consideration is too vague or formless, it is insufficient and is regarded as no consideration at all.

3.3.1 INTENTION TO CREATE LEGAL RELATIONS

Before an agreement may be regarded as valid, parties must have the intention to be bound by the agreement reached and be committed to bear the consequences of a breach. In domestic contracts, there is a presumption in law that contractual intention is absent and the parties to such an agreement cannot sue each other on it- ***Balfour v. Balfour*** (1919) 2KB. 571. However, where the performance of a domestic contract involves great sacrifices on the part of one or both parties, the presumption against the presence of contractual intention may be rebutted, particularly where the plaintiff has performed his own part of the agreement- ***Parker v. Clark*** (1960) 1 W. L.R 286; (1960) 1 ALL E.R. 93. In commercial agreements, a deliberate promise seriously made is enforced irrespective of the promisor's view regarding his legal liability. The law presumes the presence of

the contractual intention. There are two exceptions, where the law recognizes the absence of contractual intention in commercial transactions.

Where the promise was a mere puff, not intended to be taken seriously

Where the agreement itself contains a clause expressly excluding the intention to enter into legal relations.

The *locus classicus* in the law of contract is, ***Carlill v. Carbolic Smoke Ball Co***. The fact is as follows: the defendant company manufactured a patent medicine, called a 'smoke ball.' In various advertisements they offered to pay any person a sum of 100 pounds who caught influenza after sniffing the smoke ball as prescribed for two weeks. They also stated that they have deposited a sum of 1000 pounds at Alliance Bank on Regency street, to show their 'sincerity.' The plaintiff bought the medication, used it as prescribed and still contacted influenza, while still on the medication. She claimed the 100 pounds and the company refused and raised the following defences in the court:

i. The advertisement was too vague and did not state a time limit in which the user had to contact influenza- the court held that it must at least protect the user during the period of use.
ii. It was not possible to make an offer to the whole world or the public at large- such offer was possible, as in reward cases.
iii. Acceptance was not communicated – not necessary in such cases, comparison was made with reward cases.
iv. The advertisement was a mere gimmick or puff and there was no intention to create legal relations – the deposit of 1000 ponds would indicate to a reasonable man that there was an intention to create legal relations.
v. The plaintiff provided no consideration. – held that the actual act of sniffing the smoke ball was consideration (the purchase price was not consideration for contract with the manufacturer; it was consideration for contract with the retailer).

3.3.2 CAPACITY TO CONTRACT

The law recognizes that a contract might be enforceable against certain categories of persons, who enjoy a special status in contractual transactions. Such includes agreements that are binding in 'honour' only or those that specifically excludes contractual intention, such as in games of chance like football pools agreements. See ***Amadi v. Pool House Group and Nigerian Pools Co***. (1966) 2 All NLR 254; ***Lee v. Sherman's Pools*** (1951) WN 70; ***Appleton v. Littlewoods Ltd*** (1939) 1 All ER 464; ***Jones v. Vernon's Pools Ltd*** (1938) 2 All ER 626. See also ***Labinjoh v. Abake***, (1924) 5 NLR 33, which is a *locus classicus* on the capacity of an infant to contract. The aim of this principle of law is to protect people who would otherwise be subjected to exploitation or fraud in the foundation of contract. The class of persons in this category includes infants, lunatics, drunkards and illiterates.

Illiterates: An illiterate cannot enter into a written contract unless an illiterate jurat is made part of the contract document by virtue Illiterate Protection Act Cap 83 LFN (1958) and Land

Instrument Registration Law Cap 56 Laws of Western (1959). The jurat is special attestation clause stating that all the contents of the document had been explained to the illiterate person by a sworn interpreter or attorney. See ***PZ & Co Ltd v. Gusau & ors*** (1961) NRNLR 1; ***UAC v. Edem & Ajayi*** (1958) NRNLR 33 held in both cases that failure to comply with Illiterate Protection Act render any otherwise valid contract of guarantee unenforceable.

Infants

Contracts made by an infant are voidable at his option i.e. not binding on the infant but binding on the other party. This common law position has however been modified by the Infants Relief Act of 1874 to the extent that contract of loan and contract for goods are absolutely void moreover. Two types of contracts, however, bind an infant, these are:

i. **Contract for the supply of necessaries**: Such necessaries must be suited to the infant's status in life and he must not have been oversupplied with them. Thus, in ***Nash v. Inman*** (1908) 2KB 1, an action by a tailor against a Cambridge undergraduate who ordered expensive suits and eleven fancy waistcoats, who failed to pay and was sued failed on the ground that suiting were not necessaries for the boy.

ii. **Beneficial Contract of Service:** This happens where a child is under a training programme, occupation, apprenticeship or profession, because such training contracts prepare the child for a future career, they are binding on him provided the terms are not onerous or exploitative- see ***De Franscisco v. Barnum*** (1890) 43 Ch.D 165;. In ***Robert v. Gray*** (1913) 1 KB 520- it was held that an executory contract is binding on an infant once it was shown to be reasonable and for the infant benefit. Under the Infant Relief Act 1874 which is applicable in Nigeria, an infant however is not liable for contracts on goods supplied to him for trading purposes, irrespective of the fact that it was for his benefit. Thus, in the Nigerian case of ***Labinjoh v. Abake*** (1924) 5 NLR 33; an infant trader who refused to pay the balance on the goods advanced to her on credit was held not liable, and the contract void.

Lunatics

Contracts concluded by a lunatic or a mentally disordered person are usually classified into two; contract for necessaries and contract for other things. While contract for necessaries is regarded as binding, the *onus* rests on the mentally disordered person to prove that he did not understand his own actions and that the other person is very well aware of his state of mind before entering into the contract. See Hughes v. Jones 116 NY 67.

3.4 DOCTRINE OF PRIVITY OF CONTRACT

A contract cannot confer enforceable rights or impose obligations arising from the contract on any person except parties to such contract. Thus, a stranger to a contract cannot sue or be sued on it. This rule was established in ***Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd.*** (1915) AC 847; and earlier cases ***Dutton v Poole*** (1677) 2 Lev 210 and ***Price v. Easton*** (1833) 4 B& Ad 393; &

the Nigerian case of ***Chuba Ikpeazu v. ACB*** (1965) NMLR 374. In ***Etco Nig. Ltd. v. Western Nigeria Development Corporation (WNDC)*** (Unreported, Suit No I/30/69, judgment delivered on June 8, 1970). The plaintiff company claimed from the defendant corporation a certain sum being the cost of work done on the defendant's Premier Hotel. The fact of the case disclosed that the plaintiff was a sub-contractor to the company that WNDC awarded the contract at Premier Hotel to. Held that it was only the main contract that could sue WNDC, the plaintiff could only sue the former and not the latter as there was no privity of contract between it and WNDC.

It is the law that, a person who is not a party to a contract cannot bring an action to enforce it. So also, a third party to a contract cannot be made liable under that contract. Only parties to contract can enforce it or have it enforced against them- ***Ilesa Local Planning Authority v. Olayide*** (1994) 5 NWLR (Pt. 342) 91.

Exceptions to the doctrine of privity of contract include:

i. **Covenants running with land:** A restrictive covenant voluntarily accepted by a purchaser of land as part of a contract of sale will in certain circumstances bind persons who subsequently acquire the land.

ii. **Contracts for the hire of a chattel:** When a person acquires property from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and deploy the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistent with it, use or deploy the property in a manner not allowable to the giver or the seller.

iii. **Interference with contractual rights:** It is a legal wrong for someone to wilfully interfere with the contractual right of others. This principle is applicable to both chattels and services- ***British Motor Trade Association v. Salvador*** (1949) CH 556.

iv. **Restrictions upon price: T**here is no valid contract between persons where conditions are attached to goods with the objective of binding all subsequent purchasers with notice. Conditions do not run with goods as they could with land, and prior notice has no effect in respect of resale prices of goods- ***Mcgruthur v. Pitcher*** (1904) 2 Ch. 306.

v. **Insurance contracts:** Insurance policy is one good instance where statute has made an exception to the doctrine of privity of contract. Beneficiaries of life insurance policies can sue despite the fact that they are not a party to the insurance contract- ***Akene v. British American Insurance Co. Nig. Ltd*** (Unreported) High Court of Mid- Western State, Ughelli

suit no UHC/37/71 delivered 26 May 1972. The Motor Insurance Act, in section 6 (3) of the Motor Vehicles (Third party) insurance Act, provides as follows:

a. Notwithstanding anything in any written law contained, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of person. This means that any person or classes of persons can bring a claim against the insurance company, even though such person or persons were not parties to the insurance contract.

vi. **Banker's Commercial Credit: T**his is a commercial devise that allows a manufacturer selling his wares in another country to a customer whose credit worthiness he wasn't sure of, to demand an irrevocable letter of credit be opened in his (manufacturer's) favour. The manufacturer could demand that the banker redeem the importer's debt, in case of default despite not being a party to the contract between the importer and his bankers.

Other notable exceptions to the doctrine of privity of contracts are, trust and equity, assignment of chooses in action and novation.

3.5 CLASSIFICATION OF CONTRACT

The classes of contract known to law composed of the following:

Formal contract

A formal contract is a contract made by deed, sometimes referred to as contract under seal. A formal contract is made when the agreement is signed, sealed and delivered. By the provision of statute notably, section 77 of the Property and Conveyancing Law and the Company and Allied Matters Act, some contracts are required to be made under seal; examples of such contract include conveyance of a legal estate in land and some contracts made by incorporated companies.

Certain contracts such as conveyances or grants of land, including mortgage are required by law to be under seal. The benefit of this type of contract is in two forms, vis**,** they derive their binding force independently of agreement & secondly, they are binding whether, irrespective of furnishing consideration.

Simple Contract

All other contracts other than formal contracts are simple contracts. Simple contracts can take both oral and written forms and are not required to be under seal. The singular attribute of simple contract is that only a party who has finished consideration can seek to enforce it. The validity of a simple contract is directly attributable to the presence of consideration. Examples of simple contracts are all contracts not under seal, whether written or not written.

Express and implied contracts

A contract is described as express when the material terms of the contract are clearly stated. The extent of the respective obligations of each party to the contract is expressly spelt out. An example

of express contract is where tenders are invited from contractors for the construction of a building. A suitable tender is selected from the lot and the terms and conditions of executing the constructing are detailed in a document which is made available to the contractor after which both parties append their respective signatures to signify a meeting of the minds.

Implied contracts refer to contract where the terms are not expressly stated and in which the existence of a binding agreement will only be construed from the conduct of the parties rather than from their words or correspondence. Examples of implied contracts including where commuters board commercial vehicles at bus stations without any dialogue with the owner of the vehicle or by conductor while the vehicle operator is duty bound to convey the commuters to their various destinations, the persons on board the vehicle are also have a duty to pay the full fares upon request.

(a) Bilateral and Unilateral Contracts

A bilateral contract is an exchange of promises between the parties, the offer or promises to do something in exchange for the offeree's promise to do something else in return. The consideration furnished in bilateral contract is referred to as executory consideration. Example of bilateral contract includes all contracts which consist of promises.

The definition of a unilateral contract has been explained as actual performance of a consideration in return for only mere promise the performance undertaken by the other party is known as executed consideration. Examples of unilateral contracts consists mainly of reward cases, in which the offeror offer a reward for information leading to the arrest of criminals or leading to the locating and returning lost item.

Generally, in all situations where a party promises to undertake a task for the benefit of another party who has no direct or clear benefit to give in return is a unilateral contract. Thus, only the offeror or promisor is contractually bound in all material respects in the formation and execution of unilateral contracts.

3.6 THE CONTENTS OF A CONTRACT

A contract may consist of three types of clauses, namely, express, implied and exemption clauses. **Express Terms**: a statement may be an express term of contract or a representation inducing its formation. The importance of this distinction is that different remedies are available if a term is broken or a representation is untrue. There are two basic types of express terms:

a) A **condition** is a vital term, going to the root of the contract, breach of which normally entitles the innocent party to repudiate the contract and claim damages- Section 11(1)(b) of the Sale of Goods Act 1893. It may be categorized as condition precedent and condition subsequent. In ***Pym v. Campbell*** (1856) E&B 370; the defendant's promise to purchase shares in the plaintiff's invention subject to the approval of his engineer was held to be unenforceable in the absence of the said approval. (Condition precedent). An example of the condition subsequent was presented in ***ACB v. Okonkwo*** (unreported High Court of Bendel State Suit No A/20/80) the defendant applied for a loan from the plaintiff-bank and offered his house as collateral. The plaintiff invited a valuer to assess the property and with the defendant's consent debit his account with the valuer's fee. The application was

eventually refused and the defendant refused to pay the fee. The plaintiff contested this. Held the defendant was right in repudiating liability.

b) A **warranty** is a subsidiary term, breach of which only entitles the innocent party to damages. – Section 62 of the Sale of Goods Act 1893. It is difficult in practice to distinguish between condition and warranty.

Finally, conditions and warranty must be distinguished from a mere representation which forms no part of the contract itself but only induces a party to enter into the contract. Such representation if innocent will entitle the representee neither to rescind the contract nor to claim damages. Thus, in ***Oscar Chess v. Williams*** (1957) 1WLR 370, a second-hand car which was represented to the defendant as a 1948 model was sold to the plaintiff a such at 290 pounds. The plaintiff eventually found that it was a 1939 model worth only 175 pounds. He sued for damages for breach of warranty. It was held that the statement that it was a 1948 model was not a warranty but only a mere innocent misrepresentation. However, in ***Bentley Production Ltd. v. Harold Smith Motors*** (1965) 1WLR 625, a dealer misrepresented the mileage of a car to the buyer. The court held this to be a warranty since the dealer was a skilled man in the business.

Implied Terms: terms are implied by custom, the courts and statutes.

a) Custom: the parties are presumed to have contracted by reference to the customs prevailing in the trade or locality in question, unless a contrary intention is shown. In ***British Crane Hire Corporation v. Ipswich Plant Hire Ltd***. (1975) QB 303; both parties were in the business of hiring earth moving equipment. Although the fees were agreed on phone, nothing was said about the condition of hire and the hire agreement had not been signed. The crane due to no nobody's fault sank and the defendant denied liability. The court held unanimously that since it was the custom in the trade that the hirer is liable for such expense it is deemed to have been incorporated into the contract.

b) Court: the court will imply two types of terms into contracts. First, terms which are so obvious that the parties must have intended them to be included; these are terms implied in fact. Second, terms which are implied to maintain a standard of behaviour, even though the parties may not have intended them to be included; these are called terms implied by law.

Terms Implied by Fact: These are terms that are both obvious and necessary to give business efficacy to the contract. The test used here is that of an 'officious bystander' i.e. when the contract was being made, and an officious bystander had asked 'is X a term of this contract,' the reply he would have received would be in the affirmative.

Terms Implied by Law: For instance, in a contract of employment the employee implied that he is reasonably skilled and capable of faithful service.

Statutes: the well-known examples are terms implied by the Sales of Goods Act, for instance:

i. That the seller has a right to sell.
ii. That the goods supplied are of merchantable quality and fit for the purpose for which they are required.
iii. That where the goods are sold by sample the bulk will correspond to the sample.

Exemption Clauses:
This is a term in a contract which seeks to exempt one of the parties from liability or seeks to limit the liability to a specific sum on the occurrence of certain event, such as a breach of warranty, negligence, or theft.
An exemption may become a term of contract by notice.

a) If a person signs a document, he is bound by it, even if he failed to read it. In ***L'Estrange v. Graucob Ltd.*** (1934) 2KB 395; the plaintiff bought a cigarette vending machine from the defendant and signed without reading the attached sales agreement which contained in very small print an exemption clause. The machine was defective but the vendors were held to be protected by the exemption clause contained in the small print.
b) Where a document not signed, the exemption clause will apply only if:
    1) The party know of the clause or if;
    2) Reasonable steps are taken to bring it to the notice of the affected party before the contract is made.

In ***Olley v. Marlborough Court*** (1949) 1 KB 532; plaintiff booked a room at the reception desk of the defendant's hotel. On getting to the room she saw a notice on the wall exempting the hotel for liability for lost or stolen valuables, unless those deposited with the management for safe keeping. Notwithstanding, the plaintiff left her fur in the room and it was stolen. It was held that the contract was completed at the reception desk and the notice, could not have form part of the contract.
An exemption clause cannot be unilaterally introduced into a contract after its completion. Thus, an attempt to introduce an exemption clause in a receipt, which is generally not regarded as a contractual document, would not make it a term of the contract. In ***Chapelton v. Barry UDC*** (1940) 1 KB 532; it was held that an exemption clause introduced for the first time in a receipt is not binding on the affected party.

3.7 DISCHARGE OF A CONTRACT:

A contract is discharged when its obligations are no longer binding on the promisor. It may be discharged in the following ways:

A. **By Performance:**

When both parties have performed their obligations, the contract is extinguished. Generally, performance must be complete and exact. In cases, where there is substantial performance, the courts may decree the payment of *quantum meruit*, being payment for the work done.
In instances involving part performance and unilateral variation of contract, the following case is instructive. In ***Omoleye v. Okeowo*** (1973) 3 UILR 180; P entered into an agreement to supply 6,000 yards of textile material to D at an agreed rate and D deposited 2,500 pounds. P unable to obtain the specified material unilaterally supplied 2,910.5 yards at a higher rate. P accepted delivery and re sold them. It was held that D could reject the consignment on three grounds-difference in material, price and quantity; but since D has taken delivery P was entitled to payment at the agreed rate for the accepted quantity.

B. **By Agreement:**

Contract came into existence vide agreement and could be terminated by an agreement as well. The legal position depends on whether it is bilateral or unilateral discharge.

a) **Bilateral Discharge**: the contract is executory or partly executory on both sides i.e. both parties has outstanding obligations, thus each party will surrender something of value. There could be a waiver, voluntary concession or forbearance as in ***The High Trees Case*** (1947).
b) **Unilateral Discharge**: where only one side has completely performed his side of the contract, any release by him of the other party must be by seal or be supported by fresh consideration. When the release is supported by fresh consideration there is said to be 'accord' and 'satisfaction'. The 'accord' is the agreement by which the obligation is discharged and 'satisfaction' is the consideration which makes the agreement effective. The latter may be executory.

There are two other ways in which a contract may be discharged by agreement.

I) **Novation:** for instance, A owes B N1M and B owes C N 1M. A agrees to pay C if B will release B from his obligation to pay him. All the three parties must agree to this arrangement.

II) **Condition Subsequent**: sometimes a clause in the contract will provide for its discharge if a particular event occurs in the future, i.e. subsequent to the formation of the contract.

C. **FRUSTRATION:**

The general principle at common law is that if a person contracts to do something, he is not discharged even if performance proves impossible. In ***Paradine v. Jane*** (1647) 82 ER 897; a tenant who was sued for rent pleaded that he had been dispossessed of the land for the last three years by King's enemies. His pleas failed. This severe rule is mitigated by the doctrine of frustration, which if it applies automatically discharges the contract.

In general, if an event is to frustrate a contract, it must be:

i. Not contemplated by the parties when the contract was formed.
ii. One which make the contract different from the original one.
iii. One for which neither party was responsible.
iv. One which results in a situation which the parties do not wish originally to be bound.

D. **BREACH:**

This occurs if a party fails to perform one of his obligations under a contract (such as failure to perform on the agreed date or delivery of inferior quality goods) or the party before the date fixed for performance indicates his inability to perform, the latter is known as anticipatory breach.

Breach does not automatically discharge a contract. Breach of warranty and condition entitles the innocent party to damages; and damages and repudiation respectively. In ***G.A. Tewogbade v. Funsho Adeolu,*** (Unreported, HC of Oyo State, Suit No I/64/80 delivered on June 25 1981). D agreed to supply steel water tanks to P and P has paid half of the contracted sum. D failed to supply at the agreed date and proposed in the alternative to obtain it from another source at almost three times the contract price. P rejected and asked for a refund. P instituted an action on D failing to refund of the part payment. The defendant has repudiated the contract and P is entitled to a refund and damages.

3.8 REMEDIES FOR BREACH OF CONTRACT

Sometimes, a party to a contract will default in the performance or execution of the stated or implied tasks agreed to be undertaken Where such a breach has occurred, what the other party ought to receive should be such as may fairly and reasonably be considered as either arising naturally or such as may reasonably be supposed to have been in contemplation of both parties as a probable result of the breach. At the time they made the contract.

The most common remedy for breach of contract is damages, in special and deserving circumstances, equitable remedies of specific performance and injunction will be granted by the courts- ***Kusfa v. United Bawo Construction Coy*** (1994) 4 NWLR (pt. 336) 1.

3.8.1 Damages

The general rule to be considered in granting this remedy is that damages should be assessed as at the time when the breach occurred. Whilst damages for breach of contract are usually based on financial loss, in deserving circumstances, damages may also be awarded for non-pecuniary losses if they were within the contemplation of the contracting parties as not unlikely to result from the breach- ***Jarvis v. Swans Tours Ltd*** (1973) I. Q. B 233. The law of contract imposes an obligation on all parties to take reasonable steps to mitigate the losses caused by a breach of contract. Therefore, a party will not be able to recover a loss which could have been avoided by taking reasonable steps ***Victor Oladapo v. F.B.A Princewill*** (1961) ALL N.L.R 240.

3.8.2 Specific Performance

This is a remedy in equity. It is one by which the party in breach is compelled to go on and perform the contract in accordance with the agreed terms. The type of contract in which the remedy of specific performance is frequently granted is in land transactions where a vendor has refused to convey the land to the purchaser. Contract of personal service, constitutes an exception to which the doctrine of specific performance does not apply.

3.8.3 Injunction

An injunction has rightly been described as an order by which one party to a contract is required to do or refrain from doing a particular thing. Injunctions are either restrictive (preventive) or mandatory compulsive.

Remedies for breach of contract may be extinguished by the effluxion of time, fraud or mistake disability or part payment of debt.

3.9 VITIATING FACTORS

These are factors that affect the validity of an otherwise valid contract. A few of these factors includes mistake, misrepresentation, duress, undue influence, illegality e.t.c.

3.9.1 TYPES OF VITIATING FACTORS

Illegal contract: An illegal contract is an unlawful act which the law forbids, they are those contracts prohibited by statute or at common law, the making of which will attract punishment. Some contracts are patently illegal while some are void. At common law, illegal contract is expressly prohibited and sanctions exist to forestall its formation in the case of void contracts, its formation simply creates no rights in the parties involved.

Legislation has also prohibited some contracts in various forms. The form of prohibition exists in various ways and includes:

i. Express prohibition
ii. Legislative regulation
iii. Protection or promotion of an object of public policy
iv. Raising of revenue

MISTAKE: A mistake is when parties to a contract enter into it under some misunderstanding. Mistake has been classified into 3 distinct classes.

i. **Common mistake**: When both parties to a contract enter into it under the same mistake on a fact which lies at the basis of the agreement this situation is referred to as common mistake because the mistake is common to both parties on the same thing - ***Knight, Frank and Rutley v. Attorney -General of Kano State*** (1990) 4 NWLR (PC 143) 201.

ii. **Mutual mistake**: When two parties are mistaken about terms contained in their agreement, i.e. the offer accepted in a fundamentally different manner, it is described as a mutual mistake, mutual refers to the fact that both parties are mistaken in their individual beliefs but not on the same term. Both parties are not making common mistake.

iii. **Unilateral mistake:** When the mistake is committed only by one of the parties in a contract, such a mistake is said to be unilateral. In such instances, one of the parties actually understands the terms while allowing the other to wallow in ignorance on the particular or general term.

DURESS

Any form of actual violence or threats of violence to the person or to his person or his property calculated to produce fear or loss of life or bodily harm or fear of imprisonment or loss of livelihood is generally regarded as duress.

MISREPRESENTATION

A misrepresentation is a false statement of a fundamental nature made by one party to a contract to the other party before or at time of contracting. For misrepresentation to constitute a fraud and thereby vitiate a contract, it must consist of fact, past or present, radically distinct from a statement of opinion, intention or of law.

Misrepresentation has been classified into:

i. Fraudulent misrepresentation
ii. Negligent misrepresentation
iii. Innocent misrepresentation

Fraudulent misrepresentation is a false statement made recklessly or carelessly knowingly or without belief in its truth or whether it is true or false - see ***Derry v. Peck*** (1889) 14 APP.CAS 337.

Negligent misrepresentation on the other hand is a representation made without grounds for believing it to be true, especially by a party who owes a duty of care to the other party. Examples include persons who stand in a fiduciary relationship to the other party.

Innocent misrepresentation this is a false statement made by a person who honestly believes it to be true. The remedy is a claim of rescission which must be made within a reasonable time, hence no damages are awarded to the parties.

UNDUE INFLUENCE

This refers to cases of subtle coercion, domination, pressure and bargain obtained in an unfair manner. It applies where influence is acquired and abused, and confidences are reposed and betrayed. Undue influence most commonly occurs in two broad situations:

i. Where there is no special relationship.
ii. Where there is a special relationship.

The main distinction between duress at common law and undue influence in equity is that, in duress the coercion is a bit more direct, while in undue influence, the coercion is more subtle and indirect.

EFFECT OF VITIATING FACTOR

The effect of a vitiating factor is that it entitles the injured party to avoid the transaction, have it rescinded or recover damages for injury. It also gives rise to a defence to an action brought to enforce the contract. However, it does not make it void but voidable.

3.10 CONCLUSION

The singular purpose of the Law of Contract is to impose an obligation on parties to carry out the agreement that have been willingly entered into. Any party which fails or neglects to implement his own side of the bargain will have to contend with sanctions prescribed by law.

3.11 ILLUSTRATIVE AND PRACTICE QUESTIONS

i. Some principles in the law of contract are regarded as very essential in the formation of a contract. State all of the essential elements necessary for a valid contract capable of enforcement by the court.
ii. With the aid of decided cases, distinguish between an offer and an invitation to treat.
iii. Comprehensively discuss the role of consideration in a contract.
iv. What do you understand by consideration in the law of contract?
v. When is consideration said to be past?
vi. Distinguish between executed and executory consideration.
vii. Write short notes on various ways by which a breach of contract can be remedied.

MCQ

1. The laws of Nigeria recognize two parties who voluntarily execute an agreement as _____
   A. Donor and Donee
   B. Offeror and Offeree
   C. Promistor and Promistee
   D. Giver and Taker.

2. A contract recognizable by law is any agreement
    A. that bears the authorized signature
    B. which will affect the legal rights of the parties
    C. indented on a parchment
    D. derived from a business transaction

3. Intention to create legal relations is one of the valid _____ of a valid contract
A. Item
B. Terms
C. Elements
D. Lamda

4. The common law doctrine which provides that you cannot either enforce the benefit of or be liable for any obligation under a contract to which you are not a party is called --------
    A. privity of contract
    B. insufficiency of consideration
    C. term of contract
    D. protected status

5. Misrepresentation in a contract makes the contract:
A. Void.
B. Illegal.
C. Voidable.
D. Unenforceable.

3.12 CASE STUDY

Soon after Paul married Zainab in June 2023, Peter and Ali, the respective fathers of the couple, agreed to pay a monthly allowance into Paul's account to help the young couple financially during the early period of their marriage. An agreement was made where it stated that Paul could sue should any or both parent defaults. Three months after the agreement Paul and Zainab had a violent argument and Ali announced that he would no longer give the young couple any financial help. Advise Paul as to his legal position.

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CHAPTER FOUR

CHAPTER FOUR: LAW OF AGENCY

4.0 INTRODUCTION

Agency is a common form of commercial practice and the word agents have come to lent itself to liberal definition and interpretation by the general public. In law however the term agent is very restrictive and connotes a different meaning altogether. There are many issues which the law will consider before it regards someone as an agent of another person.

4.1 LEARNING OBJECTIVES

At the end of this section, readers will understand that an agent in general parlance is quite different from an agent in law. The issues which the law will consider before holding a party as an agent will also become clearer.

4.2 DEFINITION OF AGENCY

The legal relationship which arises between a principal and an agent whereby the agent is expressly or impliedly authorized by the principal or by law to affect the principal's legal relations with third parties.

4.3 TYPES OF AGENCY

There are many ways of classifying agents. It is important to classify agent so as to know the extent to which the principal may be made liable for the act of such agent. Generally, an agent may be broadly classified into two, these are General and Special Agent. Although, there may be other types of agency, but each falls under either general or special agent. The various types of agents are therefore, briefly explained as follows:

General Classification of Agents

1. **General Agent:** This is an agent with authority to perform a series of transactions that are usually of a continuous nature in the ordinary course of business on behalf of his principal. Such agent may act on behalf of his principal in all matters, e.g. the manager of a business or a sale representative is a general agent. A general agent is one that has wide powers and ostensible authority.
2. **Special Agent:** This is a type of agent is one with authority to do or carry out a special assignment on behalf of his principal. For example, an agent may be appointed to sell a car or any other properties of his principal. This often time is a once and for all affair. A special agent may also be required where a technical nature of the assignment will not permit the principal to carry out such assignment by himself. For instance, a lawyer appointed to institute an action may be regarded as special agent.
3. **Universal Agent:** An agent who has "unlimited" authority. He could perform any act that his principal could have performed, including the execution of a deed on his behalf. He is appointed by a deed known as a power of attorney.

Classification of Agents Based on Function

A factor: This is an agent entrusted with possession of goods or of the documents of title. He normally sells in his own name without disclosing his principal.

A broker: This agent acts as a go between, a negotiator. He makes contracts for the purchase or sale of property or goods which he is not entrusted with the possession or document of title.

An Auctioneer: He is an agent who is employed to sell at a public auction. He is an agent for both the seller and the buyer. He may not be entrusted with the possession of the goods to be sold or the documents thereon.

A Del Credere Agent: He is an agent who, usually for extra remuneration undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts. He is an agent charging additional commission for undertaking risks.

4.4 CREATION OF AGENCY

4.4.1 Agency by Agreement

An agent may be appointed directly through express or implied agreement between him and the principal. No formalities are prescribed in general for appointing agents. They may therefore be appointed verbally, in writing, or by deed depending on the wishes of the parties.

Exceptions: Agents who are to execute deeds for the principal must however be appointed under sealed contracts. The document appointing such agents is known as a power of Attorney. Presently, a power of attorney must be given to agents who are required to execute the following on behalf of their principals:

i. A conveyance, to transfer land.
ii. A contract, which is not supported by consideration.
iii. A contract transferring a ship, and
iv. A lease of property exceeding three years in duration.

4.4.2 Agency by Ratification

Agency by ratification arises if a principal subsequently adopts or ratifies unauthorized acts or contracts that had been entered into in his name. This can be illustrated thus:

(i) X come across bags of rice which he knows his friend Z needs for a party. Not wanting him to lose the bargain, X gets the seller to sell him three bags on credit for Z, assuring him that Z will pay later. Even though X has made the purchase without authority, when he informs Z, Z decides to accept the rice and adopt the purchase.

(ii) A mercantile agent, A, is authorized to sell a second-hand car for N20, 000.00. He accepts an offer of N18, 500.00 and when he informs the principal, the principal decides to adopt the sale.

In both cases, the principal's adoption of the transaction makes the purchaser his agent by ratification.

Legal Effect
Ratification operates retrospectively to cure the agent's lack of authority. The agent will be taken therefore as having had authority right from the time he acted. A valid ratification cannot also be withdrawn without the consent of the third party. Ratification of part of a transaction operates as ratification of the whole since the principal cannot select only the desirable aspects of the transaction for ratification: he must accept or reject the whole.

Formalities
Ratification of an unauthorized act can be made verbally, in writing or by deed. If an unauthorized person signs a deed, it can only be ratified by another deed or sealed instrument executed by the principal.

4.4.2.0 Essential Conditions for Ratification

Some conditions must be satisfied for ratification to be valid and effective. These relate to the following:

i. Existence of the principal
ii. Legal capacity of the principal
iii. Transaction is made on behalf of the principal
iv. Legality of the transaction
v. Principal's awareness of all material facts
vi. Time for ratification

4.4.2.1 Existence of the principal

The principal must be in existence when the transaction which he seeks to ratify was entered into by the agent. Human beings cannot therefore ratify acts done on their behalf before their birth. Juristic persons like companies are also prohibited from ratifying pre-incorporation contracts – transactions and expenses made on their behalf before their incorporation.
Section 96(1) & (2) of the Companies and Allied Matters Act, ('CAMA') 2020 has however amended this common law rule by providing that:
"Any contract or other transaction purporting to be entered into by the company or 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".

These statutory provisions have rendered cases like ***Kelner v. Baxter*** (1966); ***Firgos (Nig.) Ltd. v. Zetters (Nig.) Pools Ltd.*** (1865) and ***Enahoro & Co. Ltd. v. Bank of West Africa Ltd***. (1971) ineffective with regards to the legal effect of pre-incorporation contracts. Companies may ratify them contrary to the above decisions. Until they choose to do so, the so-called agent remains personally liable on the contract of transaction.

4.4.2.2 Capacity of the principal

A principal can only ratify acts and transactions if he had capacity to do those things himself at the time they were done. Supposing an agent A, contracts to buy non-necessaries for P's 18th birthday party, P is not bound by the purchases because of his incapacity due to his age. Neither can he

ratify the same after the party: his ratification would still be ineffective. Ratification is only possible if the goods ordered were necessaries.

