MAKERERE UNIVERSITY BUSINESS SCHOOL
BUSINESS LAW DEPARTMENT

BUSINESS LAW GUIDANCE NOTES

TOPIC 1: INTRODUCTION TO LAW

Definition of Law

Law is defined as a body of rules and regulations governing or regulating a society, the enforcement of which is effected by way of sanctions. In order for everyone in the society to live in harmony there is need for the law to exist. For anything to pass as law three common aspects must be present and these are;

a) There must be an order/command
b) The order/command must be enforceable.
c) The orders/commands must create sanctions to wrong doers.

The above three aspects are what distinguishes law from habits, norms and morals. In the past when there was no written law, various societies had rules and regulations which governed their people. These were in form of do and don'ts which the people in such communities had to live and abide by. This is what was and is referred to as "customary law."

Why should we study law?

It is very important for people living in a community where there is rule of law to have knowledge, understanding and appreciation of the law that governs them. We study the law to attain knowledge and to appreciate the law, this knowledge enables us to; know our rights and obligations/duties under the law and also to know where to go for redress when our rights are violated.

Rules of law and morals

Rules of law are distinct from morals. Morals can be denied as standards of behaviour or beliefs concerning what is and is not acceptable to do in a particular society. As such, we have legal wrongs and moral wrongs. Moral wrongs are those wrongs which are committed but the wrong doers are not punished in courts of law. It is the society that

Perceives such acts to be morally wrong for example in most Uganda communities it perceived immoral to walk while eating.

Classification of law

Laws are classified into a variety of forms;

i) Criminal law vs. Civil law;
ii) Public law vs. Private law;
iii) Substantive law vs. Procedural law;
iv) Municipal law vs. International law;

i) Criminal Law

Criminal law emanates from the term 'crime' that signifies an act of disobedience to the law and such disobedience is normally punishable by sanctions ranging from death, imprisonment, fine or even a caution etc. Criminal law is made to protect the public against wrongs done by bad elements/ certain individuals in the society. Criminal law characterizes certain conduct, acts or omissions (wrongdoing) as offences against the state. Under Criminal law, a person is innocent until proved guilty or until he/she pleads guilty (Article 28 (3) (a) of the Constitution of the Republic of Uganda 1995). The burden of proof lies on the prosecution **(Woolmington vs. D.P.P. (1935) A.C 462 at P.481).**

Criminal law is normally enforced by **police** and the **Directorate of Public Prosecutions** (DPP) However; in some cases a private person can also commence criminal proceedings. This is called private prosecution. Where private prosecution has been commenced, the DPP has powers under the Constitution to take over the conduct of the proceedings. For example in 2016, a total of 20 lawyers led by Mr. Abdullah Kiwanuka from Lukwago & Co Advocates working under the Network for Public Interest Lawyers (NETPIL) by way of private prosecution filed a criminal case against Gen. Kale Kayihura, the Inspector General of Police. Gen Kayihura and seven of his senior officers and commanders were being prosecuted in their individual capacity for alleged torture against the victims of the July 12th and 13th 2016 police beatings of civilians at Kalerwe Market and Busabala Road on Entebbe Road.

These cases may be cited as **Uganda Vs. Kato**

Note: Cases involving abuse of office and corruption by public officers are prosecuted by the IGG.

ii) Civil Law

Civil law provides for the rights and duties of persons (humans beings or artificial persons/legal entities/government) towards each other. For example the law of contract provides for the obligations, rights of the parties to a contract and the consequences in case of breach. The law of torts which is also part of civil law concerns civil wrongs for which a remedy lies in damages e.g. motor accidents, accidents at work places among others. The law of property which involves land rights, ownership, and transfer, the law of succession which involves property inheritance on death etc. The sanctions in civil law are

in form of remedies like damages, specific performance, injunction, rescission, rectification etc.

Distinction between Civil and Criminal Law

In civil law, legal action is commenced by a private person, or entity called the Plaintiff against another who has violated the right called the Defendant/ Respondent. Suits by or against government are brought by or against the Attorney General.

Criminal law is enforced on behalf of the state and in the name of the state e.g. R v James, The Queen v John. In Uganda, the Constitution under article 250 (4) provides that the Prosecutor should be designated as Uganda e.g. **Uganda vs. Abdul Kittata & Ors, Uganda vs. Frank Gashumba.** The person against whom criminal proceedings are brought is called the accused.

In criminal law, the standard of proof is one beyond reasonable doubt while in civil matters it is based on balance probabilities.

Note:

In both criminal and civil law, a party who appeals is called the appellant and the party against whom the appeal is made is called the respondent.

Summary of differences between criminal law and Civil Law

Criminal law	**Civil law**
Crime elements	Regulates relations between individuals include companies
Company cannot commit a crime	Company or corporate body can be sued.
Complaint who is the person against whom a crime has been committed	Plaintiff is the person who sues in a civil case
Accused is the person who is said to have committed a crime	Defendant/ Respondent is a person who is sued in court
Cited Uganda Vs Chris Brown	Chris Brown V Rihana
The government officer who conducts criminal cases is called the Director of Public Prosecution (DPP)	If government is sued in a court case, the person who represents government is called the Attorney General
Accused is said to be innocent until proved guilty	No such presumption
The burden of proof is on the DPP to prove that the accused is guilty. is beyond reasonable doubt	The parties have a 50/50 burden
The standard of proof is beyond reasonable doubt	The standard is on the balance of probabilities
Examples of crimes ; theft,	Examples of civil case; contract,

defilement, rape, murder	employment matters
End result is punishment by imprisonment, fines, caution, community service orders, death penalty	The end result is often compensation, damages, declarations, injunctions etc.

Concurrency of Criminal and Civil wrongs

Sometimes a case may fall under both criminal and civil law e.g. civil suit in negligence versus a criminal case for negligent or reckless driving, Malicious damages to property, Trespass. There is no bar against bringing a case in criminal and civil law.

iii) Public law

Public law refers to rules regulating the relationship between the government/ state and the individual or between or among states. It includes international law, administrative law, constitutional law and criminal law.

a) Constitutional Law

This is a body of rules regulating the structure of the principal organs of government, their relation to each other and also forms the basis for the validity of other laws

b) Administrative law

Administrative law regulates the rights and duties emanating from the exercise of powers and functions conferred on government organs or public officers (statutory powers granted under written law). For example local authorities and institutions.

iv) Private law

Private law governs the relationship between individuals. Private law is that part of the law which is primarily concerned with rights and duties of persons towards persons. Private law is also called civil law.

v) Substantive law

This is a branch of law that spells out the legal rights, duties, obligations and liabilities of parties among themselves and government. Examples include contract law, the Companies Act etc.

vi) Procedural law

Procedural law entails rules governing the manner in which a right is enforced under the law or a crime is prosecuted under criminal law for example the Civil Procedure Rules, the Evidence Act, the Criminal Procedure Code Act and statutory instruments passed to operationalize provisions of substantive law etc.

vii) Municipal law

Municipal law is also known as the national law. It is law which has its application to one state or to a specific or a particular city or county. For example the constitution of Uganda, The Public Order Management Act, the Anti-Pornography Act are all part of Uganda's municipal law.

viii) International law

This is the law that governs the relations between states. International law is a body of rules established by custom or treaty recognized by nations as binding in their relations with one another. International law applies to more than one state and it is derived or sourced from international treaties and conventions e.g. the Convention against Torture, the Kyoto Protocol, the East African Community Treaty etc. International law applies to Uganda if a particular instrument has been ratified or domesticated in its laws.

What is a case?

A case may be a civil case, criminal case or a constitutional case. A case is a situation whereby different persons who have a dispute between them or a complaint appear before a court of law and seek redress, a remedy, settlement or for court to determine what party has a legal right to whatever is in dispute between them. Case law is law that comes from decisions made by judges in previous cases.

Steps to be followed in enforcing legal action

❖ **Civil matters:**

i) Notice of intention to sue/ demand notice should be communicated to the other party- it must be in writing.

ii) A plaint should be filed by the Plaintiff or his or lawyer and summons be extracted (obtained) from court. A Plaintiff is a person who files a case in court.

iii) A mediation case summary is also required to be filed at the same time

iv) The summons, plaint and the mediation case summary should be served on the Defendant within the time stipulated under the law. A defendant is a person against whom a case has been filed.

v) The Defendant then files his or her defence and the mediation case summary and serves them on the Plaintiff.

The Plaintiff has a right to file a reply if they so wish.

vi) The parties undergo Court annexed mediation, if they agree to settle the dispute amicably then a consent judgement is entered by Court, if there is no agreement reached the matter is referred to a judge or magistrate for hearing.

vii) The case is then fixed for hearing.

❖ **Criminal matters:**

i) The matter is reported to police,

ii) Investigations are carried out by the police, a file is prepared and sent to a state attorney to advise whether the evidence is sufficient or not

iii) Where the evidence is found to be sufficient to support the charge against the accused it is sanctioned by the resident state attorney.

iv) The accused is then formally charged by reading out the offence to him to which he pleads either guilty, not guilty or he may keep quiet implying not guilty.

v) Where the accused pleads not guilty, he is reminded of his right to apply for bail, he is remanded (if he does not apply for bail or if the application fails), brought from time to time for hearing, till judgment and sentencing.

vi) If found not guilty, he is acquitted. If found guilty, he is convicted (he becomes a convict) and sentenced

THE STRUCTURE OF THE COURTS & ADMINISTRATION OF JUSTICE IN THE UGANDAN LEGAL SYSTEM

Important Terminologies to note.

➢ **Jurisdiction.**

This refers to scope of powers vested in a particular Court relating to what kind of cases it can handle and is determined on the basis of the value of the subject matter, location and nature of a particular offence.

➢ **Pecuniary Jurisdiction**

This means the monetary value of the subject matter which a Court is allowed to handle for example under the Magistrates' Court (Amendment) Act, a Chief Magistrates Court can hear civil cases where the value of the subject matter does not exceed Ugx 50,000,000/= (Uganda Shillings fifty million only) while a Magistrate grade one can handle civil cases where the value of the subject matter does not exceed Ugx 20,000,000/= (Uganda Shillings twenty million only) High court hears cases of value above 50 million.

Above 50 million in High court

Below 50 million we file in the Chief Magistrate court

Below 20 million we file in the Magistrate Grade I

If your case is below 500,000/= we go a Magistrate Grade II

➢ **Geographical or Territorial Jurisdiction**

Geographical jurisdiction relates to the power of a Magistrate Court to handle cases (civil or criminal) that arise within the local area where the Court is situate. For instance, if Kagingo trespasses on land located in Mbuya, Nakawa Division, belonging to Mbabazi Karen. The Court with the geographical jurisdiction to

handle this matter is the Chief Magistrates Court of Nakawa. Similarly if Kanyamuyenga Patrick steals property belonging to Matovu Sherry from her residence at Nakasero. The Court with the geographical jurisdiction to try the case of theft brought against Kanyamuyenga is the Chief Magistrates Court of Buganda Road. However, it must be noted that geographical jurisdiction largely relates to Magistrate Courts and not the High Court of Uganda. This because the High court has unlimited original jurisdiction. It is also because there is only one High Court of Uganda and it is situate at Kampala. The Judiciary for purposes of proper administration and access to justice established High Court Circuits all over Uganda. In that regard it is only proper and procedurally correct that the High Court Circuit where the matter arises should handle the case but there is nothing wrong if an offence is committed in Gulu and tried by the High Court at Kampala

- **Court of First Instance**
  This is a court where an action is originally commenced and heard. In that case, the court will be said to be exercising its original jurisdiction.

- **Appellate Court**
  This is the higher court in hierarchy to which an aggrieved party may seek remedy by way of challenging the decision made against him or her by a lower Court.

- **Appellate Jurisdiction**:
  This refers to the power of a higher court in hierarchy to either affirm or reverse a decision of a court below in a case brought to it by a party (parties) dissatisfied with the decision of that latter court. The appellate court after considering an appeal may reverse the decision of the lower court on a successful appeal in which case it is said to allow the appeal or it may affirm/ uphold the decision of the lower court in the event of an unsuccessful appeal in which case it is said to dismiss the appeal. In doing so, it is exercising its powers/jurisdiction as an appellate court.

- **Issues:**
  These are points of contention e.g.
  - Whether there was a contract between the Plaintiff and the Defendant?
  - Whether the Defendant breached the contract entered into with the Plaintiff?
  - Whether the Plaintiff is entitled to the remedies prayed for?

- **Law Applicable**
  This refers to the relevant Act of Parliament, delegated legislation, case, common law, equity, custom or authoritative text books to be relied upon in resolving the dispute.

- **Decision of Court**.
  This refers to the conclusion that Court draws from the summing up of the facts, evidence and the law e.g. a judge may say: “on the basis of the law and evidence as analysed above, I find that the Plaintiff has proved negligence and the Defendant is thus liable [in civil cases] or that the accused is guilty [in criminal

matters]. Held

- **Ratio Decidendi.**
  This refers to the reasoning of the court, the justification for reaching a particular conclusion. It is also referred to as the statement or principal of law e.g. In Donoghue vs. Stevenson, Lord Atkin stated the famous 'my neighbour principle' thus;

  > *"Every person who stands in a direct relationship with another in such a way that his actions or omissions are foreseably likely to cause injury to that other [a neighbour] owes a duty of care to that person and will be held liable if such acts or omission are the proximate cause of the other's injury".*

- **Suit**

  This means a claim that has been duly filed in court. The process of filing is commonly referred to as suing or commencing proceedings. Different claims may be instituted through various procedures.

THE NATURE OF THE UGANDAN LEGAL SYSTEM

The Judicature Act provides for the sources of law applicable in Uganda and these include;

1) The Constitution of the Republic of Uganda, 1995 as Amended
2) Acts of Parliament/Legislation
3) Principles of Common Law and Equity
4) Case Law
5) Customary Law

1) The Constitution of the Republic of Uganda, 1995

The Constitution of the Republic of Uganda, 1995 is the supreme law of Uganda from which all other laws derive their validity. Accordingly any law or custom which is inconsistent with it is void to the extent of the inconsistency. The constitution regulates the relations between the state and its citizens as well as between state organs. It defines the duties of the citizens to the state and the duties of the state to the citizens.

Law and Advocacy V ATTONEY General-

2) Legislation

Legislation refers to law enacted/made by parliament and other bodies or authorities vested with such powers by law. The key forms of legislation are Acts of Parliament and delegated legislation.

i) Acts of Parliament/ primary legislation/ direct legislation

These are the supreme source of legislation, over and above the common law and equity. Acts are written law enacted by Parliament as primary legislation. An Act arises from a Bill.

A Bill is a draft of a proposed Act of Parliament which has been formally tabled before Parliament for consideration. The process of enacting an Act of Parliament takes following steps when legislation is being proposed by a Ministry or Government Department in Uganda;

1) The Ministry concerned approaches Cabinet through a Cabinet Memorandum with a proposal for Cabinet to approve the principles for the drafting of the Bill. Cabinet then considers the proposals as contained in the Cabinet Memorandum of the Ministry concerned and approves the principles on the basis of which a Bill is drafted.

2) The Bill then goes through the processes of Parliament necessary for passing a Bill. Rule 114 of the Parliamentary Rules provides that every Bill shall be read three times prior to its being passed;

(a) First Reading:

This is a formality which marks the formal introduction of the Bill in Parliament and the Bill is then committed to the relevant Sessional Committee of Parliament for consideration. At this stage, the committee will normally invite the relevant

Minister to introduce the Bill and may invite other stakeholders to state their views on the provisions of the Bill and the committee may even sometimes hold hearings for the purpose.

(b) Second Reading:

At this stage the sessional committee submits a report on the Bill to the plenary of Parliament and at the same time, Parliament considers the Bill at Second Reading which is a debate on the principles and policies of the Bill and not on its details.

Committee of the Whole House Stage:

This is the stage of the Bill at which Parliament deals with the provisions of the Bill, clause by clause and all proposed amendments to the Bill.

(c) Third Reading and passing of the Bill:

At this stage the Bill is not debated, it is passed as a formality upon a motion "that the Bill be now read Third Time and do pass"

Assent by the President

The Clerk to Parliament prepares the original copies of the bill and forwards them to the president for signature. Upon the president signing the bill as passed by Parliament, it becomes an Act of Parliament. The Act is then published in the Gazette and it commences on a day indicated in the Act or on a date appointed by the minister concerned through a statutory instrument.

The president has a right to reject the bill and return it to parliament with recommendations on modifications, additions in the bill. However, if this happens twice, the third time the bill is passed by parliament, it automatically becomes an Act of Parliament without the president's assent.

ii) Delegated or subordinate or secondary or subsidiary or indirect legislation.

Parliament normally passes an Act setting out the general laws without details hence leaving it to bodies, authorities or persons to make rules to give effect to the law.

However, ordinarily the power to make secondary legislation is usually vested in the specific authority by the Parent Act meaning that such legislation should conform to the Parent Act or other related Acts lest it will be rendered null and void to the extent of its inconsistency.

Delegated legislation is law made by subordinates deriving their powers from an Act of parliament. A parent Act or enabling statute is the Act of Parliament from which a subordinate derives legislative powers

Types of Delegated Legislation

- **Statutory Instruments.**
  These are normally called rules, regulations or orders, Statutory Instruments are laws made by authorized persons mainly Ministers in charge of government departments upon whom such power has been vested by the Parent Act. In other words, there must be a provision in the Parent Act authorizing such legislation. Statutory Instruments normally relate to commencement dates of Parent Acts, rules of procedure, fees etc. An example of a statutory Instrument is the Land Regulations of 2004. section 93 of the Land Act shows that parliament gave powers to the Minister to make Regulations to enable operation of the Land Act as a result, the Land Regulations of 2004 were passed.

- **Ordinances**
  These are laws passed by the District Council. Section 38 (I) of the Local Government Act provides that a District Council shall have power to pass local bills into ordinances signed by the Chairperson. However the bill is required to be first forwarded to the Attorney General through the Minister to ensure that it is not inconsistent with the Constitution and any other Act of Parliament before the Chairperson signs it. Once the chairperson signs, it becomes an ordinance and is published in the gazette and in the local media. An ordinance may be made to apply to the whole district, any part of the district, a particular section or profession of the people.

  An ordinance is made for matters which are not adequately provided for by the constitution or Act of Parliament. Examples include; The Wakiso Revenue Ordinance, Kiruhura Diary and Cooling Ordinance, Pader District Education Ordinance etc.

- **Bye- Laws**
  These are made by local authorities or other authorized bodies and are only binding on persons or entities coming within their scope [limited geographical scope].The law making entities derive their authority from an enabling provision in the Parent Act. Under the Cooperative Societies' Act, cooperative societies are empowered to make bye laws as a condition for registration.

  Under the Local Governments Act, an urban, sub county, division or village council is empowered to make a bye law which must not be inconsistent with the constitution, or any Act of Parliament, or ordinance passed by a District Council, or a bye law passed by a higher council. The bye law has to be sent first to the relevant authority to certify that it is not so inconsistent with the constitution.

Advantages of Delegated Legislation

i) It gives the parliament to focus on other critical roles like analyzing policy issues and other oversight roles.

ii) Some matters are so urgent that they require immediate attention to be addressed. This situation may require that a law be passed immediately for which Parliament may not have time.

iii) Matters to be legislated on may be so technical that they may require technical persons to handle. Not all parliamentarians are technical enough to handle all matters and so expert knowledge can be got by delegating the power to legislate e.g. nurses and midwives regulations.

iv) Future difficulties are better handled with delegated legislation especially where service charges are involved e.g. payment of fees like stamp duty.

v) Delegated legislation addresses the detailed aspects of the law which may have been overlooked by parliament

vi) Delegated legislation ensures flexibility as it is simpler and in case of impracticability or unfairness, it can easily be revoked or amended.

Disadvantages of Delegated Legislation

i) Delegated authorities are at times given powers to legislate on matters of principle which should only be dealt with by Parliament.

ii) Parliament, the supreme law making organ of the state, may lack control over delegated legislation and this may lead to passing of dangerous laws.

iii) Delegated powers may be so wide and this may create uncertainty about the prevailing laws as well as leading to a multiplicity of laws that may be contradictory.

iv) There is a risk of an authority to which power is delegated to exercise those powers beyond the permitted limits in which case any law thereby passed will be void (ultra vires)

v) The publicity of delegated legislation is inadequate so people may not be aware of the rules and orders passed by ministries.

Controlling Delegated Legislation

There are mechanisms put in place to control delegated legislation.

a) Parliamentary Veto

Parliament reserves the power to withdraw authority to the delegated person or institution if such authority is misused. Parliament normally subjects any subsidiary legislation to scrutiny before it comes into force.

b) The Consultative Process

Before a proposed statutory instrument is concluded, the interested parties are normally consulted for views and comments.

c) Judicial Scrutiny

Courts are normally invited to scrutinize the validity of statutory instruments on grounds relating to:

- The content falling outside the scope of the Parent Act
- Failure to comply with the requisite procedure

- Incompatibility with fundamental human rights. For example in **Raymond v Honey (1983)**, whilst the Home secretary had powers to make rules for the management of prisons, he was not permitted to deny prisoners the right to access to the Courts.
- Also see the mechanisms under ordinances and bye/laws above.

d) The Ultravires Doctrine.

One effective way of controlling delegated legislation is by application of the ultravires doctrine. A piece of delegated legislation is ultravires if it exceeds the powers contained in the enabling Act or if it offends certain presumptions of the law. These presumptions include the following:

i) The person who has been given powers of delegation cannot delegate them to another person. (A delegate cannot sub-delegate ie delegates non protest delegate)

ii) The enabling Act does not give power to make unreasonable rules or those which infringe basic constitutional rights.

3) Common Law and Equity

Section 14 (2) (b) of the Judicature Act Cap 13 gives the High Court of Uganda power to apply common law and the doctrines of equity in adjudication of disputes. The same power is also given to Magistrates Courts under Section 11 of the Magistrates Courts Act Cap 16.

i) Common law

This refers to a body of rules that have over time been developed by English judges from English customs which became the basis of fundamental legal principles. From earliest times, certain oral customs in England came to be recognized as having general application. Over the years, principles of law were slowly evolved from these customs and because they were of general application, they yielded what came to be known as the common law of England thus common law consists of the ancient customs and usage of England which have been recognized and given the force of law. Common law is unwritten law. It can be ascertained from judgments and books of authority etc. however, some common law rules have been codified by statute and now form part of the written law of the land for example under Partnership Act, 2010 and the Sale of Goods and Supply of Services Act, 2017.

ii) Equity

This refers to a body of discretionary rules and remedies devised by Chancery Courts on the basis of fairness, rules of natural justice and good conscience to remedy the lacuna/gap/ defects created by the common law. They are laid down in form of maxims/doctrines. Examples include; equity helps the vigilant and not the indolent, he who seeks equity must do equity; equity looks at substance rather than form, delay defeats equity, equity does not act in vain.

However in the event, there is conflict between common law and the doctrines of equity, then the rules of equity prevail.

What were the defects in the common law?

a) The procedural technicalities.

Common law required claimants to commence their actions by way of a writ/claim form setting out the terms of the claim and failure to comply [however minor the non-compliance] therewith rendered the action bad in law and therefore unsustainable. Form was much emphasized than substance. The writ provided for specific claims that could be commenced by such method and any claim not provided for therein was untenable in law.

b) Limited number of remedies

A limited number of remedies were available at common law; basically damages/ monetary compensation for loss or damage. If a claim required some form of remedy other than damages, it would fail.

Equity therefore has its genesis embedded in the rigid nature of the common-law. The rules of equity were first developed by the King through petitions that were brought to him and later the Lord Chancellor. The King was guided by the desire to be fair and to do justice so where no remedy existed at common law, new remedies were created. Subsequently, a court of Chancery was established to administer equity and its rulings are the foundation of the multiplicity of equitable rules/doctrines applied today. The common law and equity are today concurrently administered in all courts but are all subject to and cannot prevail over written law.

4) Case Law or Judicial Precedent/ judge made law

Being a common law country, Uganda applies precedent as a source of law. Precedent means earlier decisions of the courts of record that are relied upon by courts in deciding cases of similar facts and issues. In Uganda, courts of record are;

i) The Supreme Court,
ii) The Court of Appeal and
iii) The High Court.

Case law is therefore referred to as judge-made law. Precedent is based on the legal principle of ***stare decisis*** (Latin for "to stand by things decided") which requires subordinate courts to stand by earlier decisions of higher courts when a similar issue has previously been brought to the Court and a ruling issued. The principle behind the doctrine of precedent is that in each case the judge applies existing principles of law by following the example or precedent or earlier decisions. Precedent promotes even-handed, predictable and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process.

Under the system, decisions are recorded in law reports so as to facilitate a degree of continuity and predictability. Law reports in Uganda include Uganda Law Reports (ULR), Kampala Law Reports (KALR), High Court Bulletins (HCB), and Uganda Law Society Reports (ULSR). English reports include the Weekly Law Reports (WLR), Kings Bench Division (K.B), Queens Bench Division (QBD), Chancery Reports (ChD), Probate Division etc. Cases are also now available online for example in Uganda they are available on the Uganda Legal Information Institute Website - www.ulii.org and on the Uganda Online Law Library Website- www.ugandaonlinelawlibrary.net

Advantages of Case Law/Precedent

i) Precedent creates certainty in the law once judges make a decision on a particular matter. The law thus becomes predictable as a party can predict the likely outcome of a case basing on its facts and an earlier decision on a similar case.

ii) Precedents allow the growth and development of the law so that it does not remain static. This arises from the aspect of overruling and distinguishing precedents.

iii) Precedent supplements parliament in its law making function. Since Parliament cannot make provision for everything, judge-made law can fill in the gaps

iv) Case law is based on real/ factual situations. It is therefore more practicable unlike statutes which are not easily ascertainable. For example whereas unnatural offenses are criminalized, no lesbian has ever been tried in the courts of law.

Disadvantages of Case Law/Precedent

a) Case law is rigid. Once a rule has been laid down by a court of record, it is binding on the lower courts even if it is thought to be wrong

b) Case law is bulky and complex. It is found scattered in so many law reports that one has to widely research if he seeks to rely on a particular precedent till he comes up with the current legal position on the matter.

