NATIONAL OPEN UNIVERSITY OF NIGERIA

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COURSE CODE: LAW 431

COURSE TITLE**:** LAW OF BANKING AND INSURANCE I

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COURSE TITLE: LAW OF BANKING AND INSURANCE I

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MODULE 1

Unit 1. History and Evolution of Banking in Nigeria

Unit 2. Nature of Banking in Nigeria

Unit 3. Laws Regulation the Establishment of Banks in Nigeria

Unit 4. Laws Regulating the Operation of Banking In Nigeria.

UNIT 1

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1.0 **INTRODUCTION**

The history of banking in Nigeria which makes up the banking system in existence now can be traced to the colonial administration. The colonial administration did not adopt any existing local banking system or any similar system to develop on it. This is because it was the advent of the colonialists that warranted increased importation of British silver coins to meet the growing trade relationship between England and West African coast. It was due to the increasing number of silver coins in large boxes in Lagos office of the initial sole shipping company, Elder Dempster & Co. that suggestions were made to establish a bank in Lagos. It was as a result of the interest of the British businessmen that the Lagos agent of Elder Dempster & Co approached some banks in

Britain to open branches in Lagos. This step gave rise to the opening of branches of banks in Lagos.

The history of banking in Nigeria developed in phases. The initial phase was witnessed by expatriate banks which were solely owned by foreigners. The next was the establishment of banks by indigenous businessmen. After this was the combination of both foreign and indigenous ownership of banks, and lastly is the era of trade liberalization where both foreigners and indigenes have the same freedom to establish banks either as foreigners alone or in combination with local investors.

2.0 OBJECTIVES

It is intended that at the end of this Unit, you should be able to:

1. Trace the origin of formal banking in Nigeria;
2. The stages of development of banking system in Nigeria; and
3. The current level of banking business in Nigeria.

3.0 MAIN CONTENT

3.1 History and Evolution of Banking in Nigeria

3.1.1 Expatriate Banks

The first attempt to establish a formal bank in Nigeria was the establishment of a branch of the African Banking Corporation in 1891 in Lagos. It was solely established to import and distribute new silver coins and a banker to the colonial government. The establishment of this bank or commencement of banking business in Nigeria was not backed up by any formal legislation. The African banking Corporation was merely given administrative mandate by the colonial authorities to commence banking business. The bank’s progress was dissatisfactory so it was sold to Elder Dempster & co. Ltd in 1893 (IJ. Goldface – Irokalibe 2007).

In 1893 the Bank of British West Africa was introduced in Lagos by George Williams Neville and registered in London the next year 1894 because there was no local legislation under which the bank could be incorporated. The bank grew steadily and opened another branch in Old Calabar in 1900 (I. J. Goldface-Irokalibe).

In 1899 the Bank of Nigeria was established by prominent Nigerian Merchants. The bank was officially known as “Anglo-African Bank Ltd” and thereafter named “Bank of Nigeria Ltd.” The first branches of the bank were located in calabar, Burutu and LokoJa and later in Jebba (I.J. Goldface-Irokalibe).

The Bank of Nigeria was later acquired by Bank of British West Africa in 1912. So at the time of the amalgamation of the Southern and Northern protectorates into one entity-Nigeria in 1914, the Bank of British West Africa was undisputedly the only bank existing in Nigeria.

The year 1916 withnessed the emergence of another bank known as the Colonial Bank with branches in Lagos and Zaria and later extended its branches to Port-Harcourt, Jos and Kano. (I.J. Goldface-Irokalibe). The Colonial Bank constituted a very strong competitor to the Bank of British West Africa. The name of Colonial Bank was subsequently changed to Barclays Bank (Dominion, Colonial, and Overseas). It resisted all attempts of the Bank British West Africa to acquire it.

As time went on other banks started emerging, such as the British and French Bank for commence and Industry (later known as British and French Bank). In 1961 the Nigerian branches of the bank were named United Bank for Africa, which still exists up till now.

Other expatriate Banks that entered Nigeria were Bank of America and later became Savana Bank of India later known as Allied Bank. Due to the banking consolidation exercise in 2005 some of these banks were merged or acquired by other banks and have ceased to exist.

3.1.2 Indigenous Banks

Nigerians wanted to own and operate banks distinct from European ownership and control. Concerted efforts were made which resulted in the establishment of banks by Nigerians.

The first of its kind was the Industrial and Commercial Bank which was apparently incorporated in England in 1914, but by 1929 it was wholly owned and managed by Africans. Unfortunately in 1930 the bank went into compulsory liquidation. (I.J. Goldface-Irokalibe).

Upon the demise of the first indigenous bank, the Nigerian Mercantile Bank came up in 1931 and wound up in 1936.

Despite the problems of the earlier two banks, Nigerians did not lose hope in ensuring that they have an indigenous bank, hence the establishment of National Bank of Nigeria in 1933. The performance of the bank was impressive. In 1955 the Western Region started patronizing the bank and eventually owned considerable shares in it. The National Bank of Nigeria became a successful competitor to the expatriate banks.

Another indigenous bank that came into lime light was the African Continental Bank, which started operation in 1948. The bank's progress was said to be slow but steady. The bank was patronized by Eastern Region government and its agencies.

Other indigenous banks began to increasingly emerge. They include Agbonmagbe Bank which later became Wema Bank. It was established in 1945. The Western Region patronized and owned shares in the bank. It became strong and constituted a second indigenous challenger of the expatriate banks. Other small banks were founded after 1952 when the first Banking Ordinance regulating baking business in Nigeria was enacted but could not survive.

3.1.3 Hybrid Banks

These are bank that were neither wholly expatriate nor wholly indigenous in ownership, but whose ownership was a mixture of both expatriate and indigenous. This specie of banks rose up in the 1950s. They included the Bank of Lagos, the Birini (Beirut Riyad) Nigeria Bank and the Bank of the North. (I,J, Goldface-Irokalibe). The Bank of Lagos had Swiss partners while the Birini (Beirut Riyad) Nigeria Bank and the Bank of the North had Lebanese partners. However, with the indigenization policy backed by the Nigerian Enterprises Promotion Act, Nigerians took over those banks completely.

3.1.4 Current Banks

With the advent of globalization, business has become internationalized Nigeria has promulgated laws that would encourage foreign business in Nigeria to attract foreign capital e.g. the Nigerian Investment Promotion Commission Act to give equal opportunities to both Nigerians and Non-Nigerians to establish business enterprises under the relevant laws in Nigeria.

The above situation made so many banks to be established in Nigeria. Prior to 2005 there were about eighty nine banks in Nigeria. Many of those banks were weak in share capital base which posed grave danger to the economy. Consequently the Central Bank of Nigeria ordered increased capital base up to N25m to consolidate banking business in Nigeria.

At the end of the consolidation exercise through mergers and acquisitions, only 25 banks emerged, while 14 banks that could not merge or be acquired were deemed as distress banks and accordingly liquidated.

Nigerian banks have become strong to compete internally. Some of these banks have branches in foreign Countries.

SELF ASSESSMENT EXERCISE 1

1. Give a brief account of the origin of formal banking operation in Nigeria
2. Briefly state the efforts made at establishing indigenous banks in Nigerian and whether the effort were fruitful.

4.0 Conclusion

The banking system as it now exist in Nigeria took its origin from the colonial businessmen who were the first to make attempt at rendering what appeared to be banking services and eventually the formal establishment of banks in Lagos. It means that the banking system in Nigeria has no local root. It is an imported system.

5.0 Summary

The first bank that was established in Nigeria was African Banking Corporation followed by Bank of British West Africa (BBWA). The Bank of Nigeria which was initially known as Anglo-African Bank Ltd was later acquired by the BBWA. The Colonial Bank which later became Barclays Bank (Dominion, Colonial, and Overseas) debuted and became a strong competitor to BBWA. Other Foreign Banks also established branches in Nigeria.

The First Indigenous Bank in Nigeria was the Industrial and Commercial Bank followed by the Nigerian Mercantile Bank and later the National Bank of Nigeria. It was after the establishment of the African Continental Bank that other indigenous Banks began to increase; notable among them was Agbonmagbe Bank which later became Wema Bank.

As time on both foreigners and Nigerians jointly established banks but with the effect of the indigenization policy of the Nigerian Enterprises Promotion Act, Nigerians took over those banks.

The current banks that exist in Nigeria now have ownership of both foreigners and indigenes. Business liberalization allows every one equal opportunity to establish business in Nigeria.

6.0 Tutor-Marked Assignment

The origin and development of banking in Nigerian can be classified into phases. Give an over view of the phases in which banking originated and developed to the present day Nigeria.

7.0 References/Further Readings

1. Goldface-Irokalibe, I. J. Law of Banking in Nigeria. (Malthouse Press Limited, Lagos). 2007.

Course Title: Law of Banking and Insurance II

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Module 1: Unit 2

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3.1.1 Definition of Bank (Banker)

3.1.2 Banking Business

3.1.3 Bank Customer

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 Reference/Further Reading

1.0 INTRODUCTION

Every discipline or field of study has its peculiar terminologies and or concepts. Some of the concepts and terms are entrenched in the relevant laws while some evolve from practice of the profession, business or trade. Some of those terms may or may not be defined by law.

The need for conceptual clarification becomes necessary to lay a basic and proper background for understanding of the subject of study. This is moreso that legal definitions of terms are subject to several interpretations depending on the perception of persons until such is definitely settled by judicial authority.

It is against this backdrop that the definitions of the key terms such as “Bank” (Banker), “Banking Business” and “Bank Customer” will be sought from both the relevant statutes and practice for better understanding.

2.0 OBJECTIVE

At the end of the study of this unit you should be in a position to:

1. know what a Bank (Banker) is
2. define the term Banking business
3. Identify who is a bank customer

3.0 MAIN CONTENT

3.1 **Nature of Banking in Nigeria**

The nature of banking in Nigeria can only be properly understood when we are able to define who is a banker, customer and what constitutes banking business.

3.1.1 Definition of Bank (Banker)

Unfortunately, both the Banks and other Financial Institutions Act (BOFIA) 2004 and the Central Bank of Nigeria, the principal statues governing banks in Nigeria have not defined what a bank is. However, by the implication of Section 55 of the CBN Act the definition of bank in the repealed Banking Act of 1990 still applies. Section 43 of the Banking Act defines a bank as "Any person who carries on banking business and includes a commercial bank, an acceptance house, discount house, financial institution and merchant bank" see also section 2(1) Evidence Act.

Section 2 of the Bill of Exchange Act 2004 defines "banker" which "includes a body of persons whether incorporated or not who carry on the business of banking"

Section 66 of BOFIA 2004 defines a commercial bank to mean "a bank in Nigeria whose business includes the acceptance of deposits, withdrawals by cheques" and merchant bank to mean "a bank whose business includes receiving deposits on deposit account, provisions of finance consultancy and advisory services relating to corporate and investment matters, making or managing investments on behalf of any person."

See also the case of Trade Bank plc v. Barilux (Nig) Ltd (2000) 13 NWLR pt 685 on definition of bank.

3.1.2 Banking Business.

Section 66 of BOFIA 2004 defines banking business as "The business of receiving deposits on current account, savings account or other similar account, paying or collecting cheques, drawn by or paid in by customers; provisions of finance or such other business as the Governor may, by order published in the Federal Gazette, designate as banking business" see Trade Bank Plc v. Barilux (Nig.) Ltd (Supra). See also section 43 of the repealed Banking Act, 1990.

The words ‘bank’ or ‘banker’ are used interchangeably to mean one and the same thing and are referred to an incorporated and licenced corporate body and not an individual who works in a bank. See Akwule & 10 others v. Reginom (1963) All NLR 193.

3.1.3 Bank Customer

There is no statutory definition of what bank customer is. The main requirement to become a bank’s customer is having an account irrespective of what form of account (whether saving, deposit or current) provided the account is in his name. See UBN Plc v. ITPP Ltd (2000) 12 NWLR pt 680; Ademuluyi & 1 Anor v. ACB Ltd. (1969) 3 ALR Comm 10; NNB Ltd v. Odiase (1993) 8 NWLR Pt 310.

In addition one becomes a customer when he makes an offer to open an account and the banks accepts e.g. acceptance of deposit. Undoubtedly creates a binding and enforceable contract. See Ladbroke & Co v. Todd (1914) 30 TLR 433; Union Bank v. Integrated Timber and Plywood products Ltd (2000) 12 NWLR pt 680, 99.

SELF ASSESSMENT EXERCISE 2

1. What do you understand by bank and banking business? Support your answer with statutory and judicial authorities.
2. What qualifies a person to be a bank customer?

4.0 CONCLUSION

The conceptual clarification of the terms Bank (Banker), Banking business, and bank customer has underpinned the nature of banking in Nigeria. By all indications a bank or banker must be a body corporate established for the purpose of carrying banking business. In dong so, it renders services to persons (both corporate and natural) who are referred to as its customers.

4.0 SUMMARY

A Bank (Banker) even though it is referred to as a person, it must be a corporate body established for the purpose carrying on banking business. The business of banking is diverse but majorly and traditionally, it is the receiving of deposits on accounts, paying and collecting cheques drawn, or paid by customers and render other financial services. While bank customer is the person either as natural persons or corporate bodies who receives service from the bank.

6.0 TUTOR-MARKED ASSIGNMENT

1. With the aid of statutory and judicial authorities explain the following terms:
   (a) Bank
   (b) Banking business
   (c) Bank Customer

7.0 REFERENCE/FURTHER READINGS

1. Layi Afolabi, Law and Practice of Banking (Heinemann Educational Books (Nigeria) Plc, Ibadan) 1999.
2. Goldface-Irokalibe, Law of Banking in Nigeria (Supra).

Module 1 UNIT 3

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1 Laws Regulating Establishment of Banks in Nigeria

3.1.1 Companies and Allied Matters Act

3.1.2 Banks and Other Financial Institutions Act.

3.1.3 Central Bank of Nigeria

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 Reference/Further Reading

1.0 INTRODUCTION

Laws are the legal mechanisms that are provided to guide the conduct of people in every aspect of human endeavours. Any thing that is not governed by law is a free for all affairs and could be done to the detriment of other persons, society and of course the nation.

The laws that are put in place for establishment of banks in Nigeria have set standard and requirements to be fulfilled by the operators.

The establishment of banks in Nigeria involves several processes which are required by different laws. There is the process of incorporation, which is regulated by the Companies and Allied Matters Act. There is also the process of obtaining banking licence under the Banks and Other Financial Institutions Act which is finalized by the authority of the Central Bank Governor under the Central Bank Nigeria Act.

Until all the necessary steps are undertaken before a bank could be said have been established.

2.0 **OBJECTIVE**

At the end of this unit, you should be in a position to:

1. Identify the principal laws for establishing a bank in Nigeria.

2. Know the Requirements under each of the Laws.

3. Know the stages of establishing a bank as required by law.

3.0 MAIN CONTENT

3.1 Laws Regulating the Establishment of Banks in Nigeria.

The Laws regulating the establishment of banks in Nigeria include principally the Companies and Allied Matters Act, Cap. C. 20 LFN 2004; Banks and Other Financial Institutions Act, Cap. B.3 LFN 2004; and Central Bank of Nigeria Cap C4 LFN 2004.

3.1.1 Companies and Allied Matters Act. (CAMA)

Banks operating in Nigeria are corporate bodies. They must firstly be incorporated as a company under the CAMA by complying with the requirements in respect of registration of such a company. See Sections 18, and 35 CAMA See also Section 2(1) BOFIA. Once a company is incorporated, it becomes a body corporate by the name contained in the memorandum of association to carry out business. See Sections 37 and 38 (1) CAMA.

3.1.2 Banks and other Financial Institutions Act.

Section 2(1) BOFIA states that no person shall carry on any banking business in Nigeria except if it is a company duly incorporated in Nigeria and holds a valid banking licence issued under the Act. The procedure for application for grant of licence to undertake banking business is contained under section 3(1) (2) of BOFIA.

The Central Bank Governor has unfettered discretion as to whether to issue or not to issue licence, however, any licence to be issued shall be with the prior approval of the Minister of Finance. See sections 3 (3) & (5) BOFIA.

3.1.3 Central Bank of Nigeria Act.

The Central Bank of Nigeria is established as a body corporate under S.1. CBN Act. It is constituted by a Board chaired by its Governor. The governor is very significant in the establishment of other banks because he issues them with banking licence.

SELF ASSESSMENT EXERCISE 3

1. State the statutory backing to the establishment of banks in Nigeria

2. What is the role of the CBN in the establishment of other banks in Nigeria?

4.0 CONCLUSION

The establishment banks in Nigeria involve compliance with different laws, and the requirements of those laws must be complied with before it can be said that a bank has been properly established.

5.0 SUMMARY

There are three principal laws that regulate the establishment of banks in Nigeria. The Companies and Allied Matters Act deals with incorporation of a bank as a body corporate, while, the Banks and Other Financial Institutions Act is concerned with application and issuance of banking licence, and the Central Bank of Nigeria Act deals with the authority to issue banking licence.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the relationship between the under listed statues with regard to the establishment of Banks in Nigeria.

(a) Companies and Allied Matters Act

(b) Banks and Other Financial Institutions Act.

(c) Central Bank of Nigeria.

7.0 REFERENCES/FURTHER READINGS

1. Companies and Allied Matters Act, Cap. C. 20 LFN 2004.

(d) Banks and Other Financial Institutions Act, Cap. B2 LFN, 2004.

(e) Central Bank of Nigeria Act, Cap. C4 LFN, 2004.

Module 1 Unit 4

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1 Laws Regulating the Operation of Banking in Nigeria

3.1.1 Banks and Other Financial Institution Act.

3.1.2 Central bank of Nigeria Act.

3.1.3 Bills of Exchange Act.

1.0 INTRODUCTION

The conduct of banking business in Nigeria as in other countries is regulated by several laws. These laws are put in place to provide some set of standards and establish Government agencies to be responsible for ensuring that banks comply with the requirements of all relevant laws.

The operation of banking includes its internal control system, conduct of business, relationship with customers, and other banks, the Central Bank, and dealings in banking instruments. All these are covered by laws such as the Banks and Other Financial Institutions Act which majorly sets criteria for all banks. The CBN Act establishes the CBN as the apex regulatory government agency to oversee the operation of other banks while the Bills of Exchange Act deals with negotiable instruments that are used by banks in their relationship with customers.

2.0 OBECTIVE

At the conclusion of this unit you should be able to:

1. Identify the relevant laws that regulate banking operation in Nigeria.
2. Distinguish between the requirements of each of the laws.
3. Identify the regulatory significance of each of the laws.

3.0 MAIN CONTENT

3.1 Laws regulating the operation of Banking in Nigeria .

After the establishment and licensing of a bank in Nigeria, it can legally commence business, however, in doing business it has to operate within the purview of the applicable laws in Nigeria. These laws include the BOFIA, CBN, and the Bills of Exchange Act. Cap B8 LFN 2004.

3.1.1 BOFIA

- The opening and closing of branches requires a written consent of the CBN. Section 6 BOFIA likewise the operation of foreign branches. Section 8 BOFIA.
- Every reconstruction, reorganization, mergers and disposal including acquisitions requires prior approval of the Governor of the CBN.
- Every bank must at all material times maintain the minimum paid-up share capital as may be determined by the C.B.N. Section 9, and 61 BOFIA.
- Every bank is required to maintain a reserve fund which a proportion of the annual profit is transferred into for the purpose of its business and adequacy in relation to its liabilities. Section 16 BOFIA.
- The BOFIA restricts certain banking activities except with prior approval of in writing of the CBN. See Section 20
- Every bank is required to keep proper books of account with respect to all the transactions of the bank. Section 24.
- The control and management of failing banks is done by the CBN in conjunction with the Nigerian Deposit Insurance Company (NDIC). See Sections 35, 36 & 38 BOFIA.
- The name which a bank should bear is also regulated, e.g. names that appear Government patronage are restricted or depict religious connotation. Section 43.
- The appointment of directors, chief executives is done with the approval of the CBN. Section 48

3.1.2 C.B.N. Act.

- The CBN operates within the Act establishing it. The Act provides for the powers of the Bank to print currency notes and coins and the monopoly of issuing them. See Section 16 & 17 CBN Act.
- The general operation powers of the CBN are contained elaborately under Section 26 while the activities it is prohibited from undertaking are stipulated under S. 28.

