NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 331

COURSE TITLE: LAW OF COMMERCIAL TRANSACTIONS I

COURSE CODE: LAW 331

LAW OF COMMERCIAL TRANSACTIONS 1

Course Developer/Writer	Mr. Ugbejeh Ernest Ogwashi National Open University of Nigeria, Victoria Island, Lagos.
Course Editors	Prof. Justus A. Sokefun National Open University of Nigeria Victoria Island, Lagos. Dr. (Mrs.) Erimma Gloria Orie National Open University of Nigeria, Victoria Island, Lagos.
Dean	Prof. Justus A. Sokefun National Open University of Nigeria Victoria Island, Lagos.
Course Lecturers	Mrs. Anene Francisca, Mr. Ugbejeh Ernest Ogwashi, Mr. Njoku Nduka National Open University of Nigeria Victoria Island, Lagos.

National Open University of Nigeria
Headquarters,
14/161, Ahmadu Bello Way
Victoria Island
Lagos.

Abuja Office
No. 5, Dares Salam Street,
Off Aminu Kano Crescent
Wuse II, Abuja,
Nigeria.

e-mail: centralinfo@nou.edu.ng
URL: www.nou.edu.ng
2015

TABLE OF CONTENTS PAGE

INTRODUCTION

Welcome to Law 331: Law of Commercial Transaction I. This course is a compulsory course in National Open University of Nigeria that you must offer in the Law programme. This course is offered in the first semester of third year of your study and it is a 4 credit unit course.

This first semester of Law of Commercial Transaction course material deals basically with the Sale of Goods Law. The nature of sale of goods, sources and meaning of sale of goods will be covered. The general principle and formation of contract as it relates to sale of goods, elements of sale of goods, terms of contract, exclusion clause, fundamental term, fundamental breach, passing of property by non owner, passing of property in specific and unascertained goods will all be examined. Duties and remedies of seller as well as that of the buyers are dealt with in this course material. Treated also in this course material is the carriage of goods by air, sea and land as it relates to delivery of goods and the use of various payment devices.

COURSE AIM

The aim of this course is to familiarize the learner with the subject matter which is dealt with herein and which the student is expected to know after reading through.

COURSE OBJECTIVES

In order to achieve the aims stated above, some general as well as specific objectives have been designed in this regard. The specific objectives are indicated at the beginning of each unit.

The general objective will be achieved at the end of the course material/work. At the completion of the course material you should be able to:

1) Understand the nature and meaning of the Sale of Goods as well as the meaning of commercial transactions.
2) Know the sources of Sale of Goods Law in Nigeria
3) Know the nature and formation of contract of sale of goods.
4) Understand what conditions, warranties and representations are.
5) Understand terms of contract and terms implied by statute
6) Understand and relate together the concepts of fundamental term, fundamental breach and exclusion clause.
7) Distinguish between ownership, possession and passing of property.
8) Understand the duties of the seller.
9) Understand the duties of the buyer.
10) Appreciate the remedies available to the seller and the buyer.
11) Know the effect of contract of sale of goods.
12) Discern the remedies available to the innocent party in case of breach.
13) Understand special commercial contracts.
14) Understand the use of various payment devices e.g. cheques, credit cards, luncheon and fuel vouchers.

15) Distinguish between bill of sales, conditional sale and credit sale agreement.
16) Appreciate the different modes of carriage of goods.

WORKING THROUGH THIS COURSE

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 17 weeks to complete. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

COURSE MATERIALS

The major components of the course are.

a) Course guide.
b) Study Units.
c) Textbooks
d) Assignment file
e) Presentation schedule.

STUDY UNITS

We deal with this course in 26 study units divided into 6 modules as follows;

MODULE 1 Introduction

Unit 1 – Meaning of commercial Law, Nature, Sources and Meaning of Sale of Goods

Unit 2 – Sale of Goods distinguished from Other Commercial Transactions

Unit 3 – Formation of the Contract of Sale of Goods.

Unit 4 – Essential Elements of a Contract of Sale of Goods

MODULE 2 Terms Of Contract And Exclusion Clause

Unit 1 Terms of Contract

Unit 2 Terms Implied by Statutes

Unit 3 Exclusion Clauses, Fundamental Terms and Fundamental Breach

MODULE 3 Passing of Property

Unit 1 – The Concept of Property.

Unit 2 – Passing of property in Specific Goods.

Unit 3 – Passing of Property in Unascertained or Future Goods

MODULE 4

Unit 1 – Transfer of title by Non-Owner.

Unit 2 – Special Exemption to the Doctrine of Nemo Dat Quo Non Habeat

Unit 3 – Fundamental terms, Fundamental Breach and Exemption Clauses

MODULE 5 Duties and Remedies

Unit 1 - Duties of the Seller.

Unit 2 – Duties of the Buyer.

Unit 3 – Remedies of the Seller.

Unit 4 – Remedies of the Buyer.

Unit 5 –Factors Affecting liability under contract of Sales of Goods.

MODULE 6

Unit 1 – Carriage by Sea, Land and Air

Unit 2 – The Hague Rules on Carriage by Sea.

Unit 3 – Contract of Afreightment.

Unit 4 – The Bill of Lading.

Unit 5 – The C.I.F. Contracts.

Unit 6 - The F.O.B Contracts.

Unit 7 – Documentary Letters of Credit.

Unit 8 – Carriage by Land and Air

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each.

We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on the law of contract. You will

then have a clearer picture into which to paint these topics. Subsequent units are written on the assumption that you have completed previous Units.

Each study unit consists of one week's work and includes specific objectives, directions for study, reading materials and Self Assessment Exercises *(SAE).* Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course.

Textbooks and References

Certain books have been recommended in the course. You should read them where so directed before attempting the exercise.

Assessment

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you are expected to apply knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work that you submit to your tutor for assessment will count for 30% of your total score.

Tutor Marked Assignments

There is a Tutor Marked Assignment at the end for every unit. You are required to attempt all the assignments. You will be assessed on

all of them but the best three performances will be used for assessment. The assignments carry 10% each.

Extensions will not be granted after the due date unless under exceptional circumstances.

Final Examination and Grading

The duration of the final examination for this course is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self-assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your self assessment exercises and tutor marked assignments before the examination.

Course Score Distribution

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Assignments 1-4 (the best three of all the assignments	Four assignments. Best three marks of the four count at

submitted)	30% of course marks.
Final examination	70% of overall course score
Total	100% of course score.

Course Overview and Presentation Schedule

Module 1	Title of Work	Weeks Activity	Assessment (End of Unit)
	Course Guide		
Unit 1	Meaning of commercial law, Nature, Sources and Meaning of Sale of Goods.	1	Assignment 1
Unit 2	Sale of Goods distinguished from other commercial Transactions.	1	Assignment 2
Unit 3	Formation of the Contract of Sale of Goods.	2	Assignment 3
Unit 4	Essential Elements of a Contract of Sale of Goods	3	Assignment 4
Module 2	UNIT 1 - Terms of	4	Assignment 5

Unit 1	Contract		
Unit 2	- Terms Implied By Statutes	5	Assignment 6
Unit 3	Exclusion Clause	6	Assignment 7
Module 3 Unit 1	Unit 1 – The Concept of Property.	7	Assignment 8
Unit 2	Passing of Property in Unconditional Sale of Specific Goods.	7	Assignment 9
Unit 3	Passing of Property in conditional Sale of Specific Goods.	8	Assignment 10
Unit 4	Passing of Property in Unascertained or Future Goods.	9	Assignment 10
Module 4 Unit 1	Unit 1 – Transfer of title by Non-Owner.	10	Assignment 11
Unit 2	Special Exemption to the Doctrine of Nemo Dat Quo Non Habeat	11	Assignment 12
Unit 3	Fundamental terms, Fundamental Breach	12	Assignment 13

	and Exemption Clauses		
Module 5 Unit 1	Unit 1 - Duties of the Seller.	13	Assignment 14
Unit 2	Duties of the Buyer.	13	Assignment 15
Unit 3	Remedies of the Seller	14	Assignment 16
Unit 4	Remedies of the Buyer.	14	Assignment 17
Unit 5	Factors Affecting liability under contract of Sales of Goods.	14	Assignment 18
Module 6 Unit I	Carriage by Sea, Land and Air	15	Assignment 19
Unit 2	The Hague Rules on Carriage by Sea.	15	Assignment 20
Unit 3	Contract of Affreightment	15	Assignment 21
Unit 4	The Bill of Lading	16	Assignment 22
Unit 5	The C.I.F. Contracts	16	Assignment 23
Unit 6	The F.O.B Contracts.	16	Assignment 24
Unit 7	Documentary Letters of Credit.	17	Assignment 25

Unit 8	Carriage by Land and Air	17	Assignment 26
	Revision	18	
	Examination	19	
		19	

How to Get the Most from This Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, you study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

Tutors and Tutorials

There are 15 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone or e-mail if you need help. Contact your tutor if;

- You do not understand any part of the study units or the assigned readings;
- You have difficulty with the self assessment exercises;

- You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attempting them. You will gain a lot from participating actively.

Summary

This course deals with sale of goods, Nature and Formation of the sale of goods Contract; Conditions, Warranties and Representations; Ownership and Passing off Property; Duties of the Seller; Duties of the Buyer; Effect of Contract; Remedies; Special Commercial Contracts in outline; the use of various payment devices e.g. Cheques, Credit Cards, Luncheon and Fuel Vouchers and carriage of goods by air, sea and land.

We wish you success with the course and hope that you will find it both interesting and useful.

TABLE OF CONTENT

Habeat

Unit 3 – Fundamental terms, Fundamental Breach and Exemption Clauses

MODULE 5 Duties and Remedies

Unit 1 - Duties of the Seller.

Unit 2 – Duties of the Buyer.

Unit 3 – Remedies of the Seller.

Unit 4 – Remedies of the Buyer.

Unit 5 –Factors Affecting liability under contract of Sales of Goods.

MODULE 6

Unit 1 – Carriage by Sea, Land and Air

Unit 2 – The Hague Rules on Carriage by Sea.

Unit 3 – Contract of Affreightment.

Unit 4 – The Bill of Lading.

Unit 5 – The C.I.F. Contracts.

Unit 6 - The F.O.B Contracts.

Unit 7 – Documentary Letters of Credit.

Unit 8 – Carriage by Land and Air

MODULE 1: INTRODUCTION

Unit 1 – Meaning of commercial Law, Nature, Sources and Meaning of Sale of Goods

Unit 2 – Sale of Goods distinguished from other commercial transactions

Unit 3 – Essential Elements of a Contract of Sale of Goods.

Unit 4 – Formation of the Contract of Sale of Goods.

UNIT 1: Nature, Sources and Meaning of Sale of Goods

CONTENTS

1.0 INTRODUCTION

Certain commercial transactions are not new to our indigenous society. Such transactions like sale of goods, pledge, hire purchase, insurance, money lending, arbitration etc were in existence before the introduction of English legal system. These indigenous systems have given way to modern system tailored in line with the English common law and statutes.

2.0 OBJECTIVES.

At the end of this unit the learners are expected to be able to understand the meaning of commercial law, nature of sales of goods, the sources of Nigerian law regulating sale of goods in Nigeria and what sale of goods contract is.

3.0 MAIN CONTENT

3.1. WHAT IS COMMERCIAL LAW?

Commercial law is a dynamic and exciting area of law. It has been flexible in order to keep pace with the rapid changes in business and with the globalization of markets. At the same time, it has been certain in order to assist in the growth and development required in commerce.

Commercial law is a subject that is difficult to define. In fact, there has never been a universally acceptable definition for this aspect of law. One thing is however clear. This is that it encompasses the laws that apply to business which include most importantly the law of contract and other aspects of law like company law, agency, sale of goods, banking, intellectual property, competition law, taxation law, insurance and hire purchase. This course, Law of Commercial Transaction does not cover all of these subjects. Its main objective is to look at certain areas in order to acquire an understanding of the themes, principles and practices of commercial law. The areas covered in the course are sale of goods, agency and hire purchase. The first semester shall focus mainly on sale of goods laws while second semester deals with

agency and hire purchase laws.

3.2 Nature of Sale of Goods

The study of sale of goods is a study of a specialised area of general contract. It is a contract which involve sale of goods. The sale of goods is essentially a part of law of contract. Consequently the laws regulating sale of goods have not therefore, done away with the general rules relating to contract; hence, offer and acceptance, consideration and other elements of a valid contract must be present in a contract of Sale of Goods.

3.3 SOURCES OF SALE OF GOODS LAW IN NIGERIA

The law governing sale of goods in Nigeria include English Law and Statute: The Sale of Goods Act, 1893 (a statute of General application in force in Nigeria). Before Nigerian independence, various Acts of British Parliament were made for or extended to Nigeria which was a British colony. The most important mode of reception of English law was through local statutes introducing English law. In Nigeria, the Sale of Goods Act is applicable except in the states of the former Western Region where the Sale of Goods Act has been repealed and replaced by the Sale of Goods Law, 1959. In order words, states of the Northern and Eastern regions and Lagos state are presently using Sale of Goods Act, 1893.

Common Law and equity: Apart from the Act, rules of Common Law, including the Merchant usage which is not inconsistent with the express provisions of the Sale of Goods Act, 1893 and doctrine of equity are also applicable. For instance, section 45 of the Interpretation Act of 1965, Cap 89 provides thus:

> *Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrine of equity, together with statue of general application that were in force in England on the 1st day of January, 1900 in so far as they relate to any matter within the exclusive legislative competence shall be in force … in Lagos … elsewhere in the Federation"*

Nigerian Statute: The legislative arm of government in Nigeria is vested with the power of law making. Some commercial items that fall under the exclusive legislative list are taxation, stamp duties, bill of exchange, currency, incorporation, banking etc.

Case Law/ Precedent: The court often in the course of interpreting statutes creates body of legal principles.

3.4 MEANING OF 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.

That the definition of a contract of sale is recognized in terms of two transactions is indicated by section 1(3) of the Act which states that, "Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an agreement to sell.

4.0 CONCLUSION

This unit has exposed learners to the nature, sources and meaning of Sale of Goods in Nigeria in commercial transactions.

5.0 SUMMARY

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

a) Nature of Sale of Goods.

b) Sources of Sale of Goods Laws in Nigeria.

c) Meaning of Sale of Goods.

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)

3. Igweike, Nigerian Commercial Law, Sale of Goods, Malthouse Law Books, (second edition) 2001

4. M.C. Okany, Nigerian Commercial Law, 1992.

5. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd

6. C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd

UNIT 2 – SALE OF GOODS DISTINGUISHED FROM OTHER COMMERCIAL TRANSACTIONS

CONTENTS

1.0 Introduction

In commercial transaction, there are other transactions that are similar to sale of goods but a close examination of sale of goods and these other transactions as we shall soon see in this unit are different. Sale of Goods is distinguishable from these other commercial transactions but similar to them in context. Some of these transactions include: exchange, bailment, hire purchase, gift and loan.

2.0 Objectives

In this unit, learners are expected to be able to know what sale of goods contracts are and the differences between sale of goods and other related transactions.

3.0 MAIN CONTENT

3.1 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. However where goods are exchanged for part goods and part money it could be sale. In *Adridge v. Johnson*, the court held the exchange of 52 bullocks for 100 quarters of barely plus payment of 112 pounds to be sale.

Okany has argued also that where value is put on the goods it can be considered as a sale whether or not the consideration is paid in money or in kind. I do not agree with this position because the requirement of section 1(1) of Sale of Goods Act is the exchange of goods for money consideration, not putting of value on the goods. Also in exchange, the value of the goods to be exchanged will necessarily be valued to ensure fair dealing.

3.2 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

.

3.3 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,(as it shall be seen later)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.

3.4 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 E*sso Petroleum Ltd v. Commissioners of Customs 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.

3.4 SALE AND LOAN

A party wishing to borrow money may use his property or goods as security for the loan. In this situation the lender retains the possession of the goods or the title document until the loan is paid in accordance with the agreed terms. This arrangement is excluded by section 61(4) of the Sale of Goods Act.

SELF ASSESSMENT EXERCISE (SAE) TWO

Distinguish between Sale of Goods and

1) Exchange

2) Bailment
3) Hire Purchase
4) Gift.
5) Loan

4.0 CONCLUSION

This unit has exposed learners to the distinction between sale of goods and other commercial transactions like exchange, bailment, hire-purchase, gift and loan.

5.0 SUMMARY

Through this unit, learners have been able to know the distinction between sale of goods on one hand and exchange, bailment, hire-purchase, gift and loan on the other hand.

6.0 TUTOR MARKED ASSIGNMENT

1) 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)
3. Igweike, Nigerian Commercial Law, Sale of Goods, Malthouse Law Books, (second edition) 2001
4. Okany, Nigerian Commercial Law, 1992.
5. John Alemo Musa Agbinika and Josephine Aladi Achor agbonika, Sale of Goods, 2009.

UNIT 3

FORMATION OF THE CONTRACT OF SALE OF GOODS

CONTENTS

1.0 INTRODUCTION

The creation of a contract for the sale of goods is a matter governed by the general principles of contract as they exist either under common law or as modified by statutory provisions. It follows therefore, that a proper grounding on the basic principles of contract is a condition precedent to the appreciation and comprehension of the principles governing the creation of the contract of sale of goods. We shall examine capacity to contract, offer, acceptance, consideration and intention to create legal relation in this unit.

2.0 OBJECTIVES

The basic objective of this unit is to discuss the basic ingredients required for the creation of a valid sale of goods contract. At the end of this unit you should be able to discuss the ingredient required for the formation of a valid contract of sale of goods.

3.0 MAIN CONTENTS

3.1 CAPACITY TO BUY AND SELL

As required, under the general law governing capacity to enter into a valid contract, both parties to a Sale of Goods contract must have the requisite capacity to enter into the contract. As pointed out in the case of Labinjoh v. Abake (1924) 4 N.L.R. 33, one has, under the general law of this country, to differentiate between the positions under customary law and the "received law". Generally, the categories of persons whose capacities are usually discussed are infants, married women, insane persons, drunkards, illiterate person and corporations.

Infant: under the Infant Relief Act 1874 and infant Law 1959, an infant is a person under the age of 21 years. The contractual power and liability of an infant is regulated by Common Law and statute. In Labinjoh v. Abake (supra), the plaintiff an adult trader sued a girl of 18years old for the sum of 150 pounds being the balance of the goods sold to the defendant who claim that she is an infant and that the contract is void. The plaintiff contended that the age of majority was the age of puberty. The court held the age of majority in Nigeria is 21years hence the defendant could not be held liable. An infant cannot enter into a valid contractual relationship except for necessaries – Peters v. Fleming (1840) 6 M and W 42, 46 -47. Where a

contract is enter into with an infant, the contract is voidable at the instance of the infant. It is however germaine to note the proviso to Section 2 of the Sale of Goods Act 1893, which states that where necessaries are sold and delivered to an infant, or mental incapacitated person or drunkard, such a person must pay a reasonable price for the goods. The proviso to section 2 of the Act defines necessaries as goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of the sale and delivery.

Unincorporated Association: Unincorporated associations, with the exception of trade union, have no contractual capacity. Thus, cannot enter into contractual relationship or be bound contractually. However, the association can sue or be sued under representative capacity.

Corporations: They are juridical person whose powers are limited to those stated in the memorandum and articles of association. They can sue and be sued. Salomon v. Salomon.

Married Women: Under customary law, married women have contractual disabilities. Under the English law, not until recently, married women had no contractual capacity because husband and wife were seen as one. However, nowadays women are personally liable in any contract they are involved.

Others as identified above include insane persons, drunkards, and illiterate persons.

SELF ASSESSMENT EXERCISE (SAE)ONE

All persons with the power and money to sell and buy goods are eligible to enter into a contract of sale of goods. Discuss.

3.2 OFFER

Definition of an Offer

One major requirement of a valid contract is an offer. A valid contract must consist of an offer by one party and an acceptance by another person to whom the offer is addressed.

What then is 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 called the offeror, and the person to whom it is addressed, the offeree. Thus all commercial transactions being contractual relationships must involve an offer and an acceptance.

Generally, there is no limit to the number of people to whom an offer can be made. It is however noteworthy that a contract comes into existence only between the parties, that is, the offeror and the offeree. In the case of ***CARLILL v. CARBOLIC SMOKE LALL CO. (1893)1 Q.B.253,*** the court held and established the principle 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.

However, for a proposition to amount to an offer capable of acceptance, it must satisfy three conditions.

1. It must be definite, certain and unequivocal. In other words, the proposition must be a definite promise with the intention to be bound, provided that certain specified terms are accepted.
2. The proposition must emanate from the person liable to be bound if the terms are accepted by the offeree. i.e. from the offeror or his authorized agent. A proposition made by a person having no authority to do so purporting it to be an offer, cannot create a contract if accepted.
3. The offer must be communicated to the offeree.

FORMS OF OFFER

An offer may be made in many ways and forms.

1. It may be made verbally i.e by word of mouth in the presence of each other or by telephone, as well as by telex or telegraphic message or by writing.

2. It may be made by conduct. In this circumstance, the offer and acceptance are deduced from the acts and conduct of the parties.

3. An offer may be either specific or general. It is specific if made to a definite or particular person, and he alone may accept it. An offer is general if addressed to the public or world at large or to a class of persons and it can only be accepted by any person coming within the scope of the offer who had notice of it.

SELF ASSESSMENT EXERCISE 1

1. Define an offer.
2. Highlight the various ways by which an offer can be made.
3. State the conditions for a valid offer.

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. In other words, some problems arise in distinguishing between certain expressions used by the parties which are intended to lead to contractual relationship between them, on the one hand, and certain other statements made by the parties which are not intended to lead to any legal consequence.