5) Customary law

Customary law is unwritten law which governs the behaviour and conduct of people of a given community. It emanates from customs and use of such customs for a long period of time. Customary law is an unwritten source of law in Uganda. **Section 15 (1) of the Judicature Act Cap 13** permits the High Court to apply customary law as long as it is not inconsistent with natural justice, equity and good conscience. Customary law is limited to civil matters and does not apply to criminal matters because **Article 28 (12) of the Constitution of Uganda** provides that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed by law. Customary law should also be compatible with written law.

Criteria that must be met by a custom for it to qualify to be applied as customary law

i) It must be in existence with uninterrupted and harmonious application which should have dated from time immemorial. This is the antiquity test which has been fixed way back to 1198 BC. A custom is immemorial when its origin was so ancient that the beginning of it is beyond human memory so that no testimony is available as to a time when it did not exist. Such a custom will be taken to have force law and thus customary law.

ii) The courts will take judicial notice of the custom because of its notoriety. This means the existence of a custom will be taken for granted without any need for further proof if it has earlier on been frequently proved

iii) It must be consistent with written laws. Where a custom contradicts with or is not in line with other written laws it cannot qualify as customary law. In **R vs. Amkeyo (1917)** the accused was an African native who was convicted of being in possession of stolen property. The Chief witness called was a woman who he had married under native custom. Upon objection by the accused to his wife giving evidence, an issue arose as to whether the accused and the witness were married within the meaning of section 12 (now section 120) of the Evidence Act.

Hamilton C.J stated that the word marriage could not be used to describe the relationship entered into by the African woman and the accused. The customs of the accused approved the marriage as a valid marriage but they were not in line with the written English laws of marriage which were applicable to Uganda at the time.

iv) It only applies in civil matters. There is nothing like customary criminal law.

v) It only applies where it has not been excluded by parties whether by express contract or by the nature of the transaction in question

vi) It must not be repugnant to natural justice, equity and good conscience e.g. in **Gwao bin Kilimo v Kisunda bin Ifuti**, a custom that allowed a man's property to be attached in satisfaction of his son's debts was held to be inapplicable.

THE HIERARCHY OF THE COURT SYSTEM IN UGANDA

According to **Article 126 (1) of the Constitution of the Republic of Uganda**, *"…judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people."*

Courts of law are the organs charged with the administration of justice. In Uganda courts of law fall under the Judiciary, one of the three arms of the state. Courts are presided over by justices, judges and magistrates, Local Council Courts are presided over by the Executive Committee Chairpersons under the Local Council Courts Act 2006.

The civil/ criminal justice system is structured in form of a hierarchy of courts with specific jurisdiction/power/limits to handle specified cases.

Under Article 129 of the Constitution, it is provided that judicial power shall be exercised by the courts of judicature which shall consist of the Supreme Court, the Court of Appeal [COA], the High Court and such subordinate courts as Parliament may by law establish.

Article 128 provides that in the exercise of judicial power, the courts shall be independent and shall not be subject to control or direction of any person or authority (judicial independence)

The Supreme Court

The Supreme Court is the highest appellate court in Uganda established under **Article 130 of the Constitution of the Republic of Uganda, 1995** as amended. According to **Article 132 of the Constitution**, the Supreme Court is the final court of appeal, it has power entertain appeals from the Court of Appeal and the Constitutional Court. The Supreme Court also has original jurisdiction in matters of presidential election petitions. For example Amama Mbabazi vs. Yoweri Museveni & Ors Supreme Court Election Petition No. 1 of 2016

The Supreme Court consists of the Chief Justice and other Justices of the Supreme Court. **Section 1 of the Judicature (Amendment) Act, 2011** which repealed **Section 3 of the Judicature Act Cap 13** elevated the number of Supreme Court Justices to eleven. The Chief Justice is the head of the Supreme Court and presides at each sitting of the Court. In his absence, the most senior member of the Court as constituted presides. Currently the Chief Justice of Uganda is Justice Alphonse Owinyi Dollo

The Court of Appeal

The Court of Appeal is established under **Article 134 of the Constitution of the Republic of Uganda, 1995**. It is the second highest Court of record in Uganda. **Section 2 of the Judicature (Amendment) Act, 2011** which repealed **Section 9 of the Judicature Act Cap 13** elevated the number of the Justices of Appeal to 15 Justices. The Court of Appeal also serves as the Constitutional Court when sitting with a bench of five justices of appeal to determine questions of interpretation of the Constitution. The Deputy Chief Justice is the head of the Court and in that capacity assists the Chief Justice in the administration of the Court. Currently the Deputy Chief Justice of Uganda is Justice

A minimum of three Justices of Appeal constitute the Coram of the court to hear and determine appeals to the Court. When sitting as a Constitutional Court, the court must consist of a bench of five justices.

The High Court

The High Court is established under Article 138 of the Constitution of the Republic of Uganda. The High Court is the third highest Court of record (courts that make precedent/ case law) possessing and exercising unlimited jurisdiction in both Criminal and Civil cases. In addition, it hears appeals from Magistrates courts and exercises general supervisory power over them. The Principal Judge is the head of the High Court and the subordinate courts and in that capacity assists the Chief Justice in administration of these Courts. Currently the Principal Judge is Justice Flavian Zeija.

The High Court is divided into eight divisions;

1) Civil Division
2) Commercial Division
3) Family Division
4) Land Division
5) Criminal Division
6) Anti-Corruption Division
7) International Crimes Division
8) Execution and Bailiffs Division

When sitting to determine matters brought before the Court, the High Court is presided over by a single judge. .The High Court holds sessions in various parts of Uganda called High Court Circuits for the trial of civil and criminal cases. Currently sessions are held in Mukono, Mpigi, Luwero, Masaka, Mbarara, Gulu, Mbarara, Mbale, Fort Portal, Masindi, Arua etc.

Pecuniary Jurisdiction – above 50 milllion

Criminal cases – hears cases were the maximum punishment is death

The Magistrates' Courts

These are established under the Magistrates Court Act. The High Court is empowered by the Judicature Act to supervise them. They consist of grades ranging from;

1. Chief Magistrate,
2. Magistrate Grade 1,
3. Magistrate Grade 2.

A Chief Magistrate is empowered to supervise all Magistrates' Courts within the area of jurisdiction. The powers and jurisdiction of a particular magistrate are determined by the grade of his or her appointment and the powers and jurisdiction conferred upon that grade by the Magistrates Courts Act.

In Civil Cases;

A Chief Magistrate has jurisdiction to hear and determine matters whose subject matter does not Ugx 50,000,000/= (Uganda Shillings fifty million only) *(Section 207 (1) (a) of the Magistrates Courts Act Cap 16 as Amended)*. A Magistrate Grade 1 has jurisdiction to hear

and determine matters whose subject matter does not exceed Ugx 20,000,000/= (Uganda

Shillings twenty million only) *(Section 207 (1) (b) of the Magistrates Courts Act Cap 16 as Amended)*. A Magistrate Grade 2 has power to hear and determine matters who subject matter does not exceed Ugx 500,000/= (Uganda Shillings five hundred thousand only). *(Section 207 (1) (c) of the Magistrates Courts Act Cap 16*).

In Criminal Cases;
A chief magistrate has power to try any offence other than an offence in respect of which the maximum penalty is death. *Section 161 (1) (a) of the Magistrates Courts Act Cap 16 as Amended).* A magistrate Grade I has power to try any offence other than an offence in respect of which the maximum penalty is death or imprisonment for life. *Section 161 (1) (b) of the Magistrates Courts Act Cap 16 as Amended).*

A magistrate grade II may try any offence under, and shall have jurisdiction to administer and enforce any of the provisions of, any written law other than the offences and provisions specified in the First Schedule to the Magistrates Courts Act. These include offences like; Incitement to violence, smuggling, rape, attempt to commit rape, abduction, defilement of girl under the age of eighteen, defilement of idiots or imbeciles, procuration.

A party dissatisfied with a decision of a Chief Magistrate or Magistrate Grade 1 has a right to appeal to the High Court of Uganda. A party dissatisfied with a decision of a Magistrate Grade 2 has a right to appeal to the Chief Magistrate.

Specialised courts
The Family and Children Court
Section 13 of the Children Act Cap 59 as Amended establishes a Family and Children Court in every district. This Court is presided over by a Magistrate Grade I and II. According to Section 93 of the Children Act, the Family and Children Court has power to hear and determine applications relating to child care and protection (e.g. custody, maintenance and parentage) as well as criminal charges against a child except any offence punishable by death or any offence for which a child is jointly charged with a person over eighteen years of age;

Note
The Children Act provides that unless otherwise provided, matters of a civil nature concerning children are dealt with by the village Local Council Courts where the child resides or where the root of the complaint arises.

Local Council Courts
These are established under **Section 3 of the Local Council Courts Act 2006** for the administration of justice at every village, parish, town, division and sub-county. They are supervised by the High Court although under **Section 40 of the Local Council Courts Act,** the Chief Magistrate may exercise this function on behalf of the High Court. The territorial jurisdiction of Local Council Courts extends only to matters arising in the territory of the Local Council where the court is established or to matters arising elsewhere if the defendant or accused ordinarily resides in that territorial area.

Under **Section 10 of the Local Council Courts Act, 2006,** Local Courts have power to hear and determine matters of a civil nature specified in the Second Schedule to the Act, these include; debts, contracts, assault or assault and battery, conversion, damage to property and trespass. The Local Council Courts further have power to hear and determine matters of a civil nature governed only by customary law specified in the Third Schedule, these include; disputes in respect of land held under customary tenure, disputes concerning marriage, marital status, separation, divorce or the parentage of children, disputes relating to the identity of a customary heir, customary bailment. The Local Council Courts also have power to hear and determine matters arising out of infringement of bye-laws and Ordinances duly made under the Local Governments Act and matters specified under the Children Act.

Under **Section 21 of the Local Council Courts Act**, the language of the court to be used in the determination of disputes is the language widely spoken in the area of jurisdiction of the court. Local Council Courts can give remedies including compensation, restitution, attachment and sale.

Appeals lie from village Local Council Courts to Parish Local Council Courts; from Parish Local Council Courts to town, division or Sub County; from town, division or Sub County to the Chief Magistrates Court; from Chief Magistrates Court to High Court with leave (permission) of the Chief Magistrates Court or the High Court.

The Military courts

The Parliament of Uganda is mandated under 210 of the Constitution to make laws regulating the Uganda People's Defence Forces. In 2005, the Parliament of Uganda passed the **Uganda People's Defence Forces Act, 2005** into law. The UPDF Act is the major legal framework governing the UPDF. Part VIII of the UPDF Act deals with the establishment and operation of military courts in Uganda. From the structural point of view, military courts in Uganda comprise of;

a) The Summary Trial Authority,
b) Unit Disciplinary Committees
c) Courts Martial.

Under "Courts Martial", the UPDF Act provides for a four tier military court system;

i) Field Courts Martial;
ii) Division Courts Martial;
iii) The General Court Martial; and
iv) The Court Martial Appeal Court.

Under the "Summary Trial Authority", an accused person can be tried by summary trial either by his or her commanding officer or officer commanding or by a superior authority. The offences triable by the Summary Trial Authority are provided for in the Eighth Schedule to the UPDF Act. They include; disobeying lawful orders, insubordinate behavior, violence to a superior officer, drunkenness, quarrels and disturbances,

Scandalous conduct by officers and absence without leave. Appeals from decisions of Summary Trial Authority lie only to the commanding officer or the immediate superior in command of the Summary Trial Authority.

According to **section 207 (1) of the UPDF Act,** appeals from decisions of superior authority in exercise of original jurisdiction lie to the Commander-in-Chief. Unit Disciplinary Committees are established under section 195 (1) of the UPDF Act. This section establishes a Unit Disciplinary Committee for each Unit of the defense forces. The jurisdiction of a Unit Disciplinary Committee is limited to trying persons accused of committing non-capital offences under the UPDF Act. A Unit Disciplinary Committee has power to impose any sentence authorized by law. This includes death. A party to the proceedings of a Unit Disciplinary Committee who is not satisfied with its decision has the right to appeal to the General Court Martial. The UPDF Act also establishes a Division Court Martial for each Division or equivalent formation of the defense forces. A Division Court Martial has unlimited original jurisdiction under the UPDF Act. The power to convene a Division Court Martial vests in the High Command or any other authority authorized in that behalf by the High Command.

Field Courts Martial are established under section 200 (1) of the UPDF Act. The jurisdiction of Field Courts Martial is limited to only circumstances where it is impractical for the offender to be tried by a Unit Disciplinary Committee or a Division Court Martial. Section 197 (1) of the UPDF Act establishes the General Court Martial. The General Court Martial is the second highest military court in the country. The General Court Martial has both original and appellate jurisdiction. Like the Division Courts Martial, the original jurisdiction of the General Court Martial under the UPDF Act is unlimited. Its appellate jurisdiction is limited to hearing and determining appeals referred to it from decisions of Division Courts Martial and Unit Disciplinary Committees. The General Court Martial also has revisionary powers in respect of findings, sentences or orders made or imposed by any Summary Trial Authority or Unit Disciplinary Committee.

The highest military court in Uganda is the Court Martial Appeal Court. The Court Martial Appeal Court hears and determines all appeals referred to it from decisions of the General Court Martial. The Court Martial Appeal Court is the last appellate military tribunal in Uganda. No appeal lies from the Court Martial Appeal Court to any other court, except cases of appeal against convictions involving death sentence or life imprisonment which have been upheld by it. In such cases, the appellant has a right of further appeal to the Court of Appeal of Uganda.

Question:

Discuss the court hierarchy system in Uganda.

TOPIC 2: THE LAW OF CONTRACT

Law Applicable:

- The Constitution of the Republic of Uganda, 1995 as amended
- The Contracts Act Cap 284
- The Sale of Good & Supply of Services Act Cap 293
- The Companies Act Cap106
- The Evidence Act Cap 8
- Common Law
- Doctrines of equity
- Case Law

Definition of a contract

A contract is a legally binding agreement or relationship that exists between two or more parties to do or abstain from performing certain acts. The parties can be natural persons or artificial persons e.g. a company.
The parties to the agreement must have a final agreement i.e. their minds must meet. This is what is called consensus ad idem. When the parties' minds divert then there is no contract.
A party to a contract is said to be in breach if he or she has failed to fulfill the terms of the contract.

Formation of a Contract

As an old maxim has it 'all contracts are agreements but not all agreements are contracts'. The rules of contract law determine whether or not an agreement is legally enforceable. There are certain necessary legal formalities in the formation of a binding contract. These include: -

- That the agreement is made as a result of an offer and acceptance.
- The agreement contains an element of value known as consideration.
- The parties must intend to create legal relations.
- The parties must have legal capacity to enter into the contract.
- The subject matter of the contract must be lawful.
- There are certain contracts, which require certain formalities before they are entertained by courts of law, and such formalities must be followed.
- It should be possible to perform
- It must be entered into freely [Genuine consent].
- The consent of the parties must be genuine and not induced by fraud, duress, mistake or misrepresentation.

Types of Contract

- **Simple contract**

This contract need not be in any form. It may be in writing or agreed orally, or even be implied from the conduct of the parties.

- **Specialty contracts**

  These are contracts under seal. They must be executed in a prescribed form. They include gratuitous promises, conveyances of leases and land etc. Usually such contract is in writing and must be properly signed if they are to be enforceable. Other contracts that must be supported by written evidence include contracts of guarantee (special promise to answer for the debt) Contracts of employment for 6 months or more, hire purchase contracts / agreements and money lending contracts.

  Contracts can also be classified in terms of their validity as **valid** contract, **void** and **voidable**.

- **A valid contract** is an agreement, which is binding and enforceable. Such contract must have the following essential elements of a contact.

- **Voidable contract**

  Voidable means valid, until avoided. When a contract is voidable the law will allow one of the parties to withdraw from it if he wishes. Voidable contracts include some agreements made by minors and contracts induced by misrepresentation, duress, or undue influence. A voidable contract remains valid unless and until the innocent party chooses to terminate it.

- **Void contracts**

  These are not contracts at all. If a contract is void, then it is of no legal effect. Void contracts include those, which are prohibited by the law or are against public policy.

- **Illegal Contracts.**

  These are contracts that involve a criminal element. They cannot be enforced in a court of law e.g. contracts to commit a crime.

- **Bilateral contract**

  This is a contract that creates binding obligations on both parties to the contract.

- **Unilateral contract**

  This is a contract that creates binding obligations on one of the parties only e.g. promising a reward to whoever finds your lost item. Nobody is under obligation to look for the item but if the item is found there is a obligation to give the promised reward.

QUESTIONS

- Explain the role of law of contract in a modern economy
- Define a contract
- Discuss the different types of contract

THE ESSENTIALS OF A VALID CONTRACT

Offer

Definition of an offer

An offer is an expression of readiness to contract on terms specified by the offer which if accepted by the offeree will give rise to binding contract.
Generally, the offeror (i.e. the person who makes the offer) makes the offer to the offeree (i.e. the person to whom the offer is made).

Types of offer

- **Counter offer**

This is a reply to an offer whose effect is to vary the terms of the original offer. It is in fact an offer in itself, which operates as a rejection of the original offer.

- **Cross offer**

Where A offers his property to B and B, without knowing about A's offer also offers to buy the same property from A, each of these offers is a cross offer of the other and therefore no contract can result from them alone. A must specifically accept B's offer or B that of A if a valid contract is to be made.

- **Conditional offer**

This is an offer which is made subject to a condition e.g. to be accepted within specific time.

Rules governing offer/Characteristics of a Valid Offer

- **An offer may be made orally, in writing, or by conduct**.

Contract can be made orally can be an express spoken statement or be made in writing or
implied i.e. People's actions in certain circumstances can be classed as an offer.

- **The offer must be firm and final**.

The offeror must not merely be initiating negotiation from which an agreement may or may not result. He must be prepared to implement his / her promise if such is the wish of the other party. An offer must be conclusive in nature and must leave no room for further negotiations.

- **An offer can be made to an individual, a group of persons or the public at large**.

The leading authority on these points is the case of ***Carlil Vs Carbolic Smoke ball Company (1893)***
The defendant company advertised in the Newspaper that it had manufactured a drug called smoke ball and that it was prevention against influenza. The defendant promised that it would offer 100 pounds to any one who caught influenza after using it in accordance with certain conditions. The defendant also stated that a sum of 1000 pounds had been deposited with the bank to show sincerity in the

matter. Relying on the advert, the plaintiff bought the drug and used it as directed but got influenza. She claimed for the 100 pounds but the company refused to pay her. She brought an action for breach of contract against the company.
The defendant company argued that:-
It was not possible to make an offer to the whole world, or to the public at large.
That the advertisement was just a mere puff and there was no intention to create legal relations.

Held

i) The defendants act of depositing 1000 pounds with their bank was to show their seriousness in the matter and as such the advert could not be referred to as a mere puff but is was an offer intended to be acted upon and as such creating binding obligations on the defendant.

ii) The defendant could not deny liability because this was a general offer. An offer can be made to the whole world and accepted by anyone who comes forward and performs the conditions even without prior notification of acceptance.

- **An offer must be communicated to the offeree**

  An offer becomes effective when it is communicated to the offeree e.g If B found A's lost dog and not having seen the advertisement by A offering a reward for its return, returns it out of goodness of heart, B will not be able to claim the reward. This principle was illustrated in the case of ***Fitch v Snadakar;*** a two hundred US Dollars reward was offered for the arrest of a criminal. The plaintiff who was not aware of the reward apprehended the criminal and later claimed the reward.
  Court held that the claim must fail as he was not aware of the offer when he arrested the criminal.

- **The offer must be lawful.**

  A person cannot offer to perform something illegal e.g. murder some one.

- **The offer may be made subject to any terms and conditions**.

  Where a condition attached to an offer is not fulfilled, the offer fails and no contract can result from it.

Distinction between an offer and an invitation to treat

An invitation to treat can be defined as an invitation to make an offer. The distinction is important in that if a firm offer is accepted, this will result in a contract, provided the other essential elements of a contract are satisfied. But the 'acceptance' of an invitation to treat will not create a contract. It is an invitation to make an offer which the person making the invitation to treat may accept or reject. The best examples of invitations to treat include the following;

- Display of goods in a shop

  The case to illustrate this is ***Fisher V Bell*** in which a shopkeeper was prosecuted for offering offensive weapons for sale, by having flick knives on display on his window. It was held that the shopkeeper was not guilty as the display in the window was not an offer for sale but an invitation to treat.

- Display of goods in a supermarket with price tags

In ***Pharmaceutical society of Great Britain V Boots Chemists (1953***) The defendant had a self service store in which certain listed drugs were displayed on the shelves. It was an offense to sell such drugs unless the sale was done under supervision of a registered pharmacists. A customer selected some of the drugs from the shelves. The defendants had placed the pharmacists at the cash desk near the exit but not near the shelves. The defendants were charged with an offence of selling such drugs without the supervision of a registered pharmacist. The issue before the court was, if the sale took place when the customer picked the drugs from the shelves, the defendants would be liable but if the sale took place at the cash desk where the registered pharmacist was stationed , then the defendants would not be liable. Court therefore, had to determine where the sale took place. **Court held** that the defendants were not liable because the display of goods on the shelves was merely an invitation to treat and not an offer.

It should be noted that declaration of intention and mere statement of information doesn't constitute an offer. This position is illustrated in ***Harris Vs Nickerson [1873]***

An auctioneer advertised that there would be a sale of office furniture. The plaintiff a prospective buyer traveled to London to attend to sale but all the furniture was withdrawn. He sued for loss of time and traveling expenses. It was held that the auctioneer was not bound to sell the furniture as he was merely stating his intentions to sell and not making an offer which by acceptance wound be transformed into a contract. The advertisement for bids in an action is mere invitation to treat. The sale is complete when the hammer falls and until that time the bid may be withdrawn.

- Ordinary advertisements on radio, television and newspapers

  This was illustrated in the case of ***Partridge V Crittenden*** where a person was charged with 'offering' a wild bird for sale contrary to the law after he had placed an advert relating to the sale of such birds in a magazine. It was held that he could not be found guilty of offering the bird for sale as the advert amounted to an invitation to treat not an offer.
- Invitation for tenders

  They occur where someone wishes particular work to be done and issues a statement asking those interested to submit the terms on which they are willing to work. The person who invites the tender makes an invitation to treat and that one who submits his tender is the offeror.
- A company prospectus

Termination of offer

An offer may be terminated in the following ways;

- **Lapse of time**

  An offer cannot remain open for acceptance longer than the time if any, prescribed in the offer or if no time is indicated, it will terminate after a reasonable time. What amounts to a reasonable time depends on the nature of the contract and

circumstances of each case for example in the case of ***Ramsgate Victoria Hotel Company –Vs-Montefiore (1866)***

M applied for the purchase of shares in the Plaintiff Company on June 8th. His offer was not accepted until Nov. 23rd. When he received a letter of allotment he refused to take the shared as by that time the price of the shares had fallen. It was held that M was entitled to refuse as his offer had lapsed because of the plaintiff's delay in accepting the offer.

- **Revocation**

  An offer may be revoked or withdrawn by the person who made it at anytime before it has been accepted.

- **An offer comes to an end if not accepted in a manner prescribed (failure of a condition subject to which an offer was made)**

  E*llason Vs Henshaw (1819);* the plaintiff offered to buy flour from the defendant requesting the reply to be sent with the Wagon driver who communicated the offer. The defendant communicated the acceptance by post office. The driver reached before the letter was received. ***Court held*** that there was no contract between the two parties.

- **Death or insanity of the one of the parties.**

  If the contract envisaged or contemplated by the offer involves personal relationship e/g an offer to act as an agent, then death or insanity of the offeror prevents acceptance Death after acceptance normally has no effect on the contract for example if X sells his car to Y and before the Car is delivered, X dies, It is possible for Y to sue the legal representatives of X for breach of contract if they refuse to deliver the car.

- **Counter offer**

  An offer is terminated by a counter offer. This position is illustrated in ***Hyde Vs Wrench (1840);*** the defendant offered in writing to sell his farm to the plaintiff for 1000 pounds. The plaintiff wrote saying he would give 950 Pounds for it. The defendant refused to accept this. Later, the plaintiff agreed to pay 1000 pounds, which the defendant refused to accept. The plaintiff sued for an order of Specific Performance. His action failed because his offer of 950 pounds was a counter offer, which terminated the defendant's offer of 1000 pounds. Thus when the plaintiff later accepted the 1000 pounds, there was no offer in existence, and so no contract was formed.

- **Rejection**

  An offer may also be terminated when the offeree rejects it.

QUESTIONS

- Discuss the rules that govern an offer
- Under what circumstances may an offer be terminated
- Distinguish between an offer and an invitation to treat

Acceptance

Definition of acceptance

This is an indication to enter into and be bound by the contract. It is a positive response to an offer.

Rules governing acceptance

- **Acceptance can be**:

- In writing
- Oral form
- By conduct.

- **Communication of acceptance**

The general rule is that acceptance must be communicated to and received by the offeror. Thus if acceptance is not received because of interference on a telephone line or the offeree's words are too indistinct to be heard by the offeror, no there is no contract.

It is a condition that therefore **silence cannot amount to acceptance.**

This rule was stated in the case of **Felthouse V Bindley (1863);**

The plaintiff wrote to his nephew offering to buy one of his horses adding " if I hear no more about him I will consider that horse is mine at 30 pounds and 15 pence'. The nephew did not reply but told the defendant who was an auctioneer not to sell the horse to any body else. The defendant sold the horse by mistake and the plaintiff sued him for damages. The issue was *whether silence by the nephew amounted to acceptance.*

Court held that since the nephew had not communicated his acceptance to the plaintiff, there was no contract of sale and the auctioneer was not liable. Court therefore concluded that silence does not amount to acceptance

- **Acceptance of the offer must be absolute and an unqualified**.

The offeree must accept the terms of the offer as made to him. He must not change them. Any change of the terms creates a counter offer hence no contract as was illustrated in the case of **Hyde V Wrench.**

- **The offeror may expressly state the method of communicating acceptance**. Acceptance must therefore be communicated to the offeror in the manner stated by him.

