

UNIVERSITY OF GHANA BUSINESS SCHOOL

COMMERCIAL LAW 1

LECTURER

DR, ALEXANDER AMANKWAA.

aamankwaa@ug.edu.gh

1. WHAT IS LAW?

There is no single definition of what is Law

The system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.

“The body of principles recognized and applied by the state in the administration of justice” – Salmond

“Rules forbidding or enjoining certain types of behaviour under penalty”

“Rules specifying what must be done to achieve certain legal effects”

“Rules conferring rights and creating obligations and providing remedies for breach of duties and obligations”

Some have even extended the definition to cover the institutions associated with the law in one way or another.

“Courts and other judicial or administrative bodies to determine what the rules are (interpretation), breaches thereof, remedies thereof, and enforcement of decisions and orders”

“ A Legislature to make new rules or abolish old ones”

– H.L.A Hart, The Concept of Law

2. CLASSIFICATION OF LAW

Law can be classified into different categories depending on the basis of classification such as effect, source and nature. For purposes of this course we will look at law under the following broad classification

(a) Public Law

PUBLIC LAW

Deals with the legal issues between the state and the citizenry such as the following...

Constitutional Law:- it deals with the constitution of the state, arms of state, powers and limitations, rights and obligations of the citizen.

Administrative Law:- deals with organs of state and provides an avenue for the lodgment of complaints.

Criminal Law:- it deals with conduct of the society as a whole and prescribes sanctions for offenders.

(b) Private Law

PRIVATE LAW

Deals with the rights and duties of individuals towards each other. It includes the following branches...

Law of Tort

Property Law

Law of Trust



DISTINCTION BETWEEN CRIMINAL LAW AND CIVIL LAW



The difference between civil law and criminal law turns on the difference between two different objects which law seeks to pursue - **redress or punishment**.

The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss.

On the other hand, in the case of **crimes**, the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution."

	Criminal Law	Civil Law
Definition	Deals with offences against the State	Deals with disputes between private individuals
Purpose	Purpose is to maintain order in society by punishing offenders to deter others	Purpose is to remedy the wrong which has been suffered
Case filed by	A Prosecutor brings an action against the Accused	A Plaintiff brings an action against the Defendant
Jury opinion	Criminal cases are handled by criminal courts or tribunals	Civil cases are handled by civil courts
Standard of proof	Standard of proof is beyond reasonable doubt	Standard of proof is on the balance of probabilities
Decision	Accused may be convicted if found guilty or acquitted if found innocent	Defendant may be found liable or not liable for the claim
Type of punishment	Punishment sanctions are imprisonment and/or fine	Punishment or sanctions are damages, injunction, restitution, and specific performance.

THE LEGAL SYSTEM OF GHANA

- The Structures and processes by which the legal machinery of a country is operated.
- It encompasses the legal tradition, the sources of law, the court structure and operations among others.
- There are several legal traditions :- common law, civil law etc.
- Ghana's legal system is based on the Common Law Tradition.
- The Tradition is based on Judicial Precedence
- The Court Structure:- Superior Courts and lower Courts

SOURCES OF LAW

By sources of law we are looking at how we get our laws in Ghana.

Article 11 of the 1992 Constitution enumerates the sources of law in Ghana as follows;

1. 1992 Constitution
2. Enactments made by or under the authority the parliament established by the 1992 Constitution – eg. Banking Act,2004 (Act 673)
3. Orders, Rules and Regulations made under a power conferred by the Constitution – eg. Bye laws of the Assemblies.
4. Existing Law:- both written and unwritten laws before the coming into force of the 1992 Constitution –eg. Contracts Act, 1960 (Act 25)
5. Common Law – the common law, equity and customary law.

THE COMMON LAW AND EQUITY

The term **common law** is confusing as it has different meanings depending on the context. So it could be used to refer to law crafted by judges when they decide cases, this is what we refer to as “case law” and this is in contrast to law established by legislation, by the legislature enacting legislation, also known as “statutory law”. It can also be used to refer to law that is not equity. And, finally, it can be used to describe the law of countries which follow the common law, like the United States and England as opposed to countries that follow Roman law or French law or the civil law tradition.

Equity is the name that we give to the set of rules that traditionally supplemented the common law where the application of the common law would have operated too harshly. This was done to achieve what is sometimes referred to as natural justice, or more simply speaking, fairness.

Maxims of Equity

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

THE SCOPE OF COMMERCIAL LAW

WHAT IS COMMERCIAL LAW?

The body of laws that deal with the rules and institutions of commercial transactions, including banking, commerce, contracts etc.

GENERAL CHARACTERISTICS

1. Based on contract
2. The main sources of law are statutory and case law
3. It combines both civil remedies and criminal sanction eg. Sale of unwholesome goods for human consumption is a criminal offence – Food & Drugs Law, 1992 s.1(1)(a)
4. It is both enabling and regulatory

RELEVANCE OF LAW IN COMMERCIAL ACTIVITIES

1. Facilitates business planning through improved understanding of rights and obligations.
2. Facilitates assessments of legal and commercial roles and the allocation of protection against risk.
3. Ensures businesses operate within regulatory requirements – failure to comply comes with cost.
4. Avoids unnecessary and costly business transactions and unenforceable contracts.

WHY REGULATE?

1. Consumer protection
2. Public interest
3. Information inadequacies
4. Settlement of disputes

LAW OF CONTRACT

- INTRODUCTION
- TYPES OF CONTRACT
- ELEMENTS OF A VALID CONTRACT
- VITIATING FACTORS
- TERMS OF CONTRACT
- MISTAKES
- TERMINATION OR DISCHARGE OF A CONTRACT

LAW OF CONTRACT - INTRODUCTION

Human interactions and co-existence necessarily requires that we engage one another for one reason or another. In the course of these engagements, there are bound to be trade-offs of wants and needs.

Each might require something that the other possesses. In order to gain access to what others posses, there is a trade-off of promises; one to provide or perform what is needed in exchange for something.

- Thus one promises to do an act or refrain from doing an act in exchange for a promise from the other to do an act or equally refrain from doing an act.
- In effect there is an Agreement based on the respective promises. People may for their own good honour choose to fulfill their promises or perform acts they have agreed to, conversely people may for reasons best known to themselves refuse or fail to fulfill promises or perform acts they promised.

It is undoubted that social cohesion would be greatly affected if society allowed people to make promises for the sake of making them. This gives birth to the Law of Contract which is simply that branch of the law that governs the effort to achieve and carry out voluntary agreements.

The term “Contract” is often used to refer to an Agreement, consisting of the exchange of promises which is recognized by law as giving rise to enforceable rights and obligations.

SOURCES OF THE LAW OF CONTRACT

English Law of Contract;
Common Law Principles;
Doctrines of Equity; and
English Statutes of general application.

Legislation;
Contracts Act, 1960

DOCTRINES THAT HAVE SHAPED THE LAW OF CONTRACT

Certain theoretical foundations have influenced the law of contract whether same is expressed in decisions of the courts or in statutes.

These are;

Freedom of Contract: this Doctrine recognizes the liberty of people to enter into Agreements without interference or limitation from any court since individuals are deemed to be the best of judges of their own interest.

Vitiating Factors: these are factors that emanate from mistake, misrepresentation, illegality, duress and generally any conduct that would render a contract unenforceable.

Sanctity of Contract: this Doctrine seeks to emphasize that obligations agreed upon must be adhered to by all parties.

DEFINITION OF CONTRACT

Sir Frederick Pollock defined Contract as “a promise or set of promises which the law will enforce”

The American Restatement (second) of Contract (1982) defines a Contract as “**a promise or set of promises** for the **breach** of which the law gives a **remedy** or the performance of which the law in some way recognizes a **duty**”.

The above definition emphasizes three (3) important aspects of a Contract, namely;

The concept of a promise;

Legal duty; and

Legal remedy.

In effect, for every case therefore, the courts concern themselves with three (3) issues, that is;

- a. What is the **promise or promises** that have been made by the parties;
- b. Does the promise or do the promises create any **legal duty**;
- c. Upon determination of a promise and a duty, what kind of **remedy** is available for any breach?

1. FORM OF CONTRACT

- a. It could be Oral
- b. It could be Written
- c. It could be implied

ELEMENTS OF A VALID CONTRACT

A Contract must have the following elements to be valid and thus enforceable;

Offer and Acceptance (Agreement)

Intention to Create a Legal Relationship

Capacity to Contract

Consideration

It is important to emphasize that though a contract may seem to be valid because of the apparent presence of these elements, the law would in certain instance refuse to deem a contract enforceable where the Contract is affected by a vitiating factor.

TYPES OF CONTRACT

Contracts can exist in many forms and thus there could be as many types of contracts as may exist depending on the mode of classification being employed. We shall however for our purposes limit ourselves to the following types of contract...

I. UNILATERAL and BILATERAL CONTRACTS

II. FORMAL and INFORMAL CONTRACTS

III. EXPRESS and IMPLIED CONTRACT

IV. EXECUTED and EXECUTORY CONTRACT

V. VOIDABLE, VOID and UNENFORCEABLE CONTRACTS

VI. QUASI CONTRACT

TYPES OF CONTRACT

I. UNILATERAL OR BILATERAL CONTRACTS:-

- a. UNILATERAL CONTRACTS: These are contracts that require a party to perform an act in exchange for the promise of the other.
- b. BILATERAL CONTRACTS: These are contracts where the parties give promises in exchange for promises. Thus one party promises to perform an act in exchange for the promises to perform an act by the other.

II.FORMAL AND INFORMAL CONTRACTS:- the criterion here is the mode of formation.

FORMAL CONTRACTS: These are Contracts that require following a specified mode in order to be deemed valid and enforceable. Contracts under seal are an example.

INFORMAL CONTRACTS: These are Contracts that do not follow any formal pattern or mode.

III. EXPRESS AND IMPLIED CONTRACT:- the criterion here is whether the Contract and its terms are spelt out or they are inferred.