The importance of the distinction between an offer and an invitation to treat is that if an offer is made and is then accepted, the offeror is bound, whereas if what the offeror said or did is not a true offer but an invitation to treat, the other party cannot by saying *"I accept"* bind the offeror to a contract.

The major distinctive feature between an offer and an invitation to treat is that for an offer must be definite, certain and unequivocal. This means that a proposition 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 *"offer for an offer"*.

The essence of an invitation to treat is that by it the supposed offeror is merely initiating negotiations from which an agreement might or might not in time result. The negotiation crystallizes into a true offer when one of the parties, the offeror, finally resumes a definite position of preparedness to be bound if the other party accepts.

The following situations usually involve invitation to treat.

1. Display of goods in shelves in a shop supermarket with or without price tag, self-service shops, etc. in Fisher v. Bell, the court held the exhibition of a knife in a shop window was merely invitation to treat and not an offer. Also in Pharmaceutical Society of Great Britain v. Boots Cash Chemist (Southern) Ltd (1952) 2 All E.R.459, the court held that the contract was made, not when the customer put the goods in the basket, but when the casher accepts the offer to buy and received the price.
2. An advertisement of goods in a catalogue.
3. Auction sale
4. Invitations of tender.

SELF ASSESSM ENT EXERCISE 2

An offer for offer is the same as offer. Discuss

Communication of an Offer

One major requirement for a true offer is the communication of the offer from the offeror to the offeree. An offer becomes effective only when it has been communicated to the offeree. Consequently, a person cannot accept an offer, the existence of which he has no knowledge. Offer is communicated when the offeree become aware of it. ***In R v. CLARKE (1927)40 C.L.R. 227,*** it was held by Higgins, J. that, this ignorance of the offer is the same thing

'whether it is due to never hearing of it or to forgetting it after hearing'.

The American case of ***FITCH v. SNEDAKER (1868)38 N.Y. 248*** also approves the principle that a plaintiff cannot accept an offer unless he is aware of it.

SELF ASSESSM ENT EXERCISE 3

How is an offer communicated?

Termination of an Offer

The general rule in respect of termination of an offer is that once an offer is made, it remains open for acceptance until an event known to law happens to terminate it. Some of these events are:

a. REVOCATION:- An offer can be revoked (i.e. withdrawn) at any time before it is accepted. This principle governing revocation remains operative even if the offeror has expressly stipulated that he would keep the offer open for a given period. In such a situation, the offeror can still exercise his right of revocation even though the time the offer was left open has

expired. Thus, in ***ROUTLEDGE v. GRANT (1824)4 BING. 653,*** 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 at any moment before acceptance, even though the time limited had not expired.

b. REJECTION:- Rejection of an offer terminates the offer, and makes it incapable of acceptance.

It follows that where an offer has been rejected, it cannot be accepted subsequently unless a fresh offer is made by the offeror.

Rejection of an offer may occur in two ways namely:

A) By a direct intentional refusal of the offer

B) By a counter offer.

Direct intentional refusal of offer occurs for example if Olu offers to sell a house to Funsho for ₦5Million and Funsho says, "No, thank you" Funsho's rejection puts Olu's offer to an end. Funsho cannot subsequently accept Olu's offer, even if Olu had left his offer for a fixed period which had not expired.

Counter offer happens when the offeree attempts to accept the offer on new terms, not contained in the offer. However, a counter offer will not occur if what the offeree did was merely to make an inquiry or request for information as to certain aspects of the offer. In other words, a genuine request for further information should not be construed as a counter offer, and would therefore not cause the original offer to lapse. Secondly, 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. See Oni v. Comm. Ass. Nig Ltd

c. 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.

d. OCCURRENCE OR NON-OCCURRENCE OF CONDITION: - If an offer is expressly or impliedly made to terminate on the occurrence of a 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 ceases to exist, and cannot be accepted after the person is dead.

e. DEATH BEFORE ACCEPTANCE: - The exact effect of the death of both the offeror and the offeree, or of either of them, has not been conclusively determined. However, the weight of academic and judicial opinions seems to indicate the following positions.

a) Death of both the offeror and the offeree before acceptance terminates the offer.

b) 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.

f. 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.

SELF ASSESSM ENT EXERCISE 4

Discuss the various ways by which an offer may be terminated.

3.3 ACCEPTANCE

Meaning of Acceptance

Acceptance is defined as the final expression of assent to the terms of an offer. By acceptance, the offeree indicates his intention and willingness to be bound by the terms of the offer. When an offer is accepted, it is transformed to a promise and a breach of it will give rise to an action.

An acceptance like an offer may be made by word of mouth, in writing, or by conduct. It must be made while the offer is still in force, and once accepted it is complete and the offer becomes irrevocable.

Conditions of Acceptance

For an acceptance to be valid, it must fulfill 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. In other words, a reply to an offer is only effective as an acceptance if it accepts all the terms of the offer without equivocation, qualification or addition. 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. Whether an acceptance is conditional or not in certain circumstances may be a strictly an issue, particularly when phrases such as 'subject to advice by our solicitor' or ' subject

to a formal contract to be approved by my solicitor', or ' subject to contract' or 'provisional agreement', are employed. This is a matter of construction. The guide from the decided cases is, that, if from the expressions used b y the parties, it is clear that they have only expressed an intention to enter a contract in future, then phrase will be taken as a condition and not a firm acceptance.

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 it (see Carlill v. Carbolic Smokeball Co. (supra). Where the offeror prescribes a certain mode of acceptance, an acceptance otherwise than 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 expeditious 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 an 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 ₦800 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.

SELF ASSESSMENT EXERCISE 1

Define an acceptance and discuss the conditions for a valid offer.

Acceptance must be Communicated

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.

Communication in this sense means actual notification to the offeror or to his agent duly authorized to receive an acceptance. This rule applies not only to the cases where parties are contracting in each other's presence but also to cases where the negotiations are conducted over the telephone or other electronic means. Thus, if the offeree accepts an offer by word of mouth or by telephone, and the words are inaudible, no contract is formed at that moment. For this reason, the offeree must repeat his acceptance so that the offeror can hear it.

A mere mental resolve on the part of the offeree to accept an offer, i.e an intention to accept but which has not been communicated to the offeror is ineffectual. In other words, silence or a mental acceptance or an unmanifested assent to an offer will

not constitute a contract.

The law requires that there must be an external manifestation of assent, some word spoken or act done by the offeree or his authorized agent which the law can regard as the communication of the acceptance to the offeror.

Acceptance may be effected in the following circumstances.

1) If the offeror prescribes or indicates a particular method of acceptances, and the offeree accepts in that way. There will be a contract, even though the offeror does not know of the acceptance.

2) Acceptance communicated to a duly authorized agent of the offeror is effective in law.

3) Where acceptance is governed by the rule in ***ADAMS v. LINDSELL (1818)1 B and Ald 681,*** i.e, acceptance made by postal correspondence, e.g, by letter or telegram. Here, where the acceptance is by post it is complete as soon as it is posted. Delay in transit or lost of the letter of acceptance does not affect the validity of the contract.

4) Where the offeror himself expressly or impliedly states the need for communication.

5) Communication of acceptance is waived impliedly, i.e, is deemed to be waived where it is to take the form of the

performance of an act, as in the case of unilateral contracts.

SELF ASSESSMENT EXCERSISE 2

In what way or ways can the acceptance of an offer be effected.

Modes of Communication

The acceptance of an offer can be communicated in any of the following modes.

i) 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.

In different cases, the question may arise as to whether an acceptance will be vitiated if the offeree communicates his acceptance by means which is equally or more expeditious than that prescribed by the offeror?. In principle, it appears that a deviation from the prescribed mode may be fatal to the acceptance. However, it is difficult to see why a tradesman should not be free to use an alternative mode to signify his willingness to contract, particularly where that mode is commercially safer, more convenient and expeditious. Therefore, if the mode of communication used by the offeree though different, is equally or more expeditions than that prescribed, the acceptance will be

effective.

But the result will be otherwise where the offeror insists that acceptance should be communicated by a particular mode prescribed and by that mode only. In ***Manchester Diocesan council for education v. Commercial and general investment Ltd (1969)3 ALL E.R. 1593,*** Buckley, J, approved this view that the offeree could employ an equally or more expeditious mode than that prescribed by the offeror, if it cannot be expressly shown that the offeror had only one mode of acceptance in mind.

ii) 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.

Generally, common sense, commercial efficiency and commercial risk demand that the offeree should, as much as possible, accept the offer in the same mode it was made. If an offer was made in the presence of each other the acceptance would be expected there and then. The same reasoning follows with regard to offers made over the telephone, or by other electronic means. The reason for this is that since it is the mode prescribed by the offeror, either expressly or impliedly, he runs all the risks that may arise, for example, where the letter of acceptance is lost or stolen. Therefore if the offeree communicates his acceptance promptly, e.g. by a courier, telephone or telex the communication is effective, but not, it seems,

if he sends an ordinary letter.

iii) 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".

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the conditions for a valid acceptance.
2. Discuss the modes of communication.
3. Under what circumstances may an acceptance be revoked.

3.4 CONSIDERATION

Definition of Consideration

The most illustrative and applied definition of consideration is that of Lush J., ***in Curie v. Misa (1875) L. R. 10 Exch 153 at 162 where he 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."

In order to be able to sustain an action, the plaintiff must prove either a benefit conferred by him on the defendant, or on someone else at the instance of the defendant, or a detriment suffered by him (the plaintiff) in the implementation or the fulfillment of the terms of the bargain.

In a simple agreement for the sale of goods the seller's consideration is the promise of transfer or the actual transfer of his title to the goods or possession of them to the buyer or someone nominated by the latter. The buyer's consideration is the money he pays or promises to pay for the goods the transfer of title to the goods or possession of them to the buyer represents a benefit to him, moving from the seller, conversely, the promise to pay money or actual payment represents a benefit to the seller, moving from the buyer.

A moral obligation does not constitute consideration. Thus, the fact

that Kofi owes Acquah a moral obligation does not constitute consideration moving from Acquah in order to entitle her to enforce a promise made by Kofi towards discharging the moral obligation. In ***Eastwood v. Kenyon (1840)11 A & E 438,*** Eastwood who was guardian to Mrs. Kenyon whilst she was an infant, had spent a considerable amount of his own money in improving her estate and in bringing her up. When she reached maturity, she promised to reimburse him for his expenses. Her husband also promised to do so independently. When they failed to carry out their promise, she sued them. The plaintiff relied on the defendant's moral obligation to her to fulfill their promises. The suit was dismissed and moral obligation was rejected as the basis of an action as such a notion would destroy the requirement for consideration.

SELF ASSESSM ENT EXERCISE 1

Define consideration.

3.2 Consideration must move from the Promisee

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 promisee (plaintiff) can take one of various forms.

3.2.1 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.***

Claim in Excess of Benefit Provided For in an Agreement

In most cases, a contract always specifies the benefit or consideration each party is to furnish. What then is the effect of a promise by one of the parties to confer an extra reward or benefit on the other party after the main contract itself has been concluded?

At best, the promise is not actionable because there is no consideration for it. In ***Egware v. Shell BP Petrol Development Company of Nigeria*** *(Unreported)* Midwestern High Court, Suit NO. VHC/36/70 delivered on April 30, 1971, the plaintiffs claimed to have agreed to allow the defendants to use their land as drilling location on condition that all minor contract jobs in the location would be given to the plaintiffs only.

The action was brought against the Defendants for committing a breach of this agreement.

It was established in evidence that the plaintiffs had already received full compensation from the defendants for the acquisition of their land. It was held that since the defendants had full legal rights to drill on the land, the plaintiffs furnished no consideration for the defendant's promise. See also ***U.T.C. v. Hauri (1940)6 W.A.C.A. 148.***

SELF ASSESSM ENT EXERCISE 2

Only a person who has furnished consideration in a contract can enforce it. Discuss.

Executory and Executed Consideration

Consideration is termed executory, when the offer and acceptance consist of promises – the offeree making a promise in return for the offeror's promise, the consideration is regarded as executory. This happens very often in commercial transactions, where the delivery and payment are to be made in the future. Both parties became bound in the contract, prior to actual performance. It is the exchange of promise that constitutes the contract. The whole transaction remains in the future.

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. The finder of the article is taken to both accept the offer and to furnish consideration for the offeror's promise by the single act of returning it to the offeror.

Where consideration is executed, liability is outstanding on one side only – on that of the offeror. The offeree is never under any obligation whatsoever.

On the other hand, where the consideration is executory, both parties are liable under the contract.

SELF ASSESSM ENT EXERICE 3

Distinguish between executory and executed consideration.

Past Consideration

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. In other words, where a party to a contract makes another promise, which is after and independent of the transaction between him and other party, the subsequent promise is said not to attach to the transaction, nor can it affect the legal position between the parties. The subsequent promise is referred to as ***"Past***

Consideration".

A past consideration is therefore a promise given after the act and is independent of it, that is, the act is wholly executed and finished before the promise is made. For instance, if Kole builds a house for Akpan at ₦5million and after the completion of the house akpan likes the house and thereafter promises Kole ₦1million, Kole cannot rely on his act as consideration because this is past consideration. ***Roscoria v. Thomas (1842)3 Q.B 234,*** the plaintiff bought a horse from the defendant. Sometime 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 subsequent to the transaction, and independent of the sale, the promise amounted to past consideration which was not capable of supporting an action in contract.

Exceptions to Past Consideration

1. Where Service Are Performed

a) At the express or implied request of the defendant but without the plaintiff and the defendant reaching any agreement for payment and the defendant subsequently agreed to pay for the services.

b) In circumstances in which it can reasonably be assumed that the parties throughout their negotiation intended that the services were ultimately to be paid for, the promise is enforceable.

2) Under section 37 of the Limitation Act, 1966 if a debtor, after the debt has been statute barred, acknowledges the creditors claim in writing, the creditor may sue on the written acknowledgment. No consideration need be sought. The effect of this is that a written acknowledgment may revive a statute barred debt, so that it will be enforceable, although the consideration is past.

SELF ASSESSMENT EXERCISE 4

The rule that consideration is past is absolute.
Do you agree?

Adequacy of Consideration

The general rule is that 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. Thus a contract will not be declared invalid simply because one party has got a much better bargain than the other.

By this token, no consideration is too small or too much or unfair. Consideration however, need not be adequate or equivalent to the promise, but it must be real or have some value. In other words, the court will not assist a party to a contract if he has made a bad bargain (unless he is an infant or fraud is alleged). As long as the consideration has some value, in the eyes of the law,

its inadequacy to the promise is irrelevant.

The courts are not normally concerned with the amount of consideration. If, in a contract, a person gives up much more than he stands to gain, the courts will not interfere since "the adequacy of consideration is for the parties to consider at the time of making the agreement, not for the court to consider when it is sought to be enforced.

In ***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.

SELF ASSESSM ENT EXERCISE 5

With the aid of decided cases, discuss adequacy of consideration.

Sufficiency of Consideration

The meaning of the requirement that consideration must be sufficient is embedded in the principle that since consideration is a 'price' it must b e 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 be insufficient 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. The most important issue is that consideration must possess some legal value. The courts are not in a position to assess the value or create a contract for the parties.

It is however noteworthy that in the circumstances stated below, consideration will be insufficient and therefore incapable of supporting a contract.

a) Where there is an existing contractual obligation and there is a promise for payment of money if the promise is fulfilled, whether the plaintiff will recover on the promise will depend on whether he can show that he has done something more than he was contractually bound to do.

b) Where a person performs no more than his public duty, he cannot rely on the performance of that duty to constitute enough consideration to sue on a promise.

c) Where the sum of money which the defendant pays to the plaintiff at the plaintiff's request is neither more or less than the sum which the defendant is already liable to pay to the plaintiff, such payment cannot serve as consideration, because nothing

more than an existing obligation is discharged by the defendant.

Rule in Pinnel's Case

The rule states, that payment of a lesser sum than the amount due does not discharge the larger sum. In other words, in the case of payment of a lesser sum than the amount due, if the plaintiff had promised to forgo the balance, the plaintiff may afterwards break the promise without incurring any contractual liability. The apparent reason is that since there is no consideration for the promise, no contractual obligation exists between him and the defendant in respect of it.

THE PINNEL'S CASE (1602)Co Rep. 1129

The facts are as follows; Pinnel sued Cole in debt for £8.105 due to be paid on November, 11, 1600. Cole pleaded that he had the sum of £5:25:6d on October 1, at Pinnel's request, in satisfaction of the whole debt, and that Pinnel had accepted this. The court, on point of pleading, gave judgment for the plaintiff, i.e for the balance due. The court however emphasized that they would have given judgment in favour of the defendant, but for the flaw in the pleadings, as the payment of a lesser sum of money at an earlier date than the date on which the debt was due, if accepted by the plaintiff, would satisfy the debt owed.

Exceptions to the Rule

1) The rule does not apply where in addition to the lesser amount paid at the creditor's request; a new element is introduced in the payment. The introduction of a new element

supplies the consideration which will otherwise be absent. The requirement is satisfied if the debtor pays the lesser amount at an earlier date than, or at a different place from that originally agreed provided it was not made at the debtor's request for his sole benefit.

2) The rule does not apply where the lesser amount is paid as part of a comprehensive settlement involving a variety of claims on both sides. In other words, the principle does not operate with regard to unliquidated sums of money in which a smaller sum of money may well be given in satisfaction of a larger amount owed.

3) Where a third party pays a lesser sum which is accepted in satisfaction of the greater amount due, the plaintiff cannot subsequently claim the balance from the debtor.

4) Where a person is unable to pay his debt which is owed to several people, and it is agreed between him and the other creditors that the creditors will accept a lesser sum than the amount owed them in full satisfaction of the debt, the agreement is binding. This is called composition of creditors.

SELF ASSESSM ENT EXERCISE 6

Discuss the rule in Pinnel's case in relation to sufficiency of consideration.

3.5 INTENTION TO CREATE LEGAL RELATION

Some authors are of the view that the intention between the parties does not form the bedrock of the formation of a contract. Perhaps the most popular view in this regard came from Professor Williston. He said:

> *"The common law does not require any positive intention to create a legal obligation as an element of contract …… a deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability."*

This quotation shall be discussed along with the position of the law on this important topic. Indeed, we shall look at domestic and social engagements as well as commercial transactions.

Domestic and Social Engagements

In order to consider the presence or otherwise of the contractual intention in agreements which are domestic and/or social in nature, there is an assumption in law that the contractual intention is absent and the parties to such an agreement cannot sue each other on it.

Agreements are made every day in domestic and social life where the parties do not intend to invoke the assistance of the courts, should the engagements not be honoured? A promise to offer a

trim to a friend's garden should not result in litigation.

It is therefore obvious that in addition to the phenomena of agreement and the presence of consideration, a third contractual element – the intention to create legal relations exists.

In ***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.

In contradistinction to ***Balfour v. Balfour*** is ***MCGregor v. Mc Gregor (1888)21 Q.B.D. 424***, in that case 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.

However, where the performance of a domestic or social engagement involves great sacrifice on the part of one or both parties, the presumption against the presence of contractual intention may be rebutted, particularly were the plaintiff has performed his own part of the agreement. In ***Parker v. Clarke (1960)1 W.L.R.***

286, on the invitation of the defendant, who was the plaintiff's uncle, the plaintiff and his wife sold their house and moved into the defendants house, it was also agreed that the Parkers would share the living expenses with the Clarkes and that Clarke would leave the house to the Parkers in his will. After quarrels between the couples, the Clarkes attempted to evict the Parkers on the ground that the agreement was not a binding one. It was held to be binding.

SELF ASSESSM ENT EXERCISE 1

The rule that domestic and social engagements are not enforceable is absolute. Discuss.

Commercial Agreements

Generally, the law presumes the presence of the contractual intention in commercial agreements. It is therefore not surprising that there is hardly a case in which the validity of a commercial agreement has been challenged for absence of the contractual intentions.

In this class of cases, the courts presume that an intention to create legal relations exists, unless and until the contrary is proved. Thus, in ***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

seriousness. The plaintiff bought the capsule, used it and caught influenza. The defendant, among others, raised the defense that they had no legal relations with the plaintiff. This defense was rejected and they were held to be contractually bound.

However, the defendant may escape liability where the agreement itself contains a clause expressly excluding the intention to enter into legal relations like agreements on betting.

SELF ASSESSM ENT EXERCISE 2

1. Not all commercial agreements are readily enforceable. Do you agree?
2. Examine the known intermediate situations in which the existence of legal relations has been rejected by the courts.

4.0 CONCLUSION

The most important message in this unit is that in the creation of the contract of sale of goods, like other forms of contract, parties must have the capacity and intention to enter into a contract; there must be consideration coupled with a price. There is no particular pattern and it is generally governed by the Sale of Goods Act of 1893 which, being a statute of general application is applicable in Nigeria.

6.0 TUTOR MARKED ASSIGNMENTS

Discuss generally the principle of contracts required for a valid creation of a contract of sale of goods.

7.0 REFERENCES/FURTHER READINGS

1. Sale of Goods Act, 1893.

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

3. Igweike, Commercial Law- Sale of Goods (2001)

4. Okany, Nigerian Commercial Law, 1992.

5. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd

6. C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.

UNIT 4

ESSENTIAL ELEMENTS OF A CONTRACT OF SALE OF GOODS

CONTENTS

1.0 INTRODUCTION

The validity or otherwise of any contractual arrangement is usually premised on the presence or otherwise of certain elements. In this unit, the elements or ingredients for ascertaining whether there exists or not a contract of sale of goods shall be thoroughly discussed. Section 1(1) of sale of Goods act define contract of sale "...as a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called price...". In this unit we distill and examine the component of this definition.

2.0 OBJECTIVES

The objective of this unit is to examine the basic elements in a contract of sale of goods. At the end, the learner should be able to discuss the elements of contract of sale of goods.