- **Acceptance must be communicated by the offeree or by someone with his authority.** This principle was stated in the case of **Powell v Lee (1908);** where,

The plaintiff applied for the post of headmaster of a school, which was run by the defendants who were the managers of the school. He was called for an interview and the managers passed a resolution appointing him, but they did not make any arrangements for notifying him. However, one of them without authority informed the plaintiff that he had been appointed. The managers subsequently re-opened the matter and appointed another candidate. Plaintiff sued for breach of contract.

The issue before court was *whether acceptance was validly communicated to the plaintiff*. **Court held** that his action for breach of contract should fail because the defendants had not properly communicated acceptance to him since the person who communicated had no authority to do so.

- **Acceptance is not effective if communicated in ignorance of the offer**

Exceptions to the communication of acceptance rule

There are certain exceptions to the rule that an acceptance must be communicated to and actually received by the offeror. These include the following;

Unilateral contracts

These are contracts which where the offer consists of a promise to pay money in return for performance of an act. In such cases performance of the act is sufficient acceptance.

- **Postal rule**

An acceptance by post is effective as soon as the letter of acceptance, which is correctly addressed and stamped, is put into the postal box, immediately a binding contract is created between the parties. This rule was stated in the case of **Adams V Lindsell**

NB:

If the letter is lost or delayed in the post because the offeree has addressed it incorrectly, the postal rule will not apply.

'Posted' means put into the control of the post office in the usual manner.

QUESTIONS

- Discuss the rules governing acceptance
- Explain the postal rule of acceptance

Consideration

Definition of consideration

Consideration is defined as a benefit acquired by one party or a detriment suffered by the other. In the case of **Currie v. Misa (1875)** where Lush J. said: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."

Consideration is the price I pay to buy your promise. So, briefly, consideration is something, which is of value to you, which I give you to buy your promise. If you make me a promise but I do not give you consideration, your promise is gratuitous. Generally, the Law does not impose a contractual obligation on a person who makes a gratuitous promise.

Types of consideration

Consideration can be;

- Executory consideration
- Executed consideration

- Past consideration
-

The distinction between executory and executed consideration

Consideration is said to be executory where there is an exchange of promises to perform acts in the future

Consideration is executed when the promisee does an act in return for the promisor's promise.

Rules governing consideration

- **The rule that consideration must move from the promisee**

The promisor is the person who makes the promise. The promisee is the person to whom the promise is made.

In ***Tweddle v. Atkinson, (1861) 1 B. & S. 393;*** Tweddle and William Guy entered into a written contract, by which they agreed to give money to William Tweddle. William Guy did not give the money promised. After his death, William Tweddle sued Guy's estate to enforce Guy's promise. He did not succeed, as he was not a party to the contract and did not give consideration to buy Guy's promise. It was stated that consideration must move from the party entitled to sue upon the contract."

- **The rules that consideration should not be past**

Past consideration can be defined as, consideration that is given before the promise is made, and the consideration and the promise are not part of the same transaction.

The general rule is that past consideration is not sufficient consideration. This means that if the consideration, which the promisee has given the promisor, is past consideration, the promisee is unable to enforce the promisor's promise.

Another case to illustrate the principle that past consideration is not sufficient consideration is ***Re McArdle [1951] Ch 669*****,** the claimant had spent her own money in improving a house belonging to some relatives. After the improvements had been carried out, the relatives signed a document promising to pay her the money she had spent on improvements. They failed to honour their promise and the claimant sued them to enforce the promise. She did not succeed, as she had done the improvements before the relatives had made the promise, and the court was unwilling to treat the claimant's consideration (i.e. doing the improvements) and the relatives' promise as part of the same transaction.

Exception to the past consideration rule

- If the promisor requested the promisee to carry out the act constituting the past consideration.

In ***Lampleigh v. Brathwait (1615)*** , Brathwait had killed a man and asked Lampleigh to meet the King and get him a pardon. Lampleigh met the King and obtained the pardon. Brathwait promised Lampleigh that he will pay Lampleigh £100 for his services. But as Brathwait did not honour this promise Lampleigh sued him. The court held that Brathwait's prior request to Lampleigh contained an implied promise to pay him a reasonable sum for his services, and that the

subsequent mention of the £100 was merely fixing the sum. The court treated the prior request and the subsequent promise as part of the same transaction.

- **The rule that consideration must be sufficient but need not be adequate**

The promisee's consideration does not have to be fair or equal in value to the promisor's promise. If one of the parties has made a bad bargain, the courts expect him/her to stick with it.

In ***Thomas v. Thomas (1842) 2 Q.B. 851***, the defendants promised to convey a cottage to the claimant, and in return, she promised to pay £1 per year as rent. The court held that the defendants were bound by their promise as the claimant had given sufficient consideration. This case makes it clear that the court is not concerned with the adequacy of consideration.

Circumstances that do not amount to sufficient consideration (consideration must be in excess of an existing duty)

- **Where a person performs a public duty imposed upon him**

If the promisee performs a legal duty and nothing more, then this is not sufficient consideration to buy the promisor's promise. In ***Collins v. Godefroy*** (1831) 1 B. & Ad.950, Godefroy was a litigant in a case and had caused Collins to be served with an order to attend court as a witness. Godefroy promised Collins to pay him some money for his loss of time in attending court, but did not fulfill his promise. Collins sued Godefroy to enforce his promise, but the court held that Collins had not given any consideration to Godefroy to buy his promise. Court stated that "If it be a duty imposed by law upon a party regularly summoned to attend from time to time to give his evidence then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think that such a duty is imposed by law;"

If, however, the promisee exceeds his legal duty, he does provide consideration.

- **where the claimant is bound by an existing contractual duty to the defendant** If the promisee merely fulfils an existing contractual duty to the promisor, and nothing more, she does not provide consideration to buy the promisor's promise.
- **In cases of part payment of debts**

Let us assume that I (the debtor) have borrowed £100 from you (the creditor) and the due date of payment is today. I inform you that I can only afford to pay you £75. You feel sorry for me and promise to forget about the balance £25 and to accept the £75 in full settlement of the debt. Are you bound by your promise to forget about the balance? What if you decide to sue me for the balance?

In ***Pinnel's case*** [1558 - 1774] All ER Rep 612, Common Pleas, it was held that "payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, can a lesser sum be a satisfaction to the plaintiff for a greater sum:...".

The principles in ***Pinnel*** and ***Foakes v. Beer*** are still good law. There are, however, several exceptions, which will be examined in the next section.

The exceptions to *Pinnel* rule

The general rule in ***Pinnel*** and ***Foakes v. Beer*** is that if the debtor pays the creditor part of the debt, on the due date of payment, and the creditor promises to forget about the balance, the creditor is not bound by his promise, as the part payment is not sufficient consideration to buy the creditor's promise. There are, however, common law exceptions and an equitable exception to this rule.

Common law exceptions

- **Part payment by the debtor on an earlier date at the creditor's request.**
- **Part payment by the debtor at a different place at the creditor's request.**

Let us assume that I owed you £100 to be repaid in London today. But this morning you ring me up and say that you will be in Brighton today, and that it is more convenient for you to be paid in Brighton. I say to you that as I will have to spend time and money in traveling to Brighton, I will only be able to pay you £80, if you want the money repaid in Brighton. You say to me that you will accept £80 in full satisfaction of the debt. In accordance with this agreement I pay you £80 in Brighton. If you then decide to sue me for the balance £20, you will not succeed, as I have conferred a benefit on you by paying you in Brighton.

- **When the debtor offers something other than money as payment and the creditor accepts this in full satisfaction of the debt.**

Now let us assume that I owe you £100 and today is the date of repayment. When I meet you today, I inform you that I have no money, but I offer you a copy of the entire set of my lecture notes, if you are willing to forget about the debt. You have missed many of my lectures and you see this as an excellent opportunity of catching up. So you accept my offer of lecture notes and promise to forget about the debt. Unfortunately for you, you will not be able to sue me for the debt, as I have conferred a benefit on you by giving you my lecture notes.

- **Where a third party makes a part payment to the creditor.**

So if your father, mother or partner makes a part payment of your debt to your creditor and your creditor accepts the part payment in full satisfaction, but then decides to sue you for the balance, you have a good defence i.e. that it would be a fraud on the third party to sue you.

QUESTIONS

1. Define consideration
2. Discuss the rules that govern consideration
3. State the rule in Pinnel's case and the exceptions to it

Privity of Contract Doctrine

The Privity of Contract Doctrine/rule

The concept is based on the fundamental assumption of English law that a contract is a bargain such that he who takes no part in the bargain takes no part in the contract. In effect this means that no one can enforce another person's promise unless he has been a party to the contract and that a stranger to consideration or to the contract cannot sue on that contract even if it is made for his own benefit. This expression is further illustrated in ***Dunlop Vs Selfridge [1915]***

The Plaintiff sold tyres to Dew Company where by Dew and company agreed not to sell the tyres below the price list provided and it was also agreed that Dew and company would obtain similar arrangements with other dealers. Dew and company sold the tyres to Selfridge and it was agreed that they would not sell the goods below the price provided. Selfridge breached this arrangement and Dunlop sued for breach of contract. Court observed that the plaintiff had no right of action because no consideration moved from Selfridges to them.

This decision of ***Dunlop Vs Selfridges*** derives its basis of an earlier case of ***Price Vs Easton (1833)*** The defendant promised a one X that if he did some work for the plaintiff, the defendant would pay sum of money to the plaintiff. The obligations were performed as agreed but the defendant declined to pay the plaintiff. The plaintiff sued for breach of contract. It was held that no consideration had moved from the plaintiff to the defendant and as such the action would not be maintained. It should be noted however that this is a general rule and there are some exceptions to this rule.

- **Agency**

  A principal may sue or be sued on a contract made by his agent. This appears more apparent because the principal is the contracting party who has merely acted through the agent. Powers of Attorney, lawyer and their client.

- **Bill of exchange**

  A holder for values of a bill of exchange (cheque) can sue prior parties on that cheque for example if A bought goods from B and paid by cheque which B endorsed or negotiates in favour of C for value, C acquires a right to sue A if the cheque is dishonored although no consideration moved from him to A.

- **Assignment**

A person who proves that a right under a contract was assigned to him can sue under that contract in his own name.

- **The law of trusts.**

  The law of trusts forms an exception in that a beneficiary (people entitled to benefit from the trust) acquires a right to sue the trustee if he intermeddles /interferes with the trust property for his personal benefit. Although the arrangement is between the settlor and the trustee, the beneficiaries though strangers to the arrangement can successfully sue on such contracts.

- **Statutory exceptions** e.g. Insurance contracts. In a life assurance and third party insurance policies, the beneficiaries can sue the insurance company.
  Administration of estates/ succession

- **Restrictive covenants.** These are rights or conditions that passed on with land.

  This is a negative term of the stopping one of the parties from doing something. They are common in land transactions where a person buys land from another and it is agreed that the restrictions on the use of land will run with the land.

QUESTIONS

- Explain the doctrine of privity of contract and the exceptions to the rule

Intention to Create Legal Relations

Definition of intention to create legal relations

The law demands that the parties must intend the agreement to be legally binding. After all if you invite a friend over for a social evening at your house, you would not expect legal action to follow if the occasion has to be cancelled.
Intentions of a party determine the creation of a binding contract. In the case of ***Broomer vs. Palmer (1942)*** Lord Green said, "*Law doesn't impute intentions to enter into legal relationship where circumstances and the conduct of the parties negate any intentions of the kind"* So it follows from this statement that statements which form the basis of the contract must contemplate legal consequences.
For the purpose of establishing the intention of the parties, agreements are divided into two categories; **business /commercial and social/domestic agreements.**

Business/commercial agreements

In business agreements, it is automatically presumed that the parties intend to create legal relations and make a contract. This presumption can however be

rebutted by the inclusion of an express statement to the effect that the parties do not intend to create legal relations.

Social/domestic agreements

This group covers agreements between family members and friends. The law presumes that social agreements are not intended to be legally binding.

Social arrangements between friends do not usually amount to contracts because the parties never intend their agreement to be legally binding. You might agree to meet someone for lunch or accept an invitation to a party, but in neither case have you entered into a contract. This principle was illustrated in the case of ***Jones V Padavatton (1969) 2ALLER 616*** where it was held that a mother who had promised her daughter that she would provide an allowance to allow the daughter to complete her legal studies was not liable for breach of contract when she later withdrew from the arrangement because it was a family arrangement and there was no intention to create legal relations.

If it can however be shown that the transaction had a commercial element, court may find that the intention to create legal relation was present. This was illustrated in the case of ***Parker V Clarke (1960) 1 ALLER 93;*** Mrs. Parker was the niece of Mrs. Clarke. An agreement was made that the Parkers would sell their house and live with the Clarke's who were an elderly couple. They agreed that they would share the bills and the Clarke's promised to leave the house to them. Mrs. Clarke wrote to the Parkers giving them the details of the expenses and confirming the agreement. The Parkers sold their house and moved in with the Clarkes. Mr. Clarke changed his will leaving the house to the Parkers. Later the couples fell out and the Parkers were asked to leave. They claimed damages for breach of contract. The issue was *whether there was an intention to create legal relations between the parties.*

Court held that the exchange of letters showed that the two couples were serious and the agreement was intended to be legally binding because the Parkers had sold their own home and secondly Mr. Clarke changed his will. Therefore the Parkers were entitled to the damages for breach of contract.

An agreement between wife and husband leaving together as one is presumed not to be intended to be legally binding, unless the agreement states to the contrary normally give rise to a contract. This principle was stated in the case of ***Balfour Vs Balfour (1919) K.B. 571***, a husband who worked in Ceylon promised to pay an allowance of 30 pounds per months to his wife who had to stay in England for medical reasons. The husband later declined to pay the promised allowance and the plaintiff sued on this promise. The issue was *whether the agreement to pay the 30 pounds was legally binding*.

Court held that there was no enforceable contract because the parties did not intend to create a legal relationship since agreements between husbands and wives are not intended to be legally binding.

However**,** this presumption will not apply where the spouses are not living together at the time of the agreement (separated) this was stated in the case of ***Merrit Vs***

***Merritt (1970) 2ALL ER 760*;** the husband left his wife. He later agreed to pay 40 pounds per month for her maintenance. It was also agreed that she would pay off the outstanding mortgage after which the husband had promised to transfer the house into her name. He wrote this down and signed the paper, but later refused to transfer the house. She sued him for breach of contract. The issue was *whether the agreement to transfer the house was intended to be legally binding.*

Court held that the agreement having been made when the parties were no longer living together was enforceable at law.

N.B:

It should be noted that agreements made between wife and husband which are not necessary of a domestic nature are valid and enforceable for example a husband can be a tenant to his wife.

QUESTIONS

- 'Social agreements are not legally binding' Do you agree

Capacity to contract

Meaning of capacity to contract

An essential element of a valid contract is that the contracting parties must be competent to contract. The general rule is that all persons have the power to enter into any contract they wish. But special rules apply to minors, mental patient, drunkards, and corporations.

Minors / Infants

A minor is defined by the contract Act as a person who hasn't attained the age of 18. Contracts entered into by a minor may be **Valid (binding), void or avoidable**.

Binding contracts

Contracts, which are binding on a minor, are contracts for necessaries and contracts ofservice.

- **Contracts for necessaries**

Necessities of life are defined under the Sale of Goods Act as goods suitable to the condition in life of an infant and to his actual requirements at the time of sale and delivery. Necessities of life include services and goods, shelter, medical care education and other services like legal advice

N.B:

- The minor is only liable to pay a reasonable price.
- If the necessaries are sold but not delivered, the minor is not bound.

A minor is liable on these contracts of necessities of life.. Therefore minor is not bound to pay for items that are deemed luxurious. Whether a particular commodity falls within the category of '' necessaries' depends on the circumstances of each case. Thus, while a suit may be an item of necessaries in the case of a minor who comes from a well to do family, it might be an item of luxury to a peasant's son.

- The seller must show the minor was not adequately supplied at the time of the contract.

This position of the law was stated in the case of ***Nash vs. Inman (1908);*** The plaintiff who was a tailor, in the course of 3 months sold 11fancy Waist coats to the value of the 145 pounds to the defendant who was an infant and under graduate of Cambridge. The infant failed to pay and the plaintiff sued for the price. The defendant's father proved that minor was an infant and was sufficiently supplied with proper clothing's according to his position. It was held that the defendant wasn't liable on contracts as there was no evidence to prove that the goods supplied were necessaries of life, which had not been sufficiently supplied to the minor.
Therefore, a minor is not liable if he has an adequate supply, even if the supplier did not know this.

- **Contracts of service**

These are contracts of a beneficial nature to the minor. They are also binding. These include contracts for education, those enabling a minor to earn a living or improve his skills, occupation or profession. The contract must be beneficial to the minor. This is illustrated in ***Roberts Vs Grey (1913);*** the infant defendant had agreed to go on a world tour with the plaintiff a professional player, competing against each other in matches .The plaintiff made all the necessary arrangements but the defendant refused. . The plaintiff sued and court observed that the contract was for the infant's benefit, as he would gain experience and fame by his association with the outstanding player like the plaintiff. However if a contract as a whole is not beneficial to the minor, it will not be binding on him.

Voidable contracts
Contracts entered into by minors can also be classified as voidable. Voidable means the contract is binding on the minor until he decides to repudiate (reject) it. Therefore voidable contracts are those contracts, which a minor is entitled to repudiate during minority or within a reasonable time after attaining majority age. Apart from the minor's option to repudiate, a voidable contract is similar to a binding one in that in either case the contract must be beneficial to the minor. But in case of a voidable contract, the subject matter is generally of a permanent or continuing nature. The most outstanding examples of voidable contract are:

- Lease agreements (here a minor acquires an interest in land)
- Contracts for the purchase of shares (minor acquires an interest in a company)
- Contracts of partnerships (minor becomes a partner in a firm)

Void Contracts
Minors must not enter into the following contracts:

i) Trading contracts and such contract are not binding however beneficial they may be to the infant thus is an infant receive goods on credit and sales them

in course of his business for cash he is still not bound to pay for then.

Mechantile limited Union Vs Ball (1937), the defendant an infant hired the plaintiff company lorry. He refused to pay a hire purchase price in breach of contract. The defendant contended that it was for the defendants benefit. Court held that trading contracts whether beneficial or not are not binding on the infant.

ii) Loan contracts

The same position is in the case of ***Leslie Vs Sheil*****.** The contract between the two parties involved a loan. The defendant had a requested for a loan which he failed to pay within the prescribed time. When the matter came up in court, court was of the opinion that such contract couldn't be enforced against the minor as it was prohibited by the law.

- Contracts to buy luxuries

Corporations

These are artificial persons recognized by the law. Corporations can take two basic forms. Those created by statute [Statutory corporations or parastetals].These have only powers conferred upon them by the creating statute.

Those created under the Companies Act generally referred to as companies. Like natural persons, corporations can enter into valid contracts. They are recognized by the law and are capable of suing or being sued in their own names. They can own property and dispose it off, they can enter into tenancy arrangement and occupy the premises, they can enter into contracts of employment etc.

Insane/persons of unsound mind

A Contract entered into by an insane persons is not binding unless if at the time of the contracts such person was capable of understanding and appreciating the nature of the contract and the obligations imposed. Drunkards also fall under this category. A contract entered into by a drunkard is voidable but ordinary drunkardness is not sufficient to avoid a contract. It must be proved that at the time of entering into the contracts the party pleading drunkard ness was incapable of understanding the full implications of the transaction.

QUESTIONS

- Explain the concept of contractual capacity of a minor
- 'Contracts entered into by drunkards are void' do you agree?

LEGALITY

This section deals with legality as an element of a contract, contracts that are illegal and effect of illegality on a contract.

Objectives

At the end of this section you will be able to:

- Understand the element of legality of contract
- Explain the different contracts that are classified as illegal
- Understand rule the effect of illegality on a contract

Definition of legality

To support a contract consideration must be lawful. For a contract to be binding on both parties, the subject matter of the contract must be lawful. The law will not give effect to a contract if it involves the commission of a legal wrong or is invalidated by a statute and those contrary to public policy. This position of the law derives it basis from the case of ***Foster Vs Driscoll (1929*)** A Contract was entered into for the shipment of Whisky from England to the U.S.A during the time when a prohibition was in force. The plaintiff sued when the contract was breached. It was held that the contract couldn't be enforced owing its illegal nature. Illegal contracts involve some degree of moral wrong and an element of crime or fraud. Such contracts include the following:-

i) **Contracts to commit a crime, a tort or fraud on a third party**. This is explained in the case of ***Dann Vs Curson (1911*)** an agreement was entered into to cause a disruption at a theatre. The plaintiff who agreed to create the disturbance and infact did so and sued for the remuneration due to him under the agreement. Supreme Court held that the action could not succeed as it was an agreement to commit a crime and against Public Policy

ii) An agreement to defraud or deceive is also illegal. This is explained in the case of ***Waldo v Martin (1825*)**. In this case an agreement was concluded to the effect that the plaintiff would secure a job for the defendant who agreed to pay part of the emoluments as a secret commission. The defendant failed to pay. Court held that the agreement was illegal and couldn't be enforced. Court further observed that the fruits of a crime are irrevocable.

iii) **Contracts involving sexual immorality.** if a man promises to pay money to a woman as recompense for sexual pleasure , such illicit intercourse is illegal and the contract is unenforceable . The law in Uganda makes prostitution and living on earnings of prostitution as an offence. This explanation was made in the case of ***Pearce vs. Brooks (1866).*** The plaintiff owned a carriage which was of an attractive design intended to assist her to obtain clients. The defendant hired the carriage and defaulted in payment. The evidence produced in court indicated that the carriage was basically intended and actually used for purpose of soliciting clients. Court held that the plaintiff claim of the sum due couldn't be enforced due to its illegal nature.

iv) **Contracts prejudicial to public safety.** This was illustrated in the case of ***Furtado Vs Rogers (1802*)**; In this case Lord Alvanley observed " we are all of the opinion that it is not competent for any subject to enter into any arrangement which may be detrimental to the interests of his own country and such a contract is as much prohibited as if it had been expressly prohibited by the Acts of parliament. The detrimental contracts in this context are those intended either to benefit an enemy county or to disturb the good relations of the state with a friendly country.

v) **Contracts prejudicial to the administration of justice**. It is a well established rule that courts will neither enforce nor recognize an agreement which has the

effect of withdrawing from the ordinary course of justice or prosecution a public offence. Consequently an agreement to prevent or to compromise prosecution is illegal and void even though the prosecutor derives no gain financial or other wise.

vi) **Contracts to corrupt public life**. Contracts that have material influence to diminish the respectability, responsibility and purity of public officers are illegal. Contracts to procure a title for a man in consideration of money payment is illegal .The authority on this point is ***Parkinson Vs the College of Ambulance Limited and Harrison (1925*****)** The first defendant was a charitable institution .The second defendant fraudulently represented to the plaintiff that the charity would obtain him some honor if he could make a suitable donation which he did. No such honor was obtained for the plaintiff court held that the contract was unenforceable.

vii) **Contracts to defraud revenue.** A contract whose terms are directly or impliedly designed to defraud revue whether national or local is illegal. ***Napier Vs National Business Agency limited (1951);*** The defendant engaged the plaintiff as their employee at a salary of 13 pounds and additional 6pounds per week for expenses. Both parties were aware that weekly expenses could not exceed 1 pound. Income tax was deducted on 13 pounds and nothing was deducted on the 6 pounds as it was taken as a re-imbursement of expenses. The plaintiff was summarily dismissed and claimed payment in lieu of the notice. Court held that the claim couldn't succeed because the contract of employment was tainted with an element of fraud.

There are other contracts which are not necessary illegal but are generally invalid and unenforceable. Such contracts are described as void. These include:-

a) **Contracts to oust (over power court) jurisdiction of court**. A contract which has effect of taking away the right of one or both parties to bring an action before a court of law is void. This is explained in the case of ***Lee Vs Shoromen Guilds of Great Britain (1952) 11 QB 329*****;** Lord Denning observed that if partied agree to take the law out of the hands of court and puts in into the hands of a private tribunal, without any recourse at all to the courts incase of error of law then the agreement is to that extent contrary to public policy and void**.** In ***Becker Vs Jonnes (1954)*** An association was formed to promote a sport of weight lifting in U.K and control of its affairs was vested in the central council .It was provided that this council would be the sole interpreter of the rules of the association and its decisions would in all cases be final. When the issue came up in court, it was held that to give the council the sole right of interpretation was void and that court has jurisdiction to consider whether the interpretation adopted by the council was proper in law .

b) **Contracts prejudicial to the status of marriage**. The status of marriage is a matter of public interest in all civilized countries and is important that nothing should be allowed to impair the sanctity of its solemn obligations or to weaken

the loyalty that one spouse owns the other under common law any contract which after marriage tends to encourage the parties into an immoral mode of life incompatible with their mutual obligation is void. Marriage ought to free and any contract which restrains a person from marrying anybody of his choice is against the welfare of the state. Case. ***Lowe Vs Peers (1976);*** A contract was made by a man in the following terms. " I do truly promise Miss Catherine Lowe that I will not marry any person besides herself, if I do, I agree to pay to the said Catherine 200 Pounds within 3 months next after I shall marry anybody else." Court observed that such clause was null and void(absolutely enforceable) As a consequence it has also been asserted with approval that marriage brokerage contracts that is a contract by which A under takes in consideration of money payment to procedure marriage for B, is null and void. However where spouses are no longer living in amity or are actually separated, it is lawful for then to conclude a separation agreement.

c) **Contracts in restraint of trade**. A contracts in restraint of trade is one in which a party restricts his future liberty to carry on his trade business or profession in such a manner and with such person as he chooses. A contracts of this nature is prima-facie void but it becomes binding upon proof that the restriction is justifiable in the circumstance as being reasonable from the point of view of the parties themselves and the community. The issue of reasonableness is a matter of law for the judge to determine on evidence presented to him which would include for example such matters as trade practices and custom's. There are several restraints. However what is dealt with here are restraints imposed upon an employee. There are basically two. Thus an employer can legally protect;

Trade secrets

A restraint against an employee is justifiable if its objective is to prevent exploitation of trade secrets learnt by the employee in the course of his employment e.g production formulas . This is explained in ***Foster & Sons limited Vs Sugget (1918*)** The plaintiff a glass manufacturer instructed its manager in certain confidential methods concerning the inter alia (among others) the correct mixture of gas and air in the furnace. He agreed that during the 5 year following the termination of his employment wouldn't carry out in U.K or be interested in glass manufacturering or any other business connected with glass making as conducted by the plaintiff .***Court held*** that plaintiff were entitled to protection as the restraint was reasonable. Two points must be noted i.e, the period must be reasonable and the restraint must not be excessive. ***Empire Meat Company Limited Vs Patrick (1939*)***; A restraint concerning a retail butchers business was held to be invalid because among other things the area within

which the employer agreed not carry on business or be employed in the business of meat selling though five miles away form the place of the employers was too wide in view of the limited are of employers trade.