EXPRESS CONTRACTS: These are Contracts where the Contracts and their terms are expressly stated and agreed to by the parties. This could be oral or written.

IMPLIED CONTRACTS: These are Contracts that come into existence not by express agreement but rather inferred from the conduct of the parties.

TYPES OF CONTRACT

IV. EXECUTED AND EXECUTORY CONTRACT.-the criterion here is the state of performance of the Contract.

- a. **EXECUTED CONTRACT**: These are Contracts that have been fully performed by the parties.
- b. **EXECUTORY CONTRACT**.- These are contracts that have not been fully performed either by both parties or by one party after the other has performed his part of the obligations.

V.VOIDABLE, VOID AND UNENFORCEABLE CONTRACTS:-
the criterion here is the enforceability of the Contract.

VOIDABLE CONTRACT: These are contracts that are valid but can be avoided or ratified at the option of either or both parties.

VOID CONTRACT: These are contracts that are deemed by the law as not having been made at all in spite of the seeming existence of the elements of validity.

UNENFORCEABLE CONTRACT: These are contracts that cannot be enforced even though all the elements of validity are present. Such contracts though legal are unenforceable because of failure to satisfy a legal requirement

VI. QUASI CONTRACT: this is a type of contract that is a variant of implied contract except that in this instance the inference is not based on the conduct solely but is imputed by law based on conduct. They are more of equitable contracts than legal.

ELEMENTS OF A VALID CONTRACT

An agreement must contain the following essential elements to be regarded as a contract. If any one of them is missing, the agreement will not be legally binding.

1. OFFER

2. ACCEPTANCE

3. CONSIDERATION

4. INTENTION TO CREATE A LEGAL RELATIONS

5. CAPACITY TO CONTRACT

ELEMENTS OF A VALID CONTRACT

OFFER

An Offer may be defined as “a statement or conduct indicating a willingness to contract on terms stated or on terms which can reasonably be inferred from conduct and made with the intention that it will become binding as soon as it is accepted” – Treitel, the law of contract.

An offer is an expression of readiness to do something which, if followed by the unconditional acceptance of another person results in a contract. For example, if a company tells you that it will sell you 100 boxes of red wine at the price of \$100,000, that company is making you an offer

FORMS OF AN OFFER

An Offer may be made Orally, in Writing or Inferred from conduct.

1.2 TYPES OF OFFERS

- 1. Specific Offer:** An Offer made to a specific person or to a group of persons in which case it can be said to be a specific offer;
- 2. General Offer:** An Offer made to the whole world and any one can accept and perform the acts specified therein. CARLILL V CARBOLIC SMOKE BALL CO.

1.3 RULES GOVERNING OFFER

1. An Offer becomes binding as soon as it is accepted by the person or persons to whom it is made.
2. An Offer must be communicated to the person or persons to whom it is made to be valid.
3. A person who knows the reward of an offer is entitled to it if he performs the act prescribed in the offer, though his motivation for performing the act was something other than the reward. – WILLIAMS V COWARDINE
4. An Offer once made remains open until it lapses, accepted, rejected or revoked.

TERMINATION OF OFFERS

An Offer can be terminated in any of the following ways;

1. Revocation.— This is where the Offeror withdraws the Offer .

An Offer can be revoked at anytime before it is accepted by the Offeree. – **DICKINSON V DODDS**

(a) Revocation can only be valid or effective when it is actually received by the Offeree. – **BYRNE V VAN TIENHOVEN**

(b) Communication of a revocation though must reach the Offeree needs not necessarily come from the Offeror. It suffices if same is received by the Offeree through a reliable third party. – ***Dickinson V Dodds***

(c) In Unilateral Contracts the offer cannot be revoked where the Offeree has started to perform the act that constitutes acceptance – *Errington V Errington*

(d) A promise to keep an Offer open for a specified period of time is not binding on the Promisor or Offeror in the absence of consideration from the Promisee or Offeree. –*Routledge v Grant*

It is important to emphasise that this common law position has been reversed by Section 8 of the Contracts Act, 1960 which provides that “*the promise to keep an offer open for acceptance for a specified time shall not be invalid as a contract by reason only of the absence of any consideration*”.

2. Rejection:- This is where the Offeree declines to accept the Offer . This can happen in one of two ways;

(a) **Outright Rejection:** By this the Offeree simply refuses to accept the Offer being made by the Offeror.

(b) **Counter Offer:** By this the Offeree instead of accepting or rejecting the offer made, rather makes another offer in return as in whilst not rejecting the price offered, the Offeree then quotes another price, invariably lower than the one contained in the original offer. This subsequent offer operates to cancel the original offer. – **Hyde v Wrench**

3. Lapse of Time:- This is where a time limit is set for the offer to be accepted and when the offer is not accepted within the time limit, the offer would lapse upon the expiration of the time.

Where no time limit is fixed, the offer lapses after a reasonable time. What constitutes a reasonable time is dependent on surrounding factors.

DISTINCTION BETWEEN OFFER AND INVITATION TO TREAT

There are instances where the conduct of a party in a bid to procure a promise from the other is confused with an offer, when in essence all that the party is doing is to solicit an Offer.

Such preliminary activities, which usually are only intended to solicit offers from potential customers are not deemed by the law as contractual offers in themselves, capable of being converted into a contract upon acceptance but rather mere invitations to the public to make offers, and are thus referred to as “**invitations to treat**”

Common examples of Invitations to treat include;

- (a) Tender Notice – **SPENCER V HARDING**
- (b) Display of goods in a shop window with prices attached –
FISHER V BELL
- (c) Advertisement of goods or services in the newspaper –
PATRIDGE V CRITTENDON.
- (d) Circulation of Catalogues and Price Lists –
GRAINGER & SON V GOUGH.
- (e) Auction Sales – **HARRIS V NICKERSON**

2. ACCEPTANCE

It is the final and unqualified expression of assent to the terms of an offer.

Acceptance may be by Words, Conduct or in Writing.

Rules governing acceptance

1. Communication of Acceptance.

1. Acceptance is not effective unless and until it is communicated to the Offeror. – Entores Limited v Miles Far East Corp.
2. For Acceptance to be effective, it must come from the Offeree himself or his authorized agent – Powell V Lee

2. The Postal Rule:

- The Postal Rule states that an acceptance communicated by post is complete and effective when the letter is posted or placed in the hands of the relevant postal authorities – *Adams v Lindsell*
- For the Postal Rule to apply, the letter of acceptance must have been posted and for this purpose a letter is deemed to have been posted when it is in the control of the Post Office.

The Rule applies only when it is reasonable to use the post as a means of communicating acceptance – HENTHORN V FRASER

The Rule applies even if the letter of acceptance is delayed or wholly lost in the post and never reached the Offeree –
HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE CO. V GRANT

The Rule can be excluded by the terms of the Offer, as where it states that acceptance is effective only when actually received – HOLWELL SECURITIES LTD V HUGHES

Prescribed method of acceptance:

- Generally, where a mode of acceptance has been indicated by the Offeror, the Offeree has to communicate the acceptance in the prescribed mode.
- Where the Offeror prescribes silence as the mode of acceptance, the silence of the Offeree would not amount to acceptance –

Felthouse V Bindley

CONSIDERATION

Consideration is the price paid for the promise of the other party. The price must be something of value, although it need not be money.

Consideration may be some right, interest or benefit going to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party.

1. Types of Consideration

Consideration can generally be categorised into three types;

(a) Executory Consideration.— it refers to a Promise given in exchange for a promise to be performed or redeemed at a future time, such as a bilateral contract to be performed in future.

(b) Executed Consideration:- it refers to an act done in exchange for the promise of the other party as in unilateral contracts where one party performs an act prescribed by the offeror.

(c) Past Consideration:- this type of Consideration consists in an act that was completely done or the forbearance had already been suffered before the promise was made.

➤ Past Consideration is not sufficient consideration and therefore cannot support a promise to create a contract – **Re Mcardle; EASTWOOD V KENYON.**

➤ There are however instances where Consideration though past, is still sufficient to support a contract;

(i) Acts specifically requested by the Promisor: if at the onset the promisor did not make any promise to pay, but after the service had been done he promises to pay for the service, such a promise is enforceable although the consideration is past – **LAMPLEIGH V BRATHWAITE**

(ii) Acts done by way of business:- where the act was done by way of business and both parties understood at the time of performance that the act was one to be paid for – **Re Casey's Patent.**

Rules governing Consideration

(a) Consideration must be sufficient

- By sufficiency of consideration, the standard is whether the act performed is recognized by law.
- The common law over the years has recognized certain acts which do not suffice as consideration, some of which have been modified by Statute in Ghana, and include the following;

- (i) **Performance of an existing legal obligation**:- this may arise in one of two (2) ways;
- (a) Where a public duty is imposed by law: under Common Law where the law imposes a public duty, its performance cannot be deemed as consideration – COLINS V GODEFROY
- (b) Performance of a contractual duty owed to the other party:- under common law where a person was under a contractual obligation to do something for the other party, and does it, it would not be deemed sufficient consideration for any promise made for its performance. – STYLK V MYRICK

- It is important to note that this position has been changed by S.9 of the Contracts Act, 1960.
- Thus under Ghanaian law where a public duty is imposed by law, performance of that duty would suffice as consideration – *Kessie V Charmant*.
- Similarly performance of an existing contractual obligation would suffice as consideration.

- (ii) Part payment of a Debt (the Rule in Pinnel's Case)
- At Common Law a promise to waive or forego a debt or part payment of a debt is not enforceable against the promisor unless there is a fresh consideration from the Promisee – Pinnel's Case; Foakes v Beer
- This position has been altered by S.8(2) of the Contracts Act, 1960 which provides that “a promise to waive the payment of a debt or part of the debt or the performance of some other contractual or legal obligation shall not be invalid as a contract by reason only of the absence of any consideration therefor”

(iii) Promise to keep an Offer open for a specified period of time

- At Common Law a promise to keep an Offer open for acceptance for a specified period of time is not binding on the promisor in the absence of consideration.
- *This position has been altered by S.8(1) of the Contracts Act, 1960*

(b) Consideration needs not be Adequate

This means that Consideration does need to be of the same value as the promise, and the Courts would not undertake an inquiry into its adequacy. It suffices if it has some economic value, and the promisor gets what he asked for in return for his promise.