1.0 MAIN CONTENTS

1.1 Contract

Every sale of goods must be preceded by a contract where the seller agrees to sell and transfer the possession absolutely and the buyer on the other hand agrees to buy and obtain possession for a price. All the basic ingredient of a valid contract must be present. There must be consensus ad idem; there must be agreement as to the price, time and place of delivery. There must be intention to create binding legal obligation.

1.2 Agreement to Sell

The contract of sale of goods must be either for transfer or agreement to transfer property in goods from the seller to the buyer. Section 1(3) of the Act provides that "Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell." The second arm of contract of sale is the agreement to sell which takes place upon fulfilment of certain condition(s). Section 1(4) provides that an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to

be transferred. Some these conditions include payment of price, measurement, putting the goods in deliverable state. Without the fulfilment of any of the required condition there would be no transfer of property as well as sale.

1.3 THE PRICE

The basic element in a sale of goods contract is the price which must be in monetary consideration. This usually includes payment by credit card, but excludes contracts of barter. e.g. exchange of goods for good involving no payment. If the parties have not fixed a price, they may not have reached an agreement, in which case, there is no contract.

Section 8 of the Act defines what constitutes "the price" in a contract of sale of follows:

1) "The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined in the course of dealing between the parties."

2) "Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price dependent on the circumstances of each particular case."

Therefore, the price in a contract of sale may be fixed (a) by the parties, or (b) may be left to be fixed in a manner provided by the contract e.g. by a valuation or an arbitration, or (c) may be determined by the course of dealing between the parties.

If however, the price is not so fixed or determined, there is a presumption that the buyer will pay a reasonable price. In Matco Ltd v. Santer FE Development Co. Ltd (1971)2 N.C.L.R.1, it was held that the burden was on the seller to prove that the price he demanded was reasonable.

On the other hand in *May & Butcher v. the king* (1929) ALL E R. 679, the parties had agreed that the appellants should purchase tentage that should become available for disposal at a price to be agreed upon by the parties themselves. It was also understood that all disputes with reference to or arising out of the agreement would be submitted to arbitration. There was no subsequent agreement as to price. It was held by the House of Lords that, the agreement between the parties did not constitute an effective contract.

It is noteworthy that under section 9 of the Act

a) If the price is to be fixed by the valuation of a third party and he cannot or does not make such valuation, the contract is voided. But if the goods or any part thereof have been delivered to the buyer and he has appropriated them to his use, he must pay a reasonable price thereof. If not appropriated, there is no contract since the parties could still be restored to their status quo ante.
b) If the valuer is prevented from making the valuation by the fault of the seller or buyer, the non-defaulting party may maintain an action for damages against the party in default.

SLEF ASSESSMENT EXERCISE (SAE) ONE

In the case of price that is not yet fixed, the presumption is that there is no contract or is yet to be concluded. Discuss.

3.4 GOODS

Generally, Goods are defined by section 62(1) of the Act 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".*

This definition was adopted in section 7(2) of the Law Reform (Contracts) Law, 1961, which applies only in Lagos state.

Therefore, the term *"Goods"* embraces widely varying objects such as clothes, shoes, aircraft, motor cars, machinery, ships, books, furniture and growing crops.

However, the term does not include "choses in action" like bills of exchange and cheques.

Real property is completely outside the ambit of the Act. In other words, land or any interest therein is excluded from the definition of goods. Although money is excluded, coins brought as commodities *(e.g Roman or Biafran Coins)* which ordinarily lack the usual negotiable attributes of money would be regarded on goods.

The term *"emblements"* which was borrowed from ancient real property law, comprises crops and vegetables (such as coins and

potatoes) produced by the labour of man and ordinarily bidding a present annual profit. In other words, the term covers crops which are planted and harvested annually. Such annual crops like yam, cassava, maize, etc are popularly called *"emblements"* are not part of land, but are regarded as chattels, even before they are separated from the land.

The term "industrial growing crops," has not yet been judicially defined, but presumably it is under emblements and may include crops which may be harvested outside the annual period.

The second part of section 62(1) refers to "things attached to or forming part of the land which are agreed to be severed.
In this instance, the Act applies to "things" forming part of land but not to the land itself. There is need to briefly discuss the position as regards minerals. The sale of minerals will be regarded as sale of goods, if the minerals have been separated from the land. The mere fact that the minerals have been quarried is not enough to make them "goods" and the question is what state is the quarried minerals as at the time of contract.

Thus, in MORGAN V RUSSEL AND SONS (1909) 1 K. B 357, the seller agreed to sell all the slag and cinders lying on a particular piece of land. After the buyer had taken some of the slag, the third parties claimed that the slag belonged to them and effectively prevented the buyer from collecting further supplies. The buyer sued the seller for damages for non-delivery under the Sale of Goods Act. It was held that since the minerals were severed and then left as cinders and slag

which are separate heaps resting on the ground, the contract of sale in respect of the mineral was a sale of an interest in the land and not of goods and therefore the Sale of Goods Act did not apply.

SELF ASSESSMENT EXERCISE (SAE) TWO

Goods are chattels personal other than *"choses in action"* and money. Industrial growing crops and things attached to or forming part of the land or to be severed from land before sale or under the contract of sale. Discuss.

There are different categories of goods and they are provided for by virtue of Section 5 of the Act which states as follows:

1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale, in the Act called "future goods".
2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.
3) Where by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Therefore, Goods may be categorized as:

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

3.4.1 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 be specific or unascertained.

3.4.2 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”.

3.4.3 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”.

3.4.4 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.

4.0 CONCLUSION

This unit has exposed learners to the rudiments of “price” in sale of goods. The interwoven nature of various categories of goods such as

the specific goods, future goods, existing goods and ascertained or unascertained goods is also fully discussed.

5.0 SUMMARY

Through this unit, learners should be able to understand the following;

1) various elements of contract of sale of goods.
2) the disparities between different types of goods.
3) the explanation of different categories of goods.

6.0 TUTOR MARKED ASSIGNMENT

1) Under the provision of the Sale of Goods Act, goods are chattel personals and they are distinguishing from real property or chattel real and these are chattels attached to or forming part of the land. Discuss.
2) Strictly explain the different categories of goods as provided for in the Sale of Goods Act with the aid of judicial authorities.

7.0 REFERENCES/FURTHER READING

1. Laws of the Federation, 1990 Hire Purchase Act, Cap 169.
2. Sale of Goods Act, 1893.
3. Rawlings, Commercial Law, University of London Press, (2007)
4.. Okany, Nigerian Commercial Law, Africana – Fep Publishers Limited, (1992).
5. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
6. C.j. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd

MODULE 2 TERMS OF CONTRACT AND EXCLUSION CLAUSE

UNIT 1 Terms of Contract

UNIT 2 Terms Implied by Statutes

UNIT 3 Exclusion Clauses, Fundamental Terms and Fundamental Breach Exclusion Clause

UNIT 1 TERMS OF A CONTRACT

CONTENTS

1.0 INTRODUCTION

In the process of entering into a contract, there are terms and conditions usually inserted into the body of the contract documents

by the parties to the contract. In most cases, these terms and conditions form the basis of the contract. Some of these terms are usually express while others are implied from a variety of situations and circumstances depending on the nature of contract.

2.0 OBJECTIVE

In this unit we shall discuss all the terms and conditions which usually bind or regulate the conduct of the parties under the contractual arrangement. By the end of this unit, learners are expected to be able to decipher between express and implied terms. Also, learners are expected to know the major difference between a term of the contract and a mere representation.

3.0 MAIN CONTENT

It is usually expected that after the parties have satisfied all the essential requirements of a valid contract, it will still be necessary to determine the extent of the obligations which the contract creates. To do this, three things must be done.

Firstly, it is necessary to determine what the terms are and which the party has expressly included in the contract. It is important to note that the rights and obligations of the parties under a contract are determined by reference to the content of the contract. In other words, the terms of the contract control the operation of the contract.

Secondly, the relative importance of those terms must be evaluated.

Thirdly, it may be necessary to ascertain some additional terms which a statute, the courts and custom may imply into the contract.

3.1 A Term of the Contract and Mere Representation Distinguished

The importance of the distinction between a term of the contract and a mere representation lies in the type of remedy available to an aggrieved party when a breach of a contract is alleged. If the breach is of a term of the contract, then the aggrieved party can sue for a breach of that term and obtain a remedy in damages or in both damages and repudiation, depending on the importance of the term breached.

If however, the term breached is not a term of the contract, but a mere representation, not only is the remedy available to the plaintiff less valuable, there may in fact, be no real remedies at all. He can only claim damages for misrepresentation if the term breached is a representation.

However, for the purpose of distinguishing and identifying a term of the contract and a mere representation three independent tests have been designed as follows:

1) At what stage of the transaction was the crucial statement made?

Statements made at the preliminary stages of the negotiations are

usually not regarded as terms of the contract, but mere representations. It is assumed that the longer the time from when the statement was made to the time when the contract was concluded, the more likely would it be regarded as a mere representation and vice versa.

2) Reduction of the terms to writing. The issue here is that where there was an oral agreement, which was subsequently reduced into writing, any term contained in the oral agreement, not contained in the later document, will be treated as a mere representation.

3) One party's superior knowledge. If the person who made the statement had special knowledge or skill as compared to the other party, then the statement is taken to be a term of the contract. If, however the statement is made by the person who is less knowledgeable about the subject matter of the contract. It is regarded as a mere representation.

SELF ASSESSM ENT EXERCISE 1

Distinguish between a term of contract and a mere representation

3.2 Express Terms

If the contract is wholly or partly oral, the task of discovering the terms which the parties expressly stipulate is a matter of evidence. But where the contract is wholly in written, the discovery of the

express terms normally presents no problem, because the written terms are the terms of the contract. In such a case, the court always insists that the parties must be confined within the four corners' of the written words in which they have chosen to express their agreement.

In determining the content of the contract, there is a cardinal rule of construction that no one is allowed 'to add to, vary or contradict a written document by a parol evidence'. The word 'parol' in this context meaning any extrinsic evidence. This rule is subject to the following exceptions:

1) Parol evidence may be adduced to prove a custom or trade usage whose implications the parties have, or may reasonably be deemed to have, tacitly assumed.

2) Parol evidence is adduced to show that the operation of the written contract was subject to an agreed antecedent condition - a condition precedent which had not occurred.

3) Parol evidence is adduced to prove that the written agreement was not the whole contract.

3) Parol evidence may be given to prove some invalidating cause outside the written contract itself, e.g. fraud, illegality, misrepresentation, mistake, incapacity or absence of consideration.

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 having ended.

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.

A condition precedent is one which must occur or be fulfilled before an obligation or right created by the contract can be enforced. In ***PYM V Campbell (1910) K.B. 1012*** where under a written contract, the defendant's promise to buy a share in the plaintiff's invention was, by an unwritten understanding made subject to the approval of a third party. It was held that, until the approval was given, he defendant was under no obligation to buy. In other words, the contract was unenforceable in the absence of the desired approval which was the condition precedent. A condition subsequent on the other hand is a statement of the circumstances in which the obligations under a contract may be prematurely terminated after the transaction has been embarked upon. In ***Head v. Tattersall (1971)L.R. 7 Exh. 7,*** the plaintiff bought a horse o f a particular description from the defendant, with the understanding

that the plaintiff could return it, up to the following Wednesday, if it did not answer the description. The description failed and the plaintiff returned the horse within time. It was held that although a contract had come into existence, the option to return operated as a condition subsequent and the plaintiff was therefore entitled to cancel the contract and return the horse.

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 importance*) a breach of which gives no right to repudiate the contract, but only a right to an action for damages for the loss sustained. It is described in the Sale of Goods Act, 1893 section 62 as:

> *"An agreement with reference to goods which …… (is) collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods, and treat the contract as repudiated."*

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 him from performing his duties under the contract.

Representation

When a statement is made by the seller of goods to the buyer, relating to the goods, the statement may be mere representation which helps to induce the buyer to enter into the contract or a term of the contract i.e a statement which constitutes part of the contract itself.

It is not easy to distinguish whether a statement is a mere representation or a part of the contract.

If a statement is held to be only a representation, then if the statement is false, no damages are obtainable by the buyer at common law unless he shows that the seller was fraudulent i.e that the seller knew his statement was false or made it recklessly not minding whether it was false or not.

SELF ASSESSMENT EXERCISE 2

1) Define express terms
2) Distinguish between conditions and warranties.

3.3 Implied Terms

Generally, apart from express terms i.e. oral or written agreements of parties, contracts entered into by parties may also be governed by implied terms.

Implied terms are terms implied in the contract, and they, like express terms may assume the character of conditions or of warranties. In certain circumstance it may be difficult to ascertain the intention of the parties without resorting to these implied terms. This is particularly so when it is remembered that, it is not in every contractual relationship that the parties will remember to express all the terms which they intended to govern their contractual arrangement. These implied terms may 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. In ***Hutton-Mills V Nkansah II and Ors (1940)6 W.A.C.A.32,*** the court was called upon to imply a term in the written agreement, that the express powers conferred on the respondents under a power of attorney to determine certain concessions and dispose of them also empowered them to collect arrears of rent. The court declined to do so, as the provisions of the power of attorney were clear, and to imply a term as urged by the respondents could not be said to be necessary for the proper functioning of the contract.

2) Terms Implied by Law or Statute

Contractual terms may also be implied by law or statute. Among outstanding examples are 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. For States in the former Western Region of Nigeria, where the English Act does not apply, provisions corresponding to section 12-15 above are contained in sections 13-16 of the Sale of Goods Law, 1959. These provisions are separately dealt with in the next unit.

3) Terms Implied by Custom and Usage

As a rule, firmly established local mercantile custom and usages may be implied in a contract, although not expressly provided in the contract by the parties. Thus, in ***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. The court held that, the lease made by the parties must be construed in the light of this custom.

Also, in ***Produce Brokers, Co. Ltd v. Olympia Oil and Cook Co. Ltd (1916)1 A.C 314,*** a written agreement for the sale of goods provided that "all disputes arising out of this contract shall be referred to arbitration; a dispute was submitted to arbitrators who in their award insisted on taking into consideration a particular custom of the trade. The House of Lords held that they were right to do so.

It should however be noted that the application of any customary implied terms is subject to the rule that such terms cannot override the terms of a written contract.

SELF ASSESSM ENTEXERCISE 3

Discuss the various heads of implied terms and their importance in contractual agreements.

4.0 CONCLUSION

The concept of terms of a contract as shown above usually forms the bedrock on which a valid contract is built. Apart from the basic requirements of an offer, acceptance, consideration and intention to create legal relations, where the parties are silent on the terms intended to govern the contract at hand, there is likely to be a breach of the contract by either of the parties thereto. Therefore, terms of a contract, particularly in relation to commercial transaction are very important.

5.0 SUMMARY

The pivotal role played by the knowledge of the distinction between a term of a contract and a mere representation; the importance of express terms in the nature of conditions and warranties and the necessity of implied terms in the absence of specific terms on a variety of subjects makes this unit a vital one in the knowledge of

the basic ingredients of contract relating to commercial transactions.

6.0 TUTOR-MARKED ASSIGNMENT

1) Examine the three tests adopted over the years in distinguishing a term of a contract from a mere representation.
2) Define an express term of a contract
3) Distinguish between conditions and warranties.
4) Discuss the various heads under which an implied term could be invoked.

7.0 REFERENCES/FURTHER READINGS

1. Kingsley Igweike *"Nigeria Commercial Law: Agency."* (1993) FAB Educational Books, Jos, Nigeria.
3. Sagay; (1999). *"Nigeria Law of Contract."* Ibadan.

4. M.C. Okany, Nigerian Commercial Law, 1992.
5. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
6. C.j. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.

UNIT 2 TERMS IMPLIED BY STATUTES

CONTENTS

1.0 INTRODUCTION

Certain terms are implied by the Sale of Good Act into the contract of sale of goods whether or not the parties make reference to such terms in the contract. Such terms relates to relevance of time of payment, right to sell, quiet possession, freedom from encumbrance, fitness for purpose, quality of good and compliance with sample. These terms are provided in section 10 t0 i5 of the Sale of Goods

Act.

2.0 OBJECTIVE

At the end of this unit the learner is expected to be able to discuss such terms implied by statutes.

3.0 MAIN CONTENT

3.1 Terms implied by Statute

The statutory provision on implied terms are provided in sections 10 to 15 0f the Sale of Goods Act.

3.2 TIME

Generally, time of payment is not of essence in a contract of sale of goods. If parties wish to make time an important part of the contract they must state it. Section 10 of the Sale of Goods Act provides that unless a different intention appears from the term of contract, stipulation as to time of payment are not deemed to be of essence in a contract of sale of goods. Though time of payment is not of the essence of the contract, time is of essence in other aspect of performance such as delivery, shipment, or opening of letter of credit. In **Amadi v. Thomas Aplin and Co**, the court held that failure of the ship to arrive as agreed was a breach of condition as to time.

3.3 TITLE

Section 12 of the Sale of Goods Act deals generally with implied condition as to title. The first part deals with condition as to title, the

second and the third deal with warranty relating to quiet possession and freedom from encumbrances.

RIGHT TO SELL

Section 12(1) provides that there is an implied condition on the parr of the seller that in the case of sale that he has the right to sell and in the case of agreement to sell, that he will have the right to sell at the time property is to pass. A person to whom property has not passed would not have a right to sell. **Rowland v. Dival(1923) 2KB 500, *Akosile v. Ogidan*, and *Neblet v. Confectioners Materials Co* (1921)3 K.B 545.**

QUIET POSSESSION

Section 12(2) provides an implied warranty that the buyer shall have and enjoy quiet possession of the goods. See ***Niblett v. Confectioners Material Co (supra).***

FREEDOM FROM ENCUMBRANCE

Section 12(3) provides an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made. See **Lloyds v. Scottish Ltd Modern Cars & Caravans (1966)1QB, 764.**

3.4 DESCRIPTION

Section 13 provides that where goods are sold by description, there an implied condition that the goods shall correspond with the description, and if the sale is by sample, as well as by description, it

is not sufficient that the bulk of the goods correspond with the sample if the goods do not correspond with the description. Description are words used to indicate or refer to the quality quantity or attribute of the goods. See **Re Moore and Co Ltd v. Landauer and Co.(2 KSB 519), Varley v. Whipps (19000 1 Q.B 513**. The buyer's remedy for breach of this condition is either to claim damages or to reject the goods. The right of rejection is exercisable even when the goods are merchantable.

This is mostly applicable where the buyer has not seen the goods offered to him and relied only on the description of the goods as was in the case of **Varley v. Whipps**. On the other hand, it applies where the buyer has seen the goods but relies on the seller's assessment of the goods. See **Grant v. Australia Knitting Mills Ltd (1936) AC 85 and Reardon smith Line Ltd v. Ynguar Hansen-Tangen (1976)1 WLR 989**.

This section 13 also applies to the mode of packing of the goods as was in **Re Moore and Co Ltd v. Landauer and Co**.

3.5 FITNESS FOR PARTICULAR PURPOSE

Section 14 provides that there are no implied warranty or condition as to the quality or fitness for a particular purpose of goods supplied under a contract of sale, except as follows, where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which is in the course of the seller's business to supply. The requirements for the application of this condition are

i. The buyer must make known (expressly or by implication)to the seller, the particular purpose for which he wants the goods. See **Khalil and Dibbo v. Mastrionikolis (1948) 12 WACA 462**. Where the goods is used for only one purpose, it will be deemed to have been impliedly made known to the seller. See **Priest v. Last(1949) 12 WACA 462** where a hot water bottle which burst while in use was held to be unfit for the particular purpose for which it was bought. See **Osemobor v. Niger Biscuit Co Ltd (1973)2 NCLR, 382**

ii. The buyer must have relied on the seller's skill and judgement See **Grant v. Australia Knitting Mills** (supra) contrast with **Ijomo v. Mid Motors Nigeria Ltd** (Igweike Page 50)

3.6 MERCHANTABLE QUALITY

Section 14(2) provides that where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality, provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. The conditions to be fulfilled for this section to be applicable are:

a. The purchase must have been by description and this include a sale under trade name

b. The goods must be such that the seller deals in

c. Where the buyer examines the goods, his rights under section 14(2) are destroyed as regards defect which such examination ought to have revealed. Where there is opportunity for the

buyer to examine , he will be deemed to have examined.

Goods are unmerchantable where they are not fit for purpose for which the goods would normally be used. See **Plastic Manufacturing Co Ltd v. Toki of Nigeria Ltd(**1976) 12 CCHCJ/2701

3.7 SALE BY SAMPLE

Section 15(2) provides that where there is a sale by sample, there is an implied condition that: the bulk shall correspond with the sample in quality. The buyer shall have a reasonable opportunity of comparing the bulk with the sample. The goods shall be free from any defect rendering them unmerchantable which will not be apparent on reasonable examination of the sample

4.0 CONCLUSION

Certain terms are implied by the statute notwithstanding whether or not the parties make reference to it in their contract. The implication is that such term will apply to all contracts of sale of goods whether or not parties remember to mention it in their contract. This makes it almost impossible for sellers to knowingly defraud an innocent purchaser.

5.0 SUMMARY

At the end of this unit, you were able to know such terms implied by the Sale of Goods Act as contained in section 10 to 15. The place of time in contract of sale of goods, implied conditions and warranties and effect of examination by buyer in a sale by description and

sample.

6.0 TUTOR-MARKED ASSIGNMENT

Comparative analysis of terms implied by statute in contract of sale of goods.