Business connection

An employer may use a covenant to restrict solicitation of persons with whom the employer deals with in business. Although no problem of area arises in this situation duration of the covenants must be reasonable.

Consequences of illegality

- Where an illegal transaction or contract has been concluded, court will not entertain a suit or a case for recovery. This position was laid down ***Kiriri cotton Co. ltd Vs Dewani (1958) E.A 239*;**
  - Money paid in pursuance of an illegal contract can't be recovered ***Nacks Vs Kyobe*** where parties were involved in contracts for money lending without a money lenders license. Court observed that money given out on interest without a money lenders license is irrecoverable.
  - Where the law provides for a punishment the individual should be punished accordingly.

QUESTIONS

- 'Illegal contracts are not valid contracts' **Discuss**
- Define an illegal contract

Genuine Consent (Vitiating Factors)

Meaning of genuine consent

A contract must have been entered into voluntarily and involved a genuine meeting of minds. The agreement may therefore be invalidated by a number of factors e.g. misrepresentation, mistake, duress, undue influence. These factors are known as vitiating factors or elements of a contract.

Misrepresentation

A misrepresentation is an untrue statement of fact, which induces a party to enter a contract, but which is not itself part of the contract. There must therefore be a statement. Mere silence cannot constitute misrepresentation even when it is obvious that the other party is mistaken as to the facts, subject to some exceptions.

Types of misrepresentation

- **Fraudulent misrepresentation** occurs when a party makes a statement, which he knows to be false, or has no belief in its truth. In such a case the innocent party may rescind the contract and claim damages for the tort of deceit. This was stated in the case of

- **Negligent misrepresentation** may occur where the person making the false statement has no reasonable ground for believing the statement to be true. A person having a duty of care makes the false statement.
- **Innocent misrepresentation** occurs when a person who has reasonable ground to believe that the statement is true makes a false statement.

In general, a misrepresentation makes a contract voidable rather than void. On discovering the misrepresentation, no matter whether fraudulent, negligent or innocent, the other party may affirm or rescind the contract.

Mistake

It may be defined as an erroneous belief concerning some thing. Mistake can divided into three types forms.

- **Common mistake**

A common mistake is made when or where both parties assume some particular state of affairs where as the reality is the other way round. Infact, both parties make exactly the same mistake. Contracts affected by common mistake are void at common law e.g. where parties make a contract believing that there are goods and yet the goods have already perished.

This was illustrated in the case of ***Counturier Vs Hastie;*** A contact was concluded between the two parties for the sale of corn, which at the time of the contract was believed to be the cargo on the ship. Unknown to both parties the goods had deteriorated in condition and sold on the way to mitigate the loss. Court held that there was no contract concluded because the contract contemplated the existence of the subject matter of something to be sold and bought, but at the time of the contract no such goods existed.

- **Mutual mistake**

This occurs where in relation to a particular matter one party assumes one thing while the other party assumes a totally different thing, so that they both misunderstands one another. Where each party is mistaken as to the intentions of the other, there is no consensus ad idem and hence no contract. ***Raffles Vs Wichlaus*** The parties entered into a contract for he sale of goods to arrive Ex-perless from Bombay, Infact there were two ships called Ex-perless which sailed from Bombay one in October, the other in December. The buyer thought the contract related to the ship sailing in December while the seller thought it was the October ship and therefore the buyer did not take delivery when the October ship arrived. Court held that the buyer was not liable as there was no contract due to mutual mistake.

- **Unilateral mistake**

A unilateral mistake occurs when just one party is mistaken as to some aspect of the contract, and the other is or is presumed to be aware of this mistake. Examples of unilateral mistake are common in fraud cases where one misrepresents his identity to the other thereby inducing the other party into contracting with him in the false belief that he is contracting with the person whose identity has been given.

Duress and undue influence

Duress

Duress is an illegal threat applied to induce a party to enter a contract, and makes the contract voidable. It is limited to illegal violence or threats of violence to the person of the contracting party. This was illustrated in the case of ***Cumming v Ince*****;** an old lady was threatened with unlawful confinement in a mental home if she did not transfer certain property rights to one of her relatives. The transfer was set aside because the threat of unlawful imprisonment amounted to duress.

In the case of ***Barton v Armstrong;*** the defendant threatened to kill the plaintiff if he did not buy his shares. Court set aside the sale because of duress.

Undue influence

A contract is said to be affected by un due influence if the relationship existing between the parties is such that one of the parties is in position to influence the will of the other and he uses the position to obtain an unfair advantage over the other. Where there is a confidential relationship existing between the parties undue influence is presumed. For example Parent/ Child, Doctor and Patient, Trustee and Beneficially etc. Undue influence renders a contract voidable.

QUESTIONS

- Discuss the various vitiating factors of a contract and their effect on the validity of a contract
- Discuss the different types of mistake

Terms of the Contract

Definition of terms

These are undertakings or promises made and agreed upon by the parties in the process of negotiating a contract. This does not mean that all the representations made in negotiating a contract form the terms of the contract. It must be a statement of such a nature that if it was not made the contract could not have been concluded.

Terms of the contract can either be express or implied.

- **Express terms** are those which are specifically put in a contract such that they can be ascertained from the contract without extrinsic evidence.

- On the other hand **implied terms** are those which are so obvious that they need not be included in the contract. Such terms are derived from custom or statute and in addition a term may be implied by the court where it is necessary in order to achieve the result which in court's view the parties obviously intended the contract to have. The Sale of Goods Act Cap 79 laws of Uganda provides for the a number

of implied terms in a contract of Sale of Goods unless if expressly excluded by the parties.

Terms of the contract can be divided into **condition**s and **warranties**.

- **Condition** is a vital term of the contract that goes to the root of the contract breach of which entitles the aggrieved party to treat the contract repudiated (as if it was not there) and claim damages for non performance.
- **A warranty** on the other hand is a subsidiary obligation which is not so vital such that failure to perform it does not go to the root of the contract. Breach of a warranty is not repudiatory and the plaintiff is only entitled to damages for loss suffered.

Whether a term is a condition or a warranty is basically a matter of the court which will be decided on the basis of the commercial importance of the term.

Exclusion/Exemption Clauses

These are terms or clauses excluding or limiting the liability of one of the parties to a contract in respect of which he would otherwise be held liable in law.

Not all exemption clauses are valid. Some are void by legislation for example those which exclude strict liability for death or personal injury from negligence.

The application and enforceability of exclusion clauses depends on a number of reasons.

- **Reasonableness of the clause**

In circumstances where the clause protects the party who has failed to carryout the basic obligation of the contract, the court will not allow him to rely on the exemption clause to escape liability. This was illustrated in the case of ***Karsale s ltd Vs Wallis;*** W inspected a car, it was in good condition and agreed to buy it. The agreement contained the following clause "no condition or warranty that the car is road worthy or so to its age, condition or fitness for any purpose is given by the owner or implied her in" When delivery of the car was made, it was in a shocking condition and incapable of self starting. W refused to accept the car. K sued him relying on the exemption clause

It was held that as the breach went to the root of the contract it was so unreasonable and could not entitle the plaintiff to rely on it.

- **Reasonable care must be taken to bring it to the attention of the contracting party at the time of the contract**.

Court requires a person relying on the exclusion clause to show that it was brought to the attention of the other party and that party agreed to it at or before the time when the contract was made, otherwise it will not form part of the agreement.

In ***Olley Vs Marl borough Court Ltd (1949)*** Husband and wife arrived at a hotel as guests and paid for the room in advance. They went up to the room allocated to them and on one of the walls was a notice, "The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the Manager for safe custody.

The wife locked the door and took the key downstairs to the reception desk. A third party picked the key and took some of the property.

The defendant sought to rely on the exemption clause. It was held that the contract was concluded at the reception desk and no subsequent notice would affect the plaintiffs rights.

The decision could have been different if the parties had visited the Hotel previously and had knowledge of such notice. ***Spurling vs. Bradshaw (1956) 1WLR 461***

- **Where an exception clause is printed at the back of the receipts it is not valid unless if brought to the attention of the other party.**

Chapelton Vs. Barry UDC (Urban Development Council) (1940)

C hired deck chairs, paid 4 pence and obtained a ticket which he put into a pocket without reading it. It was printed at the back that the defendant will not be liable for any accident or damage arising from the use of the chairs. When C sat on the chair, it collapsed and he was injured. C sued the defendant.

It was held that the printed clause at the back of the receipt could not become part of the contract as no reasonable care was taken to bring it to the attention of the contracting party C was entitled to damages.

- **Fraud/misrepresentation**

Where an exemption clause is contained in the document and a person endorses such contract document he is bound by those clauses contained in it. He cannot rely on the ignorance of the contents of the document unless if he was induced to sign by fraud or misrepresentation. This observation was made in ***Estrange v Graucob (1934) 2KB 394, Thompson vs Lms Rly (1930) 1KB, Curtis v Chemical clearing dyeing co. (1951).*** In ***Curtis*****,** the plaintiff took a dress to the defendant company for cleaning. She was told to sign a receipt she asked why and was told by the defendants that they would not accept any responsibility for damage to the beads and sequins on the dress. In fact the document contained a clause stating that the article is accepted on condition that the company is not liable for any damage however arising.

When the dress was collected it was stained and an action for damages was instituted.

It was held that the defendant could not rely on the signed document because the sign was obtained by misrepresentation.

In ***Thompson***, the plaintiff asked her niece to purchase for her an excursion ticket on front of which were On the back was a notice that the ticket was issued subject to the conditions in the company's time table which excluded liability for injury however caused. T was injured and claimed damages.

It was held that her claim must fail. That she had constructive notice of the conditions which had in courts view; been property communicated to the ordinary passenger.

NB:

Whether adequate notice relating to exclusion clauses has been given depends on

- **Type of document** e.g. a passenger ticket, it is usually sufficient for the exclusions clause to be prominently set up or referred to the face of the document e.g. ***Thompson Vs MLS Rly (1930) 1KB 41;*** However, the situation would be different if the party relying on the exclusion clause was aware of the other parties' disability e.g. ((illiteracy), where there are no words or the face of the document drawing the attention to the exemption clause, where the words are made illegible by stamp or otherwise, and where the exception clause is hidden in a mass of advertisements.
- **Nature of the exclusion clause.**

The principle is that the more unusual or least expected, the clause is, the higher will be the notice required to be incorporated. In ***Crooks v Allen (1870) 59BD 38,*** it was held that the person relying on a term least expected should make it conspicuous or take other steps to draw attention to it.

- **Timing.** The general principle is that an exclusion clause will be incorporated in the contract if notice of it is given before or at the time of the contract of ***olley v Marlborough Ltd.***

QUESTIONS

- Define an exclusion clause
- Distinguish between an implied and express term
- Distinguish between condition and a warranty

Discharge of Contract

Definition of discharge/termination of contract

Discharge of a contract means that the parties are freed from their mutual obligations. A contract can be discharged in various ways:

- **Performance**

  This is where both parties have performed the obligations, which the contract placed upon t hem. Performance must be completed i.e. it must be in accordance with the terms of the contract if the

Performance is incomplete (contrary to the terms/the defaulting party may be sued for damages.

At common law, where performance is incomplete such party in default is not entitled to any payment.

- **Discharge by agreement**

Where a contract is still executory, i.e. Where each of the parties is yet to perform his contractual obligation, the parties may mutually agree to release each other from their contractual obligation. Each party's promise to release the other is consideration for the other party's promise to release him. .

- **Discharge by frustration.**

A contract is said to be frustrated if an event occurs which brings its further fulfilment to an abrupt end, and upon the occurance the parties are discharged. But the doctrine of frustration only relates to the future.This mean that the parties are discharged from their future obligation under the contract but remain liable for whatever rights that may have accrued before the frustration , although the parties are both excused from further performance of the contract.

It is difficult to determine the frustrating events but some examples are given below:-

- **Destruction of Subject Matter**
  Taylor v. Caldwell (1862)

  The defendant let a building to the plaintiff for holding concerts on specified days. Before the concerts could be held the music hall was accidentally destroyed by fire. A suit was filed for breach of contract and court held that the action could not be maintained.

- **Death or Incapacity**
  Just as the destruction of the subject matter of the contract terminates it, the death or serious indisposition of a party whose personal services were contemplated by the contract will similarly terminate it. Thus, if A contracts to stage a series of shows during the month of June- September but is in May sentences to imprisonment for one year, or becomes insane permanently or for a substantial part of the period in question, the contract will similarly be discharged by frustration- the frustrating event being constituted by the imprisonment or insanity.

- **Supervening illegality**

A contract is also frustrated if, after its formation, a circumstance arises which renders its further performance illegal. There is said to be supervening illegality, which operates as a frustrating event e.g. change in the law of the country.

- **Discharge by breach**

Breach of contract by a party thereto is also a method of discharge of a contract, because *"breach"* also brings to an end the obligations created by by a contract on the part of each of the parties. Of course the aggrieved party i.e the party not at fault can sue for damanges for breach of contract as per law but the contract as such stands terminated.

Acontract is said to be breached when its terms are broken. Failure to honour ones contractual obligation is what constitutes a breach of contract.

buyer has two options; he may choose to wait for the date of performance to come before taking any action against the seller.

- **Discharge by operation of law**

Acontract may be discharged by operation of law in certain cases . Some important intances are as under.

- **lapse of time**

If a contract is made for a specific period then after the expiry of that period the contract is discharged e.g. partnership deed employment contact etc.

- **Death**

  The death of either party to a contract discharges the contract where personal services are involved.

- **Substitution.** If a contract is substituted with another contract then the first contract is discharged.
- **Bankruptcy**

When a person becomes bankrupt, all his rights and obligations pass to his trustees in bankruptcy.But a stustee is not liable on contracts of personal services to be rendered by the bankrupt.

Remedies for breach of contract

Whenever there is a breach of contract,the injured party becomes entitled for some remedies. These remedies are:

- Damages
- Quantum meruit
- Specific performance
- Injunction
- Rescission

- **Damages**

Damages are monitary compasation allowed to the injured party of the loss or Injury suffered by him as a result of the breach of contract. The fundermantal principle underlying damages is not punishment but compensation. By awarding damages the court aims to put the injured party into the position in which he would have been ,had there been

performance and not breach , and not punish the defaulter. As a general rule compesation must be commensurate with the injury or loss sustained, arising naturally from the breach. If actual loss is not proved , no damages will be awarded to the other party. The plaintiff cannot claim damages for loss which is attributable to his failure to mitigate.

- **Quantum Meruit**

The third remedy for a breach of contract available of an inured party against the guilty party is to file a suit upon quantum meruit. The phrase quantum merit literally means, "as much as is earned" or " in proportion to the work done.

The aggrieved party may file a suit upon quantum merit and may claim payment in proportion to work done or goods supplied.

- **Specific Performance**

This is an equitable remedy. Specific performance means the actual carrying out of the contract as agreed. Under certain circumstances an aggrieved party may file a suit for specific performance, i.e. for a decree by the court directing the defendant to actually perform the promise that he has made.

- **Injunction**

Injunction is an order of a court restraining a person from doing a particular act. It is a mode of securing the specific performance of the negative terms of the contract. To put it differently, where a party is in breach of a negative term of the contract (i.e. where he is doing something which he promised not to do), the court may by issuing an injunction, restrain him from doing , what he promised not to do. Thus "*injunction"* is a preventive relief. It is particularly appropriate in cases of "*anticipatory breach of contract*" where damages would not be an adequate relief.

- **Rescission**

When there is a breach of contract by one party, the other may rescind the contract and need not perform his part of obligation. Such innocent party may sit quietly at home if he decides not to take any legal action against the guilty party. But in case the aggrieved party intends to sue the guilty party for damages for breach of contract, he has to file a suit for rescission of the contract. When the court grants rescission, the aggrieved party is freed from all his obligations under the contract; and becomes entitled to compensation for any damage, which he has sustained through the non-fulfillment of the contract.

QUESTION

'Once a valid contract is made, it cannot be terminated under any circumstances' **Discuss**

TOPIC 3: THE LAW OF SALE OF GOODS AND SUPPLY OF SERVICES

Law Applicable:

- The Sale of Good & Supply of Services Act Cap 293
- The Contracts Act Cap 284
- Common law and the doctrines of equity
- Case Law

Introduction

The objective of this topic is to consider the principles and the rules that govern the sale of goods in Uganda. The sale of goods is an important type of business transaction as it forms a large percentage of the economic transactions in Uganda. The law that governs and regulates the sale of goods in Uganda is the **Sale of Goods and Supply of Services Act Cap 293 (SOGSSA).**

The Sale of Goods and Supply of Services Act, Cap 293 which was passed by the Parliament of Uganda last year and signed into law by the President of Uganda on 20th December 2017 repealed the Sale of Goods Act Cap 82 (SOGA). The SOGSSA is the principal law that lays down the terms intended to protect parties to a contract of sale of goods as well as the rules of general application where the parties fail to provide for instances which may interrupt the smooth performance of a contract of sale e.g. destruction of goods sold before delivery.

Scenarios:

- In a case of a potential purchase of a motor vehicle taking out the vehicle on a trial test/ride, then it is stolen from him or her at gunpoint;

- Goods delivered by a seller or the seller's courier to the premises of the buyer at midnight, abandoned & destroyed by rain;

- Machine breaks down 5 minutes after installation (& receipt may have inscription "goods once sold are not returnable").

It is important note that the general principles that relate to contracts e.g. offer, acceptance, consideration, etc. apply to a contract of sale of goods and the parties are free to agree on the terms which will govern their relationship

Definition and Nature of a Contract of Sale of Goods.

Section 2 (1) of SOGSSA defines a "contract of sale of goods" as a contract by which the seller transfers or agrees to transfer the property (ownership) in the goods to the buyer for a money consideration, called the price.

Characteristics of a Contract of Sale

The essential characteristics of a contract of sale of goods are the following;

i) Parties

There must be two distinct parties to a contract of sale of goods, that is, a seller and a buyer. The requirement that the property be transferred from one party to another means that there must be two distinct parties to a contract of sale.

In **Graff vs. Evans (1882) 8 QBD 373.** In this case, the manager of a bona fide club was prosecuted for selling by retail intoxicating liquors without a licence under the Licensing Act of 1872. The question that fell for decision was whether when a manager of a club supplies liquor to its members, the transaction in question amounts to "sale". **Field, J.,** answered that question thus:-

> *"I think not. I think Foster (member who was supplied with liquor in retail) was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff (the manager of the club) with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and became entitled to have ale and whisky supplied to him as a member at a certain price."*

ii) Transfer of property(ownership);

In this context, "property" means ownership of the goods. A mere transfer of possession of the goods will not suffice; the seller must either transfer or agree to transfer the ownership of the goods to the buyer in order to constitute a contract of sale of goods.

iii) Goods

The subject matter of the contract of sale must be **"goods"** which are defined under **Section 1 of the Sale of Goods and Supply of Services Act** to include;

(a) all things and personal chattels, including specially manufactured goods, which are movable at the time of identification to the contract of sale other than the money representing the price, investment securities and things in action;

(b) emblements, growing crops, unborn young of animals and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

(c) Computer software; and

(d) Undivided share in goods held in common;

Types of Goods

Goods fall into different categories, and inevitably different rules must apply to them. **Section 6 (1) of the SOGSSA** breaks them down into **"existing goods"** and **"future goods."**

a) Existing Goods

These are goods which are physically in existence and are in the possession of the seller at the time of entering into/making of the contract of sale of goods. They can be seen and touched by the buyer. Existing goods may again be either **"specific"** or **"ascertained"** goods.

Specific goods are goods and percentages of goods identified and agreed upon by the parties at the time a contract of sale is made and includes undivided shares in specific goods held in common. In **Re Wait [1927] 1 Ch 606**Atkin L.J stated that. ***"…specific goods bear the meaning assigned to them in the definition clause 'goods identified and agreed upon at the time the contract is made'…"***

Ascertained goods are goods which have become identified following to the formation of the contract.

"Unascertained" goods are goods not identified and agreed upon at the time the contract is made.

In **H R & S Sainsbury Ltd vs. Street [1972][1970] 3 All E.R. 1126,** Sainsbury entered into a contract to buy 275 tons of barley to be grown on Street's farm. Court held that a contract to buy a specified quantity of produce to be grown in a particular field was a contract for unascertained goods.

b) Future goods

According to **section 1 of SOGSSA** future goods are goods to be manufactured or acquired by the seller after the making of the contract of sale. Future goods include; goods not yet in existence and goods in existence but not yet acquired by the seller. Future goods therefore can only be defined by description and thus there cannot be a sale of them at that time, but only an **agreement to sell**.

Where the seller in a contract of sale of goods purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods or supply of services **(Section 6 (3) SOGSSA**).

Contingent goods are a type of future goods or fall in the category of future goods. Contingent goods are goods the acquisition of which by the seller depends upon an uncertain contingency. A contract for sale of contingent goods also operates as **an agreement to sell**. A contract for sale of goods may be made where, the acquisition

of such goods by the seller depends upon a contingency which may or may not happen **(Section 6 (3) SOGSSA**).

It should be noted that a contract of sale of contingent goods is only enforceable if the event on the happening of which the performance of the contract is dependent, happens, otherwise the contract becomes void. For instance if Sajjabi agrees to sell to Walakira a painting by Leonardo Da Vinci known as ***"The Monalisa"*** if he is able to purchase it from its present owner. This is a contract for the sale of contingent goods.

iv) The Price

Consideration for a contract of sale of goods must be money and it's called the price. According to **Section 2 (1) of SOGSSA**, the money consideration for the sale of goods is called **the price**. Price is an essential element in every contract of sale of goods.. (See Keith Abbot, Business Law 8th Edition Page 263).

Under **Section 9 (1) of the Sale of Goods Act**, the price may be fixed by the contract, left to be fixed in the manner agreed in the contract or determined by the course of dealing of the parties.

Where the price is not stated in the contract and no provision is made for its determination, the buyer must pay a reasonable price **(Section 9 (2) of SOGSSA).** What is a reasonable price is a question of fact which depends upon the circumstances of each case and may include a consideration of the prevailing market price **(Section 9 (3) of SOGSSA)**.

Where the contract specifies that the price shall be fixed by valuation of a third party and the third party does not make the valuation the contract is avoided (repudiated). If however, the goods or part of them have been delivered to and appropriated he must pay a reasonable price for them **(Section 10 (1) of SOGSSA).**

In **Campbell vs. Edwards [1976] 1 All ER 785**, Court was called upon to set aside an expert's certificate as to value. **Lord Denning MR** said that 'It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it.'

According **Section 10 (3) of SOGSSA** if the failure to value is the fault of the buyer or seller the party not at fault may maintain an action for damages against the party in fault.

Formation of a Contract of Sale of Goods

In the formation of a contract of sale of goods there are no formalities to be observed; there are no strict formalities prescribed under the SOGSSA to be fulfilled, in order for a valid contract of sale to be concluded.

Section 5 (1) SOGSSA, provides that a contract of sale may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or in the form of a data message, or may be implied from the conduct of the parties. However this provision does not affect a contract entered into under any other law requiring a contract to be made in a specific manner **(Section 5 (2) SOGSSA).**

Note

Section 10(5) of the Contracts Act, Cap 284 provides that a contract whose value exceeds 25 currency points (Ugx 500,000) must be in writing. It is important to note that it would be in the interest of the parties, to have a written contract, especially taking into account what is at stake. Otherwise, in case of a dispute, the terms agreed upon may be difficult to prove.

Distinction between "a sale" and "an agreement to sell"

Where under a contract of sale, the property (ownership) is transferred from the seller to the buyer at the time of executing the contract the contract is called a sale. Where under a contract of sale the property in the goods is to take place at a future time or subject to conditions to be fulfilled after the making of the contract, the contract is called an agreement to sell. **(Section 2 (4) SOGSSA)**

The following are the main points of distinction between a sale and an agreement to sell:

i) Transfer of property (ownership)

In **a sale,** the property in the goods passes to the buyer immediately at the time of making/execution of the contract, with the result that the seller ceases to be the owner of the goods while the buyer becomes the owner thereof and the buyer acquires a "jus in rem" i.e. a right to enjoy the goods against the whole world. In other words, a sale implies immediate transfer of ownership of the goods so that the seller stops/ceases to be the owner of the goods and the buyer becomes the owner immediately.

Whereas in **an agreement to sell,** there is no immediate transfer of ownership to the buyer at the time of making/execution of the contract, with the result that the parties acquire only a "jus in personam" i.e. a right to either the buyer or the seller against the other for any default in fulfilling his part of the agreement. The transfer of the ownership takes place after the agreement becomes a sale either by/after the expiry of a certain time or fulfilment of some condition.,

ii) Risk of Loss

The general rule is that unless otherwise agreed by the parties, the risk of loss passes with property. Therefore, in case of **a sale,** if the goods are destroyed, the loss falls on the buyer even though the goods may not have come into his possession. This is so because the property in the goods has already passed to the buyer. Thus the general rule is: "**risk passes with property unless the parties intended otherwise".**

On the other hand, in case of **an agreement to sell,** where the ownership in the goods is yet to pass from the seller to the buyer, and the goods are destroyed, such loss has to be borne by the seller even though the goods are in the possession of the buyer. This is so because the property in the goods was still with the seller.

iii) Consequences of Breach

In case of a "sale", if the buyer wrongfully neglects or refuses to pay the price of the goods, the seller can sue for the price, even though the goods are still in his (seller's) possession. For instance, where the goods have ceased to marketable/valuable. & buyer may sue 4 specific performance, e.g. where price has shot up, or goods have become more valuable. Whereas in the case of "an agreement to sell", if the buyer refuses to accept and pay for the goods, the seller can only sue for damages and not for the price, even though the goods are in the buyer's possession. For instance, where the value/price of the goods falls sharply.

iv) Right of resale

In case of a "sale", the property passes to the buyer and as such, the seller in possession of the goods after sale cannot deal with them. If, for instance the seller resold the goods, the subsequent buyer who has knowledge of the previous sale does not acquire a good title to the goods and the original buyer can sue as owner of the goods and recover them from the third party/subsequent buyer. The original buyer can also sue the seller for breach of contract or in tort for conversion. However, the right to recover the goods from the third party is lost if the subsequent buyer had bought the goods bonafide [in good faith] and without notice of the previous sale.

