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SCHOOL OF MANAGEMENT SCIENCES

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COMMERCIAL LAW

ACC307

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MODULE 1: SOURCES OF NIGERIAN LAW

Unit1. Primary source
Unit2. Secondary Sources
Unit3 Use of Source Materials

MODULE 2: THE NIGERIAN COURTS.
Unit1. Historical Development of the Court System in Nigeria.
Unit 2. Inferior Courts 1
Unit 3 Inferior Courts 2
Unit 4 The Appellate Courts
Unit 5. The State Courts, Federal High Court and The High court of the FCT, Abuja

MODULE 3: GENERAL LAW OF CONTRACT AND COMMERCIAL RELATIONS

Unit 1 Law of Contract

Unit .2 Law of Agency

Unit 3 Sale of Goods

Unit 4 Hire Purchase Transaction

Unit 5 Contract of Freight

MODULE 4

Unit 1 – Introduction to Taxation

Unit 2 – Unfair Competition.

MODULE 5: ARBITRATION

Unit 1 General Introduction
Unit 2 Types of Arbitration
Unit 3 Arbitrability

MODULE 6
PASSING OFF AND TRADE LIBEL.

Unit 1 Passing Off

Unit 2 Elements of Passing Off

Unit3 Defences and Remedies of passing off

Unit4 Trade Libel or Malicoius falsehood

MODULE 7 INTRODUCTION TO COMPANY LAW

Unit 1. Definition of Company Law

Unit 2. Types of Companies

Unit 3. Companies and different types of Business Organizations

Unit 4. Incorporation of Companies and its effect.

MODULE 8
UNIT 1: APPOINTMENT AND DUTIES OF DIRECTORS.
Unit 2 **REMOVAL OF DIRECTORS.**

MODULE 1

UNIT 1 SOURCES OF NIGERIAN LAW

CONTENTS

1.0. INTRODUCTION

The term "source of law" is used in various senses. In the first place, it means the ultimate origin of the whole body of a legal system, the origin from which the system derives its validity: from the electorate or voters, a special body the general will or the will of a dictator. Secondly, the term source of law is used to name the historical origin of a rule of law. For instance, the common law is a historical source of English law, for the origin of many rules of English law is traceable to the common law.

2.0. OBJECTIVES

At the end of this unit, you should be able to:
(i) Define the term" source of law".
(ii) Identify various sources of law;
(iii) Distinguish between statutory source of law and judicial source of law

3.0 MAIN BODY

3.1 Primary source

The primary source of law is the Nigerian Legislation and Statutes. This consists of other statutes and subsidiary legislations. Statutes are laws made by the legislator or a body so duly constituted and authorized to enact laws; while subsidiary legislations are also known as delegated legislations or statutory instruments and are usually entrusted to Ministers or Commissioners.
The primary source of law consists of Ordinances, Acts, Laws, Decrees and Edicts, depending on the status of the issuing authority or the circumstances of the prevailing political situation.

Ordinances were laws passed by the Legislative body during the colonial era. In most cases, such enactments were usually in the form of orders from the mother- country's parliament and were deemed to be applicable to the colonies concerned.

Self Assessment Exercise (SAE)1

Discuss briefly on legislation and statutes as the primary source of law.

3.2 Statutory Materials

Statutory materials as source of laws include statutes like Sale of Goods Act 1893,
Infants Relief Act 1874, Partnership Act 1890, Fatal Ancient Act 1846, Wills Act 1873, Statutes of Fraud 1877, Criminal Code Cap 77, The Nigerian Constitution 1999 [as amended] etc.

3.3 Judicial Material.

Judicial precedent is a source of law. Judicial precedent or case law consists of laws found in judicial decisions. A judicial precedent is the principle of law on which a judicial decision is based. It is the ratio decidendi or the reason for the decision. Other judicial material includes the Nigerian Law Reports. Nigerian law reports are reports of cases, wherever published or edited, decided by Nigerian courts. They include English law reports containing decisions of the Judicial Committee of the Privy Council given on appeal from Nigeria, a number of Local and foreign periodicals containing case reports and various reports including loose-sheet (unbound) series.

Self Assessment Exercise (SAE) 2

Apart from the statutory materials listed above, name other statutory materials known to you.
Self Assessment Exercise (SAE) 3
Discuss briefly what you understand by judicial material as a source of law.

3.4 Reasons For Studying Sources of Law

1. It affords an understanding of the various means by which the law governing the society is made or through which it comes into existence, e.g. through formal Legislative processes in parliament or through judicial precedents
2. It affords the means by which authoritative written materials are derived. This constitutes the literary source such as are represented by the statute books and the various compilations of the annual laws and the statutes in force including textbooks and monographs, with which a lawyer should be thoroughly familiar.
3. The study of the sources of law facilitates an understanding of the process by which law derives its validity. This refers to formal sources of law such as reflected in the constitution of a country and the activities of enacting bodies like the National Assembly.
4. A mastery of the sources of law of a given society also enhances an understanding of the historical factors that have influenced the evolution of the laws to such a direction as it had taken. By delving into such historical sources, it may be possible to trace the nature and content of the law with a view to arriving at the stuff of which the law was made. For instance: (i) The

historical fact that it is difficult, if not really impracticable to divest customary law and Islamic law from the culture, religion and traditions of the people.
(ii) Similarly, by mere fact of history that Nigeria, for example, evolved from a unitary state to a federal state under a colonial domination, which spanned over a hundred years.
(iii) The consequence of the great impact of English law on The Nigeria Legal System.
(iv) The fact of the multi-ethnic structure and political heterogeneity resulting in the plurality of laws and the concomitant complex legal system;
(v) The resultant proliferation of court to cater for the various dimensions exhibited in the ensuing polity.

4.0 CONCLUSION

The source of law means the origin from which the system derives its validity, be it the electorate, a special body, the general will or the will of a dictator. It also means the historical origin of a rule of law. Statutes books, law reports and textbooks are sources of law in any legal system.
Examples of legal sources of law are legislation and judicial precedents.

5.0 SUMMARY

In this unit, you have learnt about the: (i) Primary source of law;
(ii) Statutory materials as a source of law,
(iii) Judicial materials as a source of law
(iv) Reasons for studying the sources of law.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

Discus in detail why you think it is important or necessary to study the source of law of a given society.

7.0 . REFERENCES

Imiera, P. P. (2005). Knowing the Law FICO Nig. Ltd, (FMH) Lagos, Nigeria
Dada, T. O. (1998). General Principles of Law, T.O. Dada & Co. Lagos, Nigeria
Obilade, A.O. (1994). T

UNIT 2 SECONDARY SOURCES OF LAW

CONTENTS

1.0 INTRODUCTION

Under the second unit, you learnt about the primary source of law. In this unit , you will learn about the secondary source of law. Secondary materials as source of law include the legal textbooks, monographs, reference works, commentaries and treaties in law. An understanding of the content of these materials facilitates an effective research into the various aspects of law.

2.0 OBJECTIVES

At the end of this unit, you should be able to:
(i) Identify the secondary source of law;
(ii) Know the various materials falling or classified as secondary
(iii) Conduct a research on secondary source of law.

3.0 MAIN BODY

3.1 Secondary Sources of Law
Legal journals are the most current sources of law because of their frequency of publications, some being monthly, quarterly, half-yearly or bi-annual. They contain scholarly articles, commentaries, notes and comments on current legal problems.
In most cases, some of the contents of legal textbooks might have been published or serialized in journals earlier on. Legal journals that are of(iii) Conduct a research on secondary source of general nature may contain articles reflecting various subject background and topical issues in law. Like the law reports, legal periodicals may be broadly categorized into foreign and local titles. Periodicals oftentimes contain book reviews, seminars, and roundtable and conference announcements. Some of the standard foreign law journals as secondary source of law include, the Cambridge law journal; (C.L.J.), Harvard Law Journal (H.L.J.), Yale Law Journal (Y.L.J), Harvard law review (H.L.R). Remarkable advancement has been recorded in the area of local periodicals publishing. Some typical examples of academic and professional local journals as

secondary source of law include the Nigerian Law Journal (N.L.J), The Nigerian Journal of Contemporary Law (N.Y.C.L).

Self Assessment Exercise (SAE)1
Discuss briefly the secondary materials as source of law mentioned under
1.3.
3.2 Interviews, Periodicals and Newspaper Interviews granted by legal writers and jurists can also serve as a secondary source of law. This is because these legal luminaries are regarded as "authorities" and therefore their speeches or legal letters written by them are persuasive and form secondary source of law. Law libraries subscribe to newspapers and magazines not for the mere purpose of general reading. A deliberate effort is usually made by the law librarian to cut feature articles and notable news items and clip them neatly for storage. Such materials are thus arranged under broad subject headings in alphabetical sequence for easy retrieval. Newspaper and magazine clippings provide the most accessible current sources of research materials and therefore form secondary source of law. Articles in newspapers often cover wide areas of subject matters spanning every conceivable field of human endeavour. The only major snag about newspaper clippings as source of law is that the facts contained in a particular report or write-up may need to be further clarified or verified possibly from the writer or the maker for authenticity. This is not saying that newspaper articles and reports are not dependable as sources of law. This fact notwithstanding, newspapers are veritable sources of quick information on topical issues, which would take some time to be covered by authoritative textbooks.

Self Assessment Exercise (SAE) 2
Why do you think Newspaper writing on legal issues is veritable source of law?

3.3 Foreign Materials

Foreign materials as secondary source of law are those materials published outside the jurisdiction of Nigeria. They include treaties and conventions. These treaties and conventions consist of the various International agreements and understandings concluded by countries amongst themselves. Where the law-making bodies of the subscribing nations have ratified such treaties and conventions, they become binding. They serve as useful source of law especially in the areas of international law. Typical examples of treaties include Nigeria's treaties in force, 1971; consolidated treaty series, 1920 – 1946 and the United Nations Treaty Series 1946. These are all vital sources of international laws.
Other foreign materials include the following: Law Quarterly Review(L.Q.R), Current Legal Problems (C.L.P), International and Comparative Law Quarterly (I.C.L.Q); Modern Law Review, (M.L.R), Criminal LawReview (C.L.R), The Journal of African Law (J.A.L) and the African Journal of International Law (A.J.I.L.).

Digests also serve as foreign source of law. Digests are summaries of cases judicially considered. They differ from law reports in that they are mere paraphrasing of cases in very concise and understandable forms.
Encyclopedias and precedent books are also foreign sources of law. The Encyclopedia Britannica and Encyclopedia America cover wide subject areas of law, jurisprudence and legal theory, legal Biography etc. They therefore provide valuable secondary sources of law.

Precedent books contain samples of works done by legal authors for others to follow. Precedent books include the Butter worth's Encyclopedia of forms and precedents (5th Edition) which covers extensive areas of solicitor's work and the Atkin's court forms which deals with the forms, contents and procedure in civil matters. Other basic foreign materials include the famous Halsbury's laws of England and the Halsbury's statute of England. There are also standard compendia, which are of immense source of law. An example is the American Juris Secundum, which is an encyclopedic digest of American cases and statutes. basic foreign materials include the famous Halsbury's laws of England and the Halsbury's statute of England. There are also standard compendia, which are of immense source of law. An example is the American Juris Secundum, which is an encyclopedic digest of American cases and statutes. they also assist in the use of appropriate style, construction and framing of legal sentences to elucidate some precision, conciseness, simplicity, and unity all of which are salient hallmarks of any source of law. Legal dictionaries may either be exclusively in English or bi-lingual.

Examples of Standard English language legal dictionaries include Black's Law dictionary and Stroud's judicial Dictionary. There also exists some specialized dictionaries concerning specific subject areas as well as other topical issues –Bi- lingual legal dictionaries are most helpful for deciphering certain words or phrases especially Latin or French, which have been unavoidably used in a passage. Most of such words have Roman and Anglo – saxon origins and have become part of today's legal writing to drive home certain principles and legal maxims.

Examples of bi- lingual dictionaries may include English-French, English – Italian, English-Latin and English – Arabic Dictionaries.

(2) Words and phrase Defined

Another secondary source of law is the multi- volume work titled "Words and Phrases Defined". This covers wide areas of definition and interpretation of legal expressions. An example of such is the work of Onomade (1988) in guide to words phrases and doctrines in Nigeria law.

(3) Bibliographies and general references

Bibliographies serve as most useful source of law. A bibliography is a publication that lists the topic or titles of materials available in a given subject. The general arrangement is usually in alphabetical order by subject. Compilation of legal bibliography is the preserve of the professional law librarian. Typical examples of legal bibliographies, general or specific include Jegede's " Nigeria legal Bibliography" (1993), which is a detailed listing of invaluable source materials on the various aspects of the Nigeria law. General references usually at the end of a chapter in a book or at the end of an articles or paper assist in legal research by offering directives as to further sources of information. Such general references have become universally acknowledged sources of law and legal writing.

(4) Thesis, Dissertations and Technical Reports.

These are written research reports and authoritative pontifications in the area of law. They essentially have the characteristics of originality being the outcome of spirited research endeavours. These are listings and implications of such materials in aid of legal research. The lists are helpful in the preliminary aspects of legal research especially in literature searches and reviews, thereby forming secondary sources of law.

(5) Legal textbooks and Monographs

These constitute the bulk of the stock of a law library and can therefore be regarded as the most authoritative secondary sources of law. Legal textbooks consist of scholarly views, opinions, commentaries and authoritative expositions in certain subject area. Some legal series have become household names in academic and professional legal parlance.

An example is the common law library series made up of standard and quite authoritative legal textbooks. Other notable modern legal text writers include Lord Denning in the general aspects of law and practice.
Schwazenberger in the field of International Law, Street and Jolowicz on torts, Cheshire and Fifefoot on contracts, Roscoe pound, Hart and Fuller on Jurisprudence and legal theory, Margery and Wade on property.
Apart from citations in various academic papers, the opinions and views of some of the legal textbooks writers have been referred to with approval in the court proceedings, for instance, authoritative texts like Johnson's history of the Yoruba's, Coker's family property among the Yoruba's, obi's Ibo land law and Ajayi's History of west Africa have had to be cited in order to get to the root of certain prevailing customary practices in some societies.

(6) Government Publications.

Government documents have assumed great importance as source of law owing to the fact that they emanate directly from government sources, they are always considered to be very authoritative. For instance, any information contain in the Gazette are deemed to have been issued by authority and as such deemed to be authentic. This also applies, for example, to all documents and official publications emanating from and bearing the stamp of Her Majesty's is Stationary Office (HMSO) in the United Kingdom. Official publications include books, pamphlets, posters and pictorial items issued by the government printer. Such materials also consist of laws, regulations, directives, notices, decrees, edicts, bye – laws and important announcement relating to the state as contained in the gazette or an extra ordinary publication.
These Government publications are usually in various forms like gazette, reports of commissions of inquiries, white papers, reports of special tribunals, as constitutional bodies, as the Constituent Assembly, parliamentary publications including the "Hansard" and some other personalities in government.

4.0 CONCLUSION

You learnt that primary materials as source of law include such items as laws, or Acts collectively called statutes as well as law reports, law journals, digest and indexes, while secondary materials include the legal textbooks and monographs, reference works, commentaries and treatises on law.

5.0 SUMMARY

In this unit, you have learnt about other sources of law, falling under the secondary sources. These include the following:
(i) Books, pamphlets;
(ii) Letters and speeches;
(iii) Interviews, periodicals and newspapers;
(iv) Foreign materials; and
(v) Other sources.

6.0 TUTOR – MARKED ASSIGNMENT (TMA)

Attempt an appropriate classification of materials falling under primary and secondary sources of law and explain them briefly.

7.0 REFERENCES

Imiera, P. P. (2005), Knowing the Law FICO Nig. Ltd, (FMH) Lagos ,Nigeria
Dada, T. O. (1998), General Principles of Law, T.O. Dada & Co. Lagos, Nigeria
Obilade, A.O. (1994), The Nigerian Legal System, Sweet & Maxwell, Lagos,Nigeria

UNIT 3 USE OF SOURCE MATERIALS

CONTENTS

1.0 INTRODUCTION

Source materials are those major items or institutions used in carrying out legal research. These source institutions include the law libraries, the Nigerian Institute of Advanced Legal Studies and the Nigerian Institute of International Affairs. You shall learn about the library as a source material in legal research or about libraries as a major aspect of an educational organization.

2.0 OBJECTIVE

At the end of the unit, you should be able to use:
(i) The library;
(ii) The library catalogue;
(iii) Organization of the library ; and
(iv) Reference services.

3.0 MAIN BODY

3.1 Law library

Law libraries are very essential to the proper study of law. You should be familiar with the cataloguing and shelving systems used in the library to which you have access. Usually, university law libraries classify books by subject and shelve them in accordance with that classification. In order to enable you find easily books required by you, a law library usually has at least one general card catalogue. A general card catalogue lists all the books in the library. There is at least one card in the catalogue for each book. If only one card catalogue is available it may be arranged by author or by author and title or by subject. In an author – title catalogue, there are at least two cards for each book – one for the author and the other for the title of the book. There may be two general card catalogues – one on author – title catalogue and the other a subject catalogue. In addition to general card catalogue there are, usually, special catalogue

which list books of a special class. For instance, there may be a separate special catalogue for each of the following classes of materials: law reports, periodicals, legislation and microfilms.
In general, books other than textbooks may be classified for shelving
purpose as follows:
1. Legal periodicals
(a) Nigerian Legal Periodicals
(b) English Legal Periodicals
(c) Other Legal Periodicals arranged by country
2. Statute books
(a) Nigerian Statute Books
(b) English Statute Books
(c) Other Statute Books arrange by country
3. Law reports
(a) Nigerian law reports
(b) English law reports
(c) Other law reports arranged by country
4. Digests
(a) Nigerian law digests
(b) English law digests
(c) Other law digests arranged by country
1. Encyclopedia
2. Reference books
Generally, textbooks may be similarly divided into three classes, namely:
(1) Nigerian law textbooks;
(2) English law textbooks; and
(3) Other textbooks.

The textbooks within each group is usually arranged by subject. For e.g. textbooks on the law of contract are separated from textbooks on criminal law. There may be in a law a reserve section containing rare books in very high demand. Normally, books in a reserve section are not to be borrowed. Some reserve sections are open to only a restricted class of readers. A good study of the cataloguing, and shelving systems used in a law library is only a starting point in legal research.

Self- Assessment Exercise (SAE) 1

Briefly discuss the shelving of legal textbooks in the law library.
3.2 The Library Catalogue
Libraries are of various sizes ranging from those with very few books and other materials to the very large ones with several thousands of materials. The former are very easy to cope with. The contents of such libraries could be known by heart. But in the larger libraries, a formal organization of their contents is imperative to make their use beneficial and less frustrating.
The catalogue is therefore a record of materials held by the library ranging from books, magazine / journals, documents, theses, and dissertations to non-print media sources. The catalogues, therefore, is the key to the library holding since it contains entries, representing each material in the library. It is a vital tool to the use of the library because of the functions it performs.

Functions of the Catalogue

(1) The catalogue allows access to the collection and provides service to its users.
(2) It enables you to find a book or other library material if you know any of the following:
(a) Author's name;
(b) Title of the work;
(c) The subject;
(3) It enables you to know the following:
(a) All the works of a given author held in the library
(b) The editions of any work

Self Assessment Exercise (SAE) 2

Discuss the library catalogue and the functions if performs.

3.3 Organization of Library

(1) Acquisition Department
In the Acquisitions department books and other materials are acquired and processed. Books, pamphlet, government publications and audio- visual materials are received in the Acquisition Department. These materials may be acquired by purchase, gift and by legal deposit especially if the library has been made a depository by the government.
The National Library of Nigeria as you know receives three copies of all publications in the country because it is the legal depository for the whole country. The University of Lagos Library by the Edict of Lagos State 1973 is a depository library for the state. All publishers in the state must deposit three copies of their publications to the library. Some libraries in Nigeria are legal depository libraries for state and for some international organizations like WHO, UNESCO and ILO. Libraries receive gifts from the friends of the library and the gifts are processed in the Acquisitions Department. Self Assessment Exercise (SAE) 3
Why do you think that the Acquisitions Department of a library cannot be dispensed with?

3.4 Reference Services

The Reference Department of the library is very important in the library.
It is in this section that the library staff answers reference questions and also provides bibliographic services to the library patrons. Books in this part of the library cannot be borrowed like books in the open shelves; they can only be used or consulted in the library. Books that are housed in this part of the library have the inscription "REFERENCE ONLY, NOT TO BE TAKEN OUT OF THE LIBRARY".
The major characteristics of reference materials are:

(1) The materials are meant to be consulted in the library only;
(2) The library usually buys one copy or in rare cases two copies;
(3) They are not meant to be read from cover to cover. Users usually
[4]look for specific information. They contain factual information;
[5] They are housed in a separate section within the library;

(6) The arrangement of each material may be made to suit the peculiarity of that material. The arrangement in the dictionary is alphabetical chronological, for works on history, it could be chronological; and they are revised from time to time so as to keep abreast of recent developments.

Reference services in the library may involve the provision of personal assistance to you. The type of service required may be simple information in where to find books on a particular subject. They may be questions on directions within the library. At other times, the services may involve assistance on how to find the information on a subject which may not be well known to you.

Self Assessment Exercise (SAE) 4

Certain books cannot be taken away from the library. Name some of these books and the reason they are not taken away from the library. 3.5 Why do you use the Library?
The use of the library can be divided into three broad headings, namely: go to a library to borrow books. You also go to a library to consult reference materials, and for general study.
Let us assume that you have been given the author and title of a certain book, which has been assigned to you to read. You would like to borrow it from the library, because it makes you sometime to read it. The first thing you do when you go to a library is to check whether or not the book is in stock and be sure it is available for lending. The next thing is to locate the book where it is in the library. To locate a book in the library, you need to take the following steps:
Consult the right card catalogues. For example, if you know the name of the author of the book, you should consult author or name catalogue.
Author or name catalogue consists of the name of the author on cards arranged in alphabetical order according to the author's surname, institution or editor, by which the book is best known.

4.0 CONCLUSION

The library is very important. You should make constant use of it. A lot of information stored in the library can be of great benefit to you.

5.0 SUMMARY

At the end of this unit, you have learnt about:
(i) The use of source materials; the library;
(ii) The library catalogue;
(iii) Organization of the library;
(iv) Reference service in the library;
(v) That libraries are for lending out useful and relevant books, for consulting reference works and for getting recent information; and
(vi) For effective study, you must use the library.

6.0 TUTOR-MARKED ASSIGNMENT (TMA)

Relate the importance of the law library to a law student.

7.0 REFERENCES

Imiera, P. P. (2005). Knowing the Law FICO Nig. Ltd, (FMH) Lagos, Nigeria
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MODULE 2

THE NIGERIAN COURTS.

UNIT 1

HISTORICAL DEVELOPMENT OF THE COURT SYSTEM IN NIGERIA.

CONTENTS

1.0 INTRODUCTION

The primary and basic ingredient of the criminal justice system is the law setting up the courts without the law there will be no definitive system of criminal justice, in any query about the criminal justice system we must start with the enabling law. We must understand that the law or the courts as we have it today evolved over a period of time, and therefore it is appropriate to go into history and learn how these laws evolve, how the courts and the machinery of justice developed in Nigeria, this will give us a deeper and quicker understanding of the current status of the system. Secondly, we must appreciate the fact that the court system and the entire machinery of justice is not only complex but it is quite intricately interwoven and the ordinary man on the street may fund it most difficult to understand its workings and interdependence. The difference between the Customary Law and the criminal justice system, and how the law declares the well known rules of customary law as void and unenforceable may be beyond the understanding of a layman. Thirdly, most of the current institutions and the entire judicial system not only evolve from the received English laws adopted by Nigeria or indirectly imposed by the colonial masters, there has been the use of Customary Laws of the people which were not entirely discarded but allowed to be a part of the laws of Nigeria, here we must try to grasp some of these very

interesting developments in the legal system for a thorough and deeper understanding of its intricacies.

2.0 OBJECTIVES

By the end of this Unit you will be able to understand.
• The nature of the law before advent of colonialism.
• The type of judicial system if any in existence before colonization.
• The influence of colonization on the Customary Judicial System.
• The court system in Nigeria, today
• The different courts
• The hierarchy of courts today.

3.0 MAIN CONTENT

3.1 Judicial System before Colonization

Before the introduction of the British system of government and its courts in Nigeria, each tribe had developed their separate Customary Law that binds the people. In the northern States, the Emir as the Supreme Ruler with his advisers constitutes the Supreme Court of the land. They resolve land, family and inheritance disputes. In most cases, these cases are referred to the Alkalis, who are teachers on Islamic law. In the west, the Oba in council adjudicates on all issues brought before them, and they applied strict Customary Law in resolving the disputes. While in the East, the Elders in Council and the age grades help very much in settling disputes and in the application of Customary Law. All the tribes in Nigeria also have a set of Customary laws regulating criminal conducts in the society, known as customary criminal law which covers all known crimes in the society, like theft, rape, murder, manslaughter etc. and they all have powers within their communities to impose fines, imprisonment, banishment from the community, death etc; they also impose punishments like, public caning, public apology, offering of sacrifices or appeasing the gods. The Customary System of both civil and criminal adjudication are very well known to the whole community and observed.

SELF ASSESSMENT EXERCISE 1

Describe the customary system of criminal Adjudication in your community?

3.2 Customary Law

Though much of our laws today come under the influence of English law brought into Nigeria as a result of colonization. Before the advent of colonization there is what we call customary law. (As we learnt above).Customary law has been described as body of law that evolved from the custom of the native people. As opposed to the so called civilized countries, whose laws are normally erected by a sovereign or supreme legislature, customary law simply evolved from a pattern of behavior of the people,(accepted norms of behavior) As soon as the people accept a particular norm it is clothed in legal validity, while those that have not been adopted or once adopted but has been abandoned will no longer qualify as a customary law.

The next question is the issue of sanction, all civilized laws are backed by sanctions, where there is a breach of customary law, the people themselves normally will collectively determine the appropriate sanction. In some societies in pre – colonial Nigeria, there are Chiefs and Obas, both in the North and Western Nigeria, who have been authorized by the people to serve as Judges, in most cases the Obas or Chiefs will normally sit in Council and hardly ever determine any issue without consultations with the elders within the community, in effect all sanctions are collectively determined and the type and gravity of the sanctions for particular offence is carefully noted, as a guide in case of future breach. The sanction for an offence is therefore uniform and regular, though each case is examined and determined or its own merit. Customary law has a distinctive characteristic of being totally unwritten and only known to its subjects. It is not all the practices and customs that have the force of law, many practices are merely complied with without any fear of being sanctioned when there is a breach, while some that touches the life and well being of the community or affects the well being of the community is normally backed with sanctions. The court system though seemingly rudimentary is quite effective, and there are also local police attached to the kings court to enforce the decisions of the courts, while the council of elders and other family heads also cooperate to ensure strict observance to the sanctions.

SELF ASSESSMENT EXERCISE 2

Discuss the customary criminal justice system in any indigenous community in Nigeria?

3.3 The Courts in the Colonial Era In the year 1900 there was a change of sovereignty in the territory now called Nigeria. Hitherto, the societies are governed by themselves and their customs. But colonization brought the British in Nigeria as the supreme power having complete jurisdiction over the country. The obvious result is that the English laws were imported and applied in Nigeria, while simultaneously the British engaged in making laws for the good governance of Nigeria. The result is drastic, in the words of Lord Dunedin, "in all cases (of change of sovereignty) the result is the same. Any inhabitant of the territory can make good in municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized such rights as he had under the rule of predecessors avail him nothing".
The effect of the above is tremendous on the customary law. In the first instance, Native law and custom is recognized as an established law, though the law must be differentiated from the mere practice having no legal status.
It also follows that upon being established as the law of the people, the whole apparatus of Coercion of the state is made available to enforce the law. The fresh problem is proof of the relevant customary law and its establishment.
The Native courts established by the English colonial masters were enjoined to apply native law and customs and to put the laws into writing. This power was transferred to native Authorities in 1945. Such rules once made and approved have the force of law.
Though the British colonialists allow application of the customary law, the law must still have to pass certain tests before it could be applied, it was these tests that conclusively changed the form and content of customary law. The tests are;

Repugnancy to natural justice, equity and good conscience Incompatibility In the field of criminal law, initially the native courts were allowed to administer the customary criminal law

alongside the criminal code in 1959, the Western and Northern Regional Governments in Nigeria abolished all criminal jurisdiction under customary law unless the customary offence with local enactments.

In the field of criminal law, initially the native courts were allowed to administer the customary criminal law alongside the criminal code in 1959, the Western and Northern Regional Governments in Nigeria abolished all criminal jurisdiction under customary law unless the customary offence may have been embodied in a law made by a local council or a native authority.

In 1960, the Nigerian Constitution put the final nail on the coffin of customary criminal law, when it declares that, no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is presented in a written law.

3.4 British Courts

In Southern Nigeria before the amalgamation of the country, a single court named Supreme Court served the region. The Supreme Court consisted of the Chief Justice and a small number of pursne judges.

The court operated as a court of law and it sometimes apply the doctrines of equity. As a court of law, its powers are unlimited. It operates as 3 organs:

Full Court: Appeals from the divisional courts normally go to the full court, sitting with the Chief Justice as the presiding judge, with at least two other judges of the Divisional courts.

Divisional Court: Southern Nigeria was then divided into divisions, and each operates with a judge of the supreme court exercising the original jurisdiction of the supreme court of and also serves as court of Appeal for native and District Courts.

District Courts: The Administrative Officer of each district is the ex-officio commissioner of the Supreme Court, in that capacity, he constituted a court called the District court charged with limited jurisdiction. It was an inferior court.

After amalgamation of the country, there was established 3 main types of court,

(1) The Supreme Court

(2) Provincial Courts and

[3] Native courts

From 1933 – 1944, after reforms carried out by Sir Donald Cameron the then Governor of Nigeria, the following courts was established in Nigeria:

-The Native Courts

-The protectorate courts later replaced by the High Courts and amalgamation court.

-The Supreme Court

-The West African Court of Appeal

3.5 Court System under the Federal Constitution Upon coming into force of the 1954 Federal Constitution, each region (Western, Northern and Eastern Regions of Nigeria) was empowered to establish its own court. By virtue of the Regional Constitutions, each established its High Court, Magistrate court, customary or Native courts as the case may be Appeals lie from the High Court of a Region to the Supreme Court.

The Privy Council still remained the highest court in the land until 1963 when the constitution of that year was enacted and Nigeria became a Republic.

From the history of the court system in Nigeria and the development of our laws, it is noteworthy that the Regional Laws draw their source from the same received laws and the Federal enactments, most of the laws were renamed as state laws. The decisions of the Regional High Courts are entitled the greatest weight in other regions especially where the law remains the same. In criminal procedure, there is almost uniformity in the South, while in the North, criminal procedure code 1960 has been enacted to replace the criminal procedure code for that region, which in some respect differ from the Southern criminal procedure Act.

SELF ASSESSMENT EXERCISE 3

Trace the origin of the courts system in Nigeria from the colonial era to date.