7.0 REFERENCES/FURTHER READINGS

I. Sale of Goods Act, 1893.

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

3. Igweike, Nigerian Commercial Law, Sale of Goods, Malthouse Law Books, (second edition) 2001

4. M.C. Okany, Nigerian Commercial Law, 1992.

5. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd

6. C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.

UNIT 3 EXCLUSION CLAUSES, FUNDAMENTAL TERMS AND FUNDAMENTAL BREACH

CONTENTS

1.0 INTRODUCTION

Apart from the terms usually inserted into a contract by the parties thereto, parties are also, free to limit or exclude the obligations otherwise attached to such undertaking. It is the importance and the significance of inserting exclusion or exemption clauses and limiting terms that is our concern in this unit.

2.0 OBJECTIVE

The objective of this unit is to bring out the importance and

conditions of insertion of exemption clauses and limitation terms in the body of a contract in commercial transaction and the effect of fundamental breach on exclusion clause.

3.0 MAIN CONTENT

3.1 Exemption Clauses

An exemption clause or exclusion clause is a term in a contract which seeks to exempt one of the parties from liabilities in certain events. Where the term merely limits (rather than wholly excludes) liability, it is called a limiting clause. However, the governing principles are the same in both cases.

The courts have, over the years, made appreciable success in controlling unreasonable exemption clauses, and have fully developed principles which govern their validity. These principles are summarized as follows:

1) The document containing the exemption clause must be an integral part of the contract between the parties.

In this regard, the courts have always insisted that the contract in which the exemption clause is written must be a contractual document, for it is only when the contract is a contractual document that the exemption clauses therein contained can be a term of the contract and as such, bind the party against whom it is inserted. The contract may become a contractual document and so form part of the document in two ways:

a) The document must be signed by both parties to the contract.

b) Notice of the exemption clause is given to the affected party within reasonable time, before or at the time of contracting and the affected party already knows of the clause.

The general rule is that the burden is on the party wishing to rely on the exemption clause to establish that the other party was aware of the exemption clause or ought to have been aware of it having regard to all the circumstances.

It is therefore, obvious that an exemption clause cannot be unilaterally introduced into a contract after its completion. Thus, an attempt to introduce an exemption clause in a receipt, which is generally not regarded as a contractual document, would not make it a term of the contract, and would, therefore, not bind the person who received it.

2) Any ambiguity, or other doubt, in an exemption clause must be resolved *contra proferentem*. The *contra proferentem* rule states that it is a basic principle of the common law that an exemption clause must be constricted strictly against the party relying on it. Therefore, in considering the validity of an exemption clause, the courts resolve any ambiguity or other doubts in the clause against the person who is seeking to rely on it; that is, against the person who is proffering it.

3) If the plaintiff signed the document containing an exemption clause by reason of fraud or misrepresentation perpetrated by the

defendant or his agent, the plaintiff is not bound.

Generally, if a person signs a contractual document, he is bound by its terms, including any exemption clause it may concern, whether he read the document or not. But this rule does not apply where the plaintiff is induced to sign the document by fraud or misrepresentation on the part of the defendant or his agent.

4) Third parties are not protected by the exemption clause.

5) No exemption clause, however wide, can operate if it is contrary to statute.

6) No exemption clause can operate if it is inconsistent with a Term of the Contract.

7) If the party seeking to take advantage of either the exemption or the limitation clause acts outside the four walls of the contract.

8) If the exemption clause is repugnant to the main object and purpose of the contract.

9) A party who is guilty of a fundamental breach of contract, if the contract can be so construed, be disqualified from Relying on an Exemption Clause.

SELF ASSESSM ENT EXERCISE 1

1) What are exemption clauses?
2) Examine the rules that govern the validity of exemption clause.

3.2 The Concept of Fundamental Terms

The courts have in recent years developed the concept of "fundamental term" which insists that the operation of an exemption or limiting clause will be subject to the doctrine of fundamental terms.

Under this doctrine, no person is allowed to take shelter under the provisions of an exemption clause, notwithstanding how wide the clause is expressed, if the breach of the contract is substantial and affects the very purpose of the contract. In every contract, there are some central obligations, the non-fulfillment of which renders the contract meaningless.

An exemption clause will not avoid a party who is in breach of such obligation and like a condition, a breach of a fundamental term may entitle the innocent party to an action for damages and repudiation of the contract.

Fundamental terms imply that there is a fundamental obligation of a contract of sale to deliver the goods contracted for In ***Karoles***

(Harrow) Ltd V Wllis (1956)2 ALL E.R. 866. The defendant agreed to buy a Buick Car from the plaintiff under a hire-purchase agreement which provided, inter alia, *"no condition or warranty that the vehicle is road worthy or as to its usage, condition or fitness for any purpose is given by the owner or implied herein".* The car was left in the defendant's premises one night and on inspection the defendant found that it was badly damaged. The cylinder head was off, all the valves were burnt out, two pistons were broken and it was incapable of propulsion. The defendant refused to accept delivery of it. The court of Appeal held that

the exemption clause could not avail the plaintiffs, for they supplied something entirely different from that contracted for by the defendant. In other words there was a breach of fundamental term of the contract and not a fundamental breach of the contract.

SELF ASSESSM ENT EXERCISE 2

Examine the concept of fundamental terms.

3.3 Fundamental Breach

Generally, a fundamental breach should not be confused with fundamental terms because of their similarity. They are two different concepts. Where there is a breach of a fundamental term, the innocent party may sue for damages as well as repudiate the contract, and any exemption clause in the contract cannot avail the party in breach against the innocent party.

A fundamental breach has been described by UpJohn, L.J. in Charter House Credit Co. Ltd. V Toll (Supra) as:

"No more than a covenant shorthand expression of saying that a particular breach or breach of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract".

A fundamental breach does not mean that he fundamental obligation has been broken, but that the breach or breaches which have occurred together strike at the root of the contract. Thus, ***Charter House Credit Co. Ltd. V Tolly (Supra***) although the vehicle delivered was defective, it was still a car within the terms of the agreement. Therefore, there had not been a breach of a fundamental term. However, the principal defect was so serious that it constituted a fundamental breach of the contract.

The new governing principle, of exemption clauses in relation to fundamental term, as laid down by the House of Lords in the cases of ***Suisse Atlantique Case (1967)1 A.C 361*** and ***Photo Productions Ltd v. Securicor Transport Ltd (1980)1 ALL E.R. 596*** are as follows;

a) A distinction must be drawn between breach of a *"fundamental terms"* and *"a fundamental breach"*. A fundamental term is the same as a condition, and therefore, breach of a fundamental term

is the same as breach of a condition. A fundamental breach amount to the same thing as total non performance of the contract.

b) There is no rule that an exemption clause can never apply where there has been a breach of a fundamental term or a fundamental breach. This is because the parties are free to agree to whatever exclusion or modifications of their obligations they choose.

c) It is a question of construction whether an exemption clause applies or not in the event that have happened.

d) If, after a breach of a fundamental term or a fundamental breach, the innocent party elects to affirm the contract and continue with it, he is bound by all its clauses, including an exemption clauses unless the contract can be otherwise construed. If, on the other hand, the innocent party elects to repudiate the contract, the whole contract, including the exemption clause, comes to an end.

SELF ASSESSM ENT EXERCISE 3

Discuss the concept of fundamental breach

4.0 CONCLUSION

Exemption clauses, the concept of fundamental term and fundamental breach are principally interwoven to the extent that there is no way a discussion on one will not necessarily affect the other. This, therefore, is what the learner should look out for.

5.0 SUMMARY

Exclusion clause, limitation terms fundamental terms and fundamental breach are all technical terms used in the creation of a contract in commercial transactions. A proper understanding of this term will be of immense advantage to the learners.

6.0 TUTOR-MARKED ASSIGNMENT

1) What are exemption clauses?
2) Examine the rules that govern the validity of exemption clauses in a contract.
3) Define fundamental terms
4) Fundamental breach is actionable in law subject to rules. Discuss these rules.

7.0 REFERENCES/FURTHER READINGS

Kingsley Igweike (1993). *"Nigeria Commercial Law: Agency."* Jos, Nigeria: FAB Educational Books.

Sagay; (1991). *"Nigeria Law of Contract."* Ibadan.

J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd

C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd

MODULE 3

PASSING OF PROPERTY

Unit 1 – The Concept of Property.

Unit 2 – Passing of property in Specific Goods.

Unit 3 – Factors Negating Application of Rule 1 of Section 18

Unit 4 - Passing of Property in Unascertained or Future Goods

UNIT 1

CONTENTS

1.0 INTRODUCTION

Contract of sale of goods, as we have seen, reflects the transfer or agreement to transfer the property in goods from the seller to the buyer. The meaning and characteristic of "property" will be explained in this unit.

2.0 OBJECTIVES

The basic objective of this unit is to explain the possessory title and status of a seller.

3.0 MAIN CONTENTS

3.1 CONCEPT OF PROPERTY

In a contract of sale, the seller agrees to transfer his interest in the goods. The seller in most cases who was in possession would transfer a possessory title, and the fact of the possession would be strong evidence of ownership.

In times past there was misconception as to the terms “possession” and ownership”. They were used interchangeably.

The concept of transfer means to transfer “dominion” i.e. the highest possible rights enjoyed by the owner of goods to the buyer. Here “ownership” is used interchangeably with “dominion” and once there is transfer of ownership, that means that the seller has transferred property, in the goods to the buyer.

It should be noted, that under Section 62(1) of the Sale of Goods Act, “Property” means general property in the goods and not merely a special property. That is to say that there is a transfer of “ownership” or “dominion” and not just some possessory title. Once property can been transferred from the seller to the buyer, there is a valid contract.

3.2 TRANSFER OF PROPERTY TO THE BUYER

Part II of the Act, which covers Section 16-20 is titled 'Transfer of Property between Seller and Buyer', whilst the remaining provisions under Part II, are collectively titled "Transfer of Title".

Under Section 62(1), the term "Property" is defined as the "General Property" in goods as opposed to mere "Special property". Ordinarily and legally, the term "general property" conveys the meaning of "dominion", "title" or "ownership".

The reason for the differentiation in the wordings of the two headings of Part II is not clear. According to Craig, Sale of Goods, (1974) Pg. 17, that there was a deliberate effort to differentiate between circumstances where there is a transfer of property between the seller and the buyer from a transfer between a third party who may style himself a "seller" and a buyer. The type of transfer that takes place between the questionable "Seller" and the buyer is called "Transfer of Title" therefore, under the second heading "Transfer of title" deals with circumstances in which a buyer takes a good title even though the seller was not the owner and was not entitled to sell the goods in question. That is to say, the "Seller" may take a transfer of title as against the true seller who can transfer property in the goods.

SELF ASSESSMENT EXERCISE (SAE)

Distinguish between "General Property" and "Special Property".

3.3. PROPERTY AND POSSESSIONS

"Property" in goods means the ownership of or the title to the goods. Possession, on the other hand, is as a general rule, the physical control or custody of goods. Transfer of property in goods is not dependent on the transfer of possession of the goods. It is possible to vest the possession of certain goods in one person, and ownership of such goods be vested in another person.

For example, the possession of a car which has been sent for repairs is in the auto mechanic whilst ownership will remains with the person who sent it for repairs.

SELF ASSESSMENT EXERCISE (SAE)

Distinguish between "Possessory Rights to Goods" and Proprietary Rights to Goods"

4.0 CONCLUSION

From the foregoing, it can be said that once it is recognized that there is a sale or sale of goods, there is transfer of ownership. A contract of sale is one whereby the seller "transfers or agrees to transfer the property in the goods to the buyer". This involves transfer of ownership or dominion and not just possessory title but proprietary title.

5.0 SUMMARY

This unit has revealed the underlying facts of the concept of property in sale of goods and the interest of the seller after transfer of goods.

It also discusses the fact that the "Property" in goods means the ownership of or the title to the goods while "Possession", means physical control in goods. It is possible, as illustrated earlier, for the possession of certain goods to vest in one person whilst the ownership vests in another.

6.0 TUTOR MARKED ASSIGNMENT

1) The sale of a chattel is the strongest act of dominion that is incidental to ownership". Discuss.
2) It is possible for possession to certain goods to vest in one person, whilst the property or ownership vest in another. Discuss.

7.0 REFERENCES/FURTHER READING

1. Sale of Goods Act, 1893.
2. Rawlings (2007) Commercial Law, University of London Press
3. Okany, Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.

4. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd.

UNIT 2

PASSING OF PROPERTY IN UNCONDITIONAL SALE OF SPECIFIC GOODS

CONTENTS

1.0 INTRODUCTION

It is important in all contract of sale of goods to know the nature of goods that form the subject matter of sale, i.e are they specific or unascertained? The essence is to determine the time the property in the goods passes to the buyer and this will help determine where the liability lies. Section 62(1) of the Act refers to "specific goods" as "goods identified and agreed upon at the time a contract of sale is made".

Ordinarily, property of ascertained goods ought to pass when a contract of sale is made. However, such passing is subject to the

overriding provision laid down by Section 17(1) that "the property is transferred to the buyer at such time as the parties to the contract intend it to be transferred". In a contract for sale of specific or ascertained goods, the property in the goods passes from the seller to the buyer at such time (if any) as the parties, expressly, or impliedly, stipulate in the contract of sale. In order to ascertain the intention of the parties, regard shall be made to the terms of the contract, the conduct of the parties and the circumstances of the case.

In practice, the parties do not usually express their intention as to the time property passes. Therefore, where the parties fail to stipulate the time at which the property is to pass, resort must be made to certain rule laid down by the Act for ascertaining the time at which the property passes (section 17(2) and 18(1) of the Act.

2.0 OBJECTIVES

At the end of this unit, you should be able to;

(i) explain the meaning of passing of property in specific (ascertained) goods.

(ii) understand how the property in specific goods passes at the time a contract is made.

(iii) explain why the passing of property in specific goods is subject to the overriding provision laid down by Section 17(1) of the Act.

(iv) explain the role of the terms of contract, the conduct, of the parties, and circumstances of the case, in ascertaining the intention of the parties.

3.0 MAIN CONTENTS

3.1 RULE I ON PASSING OF PROPERTY IN UNCONDITIONAL SALE OF SPECIFIC GOODS.

Unless a different intention appears, there are rules for ascertaining the intention of the parties as to the time of which the property in the goods is to pass to the buyer.

The first of the rules came out in R. V. Ward Ltd (1967)1 G.B. 534. In that case, Diplock L. J. suggested as follows;

> *"In modern times very little is needed to give rise to the inference that the property in specific goods is to pass only in delivery or payment."*

The above dictum of his Lordship shows clearly that the parties can expressly exclude the operation of Section 18, if they so wish.
Section 18, provides that "unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

Rule 1 of the section 18 provides that "where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

Rule 1 of Section 18 gives rise to a number of questions with regard to the meaning of the following terms and phrase.

UNCONDITIONAL CONTRACT: This may mean a contract which does not contain a condition precedent or condition subsequent that may have the effect of suspending performance of the contract or passing of the property.

It may also mean a contract not containing any conditions in the sense of essential stipulations the breach of which gives the buyer the rights to treat the contract as repudiated. In other words, an unconditional contract is one which is not subject to a condition precedent or subsequent. Section 1(2) lays down that " a contract of sale may be "absolute" or "conditional" which clearly means subject to a condition precedent, for otherwise there would be no point in the contract. It should be observed that Rules 2, 3, and 4 of Section 18 deal with contracts subject to a condition precedent. By Rule 1, contracts, deals with contracts not subject to such conditions.

In Ollett V Jordan, the meaning of "unconditionally appropriated" within Rule 51 was examined. It was held that, the property in goods did not pass to the buyer owing to the fact that there was no condition precedent.

It is submitted that, for a sale of goods contract to be enforceable, it must be without conditions. In England, these difficulties appear to have been taken care of by the provision of Section 4 of the Misrepresentation Act, 1967, which provides that, "where the contract is for specific goods, the property passes to the buyer. In the light of this, it may not be necessary to give an unnatural construction to the words "unconditional contract" in Section 18 Rule

1, in order to avoid depriving a buyer of his right to reject goods. It is noteworthy that this is a foreign authority and may only be helpful in the interpretation of the term "unconditional contract".

SELF ASSESSMENT EXERCISE (SAE)

The phrase "unconditional contract" appears nebulous within the purview of Section 18 Rule. The general view is that it is a contract that does not contain a condition precedent or condition subsequent that have effect of suspending performance of the contract or the passing of property. Discuss.

3.2 SPECIFIC GOODS

The second major phrase (also a requirement) under Rule 1 is that the goods must be specific for the property to pass. The question that arises under Rule 1 is as to the meaning of the phrase "specific goods". Section 62 defines "specific goods" as goods identified and agreed upon at the time a contract of sale is made".

As far as passing of goods is concerned, it is settled that future goods can never be specific, although future goods, if truly identified may be specific goods, and its destruction may frustrate the contract.

In Varlet V Whipp (1990) 1 Q. B. 513, even though the goods were specific, they were held to be "future good" as the seller was not the owner of them as at the time of the contract.

The courts have been strict in interpreting the word "specific" under Rule 1. For instance, in Kursell v. Timber Operators and Contractors

Ltd (1972) 1 K. B. 298, the plaintiff sold to the defendants all the trees in Latvian forest of certain measurement, on a particular date for €225,500 and the defendant were given 15 years within which to remove the timber. Soon afterwards, the Latvian Assembly passed a law confiscating the forest. The question that arose was whether the sale was that of specific goods within rule 1 as to pass property in them or not.

SELF ASSESSMENT EXERCISE (SAE)

Discuss the passing of property in specific goods and when it is determined.

The Court of Appeal held that the property in the trees had not passed to the defendant as the trees of the specified dimensions were not sufficiently identified, because not all the trees in the forest were to pass but only those conforming to the stipulated measurements.

3.3 DELIVERABLE STATE

By the provision of Section 18 Rule 1 another requirement is that the goods must be in deliverable state. The means that the goods must be in a deliverable state in order to enable property to pass.

Section 62(4) provides the meaning of this term. It states that;

"Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them"

The above provision is not all that clear, for it does not give a comprehensive definition of the term “deliverable state”. It also does not say that, if the buyer would not be bound to take delivery of the goods, then the goods are not in a deliverable state.

The buyer is not bound to take delivery if the goods are defective goods but it does not follow that all defective goods are not in a deliverable state within the meaning of the above provision. Where this type of situation arises, property would never pass in defective goods.

Generally, “defective” does not prevent goods from passing because if the buyer rejects the goods, the property reverts to the seller.

Section 62(4) is probably intended to cover the case where the goods could not be said to be in a deliverable state physically yet the buyer had agreed to take delivery. In other words, the expression “deliverable state” cannot be said by reference to mean delivery as in Section 62(4) as a voluntary physical transfer of possession”.

The possession of goods can always be transferred in law, if the parties intend to transfer it, no matter what the physical condition of goods may be. Thus, if this is what “deliverable state” meant, goods would probably always be in a deliverable state.

There appears to be a difficulty in getting a clear definition of the term “deliverable state”. It does not appear that there is any known local authority on this matter but there are foreign authorities. In Kursell

v. Timber Operator (supra), the court of Appeal decided that not only was the timber not specific but could also not be regarded as being in a "deliverable state". The question now is what constitutes goods in a "deliverable state". Again, in Underwood Ltd v. Burgh Castle Brick and Cement Sundicate (1921) All ER 575, the plaintiffs' sellers agreed to sell a condensing machine to the defendants. The machine weighed 30tons and was bolted to and embedded in a cement floor. Under the term of contract, the plaintiffs were to dismantle the machine, a task which cost them €100 and took about 2 weeks. While the engine was being bided on a railway truck, it was damaged. The plaintiffs would only be entitled to sue for the price if the property had already passed before the time of damage.

It was held inter alia that the machine was not in a deliverable state. For this reason property had not passed when the contract was made. Atkin, L. J., stated that in view of the risk and expenses involved in dismantling and moving the engine, the proper inference to be drawn was that property was not to pass until the engine was safely placed on the rail in London.

4.0 CONCLUSION

The effect of Rule 1 may be illustrated as follows; if Fola enters Tola's shop and buys a washing machine for N5,000 on terms that Tola will deliver it at Fola's house the following day and receive payment and that night Tola's shop is burgled and the machine is stolen. Tola can sue Fola for the price of the machine because property in the machine passed to Fola when the contract was made and the risk also passed to him under Section 20 of Sale of Goods Act.

5.0 SUMMARY

In this unit, the learner, has been able to understand the following;

1) passing of property in specific (ascertained) Goods.
2) meaning of Rule 1 of Section 18.
3) the issues regarding the meaning of;

a. unconditional Contract.
b. specific Goods.
c. deliverable State.

6.0 TUTOR MARKED ASSESSMENT (TMA)

1. Umar sold a car to Yinus which they were required to use for his graduation. The car was delivered to the Yinus' premises but was stolen before it could be tested. At what point does the property in the car pass.
2. Mr. Chukwu agrees to sell all of the planks in his sawmill the planks are to be taken away a month after the agreement and payment is to be made at that time.
   At what point does the property in the planks pass.

7.0 REFERENCES/FURTHER READING

1. Sale of Goods Act, 1893.
2. Rawlings, Commercial Law, University of London Press, 2007.
3. Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.
4. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
5. C.j. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.

UNIT 3

RULES ON PASSING OF PROPERTY IN CONDITIONAL SALE OF SPECIFIC GOODS

CONTENTS

1.0 INTRODUCTION

The application of the rules in Section 18 depends upon the existence of the intention of the parties. This is usually discernible from evidence.

According to Rule 1, the fact that the time of delivery or the time for the payment of the price is postponed does not prevent the property from passing when the contract is made.

In an ordinary sale in a shop, property does not pass until the parties have agreed as to the mode of payment. And in big departmental shops, where the buyer usually goes round the shop to collect items he wishes to buy, property does not pass until the price is paid. It

should be noted that Rule 1 does not take the time of payment as crucial since it may be postponed.