In **"an agreement to sell ",** the property in the goods remains with the seller with the result that the seller can dispose of the goods as he wishes and the original buyer can only sue the seller for breach of contract . Under the circumstances, the subsequent buyer acquires a good title to the goods, (irrespective) of whether or not he had knowledge of the previous sale.

v) Insolvency of the buyer before he pays for the goods

In case of a sale, **"the seller"** will be required to deliver up the goods to the official receiver, whereas in the case of **"an agreement to sell",** the seller may refuse to deliver the goods to the official receiver unless they have been paid for.

However, **Section 55 of SOGSSA** provides that when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit and resuming possession of the goods as long as they are in the course of transit and may retain them until payment or tender of the price.

In the event the seller becomes Insolvent before delivering the goods but after the buyer has already paid the price; In case of a "sale", the buyer would, in the circumstances, be entitled to recover the goods from the official receiver since the property in the goods rests with him. However, in case of "an agreement to sell", the buyer would only be able to claim as a creditor but he cannot claim the goods because property in them still rests with the seller.

A SALE CONTRACT DISTINGUISHED FROM OTHER TYPES OF CONTRACTS

a) Contract for Supply of Services

Section 3 (1) SOGSSA defines a contract for the supply of services as a contract where a person agrees to carry out a service whether; goods are transferred or are to be transferred, bailed or are to be bailed by way of hire, under the contract, regardless of the nature of the consideration for which the service is to be carried out.

Contracts for supply of services involve use of skill and labour to do/deliver something. The major distinction between the two lies in their legal effects; if the contract is a sale of goods, the implied duties under the SOGA are incorporated in the contract and these are duties of strict liability whereby the seller is made responsible for defects in the goods, even in the absence of negligence. On the other hand, if the contract is for the supply of services, then in so far as the services supplied are concerned, the supplier's duties are generally those of due care only i.e. services must be carried out with reasonable care and skill.

In **Lee vs. Griffin [1861] 1 B&S 272,** Court held that a contract for the supply of the services of a solicitor was a contract for supply of services even though the solicitor must be expected to draft some documents and deliver them to the client, thereby becoming the client's property.

Where a person goes to a hospital and requests for a blood transfusion and the blood is sold to him/her at a specific price, if that blood turns out to be defective and the person suffers as a result, can she argue that there was a contract of sale of the blood so as to sue the hospital or company that supplies?

In **Perlmutter vs. Beth David Hospital 308 N.Y. 100, 123 N.E.2d 792 (1954),**

The plaintiff obtained a blood transfusion from the defendant hospital. Unfortunately, the blood was contaminated with a jaundice virus which defect according to expert evidence was not detectable by any scientific test at the time. The plaintiff suffered injury and he was a private paying patient who was charged a separate amount for the blood supplied. The plaintiff claimed that the blood had therefore been sold to him and that the defendant was liable for the defects in the blood which now constituted goods. It was held that the transaction was one of services only and that the supply of the blood was merely incidental to the said supply of services.

However, It must be noted that the Sale of Goods and Supply of Service does not apply to contracts of service (employment) – **Section 3 (2) SOGSSA**

In **Dodd V Wilson (1946) 2 ALLER 691**

The plaintiff contracted a surgeon to inoculate his cattle using a serum. The vet had bought the vaccine from a supplier and he used the serum in inoculating the plaintiff's cattle. An issue arose whether there was a contract of sale or simply of supply of services and it was held that although this was not a contract of sale, the surgeon impliedly warranted that the vaccine was fit for the purpose for which it was supplied to the plaintiff. Hence, he was liable despite the fact that he was not himself guilty of any negligence

(b) Contract of Bailment:

This is a transaction whereby goods are delivered by one party, known as the bailor to another, known as the bailee for some purpose on terms that require the bailee to hold the goods and ultimately redeliver them to the bailor in accordance with the given instructions. In a bailment, as distinguished from a sale, the property in the goods is not intended to pass upon delivery of the goods. Accordingly, the bailee has no right whatsoever to deal with the goods as though he were the owner thereof.

(c) **Distinction with a Hire-Purchase Contract;**

Although a contract of hire purchase is similar to a contract of sale, and indeed the objective of a hire purchase contract is to sell goods, the two are capable of being distinguished. Under a hire purchase agreement, the goods are delivered to the hire purchaser for his use at the time of the agreement but the owner of the goods agrees to transfer the property in the goods to the hire purchaser only when a certain fixed number of instalments of the price are paid by the hirer. Thus, in a hire purchase agreement, there is no agreement to buy but there is a bailment of the goods coupled with an option to purchase them which option may or may not be exercised. The following are the main points of distinction between a sale and a hire purchase;

Whereas in a sale property in the goods are transferred to the buyer at the time of the contract, under a hire purchase transaction the property in the goods only passes to the hire purchaser upon payment of the last instalment.

In a sale, the position of a buyer is that of owner of the goods while under hire purchase the position of the hire purchaser is that of a bailee until payment of the last instalments. The buyer under a sale cannot terminate the contract and he/she is bound to pay the price of the goods whereas the hire purchaser under hire purchase may, if he/she so wishes, terminate the contract by returning the goods to the owner without any liability to pay the remaining instalments.

Note:

A Hire purchaser who terminates a hire-purchase contract would forfeit the payments made until the date of termination.

The seller, under a sale, takes the risk of any loss resulting from insolvency of the buyer. In the case of hire purchase however, the owner takes no such risk because if the hirer fails to pay an instalment, the owner has the right to take back the goods.

In the case of a sale, the buyer can pass a good title where he sells to a bonafide purchaser but in a hire-purchase, the hire purchaser cannot sell and where he sells, he cannot pass any title even to a bonafide purchaser.

(a) Contract of Sale and Barter:

Whereas under a sale contract the consideration must be money, barter involves consensual exchange of goods for goods between two parties. Barter does not involve any money.

In **Aldridge v Johnstone (1957) 7 E & B 855**; there was a contract which involved exchange of 52 bullocks with 100 quarters of barley and the difference in value was to be paid out in money. This transaction was held to be a contract of sale.

In determining whether the transaction is a barter exchange or a sale, courts will normally consider the intention of the parties and whether the money constitutes the substantial part of the consideration. In some instances partial exchange of goods might be a convenient way to conclude a transaction for sale of goods. For instance; people who exchange their old motor vehicles for new ones, upon valuation of the old one & payment of the difference in cash.

TERMS OF A CONTRACT OF SALE OF GOODS

Terms of a contract are representations; they are rules which govern the contract. The terms vary in terms of importance; and as to whether they have been agreed upon by the parties (express) or simply incorporated by operation of law; custom, or court (implied).

Conditions and warranties:

A sale of goods contract contains several terms regarding the description and quality of goods, the price and mode of payment, the time and place of delivery etc. However, these terms differ in terms of importance. Accordingly, terms are divided into conditions and warranties.

A condition is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such a contract, the breach of which gives rise to a right to reject the goods and treat the contract as repudiated **(Section 1 of SOGSSA).** In addition, the aggrieved party may maintain an action for damages for loss suffered due to non-performance of the other party's obligations.

A warranty on the other hand means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of that contract, the

breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated **(Section 1 of SOGSSA).**

Note:

There are no hard and fast rules in determining whether a stipulation is a condition or a warranty. In fact **Section 12 (2) of SOGSSA** provides that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract.

A buyer has a right to waive a condition or to treat a breach of condition as breach of warranty under **Section 12 (1) of SOGSSA** as a result of which the buyer loses his right to rescind the contract. Also note that a stipulation may be a condition, whether or not it is called a warranty in the contract **(Section 12 (3) of SOGSSA)**

EXPRESS AND IMPLIED TERMS

Terms of a contract may either be express or implied; Express terms are those which are inserted in the contract at the will of the parties, while implied terms are those presumed to exist in a contract by operation of law, custom, or court even though they have not been provided for/stipulated by the parties in the contract.

It is important to note that terms which are implied by law in a contract of sale cannot be negative or varied. **Section 67 of SOGSSA** provides that where any right, duty or liability would arise under a contract of sale or supply of services by implication of law, it **shall not** be negative or varied by express agreement or by the course of dealing between the parties, or by usage.

IMPLIED CONDITIONS

Implied terms are generally duties imposed upon the seller by law the **Sale of Goods and Supply of Services Act** the law which incorporates/implies the following conditions into every contract of sale of goods:

1. Condition as to Title

In every contract of sale of goods, the seller implies that in case of a sale, the seller has the right to sell the goods, and that in the case of an agreement to sell, the seller will have a right to sell the goods at the time when the property is to pass. **Section 13 (1) of SOGSSA** provides that in a contract of sale there is an implied term on the part of the seller that in the case of a sale, he or she has a right to sell the goods, and in the case of an agreement to sell he or she will have such a right at the time when the property is to pass.

Rowland v Divall [1923] 2 KB 500

In this case the claimant, a car dealer, bought a car from the defendant for £334. He painted the car and put it in his showroom and sold it to a customer for £400. Two months later the car was impounded by the police as it had been stolen. It was then returned to the original owner. Both the claimant and defendant were unaware that

the car had been stolen. The claimant returned the £400 to the customer and brought a claim against the defendant under the Sale of Goods Act.

Held:

The defendant did not have the right to sell the goods as he did not obtain good title from the thief. Ownership remained with the original owner. The defendant had 2 months use of the car which he did not have to pay for and the claimant was not entitled to any compensation for the work carried out on the car.

Note

Under the implied condition as to title it is not enough for the seller to prove that he/she was the owner of the goods and he/she had power to transfer; the seller must be able to uphold the validity of the contract. **Section 13 (2) (a) of SOGSSA** provides that in a contract of sale, there is also an implied term that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made.

Accordingly, if the goods sold bear labels which infringe upon the trademark of another, the seller is guilty of breach of the implied condition as to title although he had full ownership of the goods. This was the case in **Niblett v Confectioner's Material Co. (1921) 3 K.B 387** where the defendant, an American Company sold 3,000 tins of preserved milk to the plaintiff from New York, to be transported to London. On arrival of the goods in England, they were retained by the customs authorities on the ground that 1,000 of the tins contained labels which infringed the trademarks of a well-known English company. The plaintiff was compelled to remove the labels and the tins were consequently sold at a loss. The plaintiff sued the defendant for breach of condition as to title and claimed compensation for the loss suffered.

Court Held: that there being an infringement of another company's trademark, an injunction could have been obtained to restrain sale of the goods and therefore the defendant had no right to sell. The defendant was accordingly liable to pay damages for the loss suffered by the plaintiff.

However, **Section 13 (3) of SOGSSA** provides that condition as to title shall not apply to a contract of sale in the case of which there appears from the contract or there is to be inferred from its circumstances an intention that the seller should transfer only such title as he or she or a third party may have. In such a case, there is an implied term that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made (**Section 13 (4) of SOGSSA).**

It is also important to note in a contract to which the condition as to title does not apply there is an implied term that none of the following will disturb the buyer's quiet possession of the goods, the seller or in a case where the parties to the contract intend that the seller should transfer only such title as a third party may have, that third

person; or any one claiming through or under the seller or a third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made. (**Section 13 (5) of SOGSSA)**

2. Condition in a Sale by Description

Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description (**Section 14 (1) of SOGSSA)**. The description may be in terms of the quality, quantity, packaging, model, manufacturer, etc. **Lord Blackburn in Bowes v Shand (1877)2 A.C 455** had this to say;

"If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for and the other party is not bound to take it."

In **Livi Carli & Ors V Salem Mohamed (1959) E.A 701**, the plaintiffs contracted to sell to the defendants 200 tons of cement, described as "2lions brand". The cement delivered by the plaintiff was instead "Salona towers brand". The defendants rejected the cement on grounds that it was not in accordance with the contract description. The major issue was whether the buyers were entitled to reject the goods for failure to correspond with their description.

Campbell C.J. stated that there was a failure by the plaintiffs to tender to the defendants cement according to the agreed description and since there was a sale by description the defendants were entitled to reject the goods.

It should be noted that the fact that the buyer has examined the goods will not affect his right to reject them, if the deviation of the goods from the description is such as which could not have been discovered by casual examination. In **Beale V Tailor (1967)1 W.L.R 1193**, the defendant advertised his car for sale as a "Herald, convertible, 1961" and the plaintiff bought the car after examination. He later discovered that the car was in fact made of two parts which had been welded together, only one of which was from a 1961 model. The issue was whether the buyer who had fully examined the car had bought by description or whether he had bought a specific thing.

Court Held that the sale was by description and the words "1961 Herald" formed part of the contractual description. The seller was accordingly bound to sell goods fitting the description.

Note further that if goods have acquired a trade name, the trade name may correspond with their description even if the goods are not what a literal reading of the trade name suggests they are. In **Lemy V Watson (1915)3 R.B 731 at 752**, Justice Darling had this to say;

"If anybody ordered for Bombay ducks and somebody supplied him with ducks from Bombay, the contract to supply Bombay ducks will not have been complied with."

As to whether goods correspond with their description will normally be a question of fact, but the duty of the seller in this regard is very strict. This position is not affected even the buyer selected the good. **Section 14 (3) SOGSSA** provides that a sale of goods is not prevented from being a sale by description by reason only that, the goods being exposed for sale are selected by the buyer. The rationale for the seller's duty being strict is because the buyer relies on the seller's skill and knowledge of his goods/stock.

In **Arcos Ltd v Arrenson (1933) A.C. 470**the seller was required to supply a quantity of staves. The seller delivered staves which were slightly out of conformity with the description in terms of size and the issue was whether the buyer had relied on the description given by the seller and therefore she could reject the goods. The judge noted that the seller must deliver goods that correspond with the description and that ½ an inch does not mean 'about ½ an inch'; neither does ½ a tone mean about ½ a tone.

It should be noted that according to **Section 13 (4) of the Sale of Goods and Supply of Services Act, Cap 293** the condition in a sale by description applies in sales to consumers as well as in sales to persons who are not consumers.

However, despite the strict requirement for goods to correspond with the contract description, precisely, courts have also followed the principle of "Deminimis non curatlex", which is literally translated as "the law pays no attention to trifles". By virtue of this rule, the court might hold that the damage is so insignificant and the difference above or below the described amount or quality is so small that there is only a breach in a very technical sense and because the law does not pay regard to trivialities, only nominal damages may be awarded or none at all.

3. Condition in a sale by sample

A contract of sale is said to be a sale by sample where there is a term in the contract, express or implied to that effect. **(Section 17 (1) SOGSSA)**. In the case of contract of sale by sample, that is; where goods are to be supplied according to a sample agreed upon. **Section 17 (2) of SOGSSA** provides that the following conditions are implied;

(a) The quality of the bulk shall correspond with the quality of the sample.
(b) The buyer shall have a reasonable opportunity of comparing the bulk with the sample.
(c) The goods shall be free from any defect, rendering their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

In **Drummond & Sons V Van Ingen (1822)1 B&C, 1** Lord MacNaughtern had this to say;

"The function of the sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfections of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a

sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at that time."

In **Jafferali Abdul v Jan Mohammed 18 ACA 21**; there was sale by auction of 264 dozens of plates, packed in 22 cases of plates. The auctioneer raised up a plate and said "this is a sample" and that the intending purchasers could inspect the goods in the auction room. It was later discovered that many of the plates were broken and this fact was known to the seller. The issue was whether this was a sale by sample.

Court Held: that this was a sale by sample and that in the circumstances; the seller did not accord the buyer a reasonable opportunity to examine the goods, neither did the bulk correspond with the sample in quality which amounted to a violation of the provisions of the Act. The respondent/seller was liable to make good the loss suffered by the appellant/buyer.

In **Drummond and Sons vs. Van Ingen (1887) 12 AC 284**, some mixed worsted coatings were sold by sample. The goods when supplied corresponded to the sample but it was found that owing to a latent defect in the cloth, coats made out of it would not stand ordinary wear and were therefore unsellable. The same defect existed in the sample also but could not be defected on reasonable examination. It was held that the buyer was entitled to reject the cloth.

4. Condition where a sale is by both Sample and Description

Section 14 (2) of SOGSSA provides that where the sale is by sample, as well as by description, there is an implied condition that the bulk of the goods shall correspond with both the sample and the description.

In **Nichol V Godts (1854) 10 EX 191**, the plaintiff agreed to sell some oil described as "foreign refined rape oil, warranted only equal to sample". The oil supplied, though corresponded with the sample, was adulterated with hemp oil. It was held that since the oil supplied was not in accordance with the description, the buyer was entitled to reject the same.

5. Condition as to Quality and Fitness for Purpose

The implied conditions as to fitness for the purpose and merchantable quality are generally governed by the doctrine of "caveat emptor"; this doctrine, expressed in Latin, is literally translated as **"let the buyer be aware**", that is, purchasers buy at their own risk. It calls for extra vigilance on the part of the buyer while purchasing goods and in the absence of inquiry, the seller is not bound to disclose every defect in goods. **Section 15 (1) of SOGSSA** provides that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale

Originally, caveat emptor was the general rule that governed contracts for sale of goods. However, the SOGA provisions on implied terms were initiated to mitigate the harsh effects of strict application of this doctrine or to act as exceptions to it. As such, **Section 15 (2) of SOGSSA** sets out exceptions to the doctrine of caveat emptor. That is, there is an implied condition that the goods supplied shall be reasonably fit for the purpose for which the buyer wants them, if the goods are supplied under the following circumstances:

(a) The seller sells goods of a description which it is in the course of the seller's business to supply

(b) The buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the skill or judgement of the seller, whether the seller is the manufacturer or not.

In **Baldry v Marshall [1925] 1 KB 260**, the plaintiff who wished to buy a motorcar explained to the defendants that he wanted a comfortable car which was suitable for touring purposes. The defendants recommended a type of car in which they specialised, called "bugatti car", explained that the car would meet the plaintiff's specifications and showed him a specimen. The plaintiff then placed his order for "an eighty-cylinder bugatti car". The car proved to be uncomfortable and unsuitable for touring purposes. The plaintiff sought to reject the car and recover its purchase price.

Court Held: that the requirement that the car should be suitable for touring purposes was a condition and not a warranty and the defendants were liable for default.

Multipurpose Goods:

If the goods to be supplied can be used for several purposes, the buyer must expressly make known to the seller the specific purpose for which he needs the goods. In **Re Andrew Yule & Co. (1932) A.I.R. 879**, a buyer ordered for Hessian cloth which is generally used for packing purposes, without specifying the purpose for which he wanted it. The cloth was supplied but the buyer found it unsuitable for packing food products because it had an unusual smell.

Court Held: that the buyer had no right to reject the cloth since it was generally suitable for packing purposes. The buyer ought to have disclosed his particular purpose to the seller in order to make him liable for the breach of implied condition as to fitness.

Single-Purpose Goods

However, where goods are fit for one particular purpose, only or if the purpose of the goods is by implication, ascertainable from the nature of the goods, then the purpose need not be expressly told to the seller who is deemed to know the purpose by implication.

In **Priest v Last (1838)4 M&W.399**, a draper who had no special knowledge of hot water bottles went to a shop of a chemist and asked for a hot water bottle. He was shown an American rubber bottle which he bought. The bottle, though meant for hot water could not stand boiling water. Accordingly, the bottle burst after a few days while it was being used by the buyer's wife and she got injured. It was found that the bottle was not fit for use as a hot water bottle.

Court Held: that since the bottle could be used only for one particular purpose, there was a breach of implied condition as to fitness and the seller was liable to pay damages.

Implied term as to fitness applies to normal users/buyers; abnormal users must disclose special circumstances:

It should further be noted that the implied condition as to fitness applies only in case of sale of goods to a normal buyer. If the buyer is suffering from an abnormality such as an allergy, he must make such abnormality known to the seller, otherwise the seller will be discharged. He won't be liable for any injury suffered.

In **Griffiths v Peter Conway Ltd [1939] 1 All ER 685**, the plaintiff contracted dermatitis from wearing a tweed coat which she had bought from the defendant. The issue was whether the plaintiff had made her purpose clear to the seller so as to be able to sue or reject the goods for not conforming to the purpose.

Court Held: that since she had sensitive skin and the coat was not known to cause that disease among the normal skin users, she had failed to make known to the seller the purpose for which the coat was required in the relevant sense.

According to **Section 15 (5) of SOGSSA** goods are of satisfactory quality if they meet the standards that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price and all the other relevant circumstances. Under **Section 15 (3) of SOGSSA** where the seller sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of satisfactory quality. The condition as to quality does not apply to any matter which makes the quality of the goods unsatisfactory;

(a) which is specifically brought to the attention of the buyer before the contract is made
(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal; or
(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

The quality of goods includes; their state, condition, appearance and finish, their fitness for all the purposes for which goods of the kind in question are commonly supplied, safety; and durability. (**Section 15 (6) of SOGSSA)**

A term as to quality or fitness for a particular purpose may be implied in a contract by the usage of trade or custom. (**Section 15 (7) of SOGSSA)**

IMPLIED WARRANTIES:

i) Warranty of quiet possession

Section 13 (2) (b) of SOGGA provides the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known to the buyer. Where such quiet possession is disturbed in any way by a person having a superior right than that of the seller, the buyer would be entitled to claim damages from the seller. However, note that this warrant may be regarded as an extension of the implied condition to title, since disturbance of quiet possession is likely to arise only where the seller's title to goods is defective.

ii) Warranty of freedom from encumbrances;

Section 13 (2) (a) of SOGGA provides that in a contract of sale there is an implied term that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made. If the buyer discovers afterwards that the goods are subject to a charge which he/she has to discharge, there would be breach of an implied warranty and the buyer would be entitled to damages. For instance, where goods sold had been previously pledged and then sold off before satisfaction of the pledge amount or where the goods are sold subject to a lien which was not known to the buyer. For example, a car from a garage whose repair expenses are not yet paid.

Note:

All the above implied terms are duties imposed by law upon the seller but the buyer also has implied duties which are discussed below. However, before discussion of the implied duties of the buyer, it is important to assess the extent to which implied terms have achieved the objective of protecting the buyer. There are numerous factors that inhibit a buyer from enjoying the protection of implied terms, some of which are in the **Sale of Goods and Supply of Services Act, 2017** itself, while others are practical factors. They include the following:

Factors that inhibit a buyer from enjoying legal protection under implied terms:

i) The doctrine of "caveat emptor" – let the buyer beware;

This doctrine, as discussed above calls for extra vigilance on the part of the buyer while purchasing goods and in the absence of inquiry, the seller is not bound to disclose every defect in goods. Goods are bought 'as is' or 'subject to all defects'. The SOGSSA retains some aspects of the doctrine. See opening remarks of **Section 15 (1) of SOGSSA.**

The opening remarks of **Section 15 (1) of SOGSSA** leave one in doubt as to whether the law intends to offer protection to the buyers or to do away with it altogether.

ii) Inexperienced Sellers

Many sellers are inexperienced and as such they are not in a position to tell whether or not the goods, which they sell, are fit for the required purpose. As such the buyers can hardly depend on the sellers' skill and judgment to get goods which suit the required use.

iii) Limitations concerning examination

Where goods are bought in bulk or where they are pre-packed, examination is not practical. Expiry dates are also tampered with while examination of certain goods requires high technology and/or expertise.

iv) The Doctrine of Privity of Contract;

This limits enforcement of a contract to parties to the contract with result that a buyer cannot sue a manufacturer who would be in a better position to pay off damages awarded by Court. Similarly, where a buyer purchases goods for the benefit of others, such as members of his/her household, the beneficiaries of the goods bought cannot sue because they are not privy to the contract. However, this is no bar against bringing suits based on negligence. **(See Donogue v Stevenson).**

Other factors that limit enforceability of terms implied in favour of the buyer. They include the following;

i) Majority of buyers are ignorant of the implied terms;
ii) At times the value of goods is so small that court would not be a viable option of enforcing the terms;
iii) Court process is costly and time consuming;
iv) Many sellers, such as hawkers have no fixed places of business.

In light of the above factors and more, the protection by law under implied terms is very limited and so inadequate to be relied upon by an ignorant/innocent buyer.

Implied Duties

1. Duty to Deliver the Goods

Delivery of goods means voluntary transfer of possession from one person to another and includes an appropriation of goods to the contract that results in property in the goods being transferred to the buyer **(Section 1 of SOGSSA)**

According to **Section 34 (1) of SOGSSA** the buyer has a duty to accept delivery of the goods. Delivery may take any of the following forms;

a) Physical transfer of the actual goods;

b) Handing over to the buyer the means of control over the goods, e.g. where car keys or keys to a warehouse where the goods are kept are handed over to the buyer.

c) Delivery by atonement e.g. where the seller gives the buyer a delivery order or warrant for goods stored in a warehouse. Note that the person in charge of the warehouse must accept the order or warrant.

d) Delivery of documents of title to buyer e.g. the Bill of Lading, or warehouse certificate. In **Biddle Bros Ltd V E. Clemens (1911) 1 K.B 934**, the House of Lords stated that delivery of a bill of lading operates as a symbolic delivery of goods.

e) Where the goods at the time of sale are in possession of a third party and such third party acknowledges to the buyer that he holds the goods on his behalf.**(Section 36 (5) SOGSSA)**

f) Delivery to the buyer's agent or to the carrier. **(Section 40 (1) SOGSSA)** provides that where, under a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie taken to be a delivery of the goods to the buyer. The seller is required, under **(Section 40 (1) SOGSSA)** to make a contract with the carrier on behalf of the buyer that is reasonable, having regard to the nature of the goods and the other circumstances of the case.