(c) Forbearance is Consideration

It means refraining from doing what one has the right to do, and if a person refrains from doing what he has a right to do and on the promise of another, it amounts to good consideration – HAMMER V SIDWAY

(d) Consideration must move from the Promisee

- At Common Law the person to whom a promise is made must be the one to provide the Consideration before the promise would be binding on the promisor or be enforceable against him. Thus where the Consideration was provided by a third party, other than the Promisee, the promise cannot enforce the contract against the promisor – **TWEDDLE V ATKINSON**
- The Common Law position has been changed by S.10 of the Contracts Act as *“No contract shall be invalid as a contract by reason only that the consideration for it was supplied by someone other than the promisee”*

Doctrine of Privity of Contract

It is to the effect that a contract creates a contractual relationship between the parties and no other. Thus only the contracting parties acquire enforceable rights – DUNLOP PNEUMATIC TYRE V SELFRIDGE.

Exceptions to the Doctrine

i. Statutory Exceptions

Motor Vehicles (3rd Party) Insurance Act.

Conveyancing Act, 1975 – S.15

Contracts Act, 1960 – S.5

Common Law Exceptions

- Agency Relationship
- Privity of Estate

Equitable Exception

- Trust Arrangements

Doctrine of Promissory Estoppel

It is an equitable intervention to the effect that a promise to not enforce a contractual right is given effect even in the absence of consideration, particularly where allowing the promisor to enforce that promise would be inequitable – CENTRAL LONDON PROPERTY TRUST V HIGH TREES HOUSE LIMITED.

“the promise as I understand it, is that where one party has, **by his words or conduct**, made to the other a promise or assurance that affects the **legal relationship** between them and to be acted on accordingly, then once the other party has **taken him at his word and acted on it**, the one who gave the promise or assurance cannot afterwards be allowed **to the revert to the previous legal relations** as if no such promise or assurance has been made by him, but he must accept the legal relations subject to the qualification which he himself has so introduced, **even though it is not supported in point of law by any consideration, but only his word**” – per Lord Denning in Combe v Combe.

- Requirements of the Doctrine
- Existing contractual relationship between the parties
- Clear unequivocal promise not to insist on strict legal rights for the period
- The promisee must show that his position was altered in reliance on the promise
- It must be inequitable to resile.

- INTENTION TO CREATE A LEGAL RELATIONSHIP
- A contract does not exist simply because there is an agreement between people. The parties to the agreement must intend to enter into a legally binding agreement. This will rarely be stated explicitly but will usually be able to be inferred from the circumstances in which the agreement was made.
- For example, offering a friend a ride in your car is not usually intended to create a legally binding relation. You may, however, have agreed with your friend to share the costs of travelling to work on a regular basis and agree that each Friday your friend will pay you GHC 20.00 for the running costs of the car. Here, the law is more likely to recognize that a contract was entered into.

(a) Commercial Agreements

The general position is that with Commercial Agreements, the parties are presumed to have the intention to create a legal relationship – **EDWARDS V SKYWAYS LIMITED**.

(b) Domestic Agreements and Social Arrangements

The general position is that Domestic Agreements or Social Arrangements are not made with the intention to create a legal relationship – **COWARD V MOTOR INSURERS BUREAU**

- (i) **Agreements between husband and wife:** Agreements made between husband and wife are presumed to be made not with an intention to create a legal relationship between them – BALFOUR V BALFOUR
- (ii) **Agreements between parent and child:** Agreements entered between parent and child within the domestic setting are not intended to create a legal relationship – JONES V PADAVATTON
- (iii) **Other domestic arrangements:**– where the Agreement is made in a domestic setting but not between spouses or parent and child, the court would look at the terms of the Agreement and the circumstances under which it was made to determine whether there was an intention to create a legal relationship.

The Courts will thus infer an intention to create a legal relationship where the Agreement has a commercial effect –

SIMPKINS V PAYS

- or one party has taken a drastic action in reliance on the promise as in disposing of one's property – **PARKER V CLARKE**
- or refraining from doing an act which he or she has the right to do – **HAMER V SIDWAY**

CAPACITY TO CONTRACT

Not all people are completely free to enter into a valid contract. The contracts of the groups of people listed below involve problematic consent, and are dealt with separately, as follows:

- **People Who Have A Mental Impairment;**
- **Young People (Minors);**
- **Bankrupts; Drunken or Intoxicated persons**

(a) Minors

The contractual age in Ghana is 21 years but there are other legislation which puts the age of majority at 18 years, e.g. The Children's Act, 1998. The Constitution also sets the age of maturity for voting at 18 years.

The general rule is that contracts entered into between a minor and an adult are not binding on the minor but binding on the adult.

There are however certain contracts that are deemed by the common law to be binding on the minor;

(i) Contracts for “Necessaries”

- Contracts for “Necessaries” are binding on the minor or infant.
- “Necessaries” has been defined by S.2(3) of the Sale of Goods Act of Ghana, 1962 (Act 137) as goods suitable to the condition in life of the person to whom they are delivered, and to his actual requirements at the time of the delivery.
- It generally refers to the things without which a person cannot reasonably exist and may include food, clothing, education, training in a trade, and essential services like medical care.

- To qualify as “Necessaries” the goods or services must be;
 - (a) one that is suitable for the minor’s position in life – **CHAPPLE V COOPER**;
 - (b) one that is suitable according to his actual requirement at the time of sale and delivery – **NASH V INMAN**

The law would not recognize a contract as binding on a minor where the terms are prejudicial to the interest of the minor or are harsh and onerous, even if the contract is valid and enforceable – **FAWCETT V SMETHURST**

(ii) Beneficial Contracts of Service

Where a minor enters into a contract of apprenticeship, or a contract of service by which he receives instruction or training, such contract is binding on him to the extent that the terms are beneficial to the infant – CLEMENS V LONDON & NORTHWESTERN RAILWAY, De FRANCESCO V BARNUM

Trading Contracts entered into by a minor are not deemed as necessaries and therefore not binding on him, even if the terms are beneficial to him – COWERN V NIELD

(iii) Voidable Contracts

These are Contracts which are binding on the minor until he takes steps to repudiates them whilst still a minor or within a reasonable time of attaining majority.

Under Ghanaian Law the following are voidable contracts that the minor can repudiate;

- (a) Lease Contracts
- (b) Contracts affecting land or immovable property
- (c) Contract for the acquisition of Shares in a Company

➤ Where a minor misrepresents his age and thereby induces another to enter into a contract with him, which contract is ordinarily unenforceable against a minor, the contract would still not be enforceable notwithstanding the fraud – **LESLIE LTD V SHEIL**

➤ (b) Mentally Incompetent Persons

➤ Generally a person of unsound mind is not bound by a contract he enters into with a person who knew at the time of the contract that he was of unsound mind, and the person of unsound mind did not understand or appreciate the effect of the contract by virtue of the insanity – **IMPERIAL LOAN COMPANY V STONE**

(c) Drunken or Intoxicated Persons

- A drunk or intoxicated person is not bound by a contract in much the same terms as one who is mentally incompetent.
- The intoxicated person can however ratify a contract made in a state of intoxication in his sober moments and it shall be binding on him – **MATHEWS V BAXTER**

TERMS OF CONTRACT

They define the scope and extent of the obligations undertaken by the parties to the Contract the breach of which entitles the other party to some enforceable legal right or remedy.

- They could be wholly oral, wholly written, or partly oral and partly written.

- Though all terms of the Contract need to be performed, they all do not have equal significance when it comes to the consequences for their breach.

Terms can thus be classified into three (3) categories;

- (i) Conditions;
- (ii) Warranties;
- (iii) Innominate Terms.

(i) Conditions:- A Condition is a term of a Contract which is so essential that its breach entitles the injured party to withdraw the Contract and sue for damages. In effect, a Condition goes to the very roots of the Contract such that its non performance may fairly be considered by the other party as substantial failure to perform the Contract at all – **WALLIS V PRATT**

(ii) Warranties:- A Warranty, as compared to a Condition, is a subsidiary term the breach of which does not go to the roots of the Contract and therefore the innocent party cannot repudiate or rescind the Contract, but can sue for damages only – BETTINI V GYE, POUSSARD V SPIERS

(iii) Innominate or Intermediate Terms:- They are terms that are not pre-classified as Conditions or Warranties but could be treated as either a Condition or a Warranty depending on the nature of breach and the extent of its consequence – HONG KONG FIR SHIPPING CO. LTD V KAWASAKI KISEN KAISHA LTD

- **Express Terms**:- they are terms that have been explicitly stated or indicated in the Contract whether orally or written or a combination of both.
- **Implied Terms**:- they are terms which though not explicitly provided in the Contract are agreed to by the parties, would nevertheless be deemed to be a term of the Contract. The terms of a Contract may be implied by;



- (a) The Court:- to ensure business efficacy where implying the term would achieve the objective of the business – **THE MOORCOCK**
- (b) Custom and Usage of the business or trade – **HUTTON V WARREN**
- (c) Statute:- A Statute implies the term – **Sale of Goods Act, Conveyancing Act, Hire Purchase Act.**

- **Exemption / Exclusion Clauses**

- they are terms of a Contract that seek to limit or totally exclude the liability of a party to a Contract as against the other.
- They are prevalent with standard form Contracts where a Company which has to deal with various people in respect of the same subject matter prints its terms in a wholesale manner and applicable to all, on receipts, tickets, cards etc.
- To a very large extent, the Courts try to limit the extent to which a party can rely on exemption clauses and have provided certain conditions that would have to be met before a party can rely on exemption clauses. These conditions are;

The exemption clause must be proven to be properly incorporated into the Contract for it to have effect, and this can be done by way of;

- (a) Signature of the other party
- (b) Notice to the other party
- (c) Previous course of dealing

VITIATING FACTORS

They are factors or errors that affect the validity or enforceability of a Contract.