- The CBN is entrusted with certain services which it renders to the Federal Government. Section 30
- It is also mandated to act as banker to other banks in Nigeria and outside Nigeria, Section 36 and 37.
- Very importantly, it has power to make and alter rules and regulations for the good order and management of its activities. S. 47.

3.1.3 Bills of Exchange Act. (BEA)

This Act deals with cheques, which is a bill of exchange that is commonly used by commercial banks, ("whose business includes the acceptance of deposits withdrawable by cheques") S. 66 BOFIA.

By virtue of Section 73 BEA " A cheque is a bill of exchange drawn on a banker payable on demand" See also UBN Plc V. Okubama (2000) 14 NWLR Pt 688, 573; Trade Bank Plc v. Barilux (Nig.) Ltd (supra). Therefore, the provisions of the BEA apply to a cheque. See Section 73 BEA.

There are specific provisions in respect of cheques under the BEA such as presentment of cheque for payment S. 74, crossed cheques. S. 78-84.

In Addition, other provisions of the BEA in respect of bills of exchange generally apply to cheques, so banks are bound by them. These will be considered under Module 4.

SELF ASSESSMENT EXERCISE 4.

1. State at least 5 aspects that law regulates in the operation of banking in Nigeria.
2. What is the relevance of Bills of Exchange Act to the regulation of banking operation in Nigeria.

4.0 CONCLUSION

The conduct or operation of banking in Nigeria is regulated by three principal statutes.

These laws provide operational standard to be conformed with by banks. They also provide the legal basis for their activities. Consequently, every bank is mandated to operate within the ambit of the laws. Any activity outside the law might be illegal.

5.0 SUMMARY

The Banks and other Financial Institutions Act regulates the activities of all banks apart from the Central of Nigeria. The BOFIA regulates banking business and management of banks while the CBN Act establishes the CBN as the apex regulator of the banking sub-sector with functions and powers under the Act. The Bills of Exchange Act deals with the negotiable instruments, which are used by banks in the conduct of their business, especially cheques.

6.0 TUTOR MARKED ASSIGNMENT

What is the relevance of Bills of Exchange Act to the conduct of banking business in Nigeria? Support your answer with statutory and judicial authorities

7.0 REFERENCES/FURTHER READINGS

1. Banks and Other Financial Institution Act (supra)
2. Central bank of Nigeria Act (supra)
3. Bills of Exchange Act, Cap. B8, LFN 2004.

MODULE 2

Unit 1 Nature of Banker=Customer Relationship

Unit 2 Contractual Relationship

Unit 3 Rights Arising from Banker-Customer Relationship

Unit 4 Duties of Bank and Customer

Unit 1

1.0 Introduction

2.0 Objectives

3.0 Maintain Content

3.1 Nature of banker-Customer Relationship

3.2 Debtor-creditor relationship.

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

The relationship of banker and customer creates obligations and rights on both parties. For these rights and duties to be enforceable, the relationship of bankers and customer must exist in the first place. The nature of the relationship must be discerned to know what rights and how to enforce any accruing right and obligations. This makes it necessary to examine the nature of the relationship in the first place. The traditional nature of banker-customer relationship will be firstly considered.

2.0 OBJECTIVES

The intention of this unit is to enable you:

1. know the earlier views on the relationship between a banker and its customer.
2. know the current common opinion on the traditional nature of the banker-customer relationship.
3. The effect of such a relationship.

3.0 MAIN CONTENT

3.1 Nature of Banker-Customer Relationship

The banker-customer relationship has a long evolutionary history. At one time or the other courts gave legal considerations to the banker-customer relationship and held that a bank is a bailee or debtor. In Hall V. Fuller (1826) ER 279 the bank was described as a depository of customers money. In Devaynes v. Noble (1816)1. Mer 572 it was held that money deposited with the bank is a debt on the bank. See also Sims v. Bond (1933) 5B& Ad 389.

Even though it seems settled law now that banker-customer relationship is generally considered as debtor creditor relationship, there are other ancillary services that banks render which create special relationships.

These special relationships are contractual in nature which include Agency, Bailment and Trusteeship.

We shall now consider banker-customer relationship under specific headings separately.

SELF ASSESSMENT EXERCISE 1

1. What was the opinion of the courts on the banker-customer relationship before it was finally settled.

3.2 Debtor – Creditor Relationship

The case of Foley v. Hill 1848 9ER 1002 finally settled the argument by confirming that banker-customer relationship is essentially that of debtor-creditor. It was held that money, when paid into a bank, ceases altogether to be the money of the principal, it is then the money of the banker who is to return an equivalent by paying a sum similar to that deposited with him when he is asked for it.

The trade of the banker is to receive money and use it as if it were his own, he being debtor to the person who lend or deposited it with him to use it as his own-per Lord Broughham.

This position was adopted and applied in the case of Osawaye v. National Bank of Nigeria Ltd (1973) NCLR 474.

See also recent Nigerian cases in tandem with this debtor-creditor principle. Trade Bank Plc v. Barilux (Nig) Ltd (2000) 13 NWLR.

Co-operative Development Bank Plc v. Joe Golday co. Ltd (2000) 14 NWLR Pt 688, 514.

It is categorically stated that the relationship between a banker and the customer is that of a debtor and creditor.

SELF ASSESSMENT EXERCISE 2

1. With Judicial authorities elucidate the banker customer relationship as being that of debtor creditor relationship.

4.0 CONCLUSION:

It is now settled law that the banker customer relationship is primarily that of debtor creditor relationship. This is more particularly where the relationship is based on opening an account by the customer with the bank. Monies deposited in the account of the customer with the bank makes the bank a debtor, while the customer a creditor.

5.0 SUMMARY

At the initial time the courts interpreted the relationship of banker-customer as that of bailment. It was later held that a banker was merely a depository of customers’ money. But now it is generally agreed that the banker customer relationship is a debtor-creditor relationship.

6.0 TUTOR MARKED ASSIGNMENT

1. What is the judicial view on the relationship between a bank and customer especially when it is based on account holding?

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi, Law Practice of Banking, (supra)
2. I.J. Goldface-Irokalibe, Law of banking in Nigeria (supra)

UNIT 2

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3.1.1 Principal –Agent
3.1.2 Bailment
3.1.3 Trusteeship/Executorship
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1.0 INTRODUCTION

Banks render some services to its customers other than the traditional duty of collecting deposits and paying money in demand for and on behalf of its customers.

These other services do not really fall under the debtor-creditor relationship of banker-customer. They rather create some special kind of relationships which are essentially contractual in nature. These relationships may be in the form of principal Agent, Bailee-Bailor (Bailment), and Trusteeship/Executorship. We shall now consider them one after another.

2.0 OBJECTIVES

The aim of this Unit is that at the end of it you should be able to:

1. Know the special banker-customer relationships that are created by contract.
2. Know the circumstances in which the special relationship can arise.

3.0 MAIN CONTENT

3.1 CONTRACTUAL RELATIONSHIP

There are some services which banks render that create special relationship between the bank and the persons to whom the services are rendered. Those relationships are regulated by specific laws governing the services rendered by the bank. We shall now see some of those relationships.

3.1.1 Principal-Agent Relationship

Agency is created between a bank and the customer when the bank performs its function of collection of cheques for and on behalf of its customers. See Capital Counties Bank Ltd v. Gordon (1903) AC 243 HL. When a customer pays in a cheque on which the bank cannot set itself up as holder, the customer is by implication, constituting the banker as his agent for the collection of that cheque and the relationship is governed by the law of agency. (Layi Afolabi, 1999) See West Minster Bank Ltd V. Hilton (1923) 43 TLR 124 at 126.

Another instance where agency can be established is when a customer instructs a bank to buy shares on his behalf.

3.1.2 Bailment

A contract of bailment is created when a customer delivers to the bank and the bank accepts an item for safe-custody. Here the bank is not a debtor but a bailee. This arises where the customer keeps valuable with the bank. (Layi Afolabi 1999). It is a common practice for banks to keep for their customers, valuabe items. Like Will, Certificates, precious jewelries etc and this way a contract of bailment is created, the banker being the bailee and the customer, the bailor. The bank is to deal with the property in accordance with the instruction of the customer (bailor) and shall exercise the standard of care required in bailment. (Layi Afolabi) See the following cases.

Armels Transport Ltd v. Agugua (1974) NCLR 123, Kogbe v. Ikupolowo (1972) NCLR 103.

The possible liabilities of the bank under bailment include as follows:

- An action for detinue – Aircool Metal Industries (Nig) Ltd V. Nigerian Ports Authority. (1974) NCLR.
- An action in conversion – Koko V. Nigeria Port Authority (1973) NCLR; Langry v. Union Bank of London (1896) I.L.D.B. 229.
- An action in Negligence – Kogbe V. Ikupolowo (supra)

3.1.3 Trusteeship/Executorship

Bankers do act as executors of will and if the exercise is prolonged, the bank becomes a trustee. In some instances, a bank may be asked to administer trust property. In that situation, the bank also becomes a trustee. (Layi Afolabi 1999)

SELF ASSESSMENT EXERCISE 3

1. What is the implication of the ordinary banker-customer relationship support your answer with judicial authorities
2. Briefly explain some other special relationships that arise between bank and customer.

4.0 CONCLUSION

The banker-customer relationship is not restricted to the debtor-creditor relationship but there are other kinds of relationship between a bank and a customer which, exist only when a particular circumstance takes place.
The circumstance determines the kind of relationship.

5.0 SUMMARY

The types of special relationships arising out of contract between a banker and a customer are: Principal – Agent relationship which depends on instances when a bank acts on behalf of the customer. While the relationship of bailment arises when a banks keeps the customers items for safe custody. And then the trusteeship/executionship relationship arises where the bank is either appointed a trustee of some money for a beneficiary or an executor of a will.

6.0 TUTOR MARKED ASSIGNMENT

1. Explain with practical illustrations on how the underlisted relationships can be created between a banker and a customer.
   (a) Agency
   (b) Bailment
   (c) Trusteeship/Executorship

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi, Law and practice of Banking
2. I. J. Goldface-Irokalibe, Law of Banking in Nigeria.

UNIT 3

1.0 Introduction
2.0 Objectives
3.0 Main Content
    3.1 Rights Arising from Banker-Customer Relationship
    3.1.1 Rights of the Bank
    3.1.2 Rights of the Customer
4.0 Conclusion

5.0 Summary
6.0 Tutor Marked Assignment
7.0 Reference/Further Reading

1.0 INTRODUCTION

The relationship between a banker and its customers gives rise to the several rights and obligations. A remarkable feature of this contract is that, the terms are not wholly embodied in any written agreement executed by the parties. No attempt is usually made to prepare a comprehensive list of the respective rights and duties of the banker and customers.

The relationship between the two is a complex one founded originally upon the custom and usages of bankers. Many of those customs and usages have been recognized by the courts and to the extent that they have been so recognized and not expressly stated, they must be regarded as implied terms of contract.

2.0 OBJECTIVES

It is intended that at the end of this unit you should be able to:

1. Understand the rights of banks in relation to its customers
2. Understand the rights of a customer in relation to his/her banker.

3.0 MAIN CONTENT

3.1 Rights Arising from Banker-Customer Relationship

Just like in any other contract, the banker customer relationship imposes rights and duties on the parties which are legally enforceable.

3.1.1 Rights of the bank

(a) To charge reasonable interest on credit facilities granted to the customer and reasonable commission for some other services rendered.

(b) To obtain reimbursement from the customer in respect of expenses incurred on that customer's behalf. eg. Where a bank insures a mortgaged property on behalf of the customer.

(c) To exercise right of set off as may be to his advantage and as may be permitted by law and by banking practice.

(d) To use moneys deposited by customers without recourse to, or prior approval from the customer.

(e) to close the account after giving reasonable notice

(f) To recall overdraft permitted on current account when circumstances are such that it is the best course of action and to expect immediate payment from the customer.

(g) To exercise the right of lien on its customer's properties in its possession provided that there is in agreement that is on consistent with lien.

(h) To refuse payment of any cheque or other payment orders not property drawn and even if property drawn, to refuse payment if there is any legal bar towards payment whether or not the customer is aware or where funds in his account are insufficient. (Layi Afolabi)

3.1.2 Rights of the Customer

(a) To deposit or pay in cash, cheques and other payable instruments into his account.

(b) To get payment upon the customer's written request either to himself or to a named beneficiary, provided the account is in fund or credit arrangement has already been agreed.

(c) To have his account conducted in a condition of secrecy

(d) To be given reasonable notice before his account could be closed.

(e) To be notified of any suspicious adverse events on his account.

(f) to be furnished with the statement of account regularly or upon request (Layi Afolabi).

SELF ASSESSMENT EXERCISE 4

1. Mention atleast 5 rights of bank under banker-customer relationship.
2. What are the rights the customer has in his relationship with the bank?

4.0 CONCLUSION

The banker and the customer have their respective rights which are enforceable in law. The parties are bound to recognize each other's rights at all times as long as the banker customer relationship subsists.

5.0 SUMMARY

The rights of the bank-have been itemized as well as the rights a of the customer. The banker's rights give it the mandate to deal appropriately with customer's money and account. Similarly, the customer's rights enable him to properly access his money and information on the account.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi, Law and Practice of Banking

UNIT 4

1.0 Introduction
2.0 Objectives
3.0 Main Content
    3.1 Duties of Bank and Customer
    3.1.1 Duties of Bank
    3.1.2 Duties of Bank
4.0 Conclusion
5.0 Summary
6.0 Tutor Marked Assignment
7.0 Reference/Further Reading

1.0 INTRODUCTION

The existence of rights in the banker-customer relationship automatically creates duties on each party. The rights of each party impose corresponding duty on the other party to take actions or steps that would make the other party to enjoy his right. The respective duties of both the bank and the customer are stated hereunder.

2.0 OBJECTIVE

The aim of this unit is that at the end of it, you should be able to:

1. know the duties the bank owe the customer
2. know also the duties the customer owe the bank.

3.0 MAIN CONTENT

3.1 Duties of Bank and Customer

3.1.1 Duties of Bank

(a) To collect cash, cheques and other payable instruments deposited by its customers. See Dike v. ACB Ltd (2000)5 NWLR pt 657, 445

(b) To abide by the customer's written mandate provided the account is in fund or credit arrangement has already been agreed. UBN v. Nwoye (1996)35 LRCN 234, the mandate is regularly drawn, and there is no legal impediment towards repayment.

(c) To give reasonable notice before closing account.

(d) To provide the customer with statement of account regularly or upon request

(e) To draw the customer's attention to any suspicious adverse or other circumstances as may be prudent to bring to the customer's attention so as to forestall forgery or any unauthorized dealings by third parties (Layi Afolabi)

3.1.2 Duties of the Customer

(a) To give written instruction to the bank if he seeks to withdraw his money. Such instruction usually include cheques, standing orders, direct debit instructions.

(b) To inform the bank without delay of any suspicious dealings on his account as may come to his knowledge e.g. lose of cheque leave or cheque book, forgery of his signature or other things which though not forgery, may require that the banks records be amended e.g change of signature, delegation of authority to sign etc.

(c) To draw a cheque with care and diligence and in a manner that will not facilitate fraud, forgery or unauthorized alteration.

(d) To pay reasonable commission and interest on borrowed funds as agreed

(e) To repay overdrafts on demand and to repay loan and other facilities as agreed.

(f) To ensure that his account is in fund or credit arrangement made to meet cheques and other payment instructions issued (Layi Afolabi)

SELF ASSESSMENT EXERCISE 5

1. What are the duties the bank owe to the customer?
2. What are the reciprocal duties the customer has towards the bank?

4.0 CONLCUSION

The duties of both the bank and customer are meant to be observed. Non-observance of any accrued duty would amount to breach of duty which can be enforced by the wronged party.

5.0 SUMMARY

The duties of the banks and the customer have been separately stated in the main content. The duties of the bank regulates his dealings on the account of the customer. On the other hand the customer duties require him to operate his account in accordance with banking practice.

6.0 TUTOR MARKED ASSIGNMENT

1. Mention 5 duties the customer owe to the bank

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi, Law and Practice of Banking
2. I.J. Goldface- Irokalibe, Law of Banking in Nigeria.

MODULE 3

UNIT 1. Appropriation of payment

UNIT 2. Combination of Accounts
UNIT 3. Overdraft

UNIT 4. Termination of Banker-Customer Relationship

UNIT 1

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1 Appropriations

3.2 Exceptions

4.0 Conclusion

5.0 Summary

6.0 Tutor-marked Assignment

7.0 References/further Readings

1.0 INTRODUCTION

Appropriation of payment is a banking practice that regulates dealings with a customer multiple accounts with a particular bank especially when those accounts are in debt. The rule of appropriation of payment seeks to provide for orderliness in applying any money paid into the bank by the customer. The customer has the primary right to decide to which account the money should be paid into while the bank has a secondary right to apply the money to any of the customer's debit should the costumer failed to give specific or implied directive. When both of them failed then the appropriation will be done by the operation of law.

2.0 OBJECTIVE

It is intended that at the end of this unit you should be able know:

1. Who can make appropriation of payments?
2. When appropriation of payment can be made
3. Exceptions to the rule of appropriation of payments

3.0 MAIN CONTENT

3.1 Appropriation of Payment

The general rule is that, if a customer is owing more than one debt to the same bank, he has the right to give instruction as to how the money he pays in is to be applied to settle the debts he wants to pay off or reduce. Once the debtor appropriates payment, it becomes binding and the banker must not deviate and the debt being paid need not be the oldest. Se British and French Bank Ltd v Opalaye (1962) 1 ALL NLR, 26

The case of W.P Greemhalgh & sons v. Union Bank of Manchester Ltd (1924) 2KB, 153; LT 637 was adopted and relied upon by the Nigerian supreme court in Opalaye's case. It was held:

> A bank who has agreed with a customer to open two accounts in his name, and who holds a bill which the customer has specifically appropriated to one account, is not entitled, without the customer's consent, to transfer the proceeds of such a bill to the other account.

For appropriation to be binding, the customer's intention has to be expressly communicated to the bank or is reasonably implied in the circumstances of the debts.

Where neither the customer nor the banker appropriates and the debts are many, S.55(1) Limitation Act provides the basis of appropriation that:

Where there exist a number of debts and the customer makes any payment whether on account or generally to the banker and neither the customer nor the banker appropriates the sum paid to any particular debt the following provisions shall have effect:

(a) If some or all the debts are not statute barred debts, the payment shall, unless the circumstances in which it was made, indicate otherwise, be deemed to be appropriated pari passu in respect of each debt that is not statute barred.

(b) If all the debts are statute barred, it shall be deemed appropriated among the debts pari passu.

SELF ASSESSMENT EXERCISE 2

1. What is the effect of a customer's instruction on appropriation of payment?

2. What is the legal implication of non-appropriation of payment by either the customer nor the bank where there are general debts?

3.2 EXCEPTION

1) **BETWEEN TRUSTEE AND BENEFICIARY**

The application of the rule in Clayton's Case would work hardship and injustice to beneficiaries if applied in the relationship of a trustee and beneficiaries. In this case, equity gives priority to the beneficiaries in the resulting balance, and on the basis that the trustee must be taken to have draw out his own money in preference to the trust money. This is as the rule in Hallet's case and constitute a known exception to the Clayton's rule.