4.0 CONCLUSION

It is essential to realize that the present court system and the entire legal system developed over time and several factors have impacted on its development, these include our customary law, the received English laws and the constitutions, as the machinery of justice in Nigeria develops so also the political development in the polity encourage the expansion of the legal system.

5.0 SUMMARY

We have traced the evolution of the legal system and have seen that our current courts system originate from the customary system but gradually replaced by the colonial imported laws to enable a proper functioning of their own perception of law and subject the customary law of the people to tests of repugnancy in order to be acceptable in the English introduced courts.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the evolution of the court system in Nigeria?
2. Explain the repugnancy test on customary law?

7.0 REFERENCES/FURTHER READING

Park A.E.W. (1963) - The Sources of Nigerian Law
Dr. Mojeed O.A. Alabi (2002) - The Supreme Court
Femi Soyeju (2005) Rudiments of Nigerian Law

UNIT 2 INFERIOR COURTS IN NIGERIA

CONTENTS

1.0 INTRODUCTION

It is of great importance to closely examine the court system with a view to know exactly the constitutional and other legal provisions of these courts.
Here we must learn that courts differ both in structure, purpose, jurisdiction, personnel, and powers. Court classifications are generally made along these lines. Whether they are inferior or superior, or whether they are courts of Record or not. You would have noticed that lawyers do wear only suits in some courts and wear wig and gowns in others. In this unit we shall examine the class of courts better known as inferior courts.

2.0 OBJECTIVES

It is hoped that at the end of this unit you should be able to
• Mention all inferior courts.
• Discuss and explain customary courts.
• Discuss the jurisdiction and powers of the magistrate courts.

3.0 MAIN CONTENT

3.1 Inferior Courts
There are four types of courts that could be regarded in Nigeria as inferior courts, while two, though strictly could not be regarded as a court but play important role in the administration of Justice in Nigeria.
We may hasten to explain from the onset, in Nigeria, we have superior and inferior courts of Record. Court of Record simply means courts that record
its judicial acts and proceedings in writing or record book for permanent preservation and memorial.
We must note however that all courts in Nigeria must record their proceedings in the Record Book of the court. The inferior courts of Record are therefore courts that are established by laws other than the constitution of the Federal Republic of Nigeria. They are inferior because their judgments or decisions are not binding on any court, and is not binding on the court itself, its

decisions are not reported in any law reports, and it's proceedings are described as "summary", and so also its jurisdiction is also described as summary jurisdiction. It is regarded as summary because it may adopt its own procedure to come to a very quick decision and with limited or abridged procedural rules. For instance the litigants need not file any pleadings.
While superior courts of Record are courts established under the Nigerian constitution and they have unlimited jurisdiction in terms of awards they can make. They also have the power to commit anybody for contempt committed either in the face of the court or out of the court. While the inferior courts of record are limited in terms of awards and types of matters they can handle. They are very important in our judicial system as they handle a substantial portion of disputes locally, and about 75% of the matters both civil and criminal matters are settled at this level.

3.2 Area Courts/Customary Courts

Closely related to this is the issue of service of processes the Federal Legislature has enacted a uniform regulations on service of processes. The Sheriffs and Civil Process Act allows the Order of judgment of High Court of a state to be registered in the High Court of another State and so executed by the bailiffs of that state. Though the Customary Courts judgments are exempted from the Sheriffs and Civil Process Act, yet there is a reciprocal enforcement of Customary Courts judgment in each State. From the foregoing it is clear that though there are State Courts in Nigeria, they are merely for easy administrative purpose, the State Courts still exists within a united hierarchy of court in Nigeria.

THE STRUCTURE SINCE THE SECOND REPUBLIC TO DATE

In this section of this paper it is intended to examine the present Court structure, by examine the courts within the context of Machinery of justice in Nigeria.

THE INFERIOR COURTS

1. Native (Area) and Customary Courts

The Native and Customary Courts in respective states are established under the Customary Courts Law for the respective States. Each Court is established not directly by the enabling Statute but by Warrants issued by the enabling authority. In the Eastern States the Commissioner for Justice and in Lagos State the Attorney-General and Commissioner for Justice and in the Northern States by Warrant by the Chief Judge of the State.
The warrant defines the jurisdiction, powers, and quorum of the court, it established, and its provisions in that behalf are conclusive. Area and Customary Courts are the responsibility of the Local Government Council. Customary courts members including the Presidents are appointed by the Customary Courts Judicial Service Committee for the State.
Qualification for appointment are as follows:
i. He is literate in English Language
ii. He possess at least the Primary School Leaving Certificate or its.
Equivalent and suitable experience and
iii. He is a native of the area of jurisdiction of the Customary Court.
A Customary Court has both civil and criminal jurisdiction. In certain civil matters the Customary court has unlimited jurisdiction i.e.
a. Matrimonial cases and other matters between persons married under

Customary law, that is matrimonial causes and related matters under customary law; and
b. Suits relating to the guardianship and custody of children under customary law.
It has limited jurisdiction in (1) causes and matters relating to inheritance upon intestacy and the administration of intestate estates under customary law, and (2) other cases under customary law – provided the subject matter of the case does not exceed N100.00.
The Customary Court would exercise criminal jurisdiction in the following cases:
a. Any offence against the provisions of an enactment, which expressly confers jurisdiction on the court.
b. Offences against rules and bye-laws made by Local Government
Council or having effect as if so made under the provisions of any enactment and in force in the area of jurisdiction of the court.
c. Contempt of court committed in the face of the court.

SELF ASSESSMENT EXERCISE 1

Discuss the civil and criminal jurisdiction of the Customary Court?
3.3 Magistrate Courts
Magistrate Court are established and governed by the laws of the various States.
In this paper, we will use Lagos State Magistrate Courts Law (cap 127) which fairly represents all the others as a case study. (Amended as Lagos State Magistrate Courts Law 2009).
COMPOSITION
In Lagos State the Chief Magistrates Court are graded, Chief Magistrate Grade 1,2; Senior Magistrate Grade 1,2; Magistrate Grade 1,2 and 3. A Court Registrar with the following duties serves every Magistrate.
a. To attend at such sittings of the court as the Magistrate shall direct.
b. To prepare or cause to be prepared Summons, Warrants, Orders, convictions, recognizes, writs of execution and other documents and submit the same for the signature of the magistrate.
c. To make or cause to be made copies of proceedings when required to do so by the magistrate and to record the judgments, convictions and orders of the court;
d. To receive or cause to be received all fees, fines, and penalties, and all other moneys paid or deposited in respect of proceedings in the court and to keep or cause to be kept accounts of the same, and
e. To perform or cause to be performed such other duties connected with the court as may be assigned to him by the Magistrate.
Every Magistrate is ex-officio Justice of the Peace in Lagos State and exercises all the powers of a Justice of the Peace. The Judicial Service Commission is empowered to appoint a justice of the peace as a Magistrate by a Notice Published in the State Gazette.
The Magistrate or Justice of the Peace has powers to:
1. Issue summons and warrants for the purpose of compelling the attendance of accused persons or persons as witnesses before the court;
2. Issue summons and other process in civil causes and matters;
3. Remand to the court persons who are accused but not convicted of crime; or admit them to bail,
4. Issue search warrants,
5. Take solemn Affidavits and Statutory declaration and

6. Administer any oath which may be required to be taken before him in the exercise of any of the jurisdiction and powers conferred upon him by law.

ORGANIZATION

The whole State is divided into districts called Magisterial Districts. The Chief Judge of the State pursuant to powers conferred upon him to divide the state into Districts has by Lagos State Magistrate District Directions divided the whole State into 10 Magistrate Districts. These are:

1. Lagos Magisterial District.
2. Surulere Magisterial District.
3. Yaba Magisterial District.
4. Apapa Magisterial District.
5. Mushin Magisterial District.
6. Ikeja Magisterial District.
7. Badagry Magisterial District.
8. Ikorodu Magisterial District.
9. Epe Magisterial District.
10. Agege Magisterial District.

In practice today, Mushin and Agege Magisterial District are yet to be fully operational, and are still under Ikeja Magisterial District, while Surulere is still under Yaba Magisterial District.

JURISDICTION

Every Magistrate shall have jurisdiction throughout Lagos State. A magistrate's civil and criminal jurisdiction shall extend over any territorial water adjacent to the district in which for the time being he is exercising jurisdiction as well as over inland waters whether within or adjacent to such district. The Chief Magistrate Grade 1 shall have and exercise jurisdiction in civil causes or matters in all personal actions whether arising from contract or from tort, or from both where the Debt or Damage claimed is not more than N25, 000.00. The Magistrate has until the Recovery of Residential Premises Edict, power over landlord and tenant matters.

However, they could still adjudicate on landlord and tenant matters where the tenancy is over commercial premises only subject to the N250, 000.00 limits. This has been discovered lately to be too low and has divested the Magistrate Court of jurisdiction in a lot of minor cases that could easily have been handled by them, thus leading to congestion of the High Courts.

By virtue of a new Law, Lagos State Magistrates Court (Increase in Civil jurisdiction Amendment Notice) 2001 the monetary jurisdiction of the various cadres of magistrates courts in Lagos State has been increased to amounts ranging from N25, 000.00 in the case of Magistrate grade 2 to N250, 000.00 in the case of Chief Magistrate grade1, the commencement date is 1st May 2001. Furthermore, this position had to the upgrading of the jurisdiction of the magistrate court in Lagos State to N10,000,000.00 (Ten million naira) only. See the Lagos State magistrate courts Law 2009. By virtue of this law, S.6 provides that all magistrates have equal powers, authority and jurisdiction under the law in effect the former categorization has been repealed. The criminal jurisdiction of the magistrate is only limited by the law that imposed the minimum and maximum punishment for the offence. The magistrate cannot sentence a person to a prison term of more than fourteen(14) years. (See S.29M.C.L 2009). The Magistrate shall observe and enforce the observance of every Customary Law which is applicable and is not repugnant to

natural justice, equity and good conscience or incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of customary law. It should be noted that all residents of Lagos State are subject to the jurisdiction of Magistrate Courts.

A magistrate is vested with powers to try criminal and civil cases summarily. Summary trial means with dispatch with minimum of formalities. Apart from capital offences, the magistrate may try any criminal matter provided the accused is properly given the option to choose summary trial before the magistrate or prefer his matter before the High Court.

The magistrate court lacks jurisdiction over land, matrimonial and succession matters. The Magistrate Court entertains appeals from the Customary Courts, and the Magistrate sits as an appellate court over appeals from the customary courts of the State.

THE ROLE OF MAGISTRATES IN THE JUDICIAL SYSTEM

They act as the bridge between the Customary Courts and the High Court; the Customary Courts are concerned essentially with the administration of customary law and local enactments. Their personnel are untrained, and are generally non suitable for the enforcement or interpretation of serious laws but inconsequential enactments. The High Courts on the other hand are manned by lawyers and the procedure very elaborate, strict and formal. The personnel are highly trained individuals both in law and procedure. Thus, there is an obvious gap that must be filled by an intermediate court having a personnel neither completely untrained nor over-exalted, and a procedure which would be both simple and fast. Magistrate, also play very important role in maintaining peace and order in the society; as a peace officer, they also have powers to prevent breakdown of and order in the society; they also administer oaths and take affirmations and declarations. Their role is so vital to the administration of justice considering the fact that majority of the criminal cases going before the High Courts are first charged before the magistrate court on a holding charge while proper charges are being preferred for the High Court. The police has no right of audience in the High Courts, the intermediate period, between the arrest and investigation and arraignment before the High Court which is normally proceeded by the D.P.P.'s report, is taken care of by the matter being taken before the magistrate on a holding charge.

DISTRICT COURTS

The District Courts are magistrate courts exercising only civil jurisdiction in the Northern Nigeria. They are graded Senior District judge, District Judges grade I, II and III corresponding to the grades of magistrates. They have the same organization, and the magisterial districts serve as he districts for the district courts. The jurisdiction of the district courts is the same as the civil jurisdiction of magistrates in the rest of the country.

SELF ASSESSMENT EXERCISE 2

Examine the role of magistrates in the judicial system.

4.0 CONCLUSION

Clearly, the inferior courts are very important courts in the judicial system as they are not only specialized, but they do handle the bulk of the matters affecting the citizen, as all minor issues are resolved at this stage. They also assist in decongesting the superior courts of record, and serve as court of first instance to the courts of record.

5.0 SUMMARY

We have examined the inferior courts of record; we have five main courts, they are;
1. Area / Customary Courts
2. Magistrate Courts
3. District Courts
4. Juvenile Courts
5. Coroners Courts and;
6. Justice of the Peace, though not strictly a court, but plays a very important role in administration of justice. We have seen that each was established under a specific law, having its own personnel, role, duties and limited jurisdiction.

6.0 TUTOR - MARKED ASSIGNMENT

1. What do you understand by the term inferior and superior courts of Record?
2. Discuss the essential difference between a customary court and magistrate court.

7.0 REFERENCES/FURTHER READING

Children and Young Persons Law cap. 25, Laws of Lagos State.
Magistrate Courts Law cap. 127 Lagos State.
Lagos State Magistrate Courts Law Notice No. 51 vol. 42 of 2009
Customary Courts Law cap. 34, Lagos State.
Coroners Law cap. 31, Law of Lagos State.

UNIT 3 INFERIOR COURTS IN NIGERIA 2

CONTENTS

1.0 INTRODUCTION

In this unit we shall look into the legal importance of three main inferior courts in Nigeria, they are Juvenile courts, coroner's inquest and Justice of the peace. They are specialized courts within the machinery of justice, with specific legally recognized specialized areas of jurisdiction.
The only common denominator is that they are manned by magistrates. They cater for a large number of cases that if allowed to be merged with the regular magistrate court will overwhelm the court that is already congested.
At end of this unit you will understand the following: -

2.0 OBJECTIVES

- The importance, jurisdiction and powers of the Juvenile court.
- The specific role and duties of coroner's court.
- The importance and duties of Justice of the Peace.

3.0 MAIN CONTENT

3.1 Justice of The Peace

There are two classes of justices of the Peace viz. ex.-officio and ordinary justices of the peace. The justice of the peace need not be a magistrate in the first instance, he may be appointed as justice of the peace by publication in the state Gazette by the Attorney-General of the state. No qualification is legally required for appointment, but in practice a person to be appointed must reside in the area to which he is to be appointed and be worthy. The justices of the peace, are mostly Chiefs, retired top administrative officers and police officers considered capable enough to be entrusted with some of the judicial powers of a magistrate. A justice of the peace has the powers, rights and duties of a magistrate to:
i. Issue summons and warrants for the purpose of compelling the attendance.
ii. Issue writs of summons and summonses in civil cases.
Remand to a magistrate's court persons who are accused, but not convicted to crime, or to admit them to bail. Issue search warrants.
Take solemn affirmations and statutory declarations. Administer any oath, which may be required to be taken before him in the exercise of any of the jurisdiction and power confirmed upon him by law.
Power to preserve peace, to suppress riots and affrays, and to disperse all disperse all disorderly and tumulus assemblies, and for any of these purposes call in the aid and assistance of police officers and others, who shall solely be bound to obey all such lawful commands.
Their main concern is with conservation of peace. In doing this he is entitled to call in the aid of the assistance of police officers. And who shall be bound to obey all such lawful commands. A justice of the peace does not act as a court and do not conduct trials.

SELF ASSESSMENT EXERCISE 1

Mention 5 duties of the Justice of the peace.

JUVENILE COURTS

The first enactment of Juvenile Courts in Nigeria is the Children and Young Persons Ordinance 1943. This has been re-enacted and modified by the different States. A Juvenile court is established in every magisterial district in each state. The court is constituted by a magistrate sitting with such other persons as the Chief Judge of the state may appoint. The Magistrate is the Chairman of the panel, with at least two other persons selected by the magistrate from time to time. The magistrate may sit alone where no panel members have been appointed or where no member of the panel turned up at any sitting of the court and the magistrate thinks it inexpedient to adjourn the proceedings.

Though the Juvenile Court is part of the magistrate court, in order to avoid contamination, it must sit in a separate place or at different times from those in or at which the ordinary sittings of the magistrate courts are held. A Juvenile Court has jurisdiction to try all types of offences committed by the child i.e. children under the age of 14 and young persons i.e. persons between the age of 14 and 18 years of age. If jurisdiction has been assumed on the basis of the age, the trial may go on, even if it was later discovered otherwise. A juvenile court cannot convict or use the word convict in its sentence and no child shall be ordered to be imprisoned. A juvenile court has power to commit a juvenile, by means of a corrective order, to approved institution, or a remand home, or to the care of any fit person who is willing to undertake his care, or to the supervision of a probation officer for a period not exceeding 3 years, or order his parents or guardian to pay a fine or enter into recognizance to exercise proper care and guardianship, or to order the juvenile to be caned. But a juvenile court must not sentence a juvenile to death or imprisonment, though a young person may be imprisoned if he cannot be suitably dealt with in any other way.

SELF ASSESSMENT EXERCISE 2

Discuss the importance of Juvenile court in the judicial system.

CORONERS COURTS

The first law on coroners' court was the Coroners Ordinance 1944. Subsequently each region in Nigeria re-enacted their own law, and presently each state of the Federation has its own Coroners law. A coroner's inquest may not strictly be called a court of law but every magistrate is permitted by law to hold inquests under the coroner's law.

It is the duty of a coroner to hold an inquest whenever there is lying in his district the body of a deceased person who died a violent or unnatural death or a sudden death of which the cause is unknown or in a place or under circumstances which in the opinion of the coroner makes the holding of an inquest necessary and desirable.

An inquest must likewise be held in all cases of death in a lunatic asylum or of prisoners or persons in police custody. A coroner's court is merely a fact-finding body, concerned with the ascertainment of the identity of the deceased and of how, when and under what circumstances he met with his death. A coroner does not commit anyone to trial even where it is discovered that such a person caused the death of the deceased. However, the coroner must stay his inquest, if he finds that criminal proceedings have been or about to be instituted against any person in respect

of the death in question; or he comes to the conclusion that criminal proceedings ought to be instituted against such persons.
The coroners inquisition including the depositions and the recognizance's of the witnesses, if any, shall be transmitted by the coroner with all convenient dispatch to the judicial division of the High Court in which the inquisition took place and the registrar of such division shall take charge of such proceedings. Where the High Court upon examining the coroner's inquest proceedings, in order to satisfy itself of the correctness, legality or propriety of any finding or verdict and as to the regularity of such proceedings where it is not satisfied my Direct the inquest to be reopened for the taking of further evidence, or for the inclusion in the proceedings thereof and consideration with the evidence already taken, if any evidence taken in any judicial proceedings which may be relevant to any issue determinable at the inquest, and the recording of a fresh verdict upon the proceedings as a whole;
Quash the verdict in any inquest substituting therefore some other verdict which appears to be lawful and in accordance with the evidence mentioned above.

3. Quash the whole inquest, with or without ordering a new inquest.
When may the High Court reverse the findings of the coroner's court.

SELF ASSESSMENT EXERCISE 3

4.0 CONCLUSION

Evidently, the Juvenile courts is a court that caters for the specific need if the juvenile offender, whose aims is totally different from the regular courts.
The attitude of the court is to strive as much as possible to treat the Juvenile offender with a view of assist him in his rehabilitation and reintegration into the society.
The procedure is largely summary and informal, and all concerned are notified including the parents and guardian and all efforts are mode to ensure that the juvenile is not lost into the world of crime. The coroner's inquest also serves to investigate and determine the cause of death of people suspected to have died mysteriously. No other court has this function, and the justice of the peace is also empowered to assist in the maintenance of peace of order in the society.

5.0 SUMMARY

The Juvenile court is administered by the magistrate to cater for the specific needs of the Juvenile offender. The coroner's inquest is to look into the cause of deaths of people who died in circumstances that the cause of death create to be inquired into, whole the justice of the peace are empowered to help in the maintenance of peace in the society.

6.0 TUTOR – MARKED ASSIGNMENT

1. Discuss the role and jurisdiction of the Juvenile courts.
2. Compare and contrast, the role and duties of the coroner's inquest and justice of the peace.

7.0 REFERRENCES/FURTHER READING

UNIT 4 THE APPELLATE COURTS IN NIGERIA

CONTENTS

1.0 INTRODUCTION

The superior courts of record in Nigeria could be classified into Federal and State Courts. The Federal courts consist of the following:
1. The Supreme Court of Nigeria
2. The Court of Appeal
3. The Federal High Court
4. The High Court of Federal Capital Territory
5. The Sharia Court of Appeal of Federal Capital Territory Abuja.

The state courts consist of the following:
1. The High Court of a State
2. Customary Court of Appeal of a State.

In this unit we shall examine the courts in the hierarchy of courts in Nigeria starting from the highest.

2.0 OBJECTIVES

At the end of this unit, you should be able to:
• Explain the jurisdiction, role, importance of the Supreme Court.
• The jurisdiction, appellate powers and structure of the court of Appeal.
• The different types of High Court and their powers.
• The role of the Sharia Court of Appeal and Customary Court of Appeal.

3.0 MAIN CONTENT

3.1 SUPREME COURT OF NIGERIA

The law governing the Supreme Court derives from the following sources:
The Constitution of the Federal Republic of Nigeria 1999. Which establishes the court, and prescribes the bulk of its jurisdiction and the method for the appointment and dismissal of judges.

The Supreme Court Act.
The Supreme Court rules made by the court.

COMPOSITION AND ORGANIZATION OF THE COURT

The constitution of the Federal Republic of Nigeria provided for a Court consisting of the Chief Justices of Nigeria, and such number of justices of the Supreme Court not exceeding twenty-one as may be prescribed by an Act of the National Assembly.
The number of Justices of the Supreme Court had been increased from the former limit of 10 to 19 the Chief Justice of Nigeria shall be appointed by the President on the recommendation of the national Judicial Service Commission subject to confirmation by the Senate. The appointment to the office of Chief Justice of Nigeria is therefore not at the discretion of the President, but is based on the recommendation of the National Judicial Service Commission subject to the confirmatory power of the Senate. The minimum qualification of the Justice of the Supreme Court is fifteen-year post call as a legal practitioner. The Supreme Court for the purpose of exercising jurisdiction over any matter shall be duly constituted if it consists of not less than five Justices of the Court, while for the purpose of exercising jurisdiction over appeals under the Fundamental Human Rights Provisions or in the exercise of its original jurisdiction the court shall be properly constituted when Seven Justices sit.
The Supreme Court now sits at Abuja the Nations Federal Capital. The court is served by Registrars and other administrative personnel; the head of the administrative section is the Chief Registrar of the Supreme Court.

JURISDICTION

The Supreme Court is the final court of Appeal in Nigeria and the decision of the court is final and is binding on all parties. In effect, there is no appeal from the decision of the court. The court has both original and appellate jurisdiction. As we have discussed above, the Supreme Court has original jurisdiction over any dispute between the Federation and a state, or between the federation and a state, or between states if and in so far as that dispute involves any question (whether law or fact) on which the existence or extent of a legal right depends. In addition, the National Assembly may add, not detract from the original jurisdiction of the court, where the dispute is between the Chief executive of a government and another, or between the Arm of Federal Government and a State. Adefarasin J, in the case of Governor of Kaduna State v the President of Nigeria. In trying to answer the above stated as follows:
“It seems to me that S 212 is designed as well to cover only dispute between one government and government. I consider also that any dispute raises question of law or fact touching upon a legal right”.
The Supreme Court cannot exercise original jurisdiction over criminal matters.

APPELLATE JURISDICTION

The Supreme Court, to the exclusive of any other court in Nigeria has jurisdiction to hear and determine appeals from the Court of Appeal.
Appeals lie as of right from the decisions of the Court of Appeal to the Supreme Court in the following cases: -

a. Where the ground of appeal involves questions of law alone, decision in any civil or criminal proceedings
b. Decisions in any civil or criminal proceedings on questions as to the interpretation or application of this Constitution;
c. Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter iv of the Constitution has been is being or is likely to be, contravened in relation to any person;
d. Decisions in any criminal proceedings in which any person the Court of Appeal have confirmed a sentence of death imposed by any other court.
e. Decisions on any question: -
. Whether any person has been validly elected to the office of President or Vice-President under the Constitution.
ii. Whether the term of office of President or Vice-President has ceased.
Whether the office of President or Vice-President has become vacant and
f. Such other cases as may be presented by an Act of the National Assembly. In all other cases, appeal from the decision of the Court of Appeal to the
Supreme Court shall be with the leave of the Court of Appeal or the Supreme Court.
Appeals can only lie from decisions of the Court of Appeal to the Supreme
Court. And from no other Court in Nigeria. The law after specifying the cases where appeals may lie to the court as of right in S 233 (2) went on to state that all other cases must obtain leave of Court, before appeal may be entertained, the leave must first be sought from the Court of Appeal before the party may apply to the Supreme Court. All interlocutory appeals fall within this category. Appeals must also be by the parties to the appeal or at the instance of any other person interested in the matter.
And in the case of criminal proceedings at the instance of an accused person or the Attorney-General of the Federal or state. It is noteworthy, that only the National Assembly may extend the cases where appeals may lie as of right to the Supreme Court.
No State may extend the appellate jurisdiction of the Supreme Court, and there is nothing in S 233 (2) (f) that suggests such.

PRACTICE AND PROCEDURE

S236 empowers the Chief Justice of Nigeria to make rules for regulating the practice and procedure of the Supreme Court. Pursuant to this, the Supreme Court rules had been made to aid the internal organization of the machinery of justice at the Supreme Court.

SELF ASSESSMENT EXERCISE 1

Examine the appellate jurisdiction of the Supreme Court.

3.2 THE COURT OF APPEAL

The court of Appeal is established under S237 of the 1999 Constitution and is the next Court in the hierarchy of Courts in Nigeria. Other laws are the Court of Appeal Act and Court of Appeal Rules.

COMPOSITION AND ORGANIZATION OF THE COURT

The Court of Appeal consists of the:

President of the Court of Appeal and Such number of Justices of Court of Appeal not less than forty: - nine of which not less than three shall be learned in Islamic Personal Law, and not less than three shall be learned in customary law, as may be prescribed by an Act of the National Assembly.

At the level of the Court of Appeal, the Justices of the Court of Appeal must include at least three Justices learned in Islamic law and three in Customary Law. This will take care of appeals coming from Customary Court of Appeal of State or Sharia Court of Appeal as the case may be.

The President of the Court of Appeal is appointed by the President of Nigeria on the recommendation of the National Judicial Council subject to the confirmation of such appointment by the Senate while appointment of the Justice of the Court of Appeal is made by the President on the recommendation of the National Judicial Council. The constitutionally recognized qualification for a Justice of the Court of Appeal is twelve-year post qualification as a legal practitioner. The qualification of the President of the Court is not started in the Constitution though it may be argued that the same qualification as applies to the Justice of the Supreme Court should apply to the President of the Court of Appeal, as they are rated in most cases equal.

For ease of administration, the Court of Appeal is divided into divisions, spread throughout Nigeria. Today there are 10 divisions of the court each division serving one or more state as follows: -

JUDICIAL DIVISIONS STATES

1. Abuja - Abuja, Kogi, Niger
2. Lagos - Lagos
3. Kaduna - Jigawa, Kaduna, Sokoto, Kano,
Katsina, Yola, Kebbi, Sokoto, Zamfara.
4. Enugu - Anambra, Ebonyi, Enugu
5. Ibadan - Ogun, Osun, Oyo
6. Benin - Delta, Edo, Ondo
7. Jos - Adamawa, Bauchi, Benue,
Borno, Gombe, Nasarawa, Plateau, Taraba, Yobe.
8. Port Harcourt - Abia, Bayelsa, Imo, Rivers
9. Ilorin - Kwara, Ekiti.
10. Calabar - Cross-River, Akwa Ibom.

The court will be duly constituted to hear and determine appeal if it consists of not less than three Justices of the court. Where the appeals originate from a Sharia Court of appeal, the Justices must be learned in Islamic Law.

JURISDICTION

The Court of Appeal is principally an Appellate Court and exercise Jurisdiction over appeals from the Sharia Court of Appeal, Federal High Court and High Court of a State. However, S 239 now confers on the court original jurisdiction in respect of Election petitions arising from election to the office of President or Vice-President, their term of office and vacancy of the office. The court was established under Constitution (Amendment) No.2 Decree 1976 exclusively as an appellate court, but the position has been thus altered.

APPEALS

Appeals to the Court of Appeal may be classified into two, Appeals as of right and Appeals by leave of the court or the lower court.

APPEALS AS OF RIGHT

S 241 of the Constitution of Nigeria 1999 specifies circumstances when appeals shall lie as of right from the decision of the High Court and the Federal High Court, High Court of Federal Capital Territory, Abuja, as follows:

a. Final decisions in any civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance.

b. Where the ground of appeal involves questions of law alone, decision in any civil or criminal proceedings.

c. Decisions in any civil a criminal proceedings on questions as to the interpretation or application of this Constitution.

d. Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of chapter IV of this Constitution has been, is being or is likely to be contravened in relation to any person.

e. Decisions in any criminal proceedings in which the Federal High Court or a High Court has imposed a sentence of death.

f. Decisions made or given by the Federal High Court or High Court.

a. Where the liberty of a person or the custody of an infant is concerned.

b. Where an injunction or the appointment of a receiver is granted or refused.

c. In the case of a decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies in respect of misfeasance or otherwise.

d. In the case of a decree nisi in respect of misfeasance or otherwise.

e. In such other cases as may be prescribed by any law in force in Nigeria.

g. There is absolutely no right of appeal where (a) the High Court has granted an unconditional leave to defend an action.

h. Where a Decree absolute of a divorce or nullity has been granted in favour of a party and the other party did not appeal while the order

Decisions based on the consent of the parties cannot be challenged on appeal except with the leave of either the High Court or Court of Appeal, or appeals as to costs only.

Appeals with leave

Like the Supreme Court, appeals lie to the Court of Appeal from the High Courts, with the leave of either the High Court or the Court of Appeal, in all other cases. The practice is to first seek the leave of the High Court, to appeal, and when such is refused, the appellate may then apply to the Court of Appeal for leave to Appeal.

It is important to state that only parties to suit may appeal or in cases where there are interested parties, then they must first apply for leave to appeal to the High Court or the Court of Appeal.

APPEALS FROM SHARIA COURT OF APPEAL AND CUSTOMARY COURT OF APPEAL

Appeal lie from the Sharia Court of Appeal of a State to the Court of Appeal in any civil proceedings before the Sharia Court of Appeal the respect to any question on Islamic personal law, which the Sharia Court of Appeal is competent to decide. The Sharia law is essentially Islamic Civil Law, the Court of Appeal will therefore not be competent to entertain any appeal on Islamic Criminal Law like the one now introduced.

APPEALS FROM CODE OF CONDUCT TRIBUNAL AND OTHER COURTS OR TRIBUNALS

Appeals shall lie as of right from the decisions of the Code of Conduct Tribunal to the Court of Appeal, appeals shall also lie to the Court of Appeal from the decisions of National Assembly Election Tribunals, Governorship and legislative Election Tribunals.
The National Assembly is also conferred with powers to extend the jurisdiction of the court of appeal to determine appeals from decisions of any other Court of law or Tribunal established by the National Assembly.