The Vitiating Factors can be classified into three (3);

- (i) Mistake
- (ii) Misrepresentation
- (iii) Undue Influence or Duress

(i) Mistake:- an error or being wrong as to a matter of fact that influences the making of a Contract.

- For a Mistake to have effect, it must exist at the time of the Contract was concluded.
- The legal effect of Mistake is that it renders a Contract void ab initio.

Types of Mistake

- There are three types of Mistakes; (a) Common Mistake, (b) Mutual Mistake, (c) Unilateral Mistake

MISTAKES

- (a) Common Mistake**:- with this kind of Mistake, both parties agree but in the mistaken belief that some fact which forms the basis of the Contract exists when in actual fact, that fact does not exist – COURTURIER V HASTIE
- (b) Mutual Mistake**:- with this kind of Mistake one party enters into the Contract believing the subject matter to be one thing, and the other party also understands it to be another. In essence there is no agreement – RAFFLES V WICHELHAUS/ ADDAI V PIONEER TOBACCO CO.

(c) Unilateral Mistake: – this is where only one party to the Contract is mistaken, and the other party knows of the mistake of the other such as mistake as to the identity of a contracting party – **PHILIP V BROOKS**

DOCUMENTS MISTAKENLY SIGNED – NON EST FACTUM

- The general principle is that where a party signs a document, he is bound by it irrespective of the fact that it was not the type of document he intended to sign, or that he failed to read it.
- Where however the document is radically different or fundamentally different form what he thought he was signing and
- was not careless, he may plead **non est factum** – it is not my deed or document. – **Saunders v Anglia/Quao v Squire**

• MISREPRESENTATION

- This is a false statement of material fact made by one of the parties, before, or at the time of entering into the Contract which was intended to, and actually did influence the other party to enter into the Contract.
-

• Types of Misrepresentations

- (a) **Fraudulent Misrepresentation**.– a statement made, which the person making it did not honestly believe it to be true, either because he knew it to be false or he made it recklessly without caring whether it was true or not – DERRY V PEEK

Remedies:

(i) Rescission of the Contract

(ii) Claim for damages,

(iii) Claim for damages for deceit

(b) Negligent Misrepresentation:- a representation made carelessly and in breach of a duty owed by the person making it to the person he is making it to, to take reasonable care that the representation is accurate – **NOCTON V BURN**

(c) Innocent Misrepresentation:- the representor made his statement with the honest belief that it was true, although in fact, his representations were not true – **NEWBIGGING V ADAM**

Duress and Undue Influence

(a) Duress:- it is the use or threatened use of illegitimate forms of pressure or intimidation to procure a party to enter into a contract – KAUFMAN V GERSON/ HEMANS V COFFIE

Economic Duress: the law recognizes this form of Duress as where a party threatens to break an existing Contract as a means to induce the other party to enter into another contract – D&C BUILDERS LTD V REES

The conduct must always amount to a coercion of will which will vitiate consent

(b) Undue Influence: it refers to the equitable doctrine of coercion which deals with forms of pressure that are usually less direct as what pertains under Duress, and may take one of two forms;

- **Express use of Influence or Domination of the other party:** where it can be shown that one party exercised such domination over the mind and will of the other such that his consent to contract cannot be said to have been given independently, the party who was so dominated can rescind the contract – **MORLEY V LOUGHMAN**
- **Presumption of undue influence when there is a fiduciary relationship:** this is where parties stand in a relationship of confidence to one another, which puts one party in a position to exercise over the other an influence which is capable of being abused such as;

- (a) Parent and Child
- (b) Guardian and Ward
- (c) Solicitor and Client
- (d) Physician and Patient
- (e) Trustee and Beneficiary
- (f) Religious/Spiritual Advisor and follower

- Any contract procured by Duress or Undue Influence can be rescinded at the option of the person on whom same was applied.
- The right to rescission would however be barred under the following circumstances;
 - (a) Affirmation – where after Duress or Undue Influence the party affirms the Contract – **NORTH OCEAN SHIPPING CO V HYUNDAI CONSTRUCTION CO. LTD.**
 - (b) Lapse of time
 - (c) where party recognizing that he/she might have rights, yet failed to find out or exercise same.

- Generally, undue influence may not apply if the other party is able to prove that;
- 1. there was full disclosure of all material facts to the person claiming undue influence
- consideration was given which was adequate and fair
- the person claiming undue influence received independent advice
- The effect of undue influence is to render the contract voidable.

ILLEGAL AND UNCONSCIONABLE CONTRACTS

Unconscionable Contracts are contracts that equity views as being excessively harsh, where on the account of the special disability of one party, he or she is placed at a serious disadvantage in relation to the other. The Courts would not enforce any such contract –

CFC CONSTRUCTION CO (W/A) LTD, RITA READ V ATTITSOGBE.

Illegal Contracts are Contracts whose formation is prohibited by law or its performance is prohibited by law, and involves an element which is unlawful, immoral or prejudicial to the interest of the public or state.

Among the contracts which are deemed illegal and unenforceable on grounds of public policy are;

- (a) Contracts to commit a crime, tort, or fraud on another party –
BERG & SADLER V MOORE

- (b) Contracts which promote sexual immorality – **PEARCE V BROOKS**

- (c) Contracts which interfere with Regulations of Foreign Countries – **REGAZZONIA V SETHIA**

- (d) Contracts prejudicial to the administration of Justice – **KEIR V LEEMAN**
- (e) Contracts leading to inefficiency and corruption in public life
- (f) Contracts to deceive public authorities – **ALEXANDER V RAYSON**

- (g) Contracts to oust the jurisdiction of the Courts – **LEE V THE SHOWMEN'S GUILD OF GREAT BRITAIN**
-

- (h) Contracts to use official position or public office to secure private reward – **AMPOFO V FIORINI/KESSIE V CHARMANT – REVISITED**

- DISCHARGE OF CONTRACT
- A Contract is discharged when it ceases to operate and the parties thereto become relieved of their obligations under the Contract.
- A Contract can be discharged in the following ways:
 - (a) Agreement
 - (b) Performance
 - (c) Breach
 - 1. Total failure, 2. Anticipatory, 3. Incomplete or Defective

➤d. Frustration

- It describes the situation where there has been a change in an obligation to be performed by a party that is fundamentally different from what he undertook to perform.
- Contracts for personal service;
- Non-occurrence of an event – Taylor v Caldwell
- Commercial purpose defeated – Krell v Henry
- Government intervention
- Frustration will not apply in the self induced events – Barclays Bank v Sakari

REMEDIES FOR BREACH OF CONTRACT

1. Damages
 1. Based on loss to innocent party and not gain to the guilty party
 2. Loss must be due to breach
 3. Mitigation
2. Injunction
3. Specific Performance – Redco v Sarpong
4. Action for price
5. Rescission

END OF LECTURE

SALE OF GOODS

SALE OF GOODS

It is a contract whereby the Seller transfers or agrees to transfer the property in goods to the Buyer for a Consideration called Price consisting wholly or partly of money – S.1, Sale of Goods Act, 1962 (Act 137) (SOGA)

FORM OF CONTRACT OF SALE

A contract of sale of goods may be made in writing or by word of mouth, or partly in writing, and partly by word of mouth or may be implied from the conduct of the parties – S.3 SOGA

GOODS

The term “Good” has been defined to include movable property and growing crops or plants and any other things attached to or forming part of land which are agreed to be severed before sale by or under the contract of sale – S.81

Types of Goods

- The Act identifies two (2) types of goods; (a) Specific Goods and (b) Unascertained Goods.
- **(a) Specific Goods:** they are goods identified and agreed upon at the time a contract for sale is made. Such goods exist and are identifiable from other goods at the time of the contract.
- **(b) Unascertained Goods:** they are goods not identified or agreed upon at the time of the contract. They may or may not be in existence at the time of the contract.

PRICE – S.6

Price refers to that which must be given as consideration in a contract of sale. It may consist wholly or partly of money – **ALDRIDGE V JOHNSON**

Price may be determined in any of the following manners;

- (i) Expressly fixed by the contract
- (ii) In a manner agreed between the parties
- (iii) Course of dealing between the parties
- (iv) Where price is not determined under any of the above, the buyer must pay a reasonable price which is a question of fact dependent on circumstances.

FORMS OF SALE

(i) Sale in Market Overt.

Market Overt means an open, public and legally constituted market. Where a person buys goods in a market overt in good faith without any notice of defect or lack of title and in accordance with the usage of the market, the sale is valid.

(ii) Sale to a part owner.

This is where goods are sold by one person to another who is a part owner of the same goods. Under the common law, a sale to a part owner was null and void, but under Ghanaian law, a sale to part owner is valid – S.1(3)

(iii) Sale or Return Contracts.

It is one where goods are delivered to the buyer with an option that the goods may be purchased or returned.

➤ Ownership under this type of sale is transferred to the buyer when;

(a) he communicates his acceptance to the buyer or does an act adopting the transaction, eg, reselling or pledging the goods.

(b) he does not communicate acceptance but retains the goods without giving notice of rejection within the time fixed for rejection, or if no time is fixed, within a reasonable time.

- If goods are damaged or lost while in the buyer's possession, he cannot be held liable unless the loss or damage was due to his negligence.
- If the buyer sells or pledges the goods to a third party and there is default in payment, the seller cannot recover the goods from the third party – **KIRKHAM V ATTENBOROUGH, POOLE V SMITH'S CAR SALES (BALHAM) LTD**

(iv) Sale by Sample:

This is where a contract is based on sample of goods given or shown to the buyer. In a sale by sample, the goods must correspond exactly with the sample.