4.4.2.3 Transactions are undertaken on principal's behalf

Only a principal whose existence was disclosed to third parties at the time of a transaction can ratify. The so – called agent, in acting, must have professed to be acting as an agent. Once the third party was made aware that the agent was acting on behalf of another (however untrue this impression is), that person is entitled to ratify the transaction if he wishes. Where the existence of a principal is therefore totally undisclosed, he cannot ratify even if the agent secretly intended to make the contact on his behalf.

4.4.2.4 Legality of the transaction

An unlawful or illegal transaction can not be ratified. In the case of companies, however, although section 44(1) of the CAMA 2020 still makes their ultra vires contracts unlawful, they are not void as provided at common law. The court may however order a company not to ratify ultra vires contracts and award compensation to aggrieved parties in appropriate cases.

4.4.2.5 Principal's awareness of all material facts

A principal can ratify an act validly if he is made aware of all the material facts concerning it. If the principal is deceived about essential matters relating to a transaction, his ratification is invalid.

4.4.2.6 Time for ratification

If ratification of an unauthorized act is delayed unduly, ratification becomes impossible. Reasonable or undue delay depends on the circumstances of each case.

4.4.3 By Implication of the law or necessity

It is now generally accepted that in time of emergency, a person may be bound to make a contract on behalf of another without any prior authority to do so. e.g. a shipmaster who finds it practically difficult to contact the owners of perishable goods that cannot be delivered at the destination in good condition is entitled to sell the goods for what they can fetch.

4.4.4 Agency by Estoppel

Agency by estoppel arises where a person has by his conduct or words given (a false) impression to others that somebody is his agent, and those persons have relied on this (wrong) impression to deal with that person as if he were an agent. In such cases, the person who "held out" the other as his agent shall be stopped from denying his so – called agent.

4.5 AUTHORITY OF AN AGENT

The authority of the agent to affect his principal's relationship with third parties forms the fulcrum of an agency relationship. The authority can be derived in one or a combination of the following ways:

4.5.1 Express Authority

Where an agent is authorized by a principal to act on his behalf in the performance of an act or series of acts, this is referred to as express authority. The authority needs not be in writing or be expressly stated. Once a relationship of agency can be deduced from the relationship that exists between the parties, the law will accord it the status of agency.

4.5.2 Implied Authority

The appointment of an agent by a principal to undertake an act on his behalf confers on the agent the implied authority to do such other things in furtherance of the agency in addition to those expressly authorized.

4.5.3 Usual Authority

It is incumbent on an appointed agent to extend his acts or undertaken to the usual circumstances or situations which are necessary for the due execution of his agency. A legal practitioner who acts on behalf of his client possesses usual authority to enter into a negotiation to resolve a matter under litigation.

4.5.4 Apparent Authority

An indication of agency created at the instance of a person who in law might validly be held to stand in the position of a principal to another person standing in the position of agent is understood to give rise to an apparent authority. Some conditions have been recognized as necessary precedents before an apparent authority is affirmed. These are:

i. Express or implied representations by principal as to the status of the agent;
ii. An innocent third party must have relied on that representation;
iii. Third party must have been prejudiced in one form or the other; and
iv. The knowledge of the true situation must be unknown to the third party.

4.5.5 Authority by ratification

An appointed agent who exceeds the authority to undertake act not previously contemplated or authorized may become an agent by ratification if the unauthorized acts are subsequently authorized by the Principal. The conditions for ratification are:

i. The principal must be in existence;
ii. The principal must be named;
iii. The principal must have capacity to act at the material time;
iv. The act must not be illegal or incapable of ratification; and
v. The principal must be aware of the facts.

4.6 RIGHTS AND DUTIES BETWEEN AGENT AND PRINCIPAL

The respective right and duties of agents and principals are determined by:

i. The express and implied terms of the agreement between the parties, if any;
ii. The basic legal position that agency creates a fiduciary relationship, a relationship based on mutual trust and confidence between the principal and the agent; and
iii. Any trade usages and customs recognized in the locality in which the agent operates, or by the agent's profession, business or trade.

4.6.1 DUTIES OF AN AGENT AND RIGHT OF A PRINCIPAL

The duties imposed on an agent in favour of the principal (from the above three sources) are the following:

i. To perform fully
ii. To obey the principal
iii. To exercise due care and diligence
iv. To act personally
v. To act in good faith
vi. To account to the principal

The principal has the right to demand due performance of these duties which are explained below form the agent, and to sue in respect of losses arising from any breach by the agent.

1. To Perform Fully

Every agent is under a duty to perform the duties he has assumed. Where the agency arises through agreement, performance must be in accordance with the strict terms of the contact otherwise damages can be claimed for breach of contract.

Although gratuitous agents and others whose agency arise by implication or operation of the law are not obligated to perform since there is no contract, once they begin to act, they owe the same duty as paid agents to perform to the best of their ability. Both gratuitous and paid agent may be sued for the tort of negligence if their duties are performed carelessly.

An agent owes a duty to inform the principal promptly if he cannot perform his assigned duties. He is also not required to perform any duty which is illegal.

2. To Obey the Principal

An agent is obliged to obey all lawful and reasonable instructions given to him by the principal on how to perform his duties. He cannot disregard such instructions even if he believes that they are not in the principal's best interest.

It must be emphasized that an agent owes no duty of blind obedience to the principal. An instruction may be disobeyed if the instructions are:

i. Illegal or require the agent to commit a criminal or civil offence;
ii. Ambiguous, making it necessary for the agent to use his discretion and sense of judgement;
iii. Exposes the agent to exceptional personal danger or;
iv. The instructions are contrary to the ethics, rules and regulations of agents who belong to a profession, e.g. legal practitioners.

3. To Exercise due Care and Diligence

An agent must exercise his functions with reasonable care, skill and diligence. A broker, for example must not sell goods at less than the obtainable market price whilst an estate agent must endeavour to ascertain, among other things, that tenants obtained for the principal are solvent and of good character. It is the duty of agents to ensure that contracts entered into on behalf of the principal are valid. Any losses arising from an agent's failure to exercise reasonable skill and care are claimable from him.

The degree of standard of care expected of agents varies. Agents like those mentioned above who profess to have special qualifications for their jobs must measure up to the standards established for practitioners of that profession or business. If an agent however does not profess to have any special qualifications or experience, it will be expected of him to act in a manner which a reasonable person will act in the circumstances.

4. To Act Personally

The law generally requires an agent to perform his assigned duties personally. An agent cannot therefore delegate his powers without lawful authority. This is in line with the Latin *maxim Delegatus non potest delegare* (A delegate cannot delegate). Since agency, as a fiduciary relationship, is based on thrust and confidence, it stands to reason that an agent should not substitute new persons for himself without permission.

Exceptions

The rule that an agent should act personally and should not delegate his powers is subject to the following exceptions:

a. If the principal expressly authorizes the agent to delegate his authority, the agent may appoint sub-agents and sub-dealers.
b. Where the authority to delegate may be implied.
i. From the conduct or words of the principal;
ii. From the circumstance surrounding the agency such as any trade customs and usages applicable in the industry, locality, or the agent's profession;
iii. In the event of unforeseen emergencies;
iv. Where the delegate is to perform purely ministerial functions; or
v. Where the circumstances show that the parties knew that the agent's powers must necessarily be delegated.

5. To Act in Good Faith

Another important duty of an agent is for him to act in good faith. As a party to a fiduciary relationship, this requires that an agent behaves in an honest, loyal, and trustworthy manner. The various acts prohibited by the agent's duty in good faith are the following:

6. To Render Account to the Principal

The accounting responsibilities imposed on agents are onerous and very important. They include the following:

a. An agent must keep proper account of all transactions made on the principal's behalf and be ready, on reasonable notice, to account to the principal.
b. An agent must not mix his own money and accounts with that of the principal's. If the accounts are mixed, the principal is entitled to claim the whole amount except that which the agent can establish as specifically belonging to himself.
c. All money received as an agent be paid over to the principal unless he permits the agent to retain it.

Any income generated from using any asset entrusted to the agent must equally be paid over to the principal.

4.6.2 DUTIES OF A PRINCIPAL AND RIGHTS OF AN AGENT

The Principal's duty towards his agent includes the following:

i. To indemnify the agent;
ii. To reimburse the agent; and
iii. To permit an unpaid agent to exercise a lien over the principal's property

4.7 TERMINATION OF AGENCY

Agency relationships may be brought to an end in the following ways:

i. **Act of the parties**: either party or both parties may terminate the relationship summarily or by giving the requisite notice based on the agency contract.
ii. **Operation of law**: the death, bankruptcy or insanity of either party; if the subject matter eventually becomes illegal; frustration.
iii. Completion of the agency agreement.

4.8 CONCLUSION

Agency is an important feature of business circles nowadays as it was in the past, thus a deep understanding of the legal and factual issues involved therein is crucial for modern human resource practitioners.

4.9 ILLUSTRATIVE AND PRACTICE QUESTIONS

1. Discuss with the aid of legal authorities the duties a principal owes his agent.
2. It is a widely held view that the position which an agent occupies has conferred on him a host of fiduciary responsibilities. State your opinion on this topical issue.
3. What are the legal impediments in a transaction involving an undisclosed principal?

MCQ

1. ---------- agent is a surety who is liable to the principal should the purchaser default in paying the principal.
A. Del credere
B. Nemo dat habet
C. Basic
D. Authorized

2. _____ is the mode of creating an agency relationship where the principal adopts a prior unauthorized act or acts of the agent which subsequently becomes binding in the principal.
    A. Ratification.
    B. Solemnization.
    C. Adoption.
    D. Del credere.

3. Under the law of agency, principals may be classified into _____ and _____

A. Revocable and irrevocable
B. Legal and statutory
C. Disclosed and undisclosed
D. Commercial and free

4. An agent is entitled to claim this from his principal:
   A. Remuneration
   B. Set-off
   C. Salary
   D. Commission

5. Promoters in a yet to be incorporated company become agents of the company after incorporation by:
   A. Ratification
   B. Necessity
   C. Abrogation
   D. Commission

4.10 CASE STUDY

Sunday, owns a factory which produces different types of fabrics and a management consulting firm. He employs Taiwo on a full-time basis as a sales representative for a period of five years on a commission to sell goods "manufactured or sold" by Godwin. After two years, Godwin factory was burnt down and Godwin went out of business. Taiwo thereupon sued Godwin for breach of contract and claimed damages for loss of commission. Analyse the case and state the position of law as relates to the liabilities or rights of Taiwo and Godwin.

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CHAPTER FIVE

CHAPTER FIVE: HIRE PURCHASE

5.0 INTRODUCTION

Hire Purchase is probably the most common method of obtaining possession and use of goods before making full payment. However, the absence of expert advisers has often been the bane of hire purchase transactions especially with regards to the hirer. The legal import of hire purchase transaction is clear, nevertheless only a well-informed party will be at a vantage position to avoid the perils inherent in hire purchase transaction.

5.1 LEARNING OBJECTIVES

To engender a thorough understanding of the established principles inherent in hire purchase transactions which over the years have been moulded by legislation and judicial precedents.

5.2 DEFINITION OF HIRE PURCHASE

At common law, hire purchase is defined as an agreement for the delivery of goods by the owner to a person (the hirer) under which the hirer is granted an option to purchase those goods (for a nominal amount) after fulfilling specified conditions. This type of transaction received judicial approval in the celebrated case of ***Helby v. Mathews*** (1895) AC 471. The facts of the case were as followings:

The owner of a piano agreed to let it on hire to H. at a monthly rent of ten shillings and six pence. The agreement gave possession of the piano to H and permitted him to return it to the owner at any time subject to the payment only of all instalments due at the return date. It was also agreed that the piano shall become H's property after payment of instalment totalling eighteen guineas. If he failed to pay that total however, the owner had the right to recover possession and retain ownership. Having paid some instalments, H. pledged the piano with a pawnbroker as security for a loan. The owner then instituted this action against the pawnbroker to recover the piano. At the House of Lords unanimously the owner's action succeeded.

Section 20(1) of the Hire Purchase Act, 1965, on the other hand, defines hire-purchase as 'the bailment of goods in pursuance of an agreement under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee…' Hire-purchase therefore consists of an agreement for the delivery of goods with the understanding that:

i. The hirer pays a small deposit to the owner of goods;
ii. Agrees to pay certain sums as instalment each month for the use of the goods; and
iii. Obtains an option either to purchase the goods for a nominal amount after paying a stipulated total sum, or to return the goods and stop further payments.

5.2.1 Features of Hire-Purchase

i. It is a special agreement between the owner of the goods and the hirer.
ii. The relationship between the owner of the goods and the hirer is initially that of bailor and a bailee.
iii. Property in the goods concerned never passes to the hirer until certain stipulated conditions are satisfied.
iv. The hirer has the right to terminate or determine the agreement, return the goods to the owner, and stop paying further instalments.
v. The hirer also enjoys the option to purchase the goods at the expiration of the period.

5.2.2 Hirer-Purchase Distinguished from Similar Transactions

The nature of hire-purchase transactions can be better appreciated when it is compared with similar but distinct contractual transactions such as sale of goods, barter, bailment e.t.c.

5.2.2.1 Hire Purchase Distinguished from Hire

Hire is a kind of contract that does not pass title of the goods at a future date. Hire only enables a person to access the goods for his immediate use and does not want to own the property. The hirer will return the chattel to the owner after its use. It is also a kind of bailment in which the hirer is given possession of an article during the period of the particular hiring agreement.

5.2.2.2 Hire Purchase Distinguished from Loan and Mortgage

Loans and Mortgages is a kind of arrangement where one person who desire some finance borrows money from a person or a financial institution for his use in order to satisfy some needs.

5.2.2.3 Hire Purchase Distinguished from Credit Sale

This is a situation where a person wants to make an outright purchase of goods but may find out that he does not have sufficient money to make full payment for them. In this instance, the person may pay in instalment, while the goods pass to the buyer on credit. In this instance, the seller loses his seller's right of lien on the property and where the buyer resells the goods, the third party will be an innocent purchaser for value without notice and will have a good title. In ***J. Allen and Co. v. Sanni Adewale and Bello Lateju*** (1929) 9 NLR 111, the Plaintiff sued the defendant and his surety to recover the balance of what was called the hire-purchase price on a car given to the first defendant. After reading the agreement, the court held that it was a contract of sale rather than a hire purchase contract.

5.3 HIRE PURCHASE CONTRACTS AT COMMON LAW

Hire-Purchase under the Common Law caused considerable hardship to the hirer because it only affords him minimum protection. In fact, at common law the hirer is subject to abuses and injustices. For instance, at common law, the owner could recover the goods from the hirer even if the latter is in arrears of only the last instalment. Some of the abuses and injustice of the system can be summarized as follows:

(a) There right of the hirer to redeem the hired goods after default in his instalment payments is absent. See the case of ***Bentworth Finance (Nig.) Limited v. De Bank Transport Limited*.**

(b) If the hirer wrongfully returns the goods to the owner before the expiration of the period of hire, he may remain liable to pay substantially for the rent for the entire hire period. See the case of ***J. O. Lawrence v. Bentworth Finance Co. Limited & Ors*.**

(c) The hire purchase agreement transfers no property or any proprietary interest in the hired goods to the hirer until he has exercised his option to purchase the goods, even though he may have paid substantial sums towards the agreement. See the case of **Helby v. Mathews.**

(d) The hirer has no legal interest in the goods repossessed by the owner despite the fact that their subsequent sale by him may yield substantial surplus over and above the hire purchase price or the outstanding instalments- ***Williams v. U.A.C. Limited.***

(e) The hirer may become liable to pay an excessive amount under 'minimum payment clause' on termination of the agreement. See the case of ***Amusan & Anor v. Bentworth Finance Nigeria Limited.***

It is partly for the purpose of correcting these defects and affording better protection to the hirer against these abuses and ameliorating such hardships that the Hire Purchase Act 1965 (now CAP H4 L.F.N. 2004) was enacted. It is the main statute that regulates hire purchase transactions in Nigeria and has mitigated some hardships occasioned before its promulgation as stated below.

5.3.1 Conditions and Warranties under Hire Purchase Contract

As a result of technological advancement and the resultant mass production, which inevitably give rise to standard form contracts, businesses are in the regular habit of excluding the implied conditions and warranties provided by the Act to the detriment of the Consumer/Hirer.

Section 4 of the Hire Purchase Act was meant to check the abuse of the owner against the hirer in hire purchase transactions. The section provides for five implied conditions and warranties, which are:

i. Implied condition as to quiet possession;
ii. Implied condition as to title;
iii. Implied condition as to fitness for purpose; and
iv. Implied warranty that the goods shall be free from any encumbrances at the time the property is to pass.

Obligations of the parties in the Hire Purchase Contract at Common Law:

(a) **The Owner**

i. Duty to deliver the goods to the hirer.
ii. Duty not to interfere with the peaceful possession and enjoyment of the goods by the hirer.
iii. Duty to obey the implied conditions under the hire-purchase.

(b) **The Hirer:**

The common law imposed the following duties on the hirer:

i. Duty to take delivery of the goods.
ii. Duty to take reasonable care of the goods.
iii. Duty to pay his instalments punctually and regularly.
iv. Duty not to part with possession of the goods or deal with them in a manner inconsistent with the owner's title.

v. Duty to repair the goods.
vi. Duty to inform the owner of changes in the hirer's address.
vii. Duty to redeliver the goods if the hiring agreement is terminated before the exercise of the option to purchase.

Remedies of the Owner against the Hirer
Remedies normally depend on the terms of the contract, but in the absence of any stipulation to the contrary:

i. When a hirer refuses to take delivery, the owner can sue for damages, the quantum of which depends on whether supply exceeds demands for the goods at the material time.
ii. Where hirer breaches the agreement on payment, the owner can retake (seize) the goods and claim arrears of the rent. See the cases of ***Animashaun v. C.F.A.O***., ***Atere v. Dada***.

5.4 FORMATION OF A HIRE-PURCHASE CONTRACT

The formalities prescribed by law for entering into a valid hire-purchase contract are stating the cash price, and the signing of the memorandum of agreement.

5.4.1 Stating the Cash Price of the Goods:
According to Section 2 of the Act, before any hire-purchase agreement is entered into, the owner must state in writing to the prospective hirer, the price at which the goods may be purchased for cash. If the goods are to be selected by reference to a catalogue, it will be sufficient if the publication indicates its cash price in addition to the (higher) hire-purchase prices. This is to ensure that the hirer makes an informed decision as to whether it will be more profitable for him to pay cash for the goods instead of paying the hire-purchase price in instalments.

5.4.2 Signing of Memorandum of Agreement:
The second formality prescribed by the Act for a valid hire-purchase contract is the signing of a Note or Memorandum of Agreement by the hirer and all the parties. Unless this memorandum is signed, the owner shall not be entitled to enforce the agreement against the hirer, his guarantors, or even recover the goods in case of default. According to Section 2(2) of the Hire-purchase Act, 1965, the memorandum shall contain the following:

i. The hire-purchase and cash price of the goods;
ii. The amount of each of the instalment to be paid;
iii. The date, or mode of determining the date when each instalment becomes payable;
iv. The deposit paid by the hirer;
v. A statement of the true rate of interest calculated in the prescribed manner;
vi. Terms of Termination of the agreement and manner of termination;
vii. Restriction on the owner's right to recover the goods e.t.c.

A list of the goods to which the agreement relates, described in a manner sufficient to identify them. A copy of the memorandum must be sent to the hirer not later than fourteen days after the making of the agreement. As stated above, refusal or failure to prepare this memorandum can affect the owner drastically. The court can excuse non-compliance with this requirement only if it is convinced that the hirer has not been adversely affected by the omission.

5.5 VOID TERMS IN A HIRE-PURCHASE CONTRACT

To provide additional protection to hirers, section 3 of the Act lists a number of terms which should not be included in a hire-purchase agreement. If these provisions are included in the agreement, the whole agreement shall be void. These banned provisions consist of any provision:

i. Authorizing the owner or his agent to enter premises forcibly to re-take possession of the hired goods;
ii. Seeking to exclude or limit the hirer's right to terminate the agreement at any time, return the goods, and stop paying further instalments;
iii. Imposing a penalty on the hirer for terminating the agreement in accordance with the Act;
iv. Turning the agents of the owner into hirer's agents;
v. Limiting the owner's liability in respect of acts done by his agents; or
vi. Forcing the hirer to insure or repair the hired goods with insurers or mechanics selected by the owner only.

Much as the owner of the goods would have liked to insert these terms to protect his interest, the Act forbids them.

5.6 PARTIES TO A HIRE-PURCHASE TRANSACTION

The number of parties involved in a hire-purchase contract depends on the method of financing which is adopted for the transaction. The first method of financing a hire-purchase transaction is where the dealer or seller who wishes to let the goods out on hire-purchase finances the transaction. In such cases, only two parties are involved in the transaction: the dealer (who is also the owner of the goods) and the hirer.

In most cases however, due to insufficient capital, the dealer himself may be unable or unwilling to finance the transaction. He will have to involve a third party who will be able and willing to finance the deal. This method is generally known as a 'triangular transaction' In this situation, the buyer approaches the dealer of the goods. The dealer then produces a proposal form from a finance company for the hirer to fill. The form is in fact a request to the finance company to grant a loan or credit for the purpose of buying the goods on hire-purchase.

If the finance company is satisfied with the credit worthiness of the hirer, it will approve the application and pay cash to the dealer for the goods. The finance company then lets goods on hire-purchase to the buyer for the cash price plus a 'hire-purchase charge' This will be evidenced by an agreement between the buyer (hirer) and the finance company (owner). The buyer then pays the agreed deposit and is granted possession of the goods. Three parties are clearly involved in this kind of transaction.

Other methods which the finance company can use to finance hire-purchase transactions include block discounting, hire-purchase stocking and mortgage agreements.

5.6.1 The Relationship between the Finance Company and the Dealer

The type of triangular transaction described above often give rise to this question: what is the nature of the legal relationship between the finance company and the dealer? Is he a mere agent or a seller to whom the conditions and warranties implied under section 4 of the Act apply to?

The legal approach is that between the dealer (the original owner of the goods) and the finance company, the right and obligations as well as the implied terms and undertakings as to title, correspondence to description, quality, and fitness for stated purposes e.t.c. apply. The dealer is also regarded as the guarantor of the buyer so that if there is default by the hirer the finance company, will look unto the dealer for payment. The dealer is also treated as the agent of the finance company since it is the dealer who is in direct contact with the hirer, and deals with him on behalf of the finance company. This agency relationship may arise though express or implied authority or even by conduct.

5.6.2 The Relationship between the Dealer and the Hirer

Even though there may be no claim in contract against the dealer for defects in the goods supplied under a hire-purchase agreement, it should not be taken as meaning that there could never be a contractual link between the dealer and the hirer. The contractual relationship between them may arise where the dealer, quite independently of the hire-purchase agreement, makes what is generally referred to as a 'Collateral Contract' or gives a 'Collateral Warranty' to the buyer. The dealer enters into a collateral or subsidiary agreement with the hirer. He may argue that it is a mere warranty because it does not amount to a promise which is intended to be binding.

5.7 OWNERSHIP AND TITLE

5.7.1 The Passing of Property

An essential characteristic of hire-purchase is that the property in the goods hired remains with the owner, and only passes from him to the hirer after the latter has paid the final instalment and has exercised his option to purchase the goods. The "*nemo dat quod non habet"* rule applies to hire-purchase as much as it applies to sale of goods contracts. In other words, the hirer acquires no proprietary interest in the article (other than that conferred by the agreement or by statute) and if it sold without the approval or consent of the owner, the sale is void. The purchaser acquires no title to the goods. Relief from the strict application of the *nemo dat* rule is granted to innocent purchasers whose case falls under any of the recognized exceptions to the rule.

5.7.2 Assignment of Option to Purchase

A purported disposal of the goods by the hirer may sometimes operate as an assignment of his option to purchase. In ***Belsize Motor Supply Co. v. Cox*** (1914) it was held that where the hirer has pledged the car to a third party, the pledge acquires an interest in the vehicle and the owners were therefore not entitled to its return but only to the value of the owner's interest therein, i.e. the amount of the hire-purchase price remaining unpaid.

5.7.3 Hirer's Right to Terminate and Minimum Payment Clauses

Both the Hire Purchase Act, 1965, and the common law give the hirer the right to terminate the agreement and return the goods to the owner before the final instalment is due. Section 8 of the Act provides that the hirer may terminate the agreement at any time before final payment falls due by giving notice of the termination in writing to any person entitled or authorized to receive any

sums payable under the agreement. In such situations the question of *minimum payment clause* arises.

It is usual for a hire-purchase agreement to contain a clause stipulating a specific sum which the buyer should pay in the event of exercising his right of termination or in the event of breach by him of the agreement. That amount is only payable if the hirer had not already paid up to that sum in his instalment payments. Such terms are referred to as a 'minimum payment clause' and are designed to represent the minimum sum payable by the hirer to ensure that the owner suffers no loss when the hirer determines the agreement. Though in practice the hirer is made to pay an arbitrary and often exorbitant sum which in no way represent the true loss to the owner. A minimum payment clause is enforceable against the hirer who chooses to exercises his right of termination.

Section 8(1) of 1965 Act now prescribes the maximum liability the hirer can incur on exercise of his right of termination. It provides that on determining the agreement, the hirer is liable to pay first, any arrears of instalments due and unpaid prior to termination, and also pay to the owner a further sum necessary to bring his total payments up to one – half of the hire-price. The Act therefore specifies one-half as the minimum payment should the hirer decide to terminate payments before the final instalments.

Payment of relevant proportion and recovery of possession of goods by the owner, naturally, owners of goods are anxious to recover the goods from the hirer once there is a default in payment of instalments. The Act has however restricted severely the right given to owners to recover possession in such cases.
Section 9 of the Act provides that if the hirer has paid or caused to be tendered to the owner instalments equal to the relevant proportion, the owner cannot recover the goods in the event of a default by the hirer. He can only sue to recover the balance of instalments remaining unpaid. The relevant proportion is defined as payment of:

(a) Three – fifths of the hire – purchase price, in the case of motor – vehicles, or
(b) One – half of the hire-purchase, in the case of goods other than motor vehicles.

5.8 TERMINATION OF HIRE PURCHASE AGREEMENT

A hire purchase agreement may be terminated in any of the various ways by which a simple contract may be determined. In addition, and because of its special nature it may be determined by special events some of which are provided in the Act itself. They are as follows:

A. Performance

If the parties carry out their obligations under an agreement, the agreement is terminated forthwith. The modern practice is to include the 'option fees' in the final instalment so that it is not paid separately but with the final instalment. The hirer-purchase agreement thereafter comes to an end, and the hirer becomes the owner of the goods.

B. Subsequent Agreement

The owner and the hirer can equally make a fresh agreement to bring their relationship to an end. The consideration is the promise by each party to release the other from his existing obligation

under the original contract. Thus, the existing hire-purchase agreement becomes substituted by a new one.

C. Notice to Terminate

At common law, the position is that notwithstanding the fact the agreement contains no provision for giving notice, either party may terminate a hire-purchase agreement by giving notice to the other. If the agreement is governed by the Act, the hirer is again given a statutory right to terminate the agreement by giving notice in writing to the owner or to anyone entitled to receive the sum payable. Such notice must be given before the final instalment is due. This right is however lost where the last instalment is already due.

D. Breach or Repudiation by the Hirer

Where the hirer commits a breach of the contract in such a way as to show that he no longer intends to be bound by its terms, or if he renounces his obligations under the agreement, the owner is entitled to sue for breach. This is especially true if a breach of a fundamental term or a fundamental breach of the contract is committed. The owner is entitled to accept the breach and treat it as a repudiation of the agreement.

E. Breach and Repudiation by the Owner

The owner may also breach or repudiate the agreement at times. If this happens, the hirer may determine the agreement and sue for damages. Most instances of repudiation by owner arise out of a failure to observe the implied terms or if he repossesses the goods in contravention of section 9(2) of the Act.

Frustration

The general principles of law of contract as regards frustration apply equally to hire-purchase agreements. Thus, if goods which form the subject-matter of a hire-purchase agreement are lost or destroyed by inevitable accident, by an Act of God, or by theft by a third party or they otherwise cease to exist through no fault of either party, the agreement is frustrated. The hirer is thereafter discharged from his obligation to pay future instalments and the liability to return the hired goods to the owner.

Under the terms of the Agreement

Most hire-purchase agreements invariably contain a clause permitting the owner to terminate the agreement in the event of a breach by the hirer of the any term. This is to enable the owner to repossess the goods without the necessity to prove repudiation of the agreement by the hirer. This may be based upon occurrence of certain events.

Judgement of Court

A court of competent jurisdiction may decide that failure of an owner to comply with any of the formalities provided for in the Act has prejudiced the hirer and thus the agreement is therefore unenforceable against the hirer and that the hirer can then keep the goods without paying for them.

5.9 CONCLUSION

The concept of Hire Purchase transaction has only become clearer with the enactment of the Hire Purchase Act. Hitherto, the governing rules under the common law were scattered in judicial

decisions which is to the detriment of the hirer. The Hire Purchase Act has now removed the unfair practices though legal circumstances imposing mandatory requirements to be observed by all parties to the transaction.

5.10 ILLUSTRATIVE AND PRACTICE QUESTIONS

1. Briefly discuss the abuses which the hirer in a hire purchase transaction were subjected to prior to the enactment of the Act.

2. Identify and describe the parties recognized under the law in a Hire Purchase transaction under the Hire Purchase Act.

3. (a) Hire Purchase is a contract with a difference. Discuss.
   (b) Distinguish between Hire Purchase Contract and Credit Sale Contract.
   (c) How is Hire Purchase Contract formed under the Act?

4. Discuss the effect of Hire Purchase Act on the common law position with regards to Hire Purchase transactions.

MCQ

1. The hire purchase contract is principally governed by:

A. Hire Purchase Act, 1930
B. Hire Purchase Act, 1960
C. Hire Purchase Act, 1963
D. Hire Purchase Act, 1965

2. The Hire Purchase Act prescribes that a transaction may be terminated through:

A. Selling
B. Performance
C. Possession
D. The Constitution

3. The locus classicus case in the law of hire purchase is?

A. *Carlill v Carbolic*
B. *Williams v. U.A.C. Limited*
C. *Helby v. Mathews*
D. *Labinjoh v. Abake*

4. In a hire purchase agreement, the hirer _____.

A. has an option to buy the goods.
B. must buy the goods.
C. must return the goods.
D. is not given the possession of the goods.

5. Upon the due execution of a contract of hire purchase, who in your opinion possesses the right to property of the object of the contract?

A. hirer
B. owner
C. legal practitioner to the transaction
D. seller

5.11 CASE STUDY

Nnamdi entered into a hirer purchase agreement for the purchase of a tricycle with Bolanta. The agreement stipulates that the cost of the tricycle is 100,000.00 NGN, and Nnamdi shall liquidate same in ten equal instalments. After the 8th instalment, he fell seriously ill and was admitted at the General Hospital for two weeks. During his absence Bolanta went to the Marwa Garage where the tricycle is frequently parked and drove it to his house. Identify the legal issues involved and advise on the extent of liability of each of the two parties.

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CHAPTER SIX

CHAPTER SIX: INTELLECTUAL PROPERTY LAW

6.0 INTRODUCTION

The purpose of this course is to acquaint the readers of this study pack with the intellectual property law. The important areas of the intellectual property (IP) law are copyright, trademark, and patent right. It is important that students should know that IP law is a special area of business law. This chapter analyses the current IP laws in Nigeria and undertakes a prognosis for the future should there be a law reform exercise.

6.1 LEARNING OBJECTIVES

At the end of this chapter, readers will be able to explain in simple language the legal issues in Intellectual Property, especially in the area of copyright, trade mark and patent. Further readings based on the recommended text will expose readers to another aspect of Intellectual Property law which is Industrial Designs.

6.2 DEFINITION OF COPYRIGHT

Copyright in a work is the exclusive right to control the doing of specified acts in respect of the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original, subject to certain statutory exceptions. Copyright is the right given to artists, literary men, musicians and performers to exclude others from substantial copying of the material form of their works. But what is protected is not the ideas in the works but the form in which the ideas are expressed- ***University of London Press Ltd*. v *University Tutorial Press Ltd.***, (1916) 9 Ch. 60.

6.2.1 Works Eligible for Copyright

The categories of work which qualify for copyright protection includes:

i. **Literary works**: literary work includes works as novels, poetical works, computer programmes, text books, lectures and law reports.
ii. **Musical Works**: any musical composition, sound recordings, but does not include a sound track associated with the cinematography film.
iii. **Artistic Works**: include, irrespective of artistic quality, works such as-
    - Paintings, drawings, lithographs, e.t.c.
    - Maps, plans and diagrams
    - Works of sculptures
    - Photographs not comprised in cinematography films
    - Works of architecture
    - Works of artistic craftsmanship.
iv. **Cinematography Films**: includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematography film.

v. **Broadcast:** sound or television broadcasts by wireless telegraphy or wire or both or by satellite or cable programmes and includes re-broadcast.
vi. **Neighbouring Rights:** protection is given to performers in respect of live performances and expressions of folklore. These rights are called "Neighbouring Rights".

6.2.2 Grounds for Protection

(a) Originality: a literary, musical or artistic work will not be eligible for copyright unless sufficient effort has been expended on giving it an original character.