SELF ASSESSMENT EXERCISE 2

Discuss the structure of the Customary Court of Appeal.

IMPORTANCE OF THE COURT OF APPEAL

The Court of Appeal is a very important Court in the machinery of justice in Nigeria, unlike the Supreme Court that sits only in Abuja, the Court of Appeal has its divisions closer to the states and thus affords more citizens the opportunity to appeal when aggrieved against any decision of the High Courts. Being a Federal Court, and or an appellate one at that, the allegations of corruption is non-existent there, and many litigants are satisfied with the decisions. It also helps to limit the number of cases going to the Supreme Court, as majority of the cases terminate at the Court of Appeal.
That unlike the Supreme Court, the Court of Appeal has experts in both Sharia and Customary law for proper adjudication on matter arising from the Sharia Court of Appeal of state and Customary Court of Appeal of the states.

SELF ASSESSMENT EXERCISE 3

Discuss when there is Appeal as of right to the Court of Appeal.

4.0 CONCLUSION

The constitution not only established the superior courts of record but also made extensive provisions on the jurisdiction and specific provisions on the personnel and structures of the courts, we will discover that though the courts operate independently of each other, yet they are

hierarchy and interrelated, and the extensive provisions only help to guarantee the proper dispensation of justice.

5.0 SUMMARY

All the courts in Nigeria belong to only one hierarchy of courts, whether referred to as state or Federal is of little consequence. Appeals lie from High Courts to the court of Appeal to the Supreme Court.
The court of Appeal is strictly an appeal court, while the High Court is not only a court of first instance but also sits on appeal on judgments from the magistrate courts and Area courts.
The High Court also have unlimited jurisdiction in their civil and criminal jurisdiction. The Supreme Court also in limited circumstance also entertain matters at first instance, these are instances of disputes between states, and between Federal Government.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the jurisdiction of the Federal High Court
2. Explain the Hierarchy of courts in Nigeria.

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7.0 REFERENCES/FURTHER READING

Constitution of Federal Republic of Nigeria 1999 [as amended]

UNIT 5

THE STATE COURTS IN NIGERIA

CONTENTS

1.0 INTRODUCTION

The High court is a Superior Court of Record with unlimited jurisdiction. It has original jurisdiction and also appellate jurisdiction over the decisions of the magistrate Courts, Juvenile courts and any other jurisdiction assigned under any other law. The Federal High courts and the State High Courts are of coordinate jurisdiction but having different spores of responsibility, both recognized under the constitution. Both, have jurisdiction over enforcement of Fundamental Human Rights, and are administered by a judge of the High Court we shall examine the High Court, the High Court of the Federal Capital Territory, and the customary court if Appeal in this unit.

2.0 OBJECTIVES

At the end of this unit you are expected to understand the following: -
• The role, duties, jurisdiction, and importance of the High Court.
• The jurisdiction of the Federal High Court.
• The difference between the two High Courts.

3.0 MAIN CONTENT

3.1 The High Courts

In this section, we shall examine the Federal High Court, The High Court of the States and the High Court of Federal Capital Territory.

3.2 The Federal High Court

The Federal High Court took it's origin from the then Federal Revenue Court Established by Federal Revenue Court Act, 1973, in order to simplify the machinery of Justice in Nigeria, the

Constitution Drafting Committee of the 1979 Constitution simply renamed the Federal Revenue Court as Federal High Court with its jurisdiction and powers unaltered. It was thus a court of limited jurisdiction. A complication was introduced by Decree 107 of 1993 which seems to enlarge the jurisdiction of the Federal High Court and also stated that all 'Matters involving the Federal Government and it's agencies must to the exclusion of any other court be determined by the Federal High Court.
However, under the 1999 constitution which we shall examine the position seems to have been corrected and streamlined.

CONSTITUTION AND ORGANIZATION

The Court is constituted by a Chief Judge of the Federal High Court and other Judges of the court appointed by the President, in the case of the Chief Judge on recommendation of the National Judicial Council subject to the confirmation of the Senate, while others do not need Senate confirmation, the minimum qualification of the Chief Judge and other Judges of the Court is Ten years post call as a legal practitioner. There is established in each State of the Federation a division of the Federal High Court. The court is properly constituted, if it consists of at least one Judge of the Court.

JURISDICTION

S.251 of the Constitution spell out the civil and criminal jurisdiction of the court, they include the following causes and matters.
a. Relating to the revenue of the Federal Government
b. Taxation of companies and persons subject to Federal Taxation.
c. Customs and excise duties, claims against customs service.
d. Borrowing and other financial institutions actions between two banks, or Central Bank of Nigeria and matters arising out of Banking related issues and other fiscal measures, this does not include Banker/Customer disputes.
e. Matters arising from the operation of Companies and Allied Matters Act and other Allied Issues.
f. Copyright, patent designs trade makes and passing-off, Industrial designs and merchandise marks business names, commercial and industrial monopolies, combines and trusts standards of goods and commodities and industrial standards.
g. Admiralty, supply and immigration matters inland waterways and the international waterways, Federal Ports, and consular trade representation.
h. Citizenship, naturalization and aliens, deportation, extradition immigration passports and visa matters.
i. Bankruptcy and insolvency
j. Aviation and safety of aircraft
k. Arms, ammunition and explosives
l. Drugs and poisons
m. Heights and measures
n. The administration or the management and control of the Federal Government or any of its agencies
o. Proceedings for injunction or declaration affecting the Federal Government or its agencies.

The Federal High Court also has exclusive jurisdiction and powers in respect of treason, treasonable felony and allied offences.
The interpretation of the jurisdiction of the Federal High Court has been the subject of a plethora of cases mainly due to the vague and ambiguous manner the jurisdiction of the court was couched.
For the purpose of exercising the jurisdiction, the Federal High Court shall have all the powers of the High Court of a State. The court also has its own rules of court made by the Chief Judge under S 254 for practice and procedure in the court.

SELF ASSESSMENT EXERCISE 1

Mention at least 6 matters / causes within the jurisdiction of the Federal High Court.
3.3 High Court of a State and High Court of Federal Capital Territory
The High Court is at the head of the judicial system in each state and the Federal Capital territory. Its authority derives from the Constitution and the High Court Laws setting it up.

CONSTITUTION

The High Court consists of the Chief Judge of the State and each number of
Judges as may be prescribed by the House of Assembly of the State. The Chief Judge is the head of the State Judiciary and he exercises administrative control over the entire system, though his judicial powers is not greater than those of other Judges of the High Court; all of whom enjoy equal judicial power and authority.
For the exercise of its original and appellate jurisdiction, a single Judge Constitutes the High Court, except in the Northern States where the court must sit with three Judges on appeals. Each High Court also have a Chief Registrar who consists the Chief Judge in administrative matters. He is also responsible for the organization of non judicial matters like filling of papers in court, taxing and costs, general supervision of the staff, and holidays. The appointment to the office is a stepping-stone for appointment to a Judgeship. In some States, he is also the probate Registrar, while some appoint separate Probate Registrars.
The appointment of the Chief Judge of a State is made by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State; while the appointment of a Judge of the High Court is made by the Governor acting on the recommendation of National Judicial Council. The Governor acting on the recommendation of National Judicial Council. The minimum qualification for appointment as a Judge of the High Court is Ten years post qualification as a legal practitioner in Nigeria.

ORGANIZATION

High Court of a State is organized on a territorial basis, the State is divided into Judicial Division of the State High Court. There is only one High Court of a State, the Judicial Division are merely created for administrative purposes. The Courts are numbered serially, while in most States, the number 1 is preserved for the Chief Judge in terms of judicial duties and functions, the judge of the High Court in Nigeria is a special person, he is an expert in all areas of law, and must adjudicate on all matters signed to him. This has created a lot of problems and it is still a

recurring problem today. In England the position is entirely different, the High Court operates through three division, these are: the Queens Bench Division which handles mainly common law matters, (contract and tort) the Chancery Division with Jurisdiction over trust, property and equity cases generally and the Probate Division, Divorce and Admiralty Division. This has helped the Judge as well as the law in England, it has enabled the judges to deal with areas of their greatest interest, and naturally made them experts. This may not be very easy in Nigeria due to great distance between the judicial divisions, the number of judges and courts available and lack of communication facilities. In Lagos State, the court is now gradually being organized to enable its work be allocated between its Judges according to their special interests.

CIVIL AND CRIMINAL JURISDICTION

S 272 (1) of the Constitution states 'subject to the provisions of this constitution, the High Court of a State shall have jurisdiction to hear and determine only civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in use or to hear and determine only criminal proceedings involving or relating to any penalty, punishment or other liability in respect of an offence committed by any person.
The high Court thus have original and appellate jurisdiction in both criminal and civil proceedings. The jurisdiction of the High Court in all matters is unlimited. This means that the court is not limited by monetary limitations unlike the Magistrate Courts, and subject to those areas specifically reserve under S 251 for the Federal High Court, and other election matters which is the exclusive preserve of Election Tribunals, the High Court has jurisdiction to try form of issue or matter so far as it relates to determination or extent of a civil right.

SUPERVISORY JURISDICTION OF THE HIGH COURT

The High Court exercise supervisory jurisdiction over the lower courts to ensure not only that justice is done but is seen manifestly to have been done. A mistake as to facts or law committed by a lower court or failure to observe a fundamental rule of evidence, corruption, obvious bias, or failure to observe rule of national justice could lead to miscarriage of justice. The High Court supervises the lower courts in various ways, these are: -
1. Appeal
2. Case Stated.
3. Review by means of mandamus, prohibition, certiorari and habeas corpus proceedings
4. Revision through monthly returns submitted by inferior courts.
5. Transfer of cases from one court to another.

Though, in recent times, the use of Fundamental Human Right Proceedings under the Constitution has overshadowed the use of habeas corpus
proceedings.

SELF ASSESSMENT EXERCISE 2

Discuss the civil and criminal jurisdiction of the High Court of a State.

3.4 The Sharia Court Of Appeal

The Constitution made provisions for Sharia Court of Appeal for the Federal Capital Territory and the State, the Constitution and jurisdiction are virtually the same.

CONSTITUTION

The court is constituted by the Grand Khadi of the court and such number of khadis of the court as may be prescribed by the House of Assembly in the case of a State and National Assembly in cases of Federal Capital Territory (F.C.T).
The appointment of the Grand Khadis is made by the Governor acting on the recommendation of the National Judicial Council and confirmed by the Senate. The appointment of other khadis made by the Governor on the recommendation of the National Judicial Council in case of a State while that of the F.C.T. is made by President on the recommendation of the National Judicial Council. The minimum qualification for the appointment into the office of a khadi of the Sharia Court of Appeal is ten years post – qualification as a legal practitioner and the person must have obtained a recognized qualification in Islamic Law from an institution acceptable to the National Judicial Council, or in the alternative, the person has obtained a recognized qualification in Islamic Law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than two years, and (i) he either has considerable experience in the practice of Islamic Law, or (ii) he is a distinguished scholar of Islamic Law.
The implication is that the Khadi of the court need not be a lawyer provided he has attended an Islamic training institution approved by the National Judicial Council and has considerable experience, though the measure of this considerable experience is not specified. Islamic Law itself is regarded as Customary Law, or rules stated in the Koran guiding devoted Muslims. The rule itself only binds those people subject to it and no other person.
Therefore, the Khadi need not be a lawyer, perse or trained under English law, and the Rules of Evidence may not be strictly applicable in such court. The only reason why this court was established under the Nigeria Constitution is to enable those states, who wish to practice Islamic Law take the option.

JURISDICTION

It is essentially an appellate court, and sits over appeals from inferior courts in civil proceedings involving questions of Islamic personal law, these include:
a. Marriage concluded under Islamic Law, validity, dissolution of the Marriage, family relationship or guardianship of an infant.
b. Succession inheritance where the deceased person is a Muslim
c. Where all the parties to a dispute are all Muslims and have requested the lower court to determine their case according to Islamic Personal Law.
There is absolutely nothing under the Constitution that permits the Sharia Court of Appeal to hear or determine Islamic Criminal Law. Three Khadis constitutes a court. The practice and procedure of the court is regulated by its practice and procedure rules made by the current Khadi of the State. In Nigeria today, the Sharia Court of Appeal exists in all the Northern States, and each Northern State has adopted the Sharia Court of Appeal Law 1960 of the Northern Region.

SELF ASSESSMENT EXERCISE 3

What is the relevance of the Sharia court of Appeal?

3.4 Customary Court of Appeal of a State and Customary Court of Appeal of the Federal Capital Territory

The Constitution also established the Customary Court of Appeal of the State and F.C.T. The judicial head of the Court is the President of the Customary Court of Appeal and other Judges of the Customary Court of Appeal as may be prescribed by the House of Assembly or National Assembly in case of FCT. The Provision for the establishing of the customary Court of Appeal in both FCT and the State are identical. The President of the Court is appointed by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation by the House of Assembly, while the Judges of the court are appointed by the governor of the State on the recommendation of the National Judicial Council.

The minimum qualification for appointment is ten years post-qualification as a Legal Practitioner and considerable knowledge and experience in the practice of customary law or any one who in the opinion of National Judicial Council has considerable knowledge of and experience in the practice of Customary Law.

JURISDICTION

The court exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law. The court entertain appeals from customary courts within the state, and it is properly constituted where three Judges of the court sit over an appeal.

4.0 CONCLUSION

The High Court of the State is the apex of the hierarchy of courts in the state and being a court of unlimited jurisdiction and first instance court. It is responsible for the bulk of cases entering into the judicial system in Nigeria. The importance of this court cannot be over emphasized.

5.0 SUMMARY

The High Court handles all the criminal matters emanating from the state. It is vested with jurisdiction to try matters that are above the jurisdiction of the magistrate courts. It is a court of Record, and constitutionally vested with original jurisdiction in capital offences. The current jurisdiction of the Federal High Courts is however limited to those areas recognized by the constitution and where specific laws grants such jurisdiction to the Federal High Court.

6.0 TUTOR – MARKED ASSIGNMENT

1. Discuss the jurisdiction of the State High court.
2. Examine the importance of the High Courts in administration of criminal Justice system in Nigeria.

MODULE 3

GENERAL LAW OF CONTRACT AND COMMERCIAL RELATIONS

Unit 1 – Law of Contract

Unit 2 – Law of Agency

Unit 3 – Sale of Goods

Unit 4 – Hire- Purchase Transaction

Unit 5 – Contract of Freight

MODULE 4

Unit 1 – Introduction to Taxation

Unit 2 – Unfair Competition.

UNIT 1 FORMATION OF A CONTRACT

CONTENTS

1.0 INTRODUCTION

The basic ingredients required under the law for the formation of a contract are offer, Acceptance, Consideration, Intention to create legal relations, terms of the contract and capacity of the parties. This unit is meant to deal principally with the ingredients of a valid contract in the establishment of commercial transactions.

2.0 OBJECTIVES

The main objectives of this unit are to bring to the knowledge of the learner what is meant by an offer, acceptance, consideration, intention and capacity. It will x-ray their basic ingredients, their distinctive features and how they operate in practice At the end of this unit, learners are expected to understand the rudiments of a valid contract.

3.0. MAIN CONTENT

The basic ingredients required under the law for the formation of a contract are offer, Acceptance, Consideration, Intention to create legal relations, terms of the contract and Conditions and warranties. This unit is meant to deal principally with the law relating to all the essential ingredients of a valid commercial transaction.

3.1. OFFER

An offer may be defined as a definite undertaking or promise, made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed. The person making the offer is known as the offeror, and the person to whom it is addressed, the offeree. Thus all commercial transactions must involve an offer and an acceptance.

By its very nature, there is no limit to the number of people to whom an offer can be made. It is however noteworthy that a contact comes into existence only between the parties, that is, the offeror and the offeree.

This principle was first declared in the case of **CARLILL V CARBOLIC SMOKE LALL CO. (1893)1 Q.B.253** The principle in that case is now that an offer can be made not only to an individual or to a group of persons, but also to the whole world. An offer can be made expressly or by conduct (impliedly). For example, a bus stopping at a bus stop implies that the owner of the bus is making an offer to a person waiting of the bus stop. If that person enters the bus, he accepts the offer by his conduct.

3.1.0 Communication of an Offer

An offer is only subject to acceptance if it is duly communicated by the Offeror to the offeree. No person can accept an offer of which he has no knowledge. See the American case of FITCH V SNEDAKER (1868)38 N.Y. 248 Here it was held that a plaintiff cannot accept an offer unless he is aware of it.

3.1.1 Offer Distinguished from Invitation to Treat

It is necessary to distinguish a true offer from what is called an “Invitation to treat”, because very often an invitation to make an offer (i.e an invitation to treat) is confused with an offer. The major distinctive feature between an offer and an invitation to treat is that for an offer to be a true offer, the offeror must have completed his part in the formation of a contract by finally declaring

his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal.

An invitation to treat, on the other hand, is a preliminary to an offer such expressions or acts of a person to which no legal consequence are intended to attach but may only be regarded as preliminaries to the making of a contract are generally referred to as "invitation to treat". The essence of an invitation to treat is that by it the supposed offerer is merely initiating negotiations from which an agreement might or might not in time result. Examples of invitation to treat includes; display of goods in shelves in a shop supermarket, self-service shops, e.t.c., advertisement of goods in a catalogue and Invitations of tender.

3.1.2 Termination of an Offer

It is the general rule that once an offer is made it remains open for acceptance until it becomes terminated by certain factors which includes

1**. REVOCATION**:- Revocation simply means withdrawal. An offer can be revoked any time before acceptance notwithstanding the expected or stipulated time of expiration. See the case of **ROUTLENDGE V GRANT (1824)4 BING. 653**. Here, the defendant, offered to buy the plaintiff's house for a certain sum and allowed the plaintiff six weeks within which to give him a definite answer. However, the defendant withdrew his offer before the expiration of six weeks. It was held that the defendant could withdraw the offer of any moment before acceptance, even though the time limited had not expired.

2. REJECTION:- This happens when the Offeree decline the offer. Rejection of an offer terminates the offer. Whenever an offer is rejected, it can no longer be accepted, except where a fresh offer is made. Rejection of an offer may either be by a direct intentional refusal of the offer or by a counter offer.

Note that a counter-offer replaces the original offer and becomes a new offer capable of acceptance. Thus the original offeree becomes the offeror and the original offeror becomes the new offeree. If a contract is then to result, the counter-offer must be accepted by the original offeror.

3. LAPSE OF TIME: - If an offer is stated to be open for a fixed time, it clearly cannot be accepted after that time. Therefore, if the time for the acceptance of an offer is limited or fixed, the offer lapses automatically, if not accepted within the prescribed time. Where there is no fixed time within which the offer should be accepted, the offer must be accepted within a reasonable

time. What amounts to "reasonable time" is a question to fact and depends on the subject matter of the contract and the peculiar circumstances of each case.

4. OCCURRENCE OR NON-OCCURRENCE OF CONDITION: - If an offer is expressly or impliedly made to terminate on the occurrence of some condition, it ceases to exist and becomes incapable of acceptance after that condition has occurred. Thus, an offer to insure the life of a person should impliedly terminate if the person cease to exist, and cannot be accepted after the person is dead.

5. DEATH BEFORE ACCEPTANCE: - The death of both the offeror and the offeree before acceptance terminates the offer. The death of the offeree before acceptance terminates the offer whether death is notified to the offeror or not unless, on its true construction, the offer was made to the offeree and his successes in title.

6. LOSS OF CONTRACTUAL CAPACITY BY EITHER PARTY: - If either of the parties loses his contractual capacity, for example through becoming insane, before the offer is accepted, the offer lapses.

3.2 ACCEPTANCE

At any point in time that an offer is made, the expectation is that such an offer should be accepted by whosoever could fulfil the condition for acceptance, thus, a clear definition of acceptance will be made her in order to give a better picture of the concept.

3.2.1 Meaning and Conditions of Acceptance

Acceptance occurs when the offeree indicates his intention and willingness to take up the offer and decides to be bound by the terms of the offer and once accepted it is complete and the offer becomes irrevocable. For an acceptance to be valid, it must fulfil the following conditions.

a) **The acceptance must be unqualified**. It must correspond with the offer. Therefore, any variation or modification of the offer while accepting or any acceptance which is dubiously expressed will be invalid. An attempt to accept an offer with qualification or addition operates as a counter-offer and not an acceptance. Thus in HART V MILLS (1846)15 L.J. Exch 200, the defendant ordered for four dozen of wine. The plaintiff sent eight dozen. The defendant, however, took only thirteen bottles and returned the rest. The plaintiff sued claiming the price of four dozen as originally requested by the defendant. It was held that the defendant was at liberty

to reject the entire eight dozen as a counter-offer, but if he retained thirteen bottles he was liable to pay for these only. The retention of thirteen bottles must be seen as the basis for the entirely fresh contract between the parties.

b) **An acceptance must not be conditional.** Therefore, a conditional assent to the terms of an offer is not an acceptance. In ODUFUNDADE V OSOSAMI (1972) U.I.L.R. 101, it was held that an acceptance expressed as 'a tentative agreement without engagement' could not result in a contract.

c) **An offer can only be accepted by the person to whom it is made or by his agent duly authorized**. But where an offer is made to the public at large, any member of the public may accept if (see Carlill V Carbolic Smokeball Co. (supra). Where the offeror prescribes a certain mode of acceptance, an acceptance otherwise then in the manner prescribed by the offeror, is ineffective. However, where the offeror merely indicates, without insisting on a particular mode of acceptance, any acceptance in some other but more expeditous mode will be good.

d) **An acceptance must be made not only with full knowledge of the offer but also in reliance on it**. Therefore, a contract cannot result from the mere coincidence of two independent acts. Thus, if a person does some act in ignorance of a standing offer, but subsequently discovers that he has unwittingly done an act for which a reward has been offered, he cannot claim the reward, since his act was not done with the knowledge of or in reliance on the offer. In other words, if, for example, Ngozi advertises an offer of a reward of N800 to anyone who finds and returns her lost passport and Chike in ignorance of the offer, finds and returns the passport to her, Chike cannot afterwards, on becoming aware of the offer, claim to be entitled to it.

3.2.2 Modes of Communicating Acceptance

The general rule is that acceptance of an offer is not complete until it has been communicated to the offeror either by the offeree himself or by his duly authorized agent. Therefore, acceptance becomes operative only when it has been communicated to the offeror. The acceptance of an offer can be communicated in any of the following modes.

1) Where a particular mode is prescribed. The general rule in respect of this point is that where a special mode of acceptance of an offer has been prescribed by the offeror, the offeree is bound to comply with it. Therefore, if the offer prescribes a particular mode of communication, acceptance communicated in a mode other than that prescribed will generally be nugatory.

2) Where No Particular Mode is Prescribed: - The general rule in this respect is that where the offeror does not state the mode of acceptance of the offer, the form of communication will depend upon the nature of the offer and the circumstance in which it is made.

3) Where Acceptance is By Post: - Generally, an acceptance is incomplete until notice of it has reached the offeror. But contracts made through the post, e.g. by mere posting or by telegram, are governed by a different rule which was ably stated by HERSCHELL, L.J. In HENTHORN V FRASER (1892)2 Ch. 27, at page 33 thus;

> "Where the circumstances are such that it must have been within the contemplation of the parties, that, according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptances of an offer, the acceptance is complete as soon as it is posted".

3.3 CONSIDERATION

The plaintiff must show that the defendant's promise was part of a bargain to which he himself contributed. A moral obligation does not constitute consideration.

A judicial definition of consideration has been given in the case of CURIE V MISA (1875) L. R. 10 Exch 153 at 162 where Lush J. said:

> "A valuable consideration in the eye of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus consideration does not only consist of profit by one party but also exist where the other party abandoning some legal rights in the present, or limits his legal freedom of motion in the future as an inducement for the promise of the first. So it is irrelevant whether one party benefits but enough that he accepts the consideration that the party giving it does thereby undertake some burden or lose something which is in contemplation of law may be of valve."

3.3.1 Consideration must Move from the Promise

The general rule in this regard is that only a person who has furnished consideration in a contract can bring an action to enforce a promise given by the defendant in that contract. The absence of consideration on the part of the promise (plaintiff) can take one of various forms.

3.3.2 Where Consideration is furnished by a Third Party and not the Plaintiff

The general rule is that only a party to a contract can of course bring an action to enforce it. This is the whole essence of the doctrine of privity of contract. The law is that a party that has not furnished consideration in a contract cannot be strictly regarded as a party to that contract.

Therefore any action based on consideration furnished by another party will necessarily fail. Where the plaintiff belongs to an organization that furnished the consideration, then he must sue in a representative capacity and not in his own name on his own behalf. See Gbadamosi V Mbadiwe (1964)2 All N.L.R. 19.

3.3.3 Types of Consideration

We have Executory and Executed types of Consideration

Executory: When the offer and acceptance consist of promises – the offeree making a promise in return for the offeror's promise consideration is regarded as executory. This happens where the delivery and payment are to be made in the future. Both parties became bound in the contract, prior to actual performance.

Executed: Executed consideration on the other hand is when an act is performed in return for a promise. The most common examples of this are offers of reward by the owner of a lost article to anyone who finds and returns it to him, or offers of reward by the police or anyone else for information leading to the arrest and conviction of a criminal.

3.3.4. Rules of Consideration

1. **Consideration must not be past:** A past consideration is a promise given after the act is completed and is independent of it that is the act is wholly executed and finished before the promise is made. Consideration is said to be past when it consists of a promise or an act prior to, and independent of, the promise which the plaintiff seeks to enforce. See the case of **Roscoria V Thomas (1842)3 Q.B 234**, the plaintiff bought a horse from the defendant. Some time after the sale, the defendant promised the plaintiff that the horse was sound and free from vice when in fact the horse was vicious. Whereupon, the plaintiff sued the defendant for breach of warranty on discovering that the horse was vicious. It was held that, since the warranty that the horse was sound was subsequently to the transaction, and independent of the sale, the promise amounted to past consideration which was not capable of supporting an action in contract.

2. **Consideration need not be adequate**: In the absence of fraud, duress or misrepresentation the courts will not question the adequacy of consideration. This means that they do not measure the values of the consideration furnished by the plaintiff and the defendant respectively. This means that a contract will not be declared invalid simply because one party has got a much better bargain than the other. No consideration is too small or too much or unfair. See the case of **Thomas V Thomas (1842)2 Q.B. 851**. A testator, before his death, expressed the desire that his wife should continue to live in his house for the rest of her life. After he died, his executor wrote to the wife confirming her late husband's wish and stated that the widow could have the use of the house for the rest of her life, on payment of £1 a year. When subsequently the executor tried to rescind his consent, he was held bound by the undertaking not because of the husband's wishes, but because of the widow's own undertaking to pay £1 a year, which was regarded as good consideration.

3. **Consideration must be real and for value**: Since consideration is a 'price' it must be something real, something of value. Therefore, if the price of which the plaintiff bought the defendant's promise is worthless or unreal, that price, whether it be in the form of an act, or a promise to do an act, will not be sufficient consideration and therefore incapable of supporting a contract. But once it is real and of some value, the act or promise will be sufficient, and it is immaterial that it is not adequate for, or commensurate to, the defendants promise.

4. **Consideration must be legal**: A consideration will not be deemed proper until it has a legal value. It most important that consideration must possess some legal value. Any contract where the consideration involved is contrary to the expectation or provision of the law will not be given effect to by the law. For example, the payment involved in an act of prostitution will not be given effect to by the law as it is an illegal contract.

3.4 INTENTION TO CREATE LEGAL RELATION

It is the general rule that the intention of the parties to a contract is material. Where there is an action on any contractual relationship, the law will read meaning into the contract to discover whether the parties intended to be bound by the contract. Where the intention is lacking, the contract is void.

3.4.1 Intention in Domestic and Social Engagements

In domestic and social relationships it is the presumption in law that the contractual intention is absent and the parties to such an agreement cannot sue each other on it. For example, a promise

made by a husband to buy a car for his wife as a Christmas gift will not be deemed as a contract which will be deemed to have the intention of the parties to be legally bound except such is subjected to the formality of a legal agreement. See the case **Balfour V Balfour (1919)2 K.B 571**.

> A Briton was employed by the Government of Ceylon. He returned home on leave with his wife, but the wife was unable to go back to Ceylon with him because of ill-health. He then promised to make her an allowance of £30 a month until she joined him. When he failed to make this payment, she sued him to enforce the promise. The court of Appeal held that there was no contract between the parties. As a natural consequence of their relationships, spouses make numerous agreements involving payment of money and its applications to the household themselves and their children.

But in a situation where the mutual relationship of the parties involved in a contract is no longer cordial, such a promise between the parties may be given effect to as binding. See the case of **MCGregor V Mc Gregor (1888)21 Q.B.D. 424**.

> Here it was held that when spouses are not living in amity, particularly when their relationship has degenerated to the level of mutual hostility and distrust, an agreement between them would be binding.

3.4.2 Intention in Commercial Agreements

Generally, the law presumes the presence of the contractual intention in commercial agreements. Under this issue, the courts presume that an intention to create legal relations exists, unless and until the contrary is proved. See the case of **Carlill V Carbolic Smoke Ball's Case (SUPRA).**

> The defendants advertised their anti-influenza capsules by offering to pay £100 to any purchaser who bought and used it and yet caught influenza within a given period, and by declaring that they had deposited £1, 000 with their bankers to show their security. The plaintiff bought the capsule, used it and caught influenza. The defendant, among others, raised the defence that they had no legal relations with the plaintiff. This defence was rejected and they were held to be contractually bound.

3.5. TERMS OF A CONTRACT

In giving effect to the operation of a contract, consideration will be given to the terms of the contract which are either express or implied.

3.5.1 Express Terms

Express terms are those terms or substance material to the existence of the agreements which are clearly stated at the inceptions of the contract and which are within the understanding of the parties involved. Express terms are easily identified in a contract or agreement that is subject to writing as opposed to those orally entered into.

The general rule is that oral evidence cannot be used to vitiate or prove a written agreement but this has certain except in such circumstances which includes the prove a custom or trade usage whose implications the parties have, or may reasonably be deemed to have, tacitly assumed. It is also applicable to prove some invalidating cause outside the written contract itself, e.g. fraud, illegality, misrepresentation, mistake, incapacity or absence of consideration.

3.5.2 Implied Terms

There are instances in which the Court will read meaning into and give effect to other factors that are associated with the contract even when they are not expressly stated, in order to discover the actual intention of the parties when entering into the contract, and such other factors are known as implied terms. Implied terms are terms implied in the contract, and they, like express terms may assume the character of conditions or of warranties. These implied terms will be discussed under three major groups namely:

1) **Terms Implied by the Courts**

Generally, it is not the duty of the court to make a contract for the parties. However, in very exceptional circumstances, whenever it is desirable to effectuate the intention of the parties as may be gathered from their express terms, the court may imply a term into their contract. But, the circumstances for implying such a term must be established to be necessary. See the case of **Hutton-Mills V Nkansah II and Ors (1940)6 W.A.C.A. 32.** The court was to interpret the extent of the authourity of the respondents under a power of attorney as to collection of arrears of rent. The court declined to do so, on the ground that the provisions of the power of attorney were clear, and to imply a term as urged by the respondents will not be said to be necessary for the proper functioning of the contract.