In **Galbraith & Grant Ltd v Block (1922) 2 K.B. 255**; there was delivery of wine to the defendant's premises as requested. The wine was signed for by a person at the premises and it was held that if the goods were received by a respectable person who had access to the premises then there was effective delivery and therefore the loss fell on the buyer.

In **Badische V Basle Chemicals Works (1893) AC 2004**; the buyer requested that the goods be sent through the post office and it was held that the contract of sale was completed by delivery to the post office.

Note:

(Section 36 (1) SOGSSA) provides that whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Under **(Section 36 (2) SOGSSA)** where there is no contract, express or implied, as to place of delivery, the place of delivery is the seller's place of business, if the seller has one, and if not, the seller's residence.

However, where the contract is for sale of specific goods [i.e. goods which are identified and agreed upon at the time the contract is made], which to the knowledge of the

parties, when the contract is made, are in some other place, then that place is the place of delivery.**(Section 36 (3) SOGSSA)**

The relevance of delivery is provided for under **(Section 35 (1) SOGSSA)** which provides that delivery of goods and payment of the price are concurrent conditions, namely that, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Time of delivery

Section 11 (1) SOGSSA provides that stipulations as to time of payment are not taken to be of the essence of a contract of sale unless a contrary intention appears from the terms of the contract.

In **Hartley V Hyman (1920) 3 K.B 475**Lord Maccardic stated that in ordinary commercial contracts of sale of goods, the rule clearly is that time is prima facie of the essence with respect to delivery and therefore if time for delivery is fixed by the contract, failure to deliver at that time will amount to a breach of condition, entitling the buyer to exercise his right to reject the goods.

Section 36 (4) of SOGSSA provides that where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

It should be noted that demand or tender of delivery is ineffectual unless made at a reasonable hour. What is a reasonable hour depends on the circumstances of the case. (**Section 36 (6) of SOGSSA)**

2. Duty to Deliver the Right Quantity

The seller has a duty to deliver goods of the right quantity. **Section 37 (1) of SOGSSA** provides that where the seller delivers to the buyer a quantity of goods less than the seller contracted to sell, the buyer may reject them, but where the buyer accepts the goods so delivered, the buyer shall pay for the goods at the contract rate

In the event the seller delivers to the buyer a quantity of goods larger than the seller contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or the buyer may reject the whole and where the buyer accepts the whole of the goods delivered the buyer must pay for them at the contract rate. **Section 37 (2) of SOGSSA**

It should also be noted that if the seller delivers to the buyer the goods the seller contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods, which are in accordance with the contract and reject the rest, or the buyer may reject the whole. **Section 37 (3) of SOGSSA**

However, **Section 37 (3) of SOGSSA** prohibits a buyer who is not a consumer from; rejecting the goods, where the seller delivers a quantity of goods less than the seller contracted to sell; or rejecting all the goods where the seller delivers a quantity of goods larger than the seller contracted to sell, if the shortfall or, as the case may be, the excess, is so minor that it would be unreasonable for the buyer to do so.

The duty to show that a shortfall or excess is so minor where a wrong is delivered lies on the seller **(Section 37 (5) of SOGSSA).**

DUTIES OF THE BUYER

The primary duties of the buyer are to take delivery of the goods when tendered and to pay the price in accordance with the terms of the contract.**(Section 34 (1) of SOGSSA)**

According to **Section 45 (1) of SOGSSA** where the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not take deliver within a reasonable time after the request to take delivery of the goods, the buyer is liable to the seller for any loss occasioned by his or her neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods

In **Demby Hamilton & Co. Ltd v Barden (1949) 1 ALLER 435**the sellers agreed to supply 30 tons of apple juice by samples. The seller crushed 30 tons of apples at once to ensure that they are according to the samples and filled them in the casks. After some instalments had been delivered, the buyer refused to take further deliveries. The apple juice became putrid. It was held that the property in the goods was still with the sellers, but the loss had to be borne by the buyer.

PASSING OF PROPERTY

As already discussed, sale basically means transfer of property in goods, from the seller to the buyer and transfer of property means transfer of ownership. Property in goods differs from possession of goods, which only refers to custody over goods. Thus a seller may retain possession of goods when property has joined to the buyer and vice versa.

Passing of property is relevant because of the following;

Section 27 (1) SOGSSA provides that the goods remain at the seller's risk until the property in the goods is transferred to the buyer unless the parties agree otherwise. The implication of the words "unless otherwise agreed" is that the parties may, at their option, contract that risk passes at such a time as they wish e.g. before property passes or after.

In the event the property in the goods is transferred to the buyer under subsection (1), the goods are at the buyer's risk whether delivery has been made or not. (**Section 27 (2) SOGSSA**). It should be noted that the risk of loss shall not pass from the seller to

the buyer unless the actions of the seller are in line with all the conditions imposed upon the seller under the contract. . (**Section 27 (3) SOGSSA**)

However, where a delivery has been delayed through the fault of the buyer or the seller, the goods are at the risk of the party at fault as regards any loss, which might not have occurred, but for that fault. (**Section 27 (4) SOGSSA**) **---Demby Hamilton & Co. Ltd v Barden (1949) 1 ALLER 435**

In a contract of sale, either a party, whether seller or buyer, retains their duties and liabilities as bailee of the goods for the other party, where they retain possession of goods, as such, either of the party would be under duty to take good care of goods and deliver them to the owner as and when required. (**Section 27 (5) SOGSSA**)

It is also very important to note that where an aggrieved party in case of breach of contract, is in control of goods and those goods are not covered by his or her insurance, the party in breach is liable for any loss or damage as a result of the breach caused to the aggrieved party.(**Section 27 (6) SOGSSA**)

RIGHT TO TAKE ACTION AGAINST THIRD PARTIES;

The passing of property determines who has a right to sue a third party if such third party has damaged or destroyed the goods. Only the person in whom property in goods rests has the right to sue or take action against a third party.

Right to sue for the price

The seller's right to sue for the price generally arises after property in the goods has passed to the buyer. However, **Section 60 (2) of SOGSSA** provides that where under a contract of sale, the price is payable on an agreed date irrespective of delivery, and the buyer wrongfully neglects or refuses to pay that price, the seller may bring an action against the buyer for the price, together with any incidental damages, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

Effect of insolvency of either the seller or the buyer;

In the event of insolvency, of either the seller or the buyer, the answer to the question whether the official Receiver or Assignee can take over the goods or not depends upon whether the property in the goods was with the party who has become insolvent. If the seller becomes insolvent before giving delivery of the goods but after the property in the goods has passed to the buyer, the official Receiver would have no claim against the goods.

However, if the buyer becomes insolvent before paying the price of the goods, and after property in the goods has passed from the seller to the buyer, then the Official

Receiver would have a claim against the goods. However under (**Section 50 (1) (a) of SOGSSA** the seller has a right of a lien on the goods or right to retain them for the price while he or she is in possession of the goods.

RULES GOVERNING TRANSFER OF PROPERTY

According to **Section 1 of SOGSSA** property means the general property in goods, and not merely a special property. Simply put, property means ownership of the goods. The passing of property depends on the nature of goods, that is, it depends on whether the goods are specific / ascertained, unascertained or future goods.

1. Transfer of Property in Specific or Ascertained Goods

Specific goods are defined under **Section 1 of SOGSSA** to mean goods and percentages of goods identified and agreed upon by the parties at the time a contract of sale is made and includes undivided shares in specific goods held in common.

Section 25 (1) of SOGSSA provides that where there is a contract for the sale of specific or ascertained goods, the property in the goods passes to the buyer at such time as the parties to the contract intend it to pass. For purposes of ascertaining the intention of the parties, guidance is derived from the terms of the contract, the conduct of the parties and the circumstances of the case (**Section 25 (2) of SOGSSA).**

Accordingly, property in specific/ascertained goods is transferred at such a time as the parties intend; it could be at the time of making the contract, or at the time of delivery of goods or at the time of payment of the price.

Unless a different intention appears, **Section 26 of SOGSSA** lays down rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. The rules are as follows;

a) When Goods are in a Deliverable State-

According to **Section 1 (4) SOGSSA** Goods are in a "deliverable state" within the meaning of the Act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. Therefore, if the seller still has to do something to the goods, e.g. pack them, polish, etc. they are not yet in a deliverable state.

Under **Section 26 (a) of SOGSSA** where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both are postponed.

Illustration

- If B buys a coffee set for 1 million on credit, to be paid for after 2 weeks and asks S, the shop keeper to transport the coffee set to B`s house, if S agrees to do so, the coffee set becomes B`s property.

- If B buys a suit on credit and arranges to take delivery of the suit the following day if fire broke out in the shop and destroyed all the goods including the suit bought by B , property in the suit would have passed to B and B is bound to pay the price

In **Kursell v Timber Operations (1927) 1 K.B 298 C.A** the Plaintiff sold to the defendant all the trees in a forest, which conformed to certain measurements on a particular date. The buyers were given 10 years within which to cut and remove the timber. Almost immediately afterwards, the Latvian Parliament passed a law confiscating /gazetting the forest .The issue was whether these goods had been ascertained and identified to the contract.

Court Held: that the property in the trees had not passed to the defendants as the goods were not sufficiently identified since not all the trees were to pass but only those conforming to the stipulated measurements and that further the timber was not in a deliverable state until the purchasers had severed it. Therefore the property in the timber had not passed and was not at the risk of the purchasers.

b) When Goods Have to be put into a Deliverable State

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property shall not pass until that thing is done, and the buyer has notice of it.**(Section 26 (b) of SOGSSA)**.

In **Underwood Ltd v Burgh Castle Brick & Cement Syndicate (1922) 1.K.B 343 C.A**, the plaintiff sold a condensing engine to the defendants. The engine weighed over 30 tons and was cemented to the floor. It had to be dismantled after being detached from the floor, a task that was expected to take about 2 weeks at a cost of £100. While loading it on the truck, the sellers accidentally damaged it and the buyers refused to accept it. One of the issues was whether this engine was in a deliverable state at the time of buying.

Court Held: that the engine was not in a deliverable state and that the property had not passed when the contract was made. The plaintiff had to do something, which they had not done for purposes of putting the engine into a deliverable state.

Similarly in **Rugg v Minett (1809) 11 East 210**, an owner of turpentine oil, which was lying in a cistern agreed to sell the whole of it to a buyer .The parties agreed that the oil was to be put into casks by the owner and then the buyer was to take them away. Some of the casks were filled in the presence of the buyer, but before any were removed, or the remainder filled, the whole lot was accidentally destroyed by fire.

Court Held: that the buyer had to bear the loss of oil, which had been put into the casks because for all these casks, the property had passed to him as nothing remained to

be done to them by the seller. But the property in the oil not filled in casks remained in the seller, at whose risk they remained.

c) Where something has to be done to the Goods to Ascertain the Price

Section 26 (c) of SOGSSA provides that where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing is done, and the buyer has notice of it.

In **Zagury v Furnell (1809) 240**, a seller sold bales of goatskin and the price to be paid was to be ascertained from the number of dozens in the bales sold. It was the duty of the seller to count the number of dozens of goatskins in each bale and before he could do so, the bales were destroyed by fire.

Court Held: that the property in the goods had not passed to the buyer as something still remained to be done by the seller for ascertaining the price and so the loss caused due to fire had to be borne by the seller.

d) When goods are delivered to the buyer on approval or "on sale or return" or other similar terms.

Sale or return ordinarily means that if the buyer wants the goods, then he pays the price and if not then he returns the goods.

The property in the goods shall pass where goods are delivered to the buyer on approval or "on sale or return" to the buyer when he or she signifies his or her approval or acceptance to the seller or does any other act adopting the transaction. **(Section 26 (d) (i) of SOGSSA)**

If he or she does not signify his or her approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and if no time has been fixed, on the expiration of a reasonable time. **(Section 26 (d) (ii) of SOGSSA)**

In **Elphick v Barnes (1880) 5 C.P D. 321**, the seller of a horse delivered it to a buyer on terms of "sale or return, within 8 days". The horse died on the 3rd day without any fault on the part of the buyer.

Court Held: that the seller was to bear the loss as the horse was still his property when it perished.

2. Transfer of Property in Unascertained and Future Goods.

"Unascertained goods" are goods not identified and agreed upon at the time the contract is made **(Section 1 of SOGSSA).** They are only defined and understood by the parties by description. Unascertained goods include goods to be manufactured or grown by the seller and any unidentified portion of the whole.

For example, if a seller agreed to sell 2 sacks of maize flour out of a store full of sacks of maize flour, such is a sale of unascertained goods because the parties would not have agreed on the particular bags to be delivered. The goods will only become ascertained if separated from the rest for delivery to the buyer.

"Future goods" are defined under **Section 1 of SOGSSA** to mean goods to be manufactured or acquired by the seller after the making of the contract of sale. They may be goods that are not yet in existence or not yet acquired by the seller.

Note:

There can only be an agreement to sell where the subject matter of the contract is "future goods"; there can be no present sale of future goods because property cannot pass in what is not owned by the seller at the time of the contract.

Where there is a contract for the sale of unascertained goods, property in the goods shall not pass to the buyer until the goods are ascertained (**Section 22 of SOGSSA).**

Section 26 (e) of SOGSSA also provides that where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods passes to the buyer and any such assent may be express or implied and may be given before or after the appropriation is made.

Therefore, until goods are ascertained or appropriated to the contract there is merely an agreement to sell.

The process of ascertainment or appropriation consists in earmarking or setting apart goods as subject matter of the contract .It involves separating, weighing, measuring, counting or similar acts done in relation to goods with an intention to identify and determine the specific goods to be delivered under the contract.

Where, under the contract, the seller delivers the goods to the buyer or to a carrier or other bailee whether named by the buyer or not, for the purpose of transmission to the buyer, and does not reserve the right of disposal, he or she is taken to have unconditionally appropriated the goods to the contract–(**Section 26 (f) of SOGSSA)**

RISK AND FRUSTRATION

Like all other contracts, a contract relating to sale of goods may be frustrated. When an executory contract is frustrated, neither party is under any liability to the other. Ordinarily, if the goods are at the seller's risk and they perish or deteriorate, the seller is liable to the buyer for non- delivery. Similarly, if the goods are at the buyer's risk, he is liable to pay the price even though the goods have perished or deteriorated .If the seller is to be exempted from liability; it must be under the doctrine of frustration.

Section 8 of SOGSSA provides where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is void.

The common law rules relating to frustration apply in view of **Section 29 (2) (b) of the Sale of Goods and Supply of Services Act, 2017** which allows for application of common law.

TRANSFER OF TITLE

The general rule relating to transfer of title on sale is that "the seller cannot transfer to the buyer of goods a better title than the seller has." This rule is expressed in the maxim, ***"Nemodat quod non habet";*** which when literally translated means "No one gives who possesses not". If the title of the seller is defective, the buyer's title will also be affected by the same defect –**Section 29 (1) of SOGSSA**.

For example, if the seller had stolen the goods, or if he is a hirer under a hire purchase agreement and sells the goods before he has paid all instalments, the buyer does not acquire property in the goods against the true owner who can recover the goods from the buyer.

The nemodat Rule is aimed at protecting true owners of the goods. However, the rule is subject to exceptions, which are meant to protect commercial transactions.

Lord Denning in **Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd (1949) 1 KB 322**. had this to say;

"In the development of our law, 2 principles have striven for mastery; the first is for the protection of property. The 2nd is for the protection of commercial transactions; that person who takes in good faith and for value without notice should get a better title. The 1st principle has held sway for a long time but has been modified by the common law itself and by statute, so as to meet the needs of our times. Nemodat applies where goods are sold by a person who is not the owner thereof and who does not sell them under authority or consent of the owner. In such cases, the buyer acquires no better title to the goods than the seller had except if the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

Exceptions to the Nemo Dat Rule:

1. Estoppel

This exception is provided for in the last words of Section 29 (1) of SOGSSA i.e. "unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." Estoppel arises when one is precluded from denying the truth of anything, which he/she has represented as a fact, although it is not a fact. Thus, when the true owner of the goods, by his conduct or words or by any act or omission leads the buyer to believe that the seller is the owner of the goods or has authority to sell them, he

cannot afterwards deny the seller's authority to sell. The buyer in such a case gets a better title than that of the seller.

In **Century Newbury Car Auctions v Unity Finance (1957) 1.Q .B 371**, a swindler offered to buy a Morris Car from the plaintiffs on hire- purchase terms, in part exchange for a Hillman car. The swindler signed hire purchase forms whereby the Morris car was to be sold to a finance company and then hired to him. The plaintiffs gave him the registration book and allowed him to drive away the Morris. The finance company refused the hire- purchase arrangement and the Morris car was later found in the defendant's possession, who had bought it in good faith from an unknown person, presumed to be the swindler.

L**ord Denning, dissenting, held** that there was no estoppel and the plaintiffs were entitled to recover the car because the registration book is not a document of title and it contains a warning that the person named therein may or may not be the owner. The majority of judges however held that the plaintiffs could not be said to have in any way, not represented the swindler as the owner. They had armed him with the car and the registration book.

2. Sale by Agent

Section 32 of SOGSSA imports Common Law rules of principal and agent where an agent, with consent of the owner, is in possession of goods or documents of title, any sale, or other disposition made by him, in the ordinary course of business is construed as if he expressly authorized the seller to make the sale. Therefore a person who buys or obtains goods from a mercantile agent acquires good title if he obtains them bonafide, even if the agent had no authority from the principal to dispose of the goods.

A mercantile agent is an agent who has authority, in ordinary course of business as such agent, either to sell goods, pledge them for purposes of sale or to buy goods or raise money on the security of those goods.

In the case of **Folkes v King (1923) 1 K. B. 282**, the plaintiff entrusted his car to a mercantile agent for sale at a stated price and not below that. The agent sold it to a bonafide purchaser, below the reserve price and misappropriated the proceeds. The bonafide purchaser resold the car to the defendant. It was held that the party who bought from the agent obtained a good title to the car from the mercantile agent and he conveyed a good title to the defendant and therefore the plaintiff was not entitled to recover the car from the defendant.

3. Sale under Special Powers of Sale

Special powers are granted by operation of law. **Section 29 (2) (a) of SOGSSA** provides that the Sale of Goods and Supply of Services Act, 2017 shall not affect any enactment

enabling the apparent owner of goods to dispose of them as if he or she were the true owner of the goods.

The above provisions are meant to cover transactions such as those relating to sale of goods by Banks and other financial institutions, auctioneers, and bailiffs acting under court order or in pursuance of clear statutory provisions.

4. Sale under a Voidable Title;

Section 30 of SOGSSA provides that when the seller of goods has a voidable title to the goods, but his or her title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, if he or she buys them in good faith and without notice of the seller's defect in title.

So where goods are acquired fraudulently (e.g. by trick) or other invalidating factor such as duress, and they are disposed of before the owner avoids the contract, the buyer in good faith for value acquires good title and the burden of proof of lack of good faith lies on the original owner. However, according to **Section 31 (1) of SOGSSA** where goods have been stolen and the offender is prosecuted to conviction, the property in the stolen goods reverts to the person who was the owner of the goods, or his personal representative, regardless of any intermediate dealing with them.

It should also be noted that where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in the goods shall not revest in the person who was the owner of the goods, or his or her personal representative, by reason only of the conviction of the offender. (**Section 31 (3) of SOGSSA)**

5. Sale by Seller in Possession

Section 32 (1) of SOGSSA provides that where a person who has sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him or her, of the goods or documents of title under any sale, pledge, or other disposition of the goods, to any person receiving them in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the delivery or transfer.

6. Sale by a Buyer in Possession

Section 32 (2) of SOGSSA provides that where a person who has bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him or her, of the goods or documents of title, under any sale, pledge, or other disposition of them, to any person receiving them in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were an agent in possession of the goods or documents of title with the consent of the owner.

In **Newtons of Wembley v Williams (1964) 3 ALL ER 532 C.A**, the plaintiff sold a car to a buyer, accepted a cheque and allowed him to take possession of the car. The buyer sold the car to another buyer who resold it to the defendant. The defendant bought the car in good faith, for value and without notice of defect. It was held that since the defendant and all buyers before him had bought in good faith, the sale was covered by Section 32 (2).

7. Resale by An Unpaid Seller

Section 51 (1) (c) of SOGSSA gives an unpaid seller a right to resell the goods, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, has by implication of law right of re-sale. Where an unpaid seller exercises this right, the subsequent buyer acquires a good title to the goods; as against the original buyer.

REMEDIES OF THE UNPAID SELLER

The seller becomes unpaid;

i) When the whole of the price is not paid or tendered.
ii) When a conditional payment was made by a cheque/ bill of exchange (or other negotiable instruments) and the instrument has not been honoured. (**Section 50 (1) of SOGSSA**)

In this regard a seller includes any person who is in the position of a seller, such as, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself or herself paid, or is directly responsible for, the price. (**Section 50 (2) of SOGSSA)**

The unpaid seller's right can be categorised into two;

a) Rights against the goods.
b) Rights against the buyer.

a) Rights against the Goods

An unpaid seller of goods even though the property has passed to the buyer has three rights against the goods.

i) Right of lien on the goods in his possession.
ii) Right of stopping the goods in transit i.e. stoppage in transitu.
iii) A limited right of re-sale.

i) Lien

According to **Section 51 (1) (a) of SOGSSA,** regardless of the fact that that the property in the goods may have passed to the buyer, the unpaid seller of goods, has by implication of law a right of lien on the goods or right to retain them for the price while he or she is in possession of the goods. The unpaid seller has a lien on the goods for the price as long as the goods remain in his possession and he can refuse to deliver them to the buyer until the full payment or tender of the price has been made in the following cases;

- Where the goods have been sold without any stipulation as to credit
- Where the goods have been sold on credit but the term of credit has expired
- Where the buyer becomes insolvent.

The seller's lien is a possessory lien i.e. the lien can be exercised only as long as the seller is in possession of the goods. Lien can be exercised for non-payment of the price and not for any other charges.

Termination of Lien

Under **Section 54 of SOGSSA** a lien depends on physical possession of the goods. Therefore the unpaid seller loses his lien or right of retention on the goods in the following circumstances;

- When he delivers the goods to a carrier or other party for the purpose of transmission to the buyer without reserving the right of disposal of the goods.
- When the buyer or his agent lawfully obtains possession of the goods.
- By waiver of his lien i.e. when the buyer waives his right to exercise the right of lien.

ii) Right of stoppage in transit

The unpaid seller who has parted with the possession of the goods has a right where the buyer of the goods becomes insolvent, to stop the goods in transit and resume possession of the goods as long as they are in the course of transit and may retain them until payment or tender of the price. (**Section 55 of SOGSSA)**

The right is known as stopping the goods in transit. The unpaid seller has the right of stopping goods in transit when they have been delivered for transmission to the buyer and while they are in the course of transit the buyer becomes insolvent. The buyer is insolvent if he fails to pay his debts in the ordinary course of business, or cannot pay his debts as they become due.

Duration of transit

According to **Section 56 (1) of SOGSSA** goods are taken to be the course of transit from the time when they are delivered to a carrier by land, air or water, or other bailee for the purpose of transmission to the buyer, until the buyer or his or her agent for the purpose takes delivery of them from that carrier or other bailee.

iii) Unpaid seller's right of re-sale

The unpaid seller may resale the goods under the following conditions:-

- When the goods are perishable
- Where the right to resale is expressly reserved in the contract.
- Where in exercise of the right of lien or stoppage in transitu the seller gives notice of his intention to re-sale and the buyer does not pay or tender the price within a reasonable time. **(Section 59 (3) of SOGSSA)**

Loss due to re-sale

If on re-sale there is a deficiency between the contract price and the amount realised out of the sell, the unpaid seller will be able to recover this from the buyer. But if on such resale a surplus is left i.e. the goods are sold at a higher price than the contract price, the seller is not bound to hand over the surplus to the buyer. **(Section 59 (3) of SOGSSA)**

b) Unpaid Seller's Rights against the Buyer.

The Seller is entitled to sue the buyer for the price of the goods, if the property in the goods has already passed to the buyer **(Section 60 of SOGSSA)**

The Seller is also entitled to maintain an action for damages if the buyer refuses to accept delivery and pay for the goods. **(Section 61 (1) of SOGSSA)**

RIGHTS OF THE BUYER

a) Action for non-delivery

Section 62 (1) of SOGSSA provides that where the seller or supplier wrongfully neglects or refuses to deliver the goods or supply services to the buyer, the buyer may maintain an action against the seller for damages for non-delivery of the goods. The amount of damages to be awarded shall be the difference between the contract price and the market or current price at the time or times when the goods ought to have been delivered or supplied the services, or, if no time was fixed, then at the time of the refusal to deliver.**(Section 62 (2) of SOGSSA)**

b) Recovery of Price

If the buyer has paid the price and the goods are not delivered, he can maintain an action for the recovery of the amount paid.

c) Specific performance

Section 63 of SOGSSA allows the buyer to sue for specific performance when the goods are specific or ascertained. The remedy is discretionary and will only be granted if the goods are of special value or unique in either nature or rare i.e. under this remedy, the seller is ordered to deliver the goods. **Section 63 (1) of SOGSSA** provides that In an action for breach of contract to deliver specific or ascertained goods or services, the court may, on the application of the plaintiff, by its judgment or decree, direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.

THE LAW OF SUPPLY OF SERVICES IN UGANDA

Law Applicable:

- The Constitution of the Republic of Uganda, 1995 as amended
- The Sale of Goods and Supply of Services Act Cap 293
- The Contracts Act Cap 284
- Common law and the doctrines of equity
- Case Law

INTRODUCTION

In Uganda, the main areas of complaint in regard to services is and has always been the poor quality of service, e.g. the careless servicing of cars; slowness in completing work, where the complaints have ranged over a wide area from building contractors to lawyers, the cost of services, i.e. overcharging etc.