(v) Sale by Description:

The buyer in this instance dose not or has not seen the goods but enters into the contract of sale based on a description of the goods. The goods must correspond with the description.

- **(vi) Auction Sales:**

- This is where goods are entrusted into the hands of an auctioneer for purposes of sale by putting up the goods for auction and inviting offers through a bidding process.

- An Auction Sale can either be with a reserved price or without a reserved price.

- The bidders are the offerors, and every bid is therefore an offer.
- The sale is complete when the auctioneer announces its completion with the fall of the hammer or any other customary manner.
- Auction Sales can be undertaken subject to a reserved price or without a reserved price.

(a) Auction Sales without Reserved Price.

- The Auctioneer is enjoined to sell the goods to the highest bidder irrespective of the bidding price, and a bidder can sue for the refusal of the Auctioneer to accept the bid or complete the sale.
- A bidder may retract the bid before the completion of the sale.

- (b) **Auction Sale subject to Reserved Price.**

- With this type of auction, there is a minimum price below which a bid would not be entertained.
- The Seller or his Agent or anyone acting on his behalf can participate in the bid, but can only bid once, which shall be openly declared at the auction before any other bid is received. – **McMANUS V FORTESCUE**

TERMS UNDER A CONTRACT OF SALE; CONDITIONS AND WARRANTIES

CONDITIONS. it is a stipulation in a contract that goes to the root of the contract.

➤ Its breach gives the other party a right to repudiate the contract.

WARRANTY. it is a stipulation a contract which is not of such importance as to go to the root of the contract, but is collateral to the main purpose of the contract, such that its breach would give rise to a claim of damages by the other party, but not a repudiation of the contract.

TRANSFER OF PROPERTY IN GOODS

It refers to the transfer of title or ownership in the goods from the seller to the buyer.

- The issue of importance is “at what point in time does the title or ownership in goods move form the seller to the buyer?”
- The transfer of property from the seller to the buyer is dependent on the form of sale;

(i) Specific Goods:-

(a) Where the contract is for specific goods in a deliverable state, property passes the moment the contract is made – **TARLING V BAXTER**

Any subsequent agreement that property will pass at a certain time will be inoperative – **DENNANT V SKINNER & COLLOM**

- (b) Where the contract is for specific goods and the seller is bound to do something to put the goods in a deliverable state, property does not pass until this has been done – **UNDERWOOD**
-

V BURGH CASTLE BRICK & CEMENT SYNDICATE

- (c) Where the goods are in a deliverable state but the seller is required to do other things like packaging, weighing, etc, property does not pass until it has been done and the buyer notified.

(ii) Unascertained Goods:-

Property passes when goods which fit the description in a deliverable state are unconditionally appropriated to the contract by one party with the assent of the other – **PIGNATARO V GILROY**

(iii) Sale or Return Goods:-

(Already treated under “Forms of Sale” on slides 6 & 7. Please refer)

TRANSFER OF RISK IN GOODS

RISK refers to the loss, damage or deterioration of the goods that form the subject matter of the sale.

- Risk is usually initially with the seller but is transferred at a point in time to the buyer – **HEALEY V HEWLETT & SONS**
- As a general rule, risk is transferred from the seller to the buyer at the time the parties intended it to be transferred.

- Unless otherwise agreed to the contrary, risk passes to the buyer at the same time that property in goods pass.
- Where there is a delay in delivery attributable to either party, the party responsible for the delay will be liable for any loss, damage or deterioration caused by the delay – **STERN LTD V VICKERS**

TRANSFER OF PROPERTY IN GOODS BY NON-OWNER – S.28

(NEMO DAT QUOD NON HABEIT)

- The general rule is that a person who is not the owner of goods cannot transfer the property in the goods to a third party.
- This is generally known as the principle of Nemo Dat Quod Non Habeit

EXCEPTIONS TO THE NEMO DAT QUOD NON HABEIT PRINCIPLE

- (i) **Doctrine of Estoppel:** this operates where the real owner of the goods, by his words or conduct misleads the buyer into thinking that the seller is the owner of the goods – **PICKARD V SEARS, EASTERN DISTRIBUTORS V GOLDBERG**

(ii) Power of Sale conferred by Statute: this is where even though the seller is not vested with title, the provisions of an enactment, empowers the person in possession of the goods to sell them, eg. Pawn brokers ordinance, 1959.

(iii) Sale by Merchantile Agent: A Merchantile Agent in possession of goods, or the documents of title to goods with the consent of the owner, may sell, pledge or dispose of the goods in the ordinary course of business and bind the owner thereby, whether the owner authorized it or not –

FOLKES V KING, LLOYDS BANK V BANK OF AMERICA ASSOCIATION

- To suffice, a sale by the Merchantile Agent must be under the following conditions;
 - (a) the Agent was in possession of the goods or document of title with the consent of the owner;
 - (b) in selling, the Agent was acting in the ordinary course of business of a Merchantile Agent;
 - (c) the purchaser did not at the time of sale have notice that the Agent had no authority.

(iv) Sale under a voidable contract –A Voidable Contract is one which is valid until terminated at the instance of one party. Any sale under a voidable contract to a person who buys in good faith is valid.

(v) Disposition by a buyer in possession of goods or documents of title –when a buyer who has bought or agreed to buy goods obtains, with the seller's consent, possession of the goods, or the documents of title to them, any sale by such a buyer to a third party who takes it in good faith, without notice, the third party acquires good title – **CAHN V POCKETT'S BRISTOL CHANNEL CO.**

(vi) Disposition by seller in possession -: where property in goods has passed to the buyer but the seller is in possession of the goods, he may pass good title to a third party who buys the goods in good faith for value without notice of the default in title of the seller.

(vii) Sale in Market Overt. where goods are sold in a market overt according to the custom of the market, the buyer acquires good title to the goods in so far as he buys them in good faith and for value and without notice of the defect in title of the seller. It is important to note that this position has been amended by the Sale of Goods (Amendment) Act, 1994 in the UK.

DUTIES OF THE SELLER

- (i) Deliver the goods to the buyer – Fundamental Obligation. Where sale is by sample or description, goods delivered must correspond to the sample or description.
- (ii) Supply goods of merchantable quality
- (iii) Supply goods fit for the purpose for which they are intended
- (iv) Supply goods of the right quantity
- (v) Supply goods within the stipulated time, or a reasonable time.

DUTIES OF A BUYER

- (i) To pay the price
- (ii) Accept delivery of the goods

REMEDIES OF AN UNPAID SELLER

An unpaid seller is a seller of goods for which the whole or the price has not been paid or tendered – S.34

The unpaid seller has two (2) main categories of rights or remedies; Real Rights and Personal Rights

(i) Real Rights: these are rights that are exercisable on the goods that form the subject matter of the transaction;

- (a) Lien on the goods
- (b) Stoppage in transit
- (c) Resale of the goods
- (d) Recovery of possession

- **(ii) Personal Rights:** these are rights that the seller has against the buyer himself;
 - (a) Sue for the price of the goods
 - (b) Damages for non acceptance.

RIGHTS OF THE BUYER

(i) Real Rights:

(a) Reject the goods where;

- 1. Seller is in breach of a fundamental obligation**
- 2. Seller is in serious breach of a condition of the contract.**
- 3. The buyer entered into the contract as a result of an innocent or fraudulent misrepresentation.**

INTERNATIONAL TRADE CONTRACTS

(i) FREE ON BOARD CONTRACTS (F.O.B)

It is the type of international contract where the seller undertakes to supply the goods by arranging to have the goods delivered over the ship's rail, and to deposit them on board the ship.

The price quoted for the goods covers the actual price of the goods, as well as all charges incurred up to the time the goods are placed on the ship.

In an F.O.B contract, the seller's obligation ends immediately the goods are placed on board the ship.

Both property and risk pass to the buyer when the goods are put on board the ship named by the buyer – **CARLOS FEDERSPIEL&CO SA V CHARLES TWIGG & CO**

DUTIES OF THE SELLER IN A F.O.B CONTRACT

- (i) To place the goods on board the ship named by the buyer.
- (ii) To be responsible for all charges incurred up to, and including the delivery of the goods on the ship.
- (iii) To complete declaration required by custom officials.
- (iv) Immediately inform the buyer that the goods have been placed on board the ship. Failure to do so will leave the risk on the seller.
- (v) Forward all relevant documents to the buyer.

DUTIES OF THE BUYER IN A F.O.B CONTRACT

- (i) To nominate a ship and communicate same to the seller
- (ii) To procure space in the ship for the goods
- (iii) To arrange and pay for freight and insurance of the goods.

(ii) COST, INSURANCE FREIGHT CONTRACT (C.I.F)

Under this type of contract, the seller agrees to deliver goods at a price which comprises the cost of the goods, the cost of freight, and insurance.

The characteristic feature of this type of contract is that performance by the seller is by delivering the shipping documents to the buyer, and not by delivering the goods.

It is usually said that, a C.I.F contract is not a sale of goods but a sale of the documents relating to the goods.

The relevant shipping documents are;

- (a) The bill of lading – represents the contract of carriage by sea
- (b) Insurance Policy or Certificate – represents the contract of insurance
- (c) Invoice – represents the contract of sale

- If goods are lost in transit, the seller is obliged to deliver the documents to the buyer and claim payment for the price.
- If the price has already been paid, the buyer cannot ask for a refund, but to claim against the insurer or the owner of the carrier.

DUTIES OF A SELLER UNDER A C.I.F CONTRACT

- (i) To ship at the port of shipment, goods of the description contained in the contract.
- (ii) To procure a contract of carriage under which the goods will be delivered at the port of destination.
- (iii) To arrange for an insurance of the goods
- (iv) To prepare an invoice of the goods
- (v) To tender, within a reasonable time after shipment, the shipping documents to the buyer, to enable delivery of the goods to the buyer.