(b) Fixation of work: a literary, musical or artistic work shall be eligible for copyright if it has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device. This requirement of fixation applies equally to cinematography films and sound recordings and even broadcasts.

(c) Qualification of Author: the author or one of joint authors must be:

i. A citizen of Nigeria, or a non-Nigerian who is domiciled in Nigeria; or

ii. A corporate body incorporated by or under the laws of Nigeria.

(d) First Publication in Nigeria: copyright is conferred on every work, other than a broadcast, which is eligible for copyright and which —

i. being a literary, musical or artistic work or cinematography film, is first published in Nigeria;
ii. being a sound recording, made in Nigeria.

(e) Works of Governments, e.t.c.: copyright is conferred on 'every work which is eligible for copyright and is made by or under the direction or control of the Government, a state authority and prescribed international body.

(F) Copyright by reference to international agreement

6.2.3 Mode of Acquisition of Copyright

Unlike other types of IP, there is no registration requirement for copyright. Copyright is invested automatically by the Copyright Act on all eligible work which qualifies for protection.

6.2.3.1 Ownership of Copyright

Copyright vests initially in the author if the work is commissioned by an independent person, or is made in the course of employment, copyright belongs in the first instance to the author, unless otherwise stipulated in writing under the contract.

Copyright is capable of being transferred and this may be done in any of the following ways:

i. By operation of Law — e.g. by transmission on death or bankruptcy;
ii. By will;
iii. By assignment;
iv. By grant of license which may be exclusive or non-exclusive.

An assignment or an exclusive license to do an act in relation to a copyright which is not in writing is invalid. A non-exclusive license may be written, oral or may be inferred from conduct.

6.2.4 Infringement of Copyright

Copyright is infringed by any person who without the license or authorization of the owner of the copyright;

a. Does or causes any other person to do an act, the doing of which is controlled by copyright;
b. Imports or causes to be imported into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy;
c. Exhibits in public any article in respect of which copyright is infringed;
d. Distributes by way of trade, offers for sale, hire or otherwise of for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed;
e. Makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work;
f. Permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright;
g. Performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business, any work in which copyright subsists.

6.2.4.1 Action for Infringement

Infringement of copyright is actionable at the instance of the owner of the copyright in the Federal High Court having jurisdiction in the place where the infringement occurred. An owner may also refer to:

i. an assignee; or

ii. an exclusive licensee of the copyright.

The practice however, is that where the owner and an, exclusive licensee have concurrent rights of action, none of them may, without leave of court, proceed with the action unless the other is joined as plaintiff or added as defendant.

6.2.4.2 Nature of Reliefs Claimable

In an action for infringement, the reliefs are by way of claiming damages, injunction, accounts, the use of Anton Piller Order or otherwise is available, to the plaintiff as it is available in any corresponding proceedings in respect of infringement of other proprietary rights. Anton Piller Order is usually addressed to the respondent ordering him to permit the persons serving the order to enter into the premises where the infringed copyright properties are kept and remove same from the premises.

6.2.4.2.1 Exemplary Damages

Where in an action, infringement of copyright is proved or admitted, the court may award additional damages 'if it is satisfied that effective relief would not otherwise be available to the plaintiff, having regard (apart from all other factors) to —

i. The flagrancy of the infringement; and
ii. Any benefit shown to have accrued to the defendant by reason of the infringement- ***Plateau Publishing Co. Ltd. v. Chuks Adophy*** (1986) 4 NWLR (Part 34) 205.

6.2.5 Conversion Rights

All infringing copies of a copyright work or as part of it, and all plates, master tapes, machines, equipment or contrivance used, or intended to be used for the production of such infringing copies are deemed to be the property of the owner, assignee or exclusive licensee, as the case may be, of the copyright, who accordingly may take proceedings for the recovery of possession of those articles or in respect of conversion of it. (s. 16). Thus, an owner, e.t.c., may have three causes of action:

i. Action for infringement of the copyright;
ii. Action for conversion of the offending articles; and
iii. Recovery of the offending articles.

6.2.6 Defence of Innocent Infringement

Where in an action for infringement of copyright, it is established to the satisfaction of the court that an infringement has been committed, but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work, the plaintiff will not be entitled to any damages, but to an account of the profits made from that infringement.

6.2.7 Simultaneity of Civil and Criminal Actions

Section 21 of the Copyright Act provides for both civil and criminal actions to be taken simultaneously in respect of the same infringement of copyright.

6.2.8 Inspection and Seizure

In any action for infringement of any right, where any ex-parte application is made to the court, supported by affidavit, that there is reasonable cause for suspecting that there is in any house, or premises any infringing copy or any plates, film or contrivance used or intended to be used for making infringing copies or capable of being used for the purpose of making copies of any infringing article book or document, the court may issue an order called Anton Piller Order authorizing the applicant to enter the house or premises at any reasonable time by day or night accompanied by a police officer not below the rank of an Assistant Superintendent of Police, and:

(a) Seize, detain and preserve any such infringing copy or contrivance,

(b) Inspect all or any relevant documents in the custody under the control of the defendant.

6.2.9 Duration of Copyright Protection

i. Literary, musical or artistic works other than photographs are protected for a period of seventy years after the end of the year that the author of the work dies, where the copyright

resides in a government or body corporate, seventy years after the end of the year in which the work was first published.

ii. Cinematography films and photographs — for these categories the length of protection accorded by law is fifty years after the end of the year in which the work was first published.

iii. Sound recording — Fifty years after the end of the year in which the recording was first made.

iv. Broadcasts — Fifty years after the end of the year in which the broadcast first took place.

In the case of anonymous or pseudonymous literary, musical or artistic works the copyright will subsist until the end of the expiration of seventy years from the end of the year in which the work was first published. Provided that, where the author becomes known, the term of copyright given above will apply.

6.2.10 Exceptions from Copyright Control

The right of a copyright owner in respect of literary, musical, artistic works and cinematography films does not include the right to control:

(a) Fair Dealing: The doing of the act by way of fair dealing or purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it must be accomplished by an acknowledgement of the title of work and its authorship except where 'the work is incidentally included in a broadcast.

(b) The doing of any of the aforesaid acts by way of parody, pastiche, or caricature.

(c) The inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public.

(d) The reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public.

(e The incidental inclusion of an artistic work in a film or broadcast, e.t.c.

(f) Any use made of a work in an approved educational institution.

6.2.11 Reciprocal Extension of Protection

Copyright law generally operates within the borders of the country and applicable only to works made by its citizens or aliens domiciled therein. To remedy this situation, provision is made for reciprocal extension of protection to persons in other countries.

Where Nigeria is a party to a treaty or other international agreement, and the Minister responsible for culture is satisfied that a particular country provides for protection of copyright in works which are protected under the Act, the Minister may by order in the Gazette extend the application of the Act in respect of any or all of the works referred to in Section 1(1) of the Act:

(a) To individuals who are citizens of or domiciled in that country;

(b) To bodies corporate established by or under the law of that country;

(C) To work, other than sound recording and broadcasts, first published in that country; and

(d) To broadcasts and sound recording made in that country.

Nigeria belongs to the Universal Copyright Convention 1952 (UCC), the Berne Convention 1886 and 1971 for the protection of literary and artistic works, and the Rome Convention 1961 for the protection of performers, producers of phonogram and broadcasting organizations.

The Berne Conventions and the UCC apply to literary, dramatic, musical and artistic works and films only, and do not apply to sound recording, broadcasts and neighbouring rights.

The UCC provides that the copyright notice symbol of C inside a circle, © with the name of copyright owner, and year of manufacture, is sufficient formality conferring copyright. This may be contrasted with the Berne Convention posture, that copyright is property flowing "naturally" and without formality from the act of creation so that neither registration nor formal notification is required to confer copyright or the right to sue for infringement (article 5(2)). The main difference between the two Conventions is to be found in the duration of protection the life of the author plus 50 years for the Berne Convention and the life of the author plus 25 years for the Universal Copyright Convention.

In any action for infringement of copyright in a work, the following shall be presumed, in the absence of any evidence to the contrary:

(a) That copyright subsists in a work which is the subject matter of an alleged infringement;
(b) That the plaintiff is the owner of copyright in the work;

(c) That the name appearing on a work purporting to be the name of the author is the name of such author;

(d) That the name appearing on a work purporting to be that of the publisher or producer of a work is the name of such publisher or producer;

(e) Where the author is dead, that the work is an original work;

(f) That it was published or produced at the place and on the date appearing on the work.

Responsibility for all matters affecting copyright in Nigeria as provided by the Act is vested in the Nigerian Copyright Commission while the Federal High Court exercises exclusive jurisdiction for the trial of offences or disputes under the Copyright Act.

6.3 PATENT AND DESIGN

The word patent denotes a grant of letters acknowledging a right or monopoly in respect of an invention. When a patent is granted, the 'Letters Patent' are delivered to the patentee, who is the person entered on the Register of Patents as the proprietor or grantee. A patentee is granted a right in law to prevent others from making, using or dealing in his invention whether by sale, importation or hire or otherwise. A patent for an invention does not confer upon a patentee any right to manufacture, which he does not already hold. What the 'Letters Patent' confer is the right to exclude others from the commercial exploitation of a particular invention. The simple procedure for application for Letters Patent is as follows:

(a) The applicant will need to complete some statutory forms, which may be obtained from the Patents and Trademarks Registry, and return the same accompanied by documents relating to the invention.

(b) The Application Form and supporting documents are thereafter referred to an examiner who investigates the novelty of the invention claimed and establishes whether or not an earlier claim had been made on it.

(c) The examiner's report is not binding on the Registrar but only assists him in arriving at a decision.

(d) If the request for a patent is accepted, 'Letters Patent' are granted to the applicant or joint-applicants and sealed with the seal of the Registrar of Patents upon payment of the prescribed fees.

Industrial Designs

The word 'design' refers to features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appear to and are judged solely by the eye, but does not include a method or principle of construction or features of shape or configuration which the article made in that shape or configuration has to perform.

The law in Nigeria as regards designs further provides that any combination of lines or colours or both and any three-dimensional form, whether or not associated with colour, is an industrial design if it is intended by the creator to be utilised as a model or pattern to be multiplied by industrial process and is not intended solely to obtain a technical result.

The right of registration of an individual design is vested in the statutory creator, that is, the person who, whether or not he is the true creator, is the first to file or validly claim a priority for an application for registration of the design, unless the creator was acting on behalf of another person for good consideration in which case that other person is treated as the proprietor.

Registration of an industrial design confers upon the registered owner the right to preclude any other person from reproducing the design in a manufactured product, or else, in importing, selling or utilising the design for commercial purposes. Reproducing the design in any miniature way is also prohibited by law. The protection provided by the Nigerian law is first for 5 years from the date of application for registration and two subsequent periods of 5-year renewals.

6.4 TRADE MARKS

Trade Mark is defined as, a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark. Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof. The essence of a trademark is to establish a connection in the course of trade between certain goods and a person having the right, either as a proprietor or registered user, to use the mark with or without indication of his identity on the product to which the mark is affixed. The product labels, which must indicate the origin of the goods, also represent acknowledged quality of some given products and the goodwill of their manufacturers or producers. Trademark, in essence is the mark with which a maker of a good distinguishes its products from that of others.

Registration

The Registrar of Trade Marks keeps records of all registered trademarks and related matters names and address of proprietors and registered users, notification of assignment and transmissions. The Register is divided into two parts i.e. Part A and Part B. The register shall be open to the public for inspection.

Trademarks may be registered or unregistered. Right in an unregistered trademark may be acquired by use and may exist independently of registration. In this case, an action can only lie in passing-off for its infringement. However, the proprietor of an unregistered trademark has the right to oppose the registration of a similar trademark. The basis of this action is that the owner has already acquired goodwill through usage of the name in connection with the goods. The party objecting, therefore, must show that the name or mark in question has become associated with his goods, that a reputation or goodwill has attached to them under that name or mark and that use by the person seeking registration of a similar name or mark is likely to cause confusion resulting in damage to the reputation or goodwill of the owner.

Under the Trade Mark Act, marks are registrable, and a registrable trademark must contain or consist of at least one of the following essential characteristics:

(a) The name of the company, individual or firm represented in a special or particular manner.

(b) The signature of the applicant for registration, or some predecessor in his business.

(c) An invented word or words.

(d) A word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or surname.

The duration for the enjoyment of right granted is a period of 7 years and a subsequent renewal entitles the owner to hold the right for another period of 14 years from the expiration of the first registration.

Registration confers on the registered owner the exclusive right to the use of the trade mark in relation to the goods mentioned in the register. The right granted by this statute is assignable and transmissible.

6.4.1 Convention Country

A person who applies for protection for a trade mark in a convention country can (within 6 months of such application in his country) apply personally or through legal representative or assignee for registration of his trade mark in Nigeria and he shall have priority to other applicants and his registration in Nigeria shall have the same date of application as in the convention country.

If after 5 years registered mark is not used, it can be removed from the register. Alteration of trademark in any manner not substantially, does not affect the identity already granted by the effect of registration.

6.4.2 Infringement of trade mark

If a person not being a registered user, uses a mark identical with or so nearly resembling the mark as to be likely to deceive or cause confusion in the course of trade in relation to the goods in respect of which the mark was registered, he is guilty of infringement.

6.4.3 Action for Infringement

The Federal High Court exercises jurisdiction in all matters relating to infringement of trademarks. An aggrieved party may approach the court for legal relief. The categories of relief available to the court are composed in the main of injunction. An injunction could be interim or perpetual. Delivery up of the mark and articles in the claim damages for loss of profit will be a clear and separate head to be filed before the court. However, in distinct circumstances where trade mark has not been registered, the usual relief to be pursued is to resort to the common law action of passing off.

6.5 TRADE SECRETS

Trade secrets are IP rights on confidential information which may be sold or licensed. The unauthorized acquisition or use of such information is unfair trade practice and a violation of trade secret protection.

6.6 CHALLENGES FACING THE ENFORCEMENT OF IP LAWS IN NIGERIA

i. Lack of strong Regulatory Institutions. This is largely due to poor funding. Most of these regulatory institutions are not yet computerized and as such searches and registration are still carried out manually;
ii. Obsolete IP laws;
iii. Massive piracy and other forms of IP infringements;
iv. Bribery and corruption;
v. Inefficient Judicial system.

6.7 CONCLUSION

IP law is broadly categorized into copyright law, patents, industrial design and trademark. IP law will continue to expand in scope and form as businesses/commercial endeavours such as Nollywood and other similar ventures continue to grow. The law will no doubt become enriched both through legislation and judicial pronouncements in the future.

6.8 ILLUSTRATIVE AND PRACTICE QUESTIONS

1. Briefly enumerate the steps to be undertaken by a prospective owner of copyright in a published work.
2. Itemise the legal procedure for the registration of trademark. Why, in your view, should Nigeria have a strong Intellectual Property Law Regime?
3. What are the challenges facing Enforcement of Intellectual Property laws in Nigeria? Proffer some solutions to these challenges.
4. Distinguish between Copyright, Trademark and Patent.

MCQ

1. The duration for the engagement of protection of rights under the Trademark Act is limited to _____ years in the first instance.
   A. 50
   B. 25
   C. 20
   D. 5
2. The legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances is called ---------- use.
   A. Fair
   B. Academic
   C. Alternative
   D. Public

3. _____ is the arm of intellectual property law that offers legal protection to inventions.

A. Trade mark
B. Industrial design
C. Copyright
D. Patent

4. Mr. Odu is interested in patenting his work, which agency of government will he approach?

A. National Broadcasting Commission
B. National Communications Commission
C. National Copyright Commission
D. National Identity Commission

5. The jurisdiction to adjudicate on matter under the Copyright Act is exclusively exercised by the?

A. National Industrial
B. State High Court
C. Federal High Court
D. National Copyright Commission

6.9 CASE STUDY

Mighty Benz is a reggae musician whose career has recently burgeoned. He was invited by Fusty Sparrow, a very talented and foremost music producer to participate in a music collaboration involving three other reggae musicians. The other members of the music production agreed and indeed permitted Mighty Benz to be the lead vocal. The song has now been released by Fusty Sparrow and as expected is a massive hit. Mighty Benz who had thought this one effort was destined to lead him into financial prosperity is very disappointed at the paltry sum of money given

to him. He stated very emphatically, that the copyright resides with him since he was the lead singer. Advise him paying particular attention to the position of the Copyright Act.

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CHAPTER SEVEN

CHAPTER SEVEN: SALE OF GOODS

7.0 INTRODUCTION

Sale of goods contract is often confused with similar commercial transactions such as hire purchase, bailment, and barter, contract of services, skill and labour because of some similarities that runs through these transactions. Those characteristics that define and distinguish sale of goods from other commercial transaction are hereunder considered.

7.1 LEARNING OBJECTIVES

At the end of this section, readers will understand the intricate issues, inherent in the law of Sale of Goods as a distinct area of business law. It will be explained in simple, clear and appropriate words, laced with relevant citations and examples.

7.2 DEFINITION OF GOODS

Section 1(1) of the Sale of Good Act, 1893 defines a contract of sale of goods as:
"a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price".
This definition shows that sale of goods differs from similar transactions like, hire-purchase, exchange or barter, bailment, contract for services, skill and labour, in the following ways

1. **Parties**

They are known as the seller and the buyer. The seller might be either the owner of the goods or a duly authorized agent.

2. **The Transaction is Intended to be a Binding contract**

The parties to a sale of goods contract intend that their agreement is to be binding in the sense that whoever breaches it can be sued by the other party.

3. **Goods**

Another important feature of this transaction is that goods, as defined by the Act, form the subject-matter of the contract. Thus, an agreement in which one is to render services or to supply labour and materials only, will not be treated as a sale of goods contract.

4. **Money consideration**

The consideration provided by the buyer of goods is in the form of money, not by way of goods or rendering services to the seller.

7.2.1 Types of sales

A sale is an executed contract in which ownership or property in goods is transferred from the seller to the buyer. A sale may take the following forms:

Outright or Absolute Sale: the contract transfers property in the goods immediately and unconditionally.

Conditional Sale: transfer of property in the goods is made subject to conditions imposed by the seller. The agreement can provide that ownership shall remain in the seller until the buyer completes payment.

Credit Sale: payment for the goods is to be paid at a later date, even if payment is to be effected in instalments, the property in the goods is transferred to the buyer, thus the seller cannot recover the goods but could sue for the debt owed him by the buyer.

We may add that the buyer, even under a conditional credit sale (where property remains vested in the seller and payments are made in instalments) cannot refuse to pay for the goods. Any refusal makes him liable to be sued for damages for breach of contract. He has no right to return the goods and discontinue payments as in hire-purchase contracts.

7.2.2 The meaning of good

We have emphasized that goods form the subject-matter of a sale or an agreement to sell. What is meant by the term 'goods'? Section 62 defines goods as including: 'all chattels personal other than things in action and money…. The term includes emblements (industrial growing crops), and things attached to or forming part of the land which are agreed to be severed before the sale or under the contract of sale.'

From the definition the following may be given as examples of 'goods'—

i. Tangible, movable assets such as cars, electronic gadgets, clothes etc.

ii. Things which (naturally) form part of land e.g. timber provided the agreement offers that they should be severed (cut) from the land before the sales, or under the sale agreement. The sale of potatoes to be grown on a plot of land, or an agreement to cut timber for a sawn mill are examples of sale of goods.

iii. Vegetables, maize, and other seasonal crops.

We may on the other hand give the following as items which do not qualify as "goods" according to the definition-

i. Real property like land, house etc.

ii. Negotiable instrument –like currency notes which are still circulating, bills of exchange.

iii. Sand, stone, and other things to be quarried from land represent sale of an interest in the land itself; it is therefore not of sale of goods.

iv. Things deposited on land e.g. sand may eventually become part of the land if there was no intention to dump there temporarily.

7.2.3 Classification of Goods

Goods may be classified into specific goods, unascertained goods existing goods, and future goods. This classification is important especially in relation to the rules for determining when property in goods (and risk) is transferred from the seller to the buyer:

i. **Specific Goods:** These are goods that can be identified or seen and agreed upon at the time of making the contract of sale e.g. a 1998 Volkswagen Saloon Car with a given chassis and engine numbers.

ii. **Future Goods:** These include goods yet to be acquired or manufactured by the seller after the contract has been made.

iii. **Unascertained Goods:** These are goods sold by description, but which are not identified or agreed upon as at the time of a contract but they are included in a particular class of goods e.g. 12 tons of grade one cocoa.

iv. **Existing Goods:** These are goods which are available with or to a seller at the time of making the contract of sale. These are goods which are owned and possessed by the seller at the time of contract of sale. In other words, they are goods actually in existence when the contract is made. Such existing goods may either be specific or unascertained.

7.3 Distinction between Sale of Goods and Other Similar Transactions

i. **Barter:** here consideration is not in monetary term but exchange of goods for goods.

ii. **Hire Purchase:** this is a contract of hire, with an option to buy, which may be exercised or not. It resembles a sale of goods as the ultimate may be sale of good.

iii. **Contract of Skill and Labour:** this is when someone offers his skill for a fee. A different law governs this type of contract even when the ultimate aim is the production of goods; e.g. the commissioning of an artist to paint or produce a portrait.

iv. **Mortgage:** is the transfer of the general property in the goods from the mortgagor to the mortgagee to secure a debt.

7.4 TERMS IN SALE OF GOODS CONTRACTS

The terms of the contract consist of what the parties have agreed expressly or impliedly to be binding on them. If the agreement is written, it is essential that the document is drafted to reflect all the agreed terms. If any terms are omitted from the document the court may not allow oral evidence to be admitted later on to change the terms of the written document.

7.5 TRANSFER OF PROPERTY, RISK AND TITLE

Meaning of Property in Goods: The purpose of a contract of sale of goods is the transfer of property (ownership) from the seller to the buyer. It is important to note at what time/moment property passes in a transaction of sale.

i. **Passing of Property in Specific (Ascertained Goods):** Ordinarily, the property of ascertained goods ought to pass as the time a contract of sale is made. However, such passing is subject to the overriding provision laid down by section 17(1) of SOGA which is to the effect that property is transferred to the buyer at such time as the parties to the contract intend it to be transferred. In other words, the property in the goods passes from the seller to the buyer at such time (if any) as the parties expressly or impliedly stipulated in the contract of sale.

ii. **Passing of Property in Unascertained or Future Goods:** The fundamental rule as laid down by Section 16 of SOGA is that "where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. See the case of ***Healey v Howlett & Sons*** (1917) 1 KB 337. Although, the property in unascertained goods can only pass when the goods become ascertained, it must be noted that whether the property in the goods will pass at the particular moment is dependent upon the intention of the parties as provided under section 17 of SOGA. Although, this section dealing with ascertainment of intention deal with ascertained goods, it is well settled that is also applies generally to unascertained goods. However, subject to the qualification lay down in section 16.

7.6 IMPLIED TERMS

In accordance with the common law concept of freedom of contract, parties are allowed to negotiate the best terms that fit their situations. For the buyer, the other rule at common law is caveat emptor (The buyer must beware). This means that the buyer must look out for his own interest and ensure that he contracts for goods of the right quality. The doctrine of caveat emptor will therefore prevent a buyer from complaining if the goods obtained, for example, do not correspond to their description, are not fit for the stated purpose, or are not merchantable.

The sale of Goods Acts has tried to blunt the effect of the doctrine of caveat emptor by indicating a number of conditions and warranties that must be implied into sale of goods contracts. These implied terms refer to the following:

1. Implied term as to title or the right to sell

Section 12 of the Sale of Goods Act provides that in a contract of sale of goods, unless the circumstances of the contract show a different intention it shall be assumed that the seller gives an undertaking as to title.

2. Implied condition as to correspondence to description

Section 13 of the Act implies into a contract of sale, a condition that the goods shall correspond to description. Goods may be described in various ways such as class, origin, quality or packaging.

3. Implied condition as to fitness for a particular purpose

Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specific article under its trade name, there is no implied condition as to its fitness for any particular purpose.

4. Implied condition on merchantable quality

The Act provides that if goods are bought by description from a seller in goods of that description, there is an implied condition that the goods shall be of merchantable quality. This condition however cannot be implied if the buyer had examined the goods and there are defects which he saw or ought to have seen.

5. Implied conditions in sale by sample

In a sale by sample, section 15 Sale of goods Act stipulates that there shall be an implied condition that:

i. The bulk of the goods shall correspond with the sample in quality;
ii. The buyer shall have a reasonable opportunity of comparing the bulk with the sample;
iii. The goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

6. Implied term as to time

Stipulations as to time are not deemed to be of essence in the contract unless the parties so provide. This means that the buyer will not be in breach if he does not pay on or before the stipulated day. Payment can be made within a reasonable time unless the contract emphasized the need for punctual payment.

7.7 CONCLUSION

Sale of good is one of the most popular commercial transactions in Nigeria. However, it does not cover the buying and selling of immovable or real property like land and house; rather sale of good law deals only with the rules and regulations which govern the buying and selling of personal movable properties like motor vehicles, furniture, machinery and commodities.

7.8 ILLUSTRATIVE AND PRACTICE QUESTIONS

1. Discuss in detail the full extent of implied terms in a contract of sale of goods.
2. Discuss with the aid of relevant judicial authorities the meaning of property and passing of property in a contract of sale of goods.
3. What is the legal difference if any, between a contract of sale and an agreement to sell? What are the exceptions to the rule on transfer of title in the contract of sale of goods?
4. What is the position of the law on the passing of property in ascertained and unascertained goods?
5. What is your view on the terms implied by law in the contract of sale of goods?

MCQ

1. *Nemo dat quad non habet* in sale of goods means?

A. The goods must be available
B. The goods will be delivered on payment
C. The seller cannot pass title he does not have
D. The buyer may reject the goods.

2. An agreement to render services or to supply labour and materials only DOES NOT fall within the ambit of _____

A. Law of contract
B. Agency
C. Sale of goods
D. Business law

3. The buyer who enters into an agreement to sell under a sale of goods contract acquires what is referred to in law as _____

A. Personal interest
B. Entitlement
C. Chose action
D. Right in situation

4. Under sale of goods law, the process of due diligence which the buyer conducts to confirm the accuracy of the seller's claim is known as _____

A. Caveat emptor
B. Esprit de corps
C. Obiter dicta
D. Interregnum

5. In a contract of sale of goods, breach of warranty gives the aggrieved party right to:

A. Repudiate the contract
B. Claim damages
C. Disavow the contract and claim damages
D. None of the options provided

7.9 CASE STUDY

Dele sold his car to Bala in return for a cheque which was dishonoured on presentation. Dele immediately informed the police and Auto mobile Association on the transaction. However, Bala has sold the car to Emeka, who paid for the car without the knowledge that Bala had paid Dele with dishonoured cheque. Bala has travelled to Togo and all effort to trace him has proved abortive. Dele wants to retrieve the car from Emeka. Advise the parties.

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CHAPTER EIGHT

CHAPTER EIGHT: LAW OF BANKING AND NEGOTIABLE INSTRUMENTS

8.0 INTRODUCTION

Major towns in the country have different branches of banks located within. Some of these banks are UBA Plc., First Bank Plc., Zenith Bank Plc., GT Bank Plc. etc. The major function of banks is to accept deposit from their customers and to lend money to its customers. Therefore, banking and trading/commercial transactions are like Siamese twins. Banking activity are controlled through banking laws that regulates banker- customer relationship, forms of banking, banking framework, negotiable instruments, cheques and enforcement of breach of banker-customer relationship by court e.t.c. Apparently, the enactment of banking laws and other control mechanism among others is to enhance public confidence in the banking system.

8.1 LEARNING OBJECTIVES

At the end of the chapter readers should be in a position to:

i. Understand the meaning of a banker, customer and bills of exchange;
ii. Identify the type of relationship between a customer and a banker;
iii. Understand the different forms of banking under the law;
iv. Understand what a cheque is, types of crossing, liabilities for forgery and circumstances under which bank may not honour cheques issued by customer.

8.2 BANKING AND NEGOTIABLE INSTRUMENTS

The amended Nigerian Banking Act 1969 defines a bank as any person who carries on banking business and includes a commercial bank, an acceptance house, discount house, financial institutions and merchant bank. The same Act defines banking business as:

> *"the business of receiving monies from outside sources as deposits irrespective of the payment of interest or the granting of money loans and acceptance of credits or the purchase of bills and cheques or the purchase and sale of securities for account of other or the incurring of the obligation to acquire claims in respect of loans prior to their maturity or the assumption of guarantee and other warranties for other or the effecting of transfer and clearing and such other transactions as the Commissioner may, on the recommendation of Central Bank by order published in the Gazette, designate as banking business".*

From the above statutory definition, banking can be explained to mean a business which consists mainly of accepting deposit, granting of loans, acceptance of etc.

Negotiable Instruments

The word negotiable means "transferable by delivery" and the word "instruments" means a written document by which a right is created in favour of a person. Therefore, the term negotiable instruments refer to a document containing rights that can be transferred by delivery.

8.2.1 DEFINITION OF A BANKER

In normal usage, people see employees of a bank as banker. This is wrong. The word banker refers to the company carrying on banking business and not the individual employees. See ***Awule and Others v. Reginam*** (1962). The word 'banker' refers to a company licensed to carry on banking business and not an employee, a director or a shareholder. The question, 'Who are your bankers?'for example, means 'Which bank do you use?' If, for instance, I say 'I am going to meet my bankers,' what I mean is that I am going to meet the company who run banking services for me, not the employees of that company.

8.2.2 BANKER-CUSTOMER RELATIONSHIP UNDER THE COMMON LAW

Having explained who a banker is, the next step is to explain who is a customer? In its daily transactions, a banker will come in contact with various people for different reasons. Some will come to deposit cash, some to withdraw cash, some to make an enquiry. Some of these people maintain continuous relationship with the bank while in some cases it is a 'one-off' affair. The question is, can these people be referred to as customers of their banks?

It is apparent that anybody who has anything to do in the bank, no matter the nature sees himself as a bank's customer at least as much as he is within the banking premises. This is wrong in banking, because repeated buying habit is not a pre-requisite to being labelled a bank customer. Therefore, the fact that one is seen to be transacting one form of business or the other in the bank almost every day does not make one a customer if the transactions are not such as to establish a banker- customer relationship. A banker-customer relationship is established when a prospective customer makes an offer in writing to the bank by filling account opening document with the intention to create legal relations. The bank will in turn accept the offer after the prospective customer satisfies the basic conditions for opening an account, like satisfactory reference and proper means of identification; the banker-customer relationship commences as soon as the account is funded.

The bank will however be considered negligent if there is no proper or satisfactory reference before operating the account. A banker-customer relationship may also arise when there is a clear intention of the prospective customer to become a customer and the bank accepts this offer. Such relationship may arise where the banker gives an advice to a prospective customer. In the case of ***Woods v. Martins Banks Ltd. & Another*** (1958) it was held that the customer relationship commences when a bank agrees to give a banking service to a prospective customer e.g. an investment in a Refrigeration company having been assured that the company is financially sound. He did and made a loss of £16000. It is noteworthy that at the time the advice was given, Woods had no account with the bank. He brought an action against the bank manager for fraudulent negligence and won. The bank was liable as the manager's advice was considered grossly negligent. Thus, the giving of a service by a bank to another person may bring about the customer relationship.

Technically, having an account is the main requirement to become a bank customer. It is so because; account opening is the gateway to contractual relationship between the bank and customer.

The nature of banker-customer relationship is the following:

a. Debtor-Creditor Relationship
b. Agency Relationship
c. Contractual Relationship
d. Bailor and Bailee Relationship
e. Mortgagor and Mortgagee Relationship
f. Trusteeship/Executorships

Debtor-Creditor Relationship: The relationship between a banker and customer is sometimes described as debtor- creditor relationship. This is because the banker is a debtor to a customer who has credit balance in his or her account. In this situation, the customer is a creditor to the banker. The situation is reversed where the banker grants loan or overdraft facility to the customer. In this regard, the customer becomes the debtor while the banker is regarded as the creditor.
The case of ***Foley v. Hill*** (1848), in this case the banker-customer relationship was given due legal consideration, when the English court held that the customer-banker relationship is merely a debtor-creditor relationship with the obligation that the bank will honour the customer's cheques as opposed to the ordinary debtor-creditor relationship where the debtor seeks for the creditor. In banking relationship, a banker as the debtor does not seek the customer, who is the creditor, instead the customer (creditor) seeks the banker (debtor) for the payment of his money by issuing cheques, withdrawal vouchers or debit card like ATM to make demand on the banker. Similarly, in the Nigerian case of ***Osawuye v. National Bank of Nigeria Ltd*** (1973) it was held that the relationship of a banker and its customer is that of debtor and creditor and there is no obligation on the bank to seek his customer for the payments of the money held with him.

Agency Relationship: An agent is a person who brings the principal and a third party into contractual relationship. The most common type of agency functions that banks perform are the following:

i. Payment of cheques on behalf of customers, provided necessary conditions are met;
ii. Delivery of safe custody item on customer's instruction;
iii. Collection of proceeds of cheques on behalf of the customer;
iv. Provision of safe custody service;
v. Transaction of foreign exchange for customer.

