

<b>Course Name</b>	<b>: Law of procurement</b>
<b>Course Code</b>	<b>: APBBA 1205</b>
<b>Course level</b>	<b>: Level 2</b>
<b>Credit Units</b>	<b>: 4CU</b>
<b>Contact Hours</b>	<b>: 60 Hrs</b>

### **Course Description**

The Course generally deals with legal aspects in Procurement; types of contracts, tendering procedures, legal relations with in contract administration, misrepresentations & mistakes involved, agency in contractual relationship, contract for sale of goods and services as well as patent rights involved in their exchange.

### **Course Objectives**

- To equip the students with legal knowledge required in Procuring of goods and services.
- To enable them develop confidence in conducting transactions under the law.
- To help them interpret several requirements involved in contract management during processes of business transactions.

### **Course Content**

#### **Introduction**

- Definition of contract
- Termination of an offer
- Offer and acceptance in relation to a tender
- Tendering procedures
- Stages in tendering process
- Conditions for successful tenderers and competitive bidding
- Conditions when tendering is not advisable

#### **Intention to create legal relations**

- Domestic and social agreements
- Business and commercial agreements
- Standard form contracts
- Advantages and disadvantages of using standard form contracts
- Common law, civil law and criminal law in relation to contract

#### **Misrepresentation**

- Distinguish between representation and misrepresentation with their relevance to contract
- Types of misrepresentation
- Effects of misrepresentation

- Mistakes
- Categories of operative mistakes
- Mistake as to document signed

### **Agency in contractual relationship**

- Definition of an agent
- Functions of an agent
- Creation of an agent
- Application of doctrine of apparent authority
- Agency of necessity agency by ratification
- Conditions for ratification
- Termination of agency

### **Arbitration**

- Definition of arbitration
- Basic ways when arbitration arises
- Advantages and disadvantages of arbitration
- Conciliation and mediation

### **Contract for sale of goods**

- Definition of contract of sale
- What contracts of sale of good doesn't include
- Categories of goods

**Others include;** retention of title, intellectual property rights, requirements to acquire patent rights, trade mark

**Mode of delivery**    Face to face lectures

### **Assessment**

**Coursework** 40%

**Exams**        60%

**Total Mark** 100%

### **Introduction**

**Contact:** agreement enforceable by law between two or more persons to do or abstain from doing some act or acts.

Essentials of a contract:

- Offer and acceptance

- Consideration
- Intention to create legal relations
- Capacity to contract

An offer may be oral written or implied from conduct of the offerer.

An individual who makes an offer is offerer and person to whom the offer is made is offeree.

Making of an offer and its acceptance constitutes an agreement

**Termination of an offer:**

- Acceptance
- Rejection
- counter-offer
- revocation before acceptance
- failure of pre-condition
- laps of time
- death of offeror or offeree

Consensus must be between the parties on all important aspects of the agreement.

Acceptance must be free from ambiguity.

Silence on its own cannot amount to acceptance but acceptance may be silence conduct.

Acceptance by conduct could be in practical terms by acceptance of delivery.

A contract may be discharged by four basic ways: - performance, - breach, - frustration, - agreement.

**READ ABOUT:** doctrine of substantial performance, - partial performance, and prevented performance, - actual & anticipatory breach.

**INITIATION TO TREAT**

This is an offer to negotiate or an individual by some one that one is ready to receive an offer which may or may not lead to a binding contract.

**Instances:** -advertisements

- Display of goods.
- Catalogues and price lists

Generally an invitation to tender, which invites prospective suppliers to submit a tender /bid is an invitation to treat.

**OFFER AND ACCEPTANCE IN RELATION TO A TENDER.**

A tender may be an offer or invitation to treat. A tender with a specific number of items in accordance with schedule annexed to the documents constitutes to an offer. In this case a tender will include specifications, delivery terms, requirements and conditions.

Accepting an offer (tender) to supply a fixed or calculated quantity of specific items creates a binding contract. However if a tender /invitation requests a quoted price for supply of certain items from potential suppliers with nothing more than purchases may be made at all then this is not acceptance of an offer. This is creation of a standing offer by potential supplier. Each call off order creates a separate contract. This frame work contract may be revoked anytime but orders placed before revocation must be honoured.

### **Other rules regarding tenders.**

Specific/ (Buyers invite supplies from specific number of selected suppliers and opens the tenders on indicated day and time). in this case there is implied obligation on the buyer to place an order with the supplier who best meets the selection criteria. It also implies that the buyer will consider all tenders delivered before the deadline, and there is action for damages if one of the parties is over-looked.

General/ open tenders

Here there is no obligation on the buyer to place an order with any of the tendering suppliers.

### **TENDERING PROCEDURES.**

In industrial or commercial buying we use tendering or competitive bidding. This is where vendors come to the buyers. In some cases this vendor comes from a group that is pre-qualified, where as in other cases any vendor is free to submit a bid for the contract.

The suppliers who make the most attractive bid, typically the lowest price bidder wins the contract, or in some circumstances may be invited for further negotiations. When the bidding procedure is to be covered by the strict rules the term tendering is used.

In this form of tendering process, bids or tenders received by the buyer in response to advertised requirements or invited bids can be treated as contractual offer capable of being accepted or rejected by the buyer.

Tendering is perceived as a fair and open way of awarding contracts because it means that a buyer cannot use favouritism to award contracts to a preferred supplier. Award is only to winning vendor on basis of their tender.

An invitation to tender lists details of all requirements, including adequate specification, statement Of the terms and conditions to be applied and date by when the offer should be in the hands of the buyer.