Simply stated, when a trustee of a trust property mixes trust funds with his personal money and takes out of the pool, the trustee deemed to withdraw his own money first 1eaving behind the trust fund irrespective of the chronological order to the transaction. In

HALLET'S ESTATE RE KNATCHBULL V. HALLET (1880) 13CH.D 696

Hallet, solicitor insolvent. While alive, he paid into his banking account and there mixed with own monies, funds which he held in fiduciary capacity from two sources belonging to a client. The trustees and the clients whose property had been misappropriated claimed to be entitled to the monies in the bank account in preference to the general creditors.

HELD: Since Halle was in a fiduciary position, the person for whom he held the monies were entitled to follow and recover it. The rule in Clayton's case did not apply and he must be treated as having made all his drawings on the account on his own monies, since it would have been contrary to his duty to have drawn on held in a fiduciary capacity. However, as between beneficiaries themselves, the rule in

Clayton's case would apply.

(2) TWO OR MORE ACCOUNTS

If a customer keeps two or more accounts of different characters a bank, it will not be presumed that credits in one of the those accounts will extenguish debits in his other account or accounts in order of time. In

BRADFORD OLD BANK LTD. V. SUTCLIFFE (1918) 2 KB 833

A customer had a loan account and a current account, and it was held that payments to the credit of the current account must be appropriated to that accounts, and accordingly a guarantor for the loan account could not claim that such payments should be taken in education of the loan.

However, the rule in Clayton's case can be applied to each account separately.

(3) CONTRARY INTENTION

Where the customer has himself appropriated, the rule will not apply. This is also true where a clause is inserted that security provided shall be on a continuing basis.

This rule may respectively work to the disadvantage of a banker as the case law clearly shows. It is advisable therefore that a banker on receipt of the notice of death of a joint account holder or the provider of certain securities against advances, notice of a second or the determination of guarantee to halt or break further transactions in the account in which the debt is owed and passed future transaction through a new count, failing which the bank may be caught by this rule only to discover that it’s otherwise secured debts have become unsecured.

4.0 CONCLUSION

From the foregoing, it can be seen that the bank does not have unilateral power to appropriate payments made by the customer. The banker is obliged to respect the intention and direction of the customer where it is made manifest.

5.0 SUMMARY

Appropriation of payments applies where a customer operates more than one account or debts in the same bank. Any appropriation of payment made by the customer binds the bank. But where the customer fails to appropriate, the bank can be at liberty to appropriate, and if both failed the appropriation will be deemed by operation of law. However, there are exceptions to the rule of appropriation of payments such as accounts of different status, and contrary intention of the customer.

6.0 TUTOR-MARKED ASSIGNMENT

1. With the aid of judicial authorities explain circumstances in which appropriation of payments can be properly made.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi: Law and Practice of Banking (supra)
2. I.J. Goldface-Irokalibe: Law of Banking in Nigeri

UNIT 2

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1 Combination of Accounts

3.1.1 Conditions of set-off

3.1.2 Accounts that can be combined

3.1.3 Accounts that cannot be combined

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

Where a customer has more than one account at the same branch of a bank, or at two or more branches of the same bank, the issue that arises is whether the bank has the right to set-off what is due to the customer on one account against what is due from him on another account, so that only the ultimate or net balance that is available to the customer when deciding what sum the customer can draw. This is variously referred to as bankers right of "combination of accounts" consolidation of accounts or "right of set-off".

2.0 OBJECTIVES

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

1. Know what is combination of account
2. Identify circumstances in which combination of accounts can or cannot be made

3.0 Main Content

3.1 Combination of Accounts.

Combination of account is generally referred to as the principle of set off of mutual debts so that only the net balance in customer's rights to retain a credit balance in customer's payable. It is one of the banker's rights to retain a credit balance in customer's account against a debt due to the bank from the customer. See Co-operative Development Bank Plc v. Joe Golday Co. Ltd (2000) 14 NWLR pt 685, 511

3.1.1 Conditions of set off.

(i) The two sums must be duly ascertained and agreed upon by both parties. Set off cannot be applied to disputed debts.

(ii) The debts must be due to an from the same parties in the same name and interest.

(iii) Both debts must be due for payment, either immediately or on demand. Contingent liabilities cannot be set off against a debt that is already due for payment.

It must be noted that the bank's right to combine accounts is not without some exceptions and subject to any special agreement between the bank and its customer, express or implied. See Co-operative Development Bank Plc v. Joe Golday Co. Ltd (Supra)

3.1.2 Accounts that can be combined.

1. Different current account balances, usually designated current account 1,2 or whatever designation used which are separated only for convenience sake as much as they belong to the same party in the same name and right.
2. Current account and savings account of the same customer
3. Current account and deposit account of the same customer.
4. Credit balance in the customer’s private account and debit balance in a trust account where the customer is the sole trustee.
5. Credit balance in the customer’s private account and debit balance in a joint account where the customer is jointly and severally liable with others.
6. Credit balance in the customer’s private account and debit balance in a partnership account where the customer is not a limited partner and where joint and several liability have been established.
7. Credit balance on a guarantor’s account and debit balance on the account guaranteed provided the guarantee has crystallized and demand has already been made on the guarantor. The set off is however, restricted to the limited the guarantee.
8. A current account credit balance and a loan account where the loan is already due for payment and already demanded.
9. Where in a joint account owned by two persons, one of them is dead, debit balance on the survivor’s personal account can be combined with credit balance on the joint account as the credit balance automatically passes to the survivor under the rule of survivorship. (Afolabi L 1999).

3.1.3 Accounts that cannot be combined

1. Debit balance on a personal account cannot be set off against credit balance in a trust account or other account held by a professional to keep other people’s money.
2. Current, saving or deposit account credit balance and loan account where the loan is not due for payment or demanded for.

3. Credit balance on a partnership account cannot be set off against debit balance of one of the partners private account, unless the firm guaranteed the account, the guarantee crystallized and demand has been made.
4. Credit balance on a joint account cannot be set off against debit balance in the private account of one of the joint account holders unless the other joint account holder is dead and the credit balance passes wholly to the survivor.
5. Credit balance cannot be set off against liability that is still contingent.
6. Balance on account opened in the customer's name and the other in his business name cannot be combined without the customer's consent, there being an implied agreement to keep them separate. See Allied Bank v. Akubaze (1997) 6 SCNJ 116.
7. Where one of the debts is statute barred. The right of set off is lost as the statute barred debt cannot be enforced by law.

SELF ASSESSMENT EXERCISE 3

1. What is combination of account?
2. Give 5 instances of account that can be combined and 5 instances of accounts that cannot be combined.

4.0 CONCLUSION

Combination of accounts is a right that is available to the bank. The right is not absolute and cannot be exercised arbitrary. The circumstances for the exercise of the right must exist before the bank can properly exercise same.

5.0 SUMMARY

Combination of accounts can be made where a customer has two or more accounts in the same branch of the bank or two or more branches of the same bank. The conditions for set-off have been provided and must exist before it can be validly done. There are accounts of the customer that can be conveniently set-off while there are other types of accounts that cannot be combined.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the conditions in which combination of accounts can effectively and validly be done

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi: Law and Practice of Banking
2. I.J. Goldface-Irokalibe: Law of Banking in Nigeria

UNIT 3

1.0 Introduction
2.0 Objective
3.0 Main Content
- 3.1 Overdraft
- 3.2 Classification of Overdraft
- 3.3 Interest on Overdraft
- 3.4 Payment of Overdraft

4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

Overdraft is one of the recognized ways in which a customer can borrow money from the bank. The amount represented as loan is the excess over and above the actual credit balance on the customer’s current account. An overdraft is a credit facility which the bank grants the customer upon application for it or presentment of a cheque by the customer for money requested.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. Know the meaning of overdraft
2. Know how overdraft is created.
3. Know the nature of interest the bank can charge on overdraft
4. Know when an overdraft is payable

3.0 MAIN CONTENT

3.1 Overdraft

An overdraft is a privilege which a banker allows a customer by permitting the later to issue a cheque over and above his credit balance/ standing in his current account. Technically, this is money lent by the banker to the customer.

A banker is not obliged to let the customer overdraw his account but where overdraft facilities have been granted, the bank cannot unilaterally withdraw same.

Overdraft may be express or implied. See Apugo & sones Ltd v. ACB (1989)1 CLRQ 89.

3.2 Classification of Overdrafts

3.2.1 Express Overdraft

This arises from the agreement between the customer and the banker whereupon the former is allowed to draw over and above his credit balance sequel to negotiations and previous agreement between the parties. The limit and terms of the facility are agreed upon and documented and as it is often the case collaterized.

3.2.2 Implied Overdraft

This is a situation where in the absence of any previous or express agreement, the customer is permitted to draw above the credit in his account. A customer who draws a cheque in excess of his credit in his account is said to be making an implied application for an overdraft. See UBN Plc v Okubama (2000) 14 NWLR pt 688. 570; Cuthbert v Roberts, Lubbock & Co. (1909) 2 Ch. 226 at 233; ACB v Eke (1969) NCLR 292; UBN v Ozigi (1991) 2 NWLR pt 176, 677;

3.3 Interest on Overdraft

Where the overdraft is an express one, the item of interest is usually discussed and agreed upon and subject to any limitation provided by the CBN or statute binding upon the parties.

However, where the overdraft is an implied one. The right to charge compound interest accrue to the banker. The interest changeable shall be at the prevailing market rate. The right to charge interest on implied overdraft is based on two grounds:

1. The universal custom of banks
2. Implied agreement that interest will be charged.

See Barclays Bank v Abubakar (1977) 10 SC. 13 at 23

3.4 Payment of Overdraft

Where the overdraft is an express one, the obligation to pay will arise at the contractually agreed date. Where it is implied, the banker must make a demand on the customer and allow a reasonable time for the customer to repay the overdraft. See Official Receiver & Liquidafor v Oladipo Moore (1959) L.L.R 46,50

SELF ASSESSMENT EXERCISE 4

1. What is an overdraft?
2. What are the bases for charging interest on overdraft by the banker?

4.0 CONCLUSION

The bank has unfettered discretion as to whether or not to grant overdraft facility to its customer. When a bank grants overdraft to its customer, it has the right to charge interest on the amount lent to the customer. The customer is ofcourse obliged to repay the overdraft.

5.0 SUMMARY

The definition of overdraft has been considered. The types overdraft have been stated as express and implied overdraft. The kind of interest the bank can charge on overdraft may be one that has been agreed upon or compound interest in the case of implied overdraft. The time for payment of overdraft is also determined by agreement or upon demand within a reasonable time.

6.0 TUTOR-MARKED ASSIGNMENT

1. Clearly distinguish between express and implied overdraft. Cite judicial authorities

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi: Law and Practice of Banking
2. I.J. Goldface-Irokalibe: Law of Banking in Nigeria

UNIT 4

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1 Termination of Banker-Customer Relationship

4.0 Conclusion

5.0 Summary

6.0 Tutor-marked Assignment

7.0 References/further Readings

1.0 INTRODUCTION

The banker-customer relationship is a voluntary one. It basically arises from and depends upon contract, consequently the relationship can be terminated in any of the ways by which contract may be terminated. The parties themselves have the right to bring the relationship to an end. In other situations the occurrence of certain circumstances warrant the banker-customer relationship to come to an end.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. Know how both the banker and the customer or either of them can take steps to end their relationship.
2. Know other circumstances in which banker-customer relationship can be terminated.

3.0 MAIN CONTENT

3.1 Termination of Banker-Customer Relationship

Like any other contract, banker-customer relationship can be terminated by either side. In practice, the relationship may be ended in any one or other of the following ways.

3.1.1 Mutual Agreement

The parties may mutually agree to bring their relationship to an end. Once so resolved any balance owing to the customer must be paid to him and any existing overdraft cleared. This may also be so where the relationship is for a duration of time.

3.1.2 Notice of termination

The notice to close account may be given either by the customer or banker and the sum effect would be to terminate the relationship.

1. Notice by a customer

A customer is entitled to withdraw all his balance on demand but this does not have the effect of automatically closing of current account. Where a current account is sought to be closed, the customer need to clearly indicate his intention to close the account. The notice is necessary in writing. See Wilson v Midland Bank (the Reading standard) 13-10-1961

2. Notice by the Bank

The banker is not obliged not to cease to do business with the customer except upon reasonable notice. What is reasonable in the circumstance will depend on the nature and state of the account, the size of the customer's business. The age of the account and other relevant factors.

In prosperity Ltd v Lloyds Bank (1923)39 TLR 372, a month's notice was considered insufficient for closure of the plaintiff's account. The plaintiff in this case as a company, when opening the account arranged with the defendant bank that the proceeds of a subscription of the company's "snowball" insurance scheme would be received by the bank. The insurance scheme, because of its items attracted unfavourable press criticism and the name of the bank was attached. The bank then decided to terminate the relationship by giving a month's notice when the account was having a credit balance of £7,000 and when subscription were still coming in. A month's notice was considered inadequate.

3.1.3 Death of Customer

By virtue of S.75 Bill of Exchange Act LFN 2004 "the duty and authority of a banker to pay a cheque drawn on him by his customer is determined by notice of the customer's death".

The death of the customer brings to an end the banker-customer relationship and any bank balance standing to his credit including securities and other valuables become vested on his legal representatives.

Where the deceased customer is in joint account holding with another, under the survivorship rule, the balance, if credit, automatically passes to the survivor(s).

In the case of agency, death of an agent has little impact on the account. The principal can continue to operate it. But the death of the principal determines the authority given to the agent and cheques signed by the agent, even before the principal's death cannot be paid if presented after notice of the principal's death.

3.1.4 Mental Disorder of the Customer

The authority of the bank to honour the customer's cheques ceases upon receipt of notice of the customer's insanity, especially when the banker acts as agent for the customer. See Younge v Toynbee (1910) 1 KB 215. The court can appoint a receiver to take charge of the affairs of the insane customer, in which case the banker may safely pay over to the receiver the balance in the customer's account on being satisfied of the appointing instrument and the limitations thereof. The bank is obliged to open a new account, transfer the customer's credit to such account and continue the relationship with the receiver in that account.

3.1.5 Bankruptcy

The fact of bankruptcy does not itself bring to an end the banker-customer relationship because a bankrupt's right may pass on to his trustee in bankruptcy who may adopt the contract and enforce it.

See Jennings Trustees v King (1952) 1 Ch. 893

However, when a banker receives notice that bankruptcy petition has been filed against the customer, the bank should immediately cease to honour cheques drawn by him. While the banker can receive payments tendered to the credit of the customer. It cannot safely honour withdrawals from the account by the customer.

Where he is adjudged bankrupt, he ceases to possess the right to operate the account, such right having being vested in his trustees. The trustees may operate on the funds in the account through a new account which the bank must have opened for the purpose of the trustees operating the account.

3.1.6 Winding up

When the life of a bank terminates, the relationship of banker-customer consequently terminates too. The Nigerian Deposit Insurance Corporation (NDIC) is charged with the duties of taking over the assets and liabilities of a failing bank with a view to liquidating it. On the other hand the CBN may revoke the licence of a bank and seek its winding up. In these situations, the relationship of bank-customer terminates.

Winding up may also be on the side of a company customer. Winding up under the Companies and Allied Matters Act brings the life of the company to an end. Once a liquidator is appointed all the powers the directors cease and become vested in the liquidator. At this point the existing banker-customer relationship terminates. If the liquidator wishes to continue as a customer of the bank, he is obliged to open a new account in his own right.

3.1.7 Outbreak of war

The outbreak of war does not automatically terminates the banker-customer relationship but keeps it in abeyance. But if the government declares that the properties of the enemy alien be turned over to the state, the relationship of the banker with such enemy alien whose property become vested in the state ceases to exist. See Arab Bank Ltd v Barclays Bank (DCO) (1954) AC 495.

SELF ASSESSMENT EXERCISE 5

1. Mention at least 5 ways in which banker-customer relationship can be terminated and explain two with judicial authorities.

4.0 CONCLUSION

The banker-customer relationship is not a perpetual one. It lasts as long as the parties choose to continue in the relationship. Both parties therefore have the right to terminate the relationship. Other ways by which banker-customer relationship terminates is the occurrence of certain events that are not determinate by the parties.

5.0 SUMMARY

There are several way by which banker-customer relationship can come to an end. Those ways by which the parties can exercise their right of termination of the relationship are by the mutual agreement of parties and by notices of either of the parties. Other factors that warrant termination are: Death of the customer, Mental disorder of a customer, Bankruptcy, Winding up of the bank or the customer (if the customer is a company), and outbreak of war.

6.0 TUTOR-MARKED ASSIGNMENT

1. Identify and discuss the ways by which the parties to a banker-customer relationship can exercise their right to terminate the relationship.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi: Law and Practice of Banking
2. I.J. Goldface-Irokalibe: Law of Banking in Nigeria

MODULE 4

UNIT 1. Nature of Negotiable Instruments

UNIT 2. Bills of Exchange

UNIT 3. Cheque

UNIT 4. Promissory Notes

UNIT 5. Bank Draft

UNIT 1

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1 Nature of Negotiable Instruments

3.2 Elements of Negotiable Instruments

4.0 Conclusion

5.0 Summary

6.0 Tutor-marked Assignment

7.0 References/further Readings

1.0 INTRODUCTION

Negotiable Instruments or bills are so called because of their negotiability nature. “A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill”. See section 31 Bills of Exchange Act, 2004

There are three major negotiable instruments which are: bill of exchange, Cheque and promissory notes. The Bills of exchange Act is the principal law that governs negotiable instruments in Nigeria. See section 73 and 91(1) of the Bills of Exchange Act. The Act also allows the application of rules of common law provided they are not inconsistent with its express provisions. See section 98 of Bills of Exchange Act.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. Understand the definition of negotiable instruments.
2. Know the characteristics of negotiable instruments.

3.0 MAIN CONTENT

3.1 Nature of Negotiable Instrument

A negotiable instrument is a financial instrument, the full legal title to which is transferable by mere delivery (in case of bearer instrument) or by endorsement and delivery (for order instrument). See World Wide Engineering Ltd v. NNSC (1989) 1 CLRQ. The effect of such transfer is that its complete ownership and legal interest pass to the transferee who shall be capable of having legal title superior to the title of the transferor provided he takes the instrument complete and it is regular on the face of it, before it is overdue in good faith and for value.

3.2 Elements of Negotiable Instruments

1. The transfer must be for value i.e. the holder must have given consideration although consideration must not be adequate. See S. 27 Bill of Exchange Act
2. There must be no evidence on its face to destroy negotiability. For example a cheque specifically marked “not negotiable” Account payee only” cannot be a negotiable instrument as negotiability requires transferability.

3. The bill must be complete and regular on the face of it at the time of transfer. The bill must not lack any material requirements like name of payee, amount in words.
4. Transfer must be done before the instrument is overdue. A bill is said to be overdue after maturity, and in the case of a cheque, after six months, and in that case negotiability is destroyed.
5. Transferee must act in good faith. See S.92 Bill of Exchange Act. Good faith entails honesty. A transferee is expected to act honestly without being aware of the defect in the title of the transferor.

Self Assessment exercise 1

1. What is a negotiable instrument?
2. Mention the elements of negotiable instruments

4.0 CONCLUSION

A negotiable instrument is primarily known by its nature of transferability. Any bill that cannot be transferred from one person to another either by delivery or endorsement is never a negotiable instrument. Other elements only make the instrument valid and their irregularity does not mean that the instrument is not a negotiable instrument.

5.0 SUMMARY

An instrument can only be referred to as a negotiable instrument if it can be transferred by one person to another either by mere delivery or by endorsement. The transferees therefore have legal title to the instrument. These are some requirements that make a negotiable instrument valid. There are transfer for value, regularity, good faith, and transfer before overdue.