Contractual Relationship: The relationship between a banker and the customer is contractual in the sense that there is a mutual agreement between the customer and the banker to refrain from doing certain things which can be enforced by law. Note that banks do not take oral instruction from customer but always in writing. This is often demonstrated when a prospective customer makes an offer to banker to open an account. Acceptance is indicated by the banker when the account is opened and operation commences. When operation commences, banker cannot legally refuse payment of a cheque drawn by a customer except:

i. It is irregularly drawn by customer;
ii. There is a legal bar; and
iii. The account balance is not enough to cover amount drawn.

In a similar vein a customer cannot compel a banker to make payment when the above mentioned subsist.

Bailor and Bailee Relationship
Bailment is created when a customer delivers to the bank and the bank accepts an item for safe-custody. Here the bank is not a debtor but a bailee while the customer is a bailor. Valuable items like will, gold, certificates are often kept by customer in the bank for safe-custody. It is expected of the bank to exercise the standard of care required in the contract of bailment towards the valuable items deposited see ***Armels Transport Ltd v. Agugua*** (1974). It is instructive to know

that bank that fails to exercise the required standard of care may be liable for an action for detinue, conversion and or an action in Negligence.

Mortgagor and mortgagee Relationship
This relationship arises where the customer uses the title documents to his property (land and building) to secure a credit with the bank subject to equity of redemption. In this circumstance, the customer is the mortgagor and the bank being the mortgagee.

Trusteeship/Executorship
Bankers act as executors of will and if the exercise is prolonged, the bank, becomes a trustee.

8.3 BANKING BUSINESS UNDER THE BANKS AND OTHER FINANCIAL INSTITUTIONS ACT (BOFIA 2004)

BOFIA is an Act to regulate banking and other financial institutions and matters connected therewith. It contains 68 sections, among which are as follow: establishment of banks, duties of banks, books of account, supervision, general and supplemental, miscellaneous matters, other financial institutions, miscellaneous and supplementary.

According to section 2(1) BOFIA no person shall carry on any banking business in Nigeria except it is a company duly incorporated in Nigeria and holds a valid banking license issued under the Act. The procedure for application for grant of license to undertake banking business is contained under section 3(1) of BOFIA.

Section 2(2) states that any person who transact banking business without a valid license under the Act is guilty of an offence and liable on conviction to imprisonment for a term not exceeding 10 years or to a fine of N2,000,000 or to both imprisonment and fine. The Central Bank Governor has unfettered discretion as to whether to issue or not to issue license, however, any license to be issued shall be with the prior approval of the Minister of Finance-see sections 3(3) & 5 BOFIA.

The under-listed are other essential provisions of the Act as it affects banking business

i. The opening and closing of branches require a written consent of the CBN;
ii. Every reconstruction, reorganization, merger and disposal including acquisitions requires prior approval of the Governor of the CBN;
iii. Every bank is required to maintain a reserve fund which a proportion of the annual profit is transferred into for the purpose of its liabilities-section 16 BOFIA;
iv. The Act restricts certain banking activities except with prior approval of in writing of the CBN- see section 20;
v. Every bank is required to keep proper books of account with respect to all the transactions of the bank-section 24;
vi. The control and management of failing banks is done by the CBN in conjunction with the Nigerian Deposit Insurance Company (NDIC) see sections 35, 36 & 38 BOFIA;
vii. The name which a bank should bear is also regulated e.g. names that appear to enjoy government patronage are restricted;
viii. The appointment of directors, chief executives is done with the approval of the CBN - Section 48.

8.4 FORMS OF BANKING UNDER LAW

Banking in Nigerian can be mainly classified under the following headings:
Central Banking, Commercial Banking, Non-Interest Banking, Development Banking, Merchant Banking, Micro-finance Banking e.t.c.

8.4.1 Central Bank

A Central Bank is the apex of the banking system of every country. Central bank is the representative of the government in the banking sector of any country. It does not compete for business with other banks.
Its main duty is to advise the government on monetary policy and implementation of government policy on behalf of the government.
The Central bank also performs the following duties:

i. Issuance of legal tender/currency in Nigeria.
ii. The maintenance of external reserves to safeguard the international values of the naira.
iii. The promotion of monetary stability and a sound financial structure.
iv. Acting as a banker and financial adviser to the federal government.
v. Performs supervisory role over banks and other financial institutions.

8.4.2 Commercial Banking

Commercial banks are those banks which perform all kinds of banking functions such as acceptance of deposit, advancement of loans, creation of credit and agency functions. They are now called deposit money banks. The following are some of the commercial banks in Nigeria, Access Bank Plc., Ecobank Plc., Fidelity Bank Plc., First Bank Plc., Union Bank Plc., Unity Bank Plc., Wema Bank Plc., Zenith Bank Plc. etc.

Functions of Commercial Banks

The commercial banks perform very important functions in any economy. These among others include:

i. Accepting deposits
ii. Advancing loans
iii. Creation of credit
iv. Financing foreign trade of its customer
v. Acting as referees for customers
vi. Safe-keeping of valuables
vii. Payment on behalf of customers.

8.4.3 Non-Interest Bank

A non-interest can be explained to mean a bank which transacts banking business, engage in trading, investment and commercial activities as well as the provision of financial products and services in accordance with Sharia principles and rules of Islamic commercial jurisprudence, which prohibits the charging of interest on lending and payment of interest on deposit. These are described as riba or usury in Islamic jurisprudence. It also prohibits investing in businesses that provide services or produce goods that are not in conformity with Islamic principles such as alcohol. Example includes Jaiz Bank.

Rationale for Non-Interest Banking

Interest charged as commission on turnover (COT) by commercial banks is ever increasing and has negative effects on customers' accounts.

Parties to Interest-Free banking

Non interest banking is predicated on the principle of partnership between capital and enterprise. The parties are the following:

i. The actual user of capital or entrepreneur;
ii. The bank which serves as a partial user of capital funds and as an intermediary;
iii. The supplier of saving or capital funds i.e. depositors in the bank.

Functions of Non-Interest Bank

Non-Interest bank has the same functions as conventional commercial bank except that it operates in accordance with the rules of Sharia and Islamic rules on business transactions.

Note that the basic principle of Islamic banking is the sharing of profit and loss (*Mudarabah*) and the prohibition of *riba* (usury).

Arguments in favour of Non-Interest Bank

i. It promotes wealth creation through investment;
ii. It encourages banking instead of hoarding of money;
iii. It prevents accumulation of wealth in a few hands;
iv. It leads to share of business risks;
v. It prevents investment of funds in religion forbidden business e.g. alcohol, tobacco, harmful drugs;
vi. It is based on trust which is the bedrock of financial transactions;
vii. The share of profit encourages, customer, to bring big deposit;
viii. Big deposits from customers will boost banks image;
ix. It makes lending safer since the lender and the borrower are interested in the transaction;
x. It makes the bank more entrepreneurial.

Arguments against Non-Interest Bank

i. Non-interest bank may not thrive in a secular country like Nigeria;
ii. Investment in high-risk areas of the economy is discouraged;
iii. It makes financial projection difficult;
iv. There is restriction because the market or the concept is mainly applicable to Muslims;
v. A situation where religious tenets are mixed with business practices might lead to confusion;
vi. There is lack of experienced personnel for non-interest banking;
vii. It could lead to diversion from professional banking since the bank will be more involved in customer varied business than it is involved in orthodox banking;
viii. It is difficult to differentiate between shareholders' funds and customers' deposits.

8.4.4 Development Bank

The idea of setting up development banks was mooted soon after the establishment of the Central Bank of Nigeria in 1959. The main reason for development bank was to provide medium and long-term finance, to the private sector of the economy which conventional banks scarcely provide. Similarly, the Central Bank confined its activities to its normal functions of being lender of last resort to banks and granting of temporary day to day advances to the Federal Government. Thus, with the support and encouragement of the International Bank for Reconstruction and Development (World Bank), the first development bank-the Nigerian Industrial Development Bank (N.I.D.B) was established in 1964. Other development-oriented banks established thereafter are Nigeria Agricultural and Cooperative Bank, the Nigerian Bank for commerce and Industry, the Federal Mortgage Bank, the Bank of Industry and Nigeria Export and Import Bank (NEXIM).

8.4.4.1 The Nigerian Industrial Development Bank (N.I.D.B)

It was established in 1964. It came into being through the reconstruction of the investment corporation of Nigeria, which had been operating as privately owned firm since 1959. The CBN and the Federal Government jointly own N.I.D.B.

Functions:

i. Provision of medium and long-term finance for public and private sectors;
ii. Identification of investment priorities in the economy;
iii. Promotion and development of projects;
iv. Fostering the development of capital market in Nigeria by encouraging prospective borrower to list their shares in Stock Exchange;
v. Nominating technical and managerial advisers/partners to new industrial establishments;
vi. Serving as a channel for bringing into Nigeria investible funds from international organizations.

8.4.4.2 The Nigerian Agricultural and Cooperative Bank (N.A.C.B)

The NACB was established in 1973 to promote the agricultural sector of the economy. The cardinal reason for its establishment was to improve food production in Nigeria. This explained the reason why the bank maintained a branch at each state capital with its head office in Kaduna.

Functions

i. To enhance the availability of storage facilities and to promote the marketing of agricultural products;
ii. To grant loans for agricultural production include horticulture, poultry, farming and pig breeding;
iii. To grant loans to individual farmers, cooperative societies or other bodies (corporate and non-corporate) provided the loans requested for are viable and adequate security was in place;
iv. To do all such other things as may be deemed incidental or conducive to the attainment of the objectives of establishing the bank.

8.4.4.3 The Nigerian Bank for Commerce and Industry

The bank was established at the commencement of the indigenisation of the Nigerian economy in 1973. Thus, it has the mandate to provide medium and long-term finance for the acquisition, expansion and establishment of viable business by Nigerian individuals and corporate bodies. It was also expected to conduct merchant banking and commercial banking business as deemed fit.

Functions

i. Assisting customers to prepare feasibility reports;
ii. Providing medium and long-term loans to customers;
iii. Giving advice on alternative course of investment and the most viable choices;
iv. Advising and assisting on technical and administrative areas of business management;
v. Share underwriting;
vi. It functioned as a member of Lagos Stock Exchange.

8.4.4.4 The Federal Mortgage Bank of Nigeria (FMBN)

The bank was established in 1977 vide Federal Mortgage Bank Act No. 7 of 1977, to provide and stimulate the mortgage loans sector.

Functions

i. Encouraging and promoting mortgage finance institution whether at state or federal level in Nigeria;
ii. Supervise and control of mortgage institutions in Nigeria;
iii. Provision of long-term loan to Nigerians and mortgage institutions at the rates and terms approved by the Federal Government;
iv. Acceptance of savings and term deposits from mortgage institutions, trust funds and private individuals;
v. Providing technical, managerial and administrative services to companies engaged in manufacturing of building materials.

8.4.4.5 The Bank of Industry (B.O.I)

The Bank was established in 2002, to promote the growth and development of small and medium scale industries in Nigeria. It came into being out of merger of three development financial institutions. The Nigerian Industrial Development Bank (NIDB), the Nigerian Bank for Commerce and Industry (NBCI) and the National Economic Reconstruction Fund (NERFUND). The bank is owned solely by the Federal Government and has offices in all 36 states of the federation.

Functions

i. Provision of cheap financing and business support services to existing and new industries;
ii. Resuscitating of ailing industries and promotion of new ones in all the geopolitical zones in the country.

8.4.4.6 Nigeria Export and Import Bank (NEXIM)

NEXIM Bank was established by Act 38 of 1991 as Nigeria's Export Credit Agency (ECA). It is owned 100% by the Federal Government of Nigeria. The shares are held equally by the following institutions.

- Central Bank of Nigeria - 50%
- Ministry of Finance Inc. - 50%

Functions

i. To provide export credit guarantee and export credit insurance facilities to Nigerian exporters;
ii. To provide credit in local currency to the clients in support of export;
iii. Establishment and management of funds connected with export;
iv. Maintenance of a trade information system in support of export business;
v. Purchase and sale of foreign currency and transmission of funds to all countries;
vi. To provide investment of guarantee and investment insurance facilities to exporters;
vii. Provision of domestic credit insurance where such a facility is likely to assist exports.

8.4.5 Merchant Banks

Merchant bank came into existence in Nigeria in 1960. This was when the Philip Hill Nigeria Ltd and Nigeria Acceptances Ltd (NAL) were registered. The two companies performed similar functions which included:

i. Financing of commodity export by granting credits;
ii. Acceptance of large deposits from institutions and high net worth individuals.

The two companies merged in 1969 to avoid unnecessary competition and to strengthen their capital base Philip Hill absorbed NAL but the name of the absorbed institution, Nigerian Acceptances Limited was adopted and given to the new institution because it was more acceptable as a Nigerian company.

NAL remained the only merchant bank operating in Nigeria until 1973 when other merchant banks like ICON Merchant Bank, Chase Merchant Bank, the Nigerian-American Merchant Bank Ltd, were licensed.

Functions

i. Issuing House function: Merchant bank assists their corporate clients to raise capital in the Stock Exchange by preparing their applications and collecting capital for shares subscribed for;
ii. Arrangement of syndicated loans: syndicated loan is a joint contribution of funds by two or more merchant banks to assist a corporate organization seeking financial assistance. The merchant bank that leads the syndicate is called the lead bank;
iii. Provision of medium and long-term credits to customers to finance big projects;
iv. Equipment leasing: they rent out asset purchased to their customers;
v. Provision of foreign exchange service;
vi. Management/advice on portfolio of investment.

8.4.7 Micro-finance Banking

Micro-finance bank was established to provide financial services to the active poor, indigent and the financially excluded persons who are traditionally not served by the conventional banks. The

distinguishing features of micro-finance banks from formal or conventional banks are the following:

i. The small volume of loans advanced;
ii. The small value of savings collected;
iii. The absence of asset-based collateral;
iv. The simplicity of operations.

Functions

i. To provide financial services to a large segment of the active poor Nigerians which otherwise would have little or no access to financial services;
ii. To contribute to rural transformation;
iii. Create employment opportunities and increase the productivity of the active poor in the country;
iv. Render payment services, such as salaries, gratuities and pensions for various tiers of government;
v. Mobilize funds for intermediation.

8.5 REGULATORY FRAMEWORK OF BANKS IN NIGERIA

Regulation can be explained to mean a body of specific rules of agreed behaviour either imposed by government or an implicit agreement within the industry that limits the activities and business operations of financial institutions. These rules are provided to guide the conduct of stakeholders in the industry. For instance, there are laws that are put in place for the incorporation, establishment and operation of banks in Nigeria. There is also a process of obtaining banking license under BOFIA which is finalized by the authority of the Central Bank Governor under the Central Bank Nigeria Act. Apparently, regulation/supervision of banks is very important to prevent putting depositors' funds into risky assets.

8.5.1 Laws Regulating Banks in Nigeria

The under listed are the laws regulating the establishment of banks and banking business in Nigeria:

(a) Companies and Allied Matters Act, No. 3 of 2020 ("CAMA").
(b) Banks and Other Financial Institutions Act, Cap. B3 LFN 2004 ("BOFIA").
(c) Central Bank of Nigeria Act, Cap C.4 LFN 2007 ("CBN Act").

i. **Companies and Allied Matters Act:** Banks operating in Nigeria are corporate bodies. Therefore, they must be incorporated as a company under CAMA by complying with the provisions of the Act in respect of registration. The relevant sections are sections 18-42 of CAMA.

ii. **Banks and Other Financial Institutions Act**: Section 2(1) BOFIA stipulates that no person shall carry on any banking business in Nigeria except if it is a company duly incorporated in Nigeria and holds a valid banking license issued under the Act. The procedure for application for grant of license to undertake banking business is contained under section 3(1) (2) of BOFIA. NOTE also that the Central Bank Governor has unfettered discretion as to whether to issue or not issue license, however, any license to be

issued shall be with the prior approval of the Minister of Finance. For details, see sections 3(3) and (5) BOFIA.

iii. **Central Bank of Nigeria Act (2007):** The above Act in regulating banking business has the under listed as some of its salient provisions:
(a) Granting of operational autonomy to CBN to facilitate the achievement of its mandate and to enhance stakeholder confidence;
(b) Inclusion of price stability in the core mandate of the bank;
(c) Establishment of Monetary Policy Committee to facilitate attainment of the bank's objective of price stability;
(d) Furnishing of annual accounts and returns to the National Assembly;
(e) This Act gives the Bank authority to license and regulate the activities of credit bureau.

8.6 BILLS OF EXCHANGE

By the Bills of Exchange Act, 1882, the law relating to bills of exchange, promissory notes, and cheques was codified. A bill of exchange is 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 certain sum in money to or to the order of, a specified person or to bearer (s. 3).
A cheque is a bill of exchange drawn on a banker payable on demand, and the provisions of the Act applicable to a bill payable on demand apply to a cheque unless otherwise provided (s. 73). The person signing the bill is called 'the drawer,' the person to whom it is addressed 'the drawee' and the person to receive the money 'the payee.' When the drawee has undertaken to pay the bill he is called 'the acceptor.' Note that the Nigeria version of the 1882 Act is the Bill of Exchange Act 1990.

8.7 NEGOTIABLE INSTRUMENTS

An instrument is simply a document between a party or parties under which right and liability exist. Such documents are usually written to be enforceable in the courts. Consequently, Negotiable instruments are written documents having money value e.g. bill of exchange, cheques e.t.c. which is transferable by mere delivery or delivery plus endorsement. Through such delivery, all legal rights of the transferor pass to the holder of the instrument. Simply put, negotiable instruments are contract in writing, substitutes for money or financial instrument. A negotiable instrument is a financial instrument, the full legal title to which is transferable by mere delivery (in case of bearer instrument) or by endorsement and delivery (for order instrument) with the effect that its complete ownership and legal interest pass to the transferee who shall be capable of having legal title superior to the title of the transferor provided he takes the instrument complete and regular on the face of it, before it is overdue, in good faith and for value.

The main examples of negotiable instrument commonly used for business transactions today are:

i. Bills of exchange
ii. Cheque
iii. Promissory note
iv. Bearer bonds

v. Treasury bills
vi. Negotiable certificates of deposits
vii. Dividend warrant.
viii. Bankers' draft.

The following are the attributes or characteristics of negotiable instruments:

i. Title passes by delivery only or by endorsement and delivery;
ii. A transferee taking such an instrument in good faith and for value can acquire a better title than possessed by the transferor;
iii. The holder can sue in his own name;
iv. The holder needs not give notice to prior parties to establish his title.

8.7.1 CHEQUES

Cheque is a written order by which the customer requires his banker to repay the money which has been lent to him, in law, it is technically described as a mandate, that is, an authorization to take certain action on his behalf. By the term of this mandate the customer may require the banker to make the payment in question either to himself or to a third party.

A cheque is defined in section 73 of the Bill of Exchange Ordinance 1958 as a bill of exchange drawn on a banker payable on demand. When combined with the definition of a bill of exchange a cheque may be defined as an unconditional order in writing, signed by the drawer, requiring the bank to whom it is addressed, to pay on demand, a sum certain in money to or to the order of a specified person or bearer. A cheque has the advantage of eliminating the need to carry large sums of money. Also, cheques serve as evidence of payment before a receipt is obtained and where it is in fact not possible to obtain a receipt.

8.7.1.1 Types of Cheque

A cheque may be a bearer or order cheque.

Bearer cheque: it is a cheque drawn payable to bearer or endorsed in blank. The implication is that the cheque is drawn to a non-existing person. Bearer cheque can be legally transferred by mere delivery without any endorsement to ascertain that the payee actually collects the proceeds of the cheque.

Order Cheque: it is a cheque drawn payable to a named or specified person. Consequently, before such cheque can be transferred on proceed received, it needs formal endorsement.

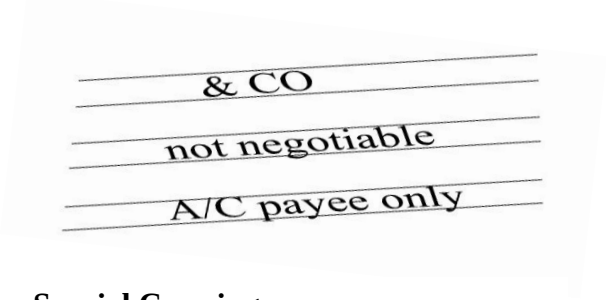
8.7.1.2 Issuance of Cheques

Cheques may be issued 'crossed' or 'open.' It is crossed if two transverse lines are drawn across it with or without the words and co or other inscriptions. Where the cheque is not crossed, it is said to be open.

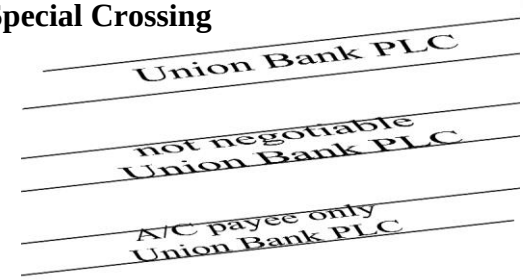
Types of Crossing

There are two types of crossing – general crossing and 'special' crossing. A cheque is specially crossed when the crossing bears the name of a bank, the crossing being special to that bank. All other types of crossing are general crossing as shown below.

General Crossing



Special Crossing



Advantages of Crossing a Cheque

i. To ensure that it cannot be cashed across the counter;
ii. To make it more difficult for a thief to obtain the proceeds of a stolen cheque;
iii. To give enough time to stop payment of the cheque either by the drawer or payee;
iv. To trace the beneficiary of the cheque to the collecting banker.

Disadvantages of Crossing a Cheque

i. it may be difficult for the payee to convert the cheque into cash if he does not have a current account;
ii. Immediate availability of cash is not possible since the payee has to wait for the cheque to be cleared through clearing system;
iii. Accessibility to cash by the payee may be stopped by the drawer before clearing of cheque.

8.7.1.3 Meaning of Not Negotiable Crossing-

A cheque is presumed to be negotiable unless marked otherwise but once so marked subsequent holders can only take it subject to equity. A cheque crossed generally but contains the word "not negotiable" ceases to be a negotiable instrument as it cannot be further negotiated to another party. However, it can still be transferred.
It remains that where a person takes a crossed cheque which bears on it 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. Thus, if the transferor has a defective title like having taken the instrument as a gift and would not normally be able to sue on it, the transferee will also not be able to sue.

8.7.1.4 Meaning of Account Payee Only Crossing

The crossing account payee only crossing as is commonly found on cheques, does not convey any clear meaning but it is believed to be an instruction to the collecting banker to ensure that in the

light of the crossing the cheque is not collected for any account other than the account named payee. Due to the fact that the use of the crossing has become fairly widespread, the collecting bank who ignores it may be liable.

8.7.1.5 Cheque Truncation

Cheque truncation involves stopping physical movement or exchange of cheques by banks during clearing period at Central Bank of Nigeria. It involves the conversion of physical cheque into electronic form for transmission to the paying bank with the aim of eliminating cumbersome physical presentation of the cheque and saving time and processing costs. The implementation of cheque truncation system has reduced clearing period from three working days to two i.e. transaction day and clearing day.

Benefits of Cheque Truncation

i. It enhances efficient and cost-effective processing of clearing cheques;
ii. It reduces processing time for clearing cheques;
iii. It offers better reconciliation between banks;
iv. It will reduce clearing fraud or missing of clearing cheques;
v. It will reduce the cost associated with paper-based payment instrument.

8.8 PROMISSORY NOTES

A promissory note is unconditional promise in writing made by one person to another signed by the maker, committing to pay, on demand or a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to a bearer. A promissory note involves two parties the 'maker' and the 'payee.' The maker of a promissory note is primarily liable.

It can also be explained as a written instrument containing an unconditional promise by a party called the maker, who signs the instruments to pay another, called the payee, a definite sum of money either on demand or at a specified or ascertainable future date. A promissory note differs from an I.O.U in that that the former is a promise to pay and latter is mere acknowledgement of debt.

8.9 LIABILITIES FOR FORGERY

Generally, liabilities of the paying banker may come under three headings:

i. Wrongful dishonour of cheque i.e. unjustifiable refusal to pay a cheque which ought to have been paid;
ii. Wrong delivery: where a bank pays a cheque to a wrong person, the bank may be liable to the true owner for conversion;
iii. Wrong debit: where a cheque is debited to a customer's account which in fact should not have been debited – e.g. payment already countermanded, post-dated or forgery of drawer's signature.

Specifically, a paying banker will be liable on forgery as according to S 24 Bills of Exchange Act (1990) where a signature on a bill is forged or placed without the authority of the person whose

signature it purports to be, the forged or unauthorized signature is wholly inoperative and no right to retain the bill or to give a discharge or to enforce payment against any party thereto can be acquired.

In a situation where the forgery is expertly done and the banker fails to distinguish the forged signature the banker would still not have any defence, because a forged cheque is not the mandate of the customer, therefore the amount cannot be debited into his account, unless the customer adopts the forger or stopped by his conduct from denying the forged signature.

8.10 CIRCUMSTANCES WHERE A BANK CAN REFUSE TO HONOUR A CHEQUE

The paying banker is the banker to whom the cheque is addressed for payment i.e. the drawee of the cheque and it is under an implied obligation to pay cheques drawn on him by the customer provided that certain conditions are met.
However, there are some circumstances under which a paying banker can refuse to pay cheque drawn by its customers, some of which are the following:

i. Drawer's signature irregular
ii. If amount in words and figure differs
iii. Cheque post-dated
iv. Stale cheque
v. Upon receipt of notice of Garnishee order
vi. When there is countermand of payment by the customer
vii. Upon receipt of notice of death of the customer.
viii. When customer goes bankrupt
ix. When there is no sufficient fund in the account
x. When there is material alteration on the cheque
xi. Account closed
xii. Cheque mutilated

8.11 BREACH OF BANKER – CUSTOMER RELATIONSHIP

The banker-customer relationship is a voluntary one. It arises and depends on its nature of relationship. Therefore, the banker and customer from the nature of relationship impose corresponding duty on other party to do or not do certain things in order to make each party to enjoy his right. For instance, the bank's duty of secrecy is a legal one and this duty extends to all information the bank may come across either directly from the customer or from third parties (e.g. through references) and to information that may be adduced in the course of its transactions with the customer not only during the life of the account but also after the closure of the account see ***Foster v. Bank of London*** (1962), ***Tournier v. National Provincial and Union Bank of England Ltd*** (1924).

It is the right of the customer to deposit or pay cash, cheques and other instruments into his account and the corresponding duty for the bank is to collect cash, cheques and other payable instrument deposited by its customers- ***Dike v. ACB Ltd*** (2000) NWLR pt. 657, 445. If a customer seeks to withdraw he must give a written instruction to the bank and the bank must abide by the customer's

written mandate provided the account is funded or credit arrangement has already been agreed- ***UBN v. Nwoye*** (1996).
The general rule is that if a customer is owing more than one debt to the same bank he has the right to give instruction as to how the money paid in, is to be applied to settle the debt he wants to pay off or reduce the debt, it becomes binding and the banker must not deviate and the debt being paid need not be the oldest- ***British and French Bank Ltd v. Opaleye*** (1962) ALL NLR 26.

Like any other contract, bank-customer relationship can be terminated by either side; the bank is however expected to give reasonable notice before closing account. What is reasonable will depend on the nature and state of the account, the size of customer's business, the age of the account and other relevant factors. In ***Prosperity Ltd v. Llyods Bank*** (1923) a month's notice was considered insufficient for closure of plaintiff's account. The plaintiff in the case as a company, when opening the account arranged with the defendant bank that the proceeds of a subscription of the company's 'snowball' insurance scheme would be received by the bank. The insurance scheme because of its items attracted unfavourable press criticism and the name of the bank was attached. The bank then decided to terminate the relationship by giving a month's notice when the account was having a credit balance of 27000 and when subscriptions were still coming in. A month's notice was considered inadequate.

The nature of banker-customer relationship was put to test in ***Osawaye v. National Bank of Nigeria Ltd*** (1973) NCR 474, the trial judge Ogbobina J. concluded that the relationship of a banker and its customer is that of debtor and creditor but that there is no obligation on the part of the bank to seek out the customer. The banker's obligation is only to pay when the customer demands or direct him to pay some other person or apply whatever may be due to him or part thereof in some other manner.

Also, in ***National Bank of Nigeria v. Maja and 2 others (trading as Lagos Fishing Company)*** (1967) it was affirmed that: Banker-Customer relationship is contractual, consisting of general and special contracts arising from particular requirements. The expressed terms over-ride the implied terms and in case of breach it will give rise to a claim. Nigerian courts have decided on cases where bank drafts were dishonoured by banks. In ***First African Trust Bank Plc v. Partnership Investment Co. Ltd*** (2004) 18 NWLR (pt. 851) the Supreme Court of Nigeria held that a bank has the right to dishonour its draft on grounds of fraud and want of or failure of consideration. However, in ***United Bank of Africa Ltd v. Ibhafidon*** (1994) NWLR (pt. 318) 90, it was held that a bank draft is payable at sight regardless of whether the person on whose behalf the draft was issued held money in his account at the material time or not. The court held that it is non-issue whether the customer's account was opened with a forged draft or not. The court took the view that the bank ought to honour its draft already issued to the payee and then proceed against the customer to recover its money.
Note that it is a commercial truism that a banker's draft, as distinct from a cheque, is generally treated as equivalent to cash and it embodies the bank's primary and unconditional undertaking to honour its own instrument. This notwithstanding the position changed in ***First African Trust Bank Plc v. Partnership Investment Co. Ltd***. (2004).

8.12 CONCLUSION

The law of banking is very central to the thorough understanding of business law. Indeed, it enjoys a pre-eminent place in the study of business law as most if not all major business transaction will be cumbersome if not impossible if the guarantee of payment for goods and services is only upon the basis of cash especially if one imagines the volume of cash to be transported for the conclusion of multi million Naira business transactions.

8.13 ILLUSTRATIVE AND PRACTICE QUESTIONS

i. Explain the relationship between banker and customer?
ii. What are the services offered by Federal Mortgage Bank of Nigeria?
iii. Distinguish clearly between a "bearer" cheque and an "order" cheque.
iv. Enumerate merits and demerits of crossed cheque.
v. What is bill of exchange?
vi. Elucidate the relevance of the under-listed in regulating banking business in Nigeria:
a. Companies and Allied Matters Act (2004)
b. Bank and other Financial Institution Act (2004)
c. Central Bank of Nigeria Act (2004)
vii. Outline and explain briefly circumstances under which cheque issued by customer may be dishonoured by banker.

MCQ

1. Which one of the following actions may a customer take against a bank for wrongful dishonour of the customer's cheque?
A. Sue for breach of contract
B. Sue for moratorium
C. Sue for fraud
D. Sue for theft

2. The most remarkable difference that distinguishes a bill of exchange from a promissory note is? _____
A. Certainty
B. Convertibility
C. Value
D. Longevity

3. The number of parties involved in a bill of exchange is?
A. 3
B. 6
C. 9
D. 12

4. In case of wrongful dishonour of a cheque of a customer by a banker having sufficient fund to the credit of the customer, the court may award?

A. Ordinary damage
B. Nominal damage
C. Exemplary damage
D. Contemptuous damages

5. This is NOT a reason for dishonouring a cheque:
A. Garnishee order.
B. Wrong domiciliation
C. Wrong signature
D. Drawer deceased

8.14 CASE STUDY

Allan is a renowned entertainer who used to be an enormously rich man but has now fallen on bad time. He had a very bad press for marrying the wife of his deceased friend due to the unconfirmed allegation that he was involved in his friend's death. Due to this, his bankers- Messrs. Aladdin Bank Plc. gave him a notice of one month within which to close his account with them. At the time of receiving Aladdin Bank's letter, Allan had a credit balance #50 million. Allan was disturbed and sought your advice on the ultimatum because he has been banking with Aladdin Bank Plc. for over thirty years. Advise him.

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CHAPTER NINE

CHAPTER NINE: INSURANCE LAW

9.0 INTRODUCTION

Every individual is exposed to risks, these risks known as perils in insurance contracts extend to life, properties, businesses and homes of individuals. This reason alone is enough to suggest that insurance policies is very important to man, in order not lose his life, properties, assets or businesses without any form of protection against an unfortunate occurrence. The primary function of insurance therefore is to ensure that the financial losses of the individual are fairly and equitably distributed over the insured community, the policy holders or the insured pay premiums into a common pool, out of which the unfortunate few, who suffer loss, are compensated.

9.1 LEARNING OBJECTIVES

i. Readers will understand the various principles applicable to insurance policies; and when an insurance policy is or has becomes void.
ii. Readers will know the various types of insurance policies available to the populace.

9.2 INSURANCE CONTRACT

Insurance contract is an arrangement in which one party, the insurer, accepts significant risk from another party, the policyholder, to compensate the policyholder if a specific uncertain future event occurs. Insurance contract can also be described as a contract whereby the party called the 'insurer' promises in return for a money consideration called the 'premium' to pay to the other party called the 'insured' or the 'assured' a sum of money or to provide him with some corresponding benefit, upon the occurrence of one or more specified events- see ***Prudential Insurance Company v IRC*** (1904). Similarly, insurance can also be defined from the point of view of an individual and from the point of view of the insurer. To an individual, it may be defined as a risk transfer mechanism or an economic device whereby a person called the insured/ assured transfers a risk of a possible financial loss resulting from unforeseeable events affecting a property, life, or body to a person called the insurer for consideration. From the point of view of the insurer, insurance may be defined as a mechanism through which risk is distributed among the group of persons who are exposed to the same type of risk.