Supplier gives all relevant details of prices, specification or deliveries in response to buyer's details of requirements. Once suppliers send this, supplier becomes tenderor and the tender is an offer.

It can be noted that there is one major difference between public and private tendering. In public sector there are legal rules that have to be strictly adhered to as stipulated by the public procurement and disposal of public Assets Act, 2003(for the case of Uganda).

### **STAGES IN THE TENDERING PROCESS.**

1. Tender documents will be proposed by purchasing functions liaising with other departments and other appropriate functions depending on contract nature.

These documents will basically include the following;

- Specification of services, equipments or material needed
- Kind of relationship anticipated with the vendor
- Proposed terms and conditions of the contract
- Criteria against which winning bidder will be selected
- Details of time scales, deadlines, contacts points and procedures
- Time frame enabling vendors proposed amendments to terms and conditions.

2. Tenders are advertised and expressions of interest are requested from the supply market, to enable tender documents being availed to interested parties.

3. All parties wishing to bid must follow precise terms requested in the tender documents, failure of which may mean that their bids may not be accepted. Any variation in terms should be given to all tenderers.

4. Addition information or clarification may be requested by tenderers, which if availed is provided to all tenderers to ensure fair competition.

5. All tender documents (bids) should be received by closing date and time is required format in order to ensure fairness to all vendors and reduce chances of supplier collusion.

6. Bids are normally put in the separate place and opened on due date and time, details being recorded before a panel of independent staff normally outside the purchasing department.

7. Each tender is analysed with reference to stated requirements and recommendations made for the most attractive. All bids may be rejected if there is evidence of collusion or if buyers are not satisfied with any bid and has clearly stated at the outset that there is no obligation to accept any bid.

8. Results of analysis will then be passed on to an authorising body (tender board / cc) to make decision formally as to the best tender. Purchasing function may then lead negotiations to clarify or improve the offer with the winning supplier.

There are two basic options if tenders received are considered not to be good value for money:

Re-tendering the contract by re-advertising requirements

Post-tender negotiations (PTN) which applies if supplier was informed of this possibility prior to tendering exercise. In this situation supplier may accept or reject suggestions made of offering better value for money if awarded the contract.

### **CONDITIONS FOR SUCCESSFUL TENDERERS AND COMPETITIVE BIDDING.**

- Amount of expenditure (value) on the purchase must justify the tendering costs of time and effort.
- Specifications must be clear to all parties and suppliers must know their costs of production.
- Vendors must be technically competent and willing to contract.
- There must be an adequate number of vendors.
- There must be sufficient time for tendering to be used.
- Buyer's procedures must have go reputation for actually awarding contracts.
- Buyer must have a good idea of the price in order to avoid being exploited by vendors.

## **CONDITIONS WHEN TENDERING IS NOT ADVISABLE:**

- When it is impossible to estimate costs with high degree of certainty.
- When the price is not the only important variable.
- When purchasing function for sees a requirement to make changes in the specification.
- When special tooling or set up costs are major factors.
- When close supplier collaboration is desirable and necessary.

In case where competitive bidding is not appropriate or not legally required then direct negotiations occur where buyers approaches one or more supplier with a view of discussing buyers requirements.

Some of the factors with effect negotiated price level:-

- Quantity ordered
- Length of contracts
- Time of requirement
- Delivery requirement
- Cost structure of seller and degree to which costs have been covered
- Method of pricing by vender initially quoting low prices to gain market share
- Skill of negotiator
- Other parameters like discounts for payments, length of credit period, excess stocks held by suppliers etc.

## **Difference between quotation and request for supply of information:**

When a response to a request for a quotation is to give a detailed reply with all the specifications, price, date and terms plus conditions of supply, then this may be sufficient to amount to an offer. On the other hand if the reply / response are to avail prices and confirmation that supplier has such goods in stock then this will not be an offer.

The basis should be that if in response to the quotation, the buyer could simply say yes then the parties would reasonably consider themselves bound to supply and pay for the goods / and services .In such a circumstance this forms an offer.

## **CONSIDERATION:**

All consideration must be sufficient but not necessary adequate. Adequacy related to perceivable value of promise while sufficiency is concerned with legal validity of consideration. As long as consideration is legal, a bad bargain is enforceable.

This is anything of value.

## **What is value?**

This includes goods, money, service or a promise.

Hence if one agrees with a supplier to buy items and date for delivery is fixed (1 week) and date for payment is fixed (14 days) after delivery, then one has consideration for the transaction. One promise to pay is of value and the suppliers promise to deliver is of value.

Promise for future performance is executor consideration while future payment is executed consideration. Consideration must also be given when a contract is varied as well as it is created.

## **Accord and Satisfaction:**

This is a principal which is important in terms of contract discharge.

If the offeree discharges a contract by performance but asks the offeror to accept less than one owes on that day then the offeree is doing less than required and the offeror may accept that part payment and still sue for the balance at a later date.

On the other hand if one offers to give creditors payment in some other form before the date of the debt is due, then the law will not enquire into the adequacy of the consideration as long as what is offered is capable of being legally sufficient to discharge the debt. This is known as substituted performance.

## **INTENTION TO CREATE LEGAL RELATIONS**

If there is no intention for parties to create legal relations then a contract will be void.

### **Two main presumptions by courts**

- Parties in a domestic agreement do not intend to create legal relations.
- Parties in a commercial or business agreement intend to create legal relations.

## **DOMESTIC AND SOCIAL AGREEMENTS**

**Here** parties' intentions depend on inferences deduced from circumstances of each case and language. Courts will assess the party's intention on an objective basis that is; would reasonable people regard the agreement as intended to be binding.