2**) Terms implied by law or statute**

There are instances when certain contract will be subject to certain performance by the law, so whenever a party enters into such agreement, it will be implied that the expectation of the law has been fulfilled or complied with. For examples see the implied terms contained in section 4 of the Hire Purchase Act, 1965 and in section 12-15 of the Sale of Goods Act, 1893.

3) Terms Implied by Custom and Usage

In cases where the entering into certain contract by the parties will require the fulfilment of certain cultural practices or believe system, it will be implied that such must be complied with and so it will be deemed to be included in the agreement. See the case of **Hutton V Warren (1836)1 M and W 466,** it was proved that, by a local custom, a tenant was bound to farm according to a certain course of husbandry and that, on quitting his tenant, he was entitled to a fair allowance for seed and labour on the arable land.

3.6 CONDITIONS AND WARRANTIES

3.6.1 CONDITIONS

The word condition is used in two senses. In the first sense it means a term or a stipulation in a contract which is absolutely essential to its existence, the breach of which entitles the injure party to repudiate the contract and to treat it as discharged. In other words, a condition is a term of major importance which forms the main basis of the contract, the breach of which normally gives the aggrieved party a right, at his option, to repudiate the contract and treat it as at an end.

In the second sense, a condition is a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event; such conditions are either precedent or subsequent.

3.6.2 WARRANTIES

Warranty ordinarily denotes a binding promise, but when it is used in a narrower and technical sense, it means a subsidiary term in a contract (i.e a term of minor impotence) a breach of which gives no right to repudiate the contract, but only a right to an action for damages for the loss sustained.

The main difference between a condition and a warranty is that a breach of the former entitles the other party to treat the whole contract as discharged, while a breach of the latter merely entitles the other party to claim damages, but does not absolve in from performing his duties under the contract.

4.0 CONCLUSION

At the end of this unit, the student must be able to have a comprehensive knowledge about the law of contract most especially as it relates to the ingredients of a valid contract.

5.0 SUMMARY

Through this unit, learners must have known what the ingredients of a valid contract contains, and must be able to differentiate between an offer and an invitation to treat, how an offer is communicated and terminated..

6.0 TUTOR-MARKED ASSIGNMENT

1) What is an offer?

2) Distinguish between an offer and an invitation to treat

3) Enumerate and discuss the various ways by which an offer could be terminated.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 WHAT IS AN AGENCY

CONTENTS

1.0 INTRODUCTION

The Law of agency is a very important part of commercial law as companies can only carry out their daily business activities through agents. The essence of the law of agency is to ensure proper and legal dealings when it comes to actions carried out in a representative capacity. Thus the interest of the parties to an Agency relationship, third party inclusive is duly protected by the law.

2.0 OBJECTIVES

In this unit we will embark on the definition the concept of agency as an essential part of commercial law. This volume shall focus on the general operation of the agency relationship vis-à-vis the duties and obligations of the parties involved in the relationship and remedies available to arties where there is a breach of obligation.

3.0 Main Content

3.1 What is Agency?

Agency relationship is created in a situation where one called "the Agent" acts for and on behalf of another called "the Principal" under the authourity conferred by "the Principal" on "the Agent", thus, establishing an Agency relationship.

This term has been defined by the Oxford Companion Law to mean:

> "The relationship between one person, the agent, having authority to act, and having consented to act on behalf of another, the principal, in contractual relations with a third party. The term is also used more widely as one acting in the interest of another".

3.2 Theories of Agency

There are three main theories that seek to define and explain the role of the agent.

These are:

a. The power-liability theory.

b. The consent theory.

c. The qualified consent theory.

a) The Power-Liability Theory

The concept of agency exists when a person (the agent) acquires the power to alter the principal's legal relations with a third party in such a way that it is only the principal who can sue, and be sued by that third party. This focuses on the external relationship with the third party

and ignores the internal relationship between the principal and the agent. Nevertheless, they are subject to fiduciary duties in the same way as agents narrowly defined.

b) The Consent Theory

This arises in a situation where the Agent, is acting on behalf and for the Principal with the consent of the principal thus establishing a direct relationship with the duo. In other words, the agent must have been invested with a degree of discretion that shows the principal has placed trust and confidence in the agent. It is this which gives rise to a fiduciary duty. Here both the Agent and the principal can be liable for a breach or misconduct

3) Qualified Consent Theory

This can happen in a situation where the actual authourity of the Principal was not given initially but the action of the Agent became acceptable and approved by the Principal. This theory combines the consent theory with the protection of 'misplaced reliance' to account for actual and apparent authority. This is more clearly defined in agency by ratification to reflect commercial reality since authorization may not always be neatly contemporaneous with the initial transaction.

3.3 Agency and Other Relationships

The concept of agency in commercial transaction has in most cases been mistaken to be the same with some other relationship of similar nature and character, thus, the need for making distinctions between similar transactions.

3.3.1 Agent and Trustee

For certain purposes, an agent may be treated as a trustee of his principal. An example of this in cases of money had and received on behalf of the principal. Equally, a trustee may for certain purposes be treated as an agent of the beneficiary (cestui que trust). This notwithstanding, both functionaries are nonetheless distinguishable on the following grounds:

I. The relationship of principal and agent is generally consensual in origin, whereas and except in minor cases, a trust is created without the consent of the beneficiary (cestui que trust) or the trustee.

II. When an agent is appointed, this is invariably done by the principal himself, whereas, in a trust situation, the trustee is never appointed by the beneficiary (cestui que trust).

III. The agent is for all purposes, the representative of his principal in dealing with third parties whereas, the trustee is not in anyway the representative of the beneficiary (cestui que trust).

IV. Actions between the principal and the agent may be barred by lapse of time under the limitation Acts whereas, no such limitation is imposed on actions between the beneficiary (cestui que trust) and the trustee.

3.3.2 Agent, Servant and Independent Contractor

Basically, an agent is distinguishable from both a servant and an independent contract. The essential feature of the master servant relationship is that the master always has the right to control the diligent performance by the servant of the terms of his employment while a servant merely works for his master, an agent acts for and in place of his principal to effect legal relations of his principal with third parties.

An independent contractor on the other hand renders services to his employer in the course of an independent occupation or calling. He contracts with his employer only as to the results to be achieved, but not as to the means whereby the work is done. Accordingly, he employs his own means and skill and is entirely independent of control and supervision of his employer.

3.3.3 Agent and Bailee

A bailment arises where personal property is delivered or transferred by the owner (bailer) to another person (bailee) under an agreement that the property can be returned to the owner (bailor) or transferred to a third party or dealt with in any other way indicated by the owner (bailor).

The distinction between the two are in their features which are the fact that:The agent is the representative of his principal but the bailee does not thereby become the representative of the bailor. Also, the agent has authority to contract for and on behalf of his principal and can make him liable in tort. A bailee essentially has no authority to bind the bailor in contract except perhaps to preserve the property the subject of the bailment, and can rarely make the bailor liable in tort.

3.4. CLASSIFICATION OF AGENTS

3.4.1 General and Special Agents

A General Agent is one who is authorized to act for and on behalf of his principal in all his affairs in connection with a particular kind of business, trade or profession or who represents him in the ordinary course of his own trade, business or profession, as agent. While A special agent on the other hand is one authorized to act for and on behalf of his principal on or for special occasion. Such an agent may also be required to handle a particular transaction or to do a specific act which is not within the ordinary course of his trade, business or profession. Distinction between General and Special Agents lies in the nature and character of the authority given or accorded and its scope in relation to third parties.

3.4.2. Commission Agents

A commissioned agent is the one to whom certain goods have been consigned for a foreign principal. A commissioned agent is therefore saddled with dual responsibility, firstly as an agent to his principal with equal rights and obligation of any other agent and secondly as an agent who does not bind his principal contractually to third parties. Instead, he stands in his own right in the position of principal to such third parties basically because he benefits from the transaction.

3.4.3. Mercantile Agents

A mercantile agent is an agent having authority to sell or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods. In essence, when one is dealing with a mercantile agent, it becomes pertinent to enquire whether in the "customary course of the agent's business he has authority to sell, consign for sale or to buy or raise money on the security of goods in his possession as such agent.

There are three types of mercantile agents. These are Factors, Brokers and Del Credere Agents.

a. Factors Agent

The term "Factor" was described in the case of BARRING V CORRIE (1818)2 B & AID. 137, Abbot C. J., as a person to whom goods are consigned for sale by a merchant residing abroad or at a distance away from the place of sale and who normally sells in his own name without disclosing that of his principal.

b. Brokers

A broker is a mercantile agent who, in the ordinary course of his business is employed to make contact with third parties for the purchase of goods, or property or for the sale of his principal's goods or property of which he is not entrusted with possession or document of title thereto. He is a mere negotiator between such persons with no possession of the goods. He lacks the power or authority to determine whether the goods belong to the buyer or seller and no legal or power to determine whether the goods should be delivered to the one or be kept by the other.

c. Del Credere Agent

A del credere agent is one who, in consideration of extra remuneration called a del credere commission, guarantees to his principal that third parties with whom he enters into contract for and on behalf of the principal shall duly pay any sums becoming due under those contracts. The element of extra remuneration by way of del credere commission is indispensable to the establishment of a del credere agency and it is this feature that mainly distinguishes it from any other agent.

3.5 TYPES OF AGENCY

3.5.1. Agency by Agreement or Contract

This occurs in a situation where the Agency agreement is formalised by the express intention of both parties. The Principal appoints and the Agent consent. This was established in the case of AYUA V ADASU & ORS (1992)3 N.W.L.R. 598 Akanbi, JCA, restated the law in the following statement of page 611 thus;

> "In the ordinary law of Agency, the paradigm is that in which the agent and the principal agree that one should act for the other. And the term "agency" is assigned to this basic principle which involves consent of both parties.

3.5.2. Agency by Estoppel

The general position of the law in this area is to the effect that where a supposed principal intentionally or otherwise causes a third party to believe that another person is his agent and the third party so relies in dealing with the supposed agent, the principal will be estopped from denying the existence of an agency relationship between him and supposed agent. In such a situation, the supposed principal will be bound by an act or omission of the supposed agent to the same extent as if an agency relationship had existed between them. See the case of **LUKAN V**

OGUNNUSI (1972)5 S.C. 40. Here, the Supreme Court of Nigeria stated that: "When a person behaves in such a way as to lead another person to believe that he has authorized a third person to act on his behalf and that other person in such belief, enters into transaction with the third person within the scope of such ostensible authority, the first mentioned person would be estopped from denying the fact of the first person's agency. It would not be material that the agent had no authority whatever in fact.

3.5.3. AGENCY BY RATIFICATION

This occurs in a situation where a supposed agent portrays himself to be representing a supposed principal whose consent he might not have secured and the principal on becoming aware of this assented to the transaction. The action of the principal is tantamount to ratification. This doctrine was explained in the case of **WILSON V TUNMAN (1843)6 MAN & G 236** where it was stated as follows: " That an act done, for another, by a person not assuming to act for himself, but for such other person, though without any antecedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established principle of law."

3.5.4. Agency by Necessity

This occurs in a situation where a person acts in good faith as regards the property of another with the intention of protecting the interest of the owner or that of the general good, such an agent will be regarded as an agent of necessity. Generally, the courts are reluctant to find that an agency of necessity exists because it imposes obligations on someone who has not given consent to the supposed agent to so act.

3.5.5. Conditions for Necessity of Agency

The existence or otherwise of an agency of authority is dependant on the fulfilment of certain conditions and these are:

i. That there is an emergency situation necessitating instantaneous action.

ii. That it was impossible for the claimed agent to communicate with the presumed principal at the material time.

iii. That the action taken was reasonably necessary having regard to the circumstances in the case.

iv. That the claimed agent acted bona fide and in the interest of the presumed principal.

3.5.6. Doctrine of Deserted Wife's Agency of Necessity

This is an example of agency of necessity arising out of an existing or subsisting legal duty concerns a deserted wife. A deserted wife is an agent of necessity endowed by law with authority to pledge her husband's credit for necessaries. See the case of PHILLIPSON V HAYTER (1870) L.R.6 C.P.38 where Wiles, J, while explaining the rule stated as follows:

> "What the law infers is this, that his wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fell fairly within the domestic department which is ordinarily confined to the management of the wife."

In invoking this principle, the following conditions must be involved: the husband and the wife must have been legally married and cohabiting as husband and wife at the material time. There must have been an actual or constructive desertion of the wife by the husband. The credit pledged by the wife must be for chattels other than money and for the domestic requirements. It must also be established that such expenditure was suitable for her style or situation in life or for what she was used to while she was living with her husband and that there was no other credit available to her for her maintenance either through her own earning power or under a court order.

3.6 DISCLOSED AND UNDISCLOSED PRINCIPAL

3.6.1 Disclosed Principal and Third Party

The general rule is that where a person contracts as agent for a principal the contract is the contract of the principal and not that of the agent, and prima-facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal. Generally, the principal may be sued on the contract if the agent acts within apparent authority.

3.6.2 The Doctrine of Undisclosed Principal

An undisclosed principal is one whose existence and identity are unknown to the third party at the time of entering into a contract with an agent. Under the doctrine of undisclosed principal, it is permissible, in appropriate circumstances for such principal on whose behalf a contract has

been entered into by an agent to sue and be sued on the contract. This doctrine has been described as an anomaly in the sense that it offends the doctrine of privity of contract and it is in this respect that it is often regarded as an exception to the doctrine of privity of contract rule.

3.7 DUTY OF AGENT

3.7.1. Duty to Perform

The primary duty of an agent particularly where he was appointed under an agreement with the principal is to execute his agency in accordance with the terms of such agreement. See the case of **Otto Hamman V Senbanjo & Anor (1962)2 All N.L.R. P9** where Adefarasin. Ag. J., stated thus:

> "It is the duty of an agent to carry out the business he had undertaken. This was his obligation unless he had in his contract expressly excluded responsibility."

3.7.2. Duty of Obedience or Loyalty

When an agent is executing the terms of his agency, he is obliged to carry out such instructions as may be given to him by the principal relating thereto and must be seen to act promptly. See the case of **Eso West African INC. V Ali (1968) N.M.L.R 414.** Here an Ibadan High Court held, inter alia, that it is the duty of an agent to carry out any instructions that may be given to him by the principal and cannot depart from such instructions even though he reasonably believed that in doing so he was promoting the interest of the principal.

3.7.3. Duty of Care and Skill

In the course of executing the terms of his agency, an agent is bound to exhibit such care, skill and judgment as are required under the circumstances of the particular situations. See the case of **Spiropolous Co. Ltd. V Nigeria Rubber & Co. Ltd (1970) N.C.L.R. 94**, where a High Court in Benin held that the prudence which an agent is expected to show in the affairs of his principal requires that he should not involve the principal in a heavier financial burden where there is available means of involving him in a higher financial burden. Accordingly, it was held that an agent who undertook to effect a policy of insurance on behalf of his principal is under a duty to do so at the most economical rate.

3.7.4. Duty of Personal Performance

The basic principle of law in this regard is covered by the maxim "Delegatus Non Potest Delegare" which means a delegated power cannot be further delegated. Agency relationship is one of confidentiality of principal and the agent, and the agent is generally expected to perform his duties as an agent, personally.

3.7.5. Duty to Act in Good Faith

This duty of an agent arises principally from the fiduciary nature or character of the principal-agent relationship. Agency relationship, as a whole, is based essentially on the trust reposed on the agent by the principal. The principal employs an agent normally because he requires that agent's personal service or expertise. He will usually depend on the agent for the due performance of those services. The law imposes on the agent the duty to show good faith in his dealings on behalf the principal.

3.7.6. Duty to Account

It is a fundamental obligation of every agent to keep and to render appropriate account of his stewardship to his principal whenever he is called upon to do so. See the case of **Majekodunmi V Joseph Daboul Ltd. (1975)2 C.C.H.C.J. 161** where a Lagos High Court held, inter alia, that once the relationship of principal and agent is established, and the agent fails to keep proper account or fails to account to the principal for monies or properties received by him in the cause of his agency, he is accountable to such a principal and can be compelled to render such account by an action in a court for an account.

3.8 DUTY OF PRINCIPAL

3.8.1 Duty to Remunerate

The primary duty of a principal to his agent is to remunerate him for the services rendered. Such duties arise whenever the agent is employed under such circumstances as would reasonably justify the expectations that he should be paid.

3.8.2. Duty of Re-Imbursement and Indemnity

In every agency relationship, there is by implication, a duty on the principal to indemnify the agent of all loses, damages or liabilities sustained by the agent in the course of discharging his authorized duties.

3.9 REMEDIES AVAILABLE TO THE PARTIES

3.9.1 Remedies Available to the Principal

In situations where the agent by some misconduct or otherwise commits a breach of a term of his agency relationship with the principal, the latter may avail himself of one or more of a number of remedies stated below.

1. **Dismissal:** The principal may determine or bring the agency relationship to an end or otherwise dismiss the agent from his employment without notice.

2. **Rescission and Damages:** The principal may also rescind any contract made on his behalf by the agent without authority or in breach of his duty and this may include claims for damages.

3. **Action for Account:** The principal may take an action to compel the agent to render an account for all his dealings on his behalf, in respect of their agency relationship. This may also include an account for all money or property of the principal in his possession.

4. **Action in Tort**: The principal may in addition sue the agent for conversion where the latter has received property on his behalf and has misappropriated or misused it. He may also institute an action for negligence where such is in contravention of the agency agreement.

5. **Private Prosecution**: The principal may be entitled to and may take out private summons against the agent where the latter's conduct, act or omission is criminal.

3.9.2 Remedies Available to the Agent

Both the principal and the agent are entitled to and may claim one or more of the following remedies:

1. **Damages**: The agent may sue the principal to recover any loss or injury he may have suffered as a result of the principal's failure to perform any of his duties under the agency arrangement. This may include his right to indemnity or re-imbursement and damages unless the parties agreed otherwise or the agent has waived or otherwise lost his right to sue.

2. **Right of Set-Off**: Whenever the principal institutes an action in a court of law against the agent, the latter may claim a right of set- off or counter-claim of engagement due to him from the principal by way of remuneration, indemnity or re-imbursement. This he must specifically do in his defense to the claims by the principal.

3. **Right of Lien**: The agent also has a right of lien on the property, goods or chattels of his principal in his lawful possession or custody in respect of and up to the amount of his claim for remuneration, losses, liabilities and expanses incurred lawfully and for advances made in favour of the principal. This is however subject to any agreement between the parties. The law recognizes only two types of lien; the general and particular lien.

4. **Right of Stoppage in Transit**: Where the agent stands towards his principal in the position of an unpaid seller of goods, he may exercise this right against the goods of his principal.

3.10 TERMINATION OF AGENCY RELATIONSHIP

A. Termination of Agency by Acts of the Parties: the parties can on their own accord agree to bring the relationship to an end. This includes the Agreement between Principal and Agent, Revocation by Principal and payment of Remuneration to the Agent

B. Termination of Agency by Operation of Law: this happens in a situation where the law will presume certain operations in such a relationship and it will be deemed to have occurred. Such situation includes: By Performance, By Effluxtion of time, By Frustration, By Death of Principal or Agent, By Insanity of Principal or Agent and By Bankruptcy of Principal or Agent.

4.0 CONCLUSION

A thorough perusal and understanding of this unit would enable the student to thoroughly understand the concept of agency, its origin and the various theories usually employed to determine the existence or otherwise of an agency relationship.

5.0 SUMMARY

This unit thought us:

a) The definition and types of agency.

b) The various theories associated with the concept of agency.

c) The Rights and the Obligations of the Parties

d) The Process of terminating Agency Relationship

6.0 TUTOR-MARKED ASSESSMENT

1. Attempt a concise definition of an agency as a legal concept.
2. The origin of agency is vague; Discuss
3. Distinguish the various theories of agency as a concept in commercial transactions.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3

SALE OF GOODS

CONTENTS

SALE OF GOODS

1.0 INTRODUCTION

The law governing sale of Goods in Nigeria is the Sale of Goods Act, 1893 (a statute of General application in force in Nigeria). The rules of Common Law, including the Law Merchant which are not inconsistent with the express provisions of the Sale of Goods act, 1893 are also applicable. The Act has applies the general rules relating to contract which must be present in a contract of Sale of Goods; such elements includes; offer and acceptance, consideration and other elements of a valid contract.

2.0 OBJECTIVES.

The learners are expected to be able to understand the basic principles and laws governing a sale of goods contract as well as other related contract. In the context of this unit, learners are also expected to be able to know what sale of goods contracts are and the differences between sale and other transactions.

3.0 MAIN CONTENT

3.1. WHAT IS SALE OF GOODS

Sale of Goods is defined in section 1(1) of the Sale of Goods Act, 1893 as "A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price".

This means that in addition to the ordinary elements of a contract, two other element, goods and money consideration, must also be present in a contract of sale of goods.

The above definition also envisages two situations namely.

a) A contract of sale, in which the property in the goods is transferred from the seller to the buyer.

b) An agreement to sell, in which the transfer of the property takes place 'in future' (at a future time), or a fulfillment of certain conditions.

A contract for the sale of goods yet to be manufactured is an agreement to sell because the property in the goods cannot pass until they are manufactured and ascertained.

3.2 SALE GOODS AND OTHER TRANSACTIONS.

Sale of Goods is distinguishable from other commercial transactions but similar to them in context. Some of these transactions are:

3.2.1 SALE AND EXCHANGE

The consideration required under section 1(1) of the Act must be money whereas an exchange involves a transfer of goods for other goods. A contract of exchange simply means the giving of goods to the person in exchange for the other persons goods-barter. In other words, money, which is a prerequisite for a contract of sale is not involved in a contract of exchange. When there is an exchange the property in the goods passes.

3.2.2 SALE AND BAILMENT

A bailment is a transaction under which goods are delivered by one party (the bailor) to another (the bailee), on certain specified terms, which generally provide that the bailee is to have possession of the goods and subsequently redeliver then to the bailor in accordance with his instruction. The property in the goods is not intended to and does not pass on delivery, and in fact remains with the bailor, though it may sometimes be the intention of the parties that it should pass in due course, as in the case of ordinary hire purchase contract. In sale, on the other hand, there is usually an indication that the property in the goods would pass to the other party in the transaction. In other words in a contract of sale for bailment there is no transfer of property in the goods from the bailor to the bailee, whereas in the case of sale, the property in the goods should be transferred from the seller to the buyer

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3.2.3 SALE AND HIRE PURCHASE

Generally, contracts of hire purchase resemble contract of sale very closely, and indeed in practically all cases of hire-purchase, the ultimate sale of the goods is the real object of the transaction. The distinction between them is very clear and extremely important at this initial stage. A contract of sale involves two parties, the buyer and the seller, whereas a hire purchase transaction invariably involves three parties to it, namely, the seller, of the goods who sells them to finance a company, which in turn leaves the goods on hire purchase terms to the hirer(who may not become the buyer). Under a hire purchase transaction the hirer,(who may or may not become the buyer) has possession of the goods and is entitled to their use, although he is not the owner.

3.2.4 SALE AND GIFT

A gift is an immediate, voluntary and gratuitous transfer of any property from one person to another. In other words, it is a transfer of property without any consideration. It is, not binding.

Sometimes, problems arise with regard to transactions in which what is regarded as "free" gift is offered as a condition of entering into some other transaction. In ESSO PETROLEUM LTD V COMMISSIONERS OF CUTOMES AND EXCISE (1976) 1 ALL E.R. 117, garages selling petrol advertised a "free" gift of a coin (bearing a likeness of a footballer) to anyone buying four gallons. It was held by the House of Lords that, although the transaction was not a gift, in as much as the garage was contractually bound to supply the coin to anyone buying four gallons of petrol, it was not a sale of goods either. The transaction was characterized as one in which the garage promised to supply a coin in consideration of a customer buying the petrol. It was thus, in substance, a collateral contract existing alongside the contract for the sale of the petrol.

3.3 TERMS OF CONTRACT OF SALE OF GOODS

3.3.1. THE PRICE

In a sale of goods contract there must be a money consideration called "the price". This usually includes any form of payment except trading by barter which is exchange of goods for good without money. Such price can be payment by credit card, cheque, bank draft, e.t.c. There must have been an agreement for the payment of a fixed price without which there will not be any contract. Section 8 of the Act defines what constitutes "the price".

3.3.2. THE SUBJECT MATTER-GOODS

Generally, Goods are defined by section 62(1) of the Act as to include:

> *"All chattels personal other than things in action and money, emblements, industrial growing crops and things attached to or forming part of the land such as agreed to be severed before sale or under the contract of sale".*

3.3.3. CATEGORIES OF GOODS

There are different categories of goods and they are provided for by the virtue of Section 5 of the Act. Goods may be categorized as:

(a) Existing Goods.
(b) Specific (or ascertained) goods.
(c) Goods sold by description.
(d) Future Goods.

A. EXISTING GOODS

These are goods that are owned and possessed by the seller at the time of contract. This can be meant to be that they are goods actually in existence when the contract is made. Such existing goods may either the specific or unascertained.

B. SPECIFIC (OR ASCERTAINED) GOODS

These are goods identified and agreed upon at the time the contract of sale was made. For example, “a 2009 Rhumba Motor Boat with Engine number 10465 and chassis number AB60421”.

C. GOODS SOLD BY DESCRIPTION

These are goods sold by description, but which were not identified or agreed upon at the time of the contract but are included in a particular class of goods, for example “10” “18 kilogrammes mahogany wood”

D. FUTURE GOODS

These are goods not yet in existence, and goods in existence but not yet acquired by the seller. That is to say, goods yet to be acquired or manufactured by the seller after the contract has been made. In HOWELL V COUPLAND (1876) 1 Q.B. 258, a sale of 200 tons of potatoes to be grown on a piece of land was held to be a sale of specific goods, despite the fact that they were not existing goods.

3.3.4. THE IMPLIED TERMS

To presume the freedom of the parties some terms are implied into the contract and these are in terms of conditions and warranties. Note that they could be excluded by the parties.

1. **Implied Term as to Warranties**
    a) An implied warranty that the hirer shall have and enjoy quiet possession of the goods. The general rule is that the owner must ensure that he remains in peaceful and undisturbed possession, note that interference from an interested third party would constitute a disturbance.
    b) An implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party at the time when the property is to pass. A charge or encumbrance in favour of a third party on goods which are subject of a hire-purchase agreement would remain perfectly good at the time of the hire because the ownership only passes when the hirer elects to exercise the option to purchase.
2. **Conditions**

There are certain implied conditions under the Act.

- Title: An implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass. This provision is aimed at assuring the buyer that the seller is an absolute owner of the goods. In addition, the right to sell arises at the time of the delivery of the hired goods and not when the agreement was signed. See Akoshile v. Ogidan (Supra).

- Merchantable Quality: In hire-purchase agreement there is an implied condition that the goods are of merchantable quality. However, no such condition will be implied where the hirer has examined the goods or a sample of them and the examination ought to have revealed the defects of which the owner could not reasonably have been aware at the time when the agreement was made.
- Fitness for Purpose: Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, an implied condition that the goods shall be reasonably fit for that purpose.
- Sale by Description: Goods sold by description must correspond to the description given. See S. 13 of the Sale of Goods Act. Note that the plaintiff can only recover if the goods correspond with the description S. 14 (2) provides that goods sold must be of merchantable quality. That is, the goods should be suitable for any purpose for which the goods are normally used. But the buyer examines the goods and did not complain, he is bound and can't complain at a later date. See **JOHN HOLT LTD. Vs EZEAFULUKWE (1990) 2NWLN (PT 133_ 520.** Where it was held that where a party to a contact to sale of goods satisfies himself of an examination of goods, he can't say that the goods are defective or bad.

- Sale by Sample: Under sale by sample the bulk must correspond with the sample in quality and the buyer shall have opportunity to compare the bulk. See S. 15 Sale of Goods Act.

3.4 TRANSFER OF PROPERTY BY NON-OWNER

It is the general rule that good title would not pass, unless the buyer gets a good title free from any encumbrance by buying from the owner or his authorized agent but there are circumstances in which the law will deemed a proper transfer when there is a transfer by a person who has either no property or whose rights are defective disposes of goods.

The general rule is built on the legal principle of the Latin Maxim **"Nemo dat quod non habeat"** which means that no one can give what he or she does not have. The purpose of this

rule is to protect the interest of the property owners. This principle is established in Section 21 of the Rule 1 of the Act.

3.4.1 EXCEPTIONS

1. SALE UNDER AGENCY

The main exception under this head is the sale by an agent as created by Section 21 Rule 1 and it states that an innocent buyer would acquire a good title where the seller sells under the authority or consent of the owner. In this instance, it means that a sale by an agent without actual authority will give the purchaser a good title if the sale is within the agent's apparent or usual authority.

2. ESTOPPEL

If the owner of goods represents that another is his agent or allows a person to represent himself as his agent, although no such agency exists in fact, he, the owner will be estopped from denying the existence of his agents authority to act, on his behalf, in relation to the goods. This exception is created by the later part of Section 21(1) of the Act

3. SALE BY A PERSON WITH VOIDABLE TITLE

By section 23, the buyer, who buys in good faith and without notice of any defect in the title of the seller, will acquire good title if the goods are bought from a seller whose title is voidable but at the time of the sale it has not been avoided.

4. SALE BY A SELLER IN POSSESSION

Where a person who sold goods retains possession of them and resells them, for instance, where A, the seller, sell goods to B and then resells the same goods to C. If property has passed to B, but the seller is still in possession of the goods or documents of title to the goods, and the seller sells them to C, who purchased in good faith and without notice of the sale to, this second transaction passes title to C. B will only have an action for breach of contract against the seller. Section 25 of the Act.

For the second buyer to acquire good title, the seller must deliver possession of the goods or documents of title. merely contracting a second sale is not sufficient to give title to the second buyer.

5. SALE BY A BUYER IN POSSESION

Section 25 (2) of the Act provides for this. The goods or title to the documents of title must have been obtained under a sale or an agreement to sell that which is bought or agreed to buy.

6. SALE IN MARKET OVERT

The word market overt was been defined by Jervis, J in Lee v. Bayes (1856) 18 CB 599 as an open, public and legally constituted market. Note that an unauthorized market does not qualify as a market overt. To constitute a sale in a market overt, it must be shown that the sale took place within the premises of the market, during ordinary business day, provided it is a sale of goods of the kind normally sold in the market. Not only must the sale be in a market overt and the whole transaction effected there, it is vital to show that the sale was open and public. In **Reid v. Metropolitan Police Commissioner (1973)2 AER 97**, the sale of stolen goods took place in a market overt in the morning when the sun had not risen and it was still only half light. The court held that the goods should have been sold in day time when all who passed could see the goods.

7. SALE BY COURT ORDER

The second arm of section 21(2) (b) of the sale of Goods Act protects all sales carried out under the order of a court of competent jurisdiction. The High Court has the power to order the sale of any goods which may be of perishable nature, or likely to deteriorate from keeping or which for any other just and sufficient reason it may be desirable to have sold at once. Consequently, a court bailiff acting in compliance with such an order may exercise a valid power of sale.