6.0 TUTOR-MARKED ASSIGNMENT.

1. Explain the two ways by which a negotiable instrument validly passes to the transferee.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi – Law and Practice of Banking
2. I. J. Goldface – Irokalibe – Law of Banking in Nigeria.

UNIT 2

1.0 Introduction

2.0 Objective

3.0 Main Content

- 3.1 Bill of Exchange
- 3.2 Parties to bill of exchange
- 3.3 Holder of bill of exchange
- 3.4 Liability of parties
- 3.5 Negotiation of bills
- 3.6 Dishonour of bills
- 3.7 Discharge of bills

4.0 Conclusion

4.0 Summary

6.0 Tutor-marked Assignment

7.0 References/further Readings

1.0 INTRODUCTION

A bill of exchange usually contain an unconditional obligation on the part of one person to pay a certain sum of money to another, it is a negotiable instrument in the sense that it may be passed to a third party in such a way as to vest him with the right to claim from the person originally bound. The third party can also pass it to another person who may further pass it to another person and so on.

A bill of exchange can be an inland bill or a foreign bill Section 4 (1) (a) and (b) of the Bills of Exchange Act defines an inland bill as one which is or on the face of it purports to be both drawn and payable within Nigeria, or drawn within Nigeria upon some person resident therein. Any other bill that is not an inland bill is a foreign bill.

A bill is said to be a sight or demand bill when the drawer of a bill directs the drawee to pay the payee or order or bearer as soon as the bill is presented to him without stating time for payment. See Section 10 (1) (a) and (b) while a bill is a time bill when the drawer orders the drawee to pay only after the lapse of a specified time after presentation or occurrence of an event.

A bill of exchange involves parties who were original parties to the contract and by negotiability (transfer) include parties who were not privy to the contract.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. Identify the original parties to a bill of exchange
2. Know the position of subsequent holder of a bill.

3.0 MAIN CONTENT

3.1 Bill of Exchange

A bill of exchange is defined in S. 3(1) Bills of Exchange Act as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future date, a sum certain in money or to the order of, a specified person, or bearer." A valid bill must fulfill all the essential ingredients that the definition requires.

3.2 Parties to a bill of exchange.

1. The drawer: i.e. the person who makes an order requiring the other person to pay.
2. The drawee: This is the person on whom the bill is drawn. He is the person who is liable to pay at the maturity of the bill.
3. The payee: This is the person named on the bill as being entitled to receive the proceeds of the bill.

3.3 Holder of a bill of exchange: S.2 Bill of Exchange Act defines a holder as "the payee or endorsee of a bill or note who is in possession of it or the bearer thereof" with the intention that the property in it has passed to him. The holder of a bill can either be holder for value or in due course.

1. Holder for value: S. 27(2) BEA states that where value has at any time been given for a bill the holder is deemed a holder for value as regards the acceptor-drawee and parties to the bill who becomes parties prior to such time.
2. Holder in due course: S. 38(b) BEA states that a holder in due course holds the bill free from any defect of title of prior parties. He must have given value and have taken the bill in good faith.

He may therefore enforce payment against all parties liable on the bill

SELF ASSESSEMTN EXERCISE 2

1. What are the necessary ingredients in the definition of a bill of exchange?
2. Explain the parties to a bill of exchange.

4.0 CONCLUSION

A bill of exchange connects parties together in one capacity or the other and their respective liabilities. Transfer of a bill from one party to another is known as negotiation and there are methods of doing so. A bill is finally discharged when paid to the holder at maturity or upon the happening of an event which should terminate the existence and operation of the bill as a negotiable instrument.

5.0 **SUMMARY**

A bill of exchange can either be an in land bill or a foreign bill.

It can be a sight/demand bill or time bill.

The parties to a bill are drawer, drawee, payee. Others are holders of a bill either as holder for value and in due course.

The conditions necessary for a party's liability are signature, delivery and capacity.

A bill is negotiated by endorsement which may be by way of blank endorsement, special endorsement, restrictive endorsement or conditional endorsement.

A bill is said to be dishonoured by non acceptance, non-payment.

Payment of a bill is made upon presentation for acceptance and payment.

There are several ways a bill is discharged i.e. by payment, renunciation, cancellation, and alteration.

6.0 **TUTOR-MARKED ASSIGNMENT.**

Explain the kinds of endorsement of bill and their implications.

7.0 **REFERENCES/FURTHER READINGS**

1. Layi Afolabi – Law and Practice of Banking

2. I. J. Goldface – Irokalibe – Law of Banking in Nigeria.

UNIT 2

1.0 Introduction

2.0 Objective

3.0 Main Content

3.1 Bill of Exchange

3.2 Parties to bill of exchange

3.3 Holder of bill of exchange

3.4 Liability of parties

3.5 Negotiation of bills

3.6 Dishonour of bills

3.7 Discharge of bills

4.0 Conclusion

6.0 Summary

8.0 Tutor-marked Assignment

9.0 References/further Readings

1.0 INTRODUCTION

A bill of exchange usually contain an unconditional obligation on the part of one person to pay a certain sum of money to another, it is a negotiable instrument in the sense that it may be passed to a third party in such a way as to vest him with the right to claim from the person originally bound. The third party can also pass it to another person who may further pass it to another person and so on.

A bill of exchange can be an inland bill or a foreign bill Section 4 (1) (a) and (b) of the Bills of Exchange Act defines an inland bill as one which is or on the face of it purports to be both drawn and payable within Nigeria, or drawn within Nigeria upon some person resident therein. Any other bill that is not an inland bill is a foreign bill.

A bill is said to be a sight or demand bill when the drawer of a bill directs the drawee to pay the payee or order or bearer as soon as the bill is presented to him without stating time for payment. See Section 10 (1) (a) and (b) while a bill is a time bill when the drawer orders the drawee to pay only after the lapse of a specified time after presentation or occurrence of an event.

A bill of exchange involves parties who were original parties to the contract and by negotiability (transfer) include parties who were not privy to the contract.

2.0 OBJECTIVES

At the end of this unit you should be able to:

3. Identify the original parties to a bill of exchange
4. Know the position of subsequent holder of a bill.

3.0 MAIN CONTENT

3.1 Bill of Exchange

A bill of exchange is defined in S. 3(1) Bills of Exchange Act as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future date, a sum certain in money or to the order of, a specified person, or bearer." A valid bill must fulfill all the essential ingredients that the definition requires.

3.2 Parties to a bill of exchange.

1. The drawer: i.e. the person who makes an order requiring the other person to pay.
2. The drawee: This is the person on whom the bill is drawn. He is the person who is liable to pay at the maturity of the bill.

3. The payee: This is the person named on the bill as being entitled to receive the proceeds of the bill.

3.3 Holder of a bill of exchange: S.2 Bill of Exchange Act defines a holder as "the payee or endorsee of a bill or note who is in possession of it or the bearer thereof" with the intention that the property in it has passed to him. The holder of a bill can either be holder for value or in due course.

1. Holder for value: S. 27(2) BEA states that where value has at any time been given for a bill the holder is deemed a holder for value as regards the acceptor-drawee and parties to the bill who becomes parties prior to such time.
2. Holder in due course: S. 38(b) BEA states that a holder in due course holds the bill free from any defect of title of prior parties. He must have given value and have taken the bill in good faith.

He may therefore enforce payment against all parties liable on the bill

SELF ASSESSEMTN EXERCISE 2

3. What are the necessary ingredients in the definition of a bill of exchange?
4. Explain the parties to a bill of exchange.

4.0 CONCLUSION

A bill of exchange connects parties together in one capacity or the other and their respective liabilities. Transfer of a bill from one party to another is known as negotiation and there are methods of doing so. A bill is finally discharged when paid to the holder at maturity or upon the happening of an event which should terminate the existence and operation of the bill as a negotiable instrument.

7.0 SUMMARY

A bill of exchange can either be an in land bill or a foreign bill.

It can be a sight/demand bill or time bill.

The parties to a bill are drawer, drawee, payee. Others are holders of a bill either as holder for value and in due course.

The conditions necessary for a party's liability are signature, delivery and capacity.

A bill is negotiated by endorsement which may be by way of blank endorsement, special endorsement, restrictive endorsement or conditional endorsement.

A bill is said to be dishonoured by non acceptance, non-payment.

Payment of a bill is made upon presentation for acceptance and payment.

There are several ways a bill is discharged i.e. by payment, renunciation, cancellation, and alteration.

6.0 TUTOR-MARKED ASSIGNMENT.

Explain the kinds of endorsement of bill and their implications.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi – Law and Practice of Banking
2. I. J. Goldface – Irokalibe – Law of Banking in Nigeria.

Unit 3

1.0 Introduction

2.0 Objectives

3.0 Main content

3.1 Cheques

3.2 Crossed and Open cheques

3.3 Types of crossing

3.4 Rules of crossing

3.5 Effects of crossed cheque "not negotiable"

3.6 payment of cheques

3.7 Dishonour of cheques

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/further readings

1.0 INTRODUCTION

Cheque is the most common and widely used negotiable instrument far above other negotiable instruments in business transactions. It is an express directive from the customer requiring his banker to repay the money he deposited to him as indicated in the cheque. Cheques are usually issued crossed or opened. The crossed cheque has its advantages such that it is easier to trace the recipient of the proceeds, through the account in case of fraud. The time allowed for clearing process may help to detect any fraud so that a stop order can be placed on it. However, on the part of the payee a crossed cheque is a delay for his payment in cash especially when he does not have a current bank account. Cheques are usually used in banks.

2.0 OBJECTIVES

It is intended that at the end of this unit you should be able to know:

1. What a cheque is
2. The implications of crossed and open cheque
3. Instances of payment and dishonor of cheques by banks.

3.0 MAIN CONTENT

3.1 CHEQUE

Section 73 BEA defines a cheque as "a bill of exchange drawn on a banker payable on demand". In bringing this definition under that of the bill of exchange, a cheque may comprehensively be defined as "an unconditional order in writing, signed by the drawer, requiring the bank to whom it is addressed, to pay on demand, a sum certain in money to, or to the order of a specified person or bearer". See UBN v Okubama (2000) 14 NWLR pt 688. 573 Trade Bank plc v. Barilux (Nig) Ltd (2000) 13 NWLR pt 685, 486.

3.2.1 "Crossed" and "open" cheques

A cheque may be issued "crossed" or "open". It is crossed if two parallel lines are drawn across its face with or without any inscriptions. Where a cheque is not crossed it is an open cheque even if it bears some inscriptions. A crossed cheque is not normally payable over the counter unlike an open cheque.

3.3 Types of Crossing see S. 78 BEA

There are two types of crossing to wit: “General” and “Special” crossing.

A cheuqe is specially crossed when the crossing bears the name of a bank i.e the crossing being special to that bank. All other types of crossing are general crossing.

3.4 Rules of Crossing s.79 BEA

1. A cheque may be crossed generally or specifically by the drawer
2. Where a cheque is uncrossed, the holder may cross it generally or specially
3. Where a cheuqe is crossed generally the holder may cross it specially
4. Where a cheque is crossed generally or specially, the holder may add the words “not negotiable”.
5. Where a cheque is crossed specially the banker to whom it is crossed may again cross it especially to another banker for collection
6. Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

3.5 Effect of Crossed cheque “not negotiable” S. 83BEA

A cheque is presumed to be negotiable unless marked “not negotiable”. A crossed cheque “not negotiable” does not prevent its title from being transferred, but the transferee cannot have a better title than that of the transferor.

SELF ASSESSMENT EXERCISE 3

1. Explain why a cheque is referred to as a bill of exchange
2. Who, when and how can a cheque be crossed?

3.6 Payment of cheques

The paying banker is the banker to whom the cheque is addressed for payment i.e the drawee of the cheque; and he is under an implied obligation to pay cheques drawn on him by the customer provided that certain conditions are fulfilled. This obligation includes payment of instruments of money transmission duly authorized by the customer like direct debit, standing order, promissory note and bill of exchange addressed to the bank for payment.

However, the duty to pay the customer's cheque is not an absolute duty that must be performed at all times and in all circumstances. It is a conditional duty that is based on the occurrence of certain events and the non-occurrence of others.

The cheque is payable if and only if:

The account is in fund or there is an arrangement for credit *(Olajide Oyewole v Standard Bank of West Africa Limited - 1968).* There is however a caveat, as decided in *Construction Industries Co. Limited v Bank of the North Limited* that "where a bank manager is held out to have a limited authority in respect of the negotiation of overdraft with a custome^{r}, the bank as principal is not liable in damages for failure to fulfill a promise to a customer who has knowledge that the manager as agent has made a promise in excess of that authority";

The cheque is regularly drawn and presented at the branch where the account is kept unless there is an arrangement to cash such cheques elsewhere;

There is no legal impediment towards payment.

3.7 Dishonour of Cheque

The usual inscriptions on cheques to be dishonored are contained in the clearing house rules which states that the reason for dishonouring an instrument must be embodied on that instrument and should not be at variance with the fact. Examples of such reasons are

as follows:

where **the account lacks fund**

(i) Refer to drawer or simply "R/D"

(ii) "Re-present" or "Please re-present"

(iii) "Effects uncleared" or "Effects uncleared please re-present" if the customer has some cheque that are not yet cleared.

Irregularity of instrument

(i) Drawer's signature required

(ii) Drawer's s signature irregular.

(iii) Signature unknown

(iv) insufficient mandate — 2nd or 3rd signature required.

(v) Alteration to ... requires drawer's confirmation (date, amount in words, amount in figure, crossing or payee's name).

(vi) Cheque mutilated — drawer's confirmation required.

(vii) Amount in words or amount in figure required.

(viii) Words and figure differ.

(ix) ‘Not due for payment' or 'Post-dated'.

(x) Payee's name required.

(xi) Cheque out of sequence (if cheque number is too far from the last one presented).

(xii) `Out of date' or 'stale' if more than six months old.

(xiii) Endorsement irregular.

(xiv) Wrong domiciliation, negotiate direct, if presented in a branch other than the branch where the account is domiciled without arrangement to cash cheque elsewhere.

(c) ***Legal bar towards payment***

(i) Payment stopped or payment countermanded.

(ii) Drawer deceased.

(iii) Refer to drawer (for drawer in bankruptcy or of unsound mind),

(iv) Refer to drawer (in case of garnishee order).

(d) Other reasons

(i) Account closed

(ii) No account (most unlikely or how would he have a cheque!)

(iii) Account transferred to ... branch.

(iv) Payee's identity requires confirmation.

(v) Drawer's confirmation required.

Countermand of Payment

Section 75 of the Bill of Exchange Act gave two main reasons for revocation of a banker's authority to pay a cheque: (1) Countermand of payment and (2) notice of the customer's death. There are, of course, other reasons which can lead to revocation of authority and these have already been discussed.

A customer may countermand (or stop) a cheque at any time before it is paid and once an effective notice of countermand has been received, the bank may not be able to debit the customer if the cheque is paid.

For the stop notice to be effective, it has to be given in writing by the customer as only the drawer has the right to stop a cheque *(Ademiluyi v African Continental Bank Limited).* As an interim measure however, the customer may use the quickest device to reach the bank with the stop notice - e.g. telephone, fax or E-mail but the banker will always request for written confirmation and until this is obtained, if the cheque is presented for payment, it can be returned marked "Drawer's confirmation required" or "cheque countermanded by telephone – written confirmation being awaited". In case of a company, the Company Secretary can stop a cheque and, in a partnership, any active partner can stop a cheque even though not signatories to the accounts. A principal can also stop a cheque drawn on his behalf by an agent.

4.0 CONCLUSION

Even with the introduction of electronic banking, cheque still occupy an important position in banking transaction especially in the payment of money by a bank customer to another person. Cheque becomes the important document evidencing the customer’s order to pay money to the named person. Cheques are still inevitable even for personal payment when the sum of money is large beyond the limit allowed for withdrawal by ATM card.

5.0 SUMMARY

A cheque is for all intent and purposes a bill of exchange requiring a bank to pay certain sum in money. The cheque can be issued crossed or open.

When a cheque is presented to the bank, it is obliged to pay the sum involved therein if there is enough fund in the account, the cheque is regularly drawn, and there is no legal impediment towards payment were these conditions are lacking. The bank would be justified in dishonouring the chque.

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the reasons that would justify a bank for refusing to pay on a cheque presented to it?

7.0 REFERENCES/FURTHR READINGS

1. Layi Afolabi – Law and Practice of Banking.
2. I. J. Goldface Irokalibe – Law of Banking in Nigeria.

UNIT 4

1.0 Introduction

2.0 Objectives

3.0 Main content

 3.1 Promissory Notes (Definition)

 3.2 Elements of Valid Promissory Note

3.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/further readings

1.0 INTRODUCTION

A promissory note is also recognized as a form of bills of exchange. However it has some differences with a bill of exchange proper. As it will be seen from the definition of a promissory note is the main content, it is a promise to make payment while in a bill, there is an order to make payment. Also, the person signing a promissory note is the debtor of the payee but in the case of a bill the drawer is generally the creditor of the drawee.

A promissory note does not have a prescribed form to adhere to so long as the conditions of the definitions are observed. See Nwokorie v. Nwaneri (1967)1 ALR

Comm. 173. The fact that a promissory note can take any form, it must however, fulfill certain conditions for it to b e valid.

2.0 OBJECTIVE

At the end of this unit you should be able to:

1. Define a promissory note
2. Know the necessary elements that make a valid promissory note.

3.0 MAIN CONTENT

3.1 Promissory Notes

Section 85(1) BEA defines a promissory note as “an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of, a specified person or to the bearer.”

3.2 Elements of a valid Promissory Note

The above definition consists of elements that make a promissory note negotiable.

1. It must be in writing and signed by the maker see. Geary v. physic (1908) ER 87 at 88. In Agbaje v. View Point (Nig) Ltd (1977) NCLR 93 it was held that initials do not qualify as signature.
2. It must be a promise or undertaking to pay. A mere acknowledgement of a debt without a promise to pay the same is not a valid promissory note. Similarly an IOU, being only evidence of a debt owed, is not a promissory note.
3. The promise must be unconditional. A note expressed to be payable on a contingency is not a valid note and the happening of the event does not cure the defect.
4. The promise must be to pay money. By virtue of S.3(2) BEA a note which promises anything in addition to the payment of money is not a valid promissory note.
5. The amount payable must be certain. By virtue of S.9(2) BEA a sum is certain, where the sum payable is expressed in words and also in figures and where there is discrepancy between the two, the sum expressed in words is the amount payable.

6. The payee must be certain. Where a bill is not payable to bearer the payee must be named or otherwise indicated therein with reasonable certainty. And where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer. See section 7(1) (3) BEA.
7. The time of payment must be certain. A note in which no time for payment is expressed is a bill payable on demand. By virtue of S.11(1) a bill is payable at a determinable future time within the meaning of the Act which is expressed to be payable -
   a. At a fixed period after date or sight
   b. On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

A promissory note made payable “on or before” a named date drew controversy as to the certainty of date. See Williamson v. Rider (1962)2 All ER 268, (1963) 1QB 89. See also John Burrows Ltd v. Subsurface survey Ltd (1968)68 DLR (2d)354.

SELF ASSESSMENT EXERCISE 4

1. What are the necessary elements of the definition of a promissory note.

4.0 CONCLUSION

A promissory note presupposes a debtor-creditor relationship, which warrants the writing of the promissory note. There is no prescribed form of writing a promissory note by any statute or in practice. It can take any form, however, there are certain conditions that the definition of promissory note require to be fulfilled.