### **Business and Commercial Arrangement**

Existence of an intention to create legal relations is presumed by courts for such agreements. But the presumption can be rebutted (denied) if a contrary intention is clearly expressed in the contract. Otherwise the contract will be binding in honour only.

A civil law is designed to compensate citizens while criminal law is to punish citizens. Civil law is between private individuals or organizations while criminal law is between state and citizen.

### **Capacity**

This is the legal capability to enter into a legal agreement. Agreements made by minors (less than 18 years) are NOT valid except in two major exceptions.

Where a minor is beneficially of a service including contracts of employment and / or training as long as the terms taken as a whole are for the benefit of a minor.

When a minor purchases a necessity. This is something which is necessary for the minor in the station in life. Note that once an item has been decided as a necessity it would remain so even if it is a luxury.

## **STANDARD FORM CONTRACTS**

### **Battle of forms**

Many contracts are based on standard forms. These include documents like order forms, enquiry, tender invitations, dispatches note, delivery note and invoice. Each of these

documents will often contain terms and conditions of party originating them or at least refer to them.

In case a buyer makes an offer/order form, it will be responded to by an acknowledgement containing non-conflicting seller's terms. On the contrary if this is not being in accordance with offer it is a counter-offer. In essence all documents coming from the supplier simply reiterate the position and unless the buyer is very careful goods may be accepted on seller's terms of business.

This may be avoided by using a tendering process whereby offer or standing offer should always be made upon the buyer's terms supplied with invitation to tender in general the problem can be overcome by careful documentation and contract management, ensuring that one is fully aware of the procedural hazards. It has to be noted that for a standard form contract parties are not of equal bargaining power. For instance a signature of a store man on a seller's delivery note containing the seller's terms is interpreted as a buyer accepting contract conditions of the seller. (Unless if the store man signs that received un examined).

### **Advantages of using standard form contracts.**

- There will be no need to negotiate terms of contract with very new customer.
- There is saving on time and effort in drafting contracts.
- The formation of contracts is relatively simple and can be easily delegated.
- The organisation can include terms advantageous to its operations.

### **Disadvantages**

- Recipient/customer is in a weaker position and may accept terms favouring business.
- Wordings may be technical so that the other party to the contract may sue or be sued.

### **Privity of contract.**

The principle of privity of contract is that only a party to the contract may sue or be sued.

### **Warranties and conditions.**

All terms in a contract will usually be either conditions or warranties.

- Conditions are fundamental terms – these are perceived to be essential to the existence of the contract and breach of these, however slight may lead to termination of a contract and sue for refund together with claim for damages for any consequential loss.
- Warranties are incidental terms: these are not vital to the continued existence of a contract. Breach of these does not give right to contract termination but is limited to right to claim for damages.
- Any clause in a contract may be made into a condition by expressly writing it in a condition. In order for a clause to be relied upon by both parties in a contract it must be incorporated in the contract – the wording or interpretation must cover the specific circumstances and it must be fair and reasonable.

### **Common Law.**



Common law means that law is made ostensibly by judges making rulings in cases brought before them on the basis of what rules are generally considered to have to have been held in 'common' by the people. Hence legal principles are derived from those commonly held beliefs and values of the country other than code of law imposed by the state.

Common law remedies are always against property such as money damaged or property possession orders.

Equity is discretionary justice in that it is dependent on the behaviour of the person seeking the remedy. Equitable remedies are nearly always against a person such as injunction or specific performance like injunction can be offered by imprisonment for corrupt of court. Equity has more flexibility in remedies. Hence there is no guarantee that equitable remedy will be given.

### **Statutes**

These are Acts of parliament which are primary legislation statutes overrule common law.

Many Acts provide that the appropriate minister may make regulations under the Act to give effect to the law. Such regulations are known as delegated or secondary legislation.

Judges are persons who will interpret the meaning of legislations in any court case in which it is called into question.

Judicial statutory interpretations are bound by the principle of judicial precedent.

Judicial precedent is the means by which judges are bound to follow decisions of previous court. Facts of a case may be different but the legal point involved may be the same. This occurs if the previous case decided was at the same level and the court hearing or a court higher in the system.

### **Difference between civil and criminal Law:**

In civil law a private party files (corporation or individual person) files a lawsuit and becomes the plaintiff. In criminal law litigation is always filed by the government, who is called prosecution.

In criminal law the guilt defendant is punished either by incarceration in jail or by payment of a fine to government. Crimes are classified as felonies (with maximum possible sentences of more than 1 year incarceration).

### **Incorporation:**

This means the clause is in the contract if a clause is not contained in a contractual document, but rather is in some other notice given after the contract is finalised then it will not be incorporated.

### **Interpretation:**

The wordings which must ensure that they cover particular situations which arise.

### **Reasonableness.**

To satisfy the reasonableness test a term must be fair and reasonable having regarded to the circumstances which were or ought reasonably to have been, known or in

contemplation of the parties when the contract was made. A term may therefore be unreasonable if it is printed in small print or drafted in obscure language. In contract law, the crucial time of assessment of reasonableness is at the time of formation of a contract.

### **Liquidated Damage clause:**

This is a clause by which a formula is included for calculation of a fixed amount which will be paid by the defaulting party in event of late delivery or late performance.

A distinction must be made between a liquidated damage and penalty as express – terms in contract.

### **Main differences between a penalty and liquidated damages.**

- Liquidated damage is a genuine pre-estimate of anticipated losses on a given event, while a penalty is not a genuine pre-estimate but designed to ‘terrorise’ the other party into compliance.
- It does not matter what the clause is called, the courts will decide whether the clause is liquidated damages or penalty.
- A penalty is un-enforceable and will be struck out of a contract (leaving the plaintiff to sue for un liquidated losses in the normal way) while a liquidated damages clause is enforceable.
- If a liquidated damages clause is unenforceable, then this limits the amount of compensation recovered to the total under the clause, regardless of the actual loss.
- Un liquidated damages are intended to compensate the injured party by putting him a position he would have been had the contract been executed.