3.5 DUTY OF PARTIES

3.5.1 DUTY OF THE SELLER

A. Duty to Deliver Goods at the Right Time

Delivery is the voluntary transfer of possession from one person to another. See Section 62(1). It does not necessarily mean transportation Transfer of possession may be actual or constructive or conceptualized as legal possession. Stipulation as to time is of essence in the contract of sale of goods. It does depends on terms of the contract but in the case of Hartley v. Hymans (1920) All E.R 328, the court held that in ordinary commercial contracts for the sale of goods, the rule is that time is prima facie of the essence in the contracts.

If the time for delivery is fixed by the contract, then failure to deliver at that time will be a breach of condition, where no date is fixed in the contract, delivery by the seller must be within a reasonable time which will be determined by matters such as the nature of the goods. Although time is of delivery, the buyer can waive this condition where he does, then it will be binding on him whether made with or without consideration.

B. Duty to Pass Good Title

This is a condition of the contract for which the buyer can terminate the contract and seek damages for any loss, or affirm the contract and recover damages for loss. The right of the buyer is to receive the best title to the goods, that is, title that cannot be defeated by another person.

C. Duty to Supply Goods of The Right and Satisfactory Quality

There is usually an implied term that the goods supplied under the contract are of satisfactory quality and correspond with the description. Goods are regarded as sold by description, where the buyer contracts to buy the goods in reliance on the description given by or on behalf of the seller.

3.5.2 DUTY OF THE BUYER

A. DUTY TO PAY THE PRICE

It is the primary duty of the buyer to pay for the price of the goods supplied to him. Payment for the goods and delivery of the goods are concurrent conditions and the buyer is not entitled to

claim possession of the goods unless he is ready and willing to pay the price in accordance with the contract.

B. DUTY TO ACCEPT THE GOODS

This is also one of the major duties of the buyer, the duty to accept the goods in accordance with the terms of the contract. In this instance, acceptance in essence involves taking possession of the goods by the buyer. And delivery of the goods by the seller is of the essence in the contract. It is worthy of note that, if the buyer fails to take delivery in time that will not justify the seller in selling the goods to another person, unless the delay is clearly unreasonable to justify the seller to conclude that the buyer has repudiated the contract.

i. ACCEPTANCE AND EXAMINATION

Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them, unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. See Section 34(1)

3.6 RIGHT OF THE PARTIES

3.6.1 RIGHT OF THE SELLER

A. Personal Remedies

The seller of goods under a sale of goods contract has two remedies under this head available to him as against the ones available under the real remedies that will be discussed later. This is an action that directly affects the buyer for the seller to recover sums of money representing that he has lost, it is a right in *personam:*

They are two of them;

1. action for the price
2. action for damage

1. Action for the Price

An action for the price is an action in debt. The seller has the right to bring an action for the price.

2. Action for Damages

Under 50 (1) of the Act, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller will have an action for damages for non acceptance.

B. Real Remedies

The seller may exercise some real rights against the goods as against the personal remedies discussed above. These are real rights and are in relation to the goods. They are rights *in rem*.

I. Rights of the Unpaid Seller

An unpaid seller is a seller who has not been paid the whole of the price or when the bill of exchange or other negotiable instrument has been received as conditional payment and the condition for which it has been received has not been fulfilled by reason of the dishonour of the instrument it. See Section 38 (1). It does not matter that the time for payment has not arrived, note that if the buyer has tendered the price and the buyer has refused to accept, he cannot be an unpaid seller within the meaning of the Act. See Lyons and Co v. May and Baker Ltd (1923) 1KB 685.

II. Rights of Stoppage in Transit

The right is a right of stopping the goods while they are in transit, resuming possession of them and retaining possession until payment of the price. The unpaid seller has the right to resume possession of goods which are left in his possession as long as they are still in the course of transit.

The following are the requirements for stoppage of goods in transit. The method of stoppage is outlined in s46 of the Act, they are stated below as where:

- the seller is unpaid
- the buyer is insolvent: that is the buyer is either ceased to pay their debts in the ordinary course of business or cannot pay their debts as they become due. (s61 (4))
- the goods are in transit

III. Rescission and Re-sale

A contract of sale is not rescinded by the exercise of the rights of lien or stoppage. Here, the buyer may be able to require delivery on tendering payment of the price. Where property in the goods has passed to the buyer, it will not revert in the seller merely because they exercise the right of lien or stoppage. Note that the seller must terminate the contract before property in the goods will revert.

3.6.2 **RIGHT OF THE BUYER**

1. **Recovery of the Price**

If the buyer has paid the price, he may sue the seller to recover the amount paid if the goods are not delivered or the consideration for the payment has failed. (S54 of the Act).

2. **Rejection of the Goods**

The buyer can repudiate the contract if the seller is in breach and the breach goes to the root of the agreement. That is, the breach is a breach of condition and not warranty. Breach of contract may arise in the following ways:

- late tender of the goods
- breach of an implied condition
- right of rejection by virtue of an express or implied term or usage of trade.

The motive for rejection is irrelevant as in the case of Arcos Ltd v. E.A. Ronaasen & Sons (1933) AC 470.

3. Acceptance

The buyer loses the right to reject the goods if all or part of the goods are accepted, unless the contract permits rejection after acceptance. (S35)Where a breach justifies rejection, unless there is agreement to the contrary, the buyer may reject all of the goods or may take those that are not defective, or may take some of the defective goods and reject the rest (S35A (2)). In **J & H Ritchie Ltd v. Lloyd Ltd (2005) SLT 64**, it was held here the buyers agrees to the repair of the that where goods and the repair was properly effected so that the goods conformed with the contract, the buyer lost the right to reject.

4. Damages

Any claim the buyer may have for damages a distinction must be made between a claim for failure to deliver and a claim relating to goods that have been delivered. Failure to deliver may cause loss and the buyer could bring an action for damages (S51 (1)).

1. If there is an available market for the goods under S51(3) the presumption is that the measure of damages is the difference between the contract price and the market at the time the goods ought to have been delivered at the time of the refusal to deliver.
2. Where the goods are delivered and the buyer elects not to reject them (S11 (2)), where the breach does not give rise to the right of rejection, it is treated as a breach of warranty and the buyer may deduct damages from the price.

Note that the buyer will not be able to claim damages where the loss was not caused by the breach. In Lambert v. Lewis (1982) AC 225, the seller of a defective towing equipment was liable for the breach of S14(3), but not for the damages the buyer had to pay to a third party who was injured when the buyer continued to use the equipment in spite of knowing that was defective.

SELF ASSESSMENT EXERCISE (SAE) TWO

Distinguish between Sale of Goods and

1) Exchange

2) Bailment

3) Hire Purchase

4) Gift.

4.0 CONCLUSION'

This unit has exposed learners to the to the general understanding of Sale of Goods in Nigeria and its importance in commercial transactions.

5.0 SUMMARY

Through this unit, learners have been able to know the following:

a) Definition of Sale of Goods.

b) Distinction between sale of Goods and exchange, bailment, hire-purchase and gift.

c) The Obligations and Rights of the parties under Sale of Goods Laws in Nigeria.

6.0 TUTOR MARKED ASSIGNMENT

1) The law of commercial transaction in relation to Sale of Goods was alien to Nigeria until the advent of Sale of Goods Act of 1893. Do you agree?

2) Distinguish between sections 1(1) and 1(3) of the Sale of Goods Act of 1893.

7.0 REFERENCES/FURTHER READINGS

1. Sale of Goods Act, 1893.

2. Rawlings, Commercial Law, University of London, (2007)

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UNIT 4

THE HIRE PURCHASE AGREEMENT

CONTENTS

HIRE PURCHASE TRANSACTION

1.0 INTRODUCTION

A Hire Purchase transaction is a bailment of goods but with a provision for the option of sale or transfer of the property in the goods bailed from the bailor to the bailee. The contract of hire purchase is mostly governed by the Hire Purchase Act, Law of the Federation, 1990 and

common law. The concept of Hire Purchase is an important aspect of commercial transactions developed in the United Kingdom and can now be found in existence all over the world now. It is also called closed-end leasing. In the true Hire Purchase Act did not come to being until the Factors Act, 1889, introduced the rule that a buyer in possession of the goods could pass a good title to a bonafide purchaser or pledgee.

In Nigeria as well, the contract of hire purchase is also of recent origin. Indeed, the first Act passed on this matter was in 1965, Its practice however dates back to scores of years ago when local traders sold on credit while dealers sold to people on local and informal.

2.0 OBJECTIVES

This unit presents us with the full knowledge of Hire-Purchase transactions. It will highlight the content, formation and usage of Hire Purchase contracts. This unit also examines the capacity of the contracting party and the rudimental of the obligations of all the party to the contract.

3.0 Main Content

3.1 Definition of Hire Purchase

Halsbury's Laws of England Vol. 1st Edition, defined a contract of hire purchase as "a contract of hire with option to purchase under which the owner of the chattel undertakes to sell it to, or that it shall become the property of the hirer conditionally on his making a certain number of payments. Until the making of the last payment, however, no property in the chattel passes."

3.2 Hire Purchase and Other Legal Transactions

The term hire purchase is always loosely employed by many people as synonymous with credit purchase or such similar transactions. Here the Hire Purchase transaction will be distinguished from other legal transactions.

3.2.1 Hire Purchase Distinguished From Hire

Hire is a kind of contract that does not pass title of the goods at a future date. The definition of Hire Purchase as seen above is different from the concept of hire. Hire only enables a person to use the goods for his immediate use and does not want to own the property. The hirer will return the chattel to the owner after its use.

3.2.2 Hire Purchase Distinguished From Loan and Mortgage

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

3.2.3 Hire Purchase Distinguished From Sale on Credit Terms

This is a situation where a person wants to make an outright purchase of goods but may find out that he does not have sufficient money to make full payment for them.

In this instance, the person may pay in instalment, while the goods pass to the buyer on credit. In this instance, the seller loses his seller's right of lien on the property and where the buyer resells the goods; the third party will be an innocent purchaser for value without notice and will have a good title.

3.3 Reason for the Adoption of the Hire Purchase System

There are mainly three reasons for the Hire Purchase system of commercial transactions

1) One of the most important reasons and the first is that it enables credit to someone, who is unable to pay cash for the goods he wants and who would be happy to pay some deposit and therefore pay the balance in instalments at a stipulated rate of interest.

2) The other reason for this system is that the dealer or the manufacturer of the goods cannot always provide credit and yet the goods must be bought to enable the dealer in business.
3) The third option for the adoption of the hire purchase system is the possible evasion of the Money Lenders Act 1939 Cap 124 LFN, 1958, which regulates the conduct of the business of money lending.

3.4 THE FORM OF HIRE PURCHASE AGREEMENT

A Hire Purchase agreement may either be oral or written under the common law rule. It is however pertinent to note that a detailed Hire Purchase agreement is usually in writing and indeed should be in writing.

The common law rule does not specify a prescribed pattern or form for hire-purchase agreements. Note that hire-purchase agreements are characterized by three main essentials which are:

a. a clause by which the owner agrees to let, and the hirer agrees to hire the goods.
b. a clause which empowers the hirer to determine the hiring and return the goods.
c. a clause giving the hirer the right or option to purchase the goods for a nominal sum at the end of the hiring.

3.5 ELEMENTS OF HIRE PURCHASE TRANSACTION

3.5.1 Offer and Acceptance

This is the first essential requirement of the hire-purchase agreement, which will give a party the right to enforce or sue for a breach of the agreement, in order to enforce a contract. If the number of the parties in agreement is two then, the offer in respect of the hire-purchase in writing is constituted by the hirer signing the hire purchase agreement, while the owner signifies acceptance by executing the agreement already signed by the hirer. The acceptance must be communicated to the hirer in order for it to be valid.

An oral agreement between the hirer and the owner is also possible. If the hire-purchase agreement involves three parties, i.e the owner, the dealer and the hirer, then the offer is made by the hirer. Generally the dealer is not an agent of the owner, but for the purpose of receiving the offer, he may be construed as the agent of the owner for that particular moment. Mere delivery of the goods is not sufficient as acceptance. It is important and compulsory to communicate such to the hirer.

3.5.2 Capacity of the Parties

The liability of infants under the general law of contract is the same under the hire-purchase agreements. Prima facie, infants are not liable under the hire-purchase agreement except those relating to necessaries and beneficial contract.

3.6 OBLIGATION OF THE OWNER, HIRER AND DEALER

3.6.1 Obligation of the Owner

The first obligation of the owner under the common law is to deliver the goods which are the subject matter of the hire purchase agreement to the hirer. It is therefore a fundamental duty and its breach will entitle the hirer to repudiate the contract. Delivery in this sense might not be physical transfer but voluntary transfer of possession from one person to another.

3.6.2 Obligation of the Hirer

This is the fundamental obligation of the hirer to accept delivery of the goods, the subject matter of the hire purchase. Such Hirer will be liable in damages if he fails to take delivery within a reasonable time after he had been requested to do so.

It is also the primary duty of the hirer to pay, punctually the various sums provided for in the agreement in accordance with the provisions of the agreement. The payment of installments as specified in the hire-purchase agreement is mandatory and must be strictly complied with. There are certain circumstances where the installment payment may be suspended or waived. See the case of **Offodile and Sons Enterprises v. S.C.O.A (Nig.) Ltd (1969) CCHCJ 1333**. The court held that the owners were entitled to the rentals, and that the hirer's strict liability to pay rentals

during the war period was only waived or suspended during the civil unrest that should not be regarded as destroying the right to recover the rentals.

3.6.3 Obligation of the Dealer

In practice generally, the hirer is allowed to face with the dealer in the transaction to enforce certain rights under an independent contract entered into between them despite the fact that the finance company is the owner of the goods. However the dealer is closer to the hirer as stated by the Supreme Court in Amusan and Thomas v. Bentworth Finance Co. Ltd (1966) N.M.L.R 276, that in law, the dealer (S.C.O.A) could be treated as agents of the finance company for the purpose of delivery of the vehicles but not for all purposes.

3.7 CONTROLS OF HIRE PURCHASE AGREEMENT

3.7.1 **Adverse Possession and Conversion**

Where section 14(1) of the Act applies, a hirer in possession of goods under a hire purchase agreement is deemed to be in adverse possession if the owner, in any action to enforce a right to recover possession of the goods from the hirer, proves that after his right to possession accrued and before commencement of the action, he made request in writing for the possession of the goods.

The purpose of this section is that where the hirer has defaulted, and a written notice has been issued on him, then if he refuses to deliver them up, the owner will have a cause of action for adverse possession against him. Giving of notice is mandatory, and if he refuses to deliver up the goods, his possession will be regarded as adverse, sufficient enough to ground the statutory cause of action in damages for adverse possession and could also be sued for conversion.

4.0 CONCLUSION

A Hire Purchase agreement is a contract whereby the owner of a chattel lets it out on hire for a periodic rent with the provision that on due compliance with the various terms of the agreement, and the compliance with the various terms of the agreement, and the completion of the agreed number of payment of rent, the hirer either becomes the owner of the goods automatically or shall have the option of purchasing the chattel by the payment of a small agreed sum.

5.0 SUMMARY

In summary the concept of Hire Purchase as we have seen in this unit is a straightforward concept of commercial transaction. It enables the buyer of the goods to repossess the goods after fulfilment of the condition of the transaction. It is clearly distinguishable from other form of legal transactions like Hire, Loan and Mortgages, just to mention a few of it.

6.0 TUTOR MARKED ASSIGNMENT (TMA)

1) Briefly explain the historical development of the concept of Hire Purchase and suggest your own definition of the term.
2) Distinguish between the contract of Hire Purchase and other Legal Transactions.

7.0 REFERENCES/FURTHER READING

- Sale of Goods Act, 1993
- Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited, 1992.
- Hire Purchase Act, CAP 169, Laws of the Federation
- M.O. Sofowora General Principles of Business and Coop Law, Soft Associates, 1999.

UNIT 5

CONTRACT OF FREIGHT

CONTENT

1.0 INTRODUCTION

Bill of lading is a major part of the contract of freight, but it serves a dual purpose either as a contract between the ship owner and the third party or as merely an evidence of goods between the ship owner and the charter party. The bill of lading is in the category of contract referred to as contract of adhesion. A contract of affreightment is normally evidenced by a bill of lading when the goods to be shipped form only part of the cargo which the ship is to carry.

2.0 OBJECTIVE

The main objective of this unit is to discuss in full, the whole content and essence of the Bill of lading. This unit will also make out the difference between a bill of lading and all other relative transactions.

3.0 MAIN BODY

3.1 Bill of Lading

The bill of lading is an important aspect of the carriage of goods by sea. A bill of lading is a document signed by the ship owner, or by the master or other agent of the ship owner, which states that certain goods have been shipped on a particular ship and sets out the terms on which these goods have been delivered to and received by the ship owner. It is usually in standard form, which in some cases governs the contract of carriage of goods by sea. It is divided into two parts: one is blank, on which the names of the party's freight and the particulars voyage will be reproduced, and one printed containing clauses inserted unilaterally in advance by the carrier.

It has been argued that the bill of lading falls into the category of contract referred to as contracts of adhesion, that is, contracts on take it or leave it basis. This view is particularly prominent in the United States of America.

The bill of lading is issued to the shipper in sets of three. One is retained by the master or broker, while two copies are dispatched; one by express mail to the buyer or the consignee. It is a document of title, possession of which, in legal sense, is possession of the goods which it represents.

3.2 Functions of the Bill of Lading

A bill of lading in its classical legal terms has three main functions:

1. It is the contract of carriage of goods or at least evidences the contract of carriage.
2. It acts as a receipt for goods put on board the vessel.
3. It acts as a document of title.

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3.2.1 The Bill of Lading as a Contract

The bill of lading is merely evidence of the contract between the shipowner and the shipper and a contract between the shipowner and third parties, An assignee who acquires rights in a bill of lading by way of negotiation of the bill of lading is bound by the terms of the contract as contained in the bill of lading or other documents in which the terms of the contract may be

contained. In Crooks v. Allan (1879) 5 Q.B.D, 38, it was held that a bill of lading is not the contract but only an evidence of the contract.

But in The Ardennes, it was settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms.

3.2.2 The Bill of Lading as a Receipt

This was originally the traditional or original role of the bill of lading. It served as receipt for the goods to which it related that the goods have been taken on board. In its original role, it itemized the goods shipped and gave further particulars of the goods such as the description, quality and shipping mark. In Cox v. Bruce (1886) 18 QBD 147, it was held that it was no part of the master's duty to insert these quality marks. A document which is not signed by or on behalf of the carrier is not a bill of lading in the legal sense.

3.2.3 The Bill of Lading as a Document of Title

The third function of a bill of lading is that it serves as a document of title to the goods it represents, and its transfer is equal to the physical transfer of the goods. The holder of a bill of lading in respect of goods that had been shipped may effect a transfer of ownership in respect of the goods by transferring the bill of lading to anybody who has given him value for the goods.

3.3 Bills of Lading as a Negotiable Instrument

A bill of lading is an assignable document of title to the goods. If a bill is transferred or assigned by one person to another, either by a mere delivery (as in the case of a bearer of bill of lading) or by an indorsement of the bill of lading followed by its delivery (as in an order bill of lading), the bill of lading is said to have been negotiated, and the party to whom the bill is transferred is referred to as the transferee of the bill of lading.

A bill of lading is not a negotiable instrument under the Bill of Exchange Act, because unlike a bill of exchange, the bona fide holder of a bill of lading and for value cannot acquire a better title than the transferor possesses. A negotiable instrument is therefore an exception to the general rule of law that nemo dat quod non habeat. International commercial contracts, the bill of lading

is the pivot upon which other contractual relationships are dependent. The important point, however, in the context of negotiability of the bill of lading is that the fact that a party is an indorsee of the documents does not by itself permit right of suit under the terms of the documents per se.

The extent of the negotiability of the bill of lading as it pertains to right enforcement in contract is contigent upon the particular enforcement regime in the particular country.

4.0 CONCLUSION

The bill of lading as part and parcel of contract of carriage of goods by sea, as has been discussed is a contract between the ship owner and third party or an evidence of contract between the charterer and the ship owner. It could also serve as receipt evidencing that the goods are on board the ship or it could serve as a title of document that can be transferred. It could also serve as a negotiable instrument in some regard.

5.0 SUMMARY

In summary, the bill of lading is a major document of carriage of goods by sea. It is a document that evidences a contract between a charterer and a ship owner and also serves as a contract of carriage of goods between the ship owner and the third party who is placing goods on board the ship.

6.0 TUTOR MARKED ASSIGNMENT

1. What are the functions of a bill of lading?
2. Bill of lading is a negotiable instrument. Discuss.

7.0 REFERENCES/FURTHER READING

1. Hire Purchase Act. Cap 169, Laws of the Federation.

2. Sale of Goods Act, 1893.

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5. Sofowora, General Principles of Business and Coop Law, Soft Associates, 1999.

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7. Course Material on Law of Commercial Transaction, School of Law, National Open University of Nigeria.

MODULE 4

Unit 1 – Introduction to Taxation

Unit 2 – Unfair Competition.

UNIT 1 INTRODUCTION TO TAXATION

CONTENTS

1.0 INTRODUCTION

In this unit, we shall examine the definition of tax, characteristics of tax, the things that must be present in a tax. We shall also examine the nature of tax as well as the characteristics and criteria used in identifying an ideal tax. Then we shall look at the importance of levying and payment of tax.

2.0 OBJECTIVES

At the end of this unit, you should be capable of:

- Defining the concept of tax and taxation
- Stating the criteria used to identify a particular payment as tax.
- Differentiating between tax and other types of payments like toll, fare etc.
- Understanding the importance of levying and paying tax in Nigeria.

3.0 MAIN CONTENTS

3.1 The Definition and Nature of Taxation

In a plain language, the *Oxford English Dictionary* (1973) has defined tax as 'a compulsory contribution to the support of government levied on persons property, income, commodities, transactions, etc, now at a fixed rate proportionate to the amount on which the contributions is levied'. However, to further simplify this definition, the *Oxford Advanced Learner's Dictionary* (2006) defined tax as 'money that you have to pay to the government so that it can pay for public services.' It further concluded that 'people pay tax according to their income and businesses pay tax according to their profits. Tax is also often paid on goods and services.'

However, despite the various definitions, you should note that a proper tax within the above definitions must be one backed by legislation and must be a deduction that gives to treasury of the authorities concerned with revenue generally. Also the compulsory nature of tax should also be noted.

Tax should not however be confused with other forms of compulsory contribution which bear semblance with it.

3.2 COMPONENT OF A GOOD TAX

There are various essential components of a good tax and these have been highlighted in the works of Kath Nightingale (2001) "*Theory and Practice of Taxation"* which states that a good tax must possess the following:

1. **Simplicity:** A good tax system must be straightforward, simple and coherent. The concept and principles of the tax must be understood by majority of the citizens and also must be simple to operate. There must also be consistency in administration of the tax among the different strata of government.

2. **Equity:** An ideal tax must be administered on the principles of equity. There are two types of equitable principles in the taxing system – horizontal equity and vertical equity. What we mean by **horizontal equity** is that those in equal circumstances should pay an equal amount of tax. And when we say **vertical equity**, it means that those in unequal circumstances should pay different amount of tax. The importance of this criterion is to install confidence in the tax payer who will be more willing to pay their taxes if they believe that the system is fair and equal.
3. **Ability to pay:** By this, we mean that the tax must not be unbearable for the tax payers. It must be within their financial capability.

4. **Administrative Efficiency:** The administrative costs should not be higher than the revenue yielded. Also the tax must take into account certain factors such as, the effects on economic incentives, and whether it is compatible with desirable international economic relations.

5. **Certainty:** The scope of the tax should be clear. This criteria also means the certainty that the tax can and will be enforced, because a tax that is easily evaded usually causes resentment and often a decline in tax payer morality. Also the tax which every person is bound to pay ought to be certain and not arbitrary.

6. **Flexibility and Stability:** The tax system should be flexible especially in a federal and democratic country such as Nigeria where there are always changes in government.

7. **Neutrality:** A tax must be neutral thus it must avoid distortions of the market. For instance, a selective tax, such as the sales tax, is not neutral, because it encourages the consumer to spend his money on another item rather than a taxable one.

3.3 The importance of Taxation

The subject of tax is important and material to any proactive and effective nation. A country that will embrace development must initiate a good and laudable tax system that will help in generating income for its operations. Thus, taxation is very important for all of the following reasons:.

a. Income tax raises revenue to meet government expenditures. Such expenditures include the running of day to day activities of the Government.

b. Tax system can be an instrument to discourage the promotion of certain businesses that are found to be detrimental to societal values; such as sales and usage of alcohol or purchase of cigarettes. Such gods can be marked with high tariff thus, making them expensive.

c. Tax system helps the Government to take care of the needs of her citizens which includes the provision of social amenities and essential reliefs such as , light, water, scholarships and grants, and e.t.c.

d. Taxation has been described to be useful in assisting in the redistribution of wealth in the society. Taxes paid are used to bridge the gap between the rich and the poor.

e. Taxation has also been seen to help in determining population growth, e.g. A state with a low income tax rate will find that more people are moving into that state, while traders will leave states with high income tax rates or engaged in various schemes of tax avoidance and tax evasions.

3.4 Classifications of Taxes

Tax can be classified into two major classes namely; Direct/Indirect Tax There are two major categories of taxation depending on the object of the taxation. The different categories of taxes include the following:

3.4.1 Direct/Indirect Taxation

Taxes can be classified into either direct or indirect. The distinguishing factor between these two is that whether the taxpayer is aware of the incidence of the particular tax paid.

a. **Direct Tax**: This is the tax levied directly on the person who is expected to pay the tax. With this type of taxation, the taxpayer will be duly advised through a notification known as 'assessment notice' and he will also be given receipt for he tax paid. Examples of direct taxation include personal income tax, Pay As You Earn (PAYE), capital gain tax, capital transfer tax, company's income tax, etc.

b. **Indirect Tax:** This is a tax demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. Indirect tax is borne by a person other than the one from whom the tax is collected. Such tax is usually levied on the manufacturer but paid by consumer. The taxpayer of indirect tax s never notified nor have actual knowledge of such levy. Examples of indirect tax include value added tax (VAT), stamp duty, custom's duty, excise tax, etc.

3.4.2 Proportional, Progressive and Regressive Taxation

This classification is based on the way in which the burden of the tax is distributed among the tax payers.

a. **Proportional Tax:** This is the kind of tax in which the amount paid as tax is directly proportionate (equal) to the amount raised (calculated) as the value of the property taxed (also known as tax base). For this, the percentage of the tax rate remains the same as the tax base increases. It is also referred to as neutral tax.

b. **Progressive Tax:** This is the form of tax in which the percentage of the tax rate increases as the tax base of a person increases. Therefore a person with higher income would pay a greater percentage of tax than a person who earns a lower income. The progressive tax system preaches fairness and equity by asking the richer to pay more tax than the poor.

c. **Regressive Tax:** This is a tax whose structure is such that the percentage of tax rate paid becomes smaller as the value of the property taxed (tax base) increases. Thus a person earning higher income pays lesser tax than a person earning lower income.

Nevertheless, it is worthy of note that there are other miscellaneous forms of categorizing taxation. Tax may be classified based on the mode of payment of the tax.

4.0 CONCLUSION

The essence of taxation is far more important than its definition and this has been proved by the fact that, there is nowhere in our laws where the word 'tax' is defined, yet we were able to look through some other surrounding materials to bring out a succinct definition for the concept. An egalitarian society is one which will stop at nothing to ensure a perfect tax system within its borders because that is the only way the economic life of such society can be sustained.

5.0 SUMMARY

In this unit, we examined the various definitions of tax. We also looked at the factors that characterize a good tax and then we discussed the importance of taxation in our society.

6.0 TUTOR-MARKED ASSIGNMENT

1. A Tax is a form of contribution from a member of a society to the constituted authority of that society in order to assist the authority. Discuss.

2. Why is it necessary to levy tax on the society?

7.0 REFERENCES/FURTHER READING

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Unit 2- Unfair Competition

CONTENTS

1.0 INTRODUCTION

The main essence of commercial law is the protection of an individual in a business environment by exposing them to their rights and obligations under the law and this will motivate the operation of such business under a fair and legal atmosphere for the benefit of all. But this notwithstanding, there are certain improper legal operations in business that could wreck the effort of genuine business minded people and such is Unfair Competition in business. To an important extent, the principles of fair competition in the business world are defined by law, and therefore unfair competition may well be unlawful or criminal. But because the forms of competition can change continually and new forms of competition may arise, competition may be unfair, but not illegal, at least not until a legal rule is explicitly made to prohibit it. The exact

meaning of unfair advantage or harm caused in business competition may be vague or in dispute, in particular if different competitors promote different.

2.0 OBJECTIVES

At the end of this unit, students should be seized of the proper understanding of the concept Unfair competition, have a good grasp of the components of unfair competition and their effect on a business operation or in the corporate business world.

3.0 MAIN CONTENTS

3.1 What is Unfair Competition?

Unfair Competition means all dishonest or fraudulent rivalry in trade and commerce, but is particularly applied to the practise of endeavouring to substitute one's own goods or products in the markets for those of another, having an established reputation and extensive sale by means of imitating or counterfeiting the name, title, size, shape, or distinctive peculiarities of the article, or the shape, colour, label, wrapper, or general appearance of the package, or other such simulations, the imitation being carried far enough to mislead the general public or deceive an unwary purchaser, and yet not amounting to an absolute counterfeit or to the infringement of a trade-mark or trade –name.

3.1.1 The Scope of "Unfair Competition''

A. The equitable doctrine of unfair competition is not confined to cases of actual market competition between similar products of different parties, but extends to all cases in which one party fraudulently seeks to sell his goods as those of another.

B. It is not confined to practices involving competitive injury but extends to practises resulting in injury to consumers.

3.1.2 Test of ''Unfair Competition''

That which constitutes "Unfair Competition'' or fraudulent business practice within statute providing that person performing or proposing to perform act of unfair competition within state may be enjoined in any court of competent jurisdiction is question of fact, the essential test being whether the public is likely to be deceived.

Deception here is not only applicable when the distinction between two competing products can be recognised when placed alongside each other, but whether when the two products are not viewed together, a purchaser of ordinary prudence would be induced by reason of the market resemblance in general effect to make mistake one for the other despite differences in matters of detail.

3.2 Components of Unfair Competition

Unfair competition in commercial law refers to a number of areas of law involving acts by one competitor or group of competitors which harm another in the field, and which may give rise to criminal offenses and civil causes of action. The most common actions falling under the banner of unfair competition include:

- Matters pertaining to antitrust law, known in the European Union as competition law. Antitrust violations constituting unfair competition occur when one competitor attempts to force others out of the market (or prevent others from entering the market) through tactics such as predatory pricing or obtaining exclusive purchase rights to raw materials needed to make a competing product.

- Trademark infringement and passing off, which occur when the maker of a product uses a name, logo, or other identifying characteristics to deceive consumers into thinking that they are buying the product of a competitor. In the United States, this form of unfair competition is prohibited under the common law and by state statutes, and governed at the federal level by the Lanham Act.