5.0 SUMMARY

The definition of promissory note under section 85(1) of the Bills of Exchange Act stipulates the conditions that make a promissory note valid. They are:

1. That the instrument must be in writing and signed by the maker.
2. There must be an undertaken or promise to pay.
3. The promise to pay must be unconditional

4. The promise to pay must be to pay money only
5. The amount payable must be certain
6. The payee must be certain
7. The time of payment must be certain.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the first three conditions for a valid promissory note.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi – Law and Practice of Banking.
2. I. J. Goldface Irokalibe – Law of Banking in Nigeria.

UNIT 5

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Bank Draft
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

A bank draft is an order for payment of money drawn by a banker upon itself. It is a more reliable order or promise to pay money more than an ordinary cheque. This is because those limitations that attends to cheques do not affect a bank draft. A bank draft contains an undertaking to pay the amount of the draft. The bank has a duty to the person on whose request it has agreed to issue a draft to issue and honour such draft. When therefore a bank dishonours its own draft the customer at whose instance the draft was issued has the right to sue the bank for breach of contract.

The banker's draft being a promissory note given by a banker to its customer contains unconditional undertaking by the banker to pay the amount of the draft.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. Know the legal definition of a bank draft
2. Understand the duty of the bank issuing a bank draft.

3.0 MAIN CONTENT

3.1 Bank Draft.

A bank draft is a prescribed instrument drawn by a banker upon himself and payable on demand at an office of his bank. A bank draft can either be treated as bill of exchange or a promissory note see S.5(2) BEA

Definition of bank draft. See UBA Ltd v. Ibhafidon (1994) 1NWLR pt. 318, 90 at 124.

A bank draft is different from a cheque in that, while, a banker may refuse to honour an ordinary cheque on the grounds that the drawer has no money in his account to cover the amount in the cheque, a bank draft on the other hand is payable at sight regardless of whether the person on whose behalf the draft was issued held money in his account at the material time or not.

In practice banks issue drafts with the name of the payee indicated on its face. Accordingly a draft may not be issued payable to bearer on demand. See Union Bank of Nigeria v. Sepok (Nig) Ltd. (1998) 12 NWLR Pt 578, 435.

Drafts are not ordinarily crossed by the issuing branch and can be paid across the counter to the beneficiary. However, if the beneficiary elects to cross the draft himself, he cannot be paid at the counter.

A bank owes a duty of care in issuing a draft quite apart from the banker-customer relationship. Se Agbanelo v. Union Bank of Nigeria (2000) 7 NWLR pt. 666, 534 at 550-551.

Where a bank issues a draft to a non account holder the relationship between the bank and the draft purchaser would still be one of a contract. The relationship of banker and customer have been established. See New Nigerian Bank v. Odiase (1993) 8 NWLR pt 314-235 at 243.

SELF ASSESSMENT EXERCISE 5.

1. What is a bank draft and its difference from a cheque?
2. What is the implication a crossed draft by a beneficiary?

4.0 CONCLUSION

Bank draft is a sure means of securing payment by a bank on behalf of its customer. This is because bank drafts are not ordinarily dishonoured like cheques. The bank would have taken into consideration all relevant factors before making the decision to undertake to pay the money of the draft. Once that decision is communicated to the customer, the bank becomes bound in contract to fulfill its promise.

5.0 SUMMARY

A bank draft has dual features. It may be treated as a bill of exchange or a promissory note.

Once a bank draft is issued by a bank, it cannot dishonor it simply because there is no money in the customer's account at the material time.

Bank drafts are not normally crossed and so payable at the counter except the payee elects to cross it himself.

A non-account holder who buys a bank drafter is deemed to be a bank customer by contract.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the duties of the bank who issued a bank draft and the consequence of breach of the duties.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi – Law and Practice of Banking.
2. I. J. Goldface Irokalibe – Law of Banking in Nigeria.

Module 5

Unit 1 Nature of Bankers Securities
Unit 2 Guarantee
Unit 3 Mortgages
Unit 4 Charges

Unit 5 Stocks and Shares

Unit 1

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1 Nature of Securities for Bankers Advances

3.2 Characteristics of Good Security.

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References /Further Readings

1.0 INTRODUCTION

Banker’s grants accommodation to their customers by way of advances, loans or overdraft. A loan refers to the aggregate principal amount borrowed and from time to time outstanding under the loan facility.

Overdraft is a credit facility granted to a bank customer to withdraw beyond his credit balance.

Every lender of money must have regard to the chances of repayment. Security in the law of banking refers to any form of assurance which guards or secures a loan or advance made by a banker to his customers. Security becomes the banker’s last resort on which he can rely to recover the amount due from his defaulting customer.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. know the concept of banker’s security
2. Identify the factors that make a good security.

3.0 MAIN CONTENT

3.1 **Securities for Bankers Advances**

When banks lend money, they expect to be repaid as and when due and in the ordinary course of business. The banker's evaluation of credit worthiness takes into consideration canons of lending commonly referred to as the Cs of lending which are: capital, capability, character, condition and connection.

- Capital refers to the owners' stake in the business.
- Capability refers to the ability of the borrower to generate income thus ensuring repayment.
- Character refers to the reliability, trustworthiness and consistency in paying debts.
- Condition refers to the state of the economy as to be able to justify the investment channel e.g. will there continue to be demand for the goods to be invested on? Will the raw materials importation be banned or restricted.
- Connection – refers to other accounts with which the customer has a linkage or can the bank gain more business through the advance? (Layi Afolabi)

Despite the precautions taken by the banker it is not possible, out of a portfolio of advances, to know which one will turn bad which obviously would have been rejected. The option left to the bank to be able to recover its lending in the face of bad debts is security.

Security is an assurance for repayment. It is the last source through which the bank can get its money recovered in the event of non payment.

Characteristics of good security

A good banking security must have a stable or increasing value and must be capable of achieving this objective by satisfying some essential requirements:-

1. **Sufficiency** – it must be adequate to cover the banks entire exposure because of the downward fluctuations in value, it is necessary to leave sufficient margin between the value of the security and the bank's exposure.

2. **Objective and stable value** – A good security must be capable of being valued in a relatively objective rather than sentimental manner. Life policy is a perfect example of security with objective value. Valuation of landed property and business assets like work

of arts are to some extent subjective as two valuers will not arrive at the same value for a property.

3. **Easily Realizable –** A good security must be easily realizable without too much cost or delay in a realization. Shares of private companies are examples because they are not traded openly on the stock exchange. Or some industrial properties and specialized equipment also have restricted market.

4. **Good Title –** The security must have unquestionable title. If the transferor has no good title, the bank will have a bad title too.

6. **Not onerous**: The security must not impose undue liabilities or inconvenience on the bank. It must not entail additional cost or risk.

7. **Prime Asset**: At best security must be the borrower's prime asset i.e. an asset that the borrower holds in esteem and would not like to lose.

4.0 CONCLUSION

The most important factor to be taken into consideration when granting a loan or advances is the issue of security. The CBN has power to fix a threshold of the sum of money which must not be granted as loan or advance without security excepted with the approval in writing of the CBN. Where the rules and regulations of a bank provide for adequate securities, such securities shall, prior to the grant must be obtained.

4.0 SUMMARY

Security is an assurance for repayment.

The bank falls back to it in case of inability to pay by the customer and realizes it to recover its money.

In assessing the safety of an advance, the banker takes into consideration the borrower's capacity to pay, the purpose for which the advance is required, the source form which payment is expect, profitability of the transaction and of course the security offered.

The characteristics of good security are as follows: Sufficiency, objectively stable value, easy realization, and good title, ease of assignment and discharge, and prime asset.

5.0 TUTOR-MARKED ASSIGNMENT

What are the essential requirements of a good security?

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi – Law and Practice of Banking.
2. I.J. Goldface Irokalibe – Law of Banking in Nigeria.

UNIT 2

1.0 Introduction
2.0 Objectives
3.0 Main Content
   3.1 Definition of Guarantee
   3.2 Basis of Guarantee.
   3.3 Features of Guarantee
   3.4 Termination of Contract
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References /Further Readings

1.0 INTRODUCTION

One of the commonest methods by which bankers protect themselves against loss on advances is by taking a guarantee. The person who gives the promise is the guarantor or surety and the person on whose behalf the promise is given is called the principal debtor, while the creditor is the banker. The guarantor must have contractual capacity, that is, he must not be a minor or a bankrupt. For a bank to claim the benefit or obligation due to it under the contract of guarantee, it must observe and perform its own obligations too.

2.0 OBJECTIVES

.It is intended that at the end of this unit you should be able to:

1. Know the meaning of guarantee
2. understand the legal implications of a contract of guarantee.

3.0 MAIN CONTENT

3.1 Definition Guarantee:

A guarantee is a written undertaking by one party (called the guarantor) to be answerable for the debt, default or miscarriage of another party (called the principal debtor) who must be under legal obligation to repay the debt or perform the act in question.

In: ***Apugo & sons Ltd V. ACB*** (1889) 1 CLRQ 88 R 1.

Held: Guarantee is a collateral promise to answer for the debt, default or miscarriage of another as distinguished form an original and direct contract for the promisor's own act.

3.2 The Basis of Guarantee: It is of the essence of guarantee that there should be someone liable as principal. Thus where one person agrees to become responsible for another, but no valid claim ever arises against the latter, no contract of guarantee exists.

See Apugo's case (supra) R. 2

The guarantor's liability is contingent liability and does not crystallize or become actual liability until the principal debtor defaults. Once a default has been committed, the guarantor becomes immediately liable even if notice of default has not been served on him.

In: ACB v. Kembi & Talabi 1974 NCLR 282

Held: the liability of a surety under a contract of guarantee arises when the principal debtor makes default and except otherwise agreed, notice of the debtor's default need not be given to the surety and he is liable even if he has not been requested to pay. When the principal debtor dies after defaulting, deceased's personal representatives being required to pay.

The liquidation of a statutory body of corporation will also make the guarantor to be primarily liable.

See: Western Nig. Finance Corp. v. Aladesanmi (1970) NCLP 335

3.3 Features of Guarantee

(i) A guarantee must be in writing

(ii) There are 3 parties in a contract of guarantee: The creditor, the principal debtor and the guarantor.

(iii) A guarantor assumes only a secondary liability and the guarantee is enforceable only if and when the principal debtor fails

(iv) A guarantee gives rise to accumulation of at least 3 sub-contracts; between the debtor and the creditor, between the creditor and the guarantor, between the guarantor and the debtor and if more than one guarantor, between or among the co-guarantors.

(v) The legal position in a contract of guarantee is that the guarantor gives the undertaking at the request of the principal debtor.

(vi) In a contract of guarantee, the guarantor, having met his obligation under the guarantee, steps into the shoes of the creditor and can take legal action against the debtor to recover his loss.

3.4 Termination of Contract of Guarantee

4.0 CONCLUSION

Whenever a bank considers accepting a guarantee as security for a loan or advance, the bank must take into consideration the financial capability of the prospective guarantor as well as the legal requirements that make a contract of guarantee enforceable.

5.0 SUMMARY

A guarantee is an undertaking by a person to pay the debt of another in case that other person fails to pay.

A guarantee is required to be in writing.

The liability of the guarantor is secondary, that is, it arises only when the original debtor fails to pay

A guarantee like any other contract can be terminated in the following ways:- By Agreement, Notice to creditor, Notice of death, Bankruptcy Alteration of the terms of the principal contract and release of principal.

6.0 TUTOR-MARKED ASSIGNMENT

With judicial authorities provide the legal definition of guarantee and the basis for the guarantor’s liability.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi – Law and Practice of Banking.
2. I.J. Goldface Irokalibe – Law of Banking in Nigeria.

UNIT 3

1.0 Introduction
2.0 Objectives
3.0 Main Content
    3.1 Mortgage on Land
    3.2 Equitable and Legal Mortgage
    3.3 Realization of Legal Mortgage
    3.4 Discharge of Mortgage
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References /Further Readings

1.0 INTRODUCTION

A mortgage is a conveyance of interest in a property as security for the payment of a debt or for the discharge of some other obligation. The borrower is called the “mortgagor” and the lender the “mortgagee” Land is a universally acknowledged security for various forms of lending. In law land includes fixtures standing thereon (Quick Quid Plantatur Solo Solo Cedit). A mortgage of land may be created in the form of legal or equitable.

2.0 OBJECTIVES

This unit intends that at the end of it you should be able to:

1. Differentiate between legal and equitable mortgages
2. The rights available to the mortgagee upon default of payment by the mortgagor.

3.0 MAIN CONTENT

3.1 Mortgage on Land

The most common mode of creating banking security affecting land is by mortgage. Mortgage can be created in the form of equitable or legal Mortgage.

However, SS. 21 and 22 LUA stipulate that mortgage must not be created without the consent of the Local Govt. Chairman or State Governor as the case chairman or state Governor as the case may be, first sought and obtained. See Savannah Bank of Nigeria Ltd v. Ajilo (1989) INWLR.

The fact of this case was that, a Deed of Legal Mortgage was created by A. O. Ajilo in favour of Savannah Bank and was duly registered on 5 -9,1980 at the Lagos State Land Registry. The Mortgage was to secure advances made by the bank. The account later developed some problems and the bank sought to sell the property. The legal mortgage was without written consent of the Governor of Lagos State.

Held: that as the Decree stipulates that holders of title of Land prior to LUA would continue to hold such title as if they were holders of statutory right of occupancy. Failure therefore of the parties to obtain the required consent of the Governor renders the deed of mortgage null and void.

See also Innih v. Ferado A&C Ltd (1990) 5 NWLR pt 152; UBN V. Ayo Dare & Sons (Nig.) Ltd (2000) 11 NWLR Pt 679

3.2 EQUITABLE AND LEGAL MORTGAGE

3.2.1 Equitable Mortgage: Equitable Mortgage can be created in three ways.

(i) By simple deposit of title deed without any supporting document. It is known as "informal mortgage" as it does not require completion of any document witnessing the purpose of the deposit but there must be an implied agreement that the title document so deposited are for banking security.

See ACB V Nnaji (1962) All NLR 269

Nnaji was a customer of the Bank. He applied to the bank for an overdraft stating that the second defendant would guarantee him. The second defendant subsequently wrote to the bank stating that he would give the guarantee and for this purpose deposited his building lease with the bank to enable prepare a deed. No deed was prepared and a memorandum of deposit was also not executed but the bank nevertheless gave the overdraft.

Held: that the bank having granted the overdraft, the second defendant was bound by the contents of his letter and that the guarantee of the overdraft had been effected.

(ii) By simple deposit of title deed with the depositor executing a memorandum of deposit. The memorandum evidences the transaction and also set out the terms of the mortgage. By this the intention of depositing the title deed is clearly identified.

(iii) By simple deposit of title deed with the depositor executing a memorandum of deposit and an irrevocable power of attorney. The power of attorney employs the bank as the customer's attorney (agent) to execute legal mortgage on his behalf if the need arises. The power \ of attorney must be by deed and stamped.

3.2.2 Legal Mortgage: This is the safest type of mortgage that the bank can obtain. Legal mortgage is created by the customer/mortgagor executing a prescribed deed of mortgage in which the mortgagor's interest in the mortgaged property is absolutely conveyed to the bank, giving the bank a number of specific remedies as much as the mortgage remains in force. In most banks now they have their pre-printed legal mortgage deed form which is only completed and signed by the mortgagor.

3.3 Realization of Legal Mortgage

(i) Right of possession

The bank as a mortgagee can take possession of the mortgaged property by virtue of the proprietary interest vested on him, it can then appoint a manager or a receiver to collect rent to repay the debt. This step is usually applied when the outstanding loan is low in amount and the rent income is reasonable. The appointment of a receiver may be very useful in respect of properties that are difficult to sell but can attract good rent.

(ii) Right of Foreclosure

Foreclosure is the assumption of ownership thereby cancelling the mortgagor's right of redemption of the mortgaged property. The power to foreclose is not automatic as the mortgagee must take a court action to effect it and once granted the property becomes that of the mortgagee.

(iii) Right to Sell

The right of the mortgagee to sell the mortgaged property is a statutory right and it is not necessary for the mortgaged deed to contain the right of sale. See S. 123 P & CL 1959

The following considerations are worthy of note in the exercise of the mortgagee's power of sale.

- Where the amount due under the mortgage agreement is in dispute, the power of sale cannot be effected.
- The mortgagee's power to sell cannot be exercised until the loan is due for payment and the customer defaults in the notice served on him to pay.
- A notice requesting for payment or threatening sale, once given, will remain valid until the mortgagee exercises his right of sale.

See Ojikutu v. Agbonmagbe Bank Ltd (1966) 1 ALLNR.

The bank after giving notice, agreed to suspend sale upon the customer's promise to pay but went on to sell without fresh notice when the customer defaulted.

Held: that the earlier notice was still valid.

- In the case of third party mortgage, the guarantor/mortgagor must be given reasonable notice and fresh notice must be given if the debt he guaranteed materially altered.

- Once a mortgagor defaults in line with the provision of Law, the power of sale arises. The moment the power to sell arises, it is immaterial that thereafter the customer or mortgagor was able to pay arrears up to date.

  See Surakatu v. Nig. Housing Dev. Ltd (1981).

- A mortgagee is not a trustee to the mortgagor when exercising his right of sale but he must not conduct the sale in a reckless manner.

  In Sabbach v. Bank of WA Ltd (1962)

  It was held that a mortgagee in selling, exercises such power for his own benefit and if he acts without corruption or recklessness the court will not interfere even if the sale is disadvantageous to the mortgagor.

3.4 Discharge of Mortgage Property

Once the mortgage loan is repaid, the mortgagees right in the property is extinguished and he is under obligation to convey the property back to the mortgagor. Until that is done, he becomes the mortgagor's trustee for the custody and preservation of the title deeds. After returning the title deeds, the mortgagee shall execute a deed of release.

4.0 CONCLUSION

Mortgage can be legal or equitable, however, legal mortgage is superior in that with it the bank has wider powers including the right to sell the property if the customer defaults. The bank is not an absolute owner under mortgage, because the customer retains the right to have the property reconveyed to him after repaying the debt, thus the customer retains the right to redeem his property by paying off the debt and have the mortgage terminated.

5.0 SUMMARY

The creation of mortgage especially the legal mortgage since it amounts to transfer of proprietary right over land requires the consent of either the local Govt. Chairman or State Governor depending on the nature of the land.

There are two kinds of mortgages i.e. legal and equitable mortgages. The legal mortgage is superior to the equitable mortgage because it gives more rights to the mortgagee to deal with the property in question. These rights include: Rights of possession, foreclosure, and to sell the property.

The mortgagor has the right to reclaim his property upon full payment of the debt.

6.0 TUTOR-MARKED ASSIGNMENT

Explain with judicial authorities where necessary, the consideration to be taken into account in the exercise of the right to sell a mortgage property by the bank.

7.0 REFERENCES/FURTHER READINGS

1. Layi Afolabi – Law and Practice of Banking.
2. I.J. Goldface Irokalibe – Law of Banking in Nigeria.

UNIT 4

1.0 Introduction

2.0 Objectives

3.0 Main Content

3.1 Charge over credit Balance

3.2 Domiciliation of payment

3.3 Bills Discounting

3.4 Produce and Goods (Trust Receipt and Hypothecation)

3.5 Floating Charge

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

The term “charge” has been defined as “the appropriation of real or personal property for the discharge of a debt or personal obligation without giving the charge either a general or special property in or possession of the subject matter of the security” See Goldface-Irokalibe at p.133

Charges that involve real property may be fixed or floating charges. A fixed charge is a charge created by a company over specified assets. In practice fixed charges take the form of “fixed asset mortgage debenture” the rights and remedies are akin to those of mortgages, which have already been discussed under unit 2. The floating charge will however be considered under this unit along with other forms of charges.

2.0 **OBJECTIVES**

At the end of this Unit you should be able to:

1. know the several kinds of charges
2. know how those charges could be created.