### **Indemnity clause:**

This is a clause which is inserted in a contract to ensure that supplier can pass back to its original supplier any liability imposed upon it by its buyer.

This occurs if the real cause of the problem originated from original supplier.

**Force majeure clause** (often included in contracts with international dimension). This contract clause seeks to exclude or limit liability in event of something unexpected happening to prevent the contract performance or make it significantly more difficult to perform. It makes provision for cancellation or suspension in such circumstances or even extension for performance time. This clause may have the effect of providing for certain events which frustration will not cover.

### **Advantages of the force majeure clauses:**

- Frustrating events being outside the control of the parties
- Other events which may potentially trigger the clause can be inserted
- Provision for contract suspension rather than automatic termination of the contract with the right to either party to counsel when the need arise.
- The clause can provide for allocation of expenses or losses in the event of it being invoked.

International arbitrators recognise force majeure’ to cover all events such as natural disasters and unforeseen outside interferences

## **FRUSTRATION IN CONTRACTS**

A frustrated contract is one which is unperformable as a result of factors beyond the control of either party .

Frustration applies in the following circumstances :

- The event having been unforeseen
- The contract is unperformed or in performance, something different from that contract occurs

### **Time of essence clause:**

This clause is inserted to ensure buyer has the right to cancel the contract and claim compensation when and if the supplier is late in delivery on performance. Without such a clause the buyer will normally only have the right to compensation. This clause time as being fundamental to the contract and is made a condition of the contract.

### **Arbitration clause.**

This provides for the handling of disputed by a specific process which does not involve going through the courts and all pertaining problems.

## **EXPRESS AND IMPLIED TERMS**

### **EXPRESS TERMS**

There are statements which be oral or written which are contractual and enforceable. If they are written precise obligations undertaken by both parties will be easy to determine. Parties are not allowed to vary, add to or subtract the terms of the contract in writing. This is known as 'parole evidence rule'

Courts have the prerogative to interpret the agreement of parties to represent what they believe parties would have agreed if they had to put their minds to that particular problem when drawing the contract.

Courts may attempt to interpret an express clause, which is in any way ambiguous to reflect the presumed intent of the parties but cannot change an express clause which is unambiguous.

If express terms are perfectly clear and free from ambiguity there is no choice to be made between different possible meanings, clear terms must be applied.

An unexpressed term can be implied if and only if the courts find that the parties must have intended that term to form part of the contract (term necessary to give business efficacy to the contract)

Express terms are traditionally classified as conditions and warranties. Some express terms do not fall into either of these categories until it becomes necessary to rule on the issue they are referred to as intermediate or in nominate terms.

### **Implied terms**

Terms may be implied in a contract by custom or by common law or being standard.

This reflects the fact that a business agreement is usually fairly complex and can be difficult in a manageable space to address all the issues that perhaps should be addressed.

It has to be noted that contracting parties are free to exclude any terms which would otherwise be implied into the contract as being customary or standard. However this is not permissible if the effect was to override a statutory obligation for example an employer is not allowed to exclude the obligation of health and safety legislation.

### **Conditions**

A condition is a major provision that goes to the root of the contract of there is breach then there is substantial failure to perform a basic element in the agreement. Innocent party can repudiate the contract and /or claim for damages.

### **Warranties**

This is a collateral term, or term subsidiary to main purpose of contract. Breach does not lead to collapse of agreement. Innocent party can sue for damages but not repudiate the contract.

### **Intermediate (or in nominate) terms.**

This is mainly used when the intension of the party is to clear. The courts will look at events which have occurred as a result to breach and decide whether those events have deprived the innocent party of substantially the whole benefit it was intended to achieve under the contract. In this case courts will review whether the breach is fundamental.

### **Non-disclosure or silent**

Failure to make full disclosure does not in general constitute misrepresentation. However there are exceptions to this rule. The main ones apply in contracts of utmost good faith (uberimae fidei) such as insurance contracts. In this case only one of the parties is in possession of all material facts and hence has a duty to make full disclosure of these facts. Failure to do so renders the contract voidable.

### **Partial non-disclosure.**

This happens when a representation is falsified by later events before conclusion of the contract and has not been notified as soon as possible to the party. If this becomes known to the representer before the contract is entered into he/she must make full disclosure. An example is where one may expect a certain amount of profit at some time but then this does not happen due to reduced sales

### **Inducement**

Here a statement must have induced the representee to enter into the contract

### **VITIATING FACTORS**

These are certain issues that are applicable at the time the contract is made which render it un-forceable.

These include: mistake, misrepresentation, duress and undue influence and illegality. These factors render a contract void or voidable depending on the application and circumstance of the formation.

### **Void contract**

This is a contract that has no legal affect as from the start (ab initio) and nothing can be done to give it legality.

### **Voidable contract**

This is contract capable of being avoided by one party in certain circumstances for specific situation but which until that time is perfectly valid. An example is a contract by a minor which is voidable at any time until achieving majority.

### **Examples of void contracts**

- Contract leading to corruption in public office/life
- Contract to defraud government tax bodies or commit a crime
- Contracts that are sexually immoral
- Contracts prejudicial to public safety
- Contracts prejudicial to status of marriage
- Contracts of unreasonable restraints of trade.

In these cases money paid is recoverable and any property transferred is recoverable. However the guilty party may not be able to enforce remedies.