- Misappropriation of trade secrets, which occurs when one competitor uses espionage, bribery, or outright theft to obtain economically advantageous information in the possession of another. In the United States, this type of activity is forbidden by the Uniform Trade Secrets Act and the Economic Espionage Act of 1996.

- Trade libel, the spreading of false information about the quality or characteristics of a competitor's products, is prohibited at common law.

- Tortious interference, which occurs when one competitor convinces a party having a relationship with another competitor to breach a contract with, or duty to, the other competitor is also prohibited at common law.

Various unfair business practices such as fraud, misrepresentation, and unconscionable contracts may be considered unfair competition, if they give one competitor an advantage over others. In the European Union, each member state must regulate unfair business practices in accordance with the principles laid down in the Unfair Commercial Practices Directive, subject to transitional periods.

4.0 CONCLUSION

The business terrain everywhere all over the world has beern plagued with the disease of unfair competition as discussed in this unit. The essence of the study nonetheless to make students understands how this concept affect the business terrain and how it can be adequately addressed.

5.0 SUMMARY

This unit has presented to the students the definitions of unfair competition which features Passing Off and Trade Libel. We have also been able to highlight situations in which they are made applicable in the business terrain most especially examining their effects on the goods and products of a genuine business operator.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by Unfair Competition?

2. Highlights the components of Unfair Competition

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- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
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- Helen Norman, Intellectual Property University of London Press (2005).

MODULE 5: ARBITRATION

UNIT I: GENERAL INTRODUCTION

1.0 INTRODUCTION

Arbitration provides a forum for the parties to present disputes to a neutral third party who is/are chosen by them to make a binding decision called an Award. It is seen as an alternative means of access to justice in the sense that the parties do not need to refer their disputes to the court of law. It is an aspect of alternative dispute resolution mechanism.

2.0 OBJECTIVES

By the end of this unit, students should be to:

- Define arbitration
- Definition of commercial arbitration
- Identify the advantages of arbitration
- Name various arbitral institution
- Highlight the advantages of arbitral institution
- Understand the applicable laws

3.0 MAIN CONTENTS

3.1 DEFINITION OF ARBITRATION

Arbitration is a process controlled by one or more arbitrators. It provides a forum for the parties to present disputes to a neutral third party who is/are chosen by them to make a binding decision called an Award. Arbitration is a process for the settlement of disputes under which the parties agree to appoint their own judge or judges (arbitrator or arbitrators) who will decide according to their agreement and the law and the parties agree to be bound by their decision.

There are variously definitions of arbitration which includes:

> "….. the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction." (**Halsbury's Laws of England**)

> "….. a mechanism for the resolution of disputes which takes place usually in private pursuant to an agreement between two or more parties under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforcement in law." (**Bernstein, Handbook of Arbitration Practice**)

Furthermore, arbitration refers to the settlement of a dispute between two or more persons after hearing the parties in a quasi-judicial manner by persons other than a competent court. An exercise is not arbitration if it does not answer this definition.
In the words of Professor Schmitthoff:

> *It is a truism to state that Arbitration is better than*
> *Litigation, conciliation better than arbitration and*
> *Prevention of legal disputes better than conciliation.*

Arbitration is a private law system available only to those who agree to use it instead of litigation. Parties to an agreement may further agree that any dispute arising there from shall be settled through arbitration by one or more arbitrators. The agreement must be in writing (Arbitration and Conciliation Act, Section 1). Under Sections 4 and 5 of the Act, where an action is the subject of an arbitration agreement, the court can enforce the arbitration agreement and direct the parties to go to arbitration. An award in arbitration is enforceable as a judgment.
Arbitration in the primitive years was governed by system of laws known as the *Lex Mercatoria*. The most common dispute among merchants in those days had to do with either the price or quality of the goods supplied and it is expected of them to submit such disputes to a neutral third party who would normally be a fellow merchant to assist them settle it amicably.

COMMERCIAL ARBITRATION
Commercial arbitration relates to arbitration of relationship of a commercial nature. The question is what is "commercial"? It is generally agreed that arbitration is a particularly suitable approach for the resolution of disputes arising out of business relationships (as opposed, for instance, to domestic relationships). Contracts entered into by merchants and traders in their ordinary course of business are regarded as a commercial contract. The level of importance that is placed on the concept of commercial contract is very high in the civil law countries as regards arbitration. This is so because in some countries only disputes arising out of commercial contracts may be submitted to arbitration. Thus it would be permissible to hold arbitration over a contractual matter between two merchants but not for a contract based on the determination of inheritance of the property of the deceased.

The fact that in some countries arbitration is only permissible in respect of commercial contracts, whilst in others there is no such limitation, was given international recognition many years ago. The **Geneva Protocol of 1923** obliges each contracting state to recognise the validity of an arbitration agreement concerning disputes that might arise from a contract "relating to commercial matters or to any other matter capable of settlement by arbitration". The words quoted indicate recognition of the distinction between "commercial" and other matters. The implication is that commercial matters are *necessarily* capable of being settled by arbitration

under the law of the state concerned, in the sense that the state allows them to be settled by arbitration, whilst it may (or may not) allow other matters to be settled in that way.

Further emphasis is added to the distinction between "commercial matters" and "any other matter" by the stipulation in the Protocol that each contracting state may limit its obligations "to contracts that are considered as commercial under its national law". This is the so-called "commercial reservation", and it appears again in the New York Convention.

Furthermore, it may be important to know whether the legal relationship out of which the arbitration arose was or was not a commercial relationship. The question arises, for example, if it becomes necessary to seek recognition or enforcement of a foreign award in a state that has adhered to the New York Convention, but has entered the commercial reservation. It is necessary to look at the law of the state concerned to see what definition it adopts of the term "commercial".

Problem occasionally arise because courts of particular countries adopt a narrow definition of commercial, but the approach internationally is to define "commercial" so as to embrace all types of trade or business transactions. The Model Law went a step further in trying to resolve this by not defining the word but stating thus:

> *"The term "commercial" should be given a wide interpretation so as to cover matters arising out formal relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."*

It is advisable to adopt the provision of the Model Law as it provides parties with a wider interpretation of the term "commercial". In Nigeria following the UNCITRAL Model Law, section 57(1) of Arbitration and Conciliation Act defines commercial as

> *"……including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road" .*

ADVANTAGES OF ARBITRATION

The advantages of arbitration include:

(a) **Speed/Flexibility:** Arbitration puts the parties in the driving seat of the proceedings. Businessmen would not want to sit in a court for weeks or months in the name of settling a dispute when they could actually spend such time making money for their

firms. They cannot force the court or judge to speed up things for them but this is possible in an arbitration proceedings. The freedom or "autonomy" of the parties gives them the opportunity to request for an accelerated or fast-track procedure.

(b) Confidentiality: Confidentiality is an essential matter for major firms who are involved in hi-tech, production, investment and research contracts. Whenever there is a dispute between them, they would not want to appear before the national court due to the issue of publicity. For this reason, they opt for a private dispute mechanism like an International Commercial Arbitration.

Recently, the issue of confidentiality came under criticism following the decision of the High Court of Australia in *Esso Australia Resources Ltd and Others v Plowman (Minister for Energy and Minerals) and others.* Scholars like *Paulsson* had actually suggested that the concept of confidentiality needs to be remodelled.

(c) Neutrality of Parties: Parties to a commercial contract and subsequently participants in the arbitration proceedings are usually from different countries or the nature of the dispute may be said to be a transnational contract. For this reason, they would need a neutral jurisdiction to arbitrate their dispute.

(d) Choice of Expert: When a matter is before a court, the judicial system would nominate, and by so doing, impose a judge on the parties but with arbitration, parties are free to choose who they believe has the required expertise to marshal their disputes to a convincing end. Parties are more relaxed with this choice.

(e) Enforcement of Award: This is by far the most important part of the arbitral proceedings because it will be a futile task if, after all the money, time and brains that have been put into the whole arbitration process an award is set aside or annulled on the grounds provided for under *Article V of the New York Convention 1958.*

ARBITRAL INSTITUTION

There are quite a number of arbitration institutions around the world today and these institutions are saddled with the responsibility of overseeing the proceedings of the arbitration process. Examples of such institutions are *International Chamber of Commerce (ICC) Paris, London Court of International Arbitration, World Intellectual Property Organization (WIPO) Arbitration Center, International Centre for the Settlement of Investment Disputes (ICSID)* to mention a few. Each of the above institution has its own rules governing the administration of arbitration. The rules of these arbitral institutions have similar provisions with slight differences. The provisions are drafted in such a way to suit the arbitration proceeding that the institution would oversee.

The first court-connected ADR Centre in Africa was the *Lagos Multi-Door Courthouse (LMDC)* which was established in 2002. LMDC was initiated and founded by Kehinde Aina, a partner in the law firm of Aina, Blankson LP. He was inspired by the "multi-door" concept enunciated by Harvard Law Professor, Frank Sander at the Pound Conference. In 1996, Mr. Kehinde Aina established the *Negotiation and Conflict Management Group (NCMG)* as the non-profit, non-governmental organisation to midwife the promotion of ADR in Nigeria and the introduction of the Multi-Door concept into the Nigerian Judicial System. Other States such as Abuja, Kano, Akwa-Ibom among others have also adopted the "multi-door" concept.

3.5 ADVANTAGES OF INSTITUTIONAL ARBITRATION

- Automatic incorporation of the rule book of an arbitral institution is one of the principal advantages of institutional arbitration. A good example of this is the issue concerning

number of arbitrators. Article 10 of the United Nations Commission on International Trade Law (**UNCITRAL) Model Law on International Commercial Arbitration** provides a way out for parties where such have failed to determine the number of arbitrators. It provides thus;

(1) The parties are free to determine the number of arbitrators.

(2) *Failing such determination, the number of arbitrators shall be three*.

Similar provision could be found in the **Section 6 of the Arbitration and Conciliation Act (ACA)** which provides that;

The parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three.

- Another advantage of institutional arbitration is the provision of trained personnel by the arbitral institution that the parties have chosen to oversee their dispute. The trained personnel bring with them their wealth of experience. They are well equipped to carry out secretarial and administrative duties for the parties.
- Furthermore, the trained personnel can also review the draft form of the award rendered by the arbitral tribunal before sending the final copy to the parties.

3.6 APPLICABLE LAWS

Arbitration in Nigeria is governed by the **Arbitration and Conciliation Act (ACA).** The first indigenous statute on arbitration and conciliation was enacted during the military era in 1988. It was known as the Arbitration and Conciliation Decree 1988 and it came into effect on the 13th March, 1988.

A large portion of the provisions of ACA is based on the **UNCITRAL Model Law** which was designed to meet concerns relating to the current state of national laws on arbitration. It was chosen as the vehicle for the improvement and harmonization in view of the flexibility it gives to States in preparing new arbitration laws.

In 2009 Lagos State enacted its own state law called *Lagos State Arbitration Law 2009*. Some other applicable laws in Lagos State are

- The Lagos Multi-Door Courthouse Law 2007
- The Lagos Multi-Door Courthouse Code of Ethics for Arbitrators
- High Court of Lagos State Civil Procedure Rules (2004)
- Lagos Multi-Door Courthouse Guidelines for Court Referral to Alternative Dispute Resolution
- Lagos Multi-Door Courthouse Guidelines for Enforcement Procedure
- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) among others

4.0. CONCLUSION

Commercial arbitration as an aspect of ADR is a private method for settlement of disputes. It is less formal, less expensive and also saves time. The agreement of the

parties to submit to arbitration is vital to the success of the arbitration proceeding without which, the whole process would be null and void. . The provision of the Model law on the definition of commercial has been instrumental in the resolving the disparity in the provision on matters that could be settled by arbitration in the various states.

5.0 SUMMARY

Commercial arbitration can save financial and emotional costs. Not only is litigation expensive and time-consuming, but it can be very stressful. You may feel that an important part of your life is on hold while you are waiting for a trial date, wondering and worrying about the outcome. If you have to deal with each other in the future, using an adversary process like litigation risks polarizing and embittering your relationship. The emotional wounds from fighting may never heal, and these wounds can complicate your future dealings and make it impossible for you to have a satisfactory relationship.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by Commercial arbitration?
2. State the advantages of institutional arbitration
3. Mention the various institutional arbitration known to you.

7.0 REFERENCE/FURTHER READING

1. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)
2. Ezejiofor, Gaius "The Law of Arbitration in Nigeria" 1997
3. The UNCITRAL Model Law
4. New York Convention
5. Orojo and Ajomo "Law and Practice of Arbitration and Conciliation in Nigeria" (1999) Mbeyi & Associates
6. Arbitration and Conciliation Act, Cap A18 Revised Edition (Laws of the Federation) Act 2004
7. Halsbury's Laws of England, 4th Ed. Vol.2.
8. Bernstein, Handbook of Arbitration Practice, 1988

UNIT 2 TYPES OF ARBITRATION

1.0 INTRODUCTION

This unit considers two type of arbitration. They are international and domestic arbitration by looking at the definition and nature of each.

2.0 OBJECTIVES

At the end this unit, you should be able to

a. identify types of arbitration
b. discus international and domestic arbitration
c. distinguish between domestic and international arbitration
d. discus ad hoc and institutional arbitration

3.0 MAIN CONTENTS

3.1 TYPES OF ARBITRATION

Commercial arbitration is classified into

(a) international commercial arbitration
(b) domestic commercial arbitration
(c) ad hoc commercial arbitration and
(d) institutional arbitration

3.2 INTERNATIONAL COMMERCIAL ARBITRATION

The term "international" is used to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are international or, in the terminology adopted by Judge Jessup, "transnational". It is sometimes said that every arbitration is a 'national' arbitration, in the sense that it must be held in a given place and is accordingly subject to the national law of that place. Whilst this may be an interesting topic for debate, it is customary in practice to distinguish between arbitrations which

are purely “domestic” and those which are “international” (because of the nature of the dispute, the nationality of the parties and some other relevant criteria).
There are good reasons for doing this. First, an international arbitration will usually have no connection with the state in which the arbitration takes place other than the fact that it is taking place on the territory of that state. Secondly, the parties will usually be corporation or state entities, rather than private individuals.

International commercial arbitration has enjoyed growing popularity with businesses and other users over the past 50 years. There are a number of reasons that prompt parties to elect to have their international disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigations in national courts, the desire to obtain a quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards (as contrasted with forum selection clauses and national court judgments), the commercial expertise of arbitrators, the parties’ freedom to select and design the arbitral procedures, confidentiality and other benefits.

International arbitration is sometimes described as a hybrid form of dispute resolution, which permits parties broad flexibility in designing arbitral procedures. For example, the International Bar Association (IBA)'s Rules on the Taking of Evidence in International Commercial Arbitration, revised in 2010. These rules adopt neither the common law jurisdictions' broad disclosure procedures (Discovery), nor follow fully the civil law in eliminating entirely the ability to engage in some disclosure-related practices. The IBA Rules blend common and civil systems so that parties may narrowly tailor disclosure to the agreement's particular subject matter.
International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creature of contract, i.e., the parties’ decision to submit disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures, usually by including a provision for the arbitration of future disputes in their contracts. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems.

3.3 DOMESTIC ARBITRATION

Domestic arbitration usually involves claims by private individuals that may be small in amount, but are of considerable importance to those concerned. According to the **United Kingdom Arbitration Act 1996**, “domestic arbitration agreement” means an arbitration agreement to which none of the parties is –

(a) an individual who is a national of, or habitually resident in, a state other than the United Kingdom, or
(b) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom.

The **Indian Arbitration and Conciliation (Amendment) Bill 2003** (IAC) defined domestic arbitration as an arbitration relating to a dispute arising out of legal relationship whether contractual or not, where none of the parties is:

i) An individual who is a nationality of, or habitually resident in, any other country other than India; or
ii) A body corporate which incorporate in any country other than India; or
iii) An association or a body of individuals whose central management and control is exercised in any country other than India; or
iv) The Government of a foreign country

It is worthy to note that ACA made no provision on the domestic nature of arbitration.

3.4 DISTINGUISHING "INTERNATIONAL" AND "DOMESTIC" ARBITRATION

One of the major features of Model Law (which was expressly designed to provide for international commercial arbitration) is that it imposes strict limit on the extent to which a national court may intervene in the arbitration proceedings. Many states, including Belgium, Brazil, Colombia, France, Hong Kong, Nigeria, Singapore, Switzerland and others, have adopted a separate legal regime to govern international arbitrations – recognising that different consideration may apply to such arbitrations.

Another reason for distinguishing between "international" and "domestic" arbitrations is that in some states, the state itself (or in most cases, entities of the state) may only enter into an arbitration agreement in respect of international transactions. Accordingly, it is necessary to know how such transactions are defined and whether arbitration in respect of them would be considered as "international" by the state concerned.

A further reason, which in practice is perhaps the most significant, is that different nationalities, different legal backgrounds and cultures, different legal systems and different principles will almost certainly be encountered in international arbitrations.

Finally, states that make no formal distinction between "international" and "domestic" arbitrations in their legislation are forced to recognise the distinction when it comes to the enforcement of arbitral awards.

3.5 Ad hoc Arbitration – which is conducted pursuant to the submission, the agreement of the parties and any applicable law and is not conducted under the rules of any Arbitration Institution.

3.6 Institutional Arbitration. This is conducted by or under the auspices of an Arbitration Institution which promotes and administers the arbitral process. These institutions have their Rules of Procedure. The following are some of the Institutions:

(i) Lagos Regional Centre for International Commercial Arbitration (Note also ALCC Regional Centers in Kuala Lumpur, Cairo and Tehran)
(ii) International Chamber of Commerce (I.C.C.) in Paris.
(iii) The London Court of International Arbitration (L.C.I.A.).
(iv) American Arbitration Association (A.A.A.).

4.0 CONCLUSION

There is always the need to make a distinction between "international" and "domestic" arbitration. The nationalities, legal backgrounds, cultures and legal systems of the parties are vital in distinguishing arbitration. The other forms of arbitration are ad hoc and institutional.

5.0 SUMMARY

At the end of this unit you learnt
Various forms of arbitration; the difference between international and domestic arbitration and what ad hoc and institutional arbitration mean.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by the word "international" in relation to arbitration?
2. What are the features of an international arbitration?
3. What are the distinguishing features between international and domestic arbitration?

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)
2. The UNCITRAL Model Law
3. New York Convention
4. Gary B. Born, "International Commercial Law" (2009)

UNIT 3: ARBITRABILITY

1.0 INTRODUCTION

The focus of this unit is on matters that are arbitrable and those that are not.

2.0 OBJECTIVES

The student is expected at the end of this unit to:

- Define the term "arbitrability"
- Identify matters that are arbitrable and those that are not

3.0 MAIN CONTENTS

3.1 ARBITRABILITY DEFINED

Wiktionary defined arbitrability as "the characteristics of being arbitrable; the ability to be arbitrated". It is the ability of a matter to be arbitrated. The term "arbitrability" is used to determine whether the dispute under the arbitration agreement could be settled by arbitration. The international understanding of arbitrability stems from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which in Article II(1) provides that each contracting state shall recognize an arbitration agreement "concerning a subject matter capable of settlement by arbitration," and Article V(2)(a) provides that an arbitral award may be refused recognition and enforcement if the "subject matter of the difference is not capable of settlement by arbitration under the law of that country."

Outside the United States, the term "arbitrability" has a reasonably precise and limited meaning: i.e., whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority. Courts often refer to "public policy" as the basis of the bar.

Thus, the subject matter of the claim is the key to "arbitrability" in international arbitration, and the question to be asked is, "under the law of the place of arbitration or the state where award enforcement is being sought, are the specific claims capable of settlement by arbitration or must they be resolved in a national court?"

3.2 NON-ARBITRABLE ISSUES

By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedure cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the disputes may not enter into an agreement upon: Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, anti-trusts matters were not regarded as arbitrable in the United States. Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters is at least restricted. However most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, nut the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.
- Some legal orders exclude or restrict the possibility of arbitration for reasons of protection of weaker members of the public, e.g. consumers. While arbitration agreements with customer are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement.

The ACA does not stipulate any particular subject matter that may not be referred to arbitration. The question of whether or not a dispute is arbitrable is therefore left for interpretation by the Courts. In **Ogunwale v. Syrian Arab Republic** the Court of Appeal held that the test for determining whether a dispute is referable to arbitration is that the dispute or difference must necessarily arise from the clause contained in the agreement. However not all disputes are necessarily arbitrable. Only disputes arising from commercial transactions are referable to arbitration. Disputes not falling within the category of commercial disputes (e.g. domestic disputes) would not be arbitrable under the ACA, though they may be referable to customary arbitration.

Also, some matters are generally more suitable for litigation than arbitration. For instance, applications for immediate enforcement of right or preservation of res e.g. the enforcement of fundamental human rights, application for *anton pillar*, *mareva* and other injunctions are less suitable for arbitration than litigation. In addition, since an arbitrator has no statutory power of joinder under the ACA, multi party proceedings may be less suitable for arbitration unless the arbitration agreement makes specific provision for it.

An inquiry into the arbitrability of the subject matter of a dispute can arise at different stages of the arbitral process, both before the arbitral tribunal and in State courts in the context of post-award enforcement or setting-aside proceedings. The issues of arbitrability may therefore arise at least four stages:

- normally the issue of arbitrability is invoked by a party at the beginning of the arbitration, before the arbitral tribunal, which will have to decide whether it has jurisdiction or not;
- the issue of arbitrability may also be referred by a party to a State court which will be requested to determine whether the arbitration agreement relates to a subject matter which is arbitrable;
- the issue of non-arbitrability can be raised in setting aside proceedings before the State court, usually at the place where arbitral tribunal has its seat;
- non-arbitrability may also be invoked by the defendant before the court deciding on the recognition and enforcement of the award.

3.3 ARBITRABLE ISSUES

Where a judicial proceeding is commenced in a matter which is subject matter of an arbitration agreement, the judicial forum is bound to refer the matter for arbitration by the arbitral tribunal. This provision implies that if the matter is an arbitrable matter, and is covered by the arbitration agreement, the matter must be decided by arbitration rather than by adjudication. The underlying crucial issue for this provision is – what exactly is an arbitrable matter, or what are the limits to arbitrability?

The limit to arbitrability is a very significant topic in law relating to arbitration, and has been discussed world-over, including at the UNCITRAL itself. Courts in several jurisdictions have rendered rulings on arbitrability. Matters that can be settled by arbitration include:

- Basically all disputes of Civil or Quasi Civil nature involving Civil Rights fall within the jurisdiction of Arbitration.
- Almost all disputes – commercial, civil, labour and family disputes in respect of which the parties are entitled to conclude a settlement – can be settled by Arbitration.
- Disputes involving joint ventures, construction projects, partnership differences, intellectual property rights, personal injury, product liabilities, professional liability, real estate securities, contract interpretation and performance, insurance claim and Banking & non-Banking transaction disputes fall within the jurisdiction of Arbitration.
- It is expanding to the areas or construction health care, telecommunication, entertainment and technology based industries.

4.0 CONCLUSION

Not all claims are resolvable through arbitration. There are some claims that are set aside for determination by the national courts. The New York Convention also permits states to recognise an arbitration agreement concerning a subject matter capable of settlement by arbitration.

5.0 SUMMARY

In this unit, we have been able to discuss matters that are suitable for arbitration and those that are not. It is very important for parties to consider the issue of arbitrability at the initial stage of their agreement and also when choosing the seat for the arbitration proceedings.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the term “arbitrability”
2. Discuss the two group of legal procedure that cannot be subjected to arbitration.

3. An arbitration agreement was signed between ABC Ltd and XYZ Ltd to submit *any* dispute to arbitration. After one year, XYZ Ltd initiated criminal proceedings against ABC for corporate manslaughter. ABC Ltd filed a motion requesting that the matter be stayed because there was an arbitration agreement between the parties to submit any dispute to arbitration. Advice XYZ Ltd

7.0 REFERENCES/FURTHER READING

1. Redfern and Hunter, "Law and Practice of International Commercial Arbitration" (4th Edition Sweet & Maxwell 2004)
2. The UNCITRAL Model Law
3. New York Convention
4. Laurence Shore, "Defining "Arbitration", New York Law Journal
5. Arbitration and Conciliation Act Cap18 Laws of the Federation 2004

MODULE 6

PASSING OFF AND TRADE LIBEL.

Unit 1

Passing Off

Contents

1.0 INTRODUCTION

Passing-off is a cause of action that is primarily founded in torts and is historically rooted in common law. It is has undergone dramatic changes over the years potent in protecting the entrenched rights in areas to which it relates. The law of passing off is a law that protects both the consumer and the trader from an unhealthy competition. Common law protects trademark and grants reliefs and injunction to the trader whose goods or services have been passed off once it is proved.

Passing off takes different dimensions including reputation of a company or trademark, name, logo or material is derived from the goodwill of the company. For this reason, the law protects all these items from unhealthy competition in order to protect the economic interest of the company.

2.0 OBJECTIVE

At the end of this unit students should be able to

- define the tort of passing off as it relates to goods and services,
- discuss on the nature of passing, and
- the scope of passing off as it relates to the goodwill of the passed off trademark or design.

3.0 MAIN CONTENT

3.1 Definition and Nature of Passing Off

Passing Off is a tort and can be described as the common law form of trademark. It can also be described as a common law tort which can be used to enforce trademark rights. The tort of passing off protects the goodwill of a trader from a misrepresentation that causes damage to the goodwill.

Passing Off gives a trader an opportunity to acquire protection through use of a brand name, logo or trade name or indeed any symbol which has been used in the course of trade to indicate the origin of goods in such a way that it has achieved public recognition.
The main function of passing off is the protection of consumers against origin confusion. It can also be used to protect traders against unfair competition or misappropriation.

In *Trebor (Nigeria) Ltd v. Associated Industries Ltd* {1972) NMLR 60, the court held that the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader.

Business goodwill is protected by passing off which may be associated with a particular name or mark used in the course of trade. This area of law is wider than trademark law in terms of the scope of marks, signs, materials and other aspects of a trader's right that can be protected.

Reputation and goodwill are often used interchangeably but it is really in connection with goodwill that passing off is concerned. It is possible to have a reputation without goodwill. However, the existence of reputation without any associated goodwill may be fatal to a claim in passing off.

The preservation of goodwill is the prime concern of passing off but in doing so, the protection of consumer's rights is also considered. See *Plix Products Ltd v. Frank M Whinstone (Merchants)* [1986] FSR 63.
It is important to reiterate that in passing off, goodwill would have been established by one trader which another trader is trying to take advantage of or to cash in on it to the detriment of the first trader.

The owner of the goodwill has a property right that can be protected by an action in passing off. In passing off the property right is not a right in the name or mark but that it is the right in the reputation or goodwill of which the name or mark is the badge or vehicle.

Passing off may overlap with other rights, especially trademark and copyright, and given set of circumstances may give rise to an action involving two or more different rights. In *Visual Connection (TVC) Ltd v. Ashworth Associates Ltd* {Unreported} 14 January 1986, the claimant sued for infringement of copyright in photographs and for passing off resulting from the use, by the defendant, of the photographs, representing his business as that of the claimant.

The general rule for determining the date at which goodwill should be assessed in a passing off action is the date that the defendant's action, in respect of which complaint is made, commences. In *Inter Lotto (UK) Ltd v Camelot Group Plc* (2004), the claimant started using the unregistered trade mark 'HOTPICK' during August and September 2001. The defendant, responsible for running the national lottery under license from the National Lottery Commission (the NLC), caused the NLC to register 'HOTPICKS' as a trademark and the application was duly filed on 17 October 2001 but it was not used by the defendant until around July 2002. The claimant opposed the trademark application. The Court of Appeal, dismissing the defendant's appeal, held that the relevant date was the date the use of the trade mark by the defendant commenced.

3.2 Scope of Passing Off

The scope of passing off is quite wide and it can protect unregistrable business names, unregistered trademarks, advertising and generally anything that is distinctive of the claimant's goods and services or business.

It is important to note that passing off has no express use or mention of a trade name, mere implication is adequate. See *Copydex Ltd v. Noso Products Ltd* (1952) 69 RPC 38.

Passing off is in relation to trade in goods. It applies equally to services as well. The use of another's name in relation to the provision of services could also be actionable as passing off. See *Harrods Ltd v. R. Harrod Ltd* (1924) 41 RPC 74.

Trade does not have to be primarily associated with commercial enterprise. It has been accepted that a charity too, is capable of possessing goodwill distinguishable from commercial goodwill which is equally entitled to legal protection through an action in passing off. In *British Diabetic Association v. Diabetic Society* (1996) FSR, the defendant charity was restrained from using its name, such use amounting to a deception calculated to injure the reputation and goodwill of the claimant charity.

Passing Off may also occur in the use of individual's names or personality without his permission. See *McCullogh v. Lewis A May Ltd* (1948) 65 RPC 58. In Irvine Talksport Ltd, it was accepted that falsely implying that a celebrity was endorsing a product was actionable under passing off.

Passing off goes beyond the type of mark that is registrable as trade mark and can apply in respect of containers and packaging. In *Reckitt & Colman Products Ltd v. Borden Inc* (1990) 1 All ER 873, it was held that the law of passing off protected the Jif Lemon, which is a plastic lemon coloured and shaped receptacle in which the claimant lemon juice was sold.

The law of passing off does not stop short at containers. Even the shapes or appearances of the article itself may be protected. See *Hodgkinson and Corby Ltd v. Wards Mobility Services Ltd* (1995) FSR 169.

Passing off can go further in the subject matter of protected and can protect, in principle, anything associated with goodwill such as a method of doing business or a theme used in advertising. See *Cadbury-Schweppes Pty Ltd v. Pub Squash Co. Pty Ltd* (1981) 1 All ER 213.

Distinctiveness is important to success in a passing off action. Where the use of number is at issue, the individual circumstances may be highly relevant. In *Law Society of England and Wales v Griffiths* (1995) RPC 16, the claimant had launched a 'phone in' advice line in respect of accidents and personal injuries. The telephone number was 0500-192939. The defendant who was not part of the claimant's scheme set up one of his own and obtained and used the telephone number 0800-192939. It was held that there was a serious issue and granted an interim injunction to the claimant.

If passing off by one trader is to damage another trader's interests in the goodwill he has acquired, it should be reasonable to assume that there should be some overlap in the geographical location and extent of the catchment area of their respective businesses.

Goodwill may also vary depending on the geographical area under consideration. See *Associated Newspaper Ltd v. Express Newspaper* (2003) FSR 909.
Goodwill has an expansive geographical range. It may be in relation to activities in a different country. In *Maxim Ltd v. Dye* (1977) 1 WLR 1155, the claimant, an English company, owned a world famous restaurant in Paris known as 'Maxim's. The defendant opened a restaurant in Norwich and also named it 'Maxim's'. It was held that the claimant had goodwill in England derived from the business in France which might be regarded as being prospective. See also In *McDonald's Corp v. MacDonald's Corp and Vincent Chang* (1997) FSR 760. In many cases the reputations of large multinational organizations precede them as they expand their activities into other countries. In this sense, reputation must equate with goodwill because if the reputation is harmed, the consequence is that, once established in those other countries, turnover there will also be harmed.