Another factor that may point to a contrary intention is the existence of a specific agreement on the transfer of risk. Generally, risk in goods passes with the property, so that where the risk has passed, it will be that the property also passed. Conversely, where the risk remains with the seller, the property has not passed.

2.0 OBJECTIVES

The objective of this unit is to explain how Rules 2, 3, and 4 deal with conditional sale of specific goods in contradistinction to Rule 1 which deals with unconditional contracts of sale of goods.

3.0 MAIN CONTENTS

3.1 RULE 2

Rule 2 provides as follows;

> *"Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such things be done, and the buyer has notice thereof."*

For the principle under Rule 2 to apply, reference must be drawn from the terms of the contract and the circumstances of the case.

It is only when it is for the seller to put the goods in a deliverable state that the Act draws that inference. For example, if Inyang sells a

house to Bitrus and agrees to replace the roof with a new one, property will not pass until Bitrus has notice that this has been done.

It is presumable that the rule is also applicable where the buyer has to do something to the goods, although Rule 2, refers to the seller only.

The fact that goods have to be repaired or altered before delivery is more likely to lead a court to conclude that the property is not to pass until delivery. This rule is basically applied to "goods not in deliverable state".

3.2 RULE 3

Rule 3 provides as follows;

> *"Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof."*

The Rule is explicit in that it makes it clear that where the passing of the property is conditional upon the performance of some act with reference to the goods property does not pass until the buyer has notice of the fulfillment of that condition. Examples of this include weighing, testing etc.

Thus, for instance, an agreement to sell an a fairly used Peugeot car at a price after the seller has tested the car does not pass the ownership of the car to the buyer until the seller has tested the car and the buyer has been informed.

Under Rule 3, goods do not acquire the character of being in a deliverable state until the seller has done all that he was supposed to do, including measuring or testing them.
If the seller of specific goods in a deliverable state is required to carry out some procedure to ascertain the price, such as weighing, testing or measuring, property will not pass until that has been done and the buyer notified.

It therefore follows that if the contract demands that someone other than the seller is to undertake this task, Rule 3 will not apply if it is the buyer or the third party and not the seller who has to do something to the goods as in the case of Turley v. Bates (1863)2 H and C. 200.

3.3 RULE 4

When goods are delivered to the buyer on approval or "on sale or return " or other similar terms the property therein passes to the buyer : —

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration

of such time, and, if no time has been fixed, on the expiration of a reasonable time, What is a reasonable time is a question of fact.

The above rule deals with different types of transactions altogether, although similar to a conditional sale and may become a sale in course of time.

The two arms of Rule 4 shall be discussed.

1. Signifying his approval or adopting the transaction; under this Rule property will pass to a buyer who takes property on sale or return, if he signifies his acceptance to the seller or does any act which shows that he adopts the transaction, or keeps the goods for longer time than the period agreed for their return, or for an unreasonable length of time.

Where the prospective buyer informs the seller that he wishes to buy, this is enough to allow the property to pass.

Similarly, where the buyer does an act in relation to the goods which is consistent only with having become owner of them, for example, pledges or resells the goods, this is an act adopting the transaction within the meaning of Rule 4.

The case of Kirkham v. Attendborogh (1897)1 Q. B. 201 is an example of "an act adopting the transaction". There, the plaintiff, allowed W to have jewellery on sale or return and W pawned the jewellery with A, the defendant. The plaintiff brought an action to recover the jewellery

from the defendant. It was held that, the action must fail as W's act of pawning the jewellery was "an act of adopting, and therefore, the property in the jewellery passed to him, so that K could not recover it from A.

In this context, it should be noted that it is immaterial that the buyer obtained the goods by fraud.

2. Elements or Ingredients of Rule 4(B)

(a). Retention of goods where time is specified:- If a time has been fixed for the return of the goods, the buyer is deemed to have exercised his option to buy if he returns them after this time. Hence, the transaction may be completed without expression of acceptance.

(b). Retention of goods where no time is specified:- Retention of goods "beyond a reasonable time" may arise where no time is specified in the arrangement between the parties. If the buyer retains the property without giving a time of their rejection, property will pass to him.

(c). Rejection of the goods:- Property will pass under Rule 4(B), if the buyer does not give notice of rejection within either the stipulated time or within a reasonable time, if time is stipulated. Though there is no duty on the buyer to return the goods in order to prevent the goods from passing.

The buyer may therefore be liable for detinue if he holds unto the goods after notice of rejection.

(d). Evidence of contrary intention:- the operation of Rule 4 of Section 18 is subject to there being no evidence of a contrary intention. It is clear that the court have allowed the seller some form of freedom. In Weiner v. Gill (1906)2 KB 574, the plaintiff delivered jewellery to Y, on the terms of a memorandum which stated that "on appropriation, on sale for cash only or return … goods will be on probation or on sale or return remain the property of Weiner …. until such goods are settled or charged" Y thought X had a potential buyer and he handed the goods to X who pledged them with the defendant. It was held that, the plaintiff brought this action to recover them from him. That is to say, X (or even Y's) act of pledging the goods which would have amounted to an act adopting the transaction was expressly excluded by the memorandum.

4.0 CONCLUSION

From the foregoing, conditional sale of specific goods and factors negating the application of Rule 1of Section 18 are shown as enshrined in Rule 2, 3, and 4. In Rule 2 it is clear that the fact that goods have to be repaired or altered before delivery is more likely to lead a court to conclude that property is not to pass until delivery. It can be therefore be inferred that the Rule is also applicable where the buyer has to do "something to the goods".

Inference can also be drawn that Rule 2 or Rule 3 will not apply if it is the buyer or the third party who has to do something to the property and not the seller.

Also, under Rule 4, it should be observed that property (and risk) in goods taken on sale or return remains in the seller. If they are destroyed or stolen while in buyer's possession, the seller cannot sue for the price, if the damage was not occasioned by the buyer's default.

5.0 SUMMARY

This unit has revealed the main intents of Rules 2, 3 and 4, of Section 18 that they deal with conditional sale of specific goods and that the Rules input in them certain factors negating the application of Rule 1 of Section 18 which deals basically with unconditional sale of specific goods.

Rule 2 of Section 18 deals with goods not in deliverable state, whilst Rule 3 of Section 18 deals with what the seller of specific goods in a deliverable state is required to carry out. Rule 4 of Section 18 deals with where goods are "delivered to the buyer on approval or sale or return", in this instance, property passes when the buyer signifies acceptance or does an act adopting the transaction, or retains the goods beyond the time fixed by the agreement for a decision without giving notice of rejection, or if no time s is fixed, retains the goods beyond a reasonable time (rule 4(b).

6.0 TUTOR MARKED ASSIGNMENT

1a. Tunde expresses an interest to buy a particular car owned by Joke for N1 million provided it will be suitable for his nephew to use in Lagos traffic. Joke agrees that Tunde can take the car for 10 days in order to determine its suitability. After a week the car breaks down. Is Tunde liable for the price?

b. Would your answer be different if Tunde had used the car himself on a number of occasions and had travelled a long distance with it.

2. Explain the conditional sale of specific goods in Rule 2, 3 and 4 as conversely different from “conditional contract in Rule 1 of Section 18).

7.0 REFERENCES/FURTHER READING

1. Sale of Goods Act, 1893.
2. Rawlings, Commercial Law, University of London Press, 2007.
1. Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.
2. J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
3. C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.

UNIT 4

PASSING OF PROPERTY IN UNASCERTAINED OR FUTURE GOODS

CONTENTS

1.0 INTRODUCTION

The essence of sale of goods is the transfer of ownership or title in a property from the buyer to the seller. Section 16 provides that no property in good is transferred from the seller to the buyer except the goods are ascertained.

> *Rule 5.—(i) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon*

passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

By the provision of Section 18 Rule 5, no matter what the parties may wish, property does not pass until the goods are ascertained.

Once the goods are ascertained, property passes when the parties intend, if no such intention can be determined where the following conditions apply:

1. Where there is a contract for the sale of unascertained goods or future goods by description.
2. Where goods of that description and in deliverable state are unconditionally appropriated to the contract.
3. Where there is an irrevocable identification of the goods that are the subject of the contract.
4. Where both parties assent.

2.0 OBJECTIVES

The purpose of this unit is for the learner to be able to understand the concept of passing of “unascertained” or “future goods”.

The Act does not in any way define the word "unascertained goods", but the term will be looked at in three different areas and they are:

- Goods to be in manufactured or grown by the seller: these are necessarily future goods and are define in section 5 (1) of the Act as goods to be manufactured or acquired by the seller after making the contract of sale.

  In Howell v. Coupland (1876) 1 Q.B. 258, the court held that a sale of 200 tons of potatoes to be grown on a particular piece of land was a contract of sale of future goods.
- Purely generic goods: these are goods sold by description, but which are not identified or agreed upon at the time of the contract but are included in a particular class of goods. For example where the seller promises to deliver 100 Abuja Yam tubers,. If the seller does not have enough yam tubers of the description under reference to appropriate to the contract, it must necessarily be a case of future goods.
- An unidentified portion of a specified whole: where the seller has enough quantity to appropriate to the contract, the goods may be categorised as an unidentified portion of a specified whole. For example, a party may assert "20 cartons out of 30 cartons of beer now in my store".

3.0 MAIN CONTENT

3.1 Property Cannot Pass Until Goods Are Ascertained

The fundamental rule in Section 16 of the Act is that

> "where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

The word “ascertained” was defined by Atkin, LJ in Re Wait (1927) 1 Ch 606, as “goods identified in accordance with the agreement after the time a contract of sale is made”.

An analytical illustration of Section 16 of the Act came up in the case of Healey v. Howlett and Sons (1917) 1 KB 337, where the plaintiff, a fish exporter carrying on business in Ireland, dispatched 190 boxes of mackerel by rail and ship to his customers in England and instructed the railway officials to earmark twenty boxes for the defendant and the remaining boxes to two other consignees. The train was delayed before the defendant’s boxes were earmarked and by the time this was done the fish had deteriorated.

The court held that the defendant was not liable because the property in the fish had not passed to the defendant before the boxes were earmarked and they were therefore still at the sellers risk when they deteriorated.

See also in a Re Goldcorp Exchange Ltd (1994) 3 W.L.R.199.

3.2 Passing of Property is Dependent upon the Intention of the Parties

Property in unascertained goods can only pass when the goods become ascertained. It is worthy of note that whether the property in the goods will pass at the particular point in time depends on the intention of the parties as provided for in Section 17 of the Act.

Section 17 (2) states that:

> “for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case”.

In the case of ***Mountbatten Investments (Pty) Ltd v. Mohamed*** 1989 3 (1) SA 171 at 177J178C, the court held that ordinarily, the price fixed in respect of a contract of sale is payable in money. Where the consideration is partly in money and partly in goods on which a fixed value is placed by the parties the contract may, depending upon the intention of the parties, be treated as one of sale, the price being the aggregate sum.

The provision of section 17 dealing with ascertaining the intention of parties also deals with ascertained goods. It should be noted that it also deals with ascertained goods. Section 16 of the Act states that no property will pass in ascertained goods, until fully ascertained or specified.

However, section 18 sets out five rules for ascertaining the intention of the parties, where their intention cannot be made out under section 17 (2). In practice, it is important to lay a good emphasis on the usefulness of the Rules set out as parties more often than not do not have a clear intention as to the exact time at which property will pass. A contrary intention expressed subsequently by the parties may be ineffective to defeat the passing of the property under the Rules. In Dennant v. Skinner and Collom (1948) 2 KB 164, the plaintiff sold a car to B, a swindler, at an auction, he being the highest bidder. He gave a false name and address and asked to be allowed to take the car away in return for his cheque. As a result of the misrepresentations, the plaintiff acceded to B's request, after obtaining his signature to a document which stated that the title of the vehicle will not pass until the cheque was honoured.

B sold the car which was subsequently resold to the defendant, B's cheque was dishonoured and the plaintiff sued to recover the car.
It was held that the property in the car passed on at the fall of the hammer under Rule 1 of Section 1, and that the intention of the parties as contained in the written statement was made too late after the contract had been concluded to prevent the property in the car from passing. That was to say the written statement did not divest B of property in the car, therefore, B passed a good title to the purchaser.

It noteworthy that Rule 5 appears to be an inference that would be made, unless the circumstances suggest otherwise.

3.3 How Goods Are Ascertained

The issue is whether ascertainment of goods may be said to be another way of saying that the goods have been unconditionally appropriated.

The most imperative and complex aspect of Rule 5 is the meaning of the term unconditionally appropriated. In spite of attempts by the courts no generic definition has been made of that phrase.

It is evident that a case of unconditional appropriation will not arise if the seller only meant to let the buyer have the goods on payment.

In Wait and James v. Midland Bank (1926) 31 Comm. Cas. 172, the plaintiff sold off their bulk leaving a balance of 850 quarters, property

in the goods could not pass because the goods had not been separated.

Where an unidentified part of a bulk is sold, one cannot speak of unconditional appropriation until there is definite separation of the part sold from the remainder.

It may be stated that what will constitute unconditional appropriation will vary according to the goods under consideration and the general circumstances of the case. The following illustrations may be used as guide.

1. The issue of appropriation has arisen in a number of shipbuilding cases. In such cases, as in the case of all goods to be manufactured by the seller, the general presumption is that no property in the goods will pass until the article is completed. Moreover, the above preposition will prevail even where the price of the article is paid in installments.
2. Where goods are being grown by the seller, the property in the goods, if well designated, passes as soon as they come into existence.
3. Where an unidentified part of a specified bulk is sold the only thing required to appropriate the goods to the contract is simply to separate the part sold from the remainder, with the consent of the parties.

3.4 When Does Property Pass

Section 18 Rule 5(1) states that property in the goods passes to the buyer in a contract of unascertained or future goods only after the goods are conditionally appropriated and Rule 5 (1) provides that the

assent required for the appropriation may either be express or implied assent of the other party to the contract.

In Aldridge v. Johnson (1857) 7 E and B 885, the buyer consented to the method of appropriation by providing the sacks.

On the other hand, if A sells to B 60 yams to be picked by B out of a large quantity at ₦10.00 each, property passes when B picks up any 60. Thus there is an implied assent given before appropriation.

3.5 Delivery to a Carrier

From the provisions of Section 18 Rule 5 (2), it can be deduced that by dispatching goods through post, as a carrier, the seller has unconditionally appropriated them to the contract. The sub rule does not lay down that in the circumstances, the buyers assent is deemed to have been given. The buyer of the goods must assent to the appropriation of the dispatch of the goods.

Thus in Badische Anilin and Soda Fabrik v. Basle Chemical Works (1898) A.C.200, the House of Lords held that the posting of the ordered goods vested the property in the buyer at the moment of posting,. This, in effect, transfers the risk in the goods to the buyer while the goods is in the cause of post. It becomes clear from this case that the time when the property passed (when the goods are posted) depends on whose agent the carrier is.

Where the seller is required to ship the goods to the buyer, there is an assumption that the shipment is an unconditional appropriation with the consent of the buyer. Although, under Rule 5(2), delivery of goods

to a carrier for transmission to the buyer is deemed to be an appropriation of the goods to the contract and not the passage of the risk in the goods, if it does, the goods will be at the buyer's risk during the course of post.

4.0 CONCLUSION

The provision of Rule 5 relates to unascertained goods. Property does not pass until the goods are ascertained. Once the goods are ascertained then property passes with parties' intention.

Although delivery of goods to a carrier for transmission to the buyer is deemed to be an appropriation of the goods to the contract in accordance with Rule 5(2).

5.0 SUMMARY

In this Unit, learners has been able to understand Section 16 of the Act which deals with unascertained goods that will not pass to the buyer except ascertained with clear intention of the parties.

Section 18 Rule 5 (1) has also been discussed. This section deals with unascertained goods, property in the goods passes to the buyer.

6.0 Tutor Marked Assignment (TMA)

1. Evaluate the distinction between ascertained goods and unascertained or future goods, critically evaluate.
2. Wendy & Co. agrees to sell to Banky Ltd 500 tons of grain to be delivered on 25th August, Wendy &Co notifies Banky Ltd of the tons of grains that have been earmarked for him at the

warehouse, but before they were taken the grains were stolen from the warehouse on 12th September. What are the implications of these .

7.0 REFERENCES/FURTHER READING

- Sale of Goods Act, 1993
- Rawlings, Commercial Law, University Of London Press, 2007.
- M.C.Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited 1992.
- Sofowora General Principles of Business and Coop Law, Soft Associates, 1999.
- J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
- C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.

MODULE 4

Unit 1 – Transfer of title by Non-Owner.

Unit 2 – Exception to the doctrine of Nemo Dat Quod Non Habet

Unit 3 _ Transfer of the Contract includes Exemption Clauses

Unit 3 – Fundamental terms and Exemption Clauses

UNIT 1 TRANSFER OF PROPERTY BY NON OWNER

CONTENTS

1.0 INTRODUCTION

In some situations, a person who has either no property or whose rights are defective disposes of goods in circumstances that enable the innocent buyer to acquire rights to the exclusion of the true owner. Generally a person cannot transfer a better title than he has himself. This is captured in 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.

However, there cases where seller either fraudulently or through their misrepresentations, express or implied, have allowed innocent third parties who are unaware of the defect in the title deal with such sellers or their agent in respect of the goods for value. The need to protect such innocent parties and for the preservation of commercial transactions the exception to the general rule has evolved over the years.

2.0 OBJECTIVE

In this unit learners are expected to be able to give an impressive and well reviewed concept of Transfer of Property by "Non-Owner" and identify the relevant section under the Act.

3.0 MAIN BODY

3.1 NEMO DAT QUOD NON HABEAT

As a general rule, a person who buys goods from someone other than the owner of the goods will not obtain good title to them, and it makes no difference if he acted in good faith.

If a seller of goods has no property in the goods and does not sell with the prior consent or authority of the owner, then he cannot transfer a good title in the goods. This general rule is expressed in the latin maxim nemo dat quod non habeat (no one can give what he has not got). The Act in Section 21(1) states that where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.

But the owner can bring an action under the Torts (Interference with Goods) Act 1977, against anyone who has wrongful possession of the goods.

Such a situation could occur where a thief sells a stolen car to an innocent purchaser, or a person misguidedly sells to an innocent buyer a car that is the subject of a hire purchase contract and is therefore the property of the finance company.

In effect, the main point of Section 21 is that a person who is not the owner of a property cannot transfer title.

In Hollins v. Fowler (1875) L.R.7 H.L 757, a Liverpool broker, Hollins, purchased cotton from another broker, Bayley, who had obtained it from Fowler, the owner, without title in circumstances of fraud. Hollins purchased the cotton in good faith and sold and delivered it to a manufacturer. In this instance Fowler was held liable, when sued for conversion.

Note that the Section 21 (1) in the later part of it states that unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell, then the buyer in that case will have a good title.

An agreement to sell before the seller gets a good title, does not preclude the buyer after the seller has got a good title. In Anderson v. Ryan, a car dealer agreed to sell a car to which he had no title, but before the car was delivered he had obtained title. It was held that Section 21 did not apply because for the original agreement was not a

sale but only an agreement to sell. It seems that, even if the seller had purported to sell the car before he had obtained title, his subsequent acquisition of the title would have gone to feed the contract.

3.2 GENERAL EXCEPTION

SALE UNDER AGENCY

The main exception under this head is the sale by an agent and is provider by Section 21 Rule 1. 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.

In essence, the principle of agency may permit a seller who is not the owner to transfer title to the buyer. The rule is further emphasized in Section 61 (2) that

> *"the rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent… shall continue to apply to contracts for the sale of goods".*

In Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd (1949) 1 KB 322, Denning LJ explained that in the development of law, two principles have striven for mastery. The first is for the protection of property, no one can give a better title than he himself possesses. The second is for the protection of commercial transaction:

the person who takes in good faith and for value without notice should get a good title.
Note that the first condition can be overridden by the second.

4.0 CONCLUSION

In conclusion, merely being in possession of goods or even document of titles does not in itself, amount to the person having a good title to sell. However, one of the main exceptions to this is where the person has authority to sell, either genuine or otherwise.

Section 21 (1) of the Act has done a great deal in protecting the owner of the goods from fraudsters, while section 61 (1) of the Act also protects the innocent buyer with good faith through the principle of Principal and Agent relationships.
This is done to protect commercial transaction.

5.0 SUMMARY

The general rule is that a buyer cannot acquire a better title than that of the seller. This rule can be overridden in particular situations where someone, who takes in good faith and for value without notice, will acquire good title and will, therefore, be able to resist the claims of the original owner.

6.0 TUTOR MARKED ASSIGNMENT (TMA)

1. What general principles apply where a person acquires goods from a person who is not the owner.
2. Briefly explain the principles in Bishopgate Motors v. Transport Brakes Ltd, as enunciated by Denning LJ.

7.0 REFERENCES/FURTHER READING

- Sale of Goods Act.
- Rawlings, (2007) Commercial Law University Of London Press
- Okany (1992) Nigerian Commercial Law, Africana .FEP Publishers Limited.
- Hire Purchase Act, CAP 169
- M.O.Sofowora, General Principles of Business and Coop Law, (1999) Soft Associates.

UNIT 3

SPECIAL EXEMPTION TO THE DOCTRINE OF NEMO DAT QUO NON HABEAT

CONTENTS

1.0 INTRODUCTION

The nemo dat rule mainly protects the interest of the property owners. If non-owners are allowed to sell properties that do not belong to them, the result is better imagined as we have seen in the previous unit of this module.

At the outset, it must be emphasized that the general rule is well enunciated in the Section 21 (1) of the Act where goods are sold by a person who is not their owner, and does not sell them under the

authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller in this circumstance.