### **Other contracts that are unenforceable.**

- Penalty clauses
- Contracts of betting/wagering contracts.
- Contracts made unenforceable by status

### **Representation**

This is a pre-contractual statement or fact made in negotiation stage of the contract which while not forming a term of the contract is one of the reasons that induces the representee to enter into the agreement. Person making the statement is representer and person to whom the statement is made is the representee. The statement must be one relating to some fact in present fact.

### **Misrepresentation**

This is a false statement of fact which is addressed to the party misled and which a material inducement to enter into a contract is.

A statement of opinion does not constitute a representation and will not amount to a misrepresentation should it turn out to be wrong. However an exception to this rule applies if it can be shown to that person who expressed the opinion did not honestly hold it or could not as reasonable person having his knowledge of the facts honestly have held it.

### **Types of misrepresentation**

### **Fraudulent Misrepresentation.**

This is a false representation of a material fact made knowing it to be false or without belief in its truth or recklessly not caring whether it's true or false.

A misrepresentation is not fraudulent if the person who made it honestly believed it to be true. The burden of proof is on the representee to show that the misrepresentation was fraudulent.

### **Negligent Misrepresentation.**

This is a false statement made without dishonesty by a person who had no reasonable grounds for believing the statement to be true.

The person who made the statement has to show that there were reasonable grounds for that person to believe it to be true.

### **Innocent Misrepresentation.**

This is a false statement made by a person who had reasonable grounds to believe that the statement was true not only when it was made but also at the time the contract was entered into.

### **Effect of misrepresentation.**

Misrepresentation leads to a contract becoming voidable. Hence it remains valid unless and until the representee elects to rescind it.

Each type of representation has a different set of remedies.

### **Fraudulent Misrepresentation.**

Main remedy here is damages. They are claimed under the tort of deceit rather than in contract.

### **Negligent Misrepresentation.**

Here a person making a false statement is liable to pay damages and also has the burden of proving that there were reasonable grounds for believing the statement to be true.

### **Rescission.**

This is the main remedy for all types of misrepresentation. It is an equitable remedy and so discretionary, and takes effect when notified to be the other party. This remedy releases the aggrieved party from his/her obligation to accept performance or carry out future obligations under the contract. Contract is set aside as though it had never been made.

Conditions under which injured party may lose the right to rescind contract:-

- Acceptance of some benefit under the contract or in some other way affirming benefit.
- Waiting too long before taking action.
- If goods/items have passed to third party.
- If it's not possible to restore parties to their original positioning.

## **MISTAKE**

This occurs where there is some kind of misapprehension or misunderstanding as to a material fact. Under common law it renders the contract void “ab-initio” this means that it is treated a nullity from the outset, or the law views this as if there was never a contract.

The true owner can therefore recover goods or damages from whoever is in wrongful possession.

Under equity the effect is that the contract is rendered voidable. Rules under equity apply where courts have not found operative mistake at common law.

A mistake is not always operative. For example, a mistake as to the quality or worth of the subject matter however fundamental does not result in being void at common law.

### **CATEGORIES OF OPERATIVE MISTAKE**

**Common mistake:** this occurs where the mistake is made about the subject matter of the contract. For instance if the seller enters contract with the buyer to sell the item when neither party knows that the item is disposed of or no longer exists.

**Mutual mistake:** Here parties make a mistake where in effect they are at cross-purposes. This occurs if the buyer believes to have bought an item where sellers have been intending to sell another item. In this case, there lack of genuine agreements.

**Unilateral mistake:** This is when one of the parties makes a mistake knowingly. This makes a contract voidable for fraud, which means it is valid until one party discovers the fraud and takes steps to avoid it.

### **Various possibilities**

**Mistake as to identity:** This is usually due to mistake of another party amounting to fraudulent misrepresentation. Such a misrepresentation leads to avoidable contract. The usual sequence is that the property is acquired and immediately resold to the third party. The dishonest purchaser then disappears while the seller tries to recover properly from the third party.

**Mistakes as attributes:** if the offeree intended to deal with the offerer, and the mistake is only and attribute, then the contract will not be void for mistake. For example if B intended to deal with A but would not have done so if he realised that A was dishonest, then the contract would be voidable for misrepresentation.

The advantage for injured party of a contract being void is that the contract will be totally invalid so, if the fraudulent party sell the goods to an innocent party, no title of ownership will pass; the injured party will be able to recover the goods from the third party.

However if the contract is merely voidable then it is valid until rescinded by the injured party. This means that if the goods are sold to a third party before rescission takes place the goods cannot be reclaimed.

**Mistake as to document signed:** the general rule is that a party is bound by the terms of any document which is signed or sealed. Even though they did not read or understand the contents.

However the exception exists where the party signs a document under a mistaken belief as to the nature of the document. This may happen through the illiteracy or senility of the person signing or from a mistake as to the nature of the document. The exception only applies if the person took all reasonable precautions before signing.

Non est. factum (it is not my deed): This defence available to a party against whom an action is brought in reliance upon a signed agreement. Where a party is able to show that he/ she was unaware of the meaning of the document when signing it, he will not be liable under the contract.

### **UNDUE INFLUENCE**

This doctrine gives relief where, in circumstances not amounting to duress, a person enters into a disadvantageous transaction of contract on gift.

This is any influence by which the exercise of free will and judgement has been prevented. The cases are divided dependency on whether or there being special judiciary relationship between the parties.

Before a transaction can be set aside for undue influence it must be shown that there was a manifest disadvantage to the person seeking to avoid the contract.

The relationships where one party is in a position of dominance over the other party, the dominant party has a duty not to take un fair advantage of the other. Examples include solicitor and client, doctor and patient, parent and child, guardian and ward, trustee and beneficiary. This is presumed apply between husband and wife as well as between banker and customer (in court).