The supply of services in Uganda is a fundamental part of our county economy, in many cases the services provided are key and necessary in our daily lives. When supplying services to customers it is important to have a contract which sets out the terms on which those services are to be supplied. The law that governs and regulates the supply of services in Uganda is the **Sale of Goods and Supply of Services Act Cap 293 (SOGSSA).**

DEFINITION AND NATURE OF A CONTRACT OF SUPPLY OF SERVICES

A contract for supply of services is defined under **Section 3 (1) of (SOGSSA)** as a contract where a person agrees to carry out a service whether goods are; transferred or are to be transferred; or bailed or are to be bailed by way of hire, under the contract, regardless of the nature of the consideration for which the service is to be carried out. A contract of supply can also be defined as a contract in which a person known as "the supplier" agrees to carry out a service. **(Keenan & Riches' Business Law 9th Edition at Page 323**).

Therefore the definition of a contract of supply of services covers agreements where the supplier simply provides a service and nothing more, such as washing a car, dry-cleaning or hairdressing. It also includes contracts where the provision of a service also involves the transfer of goods (e.g. repairing a broken screen of a mobile phone).

It is important to note that the law on supply of services in Uganda does not apply to contracts of service (employment) or apprenticeship **(Section 3 (2) of (SOGSSA).** However, the services provided to clients by professionals e.g. accountants, architects, lawyers, hairdressers and surveyors are included.

CHARACTERISTICS OF A CONTRACT OF SUPPLY OF SERVICES

The essential characteristics of a contract of supply of services are the following;

i) Parties

There must be two distinct parties to a contract of supply of services, that is, a "supplier" and a consumer. A supplier means a person who supplies or agrees to supply services whereas a consumer is a person who purchases services for final use **(Section 1 of SOGSSA)**.

ii) Service

The subject matter of the contract must be provision of **"services"** which is defined under **Section 1 of SOGSSA** to mean any service or facility provided for gain or reward or otherwise than free of charge, including services or facilities for—

(a) banking, insurance, grants, loans, credit or financing;
(b) amusement, cultural activities, entertainment, instruction, recreation or refreshment;
(c) accommodation, transport, travel, parking or storage;
(d) the care of persons, animals or things;
(e) membership in a club or organization or any service or facility provided by the club or organization,; and
(f) any rights, benefits, privileges, obligations or facilities that are or are to be provided, granted or conferred in the course of services;

iii) Consideration

Consideration refers to a right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other **(Power City Contractor Limited v Eco Bank Uganda Limited (HCCS No. 0307 of 2012).** In simpler terms consideration is a benefit which must be bargained for between the parties, and is an essential element for a party entering into a contract. Consideration must be of value (at least to the parties), and is exchanged for the performance or promise of performance by the other party.

Therefore for contract to amount to a contract of supply of services it must be supported by consideration. The principles applicable under contracts of supply of services do not apply to work done for free as a friendly gesture by a friend or neighbour **(Denis Keenan, Smith & Keenan's Law for Business 13th Edition at page 356).**

FORMATION OF A CONTRACT OF SUPPLY OF SERVICES

In the formation of a contract of supply of services there are no formalities to be observed; there are no strict formalities prescribed under the SOGSSA to be fulfilled, in order for a valid contract of supply of services to be concluded.

Section 5 (1) SOGSSA, provides that a contract of supply of services may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or in the form of a data message, or may be implied from the conduct of the parties. However this provision does not affect a contract entered into under any other law requiring a contract to be made in a specific manner **(Section 5 (2) SOGSSA).**

Note
Section 10 (5) of the Contracts Act, 2010 provides that a contract whose value exceeds 25 currency points (UGX 500,000) must be in writing. It is important to note that it would be in the interest of the parties, to have a written contract, especially taking into account what is at stake. Otherwise, in case of a dispute, the terms agreed upon may be difficult to prove.

TERMS OF A CONTRACT OF SUPPLY OF SERVICES

Express and Implied Terms

Terms of a contract of supply of services are representations made by one party to another party; they are rules which govern the contract. The terms vary in terms of importance; and as to whether they have been agreed upon by the parties (express) or simply incorporated by operation of law; custom, or court (implied).

Condition and Warranties

A condition is a major term of a contract, the breach of which gives rise to a right to reject treat the contract as repudiated and seek for compensation in damages. A warranty is a minor term of a contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

Section 12 (1) of SOGSSA gives the consumer of service a right to treat the breach of a condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

A contract of supply of services involves several terms regarding the nature and quality of the service to be rendered, the price and mode of payment etc. These terms may be express that is, they are agreed upon by the parties themselves or they are implied into the contract of supply of services by operation of the law. It is important to note that the implied terms apply only in cases where there is a contract of supply of services, if there is no contract there cannot be implied terms. This therefore excludes work done for free as a friendly gesture by a friend or neighbor. If however, injury is caused to a person who is not in a contractual relationship with a supplier, there may be an action in tort of negligence at common law. **(Denis Keenan, Smith & Keenan's Law for Business 13th Edition page 356)**

Implied Terms

The terms implied into a contract of supply of services by Sale of Goods and Supply of Services Act, Cap 293 include;

i) Care and skill

Section 18 of SOGSSA provides that where the supplier is acting in the course of a business there is an implied term that the supplier will carry out the service with reasonable care and skill.

This means that the service must be performed with the care and skill of a reasonably competent member of the supplier's trade or profession. Therefore an incompetent supplier may be liable even though he/she has done his/her best. There is no reference to conditions and warranties in regard to this implied term. Generally therefore, the action for breach of the term will be damages. However, in a serious case repudiation of the contract may be possible. **(Denis Keenan, Smith & Keenan's Law for Business 13th Edition page 356)**

For instance, if James Ainomugisha takes his black suit to be dry-cleaned and it is returned with a large tear in the fabric, clearly the cleaning process will not have been carried out with reasonable care and skill. The duty to exercise reasonable care and skill was considered in the following case.

Wilson v Best Travel [1993] 1 All ER 353

The claimant sustained serious injuries when he tripped and fell through glass patio doors at the Greek hotel he was staying in while on a package holiday organised by the defendant tour operator. The doors had been fitted with 5mm glass which complied with Greek, but not British, safety standards. The claimant sought damages against the defendant, arguing that the defendant was in breach of the duty of care which arose from s 13 of the Supply of Goods and Services Act 1982 (England).

Court held: that the defendant tour operator was not liable: its liability was to check that local safety standards had been complied with, provided that the absence of a safety feature was not such that a reasonable holidaymaker would decline to take a holiday at the hotel.

A tour operator might be in breach of duty if, for example, it used a hotel where there were no fire precautions at all. In this case, the doors met Greek safety standards and the absence of thicker safety glass in doors was unlikely to cause the claimant to decline the holiday.

ii) Time for performance

Under **Section 46 SOGSSA**, where the supplier is acting in the course of a business and the time for performance cannot be determined from the contract or ascertained by a course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time. What is a reasonable time is a matter of fact. This is also provided for under Section 11 (3) of SOGSSSA.

This term is only implied where the time for performance is not fixed by the contract but left to be fixed in a manner agreed by the parties to the contract or determined by the dealings of the parties.

For instance, If Sserugudde Mutwalibu takes his BMW motor vehicle into a garage at Nakawa for minor repairs, it is reasonable to allow a few days and, if spare parts have to be ordered, possibly a couple of weeks for the repairs to be completed. If the car is still in the garage six months later, the repairer will be in breach.

iii) Consideration

Section 2 of the Contracts Act Cap 284 defines consideration to mean a right, interest, profit or benefit accruing to one party or forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party. In simpler terms consideration is a benefit which must be bargained for between the parties, and is an essential element for a party entering into a contract. Consideration must be of value (at least to the parties), and is exchanged for the performance or promise of performance by the other party.

According to **Section 9 (1) of SOGSSA** the price (consideration) in a contract of supply of services may be fixed by the contract, or may be left to be determined in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

In the event the consideration cannot be determined from the contract or by a course of dealing between the parties, there is an implied term that the consumer or customer will pay a reasonable charge for the service **(Section 9 (2) of SOGSSA).**

For example, if the management of MUBS call a plumber to repair a burst pipe at the third floor of the main building and no reference is made to his charges, he is entitled to a reasonable amount for his services on completion of the job.

Where there is an agreement for the supply of services on the terms that the price is to be fixed by the valuation of a third party and the third party cannot or does not make the valuation, the agreement is voidable except that if the service is partially performed, the buyer shall pay a reasonable price for the service. **(Section 10 (2) of SOGSSA).**

It should be noted that **SOGSSA** implies ‘terms’ into contracts for supply of services. This means that the remedy available to the injured party will depend on the circumstances of the breach. If the breach goes to the root of the contract, it will be treated as a breach of a condition and the customer can repudiate the contract and claim damages – where the breach is slight, it will be regarded as a breach of a warranty and the customer can recover damages only.

iv) Implied term as to quality of materials used in a contract for the supply of services.

Under **Section 16 of SOGSSA** there is an implied term in every contract for supply of services where materials are used, that the materials will be sound and reasonably fit for the purpose for which they are required. This means therefore that not only should the service supplied meet the expected standards but the materials used in the supply of the service must also be of good quality and fit for the purpose.

It is also important to note that the parties to a contract of supply of services cannot expressly exclude any right, duty or liability that would arise under a contract of supply of services by implication of law **(Section 67 of SOGSSA).**

IMPLIED DUTIES OF THE SUPPLIER AND THE CONSUMER

Implied duties are obligations or responsibilities imposed upon the parties in a contract of supply of services by operation of the law.

i) Duty to Supply the Service

The Supplier is under a duty to supply the service the subject of the contract. Supply of a service and payment of the price are concurrent conditions. According to **Section 34 (2) of SOGSSA**, it is the duty of the supplier of a service to perform the service in accordance with the terms of the contract of supply of services.

The relevance of performance of the service is provided for under **Section 35 (3) of SOGSSA** which provides that supply of a service and payment of the price are concurrent conditions. This means that, the Supplier must be ready and willing perform the service in exchange for the consideration and the consumer must be ready and willing to part with the consideration in exchange for the service.

ii) Duty to perform the service with reasonable skill and care

The Supplier is under a duty to carry out the service with reasonable care and skill (**Section 18 of SOGSSA**). This means that the service must be performed with the care and skill of a reasonably competent member of the supplier's trade or profession.

iii) Duty to pay for the service

The consumer in a contract of supply of services is under a duty to pay for the service in accordance with the terms of the contract of supply of services **(Section 34 (2) of SOGSSA)**

REMEDIES OF THE PARTIES IN CASE OF BREACH

The Supplier

i) Sue for the Price

According to **Section 60 (3) of SOGSSA** where, under a contract for supply of services, the service has been supplied, and the consumer wrongfully neglects or refuses to pay for the service according to the terms of the contract, the supplier may bring an action against the buyer for the price of the service, together with any incidental damages.

ii) Sue for Damages

The Supplier also has right under **Section 60 (3) of SOGSSA** to sue the consumer for any loss that arises from the consumer's failure or neglect to pay the price of the services. In this case the supplier sues the consumer seeking for compensation in form of damages.

The Consumer

i) Action for failure to supply the services

In the event the supplier neglects or fails to supply the service, **Section 61 (1) of SOGSSA** gives the consumer, a right maintain to sue the supplier for compensation in form of damages for failure to supply services.

The amount of the damages to be awarded by Court in such a situation is the difference between the contract price and the market or current price at the time or times when the service ought to have been supplied, or, if no time was fixed, then at the time of the refusal to supply **(Section 61 (2) SOGSSA).**

TOPIC 4: THE LAW OF AGENCY

Law Applicable

- The Constitution of the Republic of Uganda, 1995 as amended
- The Contracts Act Cap 284
- The Companies Act Cap 106
- Common law & Equity
- Case law

Agency may be defined as the relationship which exists whenever one person (called the agent) acts on behalf of another person (the principal). Where such relationship exists, the acts of the agent are said to be the acts of the principal, therefore in case of any liability arising from such acts, the principal will be liable.

An **agent** is a person who is employed to do work on behalf of another person known as a principal. The law of contract generally applies to the agency relationship. However, agency itself forms one of the exceptions to the doctrine of privity of contract. This means that when an agent enters into a contract with a third party, the principal is considered to have been a party to that contract even if he was not physically a party to it. He can then be sued by the third party as if he was a party to the contract. This is because of the dictum that **he who acts through another, acts himself**. Thus where a principal acts through an agent, he is liable on the contracts entered into by the agent on his behalf.

Purpose of Agency

In most cases especially in business transactions, it is not always possible for a businessman to make contracts alone and individually. He may therefore need to employ agents to make contracts on his behalf. The common law rule is that any person can act through an agent unless a person occupies a position which requires his personal performance or where parties make a contract that expressly or impliedly prohibits a person from delegating to an agent.

Capacity of an Agent and Principal

Any person with legal capacity to enter into a contract can appoint or be appointed as an agent. **Section 119 Contract Act** provides that a person may employ an agent, where that person is eighteen years or more, is of sound mind and is not disqualified from appointing an agent by any law to which that person is subject.

a) Persons of unsound mind

The general rule is that where the party to a contract is of unsound mind, the contract is still binding on him unless he can prove that he was so insane at the time of the contract that he did not know what he was doing and this was known to the other party

A mentally incompetent person can only appoint an agent during the lucid interval i.e, during an interval when he is capable of understanding what he is doing.

b) Companies

Companies can be appointed to act as agents of individuals or other companies as long as they have been registered as required under the law **Section 22 of the Companies Act.**

Kinds of Agents

i) Universal Agent

This agent has authority which is unlimited. He has power to bind the principal by any act, provided that such act is legal and acceptable under the law of the country in which he operates. Such agent is therefore one who is appointed to handle all the affairs of his principal. This kind of agency is very rare; it has to be created by deed and in the form of a power of attorney.

ii) General Agent

This is the agent who has authority to represent his principal in all businesses of a certain kind e.g. to manage a branch bank. Such an agent has implied authority to represent his principal in all matters incidental to the business in question. i.e, such agent will be deemed to have authority to do anything which comes within the limits of his position as such agent.

iii) Special Agent

This is an agent who is appointed for a particular purpose and is therefore vested/given limited powers, i.e, he can only bind the principal if he/she acts within those powers. He/she cannot bind the principal in any other matter other than that for which he was appointed. This agency comes to an end on the conclusion of the purpose for which it was formed. E.g an agent who is appointed by a principal to sell a particular piece of land or any other property or to conclude a particular agreement, etc.

iv) Mercantile agent

Such agent is a person who in his customary course of business as such agent has authority to sell goods, or to buy goods, or to assign goods for the purpose of sale, or to raise money using the goods as security. Mercantile agents are of different kinds, i.e;

v) Factors; A factor is an agent whose ordinary business is to sell goods. Cotton L.J defined a factor as an agent who is entrusted with the possession of goods for the purpose of sale. When in possession of such goods, a factor has wider powers than an ordinary agent. He may sell, pledge or otherwise dispose of the goods as long as;

- He does so in the ordinary course of business
- He acts in good faith and without exceeding his authority or powers.

- A factor may sell the goods in his own name. Thus if A leaves his car in the garage with the garage owner, with instructions that the garage owner displays the car and sells it on A's behalf, the garage owner is a factor.

vi) Brokers

These are basically middle men who enter into contracts in return for a commission known as brokerage. Such agents are merely employed to make contracts with third parties for the purchase of goods or property, or for the sale of the principal's goods or property. The difference between brokers and factors is that brokers are agents who are not given possession of goods or the documents of title to the goods and have no authority to sell the goods in their names.

In ***Fowler v Hollins (1872)*** a broker was defined as thus; an agent employed to make bargains of contracts between persons in matters of trade, commerce and navigation. Frankly speaking, a broker is a mere negotiator between other parties …He himself… has no possession of the goods, no power actual or legal of determining the destination of the goods, no power or authority to determine whether the goods belong to the buyer or seller.

Examples of brokers include; insurance brokers; who arrange policies of insurance, Estate agents; who connect purchasers with sellers; Stock brokers; who deal with the sale of stock or shares; etc.

vii) Auctioneers;

These are agents who are given instructions to sell property on behalf of the principal by private or public treaty. Their reward is also called a commission. An auctioneer acts in two capacities. Before the sale, he is an agent of the seller. After the completion of the sale, he is an agent of the buyer for purposes of making a written record of the sale.

An auctioneer warrants that he has authority to sell the goods to the highest bidder unless he states otherwise. He should sell the goods in cash unless he is sure that if the sale is by cheque, the cheque will not bounce.

viii) Commission agents

These ones appear to resemble independent parties rather than agents. As regards the principal, they seem to be sellers and as regards the third parties, they are buyers. Eg X orders Y (agent) to purchase LG Fridges from USA. Y purchases them with his own money and sells them to X.

ix) Del Credere agents;

These agents, in return for an extra commission, promise that they will indemnify the principal, if the third party, with whom they contract in respect of the goods, fails to pay what is due under the contract. They in the first place guarantee the solvency of the third parties but where the third parties fail to pay, these agents are personally liable. This is a

contract of indemnity because these kinds of agents agree to indemnify/compensate the principal if the third party fails to pay.

Other types of agents; these include bankers, solicitors/lawyers, directors of companies, partners in a partnership, etc.

Types of Principals

a) Named principal

This is a principal whose name has been revealed to the third party by an agent. Eg the agent may intimate to the third party that he/she is working for company B or an individual D

b) Disclosed principal

This is a principal whose existence has been revealed to the third party but whose exact identity remains unknown. The general principle is that a named and disclosed principal can sue or be sued by third parties for the acts of the agent.

c) Undisclosed principal

Here, neither the identity (name) nor the existence of the principal is revealed to the third party. The third party believes that he is contracting with the agent as the principal. Surprisingly, an undisclosed principal can sue or be sued in his own name on any contract duly made on his behalf as long as the agent acted within the scope of his authority.

ACTIVITY

1. Define agency, an agent and a principal
2. What is the purpose of creating an agency relationship?
3. Who can appoint and be appointed an agent
4. Explain the different kinds of principals
5. Explain the different kinds of agents
6. Explain the different kinds of mercantile agents

Creation of Agency

Agency can be created in a number of ways and these include;

1) By Express Agreement (Express Agency) (Section 122(1) & (2) of the Contracts Act

This is where an agent is expressly appointed by the principal. The appointment may be oral, or in writing (agreement in writing). In other words, a person is appointed in clear terms by the principal to act as his agent. E.g if the principal wants the agent to execute/sign a deed/agreement on his behalf for the sale or purchase of land, he will execute a document called a **power of attorney**. This document is a formal document whose format is laid out in the Registration of Tittles Act. It is normally used where one person wants another to act on his behalf in land matters/transactions. It is in this

document that the principal appoints the agent to act on his behalf and also defines the extent of the agent's powers under the power of attorney.

Although an agent may be appointed orally, for evidential purposes (for purposes of evidence), it is better to appoint an agent by way of a written deed/agreement which clearly spells out the necessary details and limits of the agent's powers.

2) Agency by Implied Agreement (Implied Agency) Section 122 (2)

This kind of agency arises by operation of the law. In other wards, the law implies its existence from the circumstances of a particular case. It arises in a situation where by although there is no express agreement appointing a person as an agent, the law will imply the existence of an agency relationship from the circumstances of the case or from the conduct of the parties.

Such agency may rise from estoppel and from holding out, and gives rise to;

- Agency by Estoppel
- Agency by Holding out

a) Agency by Estoppel

This kind of agency arises from the doctrine of estoppel which is to the effect that where a person by words or his conduct wilfully leads another to believe that a certain state/set of circumstances or facts exists and that other person acts on that belief, the person who made the statement of facts will be precluded/estopped from later on denying the truth of such statements even if such state of affairs did not in fact exist.

Agency by estoppel is therefore created where a principal by his conduct or words spoken or written places someone in a situation where third parties are made to believe that he has authority to do what he is doing although in the real sense he does not. The law in such case will presume that the person who made the statement by word of mouth, in writing or by conduct represented the other as an agent and he will be bound by his action. He cannot deny that the person he represented as having the power to act had the power to do so; even if he did not in fact have such power.

Thus if a person by his words, statements or conduct represents another person as having authority to make contracts on his behalf, he will be bound by such contracts as if he had not expressly authorized them. For example, where A allows third parties to believe that B is acting as his authorized agent, he will be estopped/stopped from denying the fact that B had authority to act on his behalf even if in the real sense B did not have authority to act at all.

b) Agency by Holding Out

This kind of agency is in a way similar to agency by estoppel because it is based on the doctrine of holding out which is a part of the law of estoppel. The doctrine of holding out refers to a situation where a person by some positive act or conduct represents the other person as having the power to act on his behalf. In such case, the principal will be said to have held out/represented the other person as having power/authority to act on his behalf and thereby creating the agency relationship. This kind of agency is common in partnerships where every partner is said to be an agent. Therefore a partner acting on behalf of the firm will be held out to have authority to bind the firm and all the other partners.

Similarly, another example is where an employer ordinarily pays for goods bought by his employee from a seller X on behalf of the employer. Such employer will still be liable to X where the employee goes ahead and purchases goods from X in the usual manner even though this time, he may do so for his own benefit (fraudulently) and after he has ceased to be in the employment of the employer.

3) Agency by Necessity/ authority of agent in an emergency

This kind of agency is also conferred by law. **Section 124 of the Act** provides that in an emergency, an agent has authority to do any act for the purpose of protecting a principal from loss, as would be done by a person of ordinary prudence, under similar circumstances.

Example
Where an individual who has possession of another person's property deals with it without seeking the owner's consent in order to protect the owner's interest e.g. a carrier of perishable goods.

The law assumes the consent of the owner to the creation of the relationship of principal and agent. However for this kind of agency to arise, the following conditions must be satisfied;

a) The agent must show that it was impossible to obtain the owner's/principal's instructions. ***Springer Vs GW Railway (1921) 1 KB 257*** a consignment of fruit was found by the carrier to be going bad. The carrier sold the consignment locally instead of delivering it to its destination. It was held that the carrier was not an agent of necessity because he could have obtained new instructions from the owner of the fruit. He was thus liable in damages to the owner. (The carrier failed to show that it was impossible to get new instructions from the principal)

b) The agent must not do anything to deprive the owner of his title to the goods or items. For example where the delay is brought about by the carrier's recklessness/ negligent or carelessness.

c) The agent must act in good faith and if he sells the product/goods, he should attain the highest attainable/possible price for them. He /she should not sell the property at a giveaway price just because of an emergency. He/she should deal with the property as if it is his/hers.

d) There should be real necessity for acting on behalf of the principal. In ***Prager Vs Blatspiel (1924)*** the agent bought skins as agent for the principal but was unable to send them to the principal because of prevailing war conditions. Since the agent was also unable to communicate with the principal, he sold the skins before the end of the war. It was held that the agent was not an agent of necessity because he could have stored the skins until the end of the war. There was no real emergency.

Example;

Where A loads vegetables aboard X's ship at Dare-Salaam with instructions to send them to B in London. X while on the way, on finding that the vegetables are perishing rapidly decides to stop over at a port and sells them for the best price he can obtain. The principal will be bound by the sale and the agent cannot be held liable for exceeding his authority because under the circumstances of the case, there arises agency of necessity
i.e. the need to act by the agent to save the principal's goods.

4) Agency by ratification

Section 130 (1) provides that where an act is done by one person on behalf of another but without the knowledge or authority of that other person , the person on whose behalf the act is done may ratify or disown the act.

Section 130 (2) states that, where person on whose behalf an act is done, ratifies the act, the same effects shall follow, as if the act was performed under his or her authority. **Section 131** provides that ratification may be express or implied by the conduct of the person on whose behalf an act is done. This occurs in two situations;

i) Where a duly appointed agent exceeds his authority
ii) A person having no authority purports to act as agent

In such situations, the principal incurs no liability on the contract supposedly made on his behalf since the persons who entered into it acted without his authority. However, in such cases, the principal may expressly or impliedly ratify the agent's transaction and so accept liability. i.e, the principal opts or affirms such unauthorized act thereby making the act valid as if the agent had originally had authority to enter into it on behalf of the principal.

Where the principal adopts such unauthorized act, he is said to have ratified that act and this therefore creates an agency by ratification. In addition, where the principal ratifies such act, the ratification will be said to relate back to the time of contract i.e the principal will be bound by the agent's act as if the act had originally been done with his authority.

Ratification may be express or it may be implied from the conduct of the parties. It is express where the principal clearly states orally or in writing that he has adopted the transaction. It is implied if the conduct of the principal with regard to the transaction shows that he has adopted the transaction.

For the ratification to be valid the following conditions must be satisfied;

a) The agent at the time of the alleged unauthorized transaction must have claimed expressly to be contracting as an agent on behalf of a named his principal. Here, the person who enters into the unauthorized contract must profess at the time of making it to be acting on behalf of and intending to bind the person who subsequently ratifies the contract. Ordinarily the person making the contract will be required to name his professed principal but it has been said to be sufficient if the principal, though not named is "capable of being ascertained" (his existence must be disclosed) at the time of the contract, an expression which is presumably employed here to mean "identifiable".

b) The principal must have had full contractual capacity both at the time of ratification and at the time the agent made the contract.

c) The principal must have been in existence at the time of the alleged unauthorized act of the agent. Therefore, a company after its incorporation cannot ratify a contract supposedly made on its behalf before incorporation since it did not exist at the time of the contract and therefore had no contractual capacity when the contract was made. But where a person purports to contract as agent for a non–existent company, he will be personally liable on the contract. In the case of ***Kelner Vs Baxter*** the plaintiff sold wine to the defendant who purported to act as agent for a company which was about to be formed. When it was formed, the company attempted to ratify the contract made by the defendant before it came into existence. It was held that it could not do so, since it was not in existence when the contract was made. The defendant was therefore personally liable to pay for the wine. However under **section 54 of the Companies Act Cap 106** such contracts may be ratified/adopted by the Company once it's incorporated.

   Therefore, an agent who contracts on behalf of a nonexistent principal may be personally liable on the contract. In the case of companies the position is now governed by statute and the promoters who make the contract are personally liable on it subject to any contrary agreement.

d) The principal must have full knowledge of all the material facts of the agent's unauthorized act. Otherwise there cannot be valid ratification by a person who does not have full knowledge of the facts of the case.

e) There should be an act that is capable of ratification. Only a lawful act /transaction can be ratified. An illegal transaction or an act which is void cannot be ratified. E.g. the shareholders of a company cannot ratify an ultravires contract made by the directors or an act that involved fraud.

f) The principal must ratify the whole transaction entered into by the agent and not only bits or parts of it. Once part of the transaction is accepted, it will be implied that the whole contract is accepted/ratified. Thus the principal cannot accept only the benefits of the transaction and reject the burdens. He must ratify both.