9.3 TYPES OF INSURANCE

Insurance contract is usually classified into two:
i. Life Insurance Business
   a. Individual Insurance Business
   b. Group Life Insurance Business
ii. General Insurance Business
   a. Fire Insurance Business
   b. Accident Insurance Business
   c. Motor Vehicle Insurance Business

d. Others are marine and aviation insurance, oil and gas insurance, engineering insurance, bonds credit guarantee and surety-ship insurance business; and miscellaneous-insurance business.

i. **Life Insurance**: The insured life is insured for a consideration called premium. The insurer undertakes to pay a certain benefit in terms of money upon the death of the insured.
ii. **Fire Insurance**: This policy is intended to compensate the insured if the property insured is destroyed by fire. Note that the fire incident must not have been caused vide recklessness.
iii. **Accident Insurance**: It is intended to compensate the injured or his family if as a result of an accident, the insured dies.
iv. **Motor Vehicle Insurance:** This is mostly intended to receive compensation for injuries sustained or damaged done to a vehicle insured. We have a 3rd party insurance which protects the owner of the vehicle against the 3rd party risk and the comprehensive motor vehicle insurance which cover all parties to the risk.

9.4 FORMATION OF INSURANCE CONTRACTS

i. Offer:
Insurance is a contract; therefore, the general principles of the law of contract are also applicable thus, there must be an agreement between the parties on the principal terms, which will include the risk to be covered, the insured subject, the duration of risk cover, the premium and the benefit due to the insured in case of loss. It is likely that the offer is made by the prospective insured by completing a proposal form.

ii. Proposal Form:
It is a standard form consisting of important details connected with the insurance usually given out to the proposed insured for completion. It is after the satisfactory assessment of the information provided by the insured that the insurance company will calculate a premium based on the value of the property or the extent of risk to be taken and the prospect advised- see ***Ngillari v National Insurance Co. of Nigeria*** (1998) NWLR pt. 56.

iii. Acceptance:
Payment of the accessed premium by the proposed person and the receipt of the premium by the insurance company amount to an acceptance; there can be no valid acceptance by the insurance company without the payment of premium by the proposed person.

iv. Consideration:
Immediately the premium is paid, the prospect is deemed to have furnished consideration. Consideration must move from the insured to the insurer-see ***Ajaokuta Steel Co Ltd & Ors. v. Corporate Insurers*** (2004) 11 CLRN.

v. Intention to Create Legal Relations:
Once the proposed person makes an offer through the proposal form, followed by payment of premium, it is convenient to conclude a valid contract has been entered into. At this stage, it could

be assumed the parties intend that the relationship shall be legally binding on them. This implies that an insurance contract cannot be gratuitously constituted.

Vitiating Elements
The following are some of the elements that would vitiate a contract of insurance to be void or voidable, namely capacity, legality and illiteracy.

Capacity
Parties to an insurance contract must be of age and must not be insane. The only exception to capacity relative to age is where the parents of an infant enter into a contract of insurance in respect of necessaries like educational contract on behalf of the child.

Legality of Object
The subject matter of insurance contract must be lawful. For instance, smuggled or banned items cannot be the subject of insurance- sees ***Ajaokuta Steel Co. & 3 Ors. v. Corporate Insurers*** (2004) See also ***Gray v Barr*** (1977) 2 ALL ER 949.

Illiteracy
Illiteracy could lead to avoidance of insurance contract in view of the Illiterate Protection Law- see Illiterate Protection Law Cap 70 Laws of Former Bendel State 1976 as applicable in Edo & Delta States.

Parties to Insurance Contract: The under-listed are the parties to an insurance contract.

a. **The Insured: t**he insured is the party that makes the offer through the proposed form to the insurer to be insured.

b. **The Insurer:** the insurer is the party that issues out the insurance policy and agrees to make compensation to the insured in the event of occurrence of any loss envisaged in the insurance contract.

c. **Agent:** an insurance agent is the middle man between the insurer and the insured in the formation of contract of insurance. According to Section 58(2) Insurance Act Cap. 117 LFN, 2004, an insurance agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant. The Act also provides that such an agent must have a certificate of proficiency issued by the institute of insurance and must be issued with a license.

d. **Broker:** a broker is an insurance expert, he assists the insured in his dealings with the insurer. The insured could pay his premium through the broker. A broker occupies a fiduciary position and is therefore expected to exercise a very high degree of honesty and diligence.

Section 36(2) Insurance Act (2004) provides that an insurance broker must have the prescribed qualifications:

i. His firm must be a limited liability company duly registered under the Companies and Allied Matters Act; and

ii. Has paid up capital of at least #5,000,000.00.

e. **Loss Adjusters:** these are insurance experts who are usually engaged by the insurer to assist in adjusting the claim presented by the insured. Section 45 of the Insurance Act provides that a loss adjuster must be registered. Other qualifications which a loss adjuster must possess are the:

i. Duly registered as limited liability Company under CAMA;
ii. With a capital of #5,000,000.00;
iii. The company must also be registered with the Chartered Insurance Institute of Nigeria.

9.4.1 TERMS OF CONTRACT

Conditions

Conditions are certain requirements which the insured may be required to comply with either before the occurrence of the insured risk or after a loss might have been sustained. The former is called conditions precedent to liability, while the latter is called conditions subsequent to liability.

Conditions Precedent to Liability

These are things that the insured has to do before the policy comes into being or existence. If the condition is not complied with, there may be no cover for the loss. In ***Roberts v Eagle Start Insurance Co. Ltd*** (1960) a burglary policy made it a condition precedent to the insurance company's liability that a burglary alarm shall be installed and be in operation whenever the premises was closed or left unattended. The premises were broken into and some furs were stolen. In any action on the policy, it was held that the insured could not recover because he had not put the alarm into operation before he left the premises.

Conditions Subsequent to Liability

These are conditions to be fulfilled after the loss has occurred. Where they are not fulfilled, the policy could be avoided- see ***Falbel v Federated Insurance Association Ltd*** (1970) 2 ALL ER 32.

Warranties

These are clauses which insurers insert in policies by which the right of the assured to recover is made to depend upon the existence of a given fact or state of things defined in the clause without considering the matters covered by the warranties.

Particulars of Insurance Contract include:

i. **Proposal Form**: The prospect is required to complete this form. It contains important information which will assist the insurance company to determine whether to insure the person or property or not.
ii. **Cover Note:** It is a temporary document issued by the insurer to the insured pending the issuance of insurance policy. It is only valid for the period stated on it. Cover notes are usually in force for 30 days.
iii. **Premium:** Premium is the money paid by the proposer to the insurance company.
iv. **Policy:** This is a document that contains the contract of insurance. It is an evidence of the existence of an insurance contract. It usually contains names of the parties, value of the policy, description of the property insured, value of the described property. The document is often signed by the insurer.

9.5 BASIC PRINCIPLES OF INSURANCE

i. Principle of Utmost Good Faith

In any commercial relationship between two parties, it is expected of them to observe good faith in their dealings.
This implies that:

i. Each party is required to tell the other the absolute truth;
ii. This legal obligation is not limited to questions asked;
iii. Any failure to disclose information even where no question(s) borders on such still gives the aggrieved party the right to regard the contract as void.

This duty also covers life insurances, a truthful health disclosure is required, also in the case of the insurer, all facts which can influence the decision of the insurer at the time of entering the insurance contract must be revealed. In ***Northern Assurance Company Ltd v. Stephen Idugboe*** (1966) I ALL NIR 88 the non-disclosure by the plaintiff that he insured the same vehicle with another insurance company contrary to the requirement of disclosure was held to be a ground for failure in his case for payment of damages.

ii. Principle of Insurable Interest

The basis of entering into an insurance contract is to protect the insured from losing an interest he has in a particular property, it can thus be said that insured must have insurable interest in the property being insured- see ***Macaura v. Northern Assurance Co. Ltd***. (1925) AC 219. Insurable interest is defined as 'the legal right to insure arising out of a financial relationship recognized under the law between the insured and the subject matter of Insurance.'

iii. Principle of Indemnity

Contract of insurance is a contract of indemnity, the purpose of which is to protect individuals, businesses against unforeseeable losses, and to indemnify in the event of financial losses.

iv. Principle of Subrogation

Subrogation applies to all classes of insurance except life assurance, personal accident and sickness insurance. The insurer on payment of a sustained loss is entitled to be placed in the position of the insured by succeeding to all his rights and remedies against third parties in respect of the subject matter of the insurance. The principle is that an insured cannot recover more than his loss. Where the loss is caused by the fault of another or where by contract another person is liable to bear the loss insured against, and the insured claims has been paid, the insurer then succeeds to the rights of the insured against the third party.
Thus, the insurer could sue and/or seek his remedies against the third party, but he will be doing so on behalf of the insurer who are said to be subrogated to his rights. In ***Castellain v. Preston*** (1883) 11 Q.B.D 560; the defendant signed a contract to sell a house which had been insured against fire. The house was damaged by fire before the completion of the sale, and the insurers in ignorance paid the defendant £330. Thereafter, the defendant received a full purchase price for the house. It was held that the insurers were entitled to recover the £330 paid to the defendant.

Limitations on the right of subrogation

1. The right does not arise unless and until the insurer has paid the sum payable under the policy.

2. The insurer cannot recover more than the amount he has paid- ***Yorkshire Ins. Co. Ltd v. NIBET Shipping Co Ltd.*** (1961) 2 All ER 487.

v. The Principle of Contribution

Contribution is defined as; the right of insurers who have paid a loss to recover a proportionate amount from other insurers who are also liable for the same loss. This often occurs when the risk involved is high and one insurance company may not want to take such risk 'alone or even the insured may not want to entrust such risk to only one insurance company.

Conditions for Contribution

1. Two or more policies of Indemnity should exist.
2. The policies must cover a common interest.
3. The policies must cover common risks which is the cause of the loss.
4. The policies must cover a common subject matter.
5. The policies must be in operation at the time of loss.

The policies operated with the different insurance companies do not have to be identical but they must overlap having the same subject matter and risk (common peril) covered. The insurers may provide that in the event of any loss, they are liable only to payment of their "Rate-able proportion" of the loss. Hence the insured will have to lodge a claim with all his insurers if he wants full indemnity.

9.6 DOUBLE INSURANCE AND RATABLE PROPORTION,

Rate-able proportion simply means proportions of the sum to be paid by each insurance company in event of a loss on perils similarly covered by the various insurance companies.

Double Insurance

Double insurance occurs where a particular business or chattel has been insured by more than one insurer on the same risk. It has the drawback of delay in settlement of claims as the insurance companies might need to decide when and what to pay. Another disadvantage is that the insured may be paying higher premiums on the double insurance as against a single insurance contract.

Surrender Value

It is the cash value of the policy payable to the insured if he decides to terminate the contract before the maturity. Simply put, it is a concept that allows the insured to collect his contribution before maturity date.

9.7 REINSURANCE

Reinsurance means to insure again. It is a new insurance policy embarked on by an insurer, on the same risk already insured, to indemnify the insurer in whole or in part from his previous liability. The original insurer is called the 'ceding company,' while company that gives the reinsurance cover is called 'the reinsurer.' However, that the reinsurer contract is strictly between the ceding company and the reinsurer. There is no privity of contract between the insured and the reinsurer.

There are two types of Reinsurance:
1. **Facultative reinsurance-** the reinsurer is under no obligation to accept any reinsurance proposal from the ceding company, and is free to accept or reject any proposal from the ceding company.
2. **Treaty reinsurance-** the reinsurer is duty bound by contract to reinsure the ceding company.

9.8 ENFORCEMENT OF INSURANCE CLAIMS

There is firm regulatory framework for insurance business in Nigeria, mainly for the protection of the public from unscrupulous insurance operators and provide confidence in the insurance industry. In enforcing insurance claims the prominent terms in contract of insurance are subjected to judicial interpretation. Some of such terms are conditions precedent to liability, conditions subsequent to liability, misrepresentation and assignment of policies.

Conditions Precedent to Liability

These are duties the assured must perform before the policy can come into existence. Where the assured defaults, there may be no successful claim for loss incurred- see ***Roberts v. Eagle Start Insurance Co. Ltd*.** (1960).

Condition Subsequent to Liability

These are duties the assured must perform once he incurs loss, without which the claim may not be successful. In ***Falbel v. Federated Insurance Association Ltd.*** (1970) 2 ALL ER 32, in an employer's liability insurance policy, there was a condition that 'every writ served on the employers shall be notified or forwarded to the insurance company immediately.' An injured employee's solicitor wrote to the insurer if the writ should be served on the employer. The writ was served on the employer, who in turn failed to serve the insurance company. The insurer was served six weeks after the assured claimed against the insurers. They denied liability on the ground that there was a breach of condition, held that the insurance company could avoid liability. Courts evaluate the construction of conditions in insurance policies before upholding them, the proof of a breach of such condition subsequent or precedent rests on the shoulder of the insurers.

Misrepresentations

Statements of facts which are made during negotiations are known as representations. Where these statements are untrue, they are called misrepresentations. Misrepresentations could be fraudulent where intentional and innocent where they weren't said intentionally to mislead the insurer. Statement of belief does not automatically qualify for misrepresentation where they turn out to be false, what is necessary is if the belief was sincerely held by the assured. To proof misrepresentation, it must be shown that the person making the statement never entertained such belief yet made such remarks.
Half-truths also amount to misrepresentations, a statement though true on the face of it may be false when related to other relevant facts. In such a case, liability by the insurance company may be avoided. Misrepresentation of material facts will undoubtedly give insurers the option to avoid liability, where the facts misrepresented are immaterial once the insurer may not avoid liability. Where a policy makes a condition precedent premised on the accuracy of certain facts, it may be irrelevant if such facts are material or not before the insurer validly declines liability.

Assignment of Policies

A policy holder called an 'assignor' may transfers the policy to a third party called the 'assignee' so as to enable the assignee to enforce the policy in his own name. A policy of insurance is a personal thing and does not evolve with the subject matter of the policy even if ownership of such subject matter changes. However, the policy can be transferred via special agreements where the consent of the insurance company is sought and obtained, where there is an express provision prohibiting the transfer of a policy without the consent of the insurer the insurer can avoid liability. In such a situation, the policy remains in force until the insurance company avoids liability. Where consent is sought and obtained, the third party can validly lay a claim where he incurs loss on the subject matter of the assigned policy.

9.9 CONCLUSION:

The ultimate aim of insurance is to restore an affected party/policy holder, who is not in arrears in the payment of his premium to a particular insurance company to the position which was close to where he was before the mishap. Thus, the parties must be aware of their respective rights and obligations under the insurance contract.

9.10 ILLUSTRATIVE AND PRACTICE QUESTIONS

i. Name three (3) compulsory insurance schemes in Nigeria.
ii. What are the disadvantages of double-insurance?
iii. Explain how insurance principles curb any act of profit making by the insured.
iv. What do you mean by insurable interest?
v. What are the benefits of insurance and re-insurance?

MCQ

1. The sum of money paid by an insured in a contract of insurance is known as _____ ?

A. Subscription
B. Premium
C. Installment
D. Refund

2. This contract is of ultimate good faith:
    A. a contract of insurance
    B. a contract of guarantee
    C. a contact of bailment
    D. none of the given options is correct

3. An insurance agent who assists an applicant to complete an application or proposal form for insurance shall be deemed to have done so as the agent of the applicant. The section that makes this provision is

A. 58(2) Insurance Act.
B. 56(3) Insurance Act.
C. 53(2) Insurance Act.

D. 55(1) Insurance Act.

4. Subrogation means:
A. The insured may only claim what was his
B. Agent cannot benefit from the insured claim
C. The insured could not benefit above what he lost or was destroyed
D. The insured may only claim in proportion if he has more than one insurer

5. The assets and qualification of an insurance broker is provided for under?
A. Section 36 Insurance Act.
B. Section 37 Insurance Act.
C. Section 30 Insurance Act.
D. Section 40 Insurance Act.

9.11 CASE STUDY

Akpata, deceased, had taken out a life assurance policy. Prior to the taking out of the policy he had a stomach trouble about which he consulted his doctor who made no diagnosis to indicate that the assured had gastric wound of which he subsequently died. His widow, the beneficiary approached the insurance company to lodge her claim, but the latter refused to honour its obligation on the ground that Akpata failed to disclose a material fact. Advise the parties.

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CHAPTER TEN

CHAPTER TEN: FORMS OF BUSINESS ORGANIZATION I

10.0 INTRODUCTION

Business is an important aspect of human existence as people interact and exchange goods and services on a daily basis. It is always imperative for investors to make profit in whatever business he engages in. Thus, to enhance new product development, marketing network, capital accumulation e.t.c., individuals come together to form enterprises in order to enjoy certain privileges and make profit. This chapter analyses the different types of business ventures, stating their obvious and not so obvious advantages and otherwise.

10.1 LEARNING OBJECTIVES

At the end of this chapter, readers will be able to:
i. Identify with the various types of business organizations available.
ii. Distinguish between the various types of business especially based on their powers, privileges and liabilities.
iii. Know the advantages and disadvantages of engaging in particular business organizations.

10.2 COMPARISON OF THREE BUSINESS ORGANISATIONS

10.2.1 SOLE PROPRIETORSHIP

What is Sole Proprietorship?
Sole proprietorship is where a business enterprise is exclusively owned, managed and controlled by a single person called the sole proprietor. This sole proprietor is responsible for the daily running of the business as he alone makes all the decisions and takes all actions concerning the business enterprise; hence enjoy all the profit and bear all the loss of the business enterprise. Any legal action against the enterprise is directly against the sole proprietor.

Features of a Sole Proprietorship Enterprise

Single Ownership: Establishment of this type of business is done by one person called a 'sole proprietor.' The Sole Proprietor:
i. bears all the risk, hence has unlimited liability;
ii. takes charge of the day to day management of the business.

10.2.2 ADVANTAGES OF A SOLE PROPRIETORSHIP

i. Easy to Establish: It requires no legal formalities or registration, also the capital required to set up such enterprise is usually small.
ii. Decision making is easier and faster: In a sole proprietorship, the proprietor can take faster decisions on his own without referring to and waiting for another person's authority.
iii. Profit Sharing: The sole proprietor does not share the profit of the business with anybody; all the profit made in the business enterprise belongs to him.
iv. Business Secrets: The strategies of the business operation are often kept by the sole proprietor.
v. Employment: It creates employment for the support staff, sole proprietor and members of his family.

vi. Better Maintenance: The proprietor is directly involved in the management of the business and will naturally desire to manage it better than another person's business.

DISADVANTAGES OF SOLE PROPRIETORSHIP

i. Limited Capital: It is very difficult most times for one man to raise adequate capital to establish and run the business.
ii. Lack of Continuity: The continuity of the business depends on the life and financial stability of the sole proprietor. A situation of illness or death of the proprietor may bring an end to the business enterprise.
iii. Work Load: Heavy workload is associated with this type of business; staff and the proprietor are often overworked or stressed.
iv. The sole proprietor bears all the loss in case the business is being wound up, his personal property may also be used to settle business debts.
v. Lack of Better Decisions: There is no cross-fertilization of ideas in this type of business enterprise. This is because the proprietor only thinks and decides on what to do and can make awkward decision(s).
vi. Restricted Expansion: The growth of the enterprise is limited and can't really grow beyond some point in view of little capital and other attendant constraints associated with sole proprietorship.

10.3 PARTNERSHIP

A partnership is defined by Section 1(1) of the English Partnership Act 1890 as the relation which subsists between persons carrying on business in common with a view of making profit. Partnership agreement is therefore a relation between two or more persons who come together to form a business organization with the aim of making profit. Partnership business is regulated by the Partnership Act 1890, while its registration is governed by Part C and D of the Companies and Allied Matters Act 2020. Partnership agreement may be formal or informal. It is formal, if terms of the partnership are reduced into writing in order to protect the interest of the partners.

Features of a Partnership

i. Membership: There must be at least two (2) members or partners required to start a partnership business.
ii. There may be an agreement, a deed of partnership which guides the relationship between partners.
iii. Lawful Business: The subject matter of the partnership organization must be to carry on a legal business.
iv. Profit: The main objective of a partnership enterprise is for the sole aim of making profit.
v. No Separate Legal Entity: A general partnership enterprise cannot sue or be sued in its partnership name; the partnership is identified by the individual names of partners.
vi. Lack of Continuity: A partnership comes to an end on the death, lunacy or bankruptcy of any of the partners.
vii. Restriction on Transfer of Interest: A partner must seek the consent and approval of other partners before he can sell or transfer his interest i.e shares to an outside party.

10.3.1 FORMATION OF PARTNERSHIP

It is instructive to state that some elements of valid contract such as capacity, intention to create legal relation e.t.c. apply to partnership agreement. Therefore, in forming a partnership agreement, the following should be noted:

i. The purpose for which a partnership is formed must be legal. Partnership agreement formed for unlawful purpose will not be registered by the Registrar of Business Names.

ii. The partners must have capacity to form the partnership which includes being of age, where the partnership is for professional practice, the required qualification must be in place.

iii. A person of unsound mind and an undischarged bankrupt are not qualified to join a partnership.

iv. An infant (i.e. a person below 18 years) may join a partnership but will not be bound by debt of the firm during his infancy.

v. Name similar to any trade mark registered in Nigeria is prohibited (sec 852 CAMA 2020).

vi. The minimum number of persons that can form a partnership is two while the maximum is twenty, except partnership of legal practitioners and chartered accountants (sec 19 CAMA 2020).

vii. Partnership agreement may be formal or informal.

viii. Registration of partnership is not necessary where the partners bear their true surname's and fore names.

10.3.2 TYPES OF PARTNERSHIP

The following are the different types of partnership:

General Partnership: A firm must have at least one general partner. A general partner is one who will be liable for all debts and obligations of the firm. The liability of a general partner remains unlimited. He actively takes part in day to day administration of the enterprise.

Limited Partnership: Is the one whose liability is limited to the amount contributed as capital to the partnership agreement. He cannot contribute to its management although he can advise and inspect the books. His death, bankruptcy or insanity may not dissolve the firm which applies in the case of a general partner. A limited partner can best be described as an investor who shares in the profit of the business.

Limited Liability Partnership (LLP): under section 746 of CAMA 2020, a LLP is a legal entity distinct from its partners. It enjoys perpetual succession. A change such as death or bankruptcy of a partner will not affect the partnership.

Limited Partnership (LP): A limited partnership shall not consist of more than 20 persons (section 795 of CAMA 2020). A partnership not registered as prescribed in CAMA 2020 shall be deemed to be a general partnership and every limited partner shall be deemed to be a general partner (sec. 797 CAMA). If a limited partner takes part in the management of the partnership business, he is liable for all debts and obligations of the firm incurred while he takes part in the management, as though he were a general partner. Death, insanity or bankruptcy of a limited partner shall not lead to the dissolution of the partnership (sec. 801 CAMA).

Dormant or Sleeping Partner: A dormant partner takes no part in the management of the partnership, although his name must be included in the firm's name and be registered under the Registration of Business Names.

Partner by Estoppel: A situation or circumstance where a person holds himself out or presents himself as a partner in a firm and consequently induces another person to act upon that representation, he will be liable to that other person as if he really were a partner.

10.3.3 Relations of Partners and Third Partners: Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership and every partner's act

done within the normal course of the business automatically binds the firm and all the partners. However, the firm and the co-partners will not be bound, where the partners whose acts has no authority to bind the firm in the particular matter and where the person who deals with him knows that, he has no authority or does not believe him to be a partner- see section 5 of the Partnership Act.

10.3.4 RIGHTS AND DUTIES OF PARTNERS

Rights

i. Equal right of participation in making decisions and management of the partnership enterprise.
ii. Equal right as regards the sharing ratio of profits made by the partnership enterprise unless otherwise provided by the partnership deed.
iii. Every partner has a right of free access to all records, books and accounts of the business, and to also examine and/or copy them.
iv. Partnership must indemnify every partner in respect of payments made on partnership debts.
v. Every partner has a right of retirement and this may be done by giving other partners a simple notice.
vi. Every partner has a right to act in an emergency for protecting the firm from loss, but he must act reasonably.
vii. No person may be introduced as a partner without the consent of all existing partners.

Duties

i. Every partner has a duty to diligently carry on the partnership business and not act mala fide (with bad faith).
ii. Every partner must be just and faithful in all partnership dealings.
iii. Partners are bound to keep and render true and correct accounts of the partnership.
iv. It is the duty of every partner to indemnify the firm for any loss caused by his wilful neglect or fraud in the conduct of the firm's business.
v. No partner shall carry on competing business with that of the partnership.
vi. All partners are bound to share losses equally.
vii. Every partner must disclose any secret profit made by him to the firm.

10.3.5 Dissolution of General Partnership

Every partnership may cease to exist or dissolved through the following:

i. **By Notice**: Section 37 of English Partnership Act (1890) authorizes every partner to give notice of the dissolution of the firm and it could even be through notice of retirement.
ii. **By Expulsion**: Ordinarily, power of suspension or expulsion is not provided for in partnership and as decided by the court in ***Azodo v. Okwuarizor*** (1961) 5 ENLR. However, where the partners provide for this in the Article of Partnership, then that special power could be exercised to bring the firm to an end.
iii. **By Illness**: Irrecoverable illness, insanity may lead to demise of partnership,
iv. By the bankruptcy and or death of a partner.
v. By the Expirations of time, if fixed for a term.
vi. By the happening of an event which makes the enterprise unlawful to be carried on (contingent illegality).

vii. By completion of the venture: Some partnership comes into being for a purpose. Once the purpose is achieved, the firm is dissolved. See ***Uredi v. Dada*** (1988) NWLR Pt. 69 237.
viii. By the Court: Section 35 of the English Partnership Act 1890 grants powers to the court to dissolve a partnership on the application of a member of the firm. This position has been given judicial explanation in the case of ***Eminansegen v. Stephten*** (1985) NWLR Pt. 12

The grounds on which court could grant these powers are as follows:
a. A partner has become insane.
b. Where a partner, other than the partner suing becomes incapable of performing his part of the partnership contract.
c. Where a partner has committed an act of misconduct of such a nature that it has a prejudicial effect on the partnership agreement.
d. One of the partners has consistently breached the partnership agreement and the other partners cannot reasonably continue the business with him or her.
e. When the partnership business can only be carried out at a loss.
f. When in the opinion of the court, it is just and equitable that the partnership be dissolved.

Effect of Dissolution
Dissolution revokes the power of each partner to bind the firm, except to complete a transaction yet to be completed during dissolution.

10.3.6 ADVANTAGES OF PARTNERSHIP
i. Availability of Capital/Resources: Partnership presupposes the coming together of at least two persons. Therefore, parties can contribute more capital, more assets and more time to the business than a sole proprietor.
ii. Expertise: The partners are most likely to be from different fields of specialization, thus business operation become more effective because of cross-fertilization of ideas.
iii. Effective Decisions: All the partners involvement in the decision-making process would most likely mean that they will make informed decisions than in one-man business enterprise.
iv. Risk Sharing: In a partnership, risk is shared equally among all partners.
v. Easy to Establish: It can be formed without any or much legal formalities.
vi. There is a joint effort in running the business since all partners usually work for the achievement of making profit.
vii. There may be division of labour in partnership which increases productivity and efficiency.
viii. Unlike sole proprietorship business, expansion is possible in view of large capital often associated with partnership.

10.3.7 DISADVANTAGES OF GENERAL PARTNERSHIP
i. Uncertain Future: Death, bankruptcy and or retirement of a partner may lead to an end of the partnership.
ii. Decision Making Process is Cumbersome: It is easy for one man to decide on modes of business operation(s) and other incidental acts in his or her business enterprise, as against two or more persons.
iii. Lack of Harmony: Divergent opinions often lead to friction among partners.
iv. Transfer of Interest is limited: A partner in a firm cannot validly transfer his or her interest (shares) to another partner or an outsider without the consent of all the other partners.

v. Unlimited Liability: A partnership is identified by the parties individually, thus where the partnership is being wound up, individual asset may be used to settle the partnership debts.
vi. Limitation on Members: There is a limit to the number of persons that can form a partnership enterprise in Nigeria.

10.4 DEFINITION OF A COMPANY

A company is a legal entity or a person separate and distinct from its members. It is more than a mere association of individuals; it is a legal person with a personality of its own. It becomes an artificial legal entity after incorporation. This is known as the concept of **Corporate Personality**. The concept of corporate personality is a consequence of incorporation- see ***Salomon v. Salomon & Co Ltd*** (1892). Thus, a company is a legal person created by a process, other than natural birth.

10.4.1 SOURCES OF COMPANY LAW IN NIGERIA

The under listed are the identified sources of company law in Nigeria:

i. Statutes
ii. Case Law
iii. Books and Academic Writings
iv. Codes and Governance and Listing Rules

i. **Statutes:** the Companies and Allied Matters Act, 2020 (CAMA) is the extant statute regulating the formation, operation, management, supervision, investigation, inspection and winding-up of companies in Nigeria. In addition, there are statutory companies that normally come into being through Federal or State legislation. These companies operate outside the purview of CAMA.

Another category of statutes are special enactments mainly by the National Assembly to regulate special sectors. Examples are Banks and other Financial Institutions Act (BOFIA) regulating the banking and finance sector, the Mortgage Institutions Act- regulating companies in the mortgage banking industry e.t.c.

ii. **Case Law:** this arises when the provisions of CAMA or other extant laws are subjected to analysis, pronouncements, decisions and rulings by the courts. This body of case law richly forms the bedrock upon which statutory provisions rest. Case law is not static, it is an on-going process, because a greater number of the provisions are yet to be subjected to judicial analysis.

iii. **Books and Academic Writings:** Published books on company law and academic reviews in journals and law review publications are cardinal sources of company law in Nigeria.

iv. **Codes of Governance and Listing Rules:** Generally, companies are subjected to a lot of regulations and it becomes more obvious when such companies are public companies. A quoted public company under the Nigerian Stock Exchange is equally subjected to listing rules of the Exchange. In addition, the Securities and Exchange Commission in conjunction with the Nigerian Exchange prescribes and enforces a Code of Corporate Governance for Public Companies- see SEC code of Corporate Governance for Public Companies (2010) effective April 2011.

Pre-Incorporation Contracts

It is after incorporation that a company becomes a legal entity which implies that the company can own property, sue and be sued for breach of its duties. However, there are certain transactions to be entered into by the company promoters in facilitating incorporation exercise. Some of these transactions could be incurring obligations under contract, holding land, purchase of properties, e.t.c. These transactions are called pre-incorporation contracts. They are so called this name because the transactions were carried out before the company was incorporated.

Pre-incorporation contract is however not without attendant risk. The risk associated with pre-incorporation contracts is that it is only upon disclosure by the promoters to the company and ratification done by the company that the benefits and liabilities of the contract become binding on the company. Before ratification is effected, the person who entered into transaction shall be personally liable on it –sec. 96 CAMA.

10.5 INCORPORATION OF A COMPANY

The company and Allied Matters Act vest in the Corporate Affairs Commission (CAC or the Commission) the duty to regulate and supervise the formation, registration and incorporation among others of companies. However, certain classes of people are disqualified by the Act in participating in registration process. An individual shall not join in the formation of a company if he:

i. Is less than 18 years of age? But where there are two adult members who are eligible to subscribe, then persons less than 18 years can join in the formation of a company. However, he will not be counted for the purpose of determining the legal minimum number of members of a company.
ii. Is of unsound mind and has been so declared by a Court in Nigeria or elsewhere.
iii. Is an un-discharged bankrupt.
iv. Is disqualified under section 254 of the Act from being a Director.
v. If it is a corporate body in liquidation.
vi. **Note** that an alien may join in the formation of a company provided he complies with the provisions of enactments regulating the rights of aliens to engage in business in Nigeria.

Note that under section 18(2) CAMA a single person may validly form a company.

10.6 CORPORATE PERSONALITY

Corporate personality means that a company exists and attains a distinct or separate personality upon being incorporated. Consequently, a company can sue and be sued in its own name, hold its own property and crucially be liable for its own debts. It is this concept that enables limited liability for shareholders to occur as the debts belong to the legal entity of the company and not to the shareholder in that company. This concept has received judicial notification first in the case of ***Salomon v. Salomon & Co. Ltd***. See also ***Melwani v. Feed Nation Industries (Nig.) Ltd*** (2002) FWLR Pt. 113 at 135.

Facts of *Salomon v Salomon & Co. Ltd* (1897), Salomon was a leather merchant and boot manufacturer. In 1892, He formed a limited company with six other members of his family, and

sold his business to the company. He held 20,001shares and the other members hold one share each; he and two of his sons were appointed directors. The company paid some £39,000 to Salomon for the business, the mode of payment being £10,000 in debentures secured by a floating charge on the company's assets and £20,000 shares of £1 each, the balance of some £9,000 paid to Salomon in cash. The business did not prosper and when it was wound up a year later, its liabilities (including the debenture debt) exceeded its assets by some £8,000. The liquidator representing the unsecured creditors claimed that the company's business was in reality Salomon's, the company being merely a sham designed to limit Salomon's liability for debts in carrying it on, and therefore Salomon should be ordered to indemnify the company against its debts, and payment of the debenture debt to him should be postponed until the company's other creditors were satisfied.