4.0 CONCLUSION

The major issue behind the concept of passing off is goodwill built over the years and the protection of such good will. Also, the law of passing off is designed to prevent misrepresentation in the course of trade to the public as held by the court in the Nigerian case of *Niger Chemist v. Nigerian Chemist* (1961) All NLR 171.

5.0 SUMMARY

In this unit we were able to discuss the definitions of passing off and the nature of the concept. We also discussed the scope of the tort of passing off.

6.0 TUTOR MARKED ASSIGNMENT

1. In defining passing off, read and summarise the definitions offered in Reckitt & Colman Products Ltd v Borden Inc (1990) 1 All ER 873 and Ervin Warnink BV v Townend &Sons (1979) AC 731.
2. With the aid of decided cases, describe the ways by which passing off may be used to protect trademarks and other symbols used in the course of trade.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Helen Norman, Intellectual Property University of London Press (2005).
- Gilbert Kodilinye and Oluwole Aluko, The Nigerian Law of Torts (Second Edition) Spectrum Law Publishing (1999).

Unit 2

Elements of Passing Off

Contents

1.0 INTRODUCTION

It is the existence of the elements of passing off that guarantees success of an action in a passing off suit. This unit will discuss these elements. The function of passing off is to protect the consumers from origin confusion. The success of the tort of passing off depends largely on the three elements that must be present before the tort is actionable.

2.0 OBJECTIVE

At the end of this unit student should be able to

- identify the three elements of passing off,
- discuss these elements of passing.

3.0 CONTENT

3.1 Elements of Passing Off

It is important to note that a man is not to sell his own goods under the pretence that they are the goods of another trader. The law would restrain one trader from passing off his goods as being those of another trader. Where passing off is alleged, there are three elements, often referred to

as the Classic Trinity, in the tort which must be established. In *Reckitt and Coleman Products v. Borden* (Supra) the House of Lords adopted the 'Trinity Test' in establishing the ingredients of 'passing-off' as follows:

i. The claimant (that is the person alleging a breach of his right) must establish the goodwill or reputation attached to the goods or service in question and identify the circumstances under which the goods and services are offered to consumers;

ii. The claimant must also establish that there has been a misrepresentation by the defendant which has caused or has the potential of causing the members of the public to believe that the goods or service emanate from the him;

iii. Finally, the claimant must demonstrate that he has suffered or is really likely to suffer losses by the reason of the defendant's misrepresentation as to the source of defendant's goods or services, which seems to suggest that they emanate from the claimant.

For a person to be held liable in an action for passing-off, all the enunciated ingredients of the tort must exist at the same time within the particular circumstance(s) giving rise to the alleged infringement. Where the alleged act of infringement is adjudged to be calculated to deceive the members of the public, it is not required of the plaintiff to prove that the act has actually deceived some people. It is enough that under the circumstance(s), there was a possibility that potential consumers would be confused or deceived. See *Niger Chemist v. Nigeria Chemist* (Supra).

3.2 Goodwill (Reputation)

Lord Macnaghten gave a useful definition of goodwill in *Commissioner of Inland Revenue v. Muller & Co's Margarine Ltd* (1901) AC 217, where he described it as the benefit and advantage of the good name, reputation and connection of a business. He further described it as the one thing that distinguishes an old established business from a new business at its first start.

It is also very important to note that goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates.

Reputation on its own comes about through consistent use of the name, logo, material etc. There must have been a goodwill associated with a reputation which had been acquired by the claimant in relation to that name or style. In *Reddaway v. Banham* (1896) AC 199, the phrase 'Camel Hair Belting' used by the claimant from 1879 to 1891 was considered to have become distinctive of the claimants belting.

It is pertinent to reiterate that it is not possible to lay down a hard and fast rule as to the period of time taken to acquire protectable goodwill. This, it depends on the circumstances. If there is a great deal of commercial activity in advertising goodwill could be acquired in a relatively short period of time. Thus, in *Stannard v. Reay* (1967) RPC 589, court held that three weeks was sufficient to build goodwill in the name Mr. Chippy for a mobile fish and chip van.

It is generally, accepted that the date at which goodwill is required to be shown to exist is the date of commencement of the defendant's acts which are the subject of the complaint. See *Scandecor Development AB v. Scandecor Marketing* AB (1999) FSR 26.

Goodwill can exist even if the product or services to which it relates have not yet been made available but a momentous proportion of the public knew about the product or service because of a great deal of publicity. See *British Broadcasting Corp v. Talbot Motor Co Ltd* (1981) FSR 228. The relationship between the goodwill and the product or service concerned may be influenced by the form of an advertising campaign.

Goodwill may be built up over a considerable period of time and transferred with the sale of the business with which it is associated.

It is important to note that goodwill in a product can be shared by a number of traders. In *Erven Warnink Besloten Vennootschap v. J Townend & Sons (Hull) Ltd* (1979) AC 731, the goodwill shared was in the name 'Advocat' describing a particular type of alcoholic beverage and that the goodwill was shared between the Dutch companies making the drink.

A goodwill which is shared between two businesses may have the effect of giving an impression that the businesses are bigger than they actually are. Where they share goodwill in their dominant trading names, care must be taken not to make changes to them which would amount to passing off.

Determining the identity of the owner of goodwill is a question of fact. In *Medgen Inc. v. Passion for Life Products Ltd* (2001) FSR 496, it was held that ownership of goodwill was a question of fact and that there was no presumption.

In the context of licence or distributorship agreement, where the licensor or manufacturer is based in another country which recognizes the law of passing off, it will be possible that each will share goodwill but will own it on a territorial basis. A licence agreement or distributorship agreement will contain specific provisions dealing with the issue of goodwill and ownership. See *Electro Cad Australia Pty Ltd v. Mejati RCS SDN BHD* (1990) FSR 291.

Geographical names and descriptive words are likely to lack distinctiveness. It is usually difficult, if not impossible, for a trader to demonstrate that he has a goodwill associated with the word(s) in question. In *Office Cleaning Services Ltd v. Westminster Windows and General Cleaners Ltd* (1946) 63 RPC 39, the claimant unsuccessfully tried to restrain the defendant from using the trade name 'Office Cleaning Association'.

A trader using a goodwill is more likely to acquire goodwill if the word is not generally used in the trade in which the trader is involved. Note that whether a word is capable of supporting goodwill or not depends very much on its context.

In all, it is imperative to reiterate that a geographical name used by a trader could have one of three meanings. It could indicate that:

- the trader's goods come from that place

- the trader's goods are of a particular type associated with that place and, therefore likely to appeal to a particular taste
- it is the product of a particular trader. See Barnsley Brewery Co. Ltd v. RBNB (1997) FSR 462.

3.3 Misrepresentation

Misrepresentation is an essential element in the tort of passing off. It is important to note that misrepresentation may come about in numerous ways such as by written, oral statement by implication or by similarity in appearance or presentation of goods or even from the presence of some object.

For a passing off to be actionable, the misrepresentation does not have to suggest that the defendant's business is that of the claimant. The misrepresentation or deception is not necessarily limited to an exact copy of a name or mark. Similarity sufficient to result in confusion will suffice.

Misrepresentation can take many forms. It may confuse as to origin of goods or services or the nature of the defendant's goods or services. It may also be made in words or pictorial or be implied in behaviour or that a trader has failed to disabuse customers about their mistaken beliefs, which may have been encouraged by the trader. See *Musical Fidelity Ltd v. Vickers* (2003) FSR 898.

A number of factors determine whether the misrepresentation is likely to confuse or not. In *Dawnay Day & Co Ltd v. Cantor Fitzgerald International* (2000) RPC 669, the defendant was a firm involved in financial services including broking which was totally unconnected with the claimant group of companies but which had acquired one of the group of companies, known as Dawnay Day Securities Ltd, confirming that the use of the Dawnay Day name by the defendant would cause confusion and will be passing off. It was held by Lloyd J, that it would not be impossible not to conclude that the use by the defendant of the Dawnay Day name would be a plain misrepresentation. A misrepresentation that is ineffective because the public see through it as not actionable in passing off because one important and fundamental requirement is missing, that is, in the absence of confusion there can be no harm to goodwill and, therefore no damage to the claimant.

It is also of paramount importance to note that giving a false impression that a celebrity is endorsing a product is likely to amount to passing off. In *Irvine v. Talksport Ltd* (2003) FSR 619, the defendant ran the radio station 'Talk Radio'. It mounted a promotional campaign which included photographs of Eddie Irvine, the Formula One Grand Prix racing driver. The photograph had been manipulated. It originally showed Mr. Irvine speaking on a mobile phone but was changed to a picture where he held a portable radio on which the words 'Talk Radio" were clearly visible. It was held that this gave the impression that he endorsed the radio station and this false representation was passing off. Product endorsement is very common and celebrities expect to be paid large sums of money for such activities. This was held by the Court of Appeal as it increased the damages paid from 2,000 pounds to 25,000 pounds.

Inverse passing off occurs where the defendant falsely claims that the claimant's goods are actually made by, or provided by, the defendant. In *Bristol Conservatories Ltd v. Conservatories Custom Built Ltd* (1989) RPC 455, the defendant's sales representative showed potential customers photographs of conservatories as a sample of the defendant's workmanship. The photographs were in fact, of the claimant's conservatories.

Inverse passing off may also be committed by implicitly encouraging others to think that one is associated or responsible for material created and belonging to another.
Misrepresentation can even extend to an act that implies that it is authorized or consented to by another person. See *Associated Newspapers (Holdings) Plc v. Insert Media Ltd* (1991) 3 All ER 535.

The great majority of passing off cases involve deliberate and calculated attempts to take advantage of the goodwill owned by another trader and associated with goods manufactured or sold by him or services supplied by him. A fraudulent motive is not necessary to a passing off action and, indeed, innocence is not a defence. The main thrust of the law of passing off is the protection of goodwill. See *Harrods Ltd v. Harrodian School Ltd* (1996) RPC 697.

Passing off is limited in a similar way in that there must be a common field of activities between the claimant and the defendant. There must also be some common ground. If there is no common field of activity, there can be no damage to the claimant's goodwill because the public will not make a connection between the traders and their different field of activity. In *Grenada Group Ltd v. Ford Motor Company Ltd* (1973) RPC 9, it was held that the Grenada television group, famous for making the television serial coronation street, could not prevent the Ford Motor Company naming one of its cars the Ford Grenada, there was no danger of confusion because of the different fields of activity and there was no danger of the claimants goodwill being harmed.

3.4 Damage

Damage is the third element of the classic trinity. The claimant must establish that there has been or will be damage. The damage must be more than minimal, but need not be actual: a threat of damage will suffice provided all the other elements of passing off are established.
Damage may result in a number of ways and the dwindling in the claimant's goodwill may be caused by:

- lost sales because buyers confuse the defendant's product or services with those of the claimant.
- erosion, blurring or debasement of a name that is exclusive and unique and which is used by the claimant.
- indirect though invidious damage which prevents the claimant controlling and developing his goodwill in the future as he wished even though none would be deceived into thinking the defendant's product was from the claimant.

In *National Association of Software and Services Companies v. Ajay Sood* (2004) RPC 711, the High Court of Delhi decided, inter alia that the activity of phishing (misrepresentation) that the sender of an e-mail was a legitimate organization to induce the disclosure of personal information) could give rise to an action in passing off.
As the essence of passing off is deception, the basic test is whether a substantial number of persons have been or are likely to have been deceived by the defendant's misrepresentation.

It is imperative to state that the use of a disclaimer may be an important factor in the court's determination of the question of damage to goodwill. If it is clear and effective, this will tend to suggest that substantial persons will not be confused. In *Arsenal Football Club Plc v. Reed* (2001) RPC 922, the defendant used a disclaimer making it clear that his Arsenal memorabilia had no association with official club merchandise.

Erosion of goodwill may be a possibility where inferior goods and services provided by the defendant are taken to be those of the claimant. In *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd* (1998) RPC 117, the name 'Swiss Chalet' was given by the defendant to a new range of bars of chocolate. The damage was that the exclusivity of the designation 'Swiss Chocolate 'descriptive of chocolate made in Switzerland, would suffer.

A claimant must be able to satisfy the court that he has, or will suffer substantial damage to his goodwill. In this mere speculation will rarely suffice. Proof damage is not only important in quantifying damages to be awarded to the claimant but also it may be essential in demonstrating that there has been a misrepresentation calculated to injure the claimants goodwill. See *Tamworth Herald Co. Ltd v. Thomson Free Newspapers Ltd* (1991) FSR 337.

Evidence of damage may be carried out through trap and survey orders. Surveys are carried out for a number of reasons, however unless they are properly carried out, they will fail to impress the court, see *Imperial Group Plc v. Phillip Morris Ltd* (1984) RPC 293.
Note that good statistical methods must be used coupled with complete openness and disclosure.

Trap orders are often used to provide evidence of passing off. See *Showerings Ltd v. Entam Ltd* (1975) FSR 45. In executing a trap order, the claimant is representing himself as a bonafide customer. In this instance, if the defendant had been caught by a trap order, he should be put on notice immediately so that he can recall the facts clearly.

4.0 CONCLUSION

The classic trinity elements of passing off that is goodwill, misrepresentation and damage are important to the tort of passing off and they must all be present before the tort can be actionable.

5.0 SUMMARY

In summary this unit has been able to explain and the learners have been able to learn the trinity elements of passing off as well as the purpose of each of the elements to the action of passing off. We have discussed goodwill, misrepresentation and damage.

6.0 TUTOR MARKED ASSIGNMENT

1. Damage to goodwill is one of the requirements for a passing off action discuss with the aid of judicial authorities.
2. Goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Discuss with statutory and case laws.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).

- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Helen Norman, Intellectual Property University of London Press (2005).
- Gilbert Kodilinye and Oluwole Aluko, The Nigerian Law of Torts (Second Edition) Spectrum Law Publishing (1999).

Unit 3

Defences and Remedies of Passing Off

Contents

0.0 INTRODUCTION

There are defences available to a defendant in an action in passing off. Also there are remedies available to the claimant in an action for passing off, range from damages to injunction and account of profit, just to mention a few.

1.0 OBJECTIVE

The objective of this unit is to discuss the remedies available to the claimant, ranging from injunction to account of profit be discussed and the defence available to the defendant.

2.0 CONTENTS

2.1 Defences to Passing Off

The main defences will normally be that the claimant has failed to establish the element of the tort, that is, one of the classic trinity is missing. Defences to passing off are straight forward, and will be highlighted in this unit for easy understanding.

The defences to passing off action include but are not limited to the following;

a. the claimant does not have *locus standi*.
b. the defendant's activities have not harmed and are not likely to harm the claimant's goodwill associated with the name, mark or get up.
c. the defendant is not using the name in the course of trade
d. the claimant has not established the existence of goodwill associated with the name, mark or get-up in the course of trade.
e. the defendant is making honest use of his name or company name.
f. the claimant has acquiesced in the defendant's use of the name, mark expressly or impliedly granted the defendant permission to use the name or mark.
g. the claimant is estopped from enforcing his rights under passing off because he has encouraged the defendant's act.
h. the defence of no common field of activity, that is, the claimant and defendant are not in the same line of business.

And finally, the misrepresentation made by the defendant must be calculated to injure the claimant's business or goodwill.

3.3 Remedies of Passing Off

There are numerous remedies available to the claimant in an action for passing off and they range from injunctions (especially interim injunctions), damages or alternatively an account of profit. Additionally, an order may be granted for the delivery up or destruction of the article to which the name or mark has been applied.

Damages will usually be based upon the actual loss attributable to the passing off that may result from the loss of sales experienced by the claimant. Damages may also be calculated on a royalty basis, that is, based on the amount that would have been payable by the defendant if he had sought a licence to use the name or mark from the claimant.

A royalty basis could be applicable if it would yield a greater amount than that attributable to loss of sales. It will always be difficult to calculate damages resulting from a loss of sales and each sale by the defendant does not necessarily represent a sale lost by the claimant.

Passing off resulting from a false impression that a celebrity has endorsed a product may be determined on the basis of what that celebrity would normally charge as a fee for such endorsement. See Irvine v. Talksport Ltd (2003) FSR 619.

If the defendant's action infringes a trade or services mark as well as constituting passing off, the damages that may be awarded will not cumulative.

3.0 CONCLUSION

Remedies awarded by judges should be commensurate to the damage caused by the defendant. Where passing off is alleged, the defendant has some defences available to him.

5.0 SUMMARY

In this unit the defences available to the defendant have also been treated, and you should be able to explain the defences and available case laws in this regard. You now know the available remedies to passing off.

6.0 TUTOR MARKED ASSIGNMENT

1. Explain using relevant authorities, the factors which must be proved by a defendant as a defence for the action for passing off.
2. Explain the remedies to passing off.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Helen Norman, Intellectual Property University of London Press (2005).
- N. Wood, The Trouble with Domain Names (1997)

Unit 4

Trade Libel or Malicious Falsehood

Contents

I.0 Introduction

The idea behind malicious falsehood is a tort that is related to passing off, and this could also be referred to as trade libel. It is a tort that originated from slander of title, most especially slander of goods and any false disparagement about a business.

2.0 Objectives

At the end of this unit students should

- Explain what trade libel means
- Identify the element of trade libel

3.0 Main Content

3.1 Trade Libel

This is a tort that is related to passing off and is sometimes referred to as malicious falsehood. It could occur where someone publishes information that could be damaging to a trader's position or reputation.

The tort is wide ranging, having originated from slander of title to land and developed to include slander of goods and any false disparagement about a business. It could include a false and malicious statement for instance, that a dismissed company director had broken into the company premises and stolen a cash box, was setting up a business of his own and was in breach of his fiduciary duty as accompany director. In *Ratcliffe v. Evans* (1892) 2 QB 52, the

defendant falsely and maliciously published an article implying that the plaintiff business has gone out of business. The plaintiff sued to recover the losses resulting from the publication. The claim was granted.

This tort can be committed without impugning reputation. It is generally concerned with claimant economic and commercial interests.

Advertising puff and mere claims that one trader's goods are superior to those of another does not per se, amount to trade libel. The statement complained of must refer to the claimant or his goods or services. In *Schulke & Mayr UK Ltd v. Alkapharm UK Ltd* (1999) FSR 161, the court held that for an action in malicious falsehood to succeed the following three things must be shown;

1. that the statements were untrue (specifically false and not a mere puff)
2. that the statements were made maliciously, that is, without just cause or excuse.
3. and that the claimant had suffered special damage.

The basis of the action of trade libel is the false statement made maliciously, that is, without just cause or excuse. These two ingredients, falsity and malice, are essential if the claimant is to succeed.

Other examples of trade libel include circulars suggesting that the claimant's goods were not genuine or selling one class of the claimant's goods as a different class which can also amount to trade libel and passing off.

Trade libel could occur where a trader engages in comparative advertising in a way in which the stated facts concerning the other traders' goods are untrue or misleading. In *Compaq Computer Corp v. Dell Computer Corp Ltd* (1992) FSR 93, the defendant advertised using photograph showing its computers including prices and performances. This information was selected so as to show off the defendant's computer as being the best value. This information was found to be misleading, particularly as regards price.

At the interim stage, where malicious falsehood is in issue, and the defendant may intend to plead justification, a court will not normally grant an injunction if the statements are not obviously untrue. See *Macmillan Magazine Ltd v. RCN Publishing Co Ltd* (1998) FSR 9.

3.2 Elements of Trade Libel

The essential elements that must be proved by the claimant in an action for trade libel are;

1. a false statement of fact;
2. malice; and
3. damage

False Statement

The defendant must have made a false statement of fact to another person than the claimant. The statement stated must be of fact not a statement of opinion. In trade puff the advert is substantially devoted to the merit of the product while impliedly denigrating the quality of rival products. Even saying that they have the superior product does not amount to false statement provide that no false reason is advanced for lack of quality in another's product.

Malice

Another essential ingredient is that the statement must have been made with malice. Malice means without just cause or with improper motive. Where the statement is made recklessly or knowing it to be truth, there is malice.

Damage

This tort is not actionable per se but upon proves of actual damage. This is done by proving general loss of business.

4.0 Conclusion

The tort of trade libel is closely linked to the tort of passing off. The function of trade libel is to protect claimant economic and commercial interests. Where it alleged, the claimant must establish the three elements of falsehood, malice and damage.

5.0 Summary

In this unit we discussed what trade libel means and its elements. We also pointed out that trade libel is same as malicious falsehood. You learnt what trade libel means and what a claimant must established to be successful in an action of trade libel

6.0 TUTOR MARKED ASSIGNMENT

1. Explain the concept of malicious falsehood as explained in Schulke & Mayr UK Ltd v. Alkapharm UK Ltd by Jacob J in order to succeed in an action for malicious falsehood.

7.0 REFERENCES/FURTHER READING

- David I Bainbridge, Intellectual Property (Sixth Edition) Pearson Education Limited (2007).
- William Cornish and David Llewelyn, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights (Sixth Edition) London: Sweet & Maxwell (2007).
- Helen Norman, Intellectual Property University of London Press (2005).
- N. Wood, The Trouble with Domain Names (1997)

INTRODUCTION TO COMPANY LAW

MODULE 7

Unit 1. Definition of Company Law

Unit 2. Types of Companies

Unit 3. Companies and different types of Business Organizations

Unit 4. Incorporation of Companies and its effect.

Module 1 Unit 1

Definition of Company Law

1. INTRODUCTION
2. OBJECTIVES
3. MAIN CONTENT
4. CONCLUSION
5. SUMMARY
6. TUTOR MARKED ASSIGNMENT
7. REFERENCES/FURTHER READING

1. INTRODUCTION

The purpose of this unit is to study an introduction to company as a business organization. We shall define company, different types of companies we have under the law, and importance of the classification of companies. We have different types of companies each one formed for a particular reason or purpose. While some companies may be formed by individuals for nonprofit purposes, the majority of companies are incorporated for purposes of profit making.

2. OBJECTIVES

At the end of this unit, the student should be able to have a clear understanding of what a company is and its characteristics. discuss the definition of company and the different types of companies and the purpose for which each type of company is registered to fulfill.

3. MAIN CONTENT

Definition of Company

A company was defined by Lord Justice James as an association of persons formed for a common object while Lord Lindley defines a company as a voluntary association or an organization of many persons who contribute money or money's worth to a common stock and employ it in some trade or business and who share profit or loss arising therefrom.

The common stock so contributed is denoted in money and it is the capital of the company. The persons who contribute to it or to whom it belongs are the members of the company. The proportion of capital to which each member is entitled is his share.

Company law itself is the study of law regulating the management and regulation of companies. A company is described as an association of a number of people for a common object. This object is usually for economic gain or profit. Though as we shall soon learn, not all company objects are for profit motive, some companies are set up principally for non-profit reasons. In this study, we shall be concerned with Joint Stock Companies. Joint stock company system is the greatest contribution of lawyers to the economic world because it contributed in a big way to trading by many members of the society, and without the contributors taking part in the management of the company.
Section 18 of the Companies and Allied Matters Act defines a Company as follows:

> "As from the commencement of this decree, any two or more persons may form and incorporate a company by complying with the requirements of this Decree in respect of registration of such Company"

SECTION 20 (1) states

CLASSIFICATION OF COMPANY. There are different classifications of Companies. The first classification of companies is companies limited by shares, limited by guarantee or unlimited. The second classifies them as either private or public company.

DIFFERENT TYPES OF COMPANIES

Company Limited by Shares: - In Nigeria, these are companies incorporated under the Companies and Allied Matters Act. A company limited by shares is a company where the liability of the shareholders for the debts of the company is limited to the amount unpaid on their shares (see Sec A on 21 CAMA 2004).
S. 21,1 states that liability of a member of a company of a member may be limited by it's memorandum to the amount if any unpaid under the shares respectively held by them. Such a company is a company limited by shares.

Company Limited by Guarantee :- When a company is limited by guarantee the motivation is not to make profits, this is a company having the liability of the members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of the company being wound up (see Section 21, CAMA 2004) company limited by guarantee is appropriate for non-profit organization for the promotion of arts, culture, commerce, science, religion, education sports, research, charity or other similar objects and the income of the company are to be applied solely towards the promotion of its objects, and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted under the Act; the company limited by guarantee shall not be registered with share capital (section 26) the company name must end with limited by guarantee

(Ltd/Gty). S. 21,1 states that the liability of the members of the company may be limited by the memorandum to such amount as the members may be respectively thereby undertake to contribute to the assets of the company in the event of its been wound up. Such a company is a company limited by guarantee. The total amount guaranteed must not be less than N10,000.

S.12,1 states that where a company is to be formed for promoting commerce,Art, Science, Religion,Sports, Culture, Education, Research,charity or other similar opbjects and the income and property of the company are to be applied solely towards the promotion of it's objects and no portion there of is to be paid or transferred directly or indirectly to the members of the company except as permitted by this degree, the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee.
S.26,2 states that a company limited by guarantee shall not be registered with a share capital and every existing company limited by guarantee and having a share capital shall, not later than the prescribed date alter it's memorandum so that it becomes a company limited by
S,26,3 further states that any provision I n the memorandum or articles orin any resolution of a company limited by guarantee purporting to give any person a right to participate in the profits of the company or purporting to divide the companies undertakings into shares or interest shall be void. This provision prevents any attempts to circumvent the provisions under S,26,1
S,26,4 state that a company limited by guarantee shall not be incorporated with the object of carrying on business for the purpose of making profit for distribution to members
S,26,5 states that if a company limited by guarantee carries on business for the purpose of distributing profits, all officers and members therefore who knew of the fact shall be jointly and severally liable for the payment and discharge of all the debts and liability of the company incurred in carrying on such business,moreover the company and every such officer and member shall be liable to a fine not exceeding N100.00 for every day during which it carries on such business.
S,26,6 states that the total liability of the members of a company limited by guarantee to contribute in the event of it's been wound up shall not at any time be less than N10,000.
S,26,7 States that subject to s,26,6, the articles of associationof a company limited by guarantee may provide that members can retire or be excluded from membership of the company. But the liability of the member under S,26,6 prevails even after such retirement or removal
S, 26,8 state that if in breach of S,26,6, the total liability of the members of any company limited by guarantee shall at any time be less than N10,000 every director and members of the company who paid about it shall be liable to a fine of N50 for every day during which jthe default continues.
S, 26,9 states that if upon the winding up of a company limited by guarantee there remains after the discharge of all it's debts and liabilities any property of the company , the same shall not be distributed among the members but shall be transferred to someother company limited by guarantee having objects similar to the object of the company or applied some charitable object, such other company or charity shall be determined by members prior to the dissolution of the company.

Unlimited Company:- An unlimited company is a company where the liability of the members is unlimited. It follows that the members shall be personally responsible for the debts of the company. (See section 21(2).) A company limited by shares may be further divided into two, the private company limited by shares, and public company limited by shares. S,21,1c states

that the liability of the members of a company may be unlimited. Such a company is a company of unlimited liability.
S.21,2 states that any of these types of companies may either be a private company or a public company.

Private Company: A private company is a company that restricts the right to transfer its shares and limits the number of its members to 50, not including the persons who are in the employment of the company and persons who having been formerly in the employment of the company who were while in that employment and having continued after the
determination of that employment to be members of the company and (3) prohibits any
invitation to the public to subscribe for any shares or debentures of the company. Minimum share capital of private company is N10,000.00

S,22,1 states that a private company is one which is stated in it's memorandum to be a private company.
S.22,2 states that every private company shall by it's articles restrict the transfer of it's shares.
S.22,3 states that in a private company the total number of members shall not exceed fifty, not including persons who are bonafide in the employment of the or where while in that employment became members members and have continue to be member of the company after they ceased to be that employment.
S.22,4 states that if two or more persons hold one or more shares in a company jointly, they shall be treated as a single member for the purpose of this section.
S.22,5 states that a private company shall not unless authorized by law invite the public to-
1. subscribe for any shares or debentures of the company or
2. deposit money for fixed periods or payable at call, whether or not bearable interest.

CONSEQUENCIES OF CONTRAVENING THE CONDITIONS OF A PRIVATE COMPANY.
S.23,1 states that if default is in complying with the conditions laid down under S.22 in respect of a private company, the company shall cease to entitled to the privileges and exemption conferred on private companies by this decree shall apply to the company as if it where not a private company.
However, under S,23,2, if the company or any other interested person by application satisfies the court that the failure to comply with the conditions under S.22 was accidental or due to inadvertence or some
court may, on such terms and condition as it thinks just and expedient, oder that the company be relieved from the consequencies from the in S.23,1.

Public Company: The Act namely declares that any company other than a private company shall be a public company and its memorandum shall state that it is a public company. We should note that public companies have the aim of securing investment from the general public and so they are free to advertise the offer of their shares to the public. The company also issues prospectus which gives a detailed and accurate report of all the activities of the
company including the names of its directives and members, its share capital, the assets of the company and other important, information. Because the general public are involved and need to be protected, the initial capital requirements for a publiccompany, are more onerous than a

private one. The minimum capital requirement of a public company is N500,000.00 (section 27(2), CAMA 2004). The application for registration for a public company must state that it is a public company and that the liability of its members is limited, the company therefore must end its name with "PLC" (Public Limited Company) section 29(2) CAMA 2004). This will notify the public that the member's liability is limited and that it is authorized to secure investment from the general public.

In order to facilitate the sale of its shares publicly, the public company may apply to be listed on the Stock Exchange. The Nigerian Stock Exchange may list any public company that applies to be listed on the exchange, and upon being listed, the shares of the public company may be sold on the floor of the market. This is not available to a private company.

However, not all public companies are listed on the stock exchange. We may also note the restriction as to the maximum membership of a private company is 50 members, whereas a public company is not so restricted, and may have as many as a million members or more.

A private company may be converted to a public company by complying with the provisions of the Act. The private company proposing to convert to a public company must,

(1) Pass a special resolution that it should be so re-registered

(2) Apply to the Corporate Affairs Commission (C.A.C) for re-registration with the following documents

(a) a printed copy of memorandum and articles of association as altered in pursuance of the resolution.

(b) a copy of written statement by the directors and secretary certified on oath that the paid up capital of the company is not less than twenty-five percent of the authorized share capital as at that date.

(c) a copy of the balance sheet of the company

(d) statutory declaration by the director and secretary that;

(i) the special resolution has been passed,

(ii) that the company's net assets are not less than the aggregation of the paid-up capital and undistributable reserves and ,

(e) a copy of the prospectus or statement in lieu of the prospectus (see section 50, CAMA 2004).

S.24 states that any company other than a private company shall be a public company and shall be a public company and it's memorandum shall state that it is a public company.

S,25 states that an unlimited company must be registered with a share capital, if any existing unlimited company is not registered with a share capital,it must after it's memorandum before the appointed day so that it becomes an unlimited company with a share capital of not below the minimum share capital prescribed under this decree S.26.

Statutory Companies

Apart from the above classifications, companies may also be classified as statutory companies. Statutory companies are companies brought about by statute e.g. Power Holdings Company of Nigeria (PHCN). Their powers, purpose, management and functions are as stated in the enabling Act. Profit is not the major aim of setting up these companies but basically for government to provide an important social amenity. These companies major or only shareholder is the Government, the Directors and top managers are appointed by Government and they do not have share capital.