It should be noted that where ratification takes place, it is retrospective i.e it dates back to the time when the contract was made by the agent.

Authority of the Agent

Authority of an agent means his capacity to enter into a particular transaction and bind the principal by such transaction. The agent can only bind the principal if he acts within the scope of his authority.

S.123 (1) of the Contracts Act states that an agent with authority to do an act has authority to do anything which is necessary to do the act, which is lawful. S. 123(2) provides that any agent with authority to carry on a business has authority to do anything which is necessary for the purpose of carrying on the business or which is usually done in the course of conducting the business.

The scope of the agent's authority may be of various kinds i.e.

a) Express Authority
b) Implied Authority
c) Usual Authority
d) Apparent or Ostensible Authority

a) Express Authority/Actual Authority

This is where the authority of the agent is clearly spelt out orally, or in writing. If this authority is in writing, it may be under hand or seal. Where it is under seal, it is contained in a document called a power of attorney. Such authority is normally spelt out orally at the time the agent is appointed or it may be contained in the document appointing the agent to act on behalf of the principal.

b) Implied Authority

This refers to an agent's authority to do everything necessary for, or incidental to the execution of his express authority. i.e, where an agent is expressly given authority to do something, it is also implied that he has authority to do everything that may be necessary for or incidental to his performing such act. Implied authority may be implied either from conduct on a particular occasion or from other relationship. It has been held that a husband who lives with his wife impliedly authorizes her to pledge his credit for necessary household expenses. This depends on the existence of a household, which the husband permits the wife to manage. The authority will not arise where there is no household for instance where the parties live in a hotel.

Implied authority can also arise from custom. A Principal who employs an agent to act for him in a particular market impliedly authorizes the agent to act in accordance with the custom of that market. The Principal will be bound by the custom even if he is unaware of it. The inference of an implied authority according to custom may be negatived if the custom is inconsistent with the instructions given by the Principal to the agent or with the very relationship of Principal and agent. In such a situation, the custom is "unreasonable" and the Principal is not bound by it unless he knows it. Thus in ***Perry vs Barnett (1885)*** the agent who was employed to buy bank shares failed to comply with the Act of Parliament which was in force. The Act provided that such contracts were void unless the numbers of shares were stated in the contract note. The Principal did not know of the custom of the stock exchange to disregard the Act. It was held that the Principal wasn't bound by the custom, which was inconsistent with the agent's instructions in so far as it resulted in his making a void contract when he was employed to make a valid one.

Another example is where an agent is appointed to sell a house. Such agent is said to have implied authority to sign the contract of sale, to receive the proceeds of the sale etc.

c) Usual Authority

The expression "usual authority" has three possible meanings. First, it may mean implied or incidental authority as discussed above. Secondly, it may refer to cases where an agent has apparent authority because he has been placed by his Principal in a situation in which he would have had incidental authority if this had not been expressly negatived by instructions given to him by the Principal and not communicated to the third party. Thirdly, it may refer to a situation where the Principal is bound by the agent's contracts even though there is no express, implied or apparent authority.

There are certain things that are usually done according to given professions, businesses or trade. It is the authority which is usually/ordinarily possessed by persons performing/executing certain transactions in such professions or businesses. Where the usual authority that is ordinarily possessed by a person in such trade is restricted in the contract of agency, this restriction will not affect third parties who are not aware of it.

The extent of the agent's usual authority depends on the class of agents to which he belongs and on the common understanding of the trade concerning such agents. It's significant to note that where an agent doesn't belong to a well-known class of agents,

but is simply appointed for an isolated transaction, the doctrine of usual authority doesn't apply.

d) Apparent Authority/Ostensible

This refers to that authority which the agent appears to have but does not in fact have. In most cases it overlaps with actual authority. In ***Rama Corporation Vs Proved Tin & General Investments Ltd (1952) 1 ALLER*** Slade J defined ostensible or apparent authority as a form of estoppel which depends on three conditions;

i) A representation
ii) Reliance on the representation
iii) Alteration of the third party's position as a result of such reliance.

The Principal must make a representation since it is his act, which produces the belief in the mind of the third party, and gives rise to the principal's liability. Thus in ***Attorney General Vs Silva (1953) AC 461*** a crown agent falsely represented that he had authority to sell steel plates which were crown property. The Privy Council held that the crown wasn't bound since;

a) The agent had no actual authority
b) Apparent authority could only arise out of a representation made by the Principal and not out of that made by the agent.

The representation may be by words or conduct. The representation may be intentional or negligent for instance where the Principal mistakenly signs a document giving authority to the agent, then he would be liable if a third party acts on the document. In ***Edmund Schulter & Co (U) Ltd Vs Patel (1969) EA 259*** a Principal sold land to Y through his agent. A deposit of shs 50,000/= was paid to the agent and the balance paid direct to the Principal. The agent however disappeared with the deposit. The Principal now claimed the deposit afresh from Y arguing that the agent had no authority to receive such sums. The court of appeal dismissed the claim. It was explained that the Principal had given the agent the duplicate documents of title and by such behaviour the Principal was estopped from denying the agent's right to act.

<u>Duties of the Agent</u>

a) Duty to Obey

Where an agent is carrying out the terms of the agency, he is obliged to carry out/obey instructions from the principal. If he fails to do so, he is liable in damages to the principal. In the case of **Turpin Vs Bilton (1843)**, an insurance broker (the agent), in return for a fee, agreed to effect insurance on the principal's ship. He failed to do so and the ship was lost. The broker was held liable to the principal.

An agent is however not bound to obey the principal where the principal's instructions are illegal or void, ambiguous or the agent is a professional agent whose instructions are subject to the customs or usage of a particular trade. Also, where the agency is purely gratuitous (unpaid for), the agent incurs no liability for not obeying or performing at all.

b) Duty of Care, skill and Diligence.

Section 146 (1) states that, an agent shall act with reasonable diligence and conduct the business of the agency with as much skill as is generally possessed by a person engaged in similar business, unless the principal has notice of the lack of skill by the agent.

An agent must exercise due care and skill in the performance of his duties. The degree of skill required depends on the circumstances of a particular case. More skill is expected of a professional person than of a layman who merely advises a friend. If a payment is made, this will also be taken into account in assessing the care and skill expected but even an unpaid agent may be liable in tort for negligence if he gives bad advice. Therefore an agent professing a particular profession must show the required degree of skill appropriate to that profession. E.g an auctioneer or broker will be liable if he acts contrary to the rules governing his trade.

The Kenyan case of ***Marianne Winther Vs Arbon Langrish & Southern Ltd [1966] EA 292*** shows what skill a professional agent must exercise. The facts of this case are that an insurance broker wrote to a policy holder suggesting a discussion concerning the renewal of an aircraft policy and a personal accident policy. The wife of the policy holder called at the brokers and asked for both policies to be renewed with Loyd's underwriters. Through some misunderstanding on the part of the broker, the personal accident policy was not renewed. The husband was later killed in a plane crash and the wife lost 2000 pounds that would have been paid had the policy been renewed. She sued the broker for breach of duty of care. The court held in her favour on the ground that the broker possessed special skill and experience in the matter of aircraft insurance and in his dealings in this matter must be assumed to have been undertaken to apply that skill and experience for the benefit and assistance of the plaintiff.

An agent is required to compensate the principal in respect of the direct consequences of his/her own neglect, lack of skill or misconduct but not in respect of loss or damage which are indirectly or remotely caused by the neglect, lack of skill or misconduct of the agent. **Refer to Section 146 (2)**

c) Duty of Good faith

The agent must act in good faith. This entails five things:

a) The agent must not let his own interests' conflict with his duty to the principal. The reason for the rule is to prevent the agent from being tempted not to do the best for his principal. In the case of ***Igben & Oke Vs Etwarie (1971) 1 NCLR 85*** the High Court of Benin held that it was a rule of general application that an agent should not be allowed to enter into agreements in which he has or can have a personal interest conflicting with his principal.

b) The agent must not make a secret profit

The agent must not use his position to secure a benefit for himself. Where an agent makes a secret profit, he must disclose and account for it to the principal. In the case of ***Lucifero Vs Castel*** **(1887)** an agent appointed to purchase a yacht for his principal bought the yacht for himself and then sold it to his principal for a profit, the principal being unaware

that he was buying the agents own property. Court held that the agent had to pay the profit to the principal even if the principal could not have earned the profit himself.
c) The agent must disclose to the principal any opportunity or information which he comes across in his position as agent.

c) Duty of Personal performance

Section 125 (1) of the Contract Act provides that an agent shall not employ another to perform an act which the agent expressly or impliedly undertook to perform personally. This section indicates that an agent must perform personally his duties under the agency and is not permitted to delegate his duties except with express permission of the principal or unless such can be implied from that trade or business in which the agent is engaged, or where in the course of employment, the agent finds that he has to delegate. This is based on the rationale that "delegatus non potest delegare" ie a delegate cannot delegate.

However **Section 125 (3)** provides that where the nature of an agency allows it, a sub-agent may be employed to perform an act which the agent expressly or impliedly has undertaken to perform personally.

There are circumstances under which a sub-agent is appointed by the agent, where a sub-agent is properly appointed by the agent, the principal shall be represented by the sub-agent and shall be bound by and responsible for the acts of sub-agent, as if the sub-agent was the agent originally appointed by the principal. **Section 126 (1)**

Where an agent without authority to do so, appoints a person to act as a sub-agent and stands towards that person in a relation of a principal to an agent and is responsible for the actions of that person to both the principal and a third person, the principal is not represented by or responsible for the acts of the person employed as sub-agent and that person is not responsible to the principal. **Section 127.**

d) Duty to account (Section 147)

An agent is under a duty to keep and render appropriate/proper accounts of his stewardship to his principal. This means that he must pay over to the principal all sums of money or property received by him for the use of the principal. The agent must do this even if the transaction giving rise to the payment is illegal or void. He should therefore keep the principal's property distinct from his and also open up a separate account for his principal**.**

The obligation by the agent to account to the principal entails the following;

(i) He must keep proper accounts of all his dealings and transactions in the course of the execution of the agency.
(ii) He must make available to the principal or any other person appointed by the principal all books and documents in his custody relating to the agency.

(iii) He should keep any money or property of his principal separate from his own and from other persons. If he mixes the property then he is liable to the principal for everything in the mixture which he could not prove to be his own.
(iv) He must pay money and property held on behalf of the principal to the principal regardless of third party claims.

Remedies of the principal where the agent breaches his duties

a) Where the agency is contractual, the principal can sue the agent for damages for breach of contract.

b) Where the agent has received a secret profit or money for the principal, the principal can sue the agent to account for money had and received by him secretly.

c) A principal can dismiss the agent who is guilty of breach of duty and is not bound to pay him compensation.

<u>Duties of the Principal</u>

1. **To pay any agreed commission or remuneration**

Whether a commission is payable or not depends on the terms of the agreement between a principal and his agent, Thus in the case of ***Taylor Vs Brewer (1813)*** the agent was to receive such commission as should be deemed right by the principal. It was held that the agent had no legal right to commission. Where the agency is commercial, courts would deem reasonable payment for the agent in the absence of express provision for payment. If the agreement stipulates that the amount of the commission is to be left at the principal's discretion, and he refuses to fix the amount, then the court may force him to pay a reasonable amount.

A commission is payable in respect of a transaction which the agent was employed to bring about. Thus in the case of ***Toulimin Vs Millar (1887)*** the owner of a house employed an agent to find a tenant who later bought the house. His claim for a commission on the sale of the house failed since he was only employed to let the house and not to buy the house.

Therefore in every agency relationship, there must be an express or implied agreement to pay for the agent's trouble. The remuneration of an agent is called a commission. However if the principal withdraws his instructions or refuses to continue with the contract, he is not liable for damages. A principal incurs no liability for discontinuing or selling off his business unless he had agreed to conduct his business as to enable the agent to earn his commission. In ***Turner Vs Goldsmith (1891) 1 QB 544,*** it was held that the plaintiff was entitled to damages where the premises of the principal were destroyed by fire if the contract was not confined to goods manufactured by the principal but even those sold by the principal.

2. Duty to indemnify the agent (Section 156)

Under the section, a principal shall indemnify an agent against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon that agent. And where a principal employs an agent to do an act and the agent does the act in good faith, the principal is liable to indemnify the agent against loss, liability and the consequences of that act, although it may affect the rights of a third party.

The general rule is that an agent who incurs liability or uses his money in performing the agency duties is entitled to be indemnified/compensated by the form his principal for all such expenses unless the agency contract excludes this right.

However the agent's right to indemnity is subject to two main qualifications:

a) There is no right to indemnify unless the agent's acts are authorized or ratified by the principal.

b) No indemnity can be claimed in respect of an illegal act.

Section 157 provides that, where the principal employs an agent to do an act which is criminal, the principal is not liable, either upon express or implied promise, to indemnify the agent against the consequences of that act.

3. Duty to allow the agent exercise his right of lien

Section 155 of the Contracts Act provides that in the absence of any contract to the contrary, an agent is entitled to retain the goods of a principal, whether movable or immovable, received by the agent, until the amount due to the agent for commission, disbursements and services in respect of the goods is paid or accounted for by the principal.

An agent is therefore, entitled to a lien on all the property of the principal which has come into his possession in the course of the agency until the commission is paid. This means that an agent is entitled to retain possession of the principal's goods as security for payment of his commission. The agents who possess such right are ordinarily those who are given possession of the goods which are the subject of the agency relationship. They include; factors, stock brokers, bankers and solicitors. They have a general lien by usage of their profession or trade.

However, a lien can't be claimed if it has been expressly excluded by the agency contract or if the goods have been delivered for a special purpose which is inconsistent with the lien.

The right to a lien may be lost in four ways:

a) By the agent voluntarily parting with possession of the goods
b) A change in character of the possession may destroy the lien

c) Where the agent waives it (where the agent decides not to exercise his right of lien).
d) Where the principal tenders (pays) to the agent the sum due.

Remedies of the agent where the principal breaches his duties

i) The agent may sue the principal to enforce the right to indemnity

ii) Where the principal sues the agent, the latter has a right to set off or counter claim from the amounts due to him by way of payment, indemnity or reimbursement

iii) Right of lien over the goods in his possession belonging to the principal

iv) Withholding further performance under the agency where the principal's breach of contract continues

Note;
The duties of the agent are the rights of the principal and duties of the principal are the rights of the agent.

<u>Relationship between the Principal and Third Parties</u>

The rights of the principal against a third party depend on the distinction between disclosed and undisclosed principals. A disclosed principal is one whose existence the third party is aware of at the time of contracting or whose name the third party knows. An undisclosed principal is one whose existence the third party is unaware of at the time of contracting. Generally, once a contract has been made on behalf of his principal, the agent drops out of the transaction and privity of contract exists between the principal and the third party.

Disclosed principal

The general rule is that a disclosed principal can sue a third party and likewise the third party can sue the disclosed principal. The agent generally incurs neither rights nor liabilities under the contract. In the case of ***Tot Ram Vs Mistry Waryam Singh***, the agent was asked by his uncle the principal to obtain transport from the plaintiff a third party to take Y to Kampala. The third party knew that the agent had negotiated the contract on behalf of the principal. Unfortunately, the principal later left the country and gave the third party a cheque that was later dishonoured. The third party sued on the contract. It was held that the agent was not liable.

Undisclosed principal

An undisclosed principal can sue a third party however this right is limited to two main respects:

a) Where the agent discloses the fact that he is merely an agent but conceals the identity of the principal. Here the agent drops out in the normal way provided he makes it clear

when contracting that he does so merely as an agent. If he fails to do so, he is personally liable on the contract.

b) Where the agent conceals the agency altogether and appears to be acting on his own behalf. Here, the third party can enforce the contract against the agent or when he discovers his identity and existence, against the principal.

The third party thus has an option whether to compel the agent to accept personal liability or to shift liability to the principal as soon as his identity is revealed.

However, it should be noted that;

i) The third party can't enforce the contract against both the agent and the principal. If he sues one he can't later sue the other

ii) The third party may be estopped from suing the principal at all if he allows the principal to think he has settled matters satisfactorily with the agent e.g. by unreasonably delaying in taking action against the principal after his identity is revealed.

Relationship between a Third Party and an Agent

The general rule is that an agent is neither liable under nor entitled to enforce a contract he makes on behalf of his principal. However, there are exceptions to this rule;

a) Where the agent contracts personally

An agent is liable if he infact intended to undertake personal liability under the contract. Thus in the case of ***Basma Vs Weeks (1950) AC 441*** an agent who was described as a party to a written contract and who signed it without any qualification that he was signing on behalf of the principal was held to be liable under the contract even if the third party knew he was contracting as agent. However, in the case of ***Mahony Vs Kekule (1854)*** it was held that an agent who is described as agent and signs as agent is not liable.

Section 163 (1) provides that where an agent enters into a contract with a person who does not know or does not have reason to believe that he or she is an agent, the principal may require the performance of the contract; but the other contracting party shall have, as against the principal, the same rights as he or she would have against the agent, if the agent had been the principal.

b) Trade usage or custom

An agent may be personally liable or entitled if that is the usual course of business either between particular parties or in relation to a particular class of agents e.g. formerly where the agent acted for an overseas principal, there was a presumption that the agent accepted personal responsibility, this presumption no longer exists and the agent is not personally liable in such a case unless it can be shown that he volunteered to accept personal liability. (Where he/she freely accepts personal liability)

c) Principal is undisclosed

An agent is both entitled and liable under the contract where the principal is undisclosed. Under **Section 163 (2)** where a principal discloses himself or herself before a contract is completed, the other contracting party can show that he or she would not have entered into a contract if he or she had known who the principal in the contract was or if he or she had known that the agent was not the principal.

d) Agent in fact is the principal

If an agent purports to be acting for an unnamed principal when he is in fact acting for himself, he can enforce the contract for his benefit. Thus in the case of ***Schmaltz Vs Avery (1851)*** **16 QB 655** a person was described in a charter party as "agent for the freighters". He was held personally liable after it was proved that he was in fact the freighter. However, if he purports to act for a named principal, he can only enforce the contract after giving notice to the third party that he acted on his own behalf.

e) Principal is non-existent

Where the agent contracts on behalf of a nonexistent principal, he is himself personally liable. In the case of **K*elner Vs Baxter*,** the promoters of a company were held personally liable on a contract made by them on behalf of a company which had not yet been formed. However where the principal (company) is later registered/incorporated and it adopts/ ratifies such a contract, it will be liable as if the agent had instructions to enter into the said contract. **Section 54** of the Companies Act

f) Bills of exchange

These include cheques, promissory notes etc. Where the agent signs a bill of exchange in his own name, he is personally liable on it. To avoid this, he should make it perfectly clear that he is signing merely as agent e.g. by signing "for and on behalf of" a named principal. **Section 165** provides for joint liability of an agent and principal to a third party. It states that where an agent is personally liable, a person dealing with the agent may hold the agent or principal or both of them liable.

Note a person who holds out as an agent shall not be entitled to require the performance of a contract, where that person was not acting on as an agent but on his or her own account. **(Section 168)**

A person who fraudulently represents himself or herself as an authorized agent of another person and induces a third person to deal with him or her as the agent, is liable to compensate the third person in respect of any loss or damage incurred, where the alleged principal does not ratify the acts. **(Section 167)**

Questions

- Explain the different rights and duties of the agent
- Explain the different rights and duties of the principal
- When can an agent be personally liable to a third party?

Termination of Agency

In this section we shall consider the different ways through which an agency relationship can cease to exist/can be terminated/come to an end and the effect of such termination. **Section 135** provides that an agency is terminated where;

a) Mutual agreement
b) A principal revokes his or her authority
c) An agent renounces the business of the agency
d) The business of the agency is completed
e) A principal or an agent dies
f) A principal or an agent becomes of unsound mind
g) A principal is adjudicated an insolvent under the law
h) The principal and agent agree to terminate
i) The purpose of the agency is frustrated.

a) Mutual agreement

An agency may be terminated by mutual agreement like any other contract. Since the agency relationship is normally created by an agreement between the principal and agent, it could similarly be terminated by both of them agreeing to end the relationship. This is so even if there is an agreement that the relationship will last for a given period or indeed should be irrevocable. The agreement as to termination may be contained in the contract creating the agency.

b) Revocation

Section 138 provides that revocation of the agent's authority by the principal shall not take place where authority is partly exercised, with respect to acts and obligations that arise from acts already done under the agency. Section 139 attracts compensation where an agency is revoked without reasonable cause contrary to an express or implied contract that the agency is to continue for a given period of time.

However, since normally an agency is created for the benefit of the principal, he is free at anytime to revoke it or to revoke any other authority granted to the agent. Such revocation may well constitute a breach of contract. The effect of this is that even if the revocation is effective, the principal may be liable in damages to the agent for breach of contract.

The principal must however give reasonable notice of such revocation to the agent before the actual termination of the agency **Section 140.** The revocation may be in writing or oral (**Section 141)** irrespective of whether the original agreement was contained in a deed. The principal must also take steps to inform the third parties of the revocation of the agency, otherwise he will continue to be held liable for the transactions entered into by the agent after the revocation of the agency. In Alexander ***Logios Vs Attorney General of Nigeria (1938)*** it was held that although the principal has a right of revocation, a third party with whom the agent had dealt was entitled to assume that the agency was still

subsisting since no step was taken to inform him that the agency had been revoked and warning him not to deal further with the agent on the principal's behalf.

The agent may be dismissed summarily if he is found guilty of any misconduct or breach of duty to his principal. No formality is required for revocation. Revocation is effective if the principal informs the agent or the third party personally (**Section 142)**. Revocation may be by word of mouth or by the principal intervening in the course of negotiation by the agent and informing the party concerned. Where the agency was created by written authority for instance by a power of attorney, the principal's revocation should also be effected in the same way.

A revocation may be implied where the principal withdraws all necessary facilities originally provided to the agent for proper execution of the agency. Thus, until the principal takes such action, the agent or third party is justified in assuming that the agency is still in existence.

c) Renunciation by agent

Renunciation by an agent occurs where the agent personally terminates the agency relationship between him and the principal. An agent has an implied power in all agency relationships to terminate the agency before it ends unless it is stated in the agency contract that the agency is irrevocable.
Similar to revocation by the principal, renunciation of authority by the agent may amount to breach of the agency contract by the agent and render the agent liable in damages to the principal.

In addition, the agent must give reasonable notice of renunciation of the agency to the principal. **Section 140** However, the agent may revoke his authority without notice where the principal is guilty of misconduct or breach of his duties to the agent.
Renunciation by the agent may be in writing, by word of mouth or simply refusing to act in accordance with the agency. **Section 141**

d) Closure of Business

A principal's closure of business terminates the agency relationship. However, a major question arises as to whether the principal is liable to pay compensation to the gent for his removal of the opportunity for the latter to earn commission. This however largely depends on the terms of the agreement and on the customary way of doing things in a given trade.
Agency may automatically be terminated in the following cases:

e) By performance

Where the agent's was appointed to carry out a particular/specific transaction, his authority will terminate when that transaction is accomplished e.g. the authority of an auctioneer engaged to sell specific property terminates after the sale of the property.

Effluxion of time

The agency will end when the period for which it was created expires. This will be so regardless of whether the task for which the agency was created has been carried out or not. Where no time is fixed by the parties as to how long the agency is to run, a reasonable time for the duration of such agency is implied and the authority will terminate at the end of such reasonable time. What is a reasonable time will depend on the facts of a particular case and the surrounding circumstances.

f) Frustration

If property, which is the subject matter of the agency is destroyed, or otherwise ceases to exist, the agency will automatically terminate. Such events include; instances where the subject matter of the agency is destroyed or otherwise ceases to exist. However in such case, regardless of the end of the agency, the agent may still be entitled to a commission or remuneration. Thus in the case of ***Turner Vs Goldsmith (1891) 1 QB 544***, the agent was employed on a commission basis by the principal to sell shirts. The principal's factory, at which the shirts were manufactured, was accidentally burnt down. It was held that the principal was liable to pay the agent a reasonable sum representing what he would have been likely to earn by way of commission.

g) Death of principal or agent

If either the principal or the agent dies, the agency is terminated. This is because the agency relationship is confidential and personal. The effect of death is that the rights of the parties are frozen at the time of death. In the case of ***Pool Vs Pool (1889),*** it was held that if the principal died, the agent could not recover expenses incurred after the death even if he had no knowledge of the death of the principal.

h) Insanity of the principal or agent

The insanity or other legal incapacity of the principal or agent will in ordinary circumstances terminate the agency. This is because the insane person can't validly contract so as to appoint or act as agent.

i) Bankruptcy of the principal or agent

Since agency is a personal relationship, when a person becomes bankrupt, his rights vest or are transferred to the trustee in bankruptcy. As a result, the agency is affected in this way and ceases to have a personal touch. Where the principal is bankrupt, the agency is terminated unless the agent's authority is irrevocable.

j) Agency by Necessity

Since the agent's authority under this kind of agency does not arise from any agreement but comes about as a result of circumstances which justify his acting as agent, it is clear that this form of agency is not terminated by agreement. It terminates when the necessity which brought it into being has disappeared.

Effect of Termination of the Agency Relationship

As Between the Agent and the Principal

On termination, the agent ceases to have authority to act on behalf of the principal. However, this does not divest the parties of the rights which may have accrued between them before the termination of the agency relationship. As such, the principal can sue for breaches of contract or negligence committed by the agent before the agency was terminated. And the agent can sue for remuneration earned before the revocation, and possibly for remuneration which would have been earned had the agency not been terminated.

As between the Agent and third parties

The third parties have to receive a notice of revocation of the agency. Unilateral revocation by the principal will not affect the third parties as long as the agent is acting in the usual way he ordinarily carries on his business, unless and until the third party has notice of the fact that the agent's authority has been terminated. However, once proper notice has been communicated, the gent ceases to have authority to bind the principal by any transaction which he may enter into with third parties after notice of revocation has been received. If the agent acts after such notice, he will be personally liable in respect of any such transactions, either because he must be taken to have contracted in his own behalf, or because he contracted as agent. In the latter case, he will be liable for breach of the implied warranty of authority.