2.0 **MAIN CONTENT**

3.1 Charge over credit balance

The borrowing customer or a third party may have credit balance which may be charged to the bank as security for banking facilities. The credit balance that may be charged to the bank includes balance of fixed Deposit Account and short Term Deposit Account, even Saving Account and Current Account.

To obtain a charge, the customer or third party will be requested to execute the banks standard memorandum of charge over credit balance which is in the nature of indemnity.

By this instrument the bank is irrevocably authorized and instructed at any time without notice to the charger to:

(i) refuse payment of any cheque or other debit which if applied would reduce the sum which may at that time be charged to the bank

(ii) liquidate the while or any part of the liabilities for which the credit balance is charged as security by debiting the account charged.

If the customer holds anything in the nature of evidence of title, it should be surrendered to the bank as disputes may arise if the customer passes such document to somebody else as gift and can be validly held to be a donatio moritis causa (gift made in contemplation of death).

Birch v. Treasury Solicitor (1951) Ch 299 (1950) 2 All ER 1190.

An elderly widow who had no blood relations expressed the wish that her deceased husband’s nephew and his wife, who were her closet friends, would have the balance in her bank accounts on her death and gave them the deposit books which included passbooks issued in two savings bank and deposit receipt. On the death of the widow, they contended that a donatio moritis causa has been made to them and the court agreed.

3.2. Domiciliation of Payment

Domiciliation of Payment is a tripartite agreement between the customer on the first part, the third party liable to pay on the second part and the bank on the third part. The customer, in consideration of the facilities the bank may think fit to grant him, irrevocably instructs the 3rd party to pay directly to the bank and he agrees to pay into the account of the customer at the bank, the amount due from time to time. A very good example is salaries as long as the person is in employment the salary continues to come in.

Another common way of domiciliation of payment as security is contract finance. It should be noted here that nothing is payable unless the customer performs. A certificate of performance once issued constitutes a valid debt against the third party and the bank can discount it, expecting payment in due course.

3.3. Bills Discounting

A customer who holds a tenor bill may need the money and may therefore approach his bank to advance him money on the security of the bill. Factors to take note:-

- The bill must be a trading bill i.e. a bill arising from normal trading activities and not an accommodation bill.
- The bill must be regular and must be a known means of financing the nature of transaction.
- The bill must be duly accepted and without any restriction as to transfer.
- The tenor must be reasonable. The short the better.
- The credit worthiness of the parties to the bill should be established.

3.4. Produce and Goods (Trust Receipt and Hypothecation)

This is a situation where the bank is asked to fiancé importation of goods and asked to have charge on the goods to be imported as security. The customer pledges the goods to the bank until the advance is paid. Here the bank only has constructive possession of the goods as they are released to the customer who becomes the bank's trustee to sell the goods. The customer is usually asked to sign a letter of hypothecation where the goods are charged as security and the bank acquires all the rights of a pledgee, including power of sale. The bank usually request the customer to further execute a Trust Deed whereby the customer expressly acknowledges that:

- He is trustee to the bank in collecting the goods
- He will collect the goods and sell on the bank's behalf.
- All proceeds will be paid to the bank.

To avoid any doubt, all documentations must be in the bank's name. The letter of credit will be in the bank's favour such that the bill of lading, marine insurance, warehouse receipt etc are all in the bank's name as well as insurance taken on the goods on arrival at the port. This will give the bank the power in the event of breach of trust to intervene by appointing and agent to take physical possession of the goods.

3.5. Floating Charge

Floating charge is another form of banking security. It is an equitable charge on the assets for the time being of a going concern. The charge is not a specific security as the company can deal freely with the assets until such time the charge crystallizes upon cessation of businesses, appointment of receiver or if the company goes into liquidation.

The characteristics of floating charge were enunciated in the case of: Re Yorkshire woolcomfers Association (1903) as follows:-

(a) if it is a charge on a class of company assets, usually circulating assets, now and in future.

(b) If that class is one that is changing from time to time in the ordinary course of the company's business.

(c) If the company may deal with the assets involved until certain steps are taken by those interested in the charge.

The circulating assets which are usually subject to floating charge are those which by their very nature, cannot be brought under the grip of a fixed charge without Jeopardizing the company's course of business. Such assets includes; stocks, work in progress, cash and book debts.

3.5.1 Effects of floating charge

A floating charge is advantageous to both the bank and the company (debenture holder).

Although the charge covers assets now and in future without any specification the company is at liberty to deal with the assets freely without approval of the bank.

On the other hand there is the problem of running down of assets especially when the company runs into difficulties, it is likely to run down its current assets, stock and work in progress would be sold off at give away prices and other resources used up.

Foster v. Borax (1901), it was held that the sale made by a company of all its assets to another company was valid notwithstanding the floating charge.

Another problem about a floating charge is the reservation of title. This problem emanated from the case of:

Aluminium Industries Vassen v. Romalpa Aluminium (1976)

A Dutch Company sold quantities of aluminium foil to an English Company. The sale contract provided in effect that the ownership of the foil would not be transferred to the English Company until it had paid everything it owed to the Dutch Company and if the goods were sold before payment, the sales proceeds had to be held in trust for the supplier.

The English company borrowed money from its bankers against a debenture and eventually the English Company got into financial difficulties as a result of which its bankers appointed a receiver.

Held: that both the realized cash from the English Company's sales of the foil and its existing stocks of such materials supplied by the Dutch Company were recoverable by the Dutch company in priority to the secured and unsecured creditors of the English Company and was good against the appointed receiver.

The reservation of title is more applicable to stocks as the company may not own all it possesses and stocks may have been acquired on credit with the seller retaining proprietary interest on them until he is paid.

4.0 CONCLUSION

Charges are not ordinarily classified into legal and equitable as is applicable to mortgages. Even if the instrument is referred to as a legal charge, it does not like a legal mortgage vest a legal estate in the charge. The Governor's consent is therefore not required before creating a valid 'legal' charge affecting, landed property. See Omo-Oare v. New Nigerian Bank Ltd. (1978) ALR. Com.180.

5.0 SUMMARY

Charges can be made over credit balance in bank account, employee's salary by way of domiciliation of payment, Bills discounting, Hypothecation, fixed and floating charges.

6.0 TUTOR-MARKED ASSIGNMENT

Explain under two circumstances in which money can be charged in order to borrow money.

7.0 REFERENCES/FURTHER READING

1. Layi Afolabi – Law and Practice of Banking.
2. I.J. Goldfaace-Irokalibe – Law of Banking in Nigeria.

Unit 5

1.0 Introduction
2.0 Objectives
3.0 Main Content
3.1 Shares
3.2 Stock and Bonds
3.3 Life Policy
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

Stocks and shares or debentures in companies are commonly accepted by banks as security for advances to private individuals and other customers. Stocks or shares denote the members interest in the company which entitles him to share in the profit of the company by way of dividends. A debenture refers to the document in which the company acknowledges debt and charges some of its assets in favour of the lender thus entitling the debenture holder to payment of interest and the principal amount at maturity. A legal and equitable mortgage can also be created on company or government securities.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. know the nature of shares and other exchange securities as subject of bank securities.
2. know the types of life assurance policies
3. know the guides on accepting life policy as security.

3.0 MAIN CONTENT

3.1 SHARES

Shares are often classified into “quoted” and “unquoted” and this classification is of immense use in accepting shares as banking security as it determines the marketability and ease of realization. The quoted shares are shares of companies which have been duly registered as “quoted” by the stock exchange authorities while unquoted shares are substantially shares of private companies.

The bank is more comfortable with quoted shares because quoted companies are relatively stable and such shares are easily realizable as they are dealt with openly on the stock exchange. Valuation is also simple because the most current official valuation could be obtained daily from the stock exchange and financial papers.

Private company shares, which form the majority of the unquoted shares have a number of problems that ordinarily make them unacceptable as security.

- By the definition of a private company by the CAMA S. 22(2) restrict the right to transfer its shares.
- There are other restrictions often included in Article 3 pt II, Table A of CAMA which says the directors may in their absolute discretion and without assigning any reason, decline to register any transferee of shares whether or not it is fully paid share.
- Beside, in some private companies the existing shareholders may, by provision in the company’s Articles, have a right of pre-emption i.e. the right that the shares to be transferred must first be offered to the existing shareholders, and it is only when they are not buying that other buyers acceptable to the directors could be attracted.
- Another problem of private company shares is that of valuation which is usually difficult because there is no organized market.

3.2. Stock and bonds

A part from shares, there are other exchange securities which the bank may accept as securities. These include treasury bills which are government debt instruments. The Govt. guarantees that both principal and interest would be paid with unfailing regularity. It is therefore very good security because of its stability of value, if it is a bearers bond it is full negotiable security and the property in it passes merely by delivery. But if it is made payable to a named person or order, upon endorsement and delivery.

There are also long-term Government bonds like 8 years Development Loan Stock. Realization will be prolonged as it takes a long time to mature, it is therefore not as good as security unless the debt is equally long or the term of the bond had almost run out which may make it possible to offer it for discounting or sale.

"Stock" in a corporation is an equity, and it represents an ownership interest in part of the assets of the corporation and right to interest in any surplus after payment of debt.

3.3. Life Assurance Policy: A life Assurance contract is a contract under which the insurance company in consideration of premiums payable periodically by the proposer, undertakes to pay a given sum of money on the happening of an event contingent on the duration of human life.

Types of Life Assurance Policies

1. **Whole life policy**: This policy provides for payment of a capital sum to the beneficiary on the death of the life assured. The problem with this type of policy is that nothing may be payable until the death of the life assured and the uncertainty of maturity date.
2. **Industrial Policy**: This is usually for small income earners and usually for small amounts not good as banking security.
3. **Pure endowment policy**: The insurance company is liable only if the life assured lives beyond the specified period. It is possible the life assured may die during the specified period hence not good as banking security.
4. **Term assurance**: This is the opposite of pure endowment, the insurance company is liable on the policy if the life assured dies within the stated period. The life assured may survive the term.
5. **Endowment policy**: This policy mature after a fixed number of years or on death of the life assured, whichever occurs earlier. Because the maturity date is certain and it is almost definite that a capital will be paid even if death of the life assured occurs before maturity, endowment policy is acceptable as security.

Guides on Accepting life policy as security

1. **Types of Policy**: The type proposed to the bank must be one of those acceptable to the bank. The policy must be assignable and it must have an ascertainable maturity date.
2. **Insurable interest**: A person is said to have insurable interest in a property if he stands to be prejudiced by the destruction of that property of he stands to gain by its preservation. It is the presence of insurable interest that distinguishes an insurance contract from a wagering contract or mere gambling. Lack of insurable interest makes the insurance contract void in law.

   In Kent v. Bird (1777) A party took insurance cover for safe arrival of a ship on which he has no consignment, the contract was held to be a wagering contract and was therefore void for lack of insurable interest.

Note: Pecuniary loss and not mere relationship is the essence of insurable interest.

3. **The insurers**: The insurance company must be known to be duly registered for the business and must have good records of claims settlement.

4. **Surrender value**: The bank should endeavour to obtain surrender value which is the sum payable by the insurer if the policy is surrendered i.e. released to the insurance company for its cash equivalence, before the maturity period stated on the policy.

5. **Admission of Age**: Age of the life assured is the material factor in life assurance policy, if the age has been admitted, the policy will so indicate, but if not, further steps be taken to get the age admitted.

6. **Restrictive Clauses:-** There are many clauses that may restrict the policy holder or the life assured and the bank should beware because failure to observe the provisions of these clauses may lead to repudiation of liabilities under the policy. Such restrictions may include: Assignment, conditions for reinstatement, occupation restrictions or traveling.

7. **The Beneficiary:** The beneficiary is most important because it is he who will assign his interest to the bank. The beneficiary should be named beneficiary or one that can be identified with precision.

   In Tibbets v. Englebach (1924) A policy having "my children" as beneficiary is not acceptable because future children who did not join in the assignment are included.

8. **Exclusions:-** Some exclusions are contained in life assurance policies and the bank should be mindful of their implications. Most life assurance policies usually provide that nothing will be payable under life policy if the death of the life assured is caused by or as a consequence of e.g. suicide, execution of Judicial sentence of death, direct and indirect consequence of war of war like operations etc.

Assignment of life policies

Assignment of life policy can be by legal or equitable assignment.

(i) **Equitable assignment**: Simple deposit of the original life policy will create an equitable charge in favour of the bank. The customer is usually required to execute a memorandum of deposit indicating that the policy is deposited with the bank for the purpose of securing a bank advance.

(ii) **Legal Assignment**: The legal assignment is effective when the customer executes the bank's deed of assignment over life policy and the assignment is duly stamped with notice given to the insurance company which must be duly acknowledged, when life policy is legally assigned, the ownership and the benefits therefrom pass to the bank until the customer redeems it by paying off his debt and have the policy reassigned to him.

The deed of assignment must be signed by all the beneficiaries who must all be of full age and the assignment form must be duly completed.

3.0 CONCLUSION

Stocks and shares of reputable companies especially where such companies are quoted on the Stock Exchange constitute acceptable security for bank advances. Similarly, so long as premiums are regularly and full paid, life assurance is a good form of security which empowers the bank to sue the insurer in his name without joining the assignor as a party to the suit. See s.60 Insurance Act 2003.

5.0 SUMMARY

There are tow classes of shares i.e. quoted and unquoted shares, quoted shares are tradeable on the floor of the stock Exchange which make them easily transferable. Unquoted shares are not so, and have limitation of transfer which hamper their liquidity. There are also other corporate and government securities in form of stocks and bonds. They are majorly debt instruments which guarantee that both principal and interest would be paid.

Life Assurance Policy are also recognized as acceptable security for bank advances. There are several types of life policies with their respective nature. The bank has a choice of which protect its interest in the circumstance. Accordingly there are guides on accepting life policy as security, which include the consideration of these factors; the type of policy, insurable interest, the insurer, surrender value, Admission of age, Restrictive clause, the beneficiary and exclusions. Assignment of life Policy can be by legal or equitable assignment.

6.0 TUTOR-MARKED ASSIGNMENT

What advantages the quoted shares of a public company offer as bank security over the unquoted shares of a private company?

7.0 REFERENCES/FURTHER READING

1. Layi Afolabi – Law and Practice of Banking.

2. I.J. Goldfaace-Irokalibe – Law of Banking in Nigeria.

MODULE 6

Unit 1 Nature of insurance
Unit 2 Formation of the contract of Insurance
Unit 3 Principles of Insurance Law
Unit 4 Prominent Terms in contract of Insurance
Unit 5 The Regulation of Insurance Business in Nigeria

Unit 1

1.0 Introduction

2.0 Objectives

3.0 Main content

3.1 Nature of Insurance

3.2 Double Insurance and contribution

4.0 Conclusion

5.0 Summary

6.0 Tutor-marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

Insurance is very significant to commerce and industry. Without some form of organized insurance service modern industrial and commercial enterprise would not function efficiently. The functions of insurance are two-fold, i.e the primary and the secondary functions.

The primary function is to ensure that the financial losses of the individual are fairly and equitably distributed over the insured community. The polity holders or the insured pay premiums into a common pool, out of which the unfortunate few who suffer losses are compensated.

On the other hand the secondary or subsidiary function of insurance relates to the encouragement the businessman has to venture into viable but risky business in view of the promise to be indemnified in the event of loss.

Insurance policies are good securities for loan advances from banks. The large sums of money accumulated by insurers are invested in profitable capital market securities which in turn help in capital market capitalization. In addition, the insurance industry is an important employer of labour.

2.0 OBJECTIVES

This unit is intended to enable you

1. Understand the nature of contract of insurance
2. To know that a contract of insurance can be entered into severally on the same subject matter.

3.0 MAIN CONTENT

A contract of insurance can be described as a contract whereby the party called the "insurer" promises in return for a money consideration called the "premium" to pay to the other party called the "insured" or the "assured" a sum of money or to provide him with some corresponding benefit, upon the occurrence of one or more specified events (see channel J. in PRUDENTIAL INSURANCE COMPANY

V. IRC (1904) 2 KB 558)

In its legal nature,

i. Insurance is a contract. Therefore, the general principles of the law of contract are also applicable to insurance transactions.

ii. Contracts of insurance are aleatory. The event insured against must involve some amount of uncertainty. There must be some uncertainty as to whether the event will ever happen or not, or if the event is one which must happen, the time of its occurrence must be uncertain. It is however different from an investment scheme or a chance speculation. Thus, a contract whereby a party agrees to pay a certain premium over a period of years in return for a lump sum payment to it at the end of the period, is in substance a mere scheme of investment and not a contract of insurance. They are also not wagering contracts. A wagering contract is a contract whereby a party wins or loses a stake of money or some object, upon the happening of an uncertain event. The parties to such a contract have no interest in the contract apart from the chance of wining or the risk of losing the bet. On tie other hand, in a contract of insurance the party who is insured must have some proprietary interests, known as insurable interest, in the subject matter of the contract of insurance.

iii. Contracts of insurance are generally contracts of indemnity. All contracts of insurance except life and personal accident insurance are contracts of indemnity. By indemnity, we mean the insured is to be placed (by the insurer) in the same position as he was before the happening of the event he insured against. The assured can not recover more than his actual loss.

The general rule is that the measure of indemnity in respect of the loss of any property is not determined by its cost but by its value at the date of loss and at the place of the loss. If the value has increased during the currency of the policy, the assured is entitled to be indemnified at the rate of the increased value. When the policy is unvalued and the property is, damaged, the cost of repairs provides the basis of indemnity. Where it is valued the measure of indemnity will be the percentage of the loss in relation to the damage.

If the subject matter of the insurance is not totally destroyed, the insured can claim for the value of the injury, actually done to it but if however the subject matter is totally destroyed and the insurer pays, the latter is entitled to whatever remains of the vehicle as a salvage. This is called the salvage principles. The insured cannot claim indemnity and retain the subject matter. He must abandon it to the insurers.

3.2 Double Insurance and Contribution.

The application of the rule that a contract of insurance is one of indemnity and the insured will not be permitted to make profits out of a contract of insurance is further illustrated in the principle of double insurance and contribution. The concept of double insurance allows an insured to insure the same subject matter with more than one insurer and in the event of the occurrence of the event insured against, he is free to claim payment from his insurers in such order as he thinks fit until he has received the full amount of his loss. In exercising this right, the insured is free to call upon any of them to pay him in full and the fact that others are also liable will not afford the insurer any defence. Effectually, once the insured receives full payment from one insurer, he cannot receive further payment from the other.

As a corollary to the duty on the insurer to pay in cases of double insurance, is the right of such an insurer to call upon the other insurers to contribute their share of the loss to the insurer. This right is known as contribution traceable to the equitable principle of 'equality is equity".

Before a right of contribution can be enforced, the following conditions must be satisfied.

a. There must be a subject matter common to all the policies taken by the insured. Once the insurer can show that the subject matter insured with him has also been insured with another insurer, he can call on the latter to contribute to the discharge of the obligation under the policy. In **AMERICAN SURETY CO. OF N.Y. V. WRIGHTSON** (1910) 27 TLR 1, a bank insured against loss or damage caused by the dishonesty of X an employee up to E2,500 and another policy for E40,000 with another company, against a variety of losses including fire, burglary and lose through dishonesty of employees including X. It was held that contribution applied as between the two insurance companies because the loss by dishonesty was covered by both polices.

b. The loss must be due to a risk or peril which is common to both policies. This requirement simply- means that not only must the loss be covered by the various policies, but the cause of the loss must have actually been covered by the several policies even thou the policies may cover some other causes of loss. The case of **AMERICAN SURETY CO. V. WRIGHTSON** affords a good illustration of this principle. In that case, X's dishonesty was the common peril and it did not matter that a number of other perils were also included in the respective policies.

c. All policies must be enforceable. By this requirement, if any of the policies cannot be legally enforced against the insurer, as a result of a breach of a condition or non disclosure by the insured, such a policy will not give rise to a right to contribution, even if the insurer had paid the insured under such a policy.