The second aspect of the principle laid down by Denning LJ in Bishopgate Motor Finance Corp Ltd v. Transport Brakes Ltd (1949) 1 KB 322, is discussed in the last unit as the principle for the protection of commercial transactions, that is, the person who takes in good faith and for value without notice should get a good title. This is the principle that will be well discussed in this unit as the exemption to the nemo dat rule.

It is however pertinent to note that there is a whole lot of exemption to the rule in section 21 of the Act, but some of them will be discussed later in this unit.

2.0 OBJECTIVE

In this unit learners should be able to have a detailed understanding of the exemption to the general rule of *nemo dat quod non habet*.

It is relevant to note that the exemption to this rule is also well spelt out in the Act, and all the sections contained in it will be discussed for easy access.

The main objective of this unit is for the learner to know all the different types of the exemption to the rule and the outstanding judicial authorities in this regard.

3.0 MAIN BODY- SPECIAL EXEMPTION

3.1 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 which states that "…unless the owner of the goods is by his conduct precluded from denying the sellers authority to sell".

However, this principle is also well preserved by Section 61(2) of the Act which states that;

> " the rule of the common law, including the law merchant, save in so far as they are inconsistent with the express provision of this act, and in particular the rules relating to the law of principal and agent…shall continue to apply to contracts for the sale of goods."

Estoppel could be by representation or by negligence. This will be discussed briefly with judicial illustrations.

In Henderson & Co. v. Williams (1895) 1 QB 521, the true owner of the goods represented to the buyer that the person selling was acting as an agent with authority to sell or is the owner. The owner was held estopped from denying that authority to sell and the buyer acquired good title, because he had represented to the buyer in that regard.

On the other hand, it may be otherwise if it could be shown that the owner has breached the duty of reasonable care owed to the third

party and that this induced the third party to buy the goods so that the negligence was the proximate cause of the buyer's loss.

In Mercantile Credit Co Ltd v. Hamblin (1965) 2 QB 242, the owner of a car signed forms in blank, without reading them, in the belief that they would enable a car dealer, who appeared to be respectable, to raise money on the security of the car. In fact, the dealer fraudulently used the forms to sell the car to a finance company. The Court of Appeal held that a duty of care existed between the owner and the finance company, but that there was no breach of that duty because she knew the dealer and reasonably believed him to be respectable. It was therefore not negligent of her to sign the forms in blank, It was the fraud of the dealer that caused the loss and not the negligence of the owner

3.2 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.

In Kings Norton Metal Co Ltd v. Edridge, Merrette Co Ltd (1897)14 TLR 98, a manufacturer of metal received an order from Hallam & Co and in consequence sent goods. It turned out that Hallam & Co. did not exist. The rogue resold the goods. It was held that the intention had been to contract with the writer of the order, and although this had been induced by a fraudulent misrepresentation, that only made

the contract voidable, but since it had not been avoided before the goods were resold to a third party, title passed to the latter.

The law of contract governing void and voidable contracts apply in the instant cases. If property has not passed from the seller to the rogue and then to the innocent buyer then section 23 will not apply here.
Cunday v. Lindsay, (1878) 3App Cas 459.
Lewis V. Averay.

3.3 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. In Michael Gearson (Leasing) Ltd v. Wilkinson (2001) QB 514, Machinery was sold to a finance company and leased back to the seller, who then sold it to a second finance company and leased back. At all times, the machinery remained in possession of the seller. It was held that the seller's acknowledgement to the finance company that the machines were being held on its behalf amounted to a delivery.

3.4 SALE BY A BUYER IN POSSESION

Section 25 (2) of the Act states that:

> *"where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."*

The goods or title to the documents of title must have been obtained under a sale or an agreement to sell that is bought or agreed to buy.

In Cahn v. Pocketts Channel Steam Packet Co. Ltd(1889) 1 QB 647, a seller of copper transmitted a bill of exchange for the price together with the bill of lading to the buyer, X . X did not signify acceptance, but endorsed the bill of lading to the plaintiffs in accordance with a contract for resale of the copper already made. In other words, he did not accept the bill of exchange but transferred the bill of lading. It was held that, X was someone who had agreed to buy the goods and since the plaintiffs had taken the transfer of the bill of lading in good faith and without the knowledge of the original owner's rights, they

obtained a good title on the copper under 25 (2) of the Sales of Goods Act.

3.5 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.

Where stolen goods are sold in market overt, the buyer acquires good title under section 22 (1) provided he buys in good faith and without notice of the seller's lack of title.

3.6 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.

4.0 CONCLUSION

It pertinent to note that there are many exemptions to the nemo dat quod non habeat rule but some, not all of them have been discussed in this unit others not discussed are sale by Mercantile Agent which is not protected under the Sale of Goods Act.

It is however worthy to note that once one of the exemptions to the general rule is applied and the good is passed, a good title will pass to the innocent buyer without notice of the original owner of the goods.

5.0 SUMMARY

In summary it is important to note that someone who has no title to goods cannot pass the goods to another as enunciated in the general rule of nemo dat quod non habeat. By this, a person cannot give what he does not have. The innocent purchasers of such goods are protected by the provisions of the Sale of Goods Act.

6.0 TUTOR MARKED ASSIGNMENT

1. In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for

the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.' (Denning LJ). Discuss.

2. Briefly explain some types of exemptions to the rule of nemo dat quod non habeat.

7.0 REFERENCES/FURTHER READING

- Sales of Goods Act.
- Rawlings, Commercial Law University Of London Press (2007).
- Okany Nigerian Commercial Law, Africana .FEP Publishers Limited (1992)
- Sofowora General Principles of Business and Coop Law, Soft Associates, (1999).
- J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
- C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.

MODULE 4 DUTIES OF AND REMEDIES FOR THE SELLERS AND THE BUYERS

UNIT I

DUTIES OF THE SELLER

CONTENTS

1.0 INTRODUCTION

It might have been thought that in a sale of specific goods there would be an implied condition on the part of the seller that the goods were in existence at the time when the contract was made. It is the duty of the seller to deliver the goods, while the buyer has a duty to accept and pay for the goods. It is important to note that performance of the contract under sale of goods entails three main things:

- Delivery by the seller
- Acceptance by the buyer
- Payment by the buyer

The duty of one party is the right of the other. Section 27 of the Sale of Goods Act provides for the rights and duties of both the seller and

the buyer. It states that it is the duty of the seller to deliver the goods and that of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

2.0 OBJECTIVE

The purpose of this unit is to discuss and explain the duties of the seller in a sale of goods transaction. The learner is expected at the end of this unit to be able to explain the duties of the seller of goods in a sale of goods transaction as provided in the Sale of Goods Act.

3.0 MAIN OBJECT

3.1 Duty to Deliver Goods at the Right Time

Section 62(1) delivery is the voluntary transfer of possession from one person to another. There are different methods of delivery. It does not necessarily mean transportation. Transfer of possession may be actual or constructive or conceptualized as legal possession. Constructive delivery occurs where the buyer was already in possession of the goods e.g, a bailee before the sale. It could also be attornment or acknowledgement, this occurs where the goods are in possession of a third party, and delivery takes place when the third party acknowledges to the buyer that he holds on his behalf. It could be by delivery of title documents. In Mustapha $ Co V S.C.E.I 21 NLR 69, the Supreme Court sees delivery as that act or thing which the seller or his agent does which may put the goods in the custody of the buyer.

Section 28 of the Act provide that delivery of goods and payment of price are concurrent conditions.

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 which justifies the buyer in refusing to take the goods or where the seller fails to collect the goods on the appointed day, the seller will be entitled to repudiate the contract.

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 essence in delivery, the buyer can waive this condition, where he does, then it will be binding on him whether made with or without consideration. In Charles Richards Ltd v. Oppenheim (1950) 1 KB 616, the plaintiffs agreed to supply a Rolls Royce chassis to the defendants, to be ready at the least on 20th March, 1948. It was not ready on that date and the defendant continued, to press for delivery, thereby impliedly waiving the condition as to the delivery date. By 29th June, the defendant had lost patience and wrote to the plaintiffs informing them that he would not accept delivery after 25th July. In fact the Chassis was not ready until 18th October, and the defendant refused to accept it. The court held

that the defendant was entitled to reject to accept the chassis as he had given the plaintiffs reasonable notice that delivery must be made by a certain date.

3.2 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.

Under common law, the general principle of contract was that of *caveat emptor* meaning buyer beware. It may appear that the seller is not deemed to be given any undertaking as to title but section 12 of the Sale of Goods Act protects the title of a buyer by imposing a duty on the seller with regard to good title of the goods sold.

In Rowland v. Divall (1923)2 KB 500, A sold a car to B for 334pounds. B used the car for two months during which time he also repainted it. B then sold it for 400pounds to C who used it for a further two months. The car turned out to have been stolen before it came into A's possession and was, therefore, taken away from C by the police. The effect of the nemo dat quod no habeat rule is that the buyer can acquire no better title than the seller, so neither A nor B had title to the car. C recovered the purchased price from B and B recovered the purchased price from A without any allowance for the use. See Akoshile v. Ogidan (1950) 19 N.L.R 87.

Note that the definition of a contract for sale in section 2(1) does support the idea that the passing of property is the key issue.
Finally, where the seller does not have title to the goods, the buyer may, nevertheless, acquire good title under one of the exceptions to the nemo dat quod non habeat rule See Barber v. NWS BankPlc (1996) 1 WLR 641.

3.3 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.

In Varley v. Whipp (1900) 1QB 513, here, the plaintiff agreed to sell to the defendant a reaping machine described by him as only used to cut 50-60 acres. On taking delivery, the defendant found that it was a very old machine and returned it to the plaintiff. The plaintiff sued for the price of the machine but the defendant relied on section 13. The court held that the defendant is entitled to reject it, for he had bought the machine, relying on this description which the machine did not possess.

With reference to satisfactory quality, section 14(2B) will be helpful. It states that;

"the quality of goods includes their state and condition and the following:

1. Fitness for all the purposes for which goods of the kind in question are commonly supplied
2. Appearance and finish
3. Freedom from minor defects
4. Safety and
5. Durability.

See the case of Clegg v. Olle Anderson T/A Nordic Marine (2003) EWCA Civ 320

4.0 CONCLUSION

The seller has a right to sell goods, and this is regarded as fundamental to the contract of sale. It is one of the duties of the seller to the buyer where he passes a good title to the buyer. However, where there is contract for the sale of goods by description, the goods must correspond with that description and goods supplied under contract of sale of goods must be of satisfactory quality.

5.0 SUMMARY

The comparison between the goods as described and the goods as delivered is made according to the assessment of a business person or a reasonable consumer and not that of a scientist. More so, where there is an implied condition that the seller must have a right to sell the goods, where the seller is in breach of the term, then the buyer is entitled to the return of the entire purchase price, irrespective of the fact that the buyer may have used it.

6.0 TUTOR MARKED ASSIGNMENT

1. X takes possession of a car under a hire purchase. Under such a contract title remains with the hire purchase company until all the payments have been made and the hirer(X) has exercised an option under the contract. Before completing the payments and exercising the option under this contract, X sells the car to KM, a car dealer, who sells to B. Neither KM nor B is aware of the hire purchase contract. B uses the car for almost a year before discovering all of these facts Advise B.
2. Under a sale of goods contract time is of essence. Critically explain.

7.0 REFERENCES/FURTHER READING

- Sales of Goods Act.
- Rawlings, Commercial Law University Of London Press 2007.
- Okany Nigerian Commercial Law, Africana .FEP Publishers Limited, 1992.
- J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
- C.j. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd
- Sofowora General Principles of Business and Coop Law, Soft Associates, 1999.

UNIT 2

DUTIES OF THE BUYER

CONTENTS

1.0 INTRODUCTION

Once an agreement with respect to goods has occurred between two or more people for the purpose of business, they both have duties to fulfill as buyer and seller of such good.

It is however important to note that these duties are paramount to the success of the business transactions and will also enhance the growth of commercial transactions world over.

In this unit, the duty of the buyer is discussed as it is as paramount as the duties of the seller of the goods.

Payment for the goods is a major duty of the buyer as well as the duty to accept the goods as transacted after the seller fulfills its duty in the transaction.

2.0 OBJECTIVE

The main purpose of this unit is to distinguish between the duties of the buyer from that of the seller and give a detailed explanation of the duties of the buyer to the seller.

3.0 MAIN BODY

3.1 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.

Section 28 of the Act states that:

> *"delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods in exchange for the price, and the buyer must be ready and willing to pay in exchange for possession of the goods."*

It is important therefore that the principle of cash on delivery is implicit in a contract of sale, if the buyer pays by cheque or any negotiable instrument that is regarded as a conditional payment, because if the cheque is dishonoured, the seller may sue for the instrument or for the price of the goods.

In Bekederemo v. Colgate-Palmolive (Nig) 1976, a clause in the contract stipulated that "all purchases of the company's goods by the distributor shall strictly be for cash payments: provided that the company will grant up to thirty days credit after delivery of goods by the company to the distributors within which the distributors shall effect payment in full for all goods received."

The seller supplied goods on nine occasions in 1972 for which the buyer could not pay cash on all occasions thereby leaving a substantial balance. Notwithstanding this, the buyer insisted that he was entitled to further supplies of goods, and that the seller's failure to supply him amounted to breach of contract. The court held that the seller's duty to supply the goods and the buyer's obligation to accept them and pay immediately or within thirty days (if credit was granted) were concurrent and correlative duties. The buyer therefore could not insist on deliveries when he was unable to pay for them.

3.1 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.

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.

3.2 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)

By virtue of Section 34(2), unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

The conduct of the buyer could amount to an acceptance of the goods having regard to the provisions of section 35. In Hardy and Co. Ltd v. Hillerns and Fowler (1923) 2 KB 490, X contracted to sell to Y wheat to be shipped from South America. The ship carrying the wheat arrived at Hull on 18th March. On 21st March, Y resold and delivered part of the wheat to Z. On 23rd March, Y had its first opportunity to examine the goods and, on doing so found them not to conform to the contract. Consequently, he rejected them. In other words, before the expiration of a reasonable time for examination, Y rejected the wheat for non-conformity with the contract.

It was held that, the sale and delivery to Z was an act inconsistent with the ownership of X and Y had, therefore accepted the goods under section 35 of the Act and lost his right of rejection.

4.0 CONCLUSION

It is important to note that the duties of the buyer are paramount in the contract between the buyer and the seller in the contract of sale of goods. The duty of the buyer is the acceptance of the goods and the payment of the said goods. In some instances, the conduct of the buyer may make him forfeit his right of rejection after examination of the goods.

5.0 SUMMARY

The duties of the buyer is important in the contract of sale especially in C.I.F and F.O.B contract. The most important amongst them is the duty to examine and accept the goods and also the duty to pay for the goods.

It is pertinent to note that the duties of the buyer are concurrent with those of the seller in any contract of sale.

6.0 TUTOR MARKED ASSIGNMENT (TMA)

1. Briefly, explain the principle of payment for goods as enunciated in the case of Bekederemo v. Colgate-Palmolive.
2. Outline and explain the duties of the buyer in a contract of sale of goods.

7.0 REFERENCES/FURTHER READING

- Sales of Goods Act.
- Rawlings, Commercial Law University Of London Press (2007)
- Okany Nigerian Commercial Law, Africana .FEP Publishers Limited (1992).
- J. A. M. Agbonika and J. A. A. Agbonika, Sale of Goods (Commercial Law), 2009, Ababa Press Ltd
- C.J. Okoro (2013), Business Law for Professional Exams, MaltHouse Press Ltd.
- Sofowora General Principles of Business and Coop Law, Soft Associates (1999).

UNIT 3

REMEDIES OF THE SELLER

CONTENTS

1.0 INTRODUCTION

The remedies available to the seller will be well enunciated in this unit. As a starting it is important that the remedies available to the seller are concurrent with the one available to the buyer.

Apart from personal action on the contract which is available to the seller where the buyer defaults in payment of the price of goods sold, the seller may also exercise some real rights to the goods. Note that personal remedies will only be against the buyer and not third party in case the goods have been resold, as against real remedy which is against the goods sold.

2.0 OBJECTIVE

The main objective of the unit is for the learner at the end of the unit to be able to distinguish between a personal remedy and real remedy of the seller against the buyer. It is important to note that the remedy under the two heads are immense and will be discussed briefly for the purpose of this unit.

The personal remedy of the seller against the buyer is the right of payment and also right to damages. It is a personal right which a third party who benefits from the goods will not share as against the real remedy of the seller.

3.0 MAIN BODY

3.1 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 of the buyer that directly affects the seller. This enables the seller to recover sums of money representing that which the seller has lost, it is a right in *personam:*

There are two of them;

1. action for the price
2. action for damages

3.1.1 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. This action could come in two folds under section 49 of the Act:

- If property has passed and the buyer has wrongfully failed to pay according to the terms of the contract. This is well enunciated under section 49(1) of the Act. In this instance, the seller can sue for the price of the goods.

In Colley v. Overseas Exporters Ltd (1921) 3 KB 302, X sold to Y a quantity of leather f.o.b Liverpool, the goods being unascertained at the date of sale. Y instructed X to send the goods to Liverpool for shipment on the vessel (K) and X did so. The K and other ships substituted could not take the leather for which reason the leather remained at the dock for two months. X then brought an action against Y for the price. It was held that, as the property in the goods had not passed to Y and that there was no agreement for the price payable on a certain date in respective of delivery.

- If the contract stipulates a date for payment without requiring delivery and the buyer wrongfully fails to pay, then the seller can bring an action for the price of the goods. See Section 49 (2) of the Sales of Goods Act.

Generally the action for price gives the seller certainty, they know precisely how much they will receive.

3.1.2 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.

The action may be brought whether the property in the goods has passed or not to the buyer. Note that the measure of damages is the loss directly and naturally resulting in the ordinary course of events,

from the buyer's breach of contract. See Section 50 (2). In Thompson Ltd v. Robinson (Gunmakers) Ltd (1955) Ch. 177. A contracted to buy a vanguard motor car from B, who were car dealers. A then refused to accept delivery. There was no shortage of Vanguard. It was held that B was entitled to damages for the loss of their bargain, i.e the profit they would have made as they have sold it less than what they would have sold it. The seller was obliged to mitigate their loss by reselling the goods and could not claim for loss. If there is a market for the goods, the presumption is that damages will be the difference between the contract price and the market price at the time when the goods ought to have been accepted, or at the time of refusal to accept if time is not fixed for acceptance.

3.2 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*.

3.2.1 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 or otherwise (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 seller 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.

3.2.2 Unpaid Sellers Right of Lien

The unpaid seller's lien is the right to retain possession of the goods until payment, even if the title has passed to the buyer. A lien is a right to retain possession of goods until payment or tender of the whole price is made.

The lien is available where an unpaid seller is in possession and section 41 (1) of the Act provides that:

- where the goods have not been sold on credit
- where it has been sold on credit and the term of it has expired
- or where the buyer has become insolvent.
- The lien may be exercised against part of the goods where the rest have been delivered unless delivery indicates an agreement to waive the lien.

A seller has not lost his lien if the following situations occur:

- where part of the price has been paid (s38 (1) (a))
- where the seller has obtained judgement for the price of the goods (s43(2))
- where the seller is in possession as agent or bailee of the buyer.

The seller will lose his right of lien in the following instances;

- where the buyer has paid or tendered the whole of the contract sum (s38(1) (a))
- where the buyer lawfully obtains possession of the goods. In this instance, the lien lost provided that the buyer obtain possession unlawfully. by waiver of the lien (S43(1) (c))

3.2.3 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

The right of stoppage will end and the right will be lost in the following circumstances;

1. If the buyer or his agents obtain delivery before the arrival of the goods at their destination (S45 (2). See also Reddall v. Union Castle Mail Steamship Co Ltd (1914) 84 LJKB 360.
2. If, after arrival at the destination, the carrier, bailee or custodian acknowledges to the buyer that the goods are held on their behalf and that person continues in possession for the buyer.(S45 (3))
3. If the carrier wrongfully refuses to deliver the goods (S45 (6))
4. If a document of title has been transferred to the buyer and there has been a further disposition e.g to a new buyer who acts in good faith.

The transit will not have ended if in the following circumstances:

a) there is part delivery, the remainder of the goods may be stopped in transit.
b) the buyer rejects goods and the carrier continues in possession of them (S45 (4)).

3.2.4 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.

The property will revert in the seller if they exercise the right of resale. This is a right that arises if the seller defaults in which case the original sale contract is rescinded (S48 (4)).

This right may also arise in (S48 (3)) as follows;

- where there is an unpaid seller
- either the goods are perishable or the seller gives notices of the intention to resell
- the buyer does not pay or tender the price within a reasonable time.

Note that the unpaid seller may resell the goods and recover from the original buyer damages for any loss caused by this breach. In RV Ward Ltd v. Bignall (1967) 1 QB 534, the court held that reverting of property in the seller occurred as a result of rescission

of the contract by the seller following the buyer's breach. The seller elected to rescind by reselling the goods.

4.0 CONCLUSION

The seller can bring actions against the buyer for price where property has passed and the buyer has wrongfully failed to pay or for damages where the buyer wrongfully fails to accept and pay for the goods.

The seller also has a right against the goods: the unpaid seller's lien permits the seller to retain possession of the goods until payment, while the right of stoppage allows the unpaid seller to stop goods in transit where the buyer has become insolvent and also he may be able to exercise the right of resale.

5.0 SUMMARY

In summary, the seller has rights to the goods, that is right in rem and also right in personam, which is of paramount importance and they are remedies available to the seller.

The seller has a right to the price or right to damages in a situation where he has exercised his right of resale, he can only sue for damages in that regard.