It is the dominant party who should show that undue influence over the other party was not exercised or else the contract will be set aside. However, the presumption can be rebutted (to say statement is false) if the dominant party can show that the complainant was able to have the free exercise of independent will.

### **Economic Duress.**

This deals with instances brought about by inequality of bargaining power. If there is a threat to the contract rather than to the person then this will amount to economic duress. However this is a threat to break an agreed contract which will damage the economic interest of the party

### **AGENCY**

Agency is the relationship that exists between two parties/persons when one called the agent (A) is considered in law to represent the other called the principle (P) this is in such a way as to be able to affect P's legal position in respect of strangers to the relationship (known as third parties) by the making of a contracts or the disposition of property.

Agent may also be referred to as representative, broker or factor.

### **FUNCTION OF AN AGENT.**

- An agent acts on behalf of the principle and a third party.
- An agent drops out once a contract has been formed.
- An agent generally has no rights or liabilities under the contract though there are expectations to this rule. The law of agency is based on the maxim 'qui facit per



alium facit per se'. (he who employs another to something deemed to have done it himself). Anyone with contractual capacity can employ an agent and is then bound by what the agent does on one's behalf. A company always acts through agents e.g. its directors – since it has no physical existence of its own.

- No one can claim to be a principal's agent unless the principal consents to the agency.

### **CREATION OR AGENCY.**

Relationship of principal and agent can arise as follows:-

- By consent on agreement
- By application of the doctrine of apparent authority
- By ratification.

### **CONSENT OR AGREEMENT.**

Usually an agent is authorised in form of a contract by the principle to act on his behalf. Agent may be appointed by deed, in writing or orally.

### **Application of Doctrine of Apparent Authority.**

When a party deals with an agent and the limits of the agent's authority cannot be known. One must therefore rely on what appears to be within the authority of the agent. This is the doctrine of apparent (or ostensible) authority. Hence the principal is not bound only by acts which are within the express authority of the agent, but also by the acts within agent's authority that is where one has no actual authority by the third party is justified in presuming to have the authority.

### **AGENCY OF NECESSITY.**

This is where a person is entrusted with the goods of another and it becomes necessary to do something to preserve the property in an emergency. To be an agent of necessity it must be impossible or impracticable to communicate with the principal. It can be observed that now a day it is difficult to prove this due to modern means of communication.

### **Agency by Ratification.**

This is where by an agent performs an act, which is not within his/her actual authority but which later becomes binding on the principal because he/she agrees to accept the act as having been done on his/her behalf. P is then said to ratify A's actions.

This situation may occur when the agent acts without authority (because of not being P's agent) or when agent exceeds the entrusted/agent) or when agent exceeds the entrusted/agreed authority.

### **Conditions for ratification.**

- Person doing the act must purport to do it as agent and not on own behalf.
- Principal must be person whom the agent had in mind at the time of performing the act.
- At the time of ratifying the act principal must have full knowledge of circumstances relevant to the act, or must at least have waived further inquiry.

- The principal must have been in existence, competent and capable of being ascertained at the time when the unauthorised act was done.
- Ratification must take place within reasonable time if no time is specified. Ratification after the contract is intended to commence is ineffective because a reasonable time cannot extend beyond the date of commencement of the contract.
- The whole contract is to be ratified.
- Avoid contracts cannot be ratified.

## **DUTIES OF AN AGENT.**

- Obey principal's instructions failure of which leads to breach of contractual relationship and liability to damages.
- To exercise care and skill although the standard may vary in that a skilled agent is expected to perform his duty better than a gratuitous agent.
- To perform his duty personally in that agent must not delegate his duties (delegate's non potest delegate). Exceptions to this rule arise where principle authorises agent to delegate some of the duties or where delegation relates to some purely administrative skill where no special skill is required.
- To act in good faith to the principal by having no conflict of interest, making secret profit, or taking advantage of confidential information.
- To account for any money received on behalf of the principal, as well as keeping an account of all transactions entered into on behalf of the principal and produce accounts to the principal on request or as agreed.

In case of agent breaching any of the duties the principal has the following remedies.

- Suing agent for damages for breach of contract.
- Sue agent to recover secret profit or any money received on principle's behalf.
- Dismiss agent without compensation.

## **Rights of an agent.**

- **Indemnity:** If an agent incurs liability or pays out money in performance of his or her duties he or she has the right to be indemnified by the principal unless agency agreement provides otherwise. An agent cannot be indemnified in respect of authorised acts unless they have been ratified. Agent cannot be indemnified for loss caused by own fault or negligence.
- **Remuneration:** An agent's remuneration depends on the express implied agreement or it can be implied by nature of agent's services. An agent can also claim "quantum meruit" for work done under an intended contract which is not finally concluded. In absence of express agreement on amount of remuneration to pay agent, agent is entitled to receive such amount as is customarily paid to a commercial agent dealing in the type of goods to which agreement relates.
- **Lien:** This is the right to retain the goods of another as security for payment of a debt. An agent can only claim a lien if he/she has lawful possession of the property concerned.

## **THE TERMINATION OF AGENCY.**

- By agreement between parties
- By principal revoking agent's authority

- By agent renouncing the authority
- By completion of duties and obligation of the agreement
- By lapse of time (where agency was created for specified time)
- By death of principal on agent
- By principal becoming bankrupt
- By agent becoming bankrupt, to extent of prevention of carrying out duties
- By insanity of principal or agent.
- By frustration.

However not all consequences of a relationship ceases once the agency is terminated. For instance if at the time of termination agent has a right to commission or indemnity thus such vested rights do not cease.