4.0 CONCLUSION

The agreement between the parties to the contract is set out in the policy of insurance. The purpose of the insurance policy is firstly, to define the risk that is being insured against: secondly, to state the conditions and the terms of the contract, and thirdly, to make plain the procedure that will be followed in the event of a loss occurring.

5.0 SUMMARY

Parties to insurance contract are the insurer (usually an insurance company) and the insured or assured. The agreement between the parties is set out in the policy of insurance. Contracts of insurance involve some degree of uncertainty of the event insured against. The contract is a contract of indemnity. Contracts of insurance allows the principle of double insurance and contribution. The conditions for contribution are that: There must be a subject matter common to all the policies by the insured; The loss must be due to a risk or peril which is common to both policies; and All policies must be enforceable.

6.0 TUTOR-MARKED ASSIGNMENT

1. Define contract of Insurance and point out its difference from other contracts.

7.0 REFERENCE/FURTHER READINGS

1. Irukwu J.O. Insurance law and Practice in Nigeria

UNIT 2

1.0 Introduction
2.0 Objectives
3.0 Main content
3.1 Formation of contract of insurance
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

As a general rule, the first step in the making of an insurance contract is for the proposer to complete a proposal form giving details of the risk he proposes to insure. Thus the purpose of the proposal form is to obtain information about the nature of the risk intended to be insured to enable the insurer assess the risk involved. The proposal form is usually incorporated into the policy and forms the basis of the contract.

The policy on the other hand, is the printed document which contains the terms of the insurance contract. The parties are bound by the provisions of the policy.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. Necessary documents involved in consummating a contract of insurance
2. Understand the procedure for entering into contract of insurance.

3.0 MAIN CONTENT

3.1 Formation of The Contract Of Insurance

For a valid contract of insurance to arise, the following essentials must be present;

a. offer and acceptance

Being a contract, an insurance transaction will not stand unless the insured and insurer have reached an agreement on what is to be insured. An agreement can only be reached when one of the parties has made an offer and the offer has been accepted by the other party. Generally, it is the insured that makes an offer by filling a proposal form and submitting the form to the insurer. The proposal form usually contains the particulars of the risk which the insured desires the insurer to undertake. Once an offer is made, it remains in force until it is either withdrawn before acceptance or lapsed after a reasonable period of time. It must be noted, however, that a withdrawal of an offer will not be effective, until notice of the withdrawal had been received by the insurance company.

The acceptance of an offer is usually made by the insurer. Acceptance of the offer is deemed to have been properly made, when the insurer issues a policy to the insured. However, an acceptance must correspond with the terms of the offer, so that where the acceptance is made subject to some condition or where it varies, the terms of the offer, it shall be regarded as a counter- offer which cancels the original offer and becomes a new offer. Thus, where the insurers accept the insured's proposal subject to payment of a certain premium the contract becomes binding only on the tender to the insurer of that premium. Tender of the premium then amounts to an acceptance of the insurer's counter-offer by the insured. The point to note here is that, if the risk insured against should occur before the payment of the premium, the' insurer shall not be liable because there has been no acceptance and consequently no contract of insurance.

In **CANNING v. PARCUHAR** (1886) 16 CBD 727. Mr. C. applied for life assurance on one of the company's printed forms containing the usual questions and declarations. The risk was considered and approved by the company, but it was stated in the letter with which Mr. C. was informed of the acceptance that "no assurance can take place until the first premium is paid". Before a premium was paid, or any policy issued, Mr. C. fell over a cliff and seriously injured himself. The premium was then tendered by his agent, who disclosed the occurrence of this unfortunate accident, where upon the company refused the premium. Mr. C. died. His administrator sued the company, claiming that a contract to insure had been made on the day Mr. C. was written that the proposal was accepted. The English Court of Appeal held among other reasons, that the company was under no liability as it had not accepted the proposal, the letter written by the company was a counter- offer.

If the risk insured against occurred before acceptance, the insurer will not be bound. The duty to disclose all material facts binds the insured and insurer so that a non-disclosure of a material fact before acceptance will render the contract of insurance voidable. On the occurrence of the risk insured against, before the policy is issued, the following rules will apply;

i. where the insurer has issued a "cover note" (i.e., provisional covet) to the insured, the insurer will be bound during the currency of the cover note, and the insured shall be entitled to recover. A cover note is a formal document which is issued to an applicant for insurance policy (i.e., a proposer) to protect him against the occurrence of the risk in the interval between the time when the proposer submitted his proposal and the time that the insurer will decide whether or not to issue a policy. The cover note is regarded in law as a temporary contract of insurance, quite distinct from the contract contained in the policy and it is binding on the insurer. Cover notes are always issued for a definite period of time and they are normally issued for motor, burglary and fire insurance.

ii. where the loss occurs, unknown to the insurer but known to the insured, and they after wards issue a policy which they were not bound to issue, they will be entitled to avoid it on the ground of the failure of the insured to disclose the loss.

iii. where the loss had occurred unknown to both parties, the policy issued subsequently by the insurer shall be void because of the common. The insured will not be entitled to recover under such a policy.

b. consideration

This is the price paid by each of the parties to the contract of insurance to buy the other's promise. On the part of the insured, the consideration is the premium which is said to be the price for which the insurer undertaken his liabilities. However, the premium need not necessarily be money, it may be in some other from, e.g., in a mutual insurance it may consist of a liability to contribute to the losses from other members of the mutual society. It is however possible for an insured to have his premium repaid back to him.

1. Where the insured has not been put at risk (i.e. where the risk insured against has never attached) the insured will be entitled to a refund of the premium paid, then reason being that there has been a total failure of consideration. For instance where an assured warrants himself to be temperate in his habits and the falsity of this warranty was discovered before the completion of the contract. In such a case since the risk never attached, the premium therefore never became due, and may, if paid, be recovered as money paid without consideration.
2. Furthermore, where the insured and the insurer believed that the subject of, insurance was in existence at the time of the contract of insurance where a is not so, the insured will be entitled to a refund of his premium.. For instance, where the beneficiary of a life assurance policy paid premiums on the policy believing that the assured was alive, where as the assured had died, and the insurer received the premiums in ignorance of this fact. Such premiums are recoverable since they had been paid and received under a common mistake that the assured was alive.
3. Where the contract of insurance is repudiated or avoided by the insurer for a breach of warranty. Such a breach of warranty may occur before or after the completion of the contract of insurance, for example where the assured under a life policy warrants that he will not go abroad, and does so. Any renewal premiums paid after he does so would be recoverable at law.

4. Where the contract of insurance is avoided either by the insurer or the insured on ground of innocent, misrepresentation or non-disclosure not amounting to fraud premium paid may be recovered.
5. Where there is a provision in the policy for practical return of premium 6.Where the policy of insurance is not valid for instance because of absence of insurable interest, the insured will be entitled to a refund of his premium if:

- He was induced to make the contract of insurance by a fraudulent misrepresentation by the insurer or the insurer's agent that the policy was lawful. The premium is recoverable in this instance because the parties are not equally at fault.
- He was unaware of the facts making the contract illegal. For instance, where the insured believed that he was the owner of the property insured, where as in fact he is not. The contract is invalid because of want of insurable interest, and the insured is entitled to a refund of his premium.
- He gave notice of intention to abandon the policy.

c. Intention to create legal relationship.

d. Legal capacity to contract

e. There must be a subject matter of insurance.

4.0 CONCLUSION

As already pointed out, an essential feature of all contracts is that there must be unrevoked offer, followed by an unqualified acceptance of that after. A contract of insurance also admits of consideration which is paid by both parties to the contract.

5.0 SUMMARY

There are essential elements for a valid contract of insurance which are as follows:

a. Offer – filing of proposal form
b. Acceptance – issuance of policy form
c. Consideration

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the legal consequences of proposal form and policy form in a contract of insurance.

7.0 REFERENCES/FURTHER READINGS

1. Irukwu J.O. Insurance law and Practice in Nigeria

UNIT 3

1.0 Introduction
2.0 Objectives
3.0 Main content
3.1 Principles of Insurance Law
3.1.1 Good Faith
3.1.2 Insurance
3.1.3 Subrogation
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

Contract Of insurance has in addition to the general rules of law relating to contracts, provides for special rules applicable to insurance transactions. These fundamental principles include: utmost good faith, insurable interest and subrogation.

The validity of the contract depends on the existence of the utmost good faith at the time when the policy was taken out. The absence of an insurable interest renders an insurance contract void and of no legal effect. Subrogation is a corollary of the doctrine of indemnity.

2.0 OBJECTIVES

At the end of this unit you shou8ld be able to:

1. Know what amounts to utmost god faith, insurable interest and subrogation.

3.0 MAIN CONTENT

3.1 PRINCIPLES OF INSURANCE LAW

1. Good Faith *(Uberrimae Fidei)*

Contracts of insurance are contracts of the utmost good faith. The utmost good faith is required from both the insurer and the assured. This doctrine means that the assured must disclose the facts in his knowledge. Good faith forbids either party concealing what he knows, to draw the other into the bargain from his ignorance of the fact and his believing the contrary. The reason for this doctrine is to prevent over reaching. *Uberrimae fiddi* finds expression in disclosure.

The duty to disclose requires the assured must disclose all material facts within his knowledge which include those he knows and those he ought to know. There is however no duty to disclose what he does not know. In **Akpata v. African Alliance** Suit No. LD/340/67 delivered on 16'h October, 1967. Akpata who was deceased had taken out a life assurance policy. Prior to the taking out of the policy he had had a stomach trouble about which he consulted his doctor who made no diagnosis to indicate that the assured had gastric deep of which he subsequently died. His widow wanted to claim but the insurance company refused to honour its obligation on the ground that he failed to disclose a material fact. It was held that since he did not know and since the doctor could also not confirm, he could not be guilty of failure to disclose.

If the assured could discover a certain fact by making necessary enquiries, he will be guilty of non-disclosure if he .does not carry out these enquiries. It does not matter that the failure to make such enquires is inadvertent.

A failure to disclose a material -fact renders the policy voidable at the option of the insurer. Non disclosure maybe deliberate or inadvertent. Where it is deliberate, it may amount to concealment. When it is inadvertent, the net the result is virtually the same for the contract may be avoided. The policy is liable to be avoided whether the non disclosure is due to fraud, carelessness, mistake, error of judgment, etc. the insurer may, however, after knowing, the true fact waive the non disclosure and affirm the policy

2. Insurable Interest

This is the interest which an assured has in the proposal taken out by him. An assured is said to have an insurable interest in a thing if he has a benefit from its existence or prejudice from its destruction. Such interest must be real and justiceable. Mere hope of acquiring an interest is not enough. The interest must also be of a pecuniary nature.

In **MACAURA v. NORTHERN ASSURANCE CO. LTD.** (1925) ALL ER 51, a share holder in a company owning some timbers was owed large sum of money by a company, so he insured the timber against loss. A fire occurred and he claimed from the insurers who repudiated liability on the ground that he had no insurable interest in the company's assets

A share holder can only insure his shares in the company, not the assets of the company. Examples of insurable interests include:

Self

A person has insurable interest in his own life. This .is why people take but life assurance policies. However, the benefits of such insurance are assigned to a third party (beneficiary) since a dead person cannot claim the benefits, on his life.

Creditor

A creditor can insure his debtor's life for an amount equal to the debt. In **GODSALL v. BOLDERS, 9 EAST 72**. a creditor insured the life of his debtor for the sum of E500 which was the amount of debt owed to him. It was held that he had an insurable interest in the debtor's life for this sum.

Contractual/Legal relationship

A wife has an insurable interest in the life of her husband and vice versa. **GRIFFITHS V. FLEMING** (1909) 1 KB 805

The mortgagor and the mortgagee have insurable interest in the mortgaged property.

As a general rule a parent has no insurable interest in the life of this child. In **HELFORD v. KYMER,** (1830) 10 BCC 724. a father effected an insurance policy on his son's life before the age of 21. It was held that he had no insurable interest in the life of his son. Conversely a child has no insurable interest in the life of his parents' unless the parent is supporting the child.

Existence of insurable interest

The question of when an insured must possess insurable interest can only be answered when the nature of the insurance policy is examined. For this purpose insurance polices are divided into three.

a. Non-indemnity policies

In non-indemnity insurance policies like life assurance, the rule is that, insurable interest must exist at the time of the contract otherwise the contract will be void *ab initio.* However, once an insurable interest exists at the time of the making of the contract of insurance, it is not compulsory that it should remain there after.

In **DALBY V. THE INDIAN AND LONDON LIFE ASSURANCE CO.**(1854) 15 CB 36. the Duke of Cambridge was indebted to the plaintiff who._ there upon took out a policy with the defendant on the life of the duke. Subsequently, but before the duke's death, a friend of the duke paid off the duke's debt to the plaintiff, but the plaintiff continued paying the agreed premiums until the duke's death. The plaintiff then claimed from the defendant the sum assured to which claim the defendant objected, that, as the basis of the plaintiffs insurable interest had ceased before the duke's death, there was no longer any interest for which a payment could-. be "Made under the policy. It was held that a life insurance was not a contract of indemnity and that as the policy effected by the plaintiff on the life of his debtor was valid at the time it was entered into, the cessation of the interest of the plaintiff in such life before death did not invalidate the policy.

b. Non-marine indemnity policy

In non-marine indemnity policies like fire insurance, motor vehicle insurance etc, insurable interest must exit at the time of contract and at the time of the loss. If it exits only at the time of contract, the policy is valid, but the absence of interest at the time of loss may preclude the insured from claiming any indemnity since the basis of indemnity is the loss suffered by the insured, and there can be no- loss without interest unless the policy' provides that the insured can claim in spite of lack of insurable interest at the time of the loss.

c. Marine policies

Under the provisions of section 8(1) of the Marine Insurance Act, it is sufficient if the insured has interest in the subject matter insured at the time of the loss and it is immaterial whether or not he has interest at the time when the insurance is effected. However, where the subject matter is insured "loss or not lost" the insured may recover although he may not have acquired his interest until after the loss unless, at the time of affecting the contract of insurance, the insured was aware of the loss, and the insurer was not.

3. Subrogation

This is a procedure where the insurer on payment of a sustained loss is entitled to be placed in the position of the insured by succeeding to all his rights and remedies against third parties in respect of the subject matter of the insurance. In this situation, since the insured has made good the loss, he is then entitled to claim or be indemnified by the third party. Subrogation applied to all classes of insurance except life assurance.

The principle is that an insured cannot recover more than his loss. Where the loss is caused by the fault of another or where by contract another person is liable to bear the loss insured against, if the insured claims from the insurer and he is paid, the insurer than succeeds to the rights of the insured against the third party. Where the insured obtains any remedy from a third party he must make over this remedy to the insurer. Being paid by the insurer does not preclude him from seeking his remedies against someone else, but he does this on behalf of the insurer who are said to be subrogated to his rights.

Where a third party is liable to the insured in tort he cannot plead a mitigation of damages for the fact that insurers have paid or are liable, to pay for the loss. If the assured has received satisfaction from his insurer, anything he receives after this he holds as a trustee for his insurer. Subrogation rests on the ground that the insurer's contract is one* of indemnity and is therefore entitle upon paying the sum for which others are primarily liable to the assured to be proportionately subrogated to the right of the assured.

Where the assured has not been fully indemnified, he is entitled to sue the third party and make good the entire loss. It is only in respect of the excess that he becomes a trustee for the insurer.

Limitations on the right of subrogation

1. The right does not arise unless and until the insurer has admitted the insured's claim under the policy and has paid the sum payable under the policy.
2. The insurer cannot recover more than the amount he has paid. In **YORKSHIRE INS. CO. LTD. v. NIBET SHPPING CO. LTD.,** a ship was insured for E72,000.00. It became a total loss as a result of a collision with a Canadian Government Vessel. The insurer paid E72,000.00 to the insured who then claimed damages from the Canadian Government. The action was successful and the insured was paid E127,000.00. The insured then repaid E72,000.00 to the insurer and claimed that it was entitle & to keep the excess sum of E55,000.00. It was held that the insured was so entitled:

MISREPRESENTATIONS

Statements of fact made during negotiations are called representations. Untrue statements of facts made during negotiations are called "misrepresentation". Misrepresentation could be fraudulent or innocent. But in either cases, the insurance contract can be avoided. Statements made, even though innocently offered, if it is inaccurate, it may amount to misrepresentation which can make the insurer avoid the policy.

Statement of belief or opinion does not amount to misrepresentation if it turns out to be false. It simply implies that the belief or opinion is sincerely held. Before it can turn out to be a misrepresentation, it must be shown that the person making the statement never entertained such opinion or belief at all and yet deliberately made it.

Statement of intention ordinarily would amount to misrepresentation. If the insured never intended the thing but nonetheless made the statement of intention, same is inaccurate and may amount to misrepresentation if some one relies on such.

Half truth may amount to misrepresentation. A statement may be accurate on the face of it and may be false when related to other relevant facts. In such a situation, the policy may be avoided on the ground of misrepresentation.

In **LONDON ASSURANCE v. NANSEL** (1879) 4 LT 225, a question in a proposal form for a life insurance policy stated "has a proposal ever been' made to own life at any other office or offices? If so when? Was it accepted at the ordinary premium or at an increased premium or declined"? the proposer answered "insured now in two offices for E18,000.00 at ordinary rates. Policies effected last year". The answer was literally true so far as it went. When a claim was made under the policy, the insurer repudiated liability on the non-disclosure of a material fact viz, that the proposer had made proposals for life insurance to a number of insurance companies which had been declined. It was held that the insurer was entitled to do so.

Misrepresentation of material facts no doubt can avoid a policy. Where the, facts are immaterial false representations of them may not lead to repudiation of liability. However, where a stipulation makes the accuracy of certain statements condition precedent to the validity of the policy, there is no difference between material and immaterial facts as far as those statements are concerned. Once the statements are shown to be inaccurate, that will violate the policy whether the fact is material or not. Insurers effect this by inserting what is known as "the basis of the contract clause". A typical example of this clause is as follows:

"I declare that the particulars and statements made by me above are true and I agree that they shall be the basis of the contract between me and X".

CONDITIONS

There may be certain requirements which the assured may be required to comply with either before the occurrence of the insured risk or after a loss might have been sustained. The former is called conditions precedent to liability while the latter is called conditions subsequent to liability.

1. **Conditions precedent to liability**

These are things that the assured has to do before the policy comes into existence. If the condition is not complied with, then, there may be no cover for the loss. In **ROBERTS v. EAGLE START INSURANCE CO. LTD.** (1960) LLB 15, a burglary policy made it a condition precedent to the insurance company's liability that a burglary alarm shall be put into full and proper operation whenever the premises were closed for business or left unattended. The premises were broken into and some furs stolen. In an action on the policy it was held that the assured could not recover because he had not put the alarm into operation before he left the premises.

2. **Conditions subsequent to liability**

These are conditions to be fulfilled after the loss has occurred. Where they are not fulfilled the policy could be avoided. In **FALBEL V. FEDERATED INSURANCE ASSOCIATION LTD.** (1970) 2 ALL ER 32. in an employers' liability insurance there was a condition that "every writ served on the employers shall be notified or forwarded to the insurance company immediately". An employee was injured and his solicitor wrote to the insurer to inquire whether the writ should be served on the employer. This was done but the employer did not serve the insurance company. The insurance company was served about 6 weeks after the assured claimed against the insurers. They repudiated liability on the ground that the employer had broken the condition stated above. It was held that since there has been a breach of condition, the insurance company could avoid liability. It is not always that the court would accept every thing stated as a condition, the acceptance of this by the court is a matter of construction in each case. The proof of breach of a condition precedent or subsequent to liability lies on the insurers.