- Under a C.I.F contract, a buyer has the right to reject both the documents and the goods – **KWEI TEK CHAO V BRITISH TRADERS AND SHIPPERS LTD**
- If a buyer accepts the documents, knowing that they are not in order, he is stopped from trying to reject it later – **PANCHAUD FRERES S.A. v ESTABLISSEMENT GENERAL GRAIN CO. LTD**

DUTIES OF A BUYER IN A C.I.F CONTRACT

- (i) To pay the contract price upon receipt of the shipping documents.
- (ii) To pay the cost of unloading, and landing at the port of destination.
- (iii) To pay all import duties and wharfage charges.

End of lecture

HIRE PURCHASE
AND
CONDITIONAL SALE AGREEMENTS

HIRE PURCHASE

A Hire Purchase contract is a contract by which goods are delivered to a person who agrees to make periodical payments by way of hire, with an option of buying the goods after the stated hire installments have been paid. Until the option is exercised, there is no agreement to buy the goods.

A Hire Purchase contract has three (3) main components;

- (a) Contract of bailment: the hirer obtains possession of the goods but ownership vests in the owner.

- (b) Option: this entitles the hirer ownership after payment of the periodic installments, and for nominal consideration to purchase the goods.
- (c) Contract of sale: this makes the hirer the owner of goods already in his possession in the course of installment payments.

CONDITIONAL SALE AGREEMENT

- It is an agreement for the sale of goods under which the purchase price or part of it is payable by installments and the property in the goods remain with the seller notwithstanding that the buyer is to be in possession of the goods and under which certain conditions in the agreement are to be fulfilled by the buyer.

Differences between Conditional Sale and Credit Sale

- In a Credit Sale property in the goods pass immediately to the buyer, in a Conditional Sale property passes in the future but under conditions;
- In a Credit Sale price needs not be paid in installment; payment by installments is a requirement for a Conditional Sale;
- In a Credit Sale the cash price and total purchase price may be the same; in a Conditional Sale the total purchase price is higher than the cash price.

FORMAL REQUIREMENTS OF A HIRE PURCHASE /CONDITIONAL SALE AGREEMENT

The Hire Purchase Act, 1974 (NRCD 292), which governs Hire Purchase transactions in Ghana provides two (2) formal requirements;

- (i) Requirements before Agreement, and
- (ii) Requirements of the Agreement itself.

- Requirements before the Agreement
- The seller or owner needs to tell the buyer both orally and in writing, the cash price, or the hire purchase price, or the total purchase price of the goods.

Requirements of the Agreement

The Agreement must state;

- (a) The Cash Price and the Hire Purchase Price, or the Total purchase price of the goods.
- (b) The amount of each installment and the date of payment of each installment.
- (c) A description of the goods or list of the goods to which the agreement relates.

- (d) A notice indicating the rights of the hirer or buyer to terminate the agreement; restricting the owner's right to repossess the goods after payment by the hirer beyond a certain percentage; buyer to pay installment arrears upon termination at his instance.
- A copy of the Agreement must be delivered to the hirer or buyer within fourteen (14) days.

AVOIDABLE PROVISIONS IN A HIRE PURCHASE AGREEMENT

The Hire Purchase Act excludes certain provisions from being included in a hire purchase agreement. The following provisions are deemed void when put in an Agreement; a provision

- (a) which gives an owner or any person acting on his behalf to enter onto a premises or private land to take possession of goods let under a hire purchase agreement.
- (b) restricts or excludes a hirer's right to terminate the agreement, or imposes a liability beyond that prescribed by the Act – S.6

- (c) which seeks to treat a person who acts on behalf of the owner or seller as an Agent of the owner or seller.

- (d) which seeks to relieve the owner or seller of liability for the acts or defaults of a person acting on behalf of the owner or seller.

TERMINATION OF HIRE PURCHASE AGREEMENT – S.6

The hirer or buyer is entitled to terminate the Agreement at anytime before the final payment by giving written notice to the person entitled to payment.

When the hirer terminates the Agreement, he is liable to pay the difference between the total of money paid, and one half of the hire purchase or the total purchase price, or a lesser amount specified by the Agreement.

➤ Where an Agreement is terminated by the hirer, the goods shall be returned to the premises from where they were taken at the expense of the buyer.

➤ A hirer who fails to take reasonable care of the goods shall compensate the owner upon termination.

➤ A hirer who retains possession of the goods after termination shall be denied the option to buy the goods if the owner brings an action for recovery of possession

COMPLETION

Completion is effected by the hirer giving notice to the owner of his intention to complete the purchase by tendering or paying the balance due on a specified date and tendering or effecting payment on the specified date.

- The balance payable is the net balance, that is, the difference between the amounts paid and the total purchase price.

➤ The hirer's right can be exercised at anytime during the subsistence of the Agreement, or within twenty-eight (28) days after the owner has taken possession of the goods, in which case he would have to pay for the owner's expense in taking possession of the goods as well as cost of maintaining the goods.

- An owner who takes possession of goods cannot resell them until after twenty-eight (28) days.

PROTECTED GOODS

A Protected Good is one which;

- (i) has been let under a hire purchase agreement, or a conditional sale agreement;
- (ii) for which one half of the price or total purchase price has been paid, whether pursuant to a judgment, or otherwise, tendered by or on behalf of the hirer or buyer, or a guarantor, and
- (iii) in relation to which the hirer or buyer has not terminated the hire purchase or conditional sale agreement or the bailment.

Recovery of Protected Goods:

- An Owner or seller can only recover possession of a protected good through a court action.
- Where an owner or seller recovers possession of protected goods, not through a court action, the agreement is deemed terminated and the hirer or buyer is released from any liability and can sue the owner or seller for money paid by the hirer and any security given.
- The Court may however on an application by the hirer or buyer, order the return of the goods to the hirer or buyer and a rescheduling of payments.

The following terms are implied in every hire purchase agreement;

- (i) that the hirer shall have and enjoy quiet possession of the goods;
- (ii) that goods are free from any charge or encumbrance;
- (iii) that the owner has the right to sell the goods;
- (iv) that the goods are reasonably fit for the purposes for which the hirer requires them

- (v) that the goods are of merchantable quality. This term as to merchantable quality will not be implied in the following instances;
- (a) where the goods were examined by the hirer and the defect should have been seen by the examination.
- (b) where the goods are sold as second hand goods and there is a statement in the Agreement to the effect that the term does not apply
- (c) where the goods are sold subsequent to a defect which is specified in the Agreement, with a statement that the term as to merchantable quality shall not apply.

- A seller or owner can only rely on a clause excluding or modifying this term unless.
- The owner or seller brought the statement to the notice of the hirer and made its effect clear to him;
- and That the defect was brought to the attention of the hirer or buyer

A breach entitles the hirer or buyer to rescind the contract.

(vi) where goods are let or sold by reference to a sample, it is implied that the bulk shall correspond exactly with the sample; and that the hirer will have the opportunity of comparing the bulk with the sample – S.15

- vii) where goods are let or sold by description, there is the implied term that the goods correspond with the description.
 - (viii) where the goods let or sold were by sample and description, there is the implied term that the goods correspond with the sample and the description.
- A breach by the owner or seller will entitle the hirer or buyer to rescind the Agreement

SALE OF HIRE PURCHASE GOODS TO A THIRD PARTY – S.16

- Where a hirer or buyer sells, pledges or otherwise disposes of hire purchase goods for value to a third party, the following occur;
 - (i) the third party may retain the goods for sixty (60) days;
 - (ii) if the goods are repossessed by the owner or seller, the third party is entitled to recover possession after giving notice to the owner or seller who has repossessed, and the third party pays or tenders to the owner or seller either,

- (a) all amounts due and unpaid from the hirer or buyer to the owner or seller;
- (b) the total due under any three (3) installments due or unpaid from the hirer or buyer to the owner or seller, whichever is less, the rights and obligations of the hirer or buyer is transferred to the third party who is then treated as the hirer or buyer for purposes of the Agreement.

- Where the third party pays or tenders the total due under any three (3) installments, then the following will occur;
- (a) the third party is not bound to pay any outstanding installments in excess of three (3) installments
 - (b) the third party is entitled to recover from the hirer or buyer the said three (3) installments which he has paid to the owner or seller.

- (c) the owner or seller may recover from the original hirer or buyer amounts outstanding in excess of the said three (3) installments.

- (d) the contract between the third party and the hirer or buyer is terminated and a direct relationship is established between the third party and the owner or seller.

LIMITATION ON ENFORCEMENT OF AGREEMENTS – S.17

An owner or seller cannot enforce the provisions of a hire purchase or conditional sale agreement;

- (a) for the payment of an amount of damages or forfeiture or penalty;
- (b) for the acceleration of the payment of an installment

- (c) for termination of the agreement
 - (d) for repossession
-
- Unless the owner or seller has served a notice on the hirer or buyer to perform the obligations for a period of fourteen (14) days

DUTIES OF THE HIRER

1. Duty to give information: upon a request from the owner or seller. Failure to give information within 14 days would make the hirer guilty of an offence, and liable to a fine.
2. Duty not to remove goods from the jurisdiction: cannot be done without the written consent of the owner or seller. Failure to comply is an offence and liable on conviction to a fine or prison term

- 3. Duty to pay minimum price

- RIGHTS OF THE HIRER

- 1. The right to terminate

REMEDIES OF THE OWNER

1. To sue for damages
 2. To repudiate the Agreement
 3. To exercise lien over goods or to seize the goods
- Seizure of goods can be done in two (2) ways;
- (a) where there is a breach of the Agreement by the hirer or buyer
 - (b) where there is no breach but due to death of the hirer or buyer.

AGENCY

DR. ALEXANDER AMANKWAA

Introduction

- Agency deals with the relationship that arises when one person is used by another to perform certain tasks on his behalf
- The relation exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and 3rd parties.
- The relation arises wherever one person called the agent has authority to act on behalf of another called the principal and consents so to act
- It is the relationship that exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other of whom similarly consents to represent the former so to act.