**BAILMENT:** These situations arise in two cases

- Contracts of bailment
- Operations of law

**CONTRACT OF BAILMENT:**

This occurs where goods are delivered to a person (bailee) on condition that they will ultimately return to the bailer. The implication is that bailee keeps commercial goods in safe custody on behalf of the true owner (bailer) often for a money consideration.

Examples are where a car is delivered for repair, and goods are transported and stored on behalf of the owner, or goods are delivered or rejected.

**Bailment by operation of law.**

This situation arises as per the laws of a country. For example for hotel or inn keeper is a bailee of a guest's property brought onto the premises.

**Position of the Bailee:**

A bailee will always be liable for the loss occurring to the bailer where the bailee wrongfully refuses or is unable to restore the goods to the bailer under the terms of the contract. If goods are damaged in the possession of the bailee by a third party then bailee may sue that third party directly, but hold the money recovered in trust for the bailer.

**ASSIGNMENT**

Debts and obligations under a contract cannot simply be transferred by delivery like goods, (chooses in possession) or something representing goods. This is because they are intangible property or 'chooses in action' as far as the law is concerned. Liabilities under a contract cannot be assigned without the consent of the other party. Rights or a debt under a contract may be assigned.

**Assignments must be as follows:**

- Written and signed by the assignor
- Followed by the express notice given to the debtor or other person from whom the assignor would be entitled to claim assignments not adhering to the above are more limited and known as equitable assignments. On the other hand assignment may take place by operations of the law as follows:

- On death of a person, rights and liability are assigned to personal representatives such as executors
- On bankruptcy, the rights and liabilities are assigned to the trustees in bankruptcy.

## **FRUSTRATION IN CONTRACT**

Frustration occurs where there is a change in circumstances after formation of a contract which renders it physically or commercially impossible to fulfil. This may occur in instances where at time of inception of a contract conditions were quite feasible but later the conditions became impossible owing to change in circumstances such as sudden fluctuations in commodity prices, devaluation of shilling or civil disturbance necessitating change in transport routes. An exception to this rule is when there has been a physical destruction to the subject matter implying that something fundamental to the contract's performance becomes destroyed or unavailable.

On the other hand if party to a contract for personal services dies or becomes incapacitated from performing then the contract will become frustrated. But in case of incapacitation person must be permanently incapable of performing the contract. Frustration in a contract may occur if a scheduled event becomes cancelled.

It has to be noted that for frustration to occur there must not fault by either of the contracting parties. In case fault is alleged it is the burden of person alleging to prove the same. Hence if frustration is self induced then the liable party should not be excused from contractual liability.

### **Effect of frustration**

Frustration releases both parties from further performance due after frustrating event. Hence the effect is to bring the contract to an end forthwith parties being released from future obligations.

## **SETTLEMENT OR COMMERCIAL DISPUTES**

Commercial disputes are commonly settled by litigation, arbitration, mediation, conciliation, adjudication.

### **ALTERNATIVE DISPUTE RESOLUTION (ADR)**

It has to be noted that enforcing cases in the normal civil courts can be lengthy and time-consuming, hence alternative form of dispute resolution have been developed.

### **ARBITRATION**

In this case an arbitrator is usually chosen when the dispute arises, although not always. The type of arbitrator chosen will depend on the nature of the case. The main role of arbitrator is to try to effect a settlement between parties rather than impose a judgment as to who is wrong.

### **Three basic ways when arbitration arises**

- By contract – In this case parties include in a contract agreeing to refer any dispute to an arbitrator who may be named therewith.
- By court ruling – Here judge refers dispute to arbitration

- By statute – This is by law such as for marine insurance.

### **Advantages of Arbitration**

- It is less formal in that parties discuss in an informal atmosphere
- It is flexible whereby rigidly characterised by traditional courts such as judicial precedent are not imposed.
- There is greater specialist knowledge price more commercially aware experts are involved.
- It avoids publicity since proceedings are held in private
- It is often less expensive in terms of procedure and time spent though the Arbitration Act gives court the power to do so.
- An arbitrator's award may be enforced like a High court judgement, since courts maintain a supervisory role.

### **Disadvantages of Arbitration**

- Arbitration often not skilled in applying or interpreting the law.
- There are no formal rules and hence discretion can lead to inconsistent and unpredictable decisions.
- Parties may still end up in a court of law.
- Appeal is only possible in point of law not point of fact.

### **CONCILIATION**

In this case the conciliators decision is not binding on parties and they may ignore it. Here parties are brought together in an attempt to reach their own decision with the aid of a conciliation body conciliator plays an active role in the process and if necessary will give the parties his/her opinion on the issues.

### **MEDIATION**

This is a structural negotiation with a mediator, a neutral third party trying to aid parties reach settlement of dispute. Process depends on willingness of parties to negotiate. Mediator does not impose an decision on the parties as it is the parties themselves that bear responsibility for reaching an agreement.

### **READ ABOUT NOTES ON ADJUDICATION**

### **CONTRACTS FOR SALE OF GOODS.**

**Contracts of sale:-** Contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for the money consideration called the price. Agreement to sell is where the transfer of the property in the goods is to take place at a time in future or subject to some conditions to be fulfilled later. This is sometimes called a contract to sell.