Held: The company is at law a different person from the subscribers to the memorandum and though it may be that after incorporation the business is the same as it was before, and the same persons are managers and same hands receive its profits, the company is not in law agent of the subscribers or trustee for them. Nor are the subscribers as members liable in any shape or form except to the extent and in the manner provided by the Act.
The implication of separate/corporate personality connotes that once a company is registered, it becomes a separate person from individuals who are its members.

Legal Implication of incorporation

i. **Property:** On incorporation, the property of the company belongs to the company and not the members. Members of the company do not have either proprietary or insurable interest in the company's property- ***Macaura v. Northern Assurance Co. Ltd***. (1925) AC 219.
ii. **Perpetual Succession**: The death, insanity, incapacitation or bankruptcy of a member still leaves the company as a going concern. The death of the managing director or chairman or any of the shareholders of a company does not mean the end of the company- see ***Lee v Lees Air Farming Ltd*** (1960) 3 ALL ER, 420. See also ***Re: Noel Tedman Holding Property Ltd*** (1967) Qd R561- an Australian case where the only two members of the company were killed in a road accident, yet the company survived them.
iii. **Transferable shares**: with registration, the identifiable interest of a member in a company is the value and volume of the shares such members hold in the company. These shares are freely transferable without affecting the company's existence. The right to transfer shares is unfettered unless there is an express restriction to that effect.
iv. **Limited Liability**: One of the effects of incorporation is that members are not personally liable for the company's debt. The company is liable for its own debt.
v. **Corporate Litigation**: Incorporation confers on a company the capacity to sue and be sued in its own name. It can bring action to enforce its legal rights and can be sued for breach of its legal duties or obligations. It is only the company that can bring an action for wrong done to it; since it has its own name by virtue of incorporation- see ***Foss v Harbottle*** (1843) 2 Hare 461.
vi. **Borrowing Powers**: An incorporated company finds it easier to raise money by borrowing from financial institutions. This is because, in most cases, it is able to provide a more effective security to ensure payment in case of default.
vii. **Formalitie**s: An incorporated company must comply with provisions of CAMA. The company and all its officers are open to public scrutiny. Anyone dealing with the company

is entitled to check its file in the company registry to determine type and nature of the entity he is dealing with.

viii. **Taxation**: Upon incorporation a company becomes a taxable entity, therefore liable to payment of prevailing taxes to government.

ix. **Separation of management and ownership**: Directors who may not be members of the company constitute the management while members, who are shareholders, only make decisions concerning the company at the company's general meetings.

Registration of Companies

The Corporate Affairs Commission (CAC or the Commission) is the body charged with the responsibility of incorporating a company. The incorporation documents that are to be delivered to the CAC by a company seeking registration are the following:

i. The memorandum of Association.
ii. The Articles of Association.
iii. Notice of the registered office of the company.
iv. The list and particulars of Directors in the prescribed form together with the consent of the persons who are to be the first Directors.
v. Statement of the authorized share capital signed by at least one Director.
vi. Return of Allotment of Nominal share capital.
vii. Particulars of the Secretary where he is mentioned in the Articles of Association.
viii. Statutory Declaration of Compliance with the provisions of the Act signed by a legal practitioner in the prescribed form. This serves as evidence of compliance with the Act.
ix. Any other document required by the Corporate Affairs Commission to satisfy the requirement of any law relating to formation of a company.

Upon the collection of all the above documents from the would-be incorporated company, by the Commission, the Commission is duty bound to register the company unless if in the opinion of the Commission the following infractions are observed:

i. The memorandum and articles of Association do not comply with the provision of the Act.
ii. The business which the company is to carry on or the object for which it is formed or any of them are illegal.
iii. Any of the subscribers to the memorandum is incompetent.
iv. There is non-compliance with the requirement of any other law as to registration of a company.
v. The proposed name conflicts with or is likely to conflict with an existing trade mark or business name registered in Nigeria.

Where registration is not granted because of any of the above mentioned; the aggrieved individual may give notice to the Commission to seek direction from the court. Such application by the Commission to the court for direction must be done within 21 days of the receipt of the notice-sec. 41(2).

Name of a Company

The memorandum of association of every company must state clearly the name of the company. The name of a private company limited by shares must end with the word Limited and it may be

abbreviated 'Ltd.' The name of a public company limited by shares must end with the words public limited company or abbreviated 'Plc.' The name of a company limited by guarantee must end with the words (limited by guarantee) in brackets or abbreviated as (Ltd / Gte). The name of an unlimited company must end with the word 'Unlimited' and may be abbreviated 'Ultd.' – sec. 29 CAMA.

Names That Cannot Be Registered Under the Act (Prohibited Names)

i. If the name is very identical with another company's name that has been registered and in existence and can cause confusion. See ***Niger Chemists v. Nigeria Chemists*** (1961) where the court held that the name Nigeria chemists is so similar to Niger Chemists, thus likely to cause confusion; the plaintiff is entitled to an injunction restraining the defendant from using that name or any other name closely resembling Niger Chemists.
ii. Where in the opinion of the Commission the name is capable of misleading, undesirable, offensive or contrary to public policy.
iii. If in the opinion of the Commission, the name would violate any existing trade mark or business name registered in Nigeria except the consent of the owner of the trade mark or business name has been obtained.

Names Requiring the Consent of the Commission Before they can be used (Restrictive Names)
The consent of the Commission must be sought and obtained where a yet to be incorporated company wants to use a name which:

i. Includes the word 'Federal' 'National' 'Regional' 'State' 'Government' or any other word which may suggest enjoyment of government's patronage by the company.
ii. Contains the word 'Municipal' or 'Chattered' and local authority.
iii. Contains the word 'Co-operative" or the words 'Building Society.'
iv. Contains the word 'Group or Holding.'
v. Where the names contain the word 'Chamber of Commerce' unless it is a company limited by guarantee.

10.7 Types of Company

A company may either be a private company or public company. A public company is any company other than a private company and which is so stated in the Memorandum of Association that it is a public company. The purpose of a company could be to make profit in business undertaking or to undertake other activities of a social, educational, religious, sporting or charitable nature. Under CAMA there are different types of companies. A registered company may be either a private company or a public company. Section 21 CAMA 2020 provides that six types of companies may be formed. They are the following:

i. Private company limited by shares
ii. Private company limited by guarantee
iii. Private unlimited liability company
iv. Public company limited by guarantee
v. Public company limited by shares
vi. Public unlimited liability company

Features of a Private Limited Company- s.22 CAMA

i. The Memorandum of a private company must state specifically that it is a private company.

ii. The total number of members in a private limited company must not be more than 50, not including those who are bona fide employees of the company.
iii. It cannot invite the public to subscribe for any shares or debentures of the company.
iv. The Articles of Association must restrict the transfer of its shares.

v. It cannot invite the public to deposit money for fixed periods or payable at call whether or not bearing interest.

vi. a member shall not sell his shares in the company to a non-member, without first offering those shares to existing members.

Public Limited Company

A public limited company differs from the private version in that it is able to sell its shares to the public and may be quoted on the Stock Exchange. It is therefore better suited for large organizations. Any company other than a private company shall be a public company and its memorandum shall state that it is a public company.

Features of Public Company

i. The authorized share capital shall not be less than #2, 000,000.00- sec 27(2) (a) CAMA 2020.
ii. There is no restriction on transfers of its shares.
iii. It is allowed to invite the public for subscription to its capital.
iv. It may receive money on deposit whether or not bearing interests.
v. Its securities are meant to be publicly tradable and there is often no discrimination as to who becomes a member as long as the person is capable of investing in it financially.

Statutory Companies

They are companies established under special legislation for public good and they may be profit or non-profit making ventures. Examples of statutory companies are Nigeria Railway Corporation (NRC), Power Holding Company of Nigeria and Nigeria Television Authority (PHCN & NTA).

Species of Private or Public Companies

Company Limited by Shares

Here, the liability of its members is limited by the Memorandum to the amount if any, unpaid on the shares held by shareholders. This implies that the shareholders are not liable in any form for the debts or any liabilities of the company. However, where part of the subscribed capital is outstanding, it remains a debt to the concerned shareholder which should be paid as a contributory in case of liquidation.

Company Limited by Guarantee

A company limited by guarantee is formed for the purpose of promoting charitable, altruistic or other similar objects and must not carry on business for profit. The company has no share capital. The income and properties of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly either as profit or otherwise, to the members of the company-section 26 CAMA.

These types of companies are exempted from paying taxes but if they are involved in business, they are taxable-see ***Rev Shodipo v F.B.I.R*** 1974 1 FRCR 35; section 26 CAMA. The liability of

its members may respectively undertake to contribute to the assets of the company in the event of it being wound up.

Unlimited Liability Company
An unlimited company is a company that does not have any limit on the liability of its members in satisfying its debts and obligations both as a going concern and in the event of winding up. It has similar exposure to liability as partnership save that its members have tradable shares.

10.8 CORPORATE POWERS AND LIABILITIES

Corporate Powers can be said to be express and implied
Express Powers: These are powers expressly given to it by statute under registration and by its articles of association. The Express powers of a corporation include:

i. To sue and be sued in its corporate name.
ii. To purchase, use, and sell land and dispose of assets to the same extent an ordinary person can.
iii. To make contracts, borrow money, issue notes, lend money and invest funds.
iv. To establish pension schemes.
v. To join in partnerships and joint ventures.

These powers mentioned above need not be included in the Articles of Association of a company.

Implied Powers: Corporate implied powers are powers which are not expressly provided for, but are powers necessary or convenient to effect the achievement of the corporation's objective.

10.8.1 Liabilities: These are legal responsibility of a corporation for criminal acts and civil wrongs. Some instances where a company incurs liability is listed below:

i. **Ultra vires Acts**: acts or contracts entered into by the company which is beyond a company's express and implied powers. If a company for instance contracts on subjects not included in the memorandum of association, liability may be incurred.

ii. **Tortious Liability**: These provisions make a corporation liable for torts committed by its employee in the course of their employment (vicarious liability).

iii. **Criminal Liability**: a corporation may be criminally liable for violations of statutes imposing liability without fault or for an offence perpetrated by a member of its board of directors.

10.9 Comparison of Sole Proprietorship, Partnership and Corporations

Similarities

i. These three business enterprises are all in existence for the purpose, which is to make profit or gain.
ii. The business enterprises are all liable to suffer liabilities where the business winds up, the limit for the liabilities suffered however differ from one another.
iii. These three enterprises are all created to carry out business(es). So, they all have business at heart as their purpose of existence.

Differences

i. In a sole proprietorship enterprise, the idea of directors is non-existent as the proprietor is the head of the business and concerns himself with the management of his business enterprise. This is also the case in a general partnership business enterprise because usually all or most of the partners are managers of the enterprise, hence no directors are existent in a partnership enterprise, but in a corporation, we have directors present who see to the management of the company.

ii. In both general partnership and sole proprietorship business enterprises, the partners and the proprietor are liable individually for their actions as their business is not a juristic person, while in a company the liability of shareholders is limited to the amount unpaid in the shares issued to them upon winding-up only.

iii. A sole proprietorship business enterprise and a general partnership arrangement both have juridical personalities hence they cannot sue or be sued in their business names but individually, while this is not the case in a company because upon incorporation the company becomes a separate legal personality.

iv. The death, retirement or insanity of a proprietor or any of the partners in general partnership brings their enterprises to an end, this however is not the case in a corporation as continuity is guaranteed even where many shareholders are incapacitated.

v. There is no provision or mandate for AGM's or GM's in both sole proprietorship and partnership; this however is not the case in corporations.

vi. The concept of share capital is unknown to both the sole proprietorship and partnership business enterprises, this however is different in a corporation as a minimum share capital is mandatory, be it a private or public company.

vii. The concept of sharing business profit is unknown to a sole proprietor as he alone is the Almighty of his business, while in partnership and corporations sharing profit among partners and shareholders is a usual practice. The same goes for the losses suffered by the business enterprises.

10.10 CONCLUSION

There are different types of different enterprises suitable for individuals and group of individuals who seek to make profit, sometimes the aim is to foster culture, sports et cetera. The most common and easiest type of enterprise remains the 'sole proprietorship' which is a one-man business; less capital is required to set up this type of business. The advantages, detriments and peculiarities of each business will determine the appropriate business vehicle- sole proprietorship, partnership, company- which a person or a group of persons will choose, especially with the new development of LLP and LP.

10.11 ILLUSTRATIVE AND PRACTICE QUESTIONS

i. What are the legal modalities in furtherance of setting up a partnership business enterprise?

ii. List five duties of partners.

iii. List the fundamental documents needed for the registration of a company.

iv. Enumerate features of a private and public companies.

v. Elucidate the meaning of corporate liabilities and mention the types of liabilities known to you.

MCQ

1. What is the maximum numbers of partners in a professional partnership of accountants?

A. No limit
B. 20
C. 30
D. 50

2. Restriction on the transfer of a commercial interest in a business transaction is a common feature of _____

A. Sole proprietorship
B. Partnerships
C. Joint stock company
D. Banking corporations

3. Identify from the list below, **ONE** category of persons prohibited from being appointed as a trustee under the CAMA 2020.

A. Ex-president
B. Ex civil servant
C. Ex-convict
D. Ex-military man

4. Odu's logistics bank account was mistakenly debited. Mr. Odukogbe on behalf of Odu's logistics protested to the bank's office, he was consequently requested to write a formal letter of complaint. There and then he wrote it and signed and submitted to the bank. What type of company is Odu's logistics?

A. Sole proprietorship
B. Partnership
C. Corporation
D. Limited by guarantee

5. Bankruptcy or death of a party may lead to the collapse of a category of business organization recognized under the law as?

A. Partnership
B. Limited liability
C. Incorporated trustee
D. Finance company

10.12 CASE STUDY

Mr. Lawuyi was operating a sole business which he sold to a newly registered company known as Lawuyi Nig. Limited. He is the major shareholder; other shareholders are his wife, three sons and his daughter-in-law. He has always been paying the insurance premium for the company with his personal cheque from over twenty years. However, in January 2023, a fire outbreak ravaged the company and the insurance company refused to pay his duly filed claim despite the payment of the insurance premium as at when due for these past twenty years. Advise the parties.

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CHAPTER ELEVEN

CHAPTER ELEVEN: FORMS OF BUSINESS ORGANISATION II

11.0 INTRODUCTION

Anybody who wants to form or go into business is expected to acquaint himself with the different forms of business organisations that exist. This is necessary, because each type has different regulations towards its functions and administration. Adequate knowledge of company law is therefore necessary to guide investors, prospective investors and professionals charged with the duty of advising the investors and business owners from acting against the prevailing corporate rules and regulations. This chapter deals with aspects of company law not dealt with in the preceding chapter; incorporated trustees, cooperative society and joint ventures.

11.1 LEARNING OBJECTIVES

At the end of this chapter readers are expected to be able to:

i. Identify and discuss the different forms of business organizations, including those dealt with in chapter ten.
ii. Understand the other aspects of company law, such as organs of a company and company securities, mergers and takeovers.
iii. Understand the meanings, functions and the use of incorporated trustees, joint ventures and special purpose vehicles.

COMPANY LAW

11.2 ORGANS OF A COMPANY

A company is usually managed and controlled by two principal organs. These organs are:
i. Board of Directors
ii. Shareholders at general meeting

11.2.1 BOARD OF DIRECTORS

A director is a person duly appointed by the company to direct and manage the business of the company. Therefore, board of directors is the governing body of the corporation elected by the shareholders to establish corporate policy, appoint executive officers and make major business and financial decisions. Every company must have at least two (2) directors; in practice, the board of directors delegates its power to the executive directors. Therefore, executive directors are the ones directly responsible for running the company with the managing director.

11.2.2 SHAREHOLDERS AT GENERAL MEETING

A shareholder is anyone who owns or holds at least a share in a company. Having shares in a company confers the right to attend general meetings of the company and vote at such meeting. Shareholders at general meeting have the power to appoint, and remove directors and external auditors. This is the highest organ of the company.

11.2.3 DIRECTORS

Every company, not being a small company, must have at least two directors- s. 271(1) CAMA. The articles may fix a maximum number, but the general meeting has power to increase or decrease the numbers of directors. A public company shall have at least three independent directors.

Appointment of First Directors- s. 272

The number of directors and names of first directors shall be determined in writing by:

i. The subscribers to the memorandum of associations or;
ii. By a majority of the subscribers;
iii. The directors may also be named in the articles of association.

Appointment of Subsequent Directors– s. 273

Subsequent directors are usually appointed in the following ways:

i. By members in the annual general meeting.
ii. Personal representatives can apply to court to appoint new directors.
iii. Where the personal representatives failed to appoint, creditors (if any) can appoint directions.

Disqualification for Directorship

The following persons cannot be directors:

i. Infants under 18 years of age.
ii. A lunatic or person of unsound mind.
iii. A bankrupt person who has entered an agreement with his creditors.
iv. A company except its representative.
v. A person convicted for fraud in connection with promotion, formation and management of a company.

Note: under section 307 CAMA 2022 a person can only be a director in not more than 5 public companies.

Vacation of office- s 284

A person appointed director shall vacate his office if he:

i. Ceases to be director by virtue of (share qualification) under section 277.
ii. Becomes bankrupt or make any arrangement or composition with his creditors generally.
iii. Is prohibited by any order of the court made under sections 280 - 281 for being a fraudulent person.
iv. Becomes of unsound mind.
v. Resigns his office by notice in writing to the company.

Rotation of Directors

Section 285 of CAMA, provides that unless the articles otherwise provide, at the first annual general meeting of the company, all the directors shall retire from office, and at the annual general meeting in every subsequent year, one third of the directors for the time being or if their number is not three or a multiple of three, then the number nearest to one third shall retire from office.

NOTE: The directors to retire in every year shall be those who have been longer in office since their last election. A retiring director may offer himself for re-election and is deemed to have been re-elected unless:

i. Another person is elected to fill his place.

ii. It is expressly resolved at the meeting not to fill the vacancy created by his retirement.
iii. A resolution for his re-election has been put to the meeting and lost.

Types of directors

(i) Managing Director: he is often appointed from the team of directors or from employees of the company to oversee the day to day affairs of the company. He is the leader of the management team. He reports to the board on the activities of the entire management team. The managing director is answerable to the board for the company's operational performance.

(ii) Executive Directors: are the ones who manage the affairs of the company on daily basis. Their powers are as contained in the articles of association. They are servants of the company.

(iii) Shadow Director: this is a person not expressly made a director but under whose direction and instruction the real directors of a company are accustomed to act.

(iv) Alternate Director: is a person appointed by a director to sit on the board in his place under power contained in the Article. He ceases to be a director when the director that appointed him ceases to be a director.

(v) Non-Executive Director: they are directors not involved in the day to day management of the company. The main purpose of being appointed was to advise the management of the company in running of the company through their wealth of experience.

(vi) Life Director: as the name implies, he is appointed for life. He is not subject to the rotation of directors. However, he can be removed under s. 288 that is, by an ordinary resolution of which special notice is given.

vii) Independent Director: section 275 CAMA provides that a public company shall have at least three independent directors. Independent directors are non-executive directors. Independent director refers to a director of the company who is relatively detached from the company, who and whose relatives, during the two years preceding the time in question -
(a) were not employees of the company;
(b) not indebted to the company or own more than a 30% share or other ownership interest, in an entity connected with the company or engaged as an auditor to the company.

Duties of Directors (s. 279, 301-306)

i. Duty of care and skill.
ii. Duty not to expose the company to loss.
iii. Duty not to make secret profits.
iv. Duty not to allow his personal interest conflict with his duties.
v. Duty not to misuse confidential corporate information received by virtue of his position.
vi. Duty not to delegate his power amounting to abdication of duty.

Removal of Director from Office

A director may be removed from office in the manner specified in the Articles of Association of the company concerned. In the absence of this, removal of a director may be in accordance with section 288 (1) of the CAMA, which applies to director appointed for a specific or fixed time other

than for life. CAMA provides that special notice is required for any resolution to remove a director under section 288 (2) and to appoint a new one. Special notice implies that 28 days' notice shall be given to the company and the company shall in turn give 21 days' notice to the members. On receipt of notice of a proposed resolution to remove a director, the company shall send a copy of it to him or her and shall be entitled to be heard on the resolution at a meeting. The director is also entitled to have his defence sent to members or read out at the meeting.

Remedies for Wrongful Removal

i. Seek an order of court re-instating him as a director.
ii. Pray for an order of compensation for breach of service contract.
iii. Seek damages for wrongful removal.
iv. Approval by the company of a non-contractual compensation to the director wrongly removed. See ***Bernard Longe v. First Bank Plc.*** (2006) 3 NWLR (Pt. 976), 228.

11.3 SECRETARY

Every company, except in the case of a small company, must have a secretary-s. 330; CAMA defines officer of the company to include persons of the rank of Director, manager or secretary. Secretaries are officers of the company in his own right with specific duties, though additional duties may be assigned to him by the board of directors or the general meeting. The secretaries are therefore senior management staff who perform pivotal duties.

Section 332 of the CAMA provides that directors of the company shall take all reasonable steps to ensure the company secretary is a person who appears to have the requisite knowledge and experience to discharge functions of a secretary of a company and in the case of a public company, he shall be:

i. A member of the Institute of Chartered Secretaries and Administrator, or;
ii. A legal practitioner or;
iii. Member of the Institute of the Chartered Accountants of Nigeria or such bodies of accountant as are established from time to time by an Act;
iv. A firm of chartered accountants, legal practitioners or chartered secretaries and administrators;
v. A 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 limited liability company.

Duties of a Company Secretary

Section 335(1) provides that the duties of a company secretary shall include:

i. Attending the meetings 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 meeting with the applicable rules and regulation;
ii. Maintaining the registers and other records required to be maintained by the company under the Act;
iii. Rendering proper returns and giving notifications to the Commission as required under the Act and;
iv. Carrying out such administrative and other secretarial duties as directed by the directors or the company.

Other sections of the Act also require the company secretary to perform the under listed responsibilities:

i. Periodic filings and notifications to the Corporate Affairs Commission;
ii. Keeping of the Certificate of incorporation at the registered office;
iii. Notifying change of address of the registered office to the CAC;
iv. Keeping and maintenance of the register of members, register directors holding, director and secretaries;
v. Keeping register of debentures and charges;
vi. Filing of certain resolutions, financial statements and audit;
vii. Keeping the annual statement of account, details of dividends and unclaimed dividend;
viii. Making returns on appointment, retirement and removal of auditor;
ix. Compiling the form of statutory records.

Removal of the Secretary

A secretary shall be appointed and removed by directors. In removing a secretary of public company, the directors must adhere strictly to the statutorily prescribed way as contained in S 333(2) of CAMA. The statutory procedure is as follows:

i. The board of directors shall give him a 7 working days' notice of the intent to remove him. Weekends and public holidays are not inclusive.
ii. The notice shall also state the reason for the intent to remove him.
iii. The notice shall give him an option to resign instead.
iv. If the secretary resigns, that ends the process; the board may remove him and make a report of their action to next general meeting.
v. If the secretary fails to resign but put forward a defence, the board shall consider it and if it decides that the defence is not satisfactory, two options are open:

a) If the ground for his removal is that of fraud or serious misconduct, the board may remove him from office and shall report to the next general meeting.
b) If the allegation is not of fraud or serious misconduct, the board may only suspend the secretary and make a report to the general Meeting.

11.4 SHAREHOLDERS

A company incorporated under CAMA acquires a legal person of its own. Consequently, those who finance the company are therefore not its owner. They only own the money they contributed to the company by way of buying share in the company share capital.

Shareholders of a particular company are those who have shares in the company and whose names are entered in the company's Register of members. A shareholder is entitled to access information regarding the performance of the company.

Rights of Shareholders

i. Shareholders have the right to attend company's meeting.
ii. The right to vote at a meeting in person or in absentia.
iii. Right of access to information about the company's performance.
iv. Right to a copy of the memorandum and articles.
v. Right to be informed of any resolution appointing or approving the appointment of a director.

11.5 MEETINGS

The holding of meetings provides the venue for the directors, members of the company to collectively deliberate on the affairs of the company. The members in General Meeting is the other organ of company apart from the Board of Director:

a. **Board Meetings:** the management of a company is vested in the directors collectively. This implies that decision must be reached at board meetings unless the Articles provide otherwise. In practice, it is usually provided in the Articles that a resolution in writing signed by all the directors entitled to receive notice of a board meeting shall have the same effect as if it had been dully passed at a board meeting. This is because it is not always possible for directors to meet on every matter requiring a decision. Board meetings are being regulated by the directors as they deem fit, or by rules provided by the Act. Each director has one vote, where there is equality of votes; the chairman is usually given a second or casting vote.

b. **Statutory Meetings:** according to section 235 CAMA, this type of meeting is mandatory only for public company. It must be held within six months of the incorporation of the company. The meeting is principally to consider the statutory report which must be sent to the members at least 21 days before the date of the meeting.

The Statutory report contains the under listed information:

i. The number of shares allotted.
ii. The total amount received in respect of the shares allotted.
iii. Names, addresses and description of directors, manager, secretary, auditor, etc.
iv. Particulars of any pre-incorporation contracts.
v. Commission paid or to be paid in connection with the issuance of shares.
vi. Preliminary expenses of the company with receipts.
vii. The balance of money at hand and in bank.

The Statutory Report is also to be delivered to the Corporate Affairs Commission- s. 235 (6). Failure to deliver the report to the Commission may be a ground for winding up the company- s. 571(b). There penalty of default in holding the meeting is that every officer or director who is aware of the default is liable to a fine for everyday during which the default continues in such amount as the Commission shall specify in its regulation-s. 236.

c. **Annual General Meeting:** every company, except in the case of a small company or any company having a single shareholder, is to hold an annual general meeting (AGM)- s.237. There should not be more than 15 months between one AGM and the next. However, the first annual general meeting of a company may be held within 18 months of its incorporation. A company which holds its first annual general meeting within 18 months of its incorporation needs not hold it in that year or in the following year. For instance, if a company was incorporated on 1st November 2015, it needs not hold annual general meeting in 2015 or 2016 but must hold it latest by April 2017. For subsequent annual general meeting, the Corporate Affairs Commission may extend the time for holding the meeting by not more than 3 months- s. 237 (1)(b).

Sec. 240(2) CAMA provides that a private company may hold its general meetings electronically provided that such meetings are conducted in accordance with the articles of the company.

The types of business to be conducted at annual general meetings are:

i. Ordinary Business
ii. Special Business

The following which are regarded as ordinary business:

i. Declaration of Dividends
ii. The presentation of Financial Statements (Accounts)
iii. Auditors Report
iv. Election of Directors in place of those retiring
v. Appointment and fixing of remuneration of Auditors
vi. Appointment of members of the Audit Committee

There is a presumption that other business apart from the above are special business if a company fails to hold its AGM as required by law, the CAC may upon petition of a member, call or direct the calling of the meeting and give such directions as it deems fit. These directions may include permission for a member to by himself hold the meeting and take decision that will be binding on the company. This one-man meeting will be deemed to be the general meeting of the company-s. 237(2).

Note also that, failure to hold the annual general meeting or comply with the Commission's direction, the company and every officer of the company who is in default shall be guilty of an offence and be liable to a fine at the Commission's direction. Failure to deliver a copy of the resolution to the Commission as regards adopting a meeting as annual general meeting, the company and every officer of the company who is in default shall be liable at the Commission's directive.

d. **Extra Ordinary General Meeting:** an extraordinary general meeting is any general meeting other than a statutory meeting or an annual general meeting. Section 239(1) provides that an extraordinary general meeting may be called by the board of directors when they think fit. Extraordinary general meetings can be called by members as well as directors. The demand by members to convene a meeting is called requisition.

The requisition must state the objects of the meeting; it must be signed and deposited at the registered office of the company. The directors shall on receipt of the requisition forthwith proceed duly to convene an extraordinary general meeting of the company notwithstanding anything in its article. If the directors do not proceed to call the meeting within 21 days thereafter, the requisitionists themselves or the holders of more than half the company's voting rights may do so within 3 months of the date of the deposit at the registered office and recover reasonable expenses from the company. Extraordinary meetings discuss matters which cannot wait until the next annual general meeting. The meeting may be held at any time, on any day and at any place.

e. **Class Meetings:** meetings of classes of shareholders can only be held if the company has different classes of shares. In a situation like this, the Articles would usually provide a modification of rights clause, the meetings of class of shareholders will be held whenever it is proposed to vary or alter the rights of that class of shares. Sections 166-167 provide that whenever the rights attached to any class of shares are at any time varied, the holders of not less than 15 percent of the issued shares of that class who did not consent to or vote in favour of the resolution for variation, may apply to the High Court for cancellation.

Notice of General Meeting

All general meeting requires 21 days of notice calculated from date, it is sent out or posted to the date of the meeting- s. 241(1). However, shorter notice could be given- s. 241(2).

(a) For annual general meeting if it is agreed by all the members entitled to attend and vote at the meeting.

(b) For any other meeting by a majority holding not less than 95% in nominal value of the shares with right to attend and vote.

Venue of Meetings

All statutory and annual general meetings shall be held in Nigeria- s. 240. Section 240(2) provides that a private company may hold its general meetings electronically provided that such meetings are conducted in accordance with the articles of the company.

Service of Notice

Notice of meeting may be served in the following ways:

i. Personal Service: The notice may be served on the members personally, if it is a small company.
ii. By Post: It is affected through the post. Service of the notice shall be deemed to have been effected by properly addressing and containing the notice at the expiration of 7 days after postage.
iii. Joint Shareholders: Where there are joint shareholders, notice is good if it is served on the person whose name appears first on the register.
iv. Deceased and Bankrupt Members: If the personal representatives or the trustees are not registered, then notice is served by sending it to any address which they may have supplied. If they have not supplied an address, notice may be served on the deceased or the bankrupt at the address given in the register of members.
v. In addition, section 246 CAMA provides that notice of meeting must be advertised in at least two daily newspapers, 21 days to the meeting in case of public companies.
vi. Notice could be served at the recipient's email's address –s. 244 CAMA.

Content of Notice

The notice of meeting shall contain the place, date and time of the meeting. It shall also specify the nature of business to be transacted at the meeting in sufficient details. This is to enable those to whom it is given to decide whether to attend or not. A resolution not covered in the notice cannot validly be passed and if it is a special resolution, the exact wording of the resolution must be given. For annual general meetings, it will suffice to state in the notice that the purpose of the meeting is to transact the ordinary business of an annual general meeting -(S 242 (2)).

Those entitled to receive notice of meeting

According to section 243 CAMA, the following are entitled to receive notice of meeting:

i. Every director of a company
ii. Every auditor of the company for the time being
iii. The secretary
iv. Every member
v. Every person upon whom the ownership of share devolves by reason of being a legal representative, receiver or a trustee in bankruptcy of a member.

Importance of Notice
To adequately inform a member the kind of meeting he is called to attend, the venue, the business or items to be discussed so as to prepare – either to participate in the discussion or even to understand what is going to be discussed.

Effect of Failure to Give Notice
Section 245(1) invalidates the meeting in favour of a person entitled to receive notice of it and was not given except if it was an accidental omission. Misrepresentation or misinterpretation of the provisions of the Act or the Articles of the Company shall not amount to accidental omission (S 245 (2)).

Court Ordered Meeting
Where it is impracticable, for any reason, to call or conduct a meeting of the company, the court may on its own motion or on application of directors or a person entitled to vote at such meeting, order a meeting to be called – s. 247; see ***Okeowo v. Migliore*** (1979) 11 SC (38) 1978 ALL NLR 282 (1979) NSSC (210).

Proceedings at Meetings include:

a. **Quorum:** a quorum is minimum number of members that must be present at the meeting to enable the meeting to start. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business and throughout the meeting (S 256 (1)).

The quorum for the meeting of the company shall be $^{1}/_{3}$ of the total number of members or 25 members (whichever is less) present in person or by proxy. Where the number of members is not a multiple of three then the number nearest to one third ($^{1}/_{3}$) suffices and where the number of members is 6 or less, the quorum shall be two members. Note that the Articles can however provide to the contrary, for example it may say 1 or 2 is enough to validly start a meeting.

b. **Proxy:** this is the person mandated by a member of a company to represent him at the company's meeting. He may or may not be a member of the company. A proxy has the same right to speak and vote at the meeting as the member appointing him- s. 254(1). The instrument appointing the proxy shall be in writing, under the hand of the appointer or his attorney duly authorized in writing or if the appointer is a corporation either under seal or under the hand of an officer or attorney duly authorized s.254(7).

c. **Voting:** this is to be by show of hands except a poll is demanded (S 248). It implies one man one vote. Voting by show of hands does not take care of the wishes of those who have highest financial stake in the company. When voting by poll is made, voting is by the number of shares a person holds.

d. **Minutes of the Meeting:** the company secretary must ensure that a record of the proceedings at the general meetings and all other meetings of the company are kept. This record is called minutes of the meeting.

e. **Resolutions:** the decision of the meeting is called resolution. There are several types of resolutions depending on the type of the company and the type of business being transacted. They are the following:

i. **Ordinary Resolution**: A resolution is ordinary when it is passed by a simple majority of votes i.e. the highest votes cast at the meeting by members and proxies. Ordinary resolution is usually taken when the ordinary resolution is usually taken when the ordinary business of the company is being transacted –s. 258.

ii. **Special Resolution**: Special resolution requires at least ¾ three fourth of the total votes cast i.e. 75% of the total votes cast must be in favour of the resolution- s.258 (2). All businesses transacted at extra-ordinary general meeting shall be deemed to be special business - 239(8). A mandatory 21 days' notice is required for special resolution. Shorter notice may however be given if agreed to by majority not less than 95% of the nominal value of the shares or by members representing not less than 95% of the total voting rights in case of company not having share capital.

iii. **Written Resolution**: All resolutions shall be passed at general meetings otherwise, it shall not be effective, however in the case of a private company, the CAMA allows written resolution signed by all members as valid and effective as if passed in a general meeting- s.259.