6.0 TUTOR MARKED ASSIGNMENT (TMA)

1. Bunmi purchased a HP printer from George and it was agreed that collection was to be made by Bimbo. Bimbo never collected the printer and did not pay. Does George have a right for the price?

2. Briefly outline the remedies available to a seller under the rights in *rem.*

7.0 REFERENCES/FURTHER READING

- Sales of Goods Act.
- Rawlings, Commercial Law University Of London Press (2007).
- Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited (1992).
- Hire Purchase Act.

UNIT 4

REMEDIES OF THE BUYER

CONTENTS

1.0 INTRODUCTION

In this unit, the remedies available to a buyer in the sale of goods contract shall be discussed. As had been said, the remedies of the seller and those of the buyer are concurrent to each other as they both have duties to perform in a contract of sale of goods. Both parties therefore, have remedies that also go with them when contract is breached.

The remedies available to the buyer are also numerous and they range from recovery of price to rejection of the goods as well as the damages to mention just a few of the remedies that will be discussed in this unit.

2.0 OBJECTIVE

The aim of this unit is to discuss the remedies available to a buyer in a sale of goods contract. The learner is expected to be able to understand and explain the remedies available to buyer of goods in a sale of goods contract.

3.0 MAIN OBJECT

3.1 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).

3.2 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.

The right of rejection will be lost or will not be available where:

- the buyer has accepted the goods (S11(4))
- the buyer is unable to return the goods; where the goods has passed into the possession of a sub-buyer and cannot be recovered.

- that there is a breach of a warranty
- there is short or over delivery and the shortfall or excess is not material (S30 (D)). Here there is no requirement for unreasonableness.

Where the buyer has right to reject for breach of condition, he or she can:

- reject the goods and claim damages for any loss
- treat the breach as a breach of warranty and claim damages.
- waive the breach.

If the buyer wrongly rejects goods, the seller can treat this as a repudiation of the contract and, if property has passed to the buyer, it will revert in the seller.

3.3 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 goods and the repair was properly effected so that the goods conformed with the contract, the buyer lost the right to reject.

3.4 Damages

In 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.

4.0 CONCLUSION

The buyer can reject goods for defective delivery, breach of an implied or express condition, or serious breach of an innominate term, unless they have accepted the goods or where there is a minor breach.

Rejection does not necessarily constitute rescission of the contract and it may be possible for the seller to cure a defective delivery.

5.0 SUMMARY

The buyer in a sale of goods contract may be able to withhold payment of the price where the seller fails to deliver, or may be able to bring an action in damages for non delivery. Wrongful rejection of the goods may be treated by the seller as a repudiation of the contract.

6.0 TUTOR MARKED ASSIGNMENT (TMA)

1. Mufu agrees to buy 500 planks from Taju for boat building, each plank measuring 15cm in width. When delivered, 125 of the planks were 14cm wide, 125 were 16cm and the rest were as ordered. All the planks were suitable for Mufu's use, but Mufu has now found an alternative , cheaper supply of wood and wants to escape from his obligations under the contract with Taju. Advise Mufu.
2. Adamu contracts to buy 12 bottles of brandy and the seller delivers 8bottles of brandy and four bottles of whisky. What can Adamu do under the Sale of Goods Act.

7.0 REFERENCES/FURTHER READING

- Sales of Goods Act.
- Rawlings, Commercial Law University Of London Press (2007).
- Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited (1992).
- Hire Purchase Act.

- Sofowora, General Principles of Business and Coop Law, Soft Associates (1999).

UNIT 5

FACTORS AFFECTING LIABILITY UNDER CONTRACT OF SALE OF GOODS

CONTENTS

1.0 INTRODUCTION

There are numerous factors that may affect liability under the sale of goods. Some have already been discussed. Two important ones to be discussed here are the doctrines of frustration and mistake. These two factors can terminate a contract without damages or right to sue for the price of the goods.

It is however important to note that an act of God or King's enemies' act can also bring the contract to an end with both the seller and the buyer losing. The concept of frustration and mistake will be discussed in this unit.

2.0 OBJECTIVE

The main objective of this unit is that learners should be able to understand the factors that may affect the contract of sale of goods through risk, frustration and mistake.

3.0 MAIN OBJECT

3.1 Risks and Frustration

If the goods sold are accidentally lost or damaged, then the loss or damage will fall on the party who bears the risk and the general rule of *res perit domino,* that is, the risk of accidental loss, falls on the owner. The general principle attributing the risk is laid down in section 20 as follows:

> "unless otherwise agreed, goods remain at the seller's risk until the property therein is transferred to the buyer, but where the property is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not."

In section 16 of the Act, property in goods cannot pass until they are identified. The risk is not usually upon the buyer in the case of unascertained goods. In this respect, the opening word of Section 20 should be noted. It states that parties may agree that risk will pass before or after property. (See Sterns Ltd v. Vickers Ltd (1923) 1KB 78)

Frustration

The general principle of law of contract is that where a contract has been frustrated, the rights and obligations of the parties are terminated and remain in the position in which they were at the time when the frustrating event occurred.

Section 7 of the Act buttress this point by providing that "where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby frustrated." From this point it clear that section 7 discharges the parties of their obligations under the contract at the occurrence of a peril on the goods.

It is important to note that the perishing of specific goods is the only aspect of frustration provided for by the Act. Perishing of goods cannot frustrate a contract otherwise than under section 7. In Re Shipton Anderson and Co Ltd v. Harrison Bros. &Co Ltd (1915)3 KB 676, the court clearly thought there could be no frustration if property and risk had both passed.

3.2 Mistake

The discussion of this topic here will be limited to the Sale of Goods Act of 1893 where it relates to sale of specific goods which have perished. Section 6 of the Act is the section that makes provision for the doctrine of mistake and it states that

> *"where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void".*

In Couturie v. Hastie (1856) 5H.L.C. 673, the defendant was a *del credere* agent who sold, on behalf of the plaintiffs, a cargo of corn shipped from Salonika. Before the date of the sale, the cargo had been lawfully sold by the master of the ship. The purchaser repudiated the contract and the plaintiff sued the agent, whose

liability depended on whether the purchaser would have been liable. It then held that, the defendant was not liable and that the contract was void for mistake.

4.0 CONCLUSION

The factors affecting the sale of goods contract, which range from risk to frustration and to mistake, are discussed in this unit. However passing of risk in sale of goods contract depends on circumstances of each case, where generally risk passes with property. In cases of Frustration, the general principle is that parties return to status quo. In the case of mistake, the contract is void ab initio.

5.0 SUMMARY

The passing of risk in goods must pass with the goods as a general principle of the law. There are however instances where the risk will pass before the goods. This is based on agreement between the parties. Frustration is a situation where the goods are either damaged or lost without the fault of any party. In this instance, parties return to status quo as if the contract never existed.

6.0 TUTOR MARKED ASSIGNMENT (TMA)

1. The general principle of law of contract is that where a contract has been frustrated, the rights and obligations of the parties are terminated and remain in the position they were at the time when the frustrating event occurred. Critically examine this assertion with decided cases and relevant statutes of the law.

2. Sheron sold goods to Benson with the notion that the goods were still in existence, but at the time of the contract the goods was no longer in existence. Advise Benson.

7.0 REFERENCES/FURTHER READING

- Sales of Goods Act.
- Rawlings, Commercial Law, University Of London Press, (2007).
- Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited, (1992).
- Hire Purchase Act.
- Sofowora General Principles of Business and Coop Law, Soft Associates, (1999).

MODULE 5

UNIT 1

CARRIAGE OF GOODS BY SEA

CONTENTS

1.0 INTRODUCTION

The law relating to contract of carriage is today becoming increasingly important in international trade. The most important aspect of the law of carriage is the carriage of goods by sea, and it is the main point of discussion in this unit. The role of the common carrier, his duties and liabilities as well as the laws relating to the carriage of goods by sea, the Hague Rules as it relates to the carriage of goods by sea shall also be discussed

There are two types of carriers in the carriage of goods by sea. They are private and common carriers.

2.0 OBJECTIVES

The purpose of this unit is to discuss the nature of carriage of goods by sea in commercial transactions as it exist globally. At the end of this course unit, the learner should be able to define common carriers and explain their duties and liabilities in contracts of carriage of goods by sea.

3.0 MAIN BODY

3.1 Common Carrier

A common carrier is one who is engaged in the trade of carrying goods as a regular business, and also holds himself out as ready to carry for anybody who may wish to employ him. In Great Northern Railway Co. v. L.E.P. Transport and Depository Ltd (1922) 2 K.B 742, the court held that a common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as he think fit to employ him.

A common carrier may also operate with respect to a particular class of goods so long as he undertakes to carry for everyone. In Ingate v. Christie (1950) 3.C and K 61, the defendant had the word lighterman posted up over the door of his office. It was established in evidence that he carried for anyone who engaged his craft. It was held that he was a common carrier.

3.2 Duties and Liabilities of the Common Carriers

The provision of common law as it relates to liability of the common carrier was absolute in relation to the safety of goods entrusted to him. A common carrier is the insurer of the safety of the goods carried and therefore he is liable for any damage to or loss of them, whether occasioned by his negligence or not. For this reason, he

needs to exercise proper care and skill in carrying out his duty. Such duties may be summarized as follows:

- the duty to accept and carry goods offered to him, in the absence of lawful excuse and to charge no more than a reasonable price. The duty to carry implies that the carrier must not necessarily deviate from his customary route, and if he does so, he may be liable for deviation and become responsible for all losses.
- duty that the goods are safe, for he is an insurer of the goods.
- to deliver the goods to the consignee at the place to which his is directed, otherwise he will be liable with misdelivery or conversion.

  It is important to note that there are exceptions to the common position. They include:

  - Act of God: this as the first exception, is that the shipowner is not responsible for loss or damage resulting from an 'Act of God'.

    Before an act will qualify as an Act of God, it must fulfill the following conditions stated in Nungent v. Smith (1876) 1C.P.D 423, Any accident as to which a common carrier can show that it is due to natural causes directly and exclusively independent of human action, and it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected from him.
  - Kings Enemies: these are acts done by states or peoples with which the sovereign may be at war, at any time during the carriage of the goods.

- Inherent Vices: goods susceptible to damage or tendencies to easy deterioration; a carrier is not responsible for a loss or damage which has resulted from an inherent defect of the thing carried. See Nungent v. Smith (Supra).

There are situations where the common carrier exceptions do not apply. These are:

- Negligence: A carrier will be relieved from liability for damages to the goods arising from an act or omission on the part of the consignor.
- Deviation: Where the expected causes have occurred upon a departure from the proper prosecution of the voyage, as where in the course of a deviation, the ship is lost by an Act of King's enemies, the shipowner is not excused unless he can show that the loss must have occurred even if there had been no deviation.
- Unseaworthiness: The shipowner remains responsible for loss and damage to the goods, if the ship was not in a seaworthy condition when the voyage was commenced and if the loss would not have arisen but for that unseaworthiness.

3.3 The Hague Rules on Carriage by Sea

It is an international regulation, aimed at reconciling the interests of shipowners, cargo owner and insurers alike. The basic aim of the Act is to relieve a shipowner from his common law absolute liability. He is therefore liable only for negligence and is granted certain immunities. The major provisions of the Act are as follows:

- There shall no longer be any implied warranty of seaworthiness, except the carrier is expected to exercise due diligence to make the ship seaworthy at the beginning of the voyage.

- The carrier must properly and carefully load, handle, care and discharge the goods carried.
- And he must issue an appropriate Bill of Lading after loading of the goods.
- Removal of the goods at the port of discharge into the custody of the person entitled to delivery is prima facie evidence that the goods have been delivered as described in the bill of lading.

There are certain rights and immunities enshrined in the rule but for the protection of the shipper and they are as follows:

a) The shipper shall not be responsible for loss or damages sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agent or his servant.
b) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules.
c) Goods of an inflammable, explosive or dangerous nature which the carrier, master or agent of the carrier has not consented to carry may at any time before discharge be landed at any place or destroyed.

4.0 CONCLUSION

The carriage of goods by sea is a sensitive commercial transaction that cannot be treated with impunity. Much care need be taken in this area of commercial law. It is important to note that carriage of goods by sea has been largely governed by common law. All the strict

common law liability and the exceptions to them are not left out of the transaction.

The importance of this area of law cannot be overemphasized, as it is the major carrier of goods world over.

5.0 SUMMARY

In summary the carriage of goods by sea is a vital aspect of commercial transaction. The common carrier as a public carrier of goods, from one point to another, the duties of the carrier to exercise due diligence and the exceptions to the liabilities of the carrier are all important aspects of the law.

The role of the Hague Rule in the carriage of goods by sea cannot be overemphasized, the right and immunities imposed on the shipper and as well as carrier have been discussed.

6.0 TUTOR MARKED ASSIGNMENT (TMA)

1. Explain the duties and liabilities of a common carrier and the exceptions available to the strict rule.
2. Briefly explain the rights and immunities available to a shipper under the Hague Rules 1924.

7.0 REFERENCES/FURTHER READING

1. Sofowora, General Principles of Business and Coop Law, Soft Associates, 1999.
2. Sale of Goods Act, 1893.
3. Rawlings, Commercial Law, University of London Press, 2007.
4. Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.

UNIT 2

CONTRACT OF AFFREIGHTMENT

CONTENT

1.0 INTRODUCTION

A contract to carry goods by sea or to provide a ship for that purpose, in consideration of a payment known as freight is called the contract of affreightment.

There are two kinds of contract of carriage of goods by sea. They are usually referred to as contract contained in charter party or contract evidenced by a bill of lading. This unit will be discussing the charter party as a type of contract of affreightment.

2.0 OBJECTIVE

The main purpose of this unit is to examine the charter party as a kind of contract of affreightment and also to discuss the implied

terms of a charter party. From this unit, learners should be able to distinguish between a contract of affreightment and charter party.

3.0 MAIN BODY

3.1 Charter-Party

A charter-party is contract between charterer and the ship-owner by which the charterer hires from the ship-owner the use of the ship either for a voyage or a fixed period of time in consideration of money called the freight.

Most charter parties contain well-established terms and are usually in standard form contracts agreed and set out by various conferences and known by such code names like Baltime, Gencon and Shelltime.

There are three types of Charter parties and there are certain implied terms under each of these heads as follows:

1. The Voyage Charter-Party
2. The Time Charter-Party
3. The Demise Charter-Party

The Voyage Charter-Party: - here the ship is engaged to carry a full cargo on a simple voyage but however, the vessel is manned and navigated by the owner of the vessel.

The simplicity of this kind of charter –party makes it adaptable to many sorts of transaction.

Time Charter –Party

Here the ship-owner agrees to make the ship available for an agreed period of time and carry goods according to the directions of the charterers, but the manning and navigation of the ship is with the

ship-owner. Under the term charter-party, the charterer is entitled for a period of time to direct within agreed limits how the ship shall be used.

Charter-Party by Demise

It is also known as Bareboat Charter. It is demised charter-party where the charterer displaces the owner and for the period of the lease, takes possession and complete control of the ship. Here, the charterer mans and equips the vessel and assumes all responsibilities for its navigation and management. For all practical purposes, he acts as the owner.

3.3. Implied Terms

In every voyage charter party the following are the implied terms;

i. the ship is seaworthy: that the shipowner undertakes to put the ship fit for the voyage. The test of seaworthiness is whether a prudent shipowner would have made good the defect before sending the ship to sea. If he had known of it.

   In Ciampa v. British India Steam Navigation Co. (1915) 2 K.B. 774 lemons were loaded at Naples for London. At Marseilles, the ship was required by the French authorities to be fumigated, because she had come from Mombasa, a plague infected part. The fumigation damaged the lemon. It was held that, as the ship was bound to be fumigated at Marseilles, she was not reasonably fit at Naples for the carriage of the lemons and was therefore unseaworthy.

ii. That the ship shall be ready to commence the voyage without unnecessary deviation in the usual and customary manner. Deviation is defined as an intentional change in the geographical route of the voyage as contracted.

It is noteworthy that if the deviation is to save life then, it is allowed, but not deviation to save property.

iii. Another implied term in this manner is the shippers obligation not to ship dangerous goods and the word has been defined in section 2 of the Merchant Shipping Act, cap 224 LFN 1990, to mean goods which by reason of their nature, quantity or mode of stowage, are liable either singly or collectively, to endanger the lives of persons on or near any ship, or to imperil any ship, and includes all explosives within the meaning of the Explosives Act.

In Brass v. Maitland (1856) 26 I.J.Q 846, a consignment of bleaching powder containing chloride of lime had been shipped in casks. During the voyage, the chloride of lime corroded the casks and damaged other cargo in the hold. The majority took the view that the shipper would be liable even though he was unaware of the dangerous nature of the goods.

4.0 CONCLUSION

It is important to note that contract of affreightment is a contract of carriage of goods by sea and mostly carriage through charter-party and bill of lading transaction.

It is also pertinent to note that the most important aspect of the charter-party agreement is the time charter-party because it is the

busiest of them all. Ship owners are expected to adhere largely to the implied terms of the contract of affreightment.

5.0 SUMMARY

Charter-party is the major aspect of commercial transaction under the contract of affreightment alongside the contract by Bill of lading because most times they work hand in hand.

6.0 TUTOR MARKED ASSIGNMENT

1. Briefly explain Charter-party and its importance to the contract of affreightment.
2. Analyse the implied terms under a charter-party.

7.0 REFERENCES/FURTHER READING

1. Sale of Goods Act, 1893.
2. Rawlings, Commercial Law, University of London Press, 2007.
3. Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.
4. Sofowora, General Principles of Business and Coop Law, Soft Associates, 1999.
5. A Handbook on Carriage of Goods by Sea: Wale Olawoyin, Lecturer, University of Lagos.

UNIT 3

CONTRACT OF AFFREIGHTMENT 2

CONTENT

1.0 INTRODUCTION

Bill of lading is also a part and parcel of the contract of affreightment like the charter-party. But it is a contract that serves a dual purpose either as a contract between the shipowner and the third party or as merely an evidence of goods between the shipowner and the charter-party.

The bill of lading arguably falls into 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 distinguish between a bill of lading and a charter-party.

2.0 MAIN BODY

2.1 Bill of Lading

It is necessary to note the primary functions of the bill of lading in a contract of carriage of goods by sea and learner should be able to note that it is an important aspect of the carriage of goods by sea. A bill of lading is a document signed by the shipowner, or by the master or other agent of the shipowner, 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 shipowner.

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.

2.2 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.

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.

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.

Under the Hague Rules, Art III Rule 3, the shipper is entitled to demand the issue of a bill of lading incorporating a statement as to the apparent order and condition of the goods when received by the carrier. Such bill is prima facie evidence of receipt by the carrier of the goods and therein described, but conclusive evidence when the bill is transferred to a third party in good faith.

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.

Types of Indorsement

Special Indorsement

Indorsement in blank

Restrictive indorsement

Conditional indorsement

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.

3.0 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 shipowner and third party or an evidence of contract between the charterer and the shipowner. 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.

4.0 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.

5.0 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. A handbook on Carriage of Goods by Sea: Wale Olawoyin, Lecturer University of Lagos.
2. Sale of Goods Act, 1893.
3. Rawlings, Commercial Law, University of London Press, 2007.
4. Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.
5. Sofowora, General Principles of Business and Coop Law, Soft Associates, 1999.

UNIT 4

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

CONTENT

1.0 INTRODUCTION

A contract for the sale of goods often requires a shipment by sea of the goods by the seller to the buyer. There are various types of contract of sale of goods where the subject-matter of the contract is being exported. The contract of C.I.F contracts is derived from customs and usages of merchants rather than being a product of legislation.

This kind of contract is referred to as cost of the goods, insurance of the goods as well as the amount for the freight. All these are as C.I.F contract.

2.0 OBJECTIVE

The purpose of this unit is to enable the learner to be able to define, understand and explain the following phenomena; cost, Insurance and Freight (C.I.F Contract).

3.0 MAIN BODY

3.1 C.I.F Contract

A C.I.F Contract is one in which the seller undertakes to ship the goods at a price which will include the cost, insurance and freight. It is a kind of contract derived from customs and usages of merchants. A sale of timber at N10,000 dollars per ton C.I.F Lagos means that the amount includes the cost of the cotton, the transportation cost to Lagos and the cost of insurance premium.

The main feature of a C.I.F contract is that, unlike ordinary contracts, the delivery of the shipping documents (bill of lading, policy of insurance and invoice) transfers the property in and possession of the goods to the buyer.

The risk on the goods passes to the buyer once the goods have been put aboard the ship. Consequently, if they are lost or damaged, the loss will fall on the buyer, who will be able to take the benefit of the insurance policy.

The C.I.F contract, which is more commonly in use than any other contract used for purposes of contract of sale of goods by export trade, has been described by McNair, J in Gardano and Giampieri v. Greek Petroleum Namidakis and Co., as a contract in which the seller

discharges his obligations as regards delivery by tendering a bill of lading covering the goods.

Under the C.I.F contract, it is immaterial whether the goods arrive safely at the port of destination. If they are lost in transit, the marine insurance policy would cover the loss or damage.

3.2 Duties of the Seller

The following are the duties of the seller under the contract of C.I.F;

a) to ship goods of the contract description, at the port of shipment, within the time named in the contract.
b) to arrange shipment or contract for the carriage of the goods.
c) to effect a proper policy or policies of insurance on the goods, upon the terms, upon the terms current in the trade.
d) to obtain proper bills of lading for the goods.
e) to make out an invoice of the goods.
f) to obtain export license, when necessary

Under the contract of C.I.F, the buyer has a right to reject the documents and also a right to reject the goods.

It is important to note the time when the property in the goods will pass as shown in the case of Smith and Co. Ltd v. Bailey, Son and Co. (1891)2Q.B 403, where the court held that the general property remains in the seller until he transfers the bill of lading.