Introduction Cont

- Simply put an agent is a person who affects the legal position of another, called a principal, in dealings with third parties
- The common law principle in operation is usually represented in the Latin phrase, *qui facit per alium, facit per se*, i.e. the one who acts through another, acts in his or her own interests
- The principal is bound by the contract entered into by the agent, so long as the agent performs within the scope of the agency.
- A third party may rely in good faith on the representation by a person who identifies himself as an agent for another.

Introduction

- Agency is a triangular relationship.
- They are Principal/Agent relationship, Agent/Third Party relationship and Principal/Third Party relationship.
- The essence of agency is the power to affect the principal's legal relations with the outside world.
- The three features of agency are service, representation and power to affect the legal position of the principal. He can acquire rights for his principal and subject his principal to liabilities.

Types of Agents

- General and special agents may arise due to the authority granted them.
- The authority of a general agent covers doing some act in the ordinary course of his business, trade or profession on behalf of his principal.
- He may also be an agent who acts on behalf of his principal in all matters.
- The special agent has authority to act for some special occasion or purpose which is not within the ordinary course of his business, trade or profession

Types of Agents Cont.

- Professional agents are agents specialised in particular business, trade or profession.
- Examples are mercantile agents and solicitors.
- Mercantile agents are agents who in the customary course of business have authority to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods.
- The term covers factors, brokers, auctioneers and del credere agents.

Types of Agents Cont.

- A factor is an agent entrusted with possession of goods or of the documents of title thereto.
- He normally sells in his own name without disclosing that of his principal.
- A broker is a go between, a negotiator.
- He makes contracts for the purchase or sale of property or goods such as stocks and shares of which he is not entrusted with the possession or documents of title.

Types of Agents cont.

- An auctioneer is an agent who is employed to sell at a public auction. He is an agent for the seller.
- He may not be entrusted with the possession of the goods to be sold or the documents thereon.
- A del credere agent 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

Types of Agents cont.

- . He is an agent charging additional commission for risk. Other agents include insurance agents or brokers who negotiate and effect policies of insurance and estate agents who arrange for the sale, acquisition or leasing of real estate.

Creation of Agency

- Agency may arise by consent, operation of law or ratification
- Consensual authority can be granted expressly by contract or may be implied from a contractual relationship.

Express Agency

- The agent's authority is created normally by contract.
- The principal or some person authorised by him expressly appoints the agent whether by deed, by writing under hand or orally.
- Since an agent does not make contracts on his own behalf, it is not necessary that he should have contractual capacity.
- A minor or a bankrupt may be an agent. A principal, however, must have full contractual capacity.
- principal's incapacity cannot be cured by acting through an agent who has capacity in law.
- .

Express Agency cont.

- Thus whatever a person has power to do himself he may do by means of an agent, but what a person cannot do himself, he cannot do by means of an agent.
- Creation may be by a power of attorney – the instrument which confers the agency. Its proof is by means of a copy.
- The purpose of the contract must be lawful and possible.

Implied Agency

- Agency arises by implication.
- Parties have conducted themselves towards each other in such a way that they can reasonably be taken as having agreed or consented to the relationship.

Authority of Agents

- There are a number of different types of authority, derived from different sources, which an agent may possess.
- It may arise through actual authority, usual authority, customary authority and apparent or ostensible authority.

Actual Authority

- This is the actual authority given by the principal to the agent. It may be express or implied, that is, given by express words or implied from conduct or the circumstances of the case.
- The capacity of an agent to act is the same as the capacity of his/her principal.
- Subject to exceptions already mentioned, anything the principal can lawfully do can be done for him/her by an agent.

Actual Authority cont.

- Hence, the express actual authority of an agent can be co-extensive with the powers of the principal.
- Express actual authority can be conferred by deed, in writing, or orally. Authority by deed is, usually, called "a power of attorney" and as such, it is a formal document and construed more strictly than other types of express authority.

Usual authority

- Agents in particular trades or professions usually carry out certain set of duties e.g. insurance brokers, stockbrokers, solicitors.
- Hence, if a person in one of these trades or professions is employed in respect of that business as an agent, then he/she is presumed to have the authority to do whatever is usually done by agents in that particular business.
- The kind of authority that an agent in a trade, business and profession or at his place of employment would usually need and does have, if he is to discharge his commission..

Usual authority cont.

- A principal's restriction on his agent's usual authority will have no effect on a third party whose attention has not been drawn to the restrictions and who continues to deal with the agent on the basis of his usual authority.
- In *Watteau v Fenwick* [1893] 1Q.B. 346, the defendant had employed H as a hotel manager with H's name alone appearing over the bar as licensee.
- The defendant limited H's actual authority by forbidding him to buy cigars. H, however did order cigars from W. who knew nothing of the existence of the defendant.

Usual authority cont.

- It was held that the defendant was liable to pay for the cigars as such purchases were within the usual authority of a hotel manager

Customary authority

- This is similar to usual authority, but it is applied to the customs or usages of a particular place, as opposed to a particular business.
- An agent must impliedly act according to the usages and customs of the place, market or business in which he is appointed to serve his principal. Such customary authority must either be known to the principal or must be so notorious that the principal cannot deny knowledge of it.
- In *Akosah v Owusu* [1963] 2 GLR 277, the plaintiff a storekeeper at CTL, Koforidua, alleged that the defendant owed him a sum of money which he had paid to CTL at the request of the defendant for goods sold and delivered to the defendant.

Cuatomary Authority cont.

- It was held that as agent of CTL, the plaintiff was entitled to sue in his own name as he had beneficial interest in the performance of the contract for the sale of the goods to the defendant.

Apparent authority, or ostensible authority

- These are two terms for the same thing. Apparent authority is the authority the agent has as it appears to others.
- An agent can plainly appear to have a certain authority which he/she does not actually possess.
- This occurs where a person is allowed to appear as if he is the principal's agent when in fact he is not or where the principal permits his agent to give the impression that he has more authority than he actually possesses or where the principal allows his agent to appear as an agent where actually the relationship has been terminated.

- Apparent authority is a form of estoppel.
- Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such belief cannot afterwards be heard to say that the true state was far different, if to do so would involve the other person in suffering some kind of detriment.
- The principal is said to hold out as his agent the person represented as having authority to act on his behalf.
- There must be some statement or conduct on the part of the principal which can amount to a representation that the agent has authority to act on his behalf in the way he is acting.

Apparent Authority cont.

- It can be established with the proof of the following elements: a representation, reliance on the representation and an alteration of one's position due to such reliance
- In Ada Co-operative Food Farmers Union Ltd. v Abodei and Others [1982-83] G.L.R. 1144, the plaintiff union bought some tractors and equipment with a loan from the Agricultural Development Bank.
- The tractors were registered in the name of the union and the bank. Later the officers of the union found the defendants in possession of the tractors and equipment.

Apparent Authority Cont.

- They made several attempts to retrieve them but failed because the defendants asserted a claim of right on the basis that they had bought the tractors and the attachments from one A, an officer of the Department of Co-operatives which had guaranteed the loan from the bank.
- In the instant action by the plaintiff union for, inter alia, recovery of possession of the tractors and their attachments, it was held that agency by estoppel would arise where one person had so acted as to lead another to believe that he had authorized a third person to act on his behalf and that other, in such belief, entered into transactions with the third person within the scope of such ostensible authority

Apparent Authority cont.

- If it were established that the plaintiff union by its conduct enabled A to hold himself out as owner or as one entitled to sell, then the plaintiff union would be precluded from denying his authority to sell. But on the facts, A had no authority to sell.
- The onus lay on the person dealing with the agent to prove either real or ostensible authority and it was a matter of fact whether the agent had ostensible authority for the particular act.

Apparent Authority cont.

- In *Buama v Oppong* [1992] 2 GLR 213, the defendant was the owner/driver of a commercial vehicle.
- The plaintiff who paid a fare to travel on the vehicle could not find his bag on reaching his destination.
- He had paid freight for the bag to a bookman who took the bag from him and kept it in the boot of the vehicle.
- The plaintiff sued for the value of the bag and the items in it, consequential loss and damages.

Apparent Authority cont.

- In his defence the defendant contended inter alia that the bookman was not his agent.
- It was found that the bookman gave the money he had received as freight from the plaintiff to the defendant and that even though the bookmen were employees of the GPRTU they were the ones who dealt with the passengers by collecting the fares and freight from them.

Apparent Authority cont.

- The defendant was vicariously liable for the loss of the plaintiff's bag by the bookman because if a person represented or permitted it to be represented that another had authority to act on his behalf he would be bound in the same way as he would be if that other had in fact authority to act.
- The defendant was present when the fee was charged and it was also clear that the defendant had given ostensible or apparent authority to the bookman to act on his behalf.
- Accordingly, there was an agent and principal relationship between the bookman and the driver. Again in law the usage of the trade or business in which an agent was employed would in the absence of express direction frequently determine the liability of the principal.

Incidental /presumed Authority

- Incidental authority :The authority given to an agent will normally be in respect of his/her primary tasks. However, it is implied that he/she also has authority to do all such things as are necessarily incidental to the performance of the duties given by his/her actual authority.
- Presumed authority:certain relationships inevitably involve one person acting as agent for another e.g. husband and wife. In such cases, the agent is presumed to have a certain authority.

Agency by operation of law

- There is no prior agreement between the parties to create an agency relationship and there is no representation to each other or others that one of them was acting as an agent of the other.
- The law imposes the consequences of agency on their actions.
- They may arise as agency of necessity or agency of co-habitation.

Agency of Necessity

- The need to act on behalf of another is unforeseen but arises out of sudden danger to property or some interest of the person on whose behalf the intervention is made.
- A master of a ship's exercise of authority to safeguard a vessel or cargo in danger of perishing is an example.
- There is the shipmaster's presumed authority to do what is reasonably necessary taking into account the danger, distance, accommodation, expense and such like factors.
- It is especially so when it is impossible to communicate with the owners to take instructions. He is expected to act in good faith.