**Buyer** – Person who buys or agrees to buy the goods

**Seller** – a person who sells or agrees to sell goods

### **CONTRACT OF SALE OF GOOD DO NOT INCLUDE**

- Gift as valuable consideration is given
- Free offers (e.g. omo given at petrol stations) since this is usually to promote the product or service.
- Exchange of goods for work done or for rent
- Exchange of tokens since these are regarded as better
- Hire purchase agreements

### **CATEGORIES OF GOODS**

**1) Existing goods :** these are goods owned or possessed by the seller at time of the contract of sale

**2) Future goods :** goods to be manufacture are acquired by seller after making contract of sale such as coffee or maize to be harvested. However contracts relating of these operate as agreements to sell this contract of sell comes into effect when future goods come into existence

**3) Specific goods:** these are goods identified and agreed upon at the time of a contract of sale is made

**4) Unascertained goods:** these are goods not agreed upon at the time of contract of sale categorised as

- Generic if they are of a particular kind such as 200kg of salt
- Goods not yet in existence when they not yet manufacture.
- A part not identified but part of a specified bulk such as 100kg out of 1000kg of salt stored in stores.

**5) Ascertained goods:** goods originally un ascertained but now identified in accordance with the parties' agreement after contract of sale has been made such as the 10kg of salt having now been weighed.

### **TITLE**

This is the expression used to demote that someone has been given ownership of goods.

Title means that a person has the right to deal with the goods as an owner and can pas title to another person.

Perfect title –means the right to deal with the goods is not encumbered in anyway.

Imperfect title means seller has some restrictions on title.

### **RETENTION OF TITLE**

- Property in specified goods will not pass to the buyer unless the sale is unconditional

- Property in unascertained goods will not pass to the buyer unless the goods have been ascertained and have been unconditionally appropriate to the contract.

**The Nemo dat rule:**

States that seller cannot transfer any better rights than seller has. If it turns out that the seller's title to the goods was defective or non-existent, then the same will be true of the buyer's title even if the buyer may have acted in the entire innocence and good faith.

**Exceptions to memo det rule;**

**Estoppel-** sale of a seller in possession

Sale by a buyer in possession-sale under avoidable title

**Estoppel:** this where the true owner of goods is by his/her conduct, precluded from denying the seller's authority to sell this may occur if the owner deliberately gives someone else the appearance of having the right to deal with the goods,

**Hence innocent party may obtain title if ;**

- Owner has by conduct or words made a representation that the seller has authority to sell.
- The buyer has acted on that representation in good faith
- The representation is made intentionally or recklessly.

**Sale under voidable title:** this may occur in a number of situations where the law determines that the contract is voidable.

**Sale by seller in passion.**

Where a person allows the seller of goods to remain in control of possession of those goods after a sale has occurred, hence allowing seller to appear to still own the goods, then an innocent third party who may buy the goods will get good title. This is based on the premise that original buyer has not acted with due diligence in allowing the seller to appear to still own the goods.

**Sale by buyer in possession.**

If buyer is allowed to have possession of the goods even though title has been reserved by the seller, a subsequent purchaser from the buyer that purchases in good faith and without knowledge of restrictions on title will get good title

It can be not noted that in these two cases(possession) there is still the right to sue for breach of contract and damages would be based on amount needed to put innocent party back in the position they would be before the breach.

**INTELLECTUAL PROPERTY RIGHTS**

These are different types of ideas protected by different legal rights. They are basically of six forms including confidential information, trademarks, patents, copyrights, registered design and design right.

**PATENTS**

In order for companies or individuals to exploit commercial advantage of development innovative products and processes inventors either rely on the rules relating to trade secrets or seek to acquire patent. Patent is practicable. Where secrecy is impossible to achieve.

### **Requirements to acquire patent:**

An invention has to be novel in that it has not been previously available to the public.

Aspect must be more than what would be obvious to a person skilled in art such that it must involve an inventive step

Aspect must be capable of industrial application.

There have to be no specific restrictions upon the registration of that type of product e.g. a method of treatment of animal or human body by surgery or therapy. On the other hand a product to assist the surgery is patentable.

It has to be noted that under patent law inventions made by employees in the course of their duties are a property of the employer. The general rule is that the employee is only entitled to a fair compensation.

Patented may succeed in action for infringement of the patent if two conditions are satisfied.

1. Action being complained of lies within the boundaries of the invention patented  
problem here is in terms of products or processes that are similar but not identical by definitions in patent
2. Action complained of must be one prescribed in the patent Act.

### **TRADE MARKS**

A trade mark may in particular consist of words, (including personal names) designs, letters, numerals or the shape of goods or their packaging. The mark must be sufficiently distinctive to distinguish the goods or services of one undertaking from that of another

- It must be a sign capable of graphical representation.
- Other register-able things
- Specific colour or colour combination if they are sufficiently distinctive.
- Slogans such as “have a break “-ha
- Sounds such as distinctive jingles or the MGM lions roar
- Tastes and smells if sufficiently distinctive

An application has to pay a fee for each registration.

### **UNREGISTERABLE INTELLECTUAL PROPERTY RIGHTS**

**COPY RIGHT:** This is an un- registerable right which is created automatically. It lasts for the life of the creator and 70 years. What entails is establishing proof that one created the item and date of creation.



Copyright exists in all creation and aesthetic value such as literacy, dramatic, artistic or musical.

## **DESIGN RIGHT**

This is similar to copyright but lasts for 15 years the design right may be extended for 10 years if a licence is applied for.

## **PASSING-OFF**

This is an alternative to the expensive registration and re registration of the trade work.

However passing –off only protects in two scenarios

- For product which are of the market
- Products which are a acquired in reputation and where there is good will to be harmed

Hence a product not currently marketable without destructive reputation is better off registered

### **Characteristic necessary to cause action for passing off**

A misrepresentation

Statement made by trade in course of trade to prospective customers or ultimate customers of his goods and services

Causing actual damage to the business or good will of the trader by whom action is brought

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### Further readings

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