CAPACITY OF AN INDIVIDUAL TO FORM A COMPANY

S. 20 States that-

A. Any individual less than 18years of age or

B. Any individual of unsound mind who has been so found by a court in Nigeria or elsewhere or

C. Any individual who is undischarged bankrupt or

D. Any individual who is disqualified from being a director of a company for company offences are not eligible to be members of a company.

But s. 20,2 permits an individual who is less than 18 years of ages to be a member of a company if there are two persons not so disqualified, willing to subscribe to the memorandum

S.20,3 states that a company in liquidation shall not be a member in forming another company.

S.20,4 states that 'subject to any restriction imposed by any states, an alien or a foreign company may join in the formation of a company as a member'.

S. 19,1 states that any company, association or partnership consisting of more than 20 persons for the purpose of carrying on any business for profit or gain shall be registered as a company unless it is formed in pursuance of some other enactments in force in Nigeria. But S,19,2 exempts any co-operative society registered in Nigeria, any partnership of legal practitioners where everyone of the members is a legal practitioner and any partnership of accountants where each of them is essentially by law practice as an accountant.

S.19,3 states that if the number of members in any company, partnership or association exceeds 20 in contravention of S, 19,1 and it carries on business for more than 14days every member of it shall be liable after those 14days to a fine of N 25.00 for every day during which the default continues.

4. CONCLUSION

We have shown that there are different types of companies, all incorporated for particular purposes and reasons. The most popular however from the point of view of business are those that are limited by shares and having share capital. They are classified as being private and public companies. Private companies are restricted in terms of membership and ability to raise money from the public, and suitable for small businesses, while the public companies are big businesses with access to the general public for raising capital and also may be listed on the Stock Exchange for the purpose. The private company may be reregistered as a public company by simply complying with the provisions of section 50 of CAMA 2004.

5. SUMMARY

From the stand point of business and investment opportunity. The company provides an organizational structure that is designed to effectively meet this need. The shares enable the company to raise money from a very large number of people. The members have limited liability and are therefore not constrained with fears of any personal liability. Thus it minimizes risk. The company is also not hampered by the death of a member as it will not bring the business to an end like the partnership. Though the members are the ownership of the capital of the company, they appoint directors to manage the affairs of the company and therefore management is

separated from ownership, the directors must however give accountof their management periodically during meetings called the Annual General Meeting
(AGM).

6. TUTOR MARKED ASSIGNMENT

What is a company and what the different classifications of a company.

7. REFERENCES/FURTHER READING

Modern Company Law by Gower
Pennington, Company Law

Unit 2

PRELIMINARY REQUIREMENTS FOR INCORPORATION

1. INTRODUCTION
2. OBJECTIVES
3. MAIN CONTENT
4. CONCLUSION
5. SUMMARY
6. TUTOR MARKED ASSIGNMENT
7. REFERENCES/FURTHER READING

1. INTRODUCTION

The purpose of this unit is to introduce to the requirements necessary for incorporation of companies. We shall discuss when it is mandatory to incorporate a company, the capacity of an individual to form and establish a company. Section 18 of the Act provides that any two or more persons may form and incorporate a company by complying with the requirements of the Act in respect of registration of such company. In effect there are forms and requirements to be complied with, before a company can be incorporated. The promoter must ensure that he complies with all the legal requirements and therefore it is important for us to understand all these necessary requirements. The Registrar of companies is also permitted under the law not to register any company that does not comply. Where however the promoter has complied with the law and his application is refused, he is entitled to seek order from court to compel the Registrar to accept his application and register his company. In this unit we shall examine the mandatory preliminary requirements for incorporation of companies in Nigeria.

2. OBJECTIVES

At the end of this unit, the student should be able to have a clear understanding of what is required to form a company and the capacity of an individual to form a company.

3. MAIN CONTENT

1. MANDATORY INCORPORATION

No company, association or partnership consisting of more than twenty persons shallbe formed for the purpose of carrying on business for profit or gain by the company orassociation or partnership, or by the individual members thereof, unless it is registered as a company under the Act or is formed in pursuance of some other enactment in force in Nigeria (section 19). There is a mandatory incorporation for any group of persons formed with the aim of profit or gain, and any such organization that is not incorporated is illegal. In the case of *Akinlose and Others v A.I.T and Others* **(1961) N.L.R 215**, the association was being managed by over 100 members and it was not registered at all. There was a quarrel amongst them and they went to court, the court found that they were more than 20 members associated for profit and was not registered association, the Court declared the association to be illegal. Section 19(2) permitted three exceptions to the rule , (1) where the association is a registered co-operative society, it need not be incorporated. We should note that this is not an entirely necessary exception because the cooperative society must be registered under the laws of the state on cooperatives, where this has been done, it does not operate as a company but as a society with its definite and defined objectives which is not basically for gain or profit but the welfare of its members.
(2) Any partnership formed for the purpose of carrying on practice as legal practitioners by persons each of who are legal practitioners. All legal practitioners in Nigeria are persons who have undergone the mandatory course in the Nigeria Law School, and have been duly called to the Nigerian Bar and registered to practice as Solicitors and Advocates of the Supreme Court of Nigeria. The law permits more than 20 of them to form a partnership for the purpose of their profession. The requirement is that they must not only be legal practitioner but they must be practicing as such and no more where they are not associated for the strict purpose of legal practice, they must incorporate their business. (3) Any partnership formed for the purpose of carrying on practice as accountants by persons each of whom is entitled by law to practice as an accountant in Nigeria. The person must be licensed to practice as an accountant by any of the legally recognized association for the regulation of accounting practice in Nigeria (A.N.A.N and I.C.A.N)

These are the only recognized exceptions to the rule and where anybody or association exceeds twenty in contravention of the law, every person who is a member of the company association or partnership during the time that it so caries on business after fourteen days shall be guilty of an offence and liable on conviction to a fine of N25.00 for every day during which the default continues.(section 19(3))

2. RIGHT TO FORM A COMPANY

The minimum number of persons that may form a company in Nigeria is 2 (see
section 18 CAMA 2004) under the companies Act 1968, the law makes a distinction between a private and public company. The law permits any two persons to form a private company but not less than 7 members are required to form a public company (section 377 of 1968 Act). However, under the CAMA 2004, the dichotomy between the private and public company has been

removed and whether the company to be incorporated is private or public the minimum number is two members.

The pertinent question should be why "two members" what is the magic served by the number? And what good purpose is to be served with the number? And what is the practical importance of this number to companies? while arriving at this number, and after considering the position in other jurisdictions, the Nigerian law commission stated that it is not possible to fix the minimum number of persons to form a company to one member, because, the word company connotes of least two persons and that one person cannot be called a company. The position taken by the law Reform Commission seems illogical and at variance with modern practice all over the world and the practice of businessmen in Nigeria. In the first instance we must recognize the fact that most businesses always start with one individual who wish to trade and expand his sole trading into a limited liability company he does not need any other person to form his company to effectively carry out his trade. In essence, the addition of another party in most cases is only to fulfill the requirements of the law, and the additional member most times do not even know anything about the business and does not even participate in it. In many cases in Nigeria, people add the names of their spouse and children (underage or not) and the second member had always been dormant and totally ineffectual and therefore an anomaly. Prior to 1992 at least two persons had to subscribe to become shareholders in a private company in U.K. As a result of the Twelfth EC Company Law Directive (89/667) implemented in 1992, private companies could be formed with a single member but public companies still needed at least two members. The Companies Act 2006, the current Companies Act in U.K, section 7 thereof now provides for a single person private and public companies. Most of the civilized nations have adopted the one man company e.g. Canada, Europe, while countries like South Africa, Ghana and Kenya to mention a few have adopted the one man company structure. There is therefore an urgent need for reform to bring the law in conformity with modern trends.

3. CAPACITY OF INDIVIDUAL TO FORM A COMPANY

Certain categories of persons are prohibited from forming or joining in the formation of company. In effect not all persons are permitted under the law to form a company. The following are expressly prohibited from forming a company:

(a) A person that is less than eighteen years of age. However by virtue of Section 20(2), where two other persons who are not disqualified are subscribers to the memorandum then the person under eighteen years will not be so disqualified. (b) A person that is of unsound mind and has been so found by a court in Nigeria or elsewhere or (c) Anundischarged bankrupt

(d) He is disqualified under section 254 of the Act from being a director of a company

(e) A body corporate in liquidation shall not join in the formation of a company under the Act (section 20)

We may need to examine the above more closely

(a) An infant may not by himself form a company. This may seem discriminatory. If an infant could effectively understand what he is about to do there should be no reason why he or she should not be allowed to do so. However, in contract, though an infant is allowed to enter into contracts, but some and except for contracts for necessaries, the contract will not be enforceable against the infant. Under common law, the contract will remain voidable at the option of the infant. But under the Infants Reliefs Act 1874, all contracts except for necessaries are entirely void (section 1). The pertinent question is that, could we call or regard the formation of a company as contractual as to fall within the realm of contract?

Registration of company is an entirely voluntary action taken by responsible citizens in furtherance of business venture to make profits, and the subscriber to the memorandum does not thereby enter into any contract with anybody except the other shareholders by virtue of the article of association which legally is a binding contract between them. The law in fact goes further to permit the infant to subscribe to the memorandum where two other adults are also subscribers. This exception only confuses the issues more. The other two adults are also subscribers in their own right and do not hold in trust for the infant. They are presumed to represent themselves and not the infant and so the infant holds his shares and exercise control over them. Having subscribed to the articles of association he has entered into a contact and may be subject to the law on the rights and privileges of members of a company and this is entirely outside the realms of general law of contract.

The reasonable option is to remove this prohibition and regard the infant subscriber as a reasonable responsible person capable of determining the propriety and reasonableness of his action.

5. The second prohibition as we have seen above is that a person of unsound mind is prohibited from forming or joins in forming a company. The person must have beenso found by a court in Nigeria. In effect, if the person has not been so found or declared by a court in Nigeria then he could join in forming a company. The definition of unsound mind is not supplied by the Act, what level of unsoundness will qualify a person for disqualification under the section is not specified. The court referred to in the Act is also not specified. By virtue of section 650, the court is referred to as the Federal High Court, Court of Appeal or Supreme Court, could we then argue that where any other court apart from these three pronounce a person of unsound mind, such pronouncement may be disregarded in so far as it does not fall within the definition of court in the Act. Thereare no such proceedings in Nigeria, in which a court will pronounce on the state of mind of a person, so it may not arise. In criminal cases, where an accused person has put up a defense of insanity, and this has been certified by medical practitioners who had examined the accused person, the court may accept such plea and decide the matter, in such a case, such a declaration could be made but it is only limited to the defense for the crime alleged and at the time of the commission of the crime and no more, and does not stand for all time. And where such person has undergone treatment and is now medically fit, he could be allowed to form a company. The point being made here is that again this prohibition is of no use and should be removed entirely, as it is totally unworkable and ineffective.

(C) UNDISCHARGED BANKRUPT

A bankrupt is a person who cannot pay his debts of a specified amount and who has been so declared by a court of competent jurisdiction (see Bankruptcy Act Cap B2 LFN 2004) while being a bankrupt he is not qualified to stand for any elective office or act as a director of a company (section 253, CAMA 2004) see also section 126 Bankruptcy Act 2004). An undischarged bankrupt is not really expected to engage in any form of business until he has been discharged fully and properly. The Act do not specify if the undischarged bankrupt may engage in or join in the formation of unlimited liability company or company limited by guarantee which is no profit making organization and is not in fact a business strictly speaking. Another problem is that the Bankruptcy Act is not being fully utilized by legal practitioners and businessmen probably due to the very technical nature of the law so that proceedings under the law is far and

in between and therefore the provision in the section 20(1) (c) may also remain only a deed letter law, having no practical effect whatsoever.

(D) DISQUALIFICATION UNDER SECTION 254

Section 254 provides that where a person is convicted by a High Court of any offence in connection with the promotion, formation or management of a company, or in the course of winding-up a company it appears that a person has been guilty of any offence for which he is liable (whether he has been convicted or not under section 513 of the Act, or has otherwisebeen guilty, while an officer of the company, or any friend in relation to the company or of any breach of his duty to the company, the court shall make an order that person shall not be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company for a specified period not exceeding ten years.

The important point to note here is that this prohibition will only last within the years as ordered by the court but it shall not exceed ten years. Secondly, the court may only make an order prohibiting the person from being appointed a director or be involved in the management of a company and does not extend to being a subscriber to a memorandum. The law does not prohibit such person from being a shareholder of a company, and the order does not extend to prohibition from forming a company. We should also note that even where such order has been made by the High Court, there is no facility for the Corporate Affairs Commission (CAC) to detect as to the person under this disability and thus prevent him or her form being registered as a subscriber to a company. The prohibition also will only exist on paper and the practical value is doubtful.

CONCLUSION

Any two or more person may form a company by complying with the provision of the Act. The argument is why two and not one as it is now the practice all over the world. The capacity to incorporate a company is also important in Nigeria, as a person under 18years of age is not permitted to form a company unless two other adult joint him. The purpose of this provisions is not also clear and is not targeted at serving any useful purpose. Other categories of persons disqualified are persons of unsound mind,undischarge bankrupt and person found guilty of management or fraud in the formation and management of a company under section 254 of the Act.

SUMMARY

In Nigeria only two or more persons may form a company, while one man company is not yet recognized in the country. A person under 18 years of age is prohibited from forming a company unless he or she is also joined with two other adults. A person of unsound mind and who has been so declared by a court in Nigeria is also prohibited from forming a company. An undischarged bankrupt and a person already convicted or found liable for fraud or mismanagement in the promotion or management of a company is also prohibited from forming a company. We must also note that a company is liquidation is also prohibited from forming a company.

MODULE 8

UNIT 1: APPOINTMENT AND DUTIES OF DIRECTORS.

1. INTRODUCTION
2. OBJECTIVES
3. MAIN CONTENT
4. CONCLUSION
5. SUMMARY
6. TUTOR MARKED ASSIGNMENT
7. REFERENCES/FURTHER READING

INTRODUCTION

A Director is a person duly appointed to direct and manage the business of a company (section 244 of CAMA). This definition covers any person occupying the position of director in a company irrespective of the name by which he is called (section 567 CAMA) thus a person who performs the functions of a director is a director even if he is not called by the name director.

The term also extends to persons on whose instruction or directions the directors of a company are accustomed to act. This category of persons are referred to or called shadow directors (section 245 of CAMA). The company has two major organs, the General meeting and the Board of Directors. (section 63 of CAMA) these two are the alter ego. They are therefore not servant or agents of the company when they act as a board or general meeting. They are the company itself. Individual directors who take up appointment with the company are in that capacity its agents i.e. Managing Director etc. It means that some directors are employees of the company (they are called executive directors). There are directors who are not employees of the company (they are called non-executive directors. s.282 (4) CAMA.

OBJECTIVES

This unit will enable you know

(a) who a director is in law
(b) the types of directors and how they are appointed
(c) the duty of directors, and how Directors powers are exercised
(d) How directors are removed.

MAIN CONTENTS

1.1 Types of Directors.

(a) Non Executive Directors; These are Directors who do not hold any employment with the company as directors i.e. their position as directors is not by virtue of their being employed and paid salaries in the company. They only collect sitting allowances.

(b) Executive Directors: these are persons who are employed by the company as Directors under a contract of employment. Executive directors are responsible for the day to day running of the company, while non Executive directors only attend periodic meetings of the Board of Directors where company policies are formulated for the Executive directors to implement. (Section 282 (4) of CAMA).

(c) Alternate Directors: These types of directors are usually created by the Articles of Association of the company. They are directors appointed by a serving director to seat on the board in his place in case he has to be absent.

(d) Shadow Directors: these are persons on whose directives and instructions the Board of Directors is accustomed to act. This refers to those who control the decisions of the board from behind the scenes. (Section 245 of CAMA).

(e) Directors by estoppels. Section 250 and 260 of CAMA. Where a company holds someone out as its director and he so acts, the company is bound by his acts and the defect in his appointment i.e. the fact that he was never appointed in the first place will not be a defence for the company.

Number of Directors

Every company shall have a minimum of two directors at any time. (section 246 of CAMA). The company may by its articles of Association fix the maximum number of its directors (S.249 (3) of CAMA).

Appointment of Director.

1(a) First Directors; By section 247, a first director is a person named in the memorandum of the company by the first subscribers (shareholders) of the company as director

(b) They may also be named in a clause in the articles of Association of the company as directors at the point of incorporating the company.

2. Subsequent Directors

Apart from those who were the first directors appointed at the incorporation of the company, all others after them are subsequent directors. The may be appointed in the following ways:

(a) By power under the articles. Section 41(3) of CAMA. The articles of Association may confer power to appoint or fire any director on a person whether within or outside the company.

(b) By order of a court. (section 248 (2) of CAMA). Where all the directors and shareholders of a company die, any of the personal (legal) representatives of the deceased shareholders may apply to the court for an order allowing them to convene a meeting of the company to appoint new directors for the company. If they fail to do so, the creditors of the company may do so.

(c) Life director. S. 255 and 262 of CAMA. A person may in the articles of Association be named as a life director of the company. He may notwithstanding be removed either by amending the articles to delete the clause appointing him life director or he may be removed by an ordinary resolution of the general meeting of the company subject to payment of damages to him for breach of his tenure of office. S.262 (6) CAMA.

(d) Appointment to fill casual vacancy. (section 249 (1) of CAMA). Where a director dies, resigns, retires or is removed before the expiry of his term of office, the Board of Directors may fill that vacancy. Such persons will be in office only until the next General meeting when they may be re-elected or removed.

(e) Election of Directors. Section 259 of CAMA. Unless the company's articles of Association otherwise provide, all the directors of a company shall retire at the first Annual General Meeting of the company. At subsequent Annual General Meetings, one third of the Directors shall retire in the order of seniority. At these meetings, as the directors retire, those who present themselves or are nominated are voted in as directors to replace these retiring unless they are re-elected.

Rotation of Directors;

Section 259 of CAMA provides for rotation of directors as earlier noted in 3.2 above. The position in section 259 applies only if a company's articles of Association are silent on the order of rotation (or retirement) of Directors.

1. At the first Annual General Meeting all the Directors retire for fresh elections to take place. Retiring directors are eligible to re-election.
2. At every subsequent Annual General Meeting, one third of the Directors shall retire. If the number is not a multiple of three i.e 3,6,9,12,15,18, e.t.c. The number nearest to one third shall retire. The directors shall retire based on seniority in date of first appointment.

If those qualified to retire are more than one third, lot will be cast to determine the one third to retire i.e if 6 persons were appointed the same day and one third is to retire in their order of seniority only 2 will retire. To decide the 2 out of the 6 that will retire, lot will be cast since they all came in on the same day unless 2 volunteer to retire..

A retiring director who offers himself for re-election is deemed to be re-elected automatically unless:

(a) Another person is elected to replace him, or

(b) It was expressly resolved at the meeting not to fill the vacancy created by his retirement, or

(c) A resolution for his re-election is put to vote but lost.

NOMINATION AND VOTING OF DIRECTORS

S. 259(4) and 261(3) of CAMA.

(1) retiring directors are eligible to offer themselves for re-election

(2) persons other than retiring directors shall be nominated by the Board of Directors; or

(3) such persons may in the alternative be nominated by any member of the company in writing to the company by depositing the notice of nomination with the nominee's consent in writing with the company at least between 21 days to 3 days to the date of the Annual General Meeting where the election will take place. The person proposed must himself accept the nomination in writing.

Unless the articles otherwise provide, the appointment of directors is by ordinary resolution.

In a public company, each director is appointed by a separate resolution. In a private company however, the director may all be appointed by a single resolution. Section 251(1) of CAMA.

Age of Directors

The minimum age for appointment of a director is 18 years there is no maximum. Section 257 (1) (a) of CAMA.

However for a public company to appoint a person of 70 years or above, special Notice of 28 days must be given to the company (section) 256 of CAMA) The company must in turn state in its notice of the General meeting concerned that it is proposed to present a person of 70 years or above for appointment as director (section 256 of CAMA).

The person himself shall disclose this fact to the members at the general meeting.

Fiduciary duties of Directors (loyalty and good faith.)

(a) The directors must observe utmost good faith towards the company in any transaction with or for the company S. 279 (1).

(b) They must act at all times in what they honestly believe to be in the best interest of the company. S. 279 (3) and (4).

(c) They must exercise company powers for the purpose specified and not for personal benefit. S. 279(5).

(d) They must not compromise their discretion to vote in a particular way in any Board resolution S. 279 (6)

(e) They must not delegate their powers in circumstances that amount to abdication of duties S. 279(7).

Directors Duties of care and skill s. 282

Every director shall exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances.

In Re City Equitable Fire Insurance Co. LTD (1925) Ch. 407, Romer J. laid down three yardstick for this duty as follows:

(a) a director need not exhibit in the performance of his duty a greater degree of skill than should be expected of a person of his knowledge and experience.

(b) A director is not bound to give continuous attention to the affairs of the company. It is enough if he attends periodic board meetings. The position is however different if one is an Executive director on salary with the company. S. 2. 282 (4)

(c) The directors are not guilty of breach of the duty of care and skill if having regard to the exigency of business they delegate their duties to the Managing Director or a Committee of the Board provided there is basis for trusting such officials of the

board. Care should however be taken not to delegate duties as may amount to abdication of duties.

CONFLICT OF INTERESTS

A director shall not place himself in a position where his personal interests will clash with that of the company. Section 280(1) of CAMA. Conflict of interests may arise in the following situations :

1. where the director is utilizing the company's property for his personal benefit outside approved limits S.280(20 (a)
2. Where he utilizes his position to make secret profits out of the company's opportunities. section 280(3).
3. where he misuses company information coming to him by virtue of being a director.

These duties must be observed even after leaving office. S. 280(5)

LIABILITY OF DIRECTORS

(a) The directors are liable to account for any secret profits made, unless same had first been disclosed and approved or over looked by the General meeting s. 280(6).

(b) The liability of directors in the company is unlimited if the memorandum or Articles of Association states, so S. 288(1)

(c) A director who fraudulently fails to apply money received as loan on behalf of the company for a specific purpose, or money or other consideration as advance to the company for a contract or project, for the specified purpose or contract shall be liable personally for the money S. 290.

SALARY OF DIRECTORS S. 267

Directors are not entitled to any salaries unless the article of Association so provide, in which case the salary is fixed by the General meeting from time to time. The directors are however entitled to refund for expenses properly incurred in the course of the company's business.

MEETING OF DIRECTORS

After incorporation, the first meeting of the Directors shall be within 6 months of incorporation. S. 263 (1).CAMA

Decisions at Board meetings shall be by simple majority votes and in case of a tie in votes cast, the chairman shall have a second vote or casting vote s. 263(2) CAMA

The Board shall elect its chairman and fix his tenure. S. 263(4) CAMA.

Unless the articles otherwise provide, the quorum for meetings shall be 2 directors where the directors are not more than 6. If the number is more than 6, then quorum is one third or the nearest whole number to one third. S. 264(1).CAMA.

The board may delegate some or all of its powers to be exercised by the a committee of the board from time to time or appoint one or more of the directors to the office of managing Director and delegate all or some of its powers to him from time to time. S. 64 and S. 264.CAMA

All directors are entitled as of right to notice of meetings. S.219 & 266(1). Meetings are called at the instance of any director. S. 263(3)

The managing director is appointed and is removable by the Board. Yalaju-Amaye V. AREC Ltd (1990) 4 NWLR (pt 145) 425.

REGISTER OF DIRECTORS

The company Shall Keep a register of directors and Secretaries at its registered office s. 292(4)

CONCLUSION

Directors are the Directing mind and will of the Company along with the General meeting. The two are the major organs of the company. The Directors are however responsible for the management of the Company. S. 63 (3) CAMA. The General meeting on the other hand acts as a checkmate to the Board to ensure they function properly.

TUTOR MARKED ASSIGNMENTS

1. Define a director and the different types of directors.
2. What are the procedures for appointing directors.
3. Discuss the duties of directors.

UNIT 2 REMOVAL OF DIRECTORS

1. INTRODUCTION
2. OBJECTIVES
3. MAIN CONTENT
4. CONCLUSION
5. SUMMARY
6. TUTOR MARKED ASSIGNMENT
7. REFERENCES/FURTHER READING

INTRODUCTION

The Board of Directors is one of the two principal organs of the Company. Their removal is governed by the CAMA. This unit outlines the circumstances and the procedure for removal of Directors under the CAMA.

The removal of directors is a statutory matter. The CAMA provides for the appointment and removal of directors. It therefore means that any company that wants to remove its directors must adhere to the procedure prescribed by the CAMA.

In the case of, Bernard Longe v. First Bank of Nigeria Plc, (2010) All FWLR 252 528 at 310 the Supreme Court clearly stated that directors are persons whose appointment under the CAMA is one with statutory flavor and may be removed only by strict adherence to the procedures prescribed by the CAMA. In that case, Bernard Longe was removed by the Board of Directors as Managing Director of First Bank of Nigeria Plc without complying with section 262 and 266 of the CAMA. The plaintiff lost at the Federal High Court and Court of Appeal, Lagos. He however won at the Supreme Court where the court ordered his reinstatement with full benefits as if he was not removed in the first place. It is therefore very important to adhere strictly with the procedures laid down by the CAMA for the removal of directors.

OBJECTIVES

1. To show the circumstances under which a director by law may lose his office.
2. To show the procedure for the removal of Directors.

MAIN CONTENTS

DISQUALIFICATION FROM APPOINTMENT, Section 257 (CAMA).

The following persons are disqualified from being appointed as directors under the law.

(a) Infants i.e. persons under 18 years as at the date of the appointment.
(b) A lunatic or person of unsound mind
(c) Insolvent persons (s. 253)CAMA
(d) Persons convicted of fraud S. 254.CAMA
(e) A corporate body, except if it chooses a nominee to represent it. (s.257 CAMA).

VACATION OF OFFICE. S. 258 CAMA

A person already appointed as director shall vacate or lose the office if the following circumstances occur:

i. He fails, within two months of his appointment to acquire the required number of shares specified for directors in the Articles of Association of the Company
ii. He becomes bankrupt or reaches an arrangement or compromise with his creditors.
iii. He is convicted of fraud and thereby restrained by court order from taking part in the management of any company.
iv. He becomes of unsound mind
v. He resigns from office in writing to the company.

A person may not have been under the category of persons disqualified from being appointed a director under S. 257 CAMA. However, after being appointed a director and before the expiry of his tenure of office, he becomes caught up with one or more of those elements that disqualifies a person from becoming a director. In such a case he will be forced by law to resign or be removed from office by court order if he refuses to leave.

It should however be noted that in the case of a lunatic or an insolvent person, they can only be removed from office if it was a court of law that held that they are lunatic or insolvent. Only a court order on the issue is a final conclusion that a person is insolvent or a lunatic.

REMOVAL FROM OFFICE

Section 41 (3) of CAMA provides that the memorandum or articles of association of a company may empower any person to appoint or remove any director or other officer of the company. Where this is the case, then the director may be removed from office pursuant to section 41 (3).

The person who may remove a director by the power conferred by S. 41(3) shall be a person other than the company itself.

The above is one way by which a director may be removed. The other way is by complying with the procedure in section 262. This procedure will be employed where the company itself wishes to remove its director or when any other person wishes to procure a company resolution to remove a company director. S. 262.

In the case of a life director, though he is appointed for life he may be removed under section 262 by an ordinary resolution of the company's general meeting subject to payment of damages. S262(6) CAMA.

However, he may also be removed by amending the company's articles of association to delete the clause which appointed him a life director. This procedure is however very difficult as it requires three-fourths majority of total votes cast at the meeting. After a successful amendment, the life director stands removed. In this case there is no damage to be paid to him under section 262 (6) of CAMA since the basis for his claim has been removed i.e. the clause under which he could have claimed breach of his appointment has been removed through the amendment that was made deleting the clause in the articles

that appointed him. He can no longer sue under the new articles since they no longer contain the clause for life directorship.

A Company may by ordinary resolution of the General meeting remove a director from office not withstanding anything in its articles or any agreement with him. Section 262 (1) of CAMA.

This however does not deprive the director so removed from claiming damages for breach of his contract of service where there was a contract between him and the company for a fixed period. Section 262 (6) of CAMA.

A director may be removed in the following manner:

(a) If there is a procedure specified in the articles or letter of appointment of the Director, especially the Executive Directors, the procedure should be followed i.e. section 41(3) of CAMA if it proves to be shorter or faster.

(b) If there is no other shorter procedure for removal of directors especially the non-executive directors, the only other procedure is as follows:

(i) The persons proposing the removal of a director will issue a special notice to the company containing the proposal for the removal stating reasons. The notice must give at least 28 days before the proposed date of the general meeting where the removal is proposed to take place. Section 236 & 262 (2) of CAMA.

(ii) The Company Secretary then sends the notice to the director(s) to be removed requesting his response if any.

(iii) If the response of the director concerned did not come in too late, the response will be sent out along with the Notice of meeting of the company at least 21 days to the date of the meeting.

(iv) At the meeting, the director concerned is entitled to make oral representation, and have his written response circulated at the meeting if it was not earlier sent out with the Notice of meeting.

(v) The resolution to remove the director is then put to vote.
A simple resolution i.e. a simple majority of votes cast is required to remove a director. Section 162 (1) – (3) of CAMA.
The Corporate Affairs Commission is thereafter notified within 14 days of the resolution to remove the director.

Removal of life director

The procedure for removal of directors also applies to life directors. Section 255 of CAMA defines a life director as one appointed for life. S. 255 and 262 however provides that a life director may be removed by ordinary resolution not withstanding anything in the articles or in any agreement with him. All directors may be removed from office before the expiry of their tenure. However, such director is entitled to compensation or damages for the unexpired residue of his contract of service as director with the company. If a person is appointed director for a tenure of say 5 yrs and is removed, not due to a breach of his contract of service, say after only 2years .He is entitled to compensation equivalent to the money he could have earned for the balance of 3yrs had he not been removed from office.. Section 262 (6) of CAMA. In the case of a life director removed before his death or voluntary retirement, he shall get compensation equivalent to what the court may assess as the balance of his life expectancy.

If however the articles which made have a life director has been amended to delete the said clause, then the life director will not be entitled to any damages.

PUBLICATION OF REMOVAL

Once a director has been removed, it is important to notify the Corporate Affairs Commission within 14 days. The company shall also proceed to remove his name from its letterhead papers, receipts, documents in circulation etc. failure to take the above steps might make the company liable for the removed directors' acts. The company will be deemed to hold him out as a director by not taking steps to publicise his removal in all its documents that are in circulator and with the Corporate Affairs Commission. Section 69(b), 250 and 260 of CAMA.

CONCLUSION

The procedure for removal of directors is statutory and must be followed otherwise the removal will be null and void.

TUTOR MARKED ASSIGNMENT

1. Discuss the procedure for the removal of directors.
2. Discuss the disqualification of company directors.