Agency of Necessity cont.

- Agency of necessity can arise as long as there exists a real emergency. The act must be done for the benefit of the owner and not merely for the convenience of the agent. In *Springer v G.W. Ry* [1921] 1 K.B. 257, tomatoes were consigned by S. from Jersey to London.
- The ship delivered them to Weymouth three days late and, owing to a railway strike, the tomatoes could not be unloaded until two days later.
- When unloaded they were found to be bad and the railway company decided to sell them locally. No communication was made to S.

Agency of Necessity cont.

- It was held that the railway company was liable in damages to S., as it should have communicated with him and asked for instructions as soon as the ship arrived.

Agency by cohabitation cont.

- At common law as long as a married couple lives together, it is presumed that the wife has the husband's authority to pledge his credit for necessaries judged according to his style and standard of living.
- The requirements for such agency are cohabitation and domestic establishment. The goods or services ordered must be necessities suitable to the style in which the couple customarily lives, otherwise the husband will not be liable to pay.
- Where the husband shows evidence of adequate provision by him he will not be liable.

Agency by cohabitation cont.

- This may be because his wife was already sufficiently supplied with goods of the kind in question, or his wife was supplied with a sufficient allowance or sufficient means for the purpose of buying such goods without pledging the husband's credit.
- Where the order, though for necessaries, was excessive in extent or, having regard to the husband's income, extravagant then the husband shall not be liable

Agency by cohabitation

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Agency by cohabitation cont.

- There will also be no liability if he expressly forbade his wife to pledge his credit or he expressly warned the supplier not to supply his wife with goods on credit.
- If the husband has been in the habit of paying his wife's bills with a particular supplier, his wife's agency will be presumed and he can only escape liability by expressly informing the supplier that his wife's authority is revoked.
- In *Miss Gray Ltd. v Cathcart* (1922) 38T.L.R. 562, a wife was supplied with clothes to the value of £215 and the husband refused to pay for them.
- On his being sued by the tradesman, the husband proved that he paid his wife £960 a year as an allowance.
- It was held that the husband was not liable.

Agency by cohabitation cont.

- In modern times their application may be somewhat doubtful, and it may well be that in appropriate cases the court may hold that it is in the intention of the wife and the contracting party that the wife has not acted as agent of her husband and has made herself liable to the third party as principal.

Agency by Ratification.

- A person acts without authorization but the person on whose behalf the act was purported to have been carried out subsequently adopts the act. It is a retrospective constitution of agency.
- What it means is that the agent in fact, has no authority to do what he does at the time he does it and the principal on whose behalf and without whose authority the agent has acted, subsequently accepts the agent's act and adopts it just as if there had been a prior authorization by the principal to do exactly what the agent has done.

Agency by Ratification cont.

- A contract can only be ratified under the following conditions: First the agent whose act is sought to be ratified must have purported to act on behalf of the principal.
- It means the contract has been made on behalf of the principal and so the agent had expressly contracted as an agent.
- Secondly the contract can only be ratified by the principal who was named or ascertainable when the contract was made.
- Thirdly the agent must have a principal who was in actual existence at the time of the contract.

Agency by Ratification cont.

- Fourthly, the principal must have had contractual capacity at the date of the contract and have it at the date of ratification.
- That means the principal's competence must be intact at the time he seeks to ratify.
- The contract itself must be valid not void.
- The principal must at the time of ratification have full knowledge of all the material facts.

Agency by Ratification cont.

- The ratification must apply to the entire act of the agent.
- Finally the principal must ratify within the time set or within a reasonable time.
- The ratification must occur before the third party withdraws.
- Upon ratification two things happen.
- The unauthorized act becomes valid and the authority to act is restored retrospectively.

Obligations of Agency

- Agency imposes duties on both the agent and the principal.
- The duties of the agent include the duty of performance, loyalty or obedience, care and skill and non-delegation.
- Others are respect for the principal's title, duty to account, not to permit a conflict of interest to arise, misuse confidential information and not to make a secret profit or take a bribe.

Obligations of Agency

- The agent owes a fiduciary duty to the Principal.
- The agent engaged under a contract must comply with the contractual obligations.
- Even when acting gratuitously he must perform the tasks requested. The agent must obey all lawful instructions of the principal.
- The agent must show loyalty to the principal.
- The agent has a duty to exercise due diligence in the performance of his duties and to apply special skills which he professes to have. Where the agency is based on contract, the court will normally imply a term requiring reasonable care and skill.

Obligations of Agency cont.

- If he is employed to sell, it is his duty to obtain the best price reasonably obtainable.
- There is also the duty of non-delegation.
- The agent is not to delegate his authority.
- An agent cannot, without the express authority of his principal, delegate his authority to another or appoint a sub-agent to act for him in the whole or in part of his duties.
- The Latin maxim is "delegatus non potest delegare": someone to whom something is delegated cannot sub-delegate.

Obligations of Agency cont.

- The relationship between the principal and his agent is a personal and confidential one.
- Exceptions to the delegatus non potest delegare duty (a delegate must not delegate) are where the principal expressly consents, where the principal impliedly consents and where unforeseen circumstances make it necessary to delegate.
- Other exceptions include purely administrative tasks and also where it is permitted by statute.

Duties of Principal

- The Principal has the duty to pay the agent the commission or other remuneration agreed for his service.
- The amount of the commission and the terms under which it is payable depend entirely on the terms of the contract between the parties.
- The Principal has a duty to reimburse the agent for any expenses incurred in the course of acting for the principal.
- The other duty of the principal is to indemnify the agent for all acts lawfully done and liabilities legitimately incurred in the performance of his service.
- The agent loses his right to an indemnity if he acts beyond his authority or performs his duty negligently.

Rights of the Agent

- The Agent has the following rights against the Principal.
- He can claim remuneration for services provided, claim reimbursement for all expenses and claim indemnity against all liabilities incurred in the performance of his services.
- He can exercise a lien over property owned by the principal in respect of claims against the principal.

Rights of the Principal

- The remedies available to the Principal for the default of the agent are action for damages, action for account and payment of interest.
- The principal may recover any amount of secret profit from the agent. He may refuse to pay the agent his commission or other remuneration.
- The principal may dismiss the agent without notice. The principal may also repudiate the contract.

The Effects of Agency

- The agent is able to affect the legal relationship of his principal in the making of contracts and in the disposition of authority.
- The relationship has a fiduciary nature.
- The specific rights and liabilities depend on contract.
- Two broad groups are identifiable.
- These are those contracts where the agent discloses his agency and those he does not disclose his agency.

Disclosed Agency

- An agent acting within the scope of his authority who contracts with a third party by disclosing his agency establishes a direct contractual tie between the principal and the third party.
- Where the agent indicates that he is acting as an agent, the general rule is that only the principal and the third party exert any authority over the legal relations of the principal and the third party.
- The principal and the third party can sue and be sued by each other.

Disclosed Agency cont.

- In *Arhin v Kisiwaa* [1979] G.L.R. 311, it was held that the legal relationship of an accredited seller or receiver with the Director of the Department of Lotteries was that of an agent and a principal and as to the relationship with the public treating with such agent, the receiver warranted that she had authority of the director to conduct the business of a lotto receiver.
- On purchasing the tickets in issue therefore A, the lotto staker contracted with the director as a disclosed principal of (K the lotto receiver).

Disclosed Agency cont.

- Any breach of the contract by K therefore raised a liability directly against the director, for an agent of a disclosed principal acting within the scope of his authority generally never incurred upon a contract.
- However, in the instant case, since the tickets sold to A had not been lawfully allotted to K by the director, K acted outside the scope and in breach of her agency.
- Consequently, when the director declared A's winnings void on the ground that the sale of the tickets was irregular K became directly liable to A not on the basis of the contract with the director but on the basis of breach of warranty of authority.

Disclosed Agency cont.

- Exceptions can occur where the agent may also sue on behalf of his principal.
- An agent is entitled to maintain an action for money had and received.
- An agent may sue or be sued when he endorses a bill of lading, the third party still insists on dealing with him after disclosing the fact of his agency, in relation to deeds, where he does not operate within the scope of his authority and by implication.

Undisclosed Agency

- Once the principal remains undisclosed the agent may sue and be sued on the contract.
- The agent can enforce the contract against the third party.
- The principal can enforce the contract against the third party.
- The agent's right of action is lost when the principal decides to intervene. When the third party becomes aware that there is a principal he may act in a manner as to indicate that he has elected to deal with the principal.
- He has a right of election as to whom to proceed against once the existence of the principal is made known to him.

Undisclosed Agency

- The third party can choose to enforce the contract against the agent or the principal.
- Where the third party has settled with the agent in a situation of undisclosed principal, such settlement may be a complete defence to the principal's action to recover payments due from the third party.
- Where the third party had a special reason to contract with the agent the principal may be excluded from the contract.
- An undisclosed principal cannot ratify any contract made outside of the agent's actual authority.

Termination of Agency

- An agency may be terminated by the act of the parties or by operation of law.
- Acts of the parties: The parties by agreement between them bring the agency to an end. The termination may also be through revocation by the principal by notice or summarily. It may also be through renunciation of the agency by the agent.

Termination of Agency-operation of law

- An agency becomes terminated at the expiration of the time agreed upon for the duration of the agency, or on the complete performance of the undertaking.
- It may also be due to the frustration of the contract or the happening of an event rendering the continuance of the agency unlawful.
- The agency may also come to an end where either party becomes incapable of continuing the contract by reason of death, insanity or bankruptcy.

Termination of Agency-operation of law

- In *Gordon v Essien* [1992] 1 GLR 232, where the principal had died and the daughter of the agent she had earlier appointed continued to collect rents on her behalf it was stated that “It was trite law that death was one of the events which automatically determined an agency; the conception of authority demanded a continuing consent of the principal to the agent’s act on his behalf and with the death of the principal the consent would not continue because the mind from which it issued had ceased to exist.’

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