4.0 CONCLUSTION

A contract of insurance can only be valid when the fundamental principles of Utmost good faith, insurable interest are observed the principle of subrogation provides for justice equity and good conscience in mitigating the loss of the insurer.

5.0 SUMMARY

There are essentially three fundamental principles of insurance contract:

a) Utmost good faith

b) Insurable interest

c) Subrogation

6.0 TUTOR-MARKED ASSIGNMENT

1. Briefly Define "insurable interest" and provide examples of insurable interest.

7.0 REFERENCES/FURTHER READINGS

1. IRUKWU, J.0 Insurance Law and Practice in Nigeria.

UNIT 4

1.0 Introduction

2.0 Objectives

3.0 Main content

3.1 Prominent Terms in Contract of Insurance

3.1.1 Conditions

3.1.2 Warranties

3.2 Misrepresentations

3.3 Assignment of Policies.

4.0 CONCLUSION

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Readings

1.0 INTRODUCTION

Insurance Policy as earlier stated, is a printed document which contain certain conditions as terms under which the insurance contract is governed and effected. There are two types of conditions express and implied conditions. The express conditions are those expressly set down by the parties whereas the implied conditions are those which the law would read into all insurance contracts even if they are not mentioned especially by the parties.

Similarly all insurance policies are subject to one kind of warranty or another. Warranty in insurance contract is also very significant. An insurer who discovers that the insured has acted in breach of a warranty is entitled to avoid the policy. He is discharged form his promise to pay by virtue of the non-fulfillment of the warranty.

2.0 OBJECTIVES

At the end of this unit you should be able to:

1. Know what “conditions” and “warranties” mean under insurance contract.
2. Know the effect of breach of either condition or warranty.

3.0 MAIN CONTENT

3.1 PROMINENT TERMS IN CONTRACT OF INSURANCE EXCESSES

3.1.1 Conditions.

There may be certain requirements which the assured may be required to comply with either before the occurrence of the insured risk or after a loss might have been sustained. The former is called conditions precedent to liability while the latter is called conditions subsequent to liability.

1. **Conditions precedent to liability**

These are things that the assured has to do before the policy comes into existence. If the condition is not complied with, then, there may be no cover for the loss. In **ROBERTS v. EAGLE START INSURANCE CO. LTD.** (1960) LLB 15, a burglary policy made it a condition precedent to the insurance company's liability that a burglary alarm shall be put into full and proper operation whenever the premises were closed for business or left unattended. The premises were broken into and some furs stolen. In an action on the policy it was held that the assured could not recover because he had not put the alarm into operation before he left the premises.

2. **Conditions subsequent to liability**

These are conditions to be fulfilled after the loss has occurred. Where they are not fulfilled the policy could be avoided. In **FALBEL V. FEDERATED INSURANCE ASSOCIATION LTD.** (1970) 2 ALL ER 32. in an employers' liability insurance there was a condition that "every writ served on the employers shall be notified or forwarded to the insurance company immediately". An employee was injured and his solicitor wrote to the insurer to inquire whether the writ should be served on the employer. This was done but the employer did not serve the insurance company. The insurance company was served about 6 weeks after the assured claimed against the insurers. They repudiated liability on the ground that the employer had broken the condition stated above. It was held that since there has been a breach of condition, the insurance company could avoid liability. It is not always that the court would accept every thing stated as a condition, the acceptance of this by the court is a matter of construction in each case. The proof of breach of a condition precedent or subsequent to liability lies on the insurers.

3.1.3 Excesses

A policy is subject to an excess then the insured is required to bear any loss up to a fixed amount himself Thus, in the case of a policy subject to N50.00 excess, nothing is recoverable in respect of any loss below this figure, whilst if a loss of N50.00 was sustained, the company would be liable to the extent of N100,000.00 only.

3.1.4 Average

When a policy is made subject to average, the insured becomes his own insurer for the difference between the sum insured and the full value of the property at the time of the loss.

3.1.2 Warranties

These are clauses which insurers insert in policies by which the right of the assured to recover is made to depend upon the existence of a given fact or state of things defined in the clause without bothering to consider the matters covered by the warranties. Thus in **DAWSONS v. BONIN LTD** (1922) AC 41; the insurer repudiated liability on this factor although the misrepresentation was as to where the car would be garaged even though this was held to be immaterial.

The burden of proof of a breach of a warranty, like that of conditions, lies on the insurer. The National Insurance Commission is empowered to approve standards, conditions and warranties applicable to all classes of-insurance business in Nigeria. See Insurance Act, 2003.

3.2 MISREPRESENTATIONS

Statements of fact made during negotiations are called representations. Untrue statements of facts made during negotiations are called "misrepresentation". Misrepresentation could be fraudulent or innocent. But in either cases, the insurance contract can be avoided. Statements made, even though innocently offered, if it is inaccurate, it may amount to misrepresentation which can make the insurer avoid the policy.

Statement of belief or opinion does not amount to misrepresentation if it turns out to be false. It simply implies that the belief or opinion is sincerely held. Before it can turn out to be a misrepresentation, it must be shown that the person making the statement never entertained such opinion or belief at all and yet deliberately made it.

Statement of intention ordinarily would amount to misrepresentation. If the insured never intended the thing but nonetheless made the statement of intention, same is inaccurate and may amount to misrepresentation if some one relies on such.

Half truth may amount to misrepresentation. A statement may be accurate on the face of it and may be false when related to other relevant facts. In such a situation, the policy may be avoided on the ground of misrepresentation.

In **LONDON ASSURANCE v. NANSEL** (1879) 4 LT 225, a question in a proposal form for a life insurance policy stated "has a proposal ever been' made to own life at any other office or offices? If so when? Was it accepted at the ordinary premium or at an increased premium or declined"? the proposer answered "insured now in two offices for E18,000.00 at ordinary rates. Policies effected last year". The answer was literally true so far as it went. When a claim was made under the policy, the insurer repudiated liability on the non-disclosure of a material fact viz, that the proposer had made proposals for life insurance to a number of insurance companies which had been declined. It was held that the insurer was entitled to do so.

Misrepresentation of material facts no doubt can avoid a policy. Where the, facts are immaterial false representations of them may not lead to repudiation of liability. However, where a stipulation makes the accuracy of certain statements condition precedent to the validity of the policy, there is no difference between material and immaterial facts as far as those statements are concerned. Once the statements are shown to be inaccurate, that will violate the policy whether the fact is material or not. Insurers effect this by inserting what is known as "the basis of the contract clause". A typical example of this clause is as follows:

"I declare that the particulars and statements made by me above are true and I agree that they shall be the basis of the contract between me and X".

3.3 Assignment of Policies

Assignment of insurance policy means transferring the policy by the assured who is called the "assignor" to a third party called the "assignee" so as to enable the assignee to enforce the policy in his own name.

A policy of insurance is a personal contract and does not run with the subject matter of the insurance. If a car on which a policy of insurance exists is sold, the sale does not automatically transfer the policy to the buyer unless the policy itself is specifically assigned to the buyer. In the absence of some special agreement, the assignee cannot call upon the insurer to indemnify him under the policy.

For there to be a valid assignment, the consent of the insurer must be obtained and the assignment of the policy must be contemporaneous with the assignment of the subject matter. The policy may contain express prohibition against assignment without the consent of the insurer in which case the insurer has discretion not give or to withhold consent. Where consent is required, an assignment without consent renders the policy avoidable., It remains in force until the insurers avoid it. By giving consent the insurer is estopped from denying the validity of the policy. As a matter of fast most policies usually contain express provision against assignments. The assignment of the policy must be made at the same time as the assignment of the subject matter, or in pursuance of an agreement which is cotemporaneous with the subject matter of the policy. The assignee does not acquire the insurance until the actual transfer of the subject matter. The policy is not assigned until after the assignment of the subject matter. If a policy is assigned before the assignment of the subject matter, it ceases to be in force on coming to the hand of the person who as yet has no insurable interest in the subject matter. Such an assignment is therefore void.

4.0 CONCLUSION

Under a contract of insurance, a breach of a condition entitles the aggrieved party to refuse to perform his own party of the contract and in addition may claim damages for the breach.

A warranty must be strictly and literally fulfilled otherwise there is no contract. However, a breach may be excused on the ground that compliance would be unlawful, and an insurer may waive the breach.

5.0 SUMMARY

The prominent terms in contract of insurance are conditions and warranties. Conditions could be conditions precedent to liability and conditions subsequent to liability. Warranties are the lest of the insured truthfulness in providing information. Untrue statements of facts made during negotiations are called misrepresentations which have the effect of avoiding the contract. An Insurance Policy can be transferred by the insured to a third party by way of assignment.

6.0 TUTOR-MARKED ASSIGNMENT

1. With Judicial authorities explain the concept of conditions under contract of insurance.

7.0 REFERENCES/FURTHER READINGS

1. IRUKWU, J. O. Insurance Law and Practice In Nigeria.

UNIT 5

1.0 Introduction
2.0 Objectives
3.0 Main Content
  3.1 The Regulation of Insurance Business in Nigeria.
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 **INTRODUCTION**

The regulation of insurance business in Nigeria is carried on by enactment of laws that govern the conduct of insurance business. This is intended to provide for all operators in the insurance industry to operate and comp0ly with the same standard of requirements. The importance of the regulation of insurance business is also to protect the public from unscrupulous insurance operators and provide confidence in the insurance industry.

Many legislation have been enacted since the first insurance companies Act, 1`961 to regulate insurance business at one period or the other. The current legislation that regulates insurance business in Nigeria is the Insurance Act No. 1, 2003 and the National Insurance commission Act, Cap, 53 Laws of Federation of Nigeria, 2004.

2.0 OBJECTIVES

The aim of this unit is that at the end of it you should be able to:

1. Know the current law on insurance
2. Understand the position of the current law on some specific issues.

3.0 MAIN CONTENT

3.1 PROMINENT TERMS IN CONTRACT OF INSURANCE EXCESSES

3.1.1 Conditions.

There may be certain requirements which the assured may be required to comply with either before the occurrence of the insured risk or after a loss might have been sustained. The former is called conditions precedent to liability while the latter is called conditions subsequent to liability.

1. **Conditions precedent to liability**

These are things that the assured has to do before the policy comes into existence. If the condition is not complied with, then, there may be no cover for the loss. In **ROBERTS v. EAGLE START INSURANCE CO. LTD.** (1960) LLB 15, a burglary policy made it a condition precedent to the insurance company's liability that a burglary alarm shall be put into full and proper operation whenever the premises were closed for business or left unattended. The premises were broken into and some furs stolen. In an action on the policy it was held that the assured could not recover because he had not put the alarm into operation before he left the premises.

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3.1.3 Excesses

A policy is subject to an excess then the insured is required to bear any loss up to a fixed amount himself Thus, in the case of a policy subject to N50.00 excess, nothing is recoverable in respect of any loss below this figure, whilst if a loss of N50.00 was sustained, the company would be liable to the extent of N100,000.00 only.

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When a policy is made subject to average, the insured becomes his own insurer for the difference between the sum insured and the full value of the property at the time of the loss.

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These are clauses which insurers insert in policies by which the right of the assured to recover is made to depend upon the existence of a given fact or state of things defined in the clause without bothering to consider the matters covered by the warranties. Thus in **DAWSONS v. BONIN LTD** (1922) AC 41; the insurer repudiated liability on this factor although the misrepresentation was as to where the car would be garaged even though this was held to be immaterial.

The burden of proof of a breach of a warranty, like that of conditions, lies on the insurer. The National Insurance Commission is empowered to approve standards, conditions and warranties applicable to all classes of-insurance business in Nigeria. See Insurance Act, 2003.

3.2 MISREPRESENTATIONS

Statements of fact made during negotiations are called representations. Untrue statements of facts made during negotiations are called "misrepresentation". Misrepresentation could be fraudulent or innocent. But in either cases, the insurance contract can be avoided. Statements made, even though innocently offered, if it is inaccurate, it may amount to misrepresentation which can make the insurer avoid the policy.

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3.3 **Assignment of Policies**

Assignment of insurance policy means transferring the policy by the assured who is called the "assignor" to a third party called the "assignee" so as to enable the assignee to enforce the policy in his own name.

A policy of insurance is a personal contract and does not run with the subject matter of the insurance. If a car on which a policy of insurance exists is sold, the sale does not automatically transfer the policy to the buyer unless the policy itself is specifically assigned to the buyer. In the absence of some special agreement, the assignee cannot call upon the insurer to indemnify him under the policy.

For there to be a valid assignment, the consent of the insurer must be obtained and the assignment of the policy must be contemporaneous with the assignment of the subject matter. The policy may contain express prohibition against assignment without the consent of the insurer in which case the insurer has discretion not give or to withhold consent. Where consent is required, an assignment without consent renders the policy avoidable., It remains in force until the insurers avoid it. By giving consent the insurer is estopped from denying the validity of the policy. As a matter of fast most policies usually contain express provision against assignments. The assignment of the policy must be made at the same time as the assignment of the subject matter, or in pursuance of an agreement which is cotemporaneous with the subject matter of the policy. The assignee does not acquire the insurance until the actual transfer of the subject matter. The policy is not assigned until after the assignment of the subject matter. If a policy is assigned before the assignment of the subject matter, it ceases to be in force on coming to the hand of the person who as yet has no insurable interest in the subject matter. Such an assignment is therefore void.

3.1 THE REGULATION OF INSURANCE BUSINESS IN NIGERIA

The Insurance Industry in Nigeria is regulated chiefly by the Insurance Act No. 1, 2003 and the National Insurance Commission Act, CAP 53, Laws of the Federation of Nigeria, 2004. In substance the latter enactment is in substance the Insurance Decree No. 1, 1997. While the former contains the body of rules on the subject, the latter provides the institutional frame work for the administration and supervision of the insurance industry in Nigeria.

The insurance Act applies to all classes of insurance business and firms carrying an insurance business in Nigeria except friendly societies, pension or provident fund or bodies corporate or unincorporated engaged solely In re-insurance business established outside Nigeria.

Under the insurance Act, insurance businesses are divided into two', classes:

i. Life-assurance business.
ii. General insurance business

Life insurance business is sub-divided into:

i. individual life assurance business and
ii. group life assurance and pension business :and
iii. health insurance business.

General insurance business is divided into eight categories.

a. fire insurance

b. general accident insurance
c. motor vehicle insurance
d. marine and aviation insurance
e. oil and gas insurance
f. engineering insurance
g. bonds credit guarantee and surety ship insurance business; and
h. miscellaneous-insurance business

According to section 3 Insurance Act, no person shall operate any class of, insurance business in Nigeria except.

a. An incorporated limited liability company in Nigeria.
b. A body duly established by law to carry on the business of insurance or re-insurance in Nigeria.

Before the commencement of business, the company must be duly registered with the national insurance commission (NAICOM). The application to the NAICOM for registration shall be made in the prescribed form, accompanied by a business plan and such other information as the NAICOM may require. Life and general insurances business shall be subjected to separate application and registration. No person or body shall use the name "insurer" or "under writer" or their derivative unless properly registered under the insurance decree. To even operate as an insurance agent or broker or as loss adjusters, there must be registration with the NAICOM.

NAICOM is a body corporate with perpetual succession and a common seal. It may sue and be sued in its corporate name and established by the National Insurance Commission Act. The principal object of the NAICOM is to ensure the effective administration, supervision, regulation and control of insurance business in Nigeria.

The NAICOM before proceeding to register an applicant shall satisfy itself that the provisions regarding the prescribed paid up share capital is met in the case of

i. life assurance business – not less than N150,000,000.00.
ii. general insurance business – not less than N200,000,000.00
iii. composite insurance-not less than N350,000,000.00
iv. reinsurance business-not less than N350,000.1000.00)

Failure to meet this capital requirement shall be a ground for refusal of registration or cancellation of certificate of registration. This capital which is regarded as assets of the company shall be deposited with the central bank of Nigeria.

3.2 INSURANCE POLICY (S.19)

The policy document evidencing the contract of insurance shall be delivered to the insured not later than 60 days after payment of the first premium. It must be noted that payment of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of insured risk unless the premium is paid in advance. No premium, no cover.

3.3 DISCLOSURE

The proposal form or the application to be Ad by the insured shall be. drawn up to elicit all such information as the insurer considers material in accepting the risk in question and any information not specifically requested in the form shall be deemed not to be material.

The form must be printed in easily readable letters and shall state as a note in a conspicuous place of the front page that.

> "an insurance agent who assist an applicant to complete an
> application or proposal form for insurance shall be deemed to
> have done so as the agent of the applicant"

Any disclosure or representation made by the insured to the insurer's agent shall be deemed to be a representation to the insurer provided the agent is acting within his authority. For this limited purpose, an insured is defined to include an applicant for insurance.

3.4 BREACH OF CONDITION AND WARRANTIES

A breach of a term whether called a warranty or condition shall not afford a defence to the insurer to avoid the contract unless the term is material and relevant to the risk or loss insured against. The insurer shall not be entitled to repudiate the whole or any part of the contract unless the breach amounts to a fraud or, of fundamental term of the contract. A fundamental term means, condition or other term of an insurance contract which a, prudent insurer will regard as material and relevant in accepting to under write a risk and in fixing the amount of the premium. Where the insurer is um entitled to repudiate, his liability will be to the extent as if there was no each (Section.55)

3.5 INSURANCE INTEREST (SECTION.56)

An insurance policy taken out on the life of another is null and void unless the insured stands in a legal relationship to that person of which he may benefit by the safety or be prejudiced by the death of that person or the loss from the occurrence of the event insured against. Legal relationship under this heading includes the relationship which exist between person under Islamic law or customary law whereby one person assumes responsibility for the maintenance and care of the other.

3.6 THIRD PARTY RIGHTS (S. 68).

Where a third party is entitled to claim against an insured in respect of a risk insured, he shall have a right to join the insurer in the suit against the insured in respect of the claim. A third party shall, before bringing up application to join the insurer, give the insurer at least 36 days notice of the pending action and of his intention to effect the joinder.

3.7 CLAIMS ON FIRE INSURANCE

Where a house or other building insured against loss by fire:

a. is damaged or destroyed by fire; and
b. there is no reasonable ground to suspect that the owner, occupier or other person who insured the house or building is guilty of fraud in respect of the insurance or of willfully causing the fire, the insurer who is liable to make good the loss may, on the request of the insured or persons interested in the house or building, cause the insurance money payable to be paid out and expended towards rebuilding the house.

The insurer has the discretion to pay or expend the money to rebuild the house. If the money is to be paid instead, then, within 60 days after the claim is agreed, the claimant shall give security that the money shall be expended to rebuild the house or building.

4.0 CONCLUSION

The regulation of insurance business through legislation provides the legal basis for ensuring that the conducts of business of the law are found they are death with accordingly and appropriate sanctions meted. Mandatory provisions of the law must be fully complied with by both the insurers and the insured.

5.0 SUMMARY

There are two principal laws that regulate insurance business in Nigeria.
The are: The insurance Act, 2003 and the National Insurance Commission Act. Insurance Business is categorized into classes of insurance. Any person intending to carry on insurance business must meet the minimum paid up capital for the kind of insurance he wants to register. The National Insurance commission is the regulatory institution of the insurance sub-sector in Nigeria.

The Insurance Act has made specific definite provisions on some mandatory procedure to be followed in an insurance transaction. They include: Insurance policy, Disclosure, Breach of Conditions and warranties, insurable interest, third party Rights, and claims on fire insurance.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the role of the National Insurance Commission in the regulation of Insurance business in Nigeria.

7.0 REFERENCES/FURTHER READINGS

2. IRUKWU, J. O. Insurance Law and Practice In Nigeria.