Requisition of Resolution: Holders of $^{1}/_{20th}$ of the total voting rights can requisition a notice of their resolution to be circulated to members entitled to receive notice of meeting to which the requisition relates- section 260 of CAMA 2020.

11.6 COMPANY PROMOTERS

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 is called promoter. A person may therefore become a promoter if he does any of the following things:

i. Procures capital with which the company starts its business;
ii. Negotiates an agreement for purchase of property by the company;
iii. Arranges for the preparation of the memorandum and articles of association;
iv. Solicits or obtains directors for the company;
v. Agrees to advertise for the shares of the company with prospective investors;
vi. Prepares a prospectus with which new members are solicited or invited to subscribe to the capital of the company.

Note that a person acting in a professional capacity in the formation of the company is not deemed to be a promoter (e.g. Lawyers and Accountants) (S61) See ***Garba v Sheba Int. (Nig.) Ltd*** (2002) 1 NWLR (Pt.748).

DUTIES AND LIABILITIES OF COMPANY PROMOTERS

i. The promoter must account for any profit made on any transaction on behalf of the company.

ii. The promoter stands in a fiduciary relationship to the company which implies that he must observe utmost good faith in transactions entered on behalf of the company.
iii. The transaction between the promoter and the company can be rescinded by the company- except where after disclosure it is ratified by the company.
iv. There is no limitation period for company to sue promoter, but the Court may give relief from liability to the promoter if it deems it equitable to do so.
v. The promoter formulates the rules for the internal management of the company and arranged to embody in the articles of association of the company.
vi. The promoter nominates who the first directors are, the auditors, bankers and even the company secretary.
vii. The promoter prepares, print and issue prospectus where the company is a public company.

11.7 FINANCIAL STATEMENTS

Financial statements are very important to the company, the general public, investors and potential investors because it represents or are the certificates of health or otherwise of the company. It enables the members of a company to know if the company is performing well, and the investing public to decide whether to invest in the company or not. It is mandatory for every company to prepare certain financial statement under sections 374 and 377 of CAMA, so as to:

i. Disclose with reasonable accuracy, at any time, the financial position of the company; and
ii. Enable directors to ensure that financial statements comply with the requirements of the Act as to the form and contents of the company's financial statement(s).

Meaning of Accounting Records

Accounting records mean:

i. Entries from day to day of all sums of money received and expended by the company and the matters in respect of which they take place.
ii. A record of the assets and liabilities of the company.

However, accounting records of a company dealing in goods will contain the following:

i. Statements of stocks held at the end of the year of the company; and

ii. Statements of goods sold and purchased and their buyers and sellers in sufficient details for identification purposes.

Location and Preservation of Accounting Records

The accounting records shall be kept at the company's registered office or such other places in Nigeria as the directors think fit and will at all times be open to inspection by officers of the company- s. 375(1). The accounting records of each year are to be preserved for 6 years before they may be destroyed.

Directors Duty to Prepare Report

The directors shall in respect of each financial year prepare a report showing:

i. A fair view of the development of the company and its subsidiaries (if any).
ii. Recommend amount for dividend (if any) and the amount proposed to carry to Reserve (if any). The financial statement contained in the director's report shall be sent to every member of the company and every debenture holder.

Publication of Financial Reports
Every public company is required to publish its financial statements together with the Auditor's report.

Contents of Financial Statements- s. 377 CAMA
The financial statements must include the following:

a) Statements of the company's accounting policies.
b) The balance sheet of the current year.
c) The profit and loss account for the current year.
d) Notes on the account by the directors / auditors.
e) Auditors report.
f) The director's report.
g) A statement of the sources of funds of the company and its application.
h) A value-added statement for the financial year.
i) A 5-year financial summary.
j) A group financial statement (if the company is a group or holding company).

NOTE: Private companies are exempted from items (a) (g) (h) (i).
The financial statements in all ramification is also intended to reveal whether the company complied with the accounting standard laid down by the Financial Reporting Council of Nigeria- s. 378 (1) and the 5-year financial summary is for comparison to see how the company has fared so far in the past 5 years.
"Note to the account" means any explanation provided in the account to explain certain things that could lead to misinterpretation if the notes are not supplied.

Director's Duty to Lay and Deliver Financial Statements
The director must at a date not later than 18 months after the incorporation of the company and subsequently once at least in every calendar year, lay before the company in a general meeting, copies of the financial statement of the company made up to a date not exceeding nine (9) months previous to the date of the meeting –s. 388(1) Furthermore, the directors shall in each year deliver the notes on the statements which were laid before the general meeting.
For shareholders' right to obtain copies of financial statements see S. 387 CAMA.

Modified Financial Statements by Small Companies
A small company may deliver modified financial statements in accordance with part 1 of schedule 6. For the definition of a small company-see s. 393(1); and publication of Financial Statement- s. 398 and 399 CAMA.

11.7.1 AUDIT
Under the CAMA, every company is required to appoint an auditor or auditors to examine the financial statements of the company, unless it is a small company within the meaning of section 394 -section 402(1)(b) CAMA. He is appointed at each general meeting and holds office from the conclusion of one general meeting to the next- section 401 (1). At the end of the financial year, an auditor's report should be attached to the balance sheet and it should state whether, in the opinion of the auditors, the financial statements comply with the Companies and Allied Matters Act and give a true and fair view of the state of the company's affairs at the balance sheet date and of its profit and loss account for the year ended on that date.

At any annual general meeting, a retiring auditor however appointed shall be re-appointed without any resolution being passed unless:

a) He is not qualified for re-appointment
b) A resolution has been passed at that meeting that some other person instead of him be appointed or providing expressly that he will not be re-appointed.
c) He has given the notice of his willingness to be re-appointed.

The Audit Functions

i. Act as a gate keeper, verifying the financial affairs of a company.
ii. Review accounts drafted by the company i.e. by directors.
iii. Right of access at all times to the books and accounts and vouchers of the company.
iv. May require any necessary information or explanation from any officer of the company.
v. They also act antagonistically to the directors and as a check upon them.
vi. Review and scrutinize director's report to confirm whether the report relates to the financial year in question.

Auditor's Report

The Auditor of a company shall make the report to the members on the accounts examined by them, and on every balance sheet, and profit and loss account and on all group financial statements copies of which are to be laid before the company in general meeting during the auditor's tenure of office and in the case of a public company, a similar report shall be made to the Audit Committee.

Qualification of Audit Report

Audit report provides only limited information to shareholders. It is common for shareholders to assume that an unqualified report means that all is well with financial statements of the company in terms of accuracy and reliability. However, audit report, may be of an unqualified opinion, qualified, adverse or an outright disclaimer.

a) **Unqualified Opinion**

An unqualified audit report is given when the auditor believes that the accounts give a true and fair view of the company's financial position and performance.

b) **Qualified Opinion**

This is when the audit report includes a qualified opinion that the auditor believes that the financial statements give a true and fair view except for a particular matter. For instance, the auditor might state that they were unable to check physically by counting the inventory quantities at a particular place but relied on the company's inventory records as being sufficiently accurate. If the amount of the inventory involved is small, a qualified audit opinion should be sufficient.

c) **Adverse opinion**

An adverse opinion is the most negative type of modified audit report. This is given when there is a disagreement between the auditors and the company's managements, and the auditors believe that the financial statements are misleading or incomplete in a material or pervasive way. Adverse opinion is the least common form of modified opinion. In practice, public companies normally expect to have an unqualified audit report to enhance investors' confidence in the management team of the company.

d) **Disclaimer of Opinion**

A disclaimer of opinion is a refusal by the auditor to give an opinion on a particular item in the financial statements. A disclaimer is appropriate where the auditor encountered difficulty and unable to obtain sufficient audit evidence, and the amount involved could be material.

Removal of Auditors

A company may by ordinary resolution of which special notice is given remove an auditor- sections 409(1) and 411(1)(d) CAMA. Notice of removal of an auditor will be given to the Commission within 14 days of passing of the resolution -S 409(2) CAMA.

Audit Committee

Section 404(3) CAMA provides that in addition to the report made to the members of the company on its account, the auditor shall in the case of a public company also make reports to an Audit Committee which shall be established by the public company.

Audit Committee is made of two non-executive directors and three representatives of the shareholders of the company subject to maximum of five members [s. 404(3) CAMA]. Nomination of a shareholder as a member of audit committee may be made by a member giving notice of such nomination to the secretary of the company at least 21 days before the annual general meeting- s. 404(6) CAMA. All members of the audit committee shall be financially literate, and at least one member shall be a member of a professional accounting body in Nigeria- s. 404(5) CAMA.

Objectives and Functions of the Audit Committee

i. To examine the auditor's report and make recommendations thereon (S. 404(4).
ii. To ascertain that the accounting and reporting policies of the company are in accordance with legal requirements and agreed ethical practices (S. 404 (7)(a).
iii. To review the scope and planning of audit requirements (S. 404 (7) (b).
iv. To review the findings on management matters in conjunction with the external auditors and departmental responses thereon (S. 404 (7) (c).
v. To keep under review the effectiveness of the company's system of accounting and internal control [S. 404(7)(d).
vi. To make recommendations to the Board in regard to the appointment, removal and remuneration of the external auditors of the company (S. 404 (7)(e).
vii. To authorize the internal auditors to carry out investigation into any activities of the company which may be of interest or concern to the committee [S.404 (7)(f).

11.7.2 ANNUAL RETURNS

Every company shall once at least in every year make and deliver to the Commission any annual return but the company need not make a return in the year if the company did not hold meeting in that year under review (S. 417,418). The annual return is a detailed schedule of information regarding the company to be furnished on an annual basis. The filing of an annual return is important and very essential for a company without which it may not continue in operation as it stands the risk of having its name struck off the register of companies. It also allows the Commission to monitor the affairs of the company as well as provide public with a ready tool of assessing the viability of the company for possible investment.

Time for Completion of Annual Return
A company is expected to complete its annual return within 42 days after its annual general meeting for the year, whether or not that meeting is the first or the only ordinary general meeting of the company in that year, and forthwith forward to the Commission a copy of the return signed both by a director and by the secretary of the company.

Documents to be annexed to Annual Return
Subject to the provision of S. 377 exempting unlimited companies and small companies, the annual return must have annexed to it:

a) A written copy, certified by a director and the secretary of the company to be a true copy of every balance sheet and profit and loss account laid before the company in general meeting held in the year to which the return relates;
b) A copy certified by a director and secretary of the company of the auditor's report and the report of the directors accompanying the balance sheet (Ss. 417-420, 422).

For a private company, the annual return will be accompanied by a certificate signed by a Director and the Secretary of the private company affirming that since the date of incorporation the company has not issued any invitation to the public to subscribe for any share or debentures of the company and if applicable, another certificate to be given if the number of members exceeds fifty.

Contents of Annual Return by Company Having Share Capital other than Small Company:

i. Address of the Registered office;
ii. Situation of the Register of members and Register of Debenture holders;
iii. Summary of share capital and Debentures;
iv. Particulars of Indebtedness;
v. List of past and present Members;
vi. Particulars of Directors and Secretary.

11.8 COMPANY SECURITIES

Company securities are contributions to the trading capital of companies which is made with a view to obtaining some profitable returns by the investors. The securities of a company consist mainly of shares and debentures.

Shares
A share represents a unit of the bundle of rights and liabilities, which a shareholder has in a company as provided in the terms of issue and the Articles and now includes the right to attend and vote at a meeting. A share is a chose in action and it is property transferable as provided in the articles (S. 115) see ***Okoya v. Santili*** (1994) 4 NWLR (Part 338) 256: 1994) 4 S CNJ (Part 11333).

In ***Borland's Trustee v. Steel Brothers & Co Ltd*** (1901) A share was held to be the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders. A share is not a sum 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. See section 868 CAMA for the statutory definition of shares.

Issue of Shares
A company has the right, subject to the articles, to issue shares up to the total number authorized in the memorandum.

Issue of Shares at a Premium
Shares of a company may be issued at a premium-s. 145 (1). Shares are issued at a premium when the price at which they are issued is higher than the nominal value of the shares. For instance, if the nominal value of the company's share is N2.00 per share it may issue at N2.50.

Issue of Shares at a Discount
Shares are issued at a discount when the price at which they are issued is lower than the nominal value of the shares. It is unlawful for a company to issue shares at a discount in Nigeria- s. 146.

Issue of Shares at par
Shares are issued at a par when the price at which they are issued is the same as the nominal value of the shares.

Allotment of Shares
The power to allot shares is in the company. Shares may be allotted wholly or partially but the applicant must be notified within 42 days after the allotment and the number of shares allotted.

Return of Allotment
Whenever a company makes allotment of the shares, the company must within one month thereafter deliver to CAC for registration as prescribed in section 154 CAMA.

Payment for Shares
Payment for shares may be made in cash or by valuable consideration other than cash where the articles of the company permits- s. 154. Where a company agrees to accept payment for its shares by a consideration other wholly in cash, it shall appoint an independent valuer who will determine the true value of the consideration- ss. 154(1)(b) & 162.

Call on Shares
Upon issuance, a specified sum may be paid on allotment and the balance paid subsequently. The demand to pay any sum outstanding on shares allotted is referred to a call on shares. This call is made by the directors in accordance with the Articles where shares are not payable in full on allotment- s.158.

Share Certificate
Every company must within 2 months after the allotment of any share and within 3 months after the lodging of share transfer, complete and have ready for delivery the certificate of the shares allotted or transferred- s. 171(1).

11.8.1 CATEGORIES OF SECURITIES/TYPES OF SHARES
Companies' securities include shares and debentures. The following are the major types of shares:

i. **Ordinary Shares:** These are shares issued by companies with no special rights attached to them. The holders are entitled to dividend only after other shareholders with preference rights have been paid dividend; and in liquidation, they are not entitled to return of capital, unless there is an excess after all other stakeholders have been paid. Ordinary shareholders

are the major risk-takers if the company's undertaking proves unsuccessful but they are also the greatest beneficiaries if it proves successful. Ordinary shares are sometimes referred to as 'equity' or risk capital.

ii. **Preference Shares:** Holders of this class of shares are entitled to be paid first whenever dividends are declared. Dividends are profits set aside by the company for distribution to its shareholders. They are paid the agreed percentage before any other shareholder is paid. Preference shares could be cumulative preference shares. This implies that if a company is unable to declare a dividend in a given year, the agreed percentage is carried over to the next year for payment. Preference shares could also be non- cumulative in a given year, the arrears are forfeited i.e. they are not carried over to the next or any other year.

iii. **Deferred Shares:** It is also called founders shares. These are shares specifically allocated to the founders of the company or its main financiers. Deferred shares usually rank next in priority to ordinary shares. This entitles the holders to the whole or a portion to the profits after the ordinary shareholders have been paid a fixed dividend. The Investment and Securities Act 2007 requires that founders' shares be disclosed in the company prospectus with the attached rights, in order to prevent situations where the company's management will use founders' shares to exploit other shareholders especially the ordinary shareholders.

Debentures

Upon borrowing of money by a company for purpose of its business or objects, it may give a written acknowledgement to the creditor to evidence that the company has borrowed money. The document of acknowledgement is called a debenture. This document of acknowledgement of debt usually shows the amount, the terms of the loan, the mode and date of payment. Section 868 CAMA defines debenture as a written acknowledgement of indebtedness by the company setting out the terms and conditions of the indebtedness. Debenture may be secured or unsecured. It is secured when it is guaranteed by a charge over the assets of the company so that in the event the company is unable to pay, the assets charged may be taken and sold by the creditor to recover his money. Debenture is not secured if the debt is not secured by any assets of the company.

Types of Debentures

i. Perpetual Debentures

These are debentures that are intended to be permanent i.e. irredeemable or may be redeemed only on the happening of an event, or on the expiration of a period however long- sec. 196 CAMA.

ii. Convertible Debentures

These are debentures that have the option of being converted into shares of the company at the option of the debenture holder or the company, based on the terms in the agreement- sec. 197 CAMA.

iii. Secured or Naked Debentures

Secured debenture are those which are secured by charges over the company's property, whether by a fixed charge or by a floating charge, while a naked debenture is one which is not secured by a charge - sec. 203 CAMA.

iv. Redeemable Debentures

These are debentures that are redeemable at any time by the company - sec. 199 CAMA.

v. Bearer Debentures

These debentures are issued payable to bearer. They are negotiable instruments transferable by mere delivery. A bonafide transferee for value without notice of any defect in the title of the prior holder is not affected. The transferee of a bearer debenture becomes a creditor to the company and is entitled to recover the face value plus interest when due.

vi. Registered Debentures

These debentures are payable only to those mentioned in the debentures as the registered holders.

Issue of Debentures

Debentures are issued in accordance with the provisions in the Memorandum and Articles of Association. If debentures are issued to the public, they must comply with requirement of section 44 of the Investments and Securities Act i.e. a prospectus must be issued.

Charges Securing a Debenture

Debenture may be secured fixed or floating charges (S.178). A fixed charge is a mortgage of a specified property of the company such as land. A floating charge on the other hand is an equitable charge over the whole or specified part of the undertaking or assets of the company including cash and uncalled capital both present and future.

Registration of Charges

Section 223(1) provides that the CAC shall keep a register of all charges requiring registration with respect to each company. Upon registration of a charge the Commission shall issue a registration certificate, setting out the parties to the charge, the amount thereby secured and other particulars; the certificate serves as a prima facie evidence of due compliance with the requirements as to registration under this Part B of CAMA- s. 223(2).

Effect of Non-Registration

Failure to register a charge as required will render it void against the liquidator and any creditor of the company. The obligation to pay the debt is however not thereby discharged, ***Capital Finance Ltd v. Stokes*** (1969) Ch. 261.**Remedies of Debenture Holders**- s. 233.

i. He may levy execution on the property of the company if there is default in the payment of principal and interest.
ii. A debenture holder may present a petition for winding up as creditor of the company if the company failed to pay the principal and or interest.
iii. He may apply to court for foreclosure of the company's right to redeem the debentures.
iv. He may proceed to sell the charged property if such a power is conferred by the debenture instrument.
v. On winding up, he may value his security and if it is insufficient, he may prove for the balance like any unsecured creditor.

11.8.2 SECONDARY SECURITIES

Instruments that grant rights of transfer relative to shares or debt securities under an existing contract are called subordinate or secondary securities. This is because they exist as variants and

often, temporary forms of the conventionally accepted primary securities. These secondary securities include the following:

i. Renounceable Letters of Allotment

Renounceable letters of allotment are documents that evidence titles to newly issued shares or debt securities which will eventually be replaced by certificates and the registration of the holders in the register of the issuing company. Renunciation implies or means that the right of the allottee to transfer to another person his right and to be entered in the register of members or of creditors in the books of the issuing company.

ii. Depository Receipts (DRs)

Certificates of Deposit or Receipts evidence the right of the holders to a specified number of shares or debt securities out of 'holding' of them vested in or held by the issuer of the Certificate or Receipts. The issuer of the Certificate of Deposits or Receipts is usually not the issuer of the Share Certificate or Debenture Instrument against which the secondary security is issued. This option allows companies securities to be traded outside the country. DRs came into being to overcome attendant difficulties associated with cross border securities transaction.

Some of the difficulties include but not limited to the following:

a. Unfamiliar procedures in acquisition and transfer of shares.
b. Complication posed by completion and settlement timing which varies from country to another.
c. Foreign exchange issue and risk.
d. Prohibition of foreigners from direct ownership in domestic equity share.
e. Heavy taxation.

The process of purchasing DRs involves two banks namely:

a. Depository bank (Foreign bank)
b. Investment bank

The investment bank will instruct a stock broker in the home country to purchase shares of the issuing company on the open market in the home country of the issuing company. The shares are then delivered to a custodian bank of the depository bank. Note that the depository bank is typically a foreign bank where the DRs are to be sold.

Upon receipt of shares by the local custodian, the depository bank then issues DRs to purchasers in the foreign market. The issuing company's register in the home country maintain one account in the nominal name of Depository bank for the benefit of the holders of the DRs which represents the total number of shares underlying the DRs. The Depository bank maintains records of each individual holder of the DRs. The DRs are denominated in the currency of the country in which they are issued.

The Depository bank receives all communication, such as annual reports or information on shareholders and distributes them to holders of DRs. Exercise of voting rights, and receipt of dividend payments are through the Depository bank.

iii. Share Warrants

A share warrant evidences a right to acquire shares on the term stated. A warrant is generally embodied in an instrument that represents the right to acquire shares and is usually transferable either freely or in accordance with certain restriction. Share warrants to bearer are usually issued by only public companies. Part II, Table A of the Companies 1968 prohibited private companies from issuing bearer warrants. However, section 174(1) of CAMA, 2020 forbids any company from issuing bearer shares.

11.9 DERIVATIVES

A derivative is a financial instrument or bilateral contract that derives its value from the changes in value of other financial instruments or underlying reference price, rate or index. It is not a secondary form of a primary security. It has an independent existence but its value depends on changes in the value of a primary or even a secondary security.

Types of Derivatives

The under listed are the types of derivatives:

i. Forwards
ii. Futures
iii. Options
iv. Swaps

i. **Forwards:** A forward contract is a duly executed contract to supply and deliver securities or other goods where performance is postponed to some definite time in the future. It is a contract initiated at one time, performance at a date in future in accordance with the terms of the contract. Forward contracts exist for agricultural and physical commodities, currencies (foreign exchange forwards) and interest rates. A forward contract creates an obligation for the buyer of the contract to purchase the underlying asset from the seller at the expiration date and the asset must be delivered by the seller to the buyer for the price agreed upon.

By fixing in the present, the price at which the underlying asset will be sold in the future forward contracting reduces the risk of loss from adverse price changes and reduces the cost of doing business.

ii. **Futures:** Future contracts are standardised forward contracts. They are obligations to buy or sell an asset at a specified future date for a specified price and no money changes hands until maturity.

Future contracts are treated in an organised exchange and highly standardized. Performance of future contract is guaranteed by a clearing house, that is, a financial institution associated with the futures exchange. Future markets are generally regulated by an identifiable government agency while forward contracts in general trade is in an unregistered market.

iii. **Options:** An option is a choice created through a financial contract. It is a right to either purchase or sell an underlying good at a specific price within a specified period of time. Every option is either a call option or out option. The owner of a call option has the right to purchase the underlying goods at a specific price, and this right lasts until a specified date. The owner of a put option has the right to sell the underlying goods at a specific price and this right lasts until a specified date.

iv. **Swaps:** mean an exchange of cash flows. It is a bilateral contract between two parties (counter parties) to exchange or swap defined cash flow at a specified interval. Simply put, a swap is an agreement between two or more parties to exchange sets of cash flows over a period in the future.

11.10 COLLECTIVE INVESTMENT SCHEMES

Collective Investment Scheme is an umbrella fund for a collective investment, structured as a single legal entity with distinct sub-funds which are traded as separate investment funds. For example, a fund manager may desire to set up a fund to invest in financial services but after interacting with prospective investors, he realized that some of these prospective investors are interested in the banking sector while others are interested in insurance companies. To take care of the desires or appetite of the various investors, the fund manager will set up a main fund which is in the financial services fund and then invest in financial services through sub-funds that will be invested in specific sectors.

In practice, there is a statutory backing for the segregation of the liabilities of the sub-funds under an umbrella fund such that the assets of each sub-fund belong exclusively to that sub-fund so as to be effectively ring-fenced from the other sub-funds in the umbrella company and the umbrella company itself. Examples of collective Investment Schemes are:

i. Unit Trusts

A unit trust is an investment mechanism that provides a large number of investors (usually small investors) with a means to pool resources and participate in diversified portfolio investments. In return for their savings, investors are issued units of a nominal value which represents their holdings in the scheme. These units earn dividend and are redeemable at any time.

ii. Government Securities

These are traded by individuals and institutions because of the safety associated with government securities. The most common type of government security is Treasury Securities, which are issued on behalf of the federal government. They are issued in several forms, of varied denomination, maturity and interest rates. The simplest of the treasury securities is the "Treasury Bill". They have a minimum maturity of one year and are sold at discount from their face value. The difference between the discount price and the maturity value is the interest income. Other government securities are Treasury Notes and Treasury bonds.

iii. Money Market Instrument

Examples of Money Market Instruments are Reserve funds and repurchase agreements. Reserve funds are pools of cash which the CBN requires commercial banks to have on hand for liquidity purposes. Banks holding inadequate cash reserves may borrow from those banks with excess

reserves. These funds are usually loaned 'overnight' with interest paid for one day. The interest is paid at the CBN minimum re-discount rate.
Repurchase Agreements are investment devices which enable institutional investors and government security dealers to exchange cash for government securities. Many cities, pension funds use repurchase agreements to lend idle cash for short periods of time, often just overnight. The rate of return on repurchase agreements is higher than the prevailing rate on Treasury Bills and can be easily structured to meet the needs of the parties. Overnight repurchase, Open repurchase and term repurchase are the three types of repurchase agreements.

11.11 MERGERS AND TAKE OVERS

Mergers are another type of corporate reconstruction. Mergers and Take overs provide alternative to outright winding up of companies. Mergers are regulated by the Investment and Securities Act (ISA) 2007.

Mergers
A merger is any amalgamation of the undertakings of any part of the undertaking or interest of two or more companies. A company could merge with another company or combine in some way in united ownership. Merger scheme is referred to the court and Securities and Exchange Commission (SEC) for approval SEC will refuse to approve a merger that will lead to a monopoly or create restraint of competition.

Types of Mergers
i. Vertical Mergers: This is when two companies involved in different levels of production in the same industry merge.
ii. Horizontal Mergers: This is when two companies involved in the same level of production merge to eliminate competition.
iii. Conglomerate Mergers: This is when two or more companies in different or unrelated business merge.

Procedures for Mergers

The under listed are the three step procedures for combination of companies:
i. Pre-merger stage
ii. The consolidation stage
iii. Merger stage

Pre-merger Stage
i. The merger proposal is prepared, considered and approved by the boards of the merging companies.
ii. A pre-merger notice is given to the members of each company and the Securities and Exchange Commission (SEC).
iii. Any of the merging companies will then make an application to the Federal High Court to approve the merger.
iv. If the court approves it, the general meeting of each of the merging companies is called separately to consider the merger documents.

The Consolidation Stage

i. If the special majority of the three fourth of members of each of the merging companies voting in person or by proxy approve the merger, it is then referred to the SEC for approval.
ii. If SEC approves the scheme, any of the two companies will again apply to the Federal High Court for final approval.

Merger Stage

i. The merging companies shall cause a copy of the court order giving final approval to be delivered to SEC for registration within 7 days of the order.
ii. A notice is published in the Federal Government Gazette and in at least one Newspaper.
iii. SEC is thereafter notified of the completion of the merger.

Reasons for Mergers

Please note that the following reasons may be responsible for companies to merge:

i. To increase profit.
ii. For technology improvement.
iii. To minimize lost or cost of production.
iv. To create monopoly or eliminate competition.
v. Risk diversification.

Finally, it is essential to note that the courts are involved in merger to create fair hearing and provide additional supervision to that of SEC in order to enhance and ensure a fair deal.

Take-Overs

Take-overs are aimed at acquiring control in a desired company. This process is however a way of taking over the management or acquiring substantial voting rights in a target company. According to section 99 of the Investment and Securities Act 2007, 'a take-over' is the acquisition by one company of sufficient shares in another company to give the acquiring company control over that company. Every take-over is initiated by a take-over bid.

Procedure for Take-Overs

i. A bid is prepared for the Board of the offeror Company which is expected to meet and consider it.
ii. An application is consequently made to SEC for approval to proceed with the bid.
iii. If approval is given by SEC, it shall remain in force for 3 months subject to further extension.
iv. If SEC refuses to give approval, the offeror Company may seek judicial intervention.
v. If approval is given, the take-over bid is dispatched to the shareholders of the target Company, directors and SEC.
vi. The Offeror shall take-up the shares deposited or indicated for the take-over by shareholders of the target company.
vii. The shares of dissenting shareholders shall be taken over at fair value by the Offeror at the agreed price subject to SEC approval. Sections 131 to 151 of ISA (2007).11.12 OTHER FORMS OF BUSINESS ORGANISATIONS

There are many ways through which a businessman or an investor may structure his business such as sole proprietorship and partnership which has been discussed in some detail in the previous

chapter. Other forms of business organizations include incorporated trustees, unincorporated associations, co-operative society and incorporated company.

11.12.1 Cooperative Society

This is a voluntary association of persons united to meet their socio-economic and cultural needs through a jointly owned enterprise. It is a society for mutual help. It is established under the laws of the different states in Nigeria Co-operative Societies Law, Cap 35 Laws of Oyo State, Co-operative Societies Cap 33 Laws of Kano State. Some are formed directly by statute. There are different types of cooperatives such as consumers' cooperative, retail cooperative housing co-operative, utility cooperative, community cooperative, workers' cooperative, producer cooperative e.t.c.

11.13 INCORPORATED TRUSTEES

These are usually clubs, associations of persons, related customs, tribe, churches, mosque and non-governmental organizations. These types of organizations are allowed under section 823 of CAMA 2020. The benefit of incorporated trustees is that it assumes corporate attributes.

Legal Regulation of Trustees

Where a non-profit organization is structured as a trust, its legal regulations are derived from:

i. The provisions of the CAMA
ii. The constitution of the organization
iii. Provisions of the Trustee Investment Act 1962
iv. Principles of the common law, and equity formulated by the courts
v. Internal rules, bye laws, code of conduct and operational manual

Legal Status of Registered Trustees

Upon registration, a certificate of incorporation shall be issued and this certificate confers the following:

i. The trustee or trustees shall become a body corporate by the name described in the certificate;
ii. Shall have perpetual succession and a common seal;
iii. Has power to sue and be sued in its corporate name;
iv. To hold and acquire and transfer, assign or otherwise dispose any property or interest.

Qualification of Trustees

A person, according to sec. 826 CAMA, shall not be qualified to be appointed as a trustee if:

i. He is an infant;
ii. He is a person of unsound mind;
iii. He is an undischarged bankrupt;
iv. He has been convicted for fraud related cases within five years of his proposed appointment.

Duties of Trustees

i. Duty to observe the terms of the trust;
ii. Duty of standard care. This implies that a trustee is to exercise that utmost diligence as a prudent man of business would employ in the management of his own affairs;
iii. Duty to protect trust property;

iv. Fiduciary Duty: This is a duty of loyalty and confidence, duty to act gratuitously;
v. A private trustee must be loyal to the interest of the beneficiaries;
vi. Duty to maintain the confidentiality of the association;
vii. Duty not to make secret profit.

11.14 JOINT VENTURES

A joint venture is a formal agreement between at least two firms to create or merge their businesses for the sole aim of mutual benefits often related to business expansion, especially to promote a new product and/or market. The synergised parties hence share ownership, risks and governance of the new business enterprise. Joint ventures have become very popular among firms in this century, as they take different forms ranging from corporations to partnerships. In Nigeria, most Joint Venture agreements involve foreigners as a party due to government policies which support indigenisation in various industries.
Indigenisation is an act of infusing some local or native content; transformation of some service, idea e.t.c. to suit a local culture, creating more employment opportunities for the indigenes, e.t.c. It simply means to increase local participation in or ownership of, to indigenise foreign-owned companies, or to adapt such companies to local ways.

In some industries in Nigeria i.e. petroleum industry, local exploration of natural resources and their onward processing may not be possible without the involvement of foreign based corporations who have the expertise and equipment's to work with. Some of these foreign companies i.e. Shell, Total, Exxon-Mobil enter into joint venture agreements with the national body regulation petroleum products in Nigeria (NNPC) to secure the production of petroleum products while the companies split profits according to earlier agreement.
There are four particular reasons why companies opt for Joint Venture (JV)

i. To access a new market
ii. To gain scale efficiencies by combining assets and operations
iii. To share risk for major investments or projects
iv. To access skills and capabilities

Types of Joint Ventures
Short term collaborations
The length of this Joint venture is stipulated from the inception, JV partners create synergies for executing particular projects instead of a commitment to a long lasing business relationship.

Limited Co-operation with another business
This refers to an agreement of a smaller company to co-operate with another business in a limited and specific way. The smaller partner with an exciting new product may use a larger company's distribution network to market its new product.

SEPARATE JOINT VENTURE BUSINESS
Here the partners who have different businesses will set up another separate company to handle a particular contract or contracts. The partners each will own shares in the new company and set out in an agreement how it will be managed.

Business Partnership
Here there is a merger of two businesses, as they become one. The joint venture agreement will expressly set out the mode of operations, sharing ratio and risk sharing.