The resultant effect is that the buyer takes all the risks of transit, and on tender of shipping documents to him, he must pay the agreed

price. It is irrelevant that the goods are already lost. Usually, the risk will already be covered by the insurance.

3.3 Duties of the Buyer

The following are the duties of the buyers a C.I.F contract

1. Acceptance of Document of Title

The most important of the C.I.F contract is for the buyer to accept all shipping documents representing the goods sold. The Bill of lading is the most important that must be accepted.

2. Payment of Price

On tender of the documents, the buyer becomes obliged to pay the price within a reasonable time after the tender of the documents. He cannot insist on waiting for the goods to be delivered before paying or refuse to pay merely because the goods are defective. Berger & Co Inc v. Duffus SA (1984) AC 382.

3. Payment of Import duty and Cost of Unloading

It is the duty of the buyer to pay all import duties and wharfage charges, if any. He is also expected to pay the cost of unloading, lighterage and landing at the port of destination, in accordance with the bill of lading.

3.4 Passing Property and Risk

Property in the goods under a C.I.F does not usually pass on shipment, although it might be an indication of the intention to pass property on shipment if the bill of lading is made out in the buyer's name.

Usually, the fact that the buyer has gained possession of both the documents and the goods does not mean property has passed.

Where goods are lost, the normal rule that risk passes with property, does not apply to most C.I.F contracts. Where the goods are lost after the buyer has accepted the documents, the buyer bears the loss. Where the buyer bears the loss, his remedy is against the carrier under the contract of carriage, or the insurer under the insurance policy.

3.5 Breach of Contract by the Buyer

Mostly in C.I.F contract the buyer is the one always in breach of the contract and this comes in different heads;

1. Non-Payment of the Price,; if the buyer fails to pay or neglects to pay after the property in the goods has passed, the seller has a right of action. This does not apply to C.I.F Contract because the price is payable expressly against delivery.
2. Non-Acceptance of Document of Title, if the buyer wrongfully fails to accept the documents and the property has passed to the buyer, the seller has a right of action and cannot maintain an action for the price. In a C.I.F contract, the damages will be the difference between the contract price and the value of the documents at the date of the buyers refusal.

3. There are certain rights enjoyed in relation to the goods. In a C.I.F Contract, the seller has the usual rights enjoyed by the unpaid seller e.g.

a. The right of withholding delivery
b. The right of stoppage in transit
c. The right of resale.

4. Right of lien, the seller has a right of lien in the goods. It exists where the seller has taken the bill of lading to his own order.

Remedies for Breach in C.I.F Contracts

1. Action for Damages

If the seller wrongfully fails or refuses to ship the goods or tender the documents, the buyer's remedy is an action for damages as provided for in section 51of the Sales of Goods Act.

2. Specific Performance

The court may order specific performance of the contract under section 52 of Sale of Goods Act. This order is a discretionary remedy and therefore would only be granted on equitable grounds. Where the court is satisfied that monetary compensation would be wholly inadequate in the circumstances, then the court will refuse to grant specific performance.

3. Rejection of Goods

The buyer has a right to reject the goods. If the shipped goods are not in accordance with specifications under the contract, then the buyer may reject the document.

He also has a right of examination of the goods and goods are not deemed to be accepted by the buyer by mere delivery except they have been previously examined. The buyer may also lose his right of rejection as in Perkins v. Bell (1893) 1 Q.B.193, where the buyer

bought some barley which were dispatched to him for a delivery at a railway station. The defendant without examining them dispatched them to a sub-buyer, who rejected them. The court held that the buyer had lost his right to reject the goods.

In the contract of C.I.F, the only place where the goods can be examined is the place of destination of the goods.

4.0 CONCLUSION

It is pertinent to note that contact of C.I.F is a contract of passing of goods and the risk pass immediately the goods are shipped. Either lost in transit or not the buyer has no right of suit under the **B**ill of Lading Act. The most significant aspect of this kind of contract is that the contract is insured against all risks.

5.0 SUMMARY

In a typical C.I.F contract, the goods that the seller sells to the buyer would have either been shipped by the seller or acquired while in transit. The seller transfers to the buyer the contract for the carriage of the goods and the policy of insurance covering the goods during transit.

Normally, risk passes on shipment of the goods, but property will only pass on delivery of the documents and payment by the buyer. The buyer is under separate obligation to accept conforming documents and also conforming goods.

6.0 TUTOR MARKED ASSIGNMENT

1. Bimco & Co, contracts to buy from Asia & Co 1,000 tons of Barley, which is on board MV Gurara. The ship sinks before delivery. Who bears the loss.
2. What are the remedies available to a buyer under C.I.F Contract.

7.0 REFERENCES/FURTHER READING

1. Sofowora, General Principles of Business and Coop Law, Soft Associates, 1999.
2. Sale of Goods Act, 1893.
3. Rawlings, Commercial Law, University of London Press, 2007.
4. Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.

UNIT 5

THE FREE ON BOARD (F.O.B) CONTRACT

CONTENTS

1.0 INTRODUCTION

Although generally employed in international commerce, it is also a transaction that is applicable to local transactions. The basic feature of this type of contract is that the seller must pay the cost of the goods and bear the responsibility of putting goods 'free on board' (f.o.b) and until they pass the ship rail. After this delivery is complete and the risk of loss in the goods is there and then transferred to the buyer.

2.0 OBJECTIVE

The main objective of this unit is for learners to be able to define the term F.O.B, and to be able to distinguish between the contract of C.I.F and that of F.O.B. The learner should be able to know the duties of both the buyer and the seller.

3.0 MAIN BODY

3.1 F.O.B (FREE ON BOARD)

An F.O.B contract is one in which the seller undertakes to supply the goods and places them free on board the ship to be named by the buyer who in turns pays the freight and the cost of insurance.

Since F.O.B contracts are meant to serve different commercial interests in different periods or times, they have different variants. In Raymond Wilson and Co Ltd v. N Scratchard Ltd (1944) Lloyds Rep 373, it was decided that once the seller had an F.O.B contract, it was deemed that he put the goods on board, bears the expenses and once delivery is made, the risk in the goods passes and it is the buyer who pays the cost of carriage. *Payrene Co Ltd v. Scindia Steam Navigation Co. Ltd* (1954) 2 QB 402.

3.2 Types of F.O.B Contracts

There are two types of F.O.B contract. They are

1. Strict or Classical

Under the strict F.O.B contracts, the arrangement for shipment, (and if he wishes for insurance) are made by the buyer direct. He is a party to the carriage of goods by sea and that of marine insurance, if he insures the goods in transit. It is the main responsibility of the buyer

to name an effective ship, if the buyer fails to nominate an effective ship the seller cannot do so.

2. Contract providing for additional service

Here the parties have agreed that arrangements for the carriage by sea and insurance shall be made by the seller, but for and on behalf of the buyer and for his account. The buyer bears responsibility for any subsequent increase.

Delivery of goods is complete when the goods are put on board ship and the risk of accidental loss under Section 20 (1) of the Sales of Goods Act passes on to the buyer when the seller has placed the goods safely on board. See Carlos Federspiel and Co. S.A v. Charles Twigg and Co. Ltd.(1957) 1 Lloyd's Rep 240.

3.3 Duties of the Seller

1. The seller is obliged to deliver the goods to the place of loading and load them on a vessel agreed by the parties or designate by the buyer and also at the time agreed for it. See All Russian Cooperative Society Ltd v. Bejamin Smith & Co. (1955) 14 Lloyds's Rep 351.
2. The seller is usually to pay the charges of loading the goods to the ship.
3. It is the duty of the seller to ensure that the goods are adequately packed, carefully loaded and that they are fit and proper and fit for their sea transit.
4. The seller must deliver to the buyer the documents stipulated in the contract. Hence, he must also provide the information

necessary for the buyer to insure the goods, failing which the risk of loss will not pass to the buyer. Section 32(3) Sale of Goods Act.

3.4 Duties of the Buyer

1. It is the buyer's duty to nominate the ship on which the goods may be loaded by the seller and must give adequate notice to the seller. The ship must be effective ship and in capable condition, both physically and otherwise, of receiving the cargo. This duty is a condition precedent to the obligation of the seller to load the goods under the contract. See Modern Transport Co Ltd v. Ternstrom and Ross (1924) 19 Lloyds Rep 354.
2. The choice of loading port in an F.O.B contract is that of the buyer. In David T. Boyd and Co. v. Lousi Louca (1973) 1 Lloyds Rep 209, Kerr J. held that it was the obligation of the buyer to elect the port of shipment.
3. Except otherwise stated, the buyer is responsible for the cost, stewage, trimming, insurance, tallying and other incidental expenses under F.O.B contract.
4. The buyer must pay the price of the goods. Where payment is of letter of credit, unless otherwise agreed, the seller can require a conforming letter of credit before loading. See Glencore Grain Rotterdom BV v. Lebanese Organisation for International Commerce (1997) 1 Lloyds Rep 578.

3.5 Passing of Property

In an F.O.B contract there is strong presumption that the parties intend property to pass as soon as the goods cross the ship's rail. Most F.O.B contracts are concerned with unascertained goods in

which property cannot pass until the goods have been ascertained by being unconditionally appropriated to the contract and the parties intend it to pass. The appropriation usually occurs when the goods pass over the ship's rail for loading.

Risk of the goods will usually pass on shipment, even if property has not passed. See Inglis v. Stock (1885) 10 A.C 26.

Risk may not pass if the seller fails to provide sufficient information to enable the buyer to insure the goods. See Section 32(3) Sale of Goods Act

3.6 Breach and Remedies

1. Where the seller fails to deliver, the buyer can bring an action under section 51 (1) Sale of Goods Act against the seller for damages for non-delivery.
2. The buyer can reject the goods if they do not conform to the provisions of the contract or he may instead of rejecting treat the matter as a breach of warranty and sue for damages.
3. The buyer's right to reject the goods and the documents are separate remedies in that regard.
4. Where the seller withholds delivery when the property has passed to the buyer i.e by transfer of the bill of lading then an action will lie in tort for detinue or conversion.

   The following are the instances of breach of the buyer and the remedies available to the seller in that regard.

1. Where the buyer fail or refuses to accept the property, an action for damages will be available to the seller in that regard, but not a right to sue for the price of the goods.

2. The seller has three proprietary rights against the buyer in an F.O.B contract in relation to the goods.
   a. a lien on the goods while they are still in his possession.
   b. a right of stoppage *in transitu* after he has parted with possession, but before the buyer obtains possession of them.
   c. a right of resale under section 48 (3) and (4) of Sale of Goods Act

   .

4.0 CONCLUSION

The contract of F.O.B is a contract of international commercial transactions that risk in the goods passes once the goods crosses the ship rail and the seller bears the cost before then. Once it cross then the buyer bears the risk from then on. The only remedies available for the seller is an action for damages and the price of the goods, not the price of the goods where the buyer fails to accept the goods.

5.0 SUMMARY

In a classical F.O.B contract, the seller puts the goods on board a ship nominated by the buyer. The seller pays the cost of delivering the goods over the ship's rail and takes a bill of lading. The buyer pays the cost of carriage and it is usually when the goods cross the rail that the risk of loss passes to the buyer, but the seller normally reserves the right of disposal until payment so property does not pass.

6.0 TUTOR MARKED ASSIGNMENT

1. Under an F.O.B contract, what is the effect of the property passing to the buyer.
2. Briefly explain the duties and remedies available to a buyer in an F.O.B contract.

7.0 REFERENCES/FURTHER READING

1. Sofowora, General Principles of Business and Coop Law, Soft Associates, 1999.
2. Sale of Goods Act, 1893.
3. Rawlings, Commercial Law, University of London Press, 2007.
4. Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.

UNIT 6

DOCUMENTARY LETTERS OF CREDIT

CONTENTS

1.0 INTRODUCTION

There are various ways of paying for goods in international commercial transactions especially in the contract of c.i.f and f.o.b. Although the traditional ways of payment is by cash or cheques, nowadays, the documentary letters of credit have superceded these methods.

Usually the bankers will open the letters of credit at the request of the buyer who would have given them a satisfactory security for the reimbursement of the amount paid by the bankers to the seller.

Letters of credit are employed in both c.i.f and f.o.b contracts and the principles of law governing letters of credit are the same for both types of contract.

2.0 OBJECTIVE

The main purpose of this unit is to discuss documentary letters of credit. Learners should be able to explain the main reason behind the issuance of letters of credit and to understand the safeguards afforded by a documentary credit, as a contractual promise by a bank.

3.0 MAIN OBJECT

3.1 Documentary Letters of Credit

The principle of documentary letter of credit is that the buyer of goods instructs a bank in his country (the issuing bank) to open a credit with a bank in the seller's country (the advising bank), in favour of the seller, specifying the documents which the seller has to deliver to the bank if he wishes to be paid for his goods. The instructions also specify the date of expiry of the credit.

If the documents tendered by the seller are correct (bill of lading, insurance policy and invoice) and tendered before the credit are expired, the advising bank becomes obliged to make the payment to the seller. See Glencore International AG v. Bank of China (1996) 1 Lloyds Rep 135.

3.2 Types of Letters of Credit

There are various types of letters of credit and it is important for parties to state the type that will govern there transactions.
The following are the main types of Letters of Credit:

a. The Revocable and Unconfirmed Letters of Credit

In this type of Letter of Credit neither the issuing nor the advising bank gives its commitment to the seller. However, the letter of credit may be revoked at any time.

b. The Irrevocable and unconfirmed Letter of Credit

The authority here is an irrevocable one and the issuing bank enters into an obligation to the seller to pay, and the obligation is also irrevocable. If the bank refuses to pay after the seller tenders correct documents, then he can sue the issuing bank at his headquarters or the seller's country, if the issuing bank has a branch there.

c. The Irrevocable and Confirmed Letters of Credit

This is a situation where the issuing bank adds its own confirmation of the credit to the seller. If he delivers the correct documents at the stipulated time, then he will be obliged without any problem.

A confirmed letter of credit which has been notified to the seller cannot be cancelled by the bank on the buyer's instruction. See Urquahat Lindsay and Co. v. Eastern Bank (1922) 1 K.B 318.

d. The transferable Letter of credit

The parties to the contract of sale may agree that the credit shall be transferable, and the seller can use such credit to finance the supply transaction.

3.3 Opening of Letter of Credit

While the parties in the underlying sale contract must agree that payment is to be made by documentary letter of credit, it is important to emphasise that the documentary credit gives rise to separate contractual rights and obligations from those in the sale contract.

A letter of credit must be made available to the seller at the beginning of the shipment period. It must be made open at a reasonable time before shipment. Stach Ltd v. Baker Bosly Ltd (1958) 2 Q.B 130.

Although the furnishing of letters may be condition precedent for the obligation of delivery or shipment of goods, the terms of the contract may stipulate that the letter of credit will be opened upon the performance of a specified act by the seller. It is mandatory for the buyer to open the letter of credit on time and no excuse will exonerate him from his liability.

3.4 The Doctrine of Strict Compliance under Letter of Credit

The issuing bank which operates the documentary credit acts as agent for the buyer who is the principal. The bank which documents are presented must ensure that they comply with the terms of the credit. Banks must examine all documents stipulated in the credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the credit. If the banks exceed the instructions given to them by the buyer any have acted without authority, he is not bound to ratify there act, in that event the loss will fall on the bank.

In Equitable Trust Co. of New York v. Dawson Partners, the court held that there is no room for documents which are almost the same or which will do just as well.

Once there is discrepancy in the document no matter how insignificant, then the bank must not pay. The courts have however allowed banks to pay for trivial discrepancy. In Glencore International AG v. Bank of China (Supra) the word ***branch*** was used instead of ***brand*** but the court held this was a mere error and the word should be read as brand.

The court may refuse payment where there is compelling evidence of fraudulent presentation by the beneficiary or his agents.

4.0 CONCLUSION

In a contract where documentary letter of credit is used, there is room for more safeguards on the part of the buyer to the seller. The seller is more secured with his money in this regard. And also the type of letter of credit determines the extent of the safeguard offered to the seller by the buyer through its agent the bank. And it is also important to open a letter of credit to give it the value it requires for payment

5.0 SUMMARY

A documentary letter of credit enables the seller and the buyer to obtain important safeguards regarding payment under a sale contract. Those safeguards originate in contractual promises by a

bank or banks that the money due will be paid, subject to certain conditions being fulfilled.

The bank is not bound by the sale contract, so if defective goods are delivered, the fact that the buyer has remedies against the seller does not mean a bank cannot enforce the payment obligation under the credit.

6.0 TUTOR MARKED ASSIGNMENT

1. Discuss the strict compliance rule.
2. Explain the different types of documentary letter of credit, and explain the steps involved in opening a letter of credit.

7.0 REFERENCES/FURTHER READING

1. Sale of Goods Act, 1893.
2. Rawlings, Commercial Law, University of London Press, 2007.
3. Okany, Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.

UNIT 7

CARRIAGE BY LAND AND AIR

CONTENTS

1.0 INTRODUCTION

The carriage of goods by land and air is governed partly by the rule in common law and partly by other statutory provisions. Carriage of goods by air is governed by international conventions to that regard.

Carriage of goods by land is the transportation of goods from one destination to another by road. In the past it used to be by horse, but now it is mostly done through railway and vehicle for that purpose.

2.0 OBJECTIVE

The objective of this unit is for learners to be able to distinguish between contract of carriage by air and by land. Learners should be able to understand and explain the various laws governing these

kinds of commercial transactions including the basic elements of liability in this transaction.

3.0 MAIN BODY

3.1 Carriage by Land

The transportation of goods from one point to another for commercial purposes and carriage of goods by road is carried on partly by private and partly by public organizations. There is an elaborate licensing system for goods vehicles, which applies to both private and public carrier of goods.

It should be well emphasized that most carriers by road are private carriers and their rights and duties are governed by the general principles of bailment. There is no common law obligation to accept all goods for carriage, nor does their liability extend beyond the normal liability of a bailee.

A carrier of goods by land does not warrant that his vehicle is roadworthy, although the standard of care required is high.

Exemption Clauses

A private carrier can and does frequently limit or exclude his liability by contract. Some road haulage associations limit liability to a fixed amount in case of loss or damage. In Mayfield Photographic Ltd v. Baxter Hoare Ltd ((1972) 1 Lloyds Rep's 410, the defendant carriers put the plaintiffs cameras on the same lorry as the goods of another customer and delivered the goods of the other customer first, thus deviating from the direct route. It was held that this deviation was justified and so they were not strictly liable.

The owner is the person who can sue the carrier for loss or damage as a general rule and the owner might have an action in tort.

3.2 Carriage by Air

There have been a lot of international conventions in relation to the carriage of goods by air. Consequently, a considerable degree of uniformity now exists internationally in the law relating to carriage of goods by air.

The following are the relevant conventions in relation to the carriage of goods by air:

1. Warsaw Convention

It is evident that innumerable problems and disputes would arise between countries if each one had its own different aviation rules. In 1929 the Warsaw Convention was drawn up and it has been ratified by many countries. The convention laid down uniform rules for the international carriage of passengers, luggage and goods. However the Carriage By Air Act, 1932 gave statutory effect in the United Kingdom to the Warsaw Convention of 1929. The maximum liability in the event of death of or injury to a passenger under the Convention and the 1932 Act was 125,000 francs.

2. Carriage by Air 1961

This is an amendment to the Warsaw Convention 1929 which took place in Hague in 1955 and came into force in 1967 and was enacted in the carriage by Air Act, 1961.

3. Carriage by Air (Supplementary Provisions) Act 1962

This is also a further amendment to the Warsaw Convention after the 1961 Hague Convention. The Act came to clear the real carrier

in this regard as mentioned in the 1929 and also the 1961 Act. It also addressed the limit of liability referred to above and protects solely the carrier who is actually performing the carriage during which an accident or delay takes place.

There have been other amendments to the Warsaw Convention that came up in 1975. The main purpose of this amendment was to replace the gold francs and the liability of the carrier is expressed by special Drawing Rights of the International Monetary Fund.

3.3 Basic Elements of Liability

The Convention provides that the carrier of goods by air will be liable for destruction or loss of, or damage to or delay of cargo, if it occurs during the carriage by air. The carrier can escape liability by proving that he and his agents took all positive measures to avoid the damage.

The carrier can limit his liability, and the liability is limited to 250francs per kilogram unless the consignor makes a special declaration and pays a supplement if required.
The consignor has a right of action against the first carrier as well as the carrier who actually performed the carriage during which destruction, loss, damages or delay took place unless the first carrier has expressly assumed liability for the whole carriage.

The first carrier, the performing carrier and the last carrier are jointly and severally liable respectively to the consignor and the consignee.

4.0 CONCLUSION

It is important to note the basic rules of liability of the carriage of goods by road and air in that respect. Carriage of goods by road is one of the oldest systems of carriage of goods in commercial transactions. This type of Carriage is mostly governed by common law. On the other hand, carriage of goods by air is mostly governed by the different international Conventions.

5.0 SUMMARY

The Carriage of Goods by Road and Air, is one of the mostly used after sea carriage in international commercial carriage of goods. It is important that these areas of commercial transactions are governed by both common law and different international conventions. The Warsaw Conventions and the so many amendments already discussed are points of reference.

6.0 TUTOR MARKED ASSIGNMENT

1. Briefly explain the concept of Carriage of Goods by Road and the laws governing it.
2. State the purpose of the Warsaw Convention 1929 on the Carriage of Goods by Air.

7.0 REFERENCES/FURTHER READING

1. Sales of Goods Act, Laws of the Federation of Nigeria.
2. Okany, Nigerian Commercial Law, Africana. FEP Publishers Ltd, 1992.
3. Sofowora, General Principles of Business and Coop Law, Soft Associates, 1999