Benefits of Joint Ventures
i. Partners can save money while reducing their risks through capital and resource sharing.
ii. Opportunity is given to companies of all sizes, through synergy they can increase sales, gain access to wider markets, and enhance technological capabilities through research and development underwritten by at least two parties.
iii. It gives small companies the opportunity to align with larger ones hence provides an opportunity for the small company to develop drastically.
iv. It enhances cultural understanding which leads to a more productive and stable business environment.

Dissolution of Joint Ventures
i. Where the aim(s) of the venture has been met.
ii. Where either of the parties or where all parties develop new goals.
iii. Where a party or both parties no longer agree with the joint venture aims.
iv. Where the joint venture agreement was entered to for a particular span of time which has now expired.
v. Where one party to the joint venture agreement acquires the other making the business enterprise a one-party business.
vi. Where a non-defaulting party terminates the joint venture agreement in accordance with a default clause.
vii. Where the parties to a joint venture agreement decide to bring such relationship to an end.
viii. Where the market in which a joint venture operates evolves and makes such relationship obsolete or irrelevant.

11.15 SPECIAL PURPOSE VEHICLES

Special Purpose Vehicles (SPV) is corporations which come into existence to secure the interest of their parent companies. Some companies can come together; having pooled their resources together to create a subsidiary company which will be managed according to the agreement at its inception. SPV's have been used extensively as a means of securitisation for property based financial products. SPV's may be structured in different ways, such as charitable trusts, a limited liability corporation, a limited partnership, or corporations as the case may be.

The parent company creates an SPV so as to sell assets on its balance sheet to the SPV and thereby will obtain some beneficial financing from the SPV. The SPV in this case will get financing to buy the assets of the parent company from independent investors. The main company here which incorporated the SPV gets financing from the SPV The assets flow in opposite directions from the parent corporation to the SPV and then to the investment bank and back to the parent company. The SPV owns the assets which it uses as collateral in securing finance from lenders who evaluate the credit quality of the collateral and not the credit quality of the corporation.

Note that an SPV is a subsidiary company with an asset/liability structure and legal status that makes its obligations secure even if the parent company goes bankrupt. They may be designed for independent ownership, management and funding of a company; have protection of a project from operational to insolvency issues; or for creating a synthetic lease that is exposed on the company's income statement rather than recorded as a liability on the balance sheet.

The SPV may facilitate and support securitisation, financing, risk sharing and raise capital for their parent companies, these objectives which would not be possible without putting the entire parent corporation at risk.

Benefits of Parent Company in Sponsoring SPV's

i. An SPV makes it possible for multiple parent companies to own a single asset and there is also an ease of onward transfer of the acquired asset.
ii. The SPV documentation at its inception can limit the operation, activities and prohibit unauthorized transactions of the SPV.
iii. The firm(s) or parent companies incorporating an SPV have the opportunity to incorporate the SPV in a favourable jurisdiction while the parent company continues her operation in its own jurisdiction.
iv. SPV's have limited liabilities when properly structured hence, the sponsor or parent company has limited liability in case the underlying project of the SPV fails.
v. A well-structured SPV's bankruptcy will usually not affect the parent company's position where the assets of the SPV are not consolidated on the parent company's on-balance sheet. In this situation, the parent company is 'bankruptcy remote.'

11.16 CONCLUSION:

The scope of legislation in company law has expanded beyond the traditional ambit to include novel concepts. A detailed examination of the traditional and the current issues has been undertaken in this chapter. Moreover, CAMA 2020 has come up with new innovations such as one man could now incorporate a company, private companies may hold virtual AGM etc. The chapter discusses pertinent corporate and investment issues such as collective investment scheme, derivatives, mergers and acquisition, JV, SPV e.t.c.

11.17 ILLUSTRATIVE AND PRACTICE QUESTIONS

1. The principle of law in *Salomon v Salomon* established the separate personality doctrine. Discuss.
2. Discuss the procedure for take-overs under ISA 2007.
3. Write short notes on the following:

a. Quorum
b. Voting
c. Minutes of Meeting
d. Proxy

4. List the category of persons entitled as of right to receive notice of company Meetings.
5. Discuss the components of an annual return under CAMA.
6. Discuss the different types of Mergers recognized in the capital market.

7. List documents for incorporation of a company.
8. *First Bank v. Longe* has emphasized the requirement of notice for directors of companies before they can be sacked. Examine the principles in this case with reference to CAMA.

MCQ

1. _____ constitutes acts which are largely unauthorized and beyond the capacity of an appointed officer of a company.

A. Ultra vires
B. Negativism
C. solicitism
D. Nex ex cirita

2. A legal person appointed to sit on the board of a company in the place of a director, where the principal would be otherwise unable to attend is called a/an _____ Director

A. Shadow
B. Interim
C. Alternate
D. Confirmed

3. A mandatory _____ day's notice is required by law for special resolution passed by the shareholders to be effective

A. 7
B. 21
C. 30
D. 72

4. A public limited liability company possesses the legal right, subject to the _____ to issue shares up to the total number authorized in the Memorandum.

A. Agreement
B. Availability of funds
C. Articles
D. Time and space

5. Where one or more non-business and non-profit making organization are appointed by any community of persons bound together by custom, religion, kinship or nationality, they may apply to the Corporate Affairs Commission (C.A.C) to be registered as _____

A. Incorporated trustees
B. Trustee committee
C. Trade union
D. Elite committee

11.18 CASE STUDY

Daniel (35 years old), Abdullahi (17 years), Richard (12 years), James (22 years), Obi (16 years), Jimoh (18 years) and Joseph (15 years) have all subscribed to a memorandum of association so as to form a public company. They listed Dr. Timothy Omowaiye, the renowned financier and corporate guru, who is a director in five other companies and Mrs. Diekola Chinedu, a chartered

arbitrator as director and the company secretary respectively. The Corporate Affairs Commission refused to register the company and raised certain queries.
Required: Advise the promoters and prepare a response to the likely queries

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CHAPTER TWELVE

CHAPTER TWELVE: CONSUMER PROTECTION LAW

12.0 INTRODUCTION

Consumer protection is the process of defending the general public, the consumers of goods and services, against unethical business activities. It ensures that consumers' rights are protected by the producers, business organizations and the government. Protection of consumer rights is germane to deriving utility and satisfaction over money paid or spent on goods and services. It however took a different dimension during the outbreak of COVID-19, when some unscrupulous merchants were selling substandard and expired products to the unsuspecting public. The need to protect the consumers and check the excesses of businesses and individuals is therefore apt.

12.1 LEARNING OBJECTIVES

At the end of this chapter, we shall understand the following concepts, principles and frameworks:

i. The meaning and essence of consumer protection.

ii. The legal frameworks protecting the rights of consumers in Nigeria.

iii. The bodies charged with the responsibility of protecting the consumers.

iv. The procedures for investigating the potential breaches regarding consumer protection.

v. The enforcement mechanism of consumer protection awards or decisions.

vi. The penalties and remedies for violations of consumers' rights.

12.2 LEGAL FRAMEWORKS OF CONSUMER PROTECTION IN NIGERIA

The major statute that governs and protects the rights of consumers in Nigeria is the Federal Competition and Consumer Protection Act, 2018 (FCCPA) which established the Federal Competition and Consumer Protection Commission (FCCPC) to, amongst others:

i. Protect and promote consumers' interest and welfare by providing consumers with a wider variety of quality products at competitive prices; and

ii. Prohibit restrictive or unfair business practices that prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria.

Prior to the enactment of the FCCPA, the principal legislation that protected the rights of consumers in Nigeria was the Consumer Protection Council Act, 2004 ("CPA"), which established

the Consumer Protection Council ("CPC"); however, the FCCPA repealed the CPA and the FCCPC assumed all rights, interests, obligations, assets and liabilities of the CPC.

Section 163 of the FCCPA empowers the FCCPC to make rules and guidelines for the effective implementation of the provisions of the FCCPA. In addition to the provisions of the FCCPA, there are the:

i. FCCPC (Sales Promotion) Registration Regulations, 2005;
ii. FCCPC Guidelines for Sales Promotion Registration;
iii. FCCPC Business Guidance Relating to COVID-19 on Business Co-Operation/Collaboration and Certain Consumer Rights Under FCCPA, 2020;
iv. FCCPC (Administrative Penalties) Regulations, 2020;
v. FCCPC Investigative Cooperation/Assistance Rules & Procedure, 2021;
vi. FCCPC Guiding Principles for Sustainable Consumption 2020.

12.2.1 Powers of the FCCPC- section 18, FCCPA

The Commission is empowered to:

i. Prevent the circulation of goods or services which constitute public hazard or an imminent public hazard;

ii. Compel manufacturers, suppliers, dealers, importers, wholesalers, retailers, providers of services and other undertakings to;

iii. Comply with the provisions of this Act;

iv. Certify that all goods and services meet the specified standards;

v. Give public notice of any health hazards associated with any good or service.

The FCCPA prohibits business practices/conducts that are misleading, fraudulent, unconscionable or generally anti-competitive. Some of such conducts include the following:

i. issuing a false or wrong advertisement;

ii. altering, covering, removing or obscuring a trade description or trade mark applied to any goods in a manner calculated to mislead consumers;

iii. giving false, erroneous, misleading or likely to be misleading in any material respect, fraudulent or deceptive representations concerning any material fact for the purpose of promoting or marketing a product;

iv. giving representations in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of products which are not based on an adequate and proper test of the goods or services; and

v. offering to supply, supplying or entering into an agreement to supply any goods or services on unfair, unreasonable or unjust contract terms.

The FCCPC in enforcing the provisions of the FCCPA may:

i. seal up any premises on reasonable suspicion that such premises contain or is being used to produce or distribute substandard or hazardous goods or services or those inimical to consumers' welfare;
ii. commence and prosecute a suit against a defaulting undertaking in a competent court;

iii. impose an appropriate administrative penalty on a defaulting undertaking; and

iv. where its orders or summons are disobeyed, the FCCPC can make referral to the Office of the Attorney General for prosecution.

Reasons for Consumer Protection in Nigeria are to ensure that:

i. consumers could make informed choices based on accurate information;

ii. goods and services' providers observe extant laws on safety and quality standards;

iii. markets for products and services operate transparently and efficiently to facilitate access and innovation;

iv. restitution and compensation are paid to buyers of defective goods/services;

v. consumers get value for money spent; and

vi. promotion of fair competition through consistent application of federal consumer protection and competition laws.

12.2.2 Consumer, goods and services
Section 167(1) of the FCCPA defines a consumer in to include any person:

'Who purchases or offers to purchase goods other than for the purpose of resale.'

The definition of goods as provided for in the FCCPA is vast, it includes ships, aircraft, vehicles, minerals, trees and crops – whether attached to land or not – as well as gas and electricity. Service is similarly defined broadly to include service of any description, whether industrial, professional or any other service, and the sale of goods, where the goods are sold in conjunction with the rendering of a service.

The FCCPA applies to and binds all undertakings (that is, any person involved in the production of or the trade in goods, or the provision of service) and all commercial activities within, or having effect within Nigeria, including:

i. a body corporate or agency of the Government of the Federation or of a sub-division of the Federation, which engages in commercial activities;

ii. a body corporate or agency in which the Government of the Federation or a State, or a body corporate or agency of the Government of the Federation or any State or Local Government, has a controlling interest, where such a body corporate engages in economic activities; and

iii. all commercial activities aimed at making profit and geared towards the satisfaction of demand from the public.

In addition, the provisions of the FCCPA apply to certain conduct occurring outside Nigeria where such conduct is carried out by:

i. a citizen of Nigeria or person ordinarily resident in Nigeria;

ii. a body corporate incorporated in Nigeria or carrying out business within Nigeria; and

iii. any person in relation to the supply or acquisition of goods or services by that person into or within Nigeria.

12.2.3 Conflict Resolution Process of the FCCPC

The FCCPC is conferred with powers to carry out investigations or inquiries considered necessary or desirable on any matter falling within the purview of the FCCPA- section 17(e). Additionally, the FCCPA specifically empowers the FCCPC to: (i) summon and examine witnesses; and (ii) call for and examine documents, e.t.c. -section 18(4).

The key steps in a typical investigation, as set out in sections 148–150 of the FCCPA, are as follows:

i. a complaint is initiated or received by the FCCPC;

ii. upon receipt of the complaint, the FCCPC may: (i) issue a notice of non-referral (for frivolous complaints or complaints that do not entitle such consumer to any remedy in the FCCPA); (ii) refer the complaint to the applicable industry/sector regulator for investigation or resolution of the complaint; or (iii) direct an inspector to investigate the complaint;

iii. where an inspector is directed to investigate the complaint, upon completion, the inspector will submit a report to the FCCPC;

iv. the FCCPC will determine whether to: (i) issue a notice of non-referral to the complainant; (ii) make an order; or (iii) issue a compliance notice to the erring undertaking; and

v. where the FCCPC decides to make an order and the erring undertaking agrees to the terms of the order, such consent order will be made by the FCCPC and it can be registered with a competent court.

Investigation may be triggered based on a complaint filed by an aggrieved consumer, an accredited consumer protection group, and an industry sector regulator; or by the FCCPC on its own motion.

An aggrieved consumer may directly lodge a complaint to the undertaking (s)he has a grievance against for a resolution of such complaint or lodge the complaint with an industry/sector regulator who exercises regulatory control over such undertaking.

The FCCPC states that it is committed to providing speedy redress to valid complaints and puts its deadline at not more than 45 days. Nonetheless, complex cases may exceed the given time frame.

The FCCPA provides for the resolution of complaint and investigation in the form of a consent order (with the erring undertaking). The consent order can be registered with a competent court. In addition, where an erring undertaking cooperates or assists the FCCPC in investigations pursuant to the FCCPC Investigative Cooperation/Assistance Rules & Procedure, 2021, such cooperation and assistance may result in a grant of immunity, waiver of prosecution, exercise of prosecutorial discretion or reduced penalties.

12.4 ADJUDICATORY POWER

An aggrieved consumer, an accredited consumer protection group, an industry sector regulator, and the FCCPC can all initiate proceedings for a breach-see section 146, FCCPA. Requests relating to consumer protection issues or complaints shall be heard and determined by the FCCPC and appeals against such decisions lie before the Competition and Consumer Protection Tribunal. Pursuant to section 39 of the FCCPA the Competition and Consumer Protection Tribunal ("CCPT") is established to adjudicate over conduct prohibited under the FCCPA.

The jurisdiction of the CCPT includes the powers to:

i. hear appeals from or review any decision of the FCCPC;

ii. hear appeals from, or review any decision from any sector-specific regulatory authority, in respect to consumer protection matters; and

iii. issue such orders as may be required of it under the FCCPA.

The CCPT is properly constituted by panels of at least three members; jointly sitting and the decision of a majority constitute the decision of the tribunal.

The order, ruling, award or judgement of the CCPT is binding on the parties, registrable with the Federal High Court, for the purposes of enforcement- section 54, FCCPA. An Appeal does not operate as an automatic stay of execution of a judgement. In order to suspend the effect of any penalty or requirement, an order of the court directing a stay of execution of the judgement appealed against, pending the determination of the appeal, must be obtained.

Apart from the FCCPA, there are other sector regulators who, by virtue of the enabling laws have responsibilities to protect consumers in that particular sector, they include:

i. The Central Bank of Nigeria ('CBN'): by virtue of the CBN Act and the BOFIA, the CBN issued the Consumer Protection Regulations, 2019 which made provision for the protection of consumers of financial services under the regulatory purview of the CBN.

ii. Nigerian Communications Commission ('NCC'): The NCC is vested with powers to protect and promote the rights of communication services consumers against unfair practices. The NCC issued the General Consumer Code of Practice, 2018, in which provisions on the protection of the rights of communication services consumers are itemized.

iii. Nigerian Electricity Regulatory Commission ('NERC'): The NERC is established vide the Electric Power Sector Reform Act, 2005, and is empowered to, ensure: (i) that the prices charged by electricity supply/distribution licensees are fair to the consumers; and (ii) the safety, security, reliability and quality of service in the production and delivery of electricity to consumers. The NERC issued the NERC Customer Service Standards of Performance for Distribution Companies, 2007 and the Customer Complaints Handling: Standards and Procedure, 2006 in order to leverage on international best practice for handling customers' complaints and fair dealing.

iv. National Agency for Food and Drug Administration and Control ('NAFDAC'): the NAFDAC Act, 2004 established NAFDAC, to ensure that the consumers are protected by regulating and controlling the manufacture, importation, advertisement, distribution, sale and use of food, drugs, cosmetics, medical devices, chemicals and packaged water and beverages in Nigeria.

v. Standards Organisation of Nigeria ('SON'): was established by the SON Act, 2015, and empowered to ensure that: locally manufactured and imported products are of the right quality.

vi. Nigerian Broadcasting Commission ('NBC'): was established by virtue of the NBC Act, 2004, and it is vested with the responsibility of, receiving, considering and investigating complaints of consumers in respect of broadcasting services.

vii. Nigerian Civil Aviation Authority ('NCAA'): By virtue of the Civil Aviation Act, 2006, the NCAA has regulatory oversight over the aviation industry in Nigeria. The NCAA created a Consumer Protection Department, which ensures that all consumers in the aviation industry obtain the best services in air transportation, and issued the Nigeria Civil Aviation Regulations, 2015, which addresses consumer protection issues such as compensation for denied boarding, delays and cancellation of flights.

viii. The Securities and Exchange Commission has regulatory oversight over capital market operators in relation to complaints by their clients.

There are prescribed criminal offences in the FCCPA and criminal penalties that range from a fine and term of imprisonment, in the case of an individual, to fines, in the case of a corporate body. The prescribed criminal offences include: (i) failure to comply with a compliance notice issued by the FCCPC with regard to an investigation process; (ii) failure to appear as a witness to give evidence or produce a requested document or information; and (iii) obstruction of an employee of the FCCPC in the course of their duties.

By virtue of section 51(3) of the FCCPA, the CCPT may impose administrative penalties for prohibited conduct, and when determining an appropriate penalty, the CCPT shall consider:

i. the nature, duration, gravity and extent of the contravention;

ii. any loss or damage suffered as a result of the contravention;

iii. the behaviour of the defaulting party;

iv. the market circumstances in which the contravention took place and the level of profit derived from the contravention;

v. the degree to which the defaulting party has cooperated with the FCCPC and CCPT; or

vi. whether the defaulting party has previously been found to be in contravention of any of the provisions of the FCCPA.

Similarly, under Regulation 6 of the FCCPC (Administrative Penalties) Regulations 2020, the FCCPC may consider any aggravating or mitigation factors in assessing the penalty to be imposed on an erring undertaking. Aggravating factors include the role of the enterprise as a leader, active participant or instigator in or of the violation, the period the violation occurred or continued without remedy or abatement and prevalence of the alleged violation, amongst others.

Additionally, the fact that FCCPC's investigation has uncovered a violation of the consumer's rights or any wrongdoing does not preclude the consumer from instituting a civil action for compensation or restitution in a competent court.

12.5 Quality and Function of Goods and Services

The FCCPA applies the reasonable persons' test by providing that the consumer has a right to those goods or services of the quality that reasonable persons are generally entitled to expect. The FCCPA provides that every consumer has a right to good quality products, in good working condition, free from defects, and compliant with the extant industry's standards set by the appropriate regulator. Similarly, the customer has a right to return the goods within a prescribed period for failure to comply with the foregoing.

Where there is an allegation of defective goods or service, the onus of proof is on the supplier or the provider of the goods or service. Similarly, the FCCPC has the power to order quality tests to be conducted on consumer goods as it deems necessary.

A transaction, agreement, term or condition will be deemed unfair, unreasonable or unjust if:

i. it is excessively one-sided in favour of any person other than the consumer;

ii. the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;

iii. the consumer relied upon a false, misleading or deceptive representation or a statement of opinion provided by or on behalf of the undertaking that supplied the goods or services concerned, to the detriment of the consumer; or

iv. the fact, nature and effect of a term, condition or notice was not drawn to the attention of the consumer.

12.5.1 Available Remedies for a Breach of the Protections In Relation To the Quality and Function of Goods and Services

The available remedies for aggrieved consumers include penalties/fines, monetary restitution or compensation; and/or term of imprisonment for the culprit. Specifically, the consumer has a right to return defective goods within three months, and the undertaking is expected to repair or replace such goods or return a portion of the purchase price.

Further, a consumer can file a complaint in accordance with the provisions of the FCCPA. Where the damage is caused wholly or partly by defective goods or supply of service, the undertaking that supplied the goods or service is liable for the damage. Such damage may include personal injury and damage to the consumer's property.

Section 52 of the FCCPA empowers the CCPT to make an order directing any undertaking to sell any portion or all of its shares, interest or assets if the prohibited practice or conduct cannot adequately be remedied or is substantially a repeat by that undertaking of conduct previously found by the CCPT to be a prohibited practice.

The FCCPA also imposes an obligation on manufacturers to ensure that the notice on any product must be in the prescribed form or in plain language, where no form is prescribed for that notice.

Furthermore, an undertaking is obliged to adequately display the prices of goods and services on sale.

12.5.2 Protections in Relation to the Safety of Consumers

Where an undertaking or distributor becomes aware of any unforeseen hazards arising from the use of goods placed in the market, it shall immediately notify the general public of such risk or danger and cause such goods to be withdrawn from the market. Or if the FCCPC has reasonable grounds to believe that any goods may be unsafe, it may by written notice require the undertaking to recall the goods.

12.6 Instances of FCCPC's Enforcement in Furtherance of Customers' Protections

On March 2, 2022, the FCCPC issued interim orders under sections 17; 18(3)(a); 157; and 158 of the FCCPA prohibiting the observance of any agreement resulting from the resolutions made by domestic airline operators in Nigeria regarding any coordinated and arbitrary increase in airfares.

On August 28, 2020, the FCCPC issued a notice of commencement of investigation pursuant to sections 157 and 158 of the FCCPA to MultiChoice Nigeria Limited, due to complaints to the FCCPC by customers alleging the abuse of the dominant position by the company. Upon conclusion of its investigation, the FCCPC issued an order to the company to provide a better value for money to its customers.

In March 2022, the FCCPC visited local markets and supermarkets in Lagos in order to enforce the provisions of the National Tobacco Control Regulations, 2019, requiring all tobacco packages to display specified warnings in a prescribed form. The FCCPC seized products that did not comply with the prescribed form.

On Tuesday August 11, 2020, the FCCPC, due to complaints from consumers about expired goods being sold by the producer of a popular vegetable oil label instituted an investigation, which uncovered an unapproved and unsafe production, and repackaging of vegetable oil depot in Abuja. The Commission placed the Abuja factory under seal and confiscated the expired or unwholesome products in concert with NAFDAC.

12.7 CONCLUSION

The FCCPC has improved the lot of the consumers since inauguration. The Commission has been responsive in enforcing consumers' rights in Nigeria. The activities of the Commission during and after the COVID-19 era are commendable because some unscrupulous manufacturers and merchants who used the opportunity of the pandemic to fester their net by offering substandard or expired goods were sanctioned.

12.8 ILLUSTRATIVE AND PRACTICE QUESTIONS

1. What legislation, regulations and guidelines are relevant to consumer protection in Nigeria?

2. Why did it become necessary to establish a Consumer Protection Department in the Nigerian Civil Aviation Authority?

3. Enumerate the procedure that a consumer should follow in order to launch a complaint to the Federal Competition and Consumer Protection Commission and thereafter.

MCQ

1. Consumer Protection Act is applicable to?

    A. Immovable Goods
    B. Movable Goods
    C. Particular Goods and Services
    D. All Goods and Services

2. Under the Consumer Protection Act, the rights of a consumer do not include the right to?

    A. Safety
    B. Choosing
    C. Presentation
    D. Information

3. When the seller manipulates the price, it is known as?

    A. Caveat Emptor
    B. Unfair trade practices
    C. Restricted trade practices
    D. None of the above

4. Appeals from the Federal Competition and Consumer Protection Commission lie with?

    A. Competition and Consumer Protection Tribunal
    B. Federal High Court
    C. Court of Appeal
    D. Code of Conduct Tribunal

5. On which ground is the consumer precluded from claiming compensation from the product manufacturer?

    A. Manufacturing defect

B. Defect in design
C. Deviation from specification
D. Damaged by consumer

12.9 CASE STUDY

In Aguo State, Nigeria, Brighton Muda Electricity Supply & Transport Co. Ltd, (BESTCo.) had a total control of the market in retail electricity supply even though Team Electric Co. (TEAM) was recently granted the license to supply electricity in the same state by the Federal Electricity Regulatory Board. Despite the hitherto monopolistic stance, BESTCo. was making big losses due to various corrupt practices and inefficient management of their subsidiaries. BESTCo. keep up increasing the unit cost of electricity in order to reduce the losses. TEAM prices were more competitive and Tony- a customer of BESTCo was desirous of switching over to TEAM. TEAM asked Tony to obtain permission from BESTCo as required by the law. BESTCo refused to give the permission on the ground that they are a 'local authority under the Electricity Act and hence in their area, nobody can supply electricity to retail customers; and that TEAM should provide its own infrastructure.' This contention was accepted by the Federal Electricity Regulatory Board. Tony came to you for advice, advise him on his options and the likelihood of success or otherwise.

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CHAPTER THIRTEEN

CHAPTER THIRTEEN: ICT AND LAW

13.0 INTRODUCTION

Information and Communication Technology (ICT) is pivotal in driving improvement in trade, services, and other aspects of the economy. The advent of new trends in ICT such as cyber activities, artificial intelligence (AI) and the need to regulate these devices has led more credence to ICT law. ICT is an acronym, which refers to technologies that provide access to information through telecommunications. It covers any product that stores, retrieves, manipulates, transmits or receives information electronically, such as the internet, email, wireless networks, e.t.c.

i. **Computer:** - is an electronic machine that accepts and processes data and provides requisite information.
ii. **Email**: - Electronic mail involves the transmission and distribution of messages, information, facsimiles of documents, e.t.c., from one terminal to another through electronic means.
iii. **Internet:** - global computer networks through which information is shared.
iv. **Intranet**: - a local network designed to provide and disseminate information internally such as private network created using World Wide Web.
v. **Extranet:** - a network designed to provide, disseminate and share confidential information.
vi. **Social Media Outlets**: - communication outlets such as Facebook, X (formerly Twitter), WhatsApp, Telegram, Instagram e.t.c.
vii. **Cell Phones**: - portable telephones operated by cellular radio.
viii. **Softwares:** - are programmes that are compatible with a particular computer system such as- operating system software, utility software and application software.

13.1 LEARNING OBJECTIVES

At the end of this chapter, readers will understand the interrelationship between ICT, the law, business and human relations.

13.2 LEGAL FRAMEWORK REGULATING ICT

ICT is very broad, in the sense that it affects all aspects of human endeavours; it includes telecommunications, cyber-security, competition, broadcasting, cloud computing, artificial intelligence e.t.5c. Thus, there were laws and policies developed to allow natural and juristic persons leverage on ICT and protect them against the detrimental after-effect of ICT. These are some national laws and policies focused on ICT/Digital infrastructure and service. It includes

Copyright Act and FCCPA which has been discussed earlier in chapters 6 and 12 above; the others are discussed below.

13.2.1 Nigerian Communications Act

The Nigerian Communications Act No. 19, 2003 ("NCA") regulates the communications industry; it established the National Frequency Management Council ("NFMC") and the Universal Access Fund. The NCA contains 158 Sections with two schedules and an explanatory memorandum. The NCA creates the Nigerian Communications Commission ("NCC"), to enforce the provisions of the Act. This includes management and administration of frequency spectrum for the communications sector and assisting the NFMC in developing a national frequency plan; development, management and administration of a national numbering plan and electronic addresses plan and the assignment of numbers and electronic addresses there-from to licensee; proposing, adopting, publishing and enforcing technical specifications and standards for the importation and use of communications equipment in Nigeria and for connecting or interconnecting communications equipment and systems; the formulation and management of Nigeria's inputs into the setting of international technical standards for communications services and equipment; encouraging and promoting infrastructure sharing amongst licensees and providing regulatory guidelines thereon; examining and resolving complaints and objections filed by and disputes between licensed operators, subscribers or any other person involved in the communications industry, using such dispute-resolution methods as the Commission may determine from time to time including mediation and arbitration; preparation and implementation of programmes and plans that promote and ensure the development of the communications industry and the provision of communications services. The major focus of this Act is the granting of licenses to operators of communications system, facility or service in Nigeria-chapter 4 of the NCA.

13.2.2 The National Broadcasting Commission Act

The National Broadcasting Commission Act regulates radio broadcasting activities in Nigeria; and the licensing of Cable, direct to home broadcast (DTH) and all terrestrial radio and television services. It empowers the National Broadcasting Commission to, among other things, regulate and control the broadcast industry-section 2 (1) (d) of the NBC Act- see ***Femi Davies v. NBC***, (suit no.: FHC/L/CS/1152.2020-Unreported).

13.2.3 National Film and Video Censors Board Act

The National Film Video Censors Board Act (NFVCB Act) established and empowers the National Film Video Censors Board to regulate the films and video industry in Nigeria- Section 1 of NFVCB Act. The Board is empowered to censor, approve and classify all imported and locally produced films and videos- see Part VII of the NFVCB Act; ***Evangelist Mrs. Helen Ukpabio v. National Films and Video Censors Board*** (unreported case number CA/A/ 103/06 of 9 January 2008).

13.2.4 Evidence Act

Section 84 and 93 of the Evidence Act provides for the admissibility of electronically-generated evidence and electronic signatures in Nigerian courts and tribunals.

13.2.5 Cyber Crime Act

Cyber crimes (Prohibition, Prevention, E.t.c.,) Act, 2015 is the principal law on cyber security in Nigeria, it provides for the detection, prevention, prosecution, prohibition and punishment of cyber crimes in Nigeria. The Act also promotes cyber-security and the protection of electronic communications, data and computer programs, intellectual property and privacy rights.

Part III of the Act stipulates offences and their respective penalties. Section 5 punishes culprits found guilty of offences against the critical national information infrastructure to terms of imprisonment. Anyone who has access unlawfully to a computer is guilty of a crime- s.6. Other crimes stipulated in sections 8-36 include system interference; interception of electronic messages, email, electronic money transfers; cyber-terrorism; cyber-stalking; cyber-squatting; phishing; tampering with critical infrastructure; willful misdirection of electronic messages; unlawful interceptions; computer related forgery; computer related fraud; theft of electronic devices; etc.

13.2.6 National Identity Management Commission Act

This Act establishes the National Identity Management Commission (NIMC) to create a National Identity Database and the National Identity Management Commission charged with the responsibilities for maintenance of the national database, the registration of individuals, and the issuance of general Multi-purpose Identity Cards; and related matters. Section 14 of the Act provides for the establishment of a national identity database, which shall contain data relating to citizens of Nigeria and non-Nigerian citizens who are register-able persons within the meaning of the Act. The Act also prescribes offences and the penalties-Part VI of the NIMC Act.

13.2.7 National Information Technology Development Agency Act No. 28, 2007

The Act established National Information Technology Development Agency ("NITDA") in 2007 to regulate digital content in Nigeria. Section 19 of the NITDA Act provides for the establishment of Information Technology Parks. Section 35 of the NITDA Act defines ICT unrelated terms such as computer, computer network, computer system, data, electronic form, electronic record, software and information technology.

13.2.8 Freedom of Information Act (FOI)

The FOI Act, 2015 was enacted to make public records and information more freely accessible to the public.

13.3 CONCLUSION

The need for the appreciation and comprehension of ICT law need not be overemphasized because of its growing influence over our lives. ICT has revolutionized our way of living, hence the laws which facilitates the use of these amazing ICT devices and simultaneously protecting investments,

privacy, properties e.t.c. against abuses by the devices and their owners are important in modern businesses and professionals.

13.4 ILLUSTRATIVE AND PRACTICE QUESTIONS

1. Explain to a layman the legal framework of ICT in Nigeria.

2. Define ICT; what are its essential attributes and the reasons why it must be regulated?

MCQ

1. The court that has jurisdiction with regards to the infringement of patent granted Mr. Omodeni on the Xray computer programme developed by him and by Ms. Jemima in Ikoyi, Lagos State?
    A. Cyber Appellate Tribunal
    B. Competition and Consumer Protection Tribunal
    C. Federal High Court
    D. Lagos State High Court

2. Attempts to steal someone's money or identity by getting him to reveal personal information such as PIN number is known as?
    A. Stalking
    B. Phishing
    C. Spamming
    D. Spoofing

3. Harassing or monitoring someone through electronic media is an offence known as cyber?
A. Hacking
B. Squatting
C. Stalking
D. Phishing

4. "Nigerian Scam 419" does NOT involve a scam such as?
A. Phishing
B. Cyber stalking
C. Net extortion
D. Pornography

5. A network designed to disseminate and share confidential information is known as?
A. Internet
B. Intranet
C. Extranet

D. Social Media Outlets

13.5 CASE STUDY

The President of the Federal Republic of Nigeria was projected in a bad light by Alao, 17 years, Nigerian citizen, native of Oyo, South-west Nigeria on the Facebook. The Minister of Information, Mr. Lying Muhad maintained that it is beneath the dignity of the country to continue patronizing Facebook if it becomes the forum for disparaging the President. Mr. Muhad then ordered for the arrest of Alao for trial on cyber-terrorism under the Cyber Crime Act. Further, he directed that Facebook should be banned from operating within Nigeria. Analyse this case.

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