

**COURSE  
GUIDE**

**CLL 817  
LAW OF COMMERCIAL AND CONSUMER PROTECTION  
LAW I**

**Course Team**      Dr. Ernest O. Ugbejeh (Course Developer/  
Writer)-NOUN  
Prof. Justus Sokefun (Course Editor)-NOUN  
Dr. Ernest O. Ugbejeh  
Dr. Felix K. Olakulehin (Copy Editor)-NOUN



**NATIONAL OPEN UNIVERSITY OF NIGERIA**

Headquarters  
Plot 91, Cadastral Zone,  
University Village,  
Nnamdi Azikiwe Expressway,  
JABI - ABUJA  
URL: [www.nou.edu.ng](http://www.nou.edu.ng)

Lagos Office  
14/16 Ahmadu Bello Way  
Victoria Island, Lagos

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## INTRODUCTION

Welcome to CLL 817: Law of Commercial and Consumer Protection I. This course is one of the LL.M courses in National Open University of Nigeria available to LL.M students. This course is offered in the first semester of your study and it is a 3-credit unit course.

This first semester of Law of Commercial Transaction and Consumer Protection I course dealt with the sale of goods law and the e-commercial transactions. On the first arm of sale of goods: development and sources of sale of goods law, the nature and definition of sale of goods, subject matter of sale of goods and the distinction of Sale of Goods from Other Commercial Transactions were covered. The general principle and formation of contract as it relates to sale of goods, elements of sale of goods, terms of contract, exclusion clause, fundamental term, fundamental breach, passing of property by non-owner, passing of property in specific and unascertained goods were all examined. Duties and remedies of seller as well as that of the buyers were dealt with in this course material. Also, treated in this course material is the e-commercial transaction as it relates to sale of goods.

## COURSE AIM

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

## COURSE LEARNING OUTCOMES

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

The general LEARNING OUTCOME will be achieved at the end of the course material. At the completion of the course material you should be able to:

- 1) Understand the development and sources of sale of goods law.
- 2) Understand the nature and definition of the Sale of Goods.
- 3) Distinguish sale of goods from other commercial transactions.
- 4) Know the essential elements of a contract of sale of Goods.
- 5) Understand the formalities for the formation of a contract of sale of goods
- 6) Understand terms of contract and terms implied by statute
- 7) Understand and relate together the concepts of fundamental term, fundamental breach and exclusion clause.

- 8) Distinguish between ownership, possession and passing of property.
- 9) Understand the duties of the seller.
- 10) Understand the duties of the buyer.
- 11) Appreciate the remedies available to the seller and the buyer.
- 12) Know the effect of contract of sale of goods.
- 13) Discern the remedies available to the innocent party in case of breach.
- 14) Understand e-commercial contracts.
- 15) Know the formation of e-commercial contract.
- 16) Understand the various payment devices

## **WORKING THROUGH THIS COURSE**

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self-Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 13 weeks to complete. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

## **COURSE MATERIALS**

The major components of the course are.

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

## **MODULES AND STUDY UNITS**

There are 23 study units divided into 6 modules as follows:

### **MODULE 1 INTRODUCTION**

- |        |  |
|--------|--|
| Unit 1 | Development and Sources of Sale of Goods Law                   |
| Unit 2 | Nature and Definition of Sale of Goods                         |
| Unit 3 | Subject Matter of Sale of Goods                                |
| Unit 4 | Sale of Goods Distinguished from Other Commercial Transactions |
| Unit 5 | Essential Elements of a Contract of Sale of Goods              |

Unit 6 Formalities for the Formation of a Contract of Sale of Goods

## **MODULE 2 PASSING OF PROPERTY**

Unit 1 Terms of Contract  
 Unit 2 Terms Implied by Statute  
 Unit 3 Exclusion Clauses, Fundamental Terms and Fundamental Breach

## **MODULE 3 PASSING OF PROPERTY**

Unit 1 The Concept of Property.  
 Unit 2 Passing of property in Specific Goods.  
 Unit 3 Factors Negating Application of Rule 1 of Section 18  
 Unit 4 Passing of Property in Unascertained or Future Goods

## **MODULE 4 TRANSFER OF TITLE TO NON-OWNER**

Unit 1 Transfer of title by non-Owner.  
 Unit 2 Exception to the doctrine of *Nemo Dat Quod Non Habet*

## **MODULE 5 DUTIES OF AND REMEDIES FOR THE SELLERS AND THE BUYERS**

Unit 1 Duties of the Seller.  
 Unit 2 Duties of the Buyer.  
 Unit 3 Remedies of the Seller.  
 Unit 4 Remedies of the Buyer.  
 Unit 5 Factors Affecting liability under contract of Sales of Goods

## **MODULE 6 E-COMMERCIAL CONTRACTS AND VARIOUS PAYMENT DEVICES**

Unit 1 Definition of E-Commercial Contracts  
 Unit 2 Formation of E-Commercial Contract  
 Unit 3 Various Payment Devices

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

We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on the law of contract. You will then have a clearer picture into which to paint these topics. Subsequent units are written on the assumption that you have completed previous Units.

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

## **REFERENCES – FURTHER READING**

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

## **ASSESSMENT**

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

## **SELF-ASSESSMENT EXERCISES**

There is a self-assessment exercise at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them, but the best three performances will be used for assessment. The assignments carry 10% each.

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

## **FINAL EXAMINATION AND GRADING**

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

course. You may find it useful to review yourself assessment exercises and tutor marked assignments before the examination.

## COURSE SCORE DISTRIBUTION

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

Assessment	Marks
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments. Best three marks of the four count at 30% of course marks.
Final examination	70% of overall course score
Total	100% of course score.

## COURSE OVERVIEW AND PRESENTATION SCHEDULE

Module	Title of Work	Weeks Activity	Assessment (End of Unit)
Module 1	Course Guide		
Unit 1	Development and Sources of Sale of Goods Law	1	Assignment 1
Unit 2	Nature and Definition of Sale of Goods	1	Assignment 2
Unit 3	Subject Matter of Sale of Goods	2	Assignment 3
Unit 4	Sale of Goods Distinguished from Other Commercial Transactions	2	Assignment 4
Unit 5	Essential Elements of a Contract of Sale of Goods	3	Assignment
Unit 6	Formalities for the Formation of a Contract of Sale of Goods	3	Assignment
Module 2	UNIT 1 - Terms of Contract	4	Assignment 5
Unit 1			
Unit 2	- Terms Implied By Statutes	4	Assignment 6
Unit 3	Exclusion Clause and Fundamental Breach	5	Assignment 7
Module 3	Unit 1 – The Concept of Property.	6	Assignment 8
Unit 1			
Unit 2	Passing of Property in Unconditional Sale of Specific Goods.	6	Assignment 9
Unit 3	Factors Negating Application	6	Assignment 10

	of Rule 1 of Section 18		
Unit 4	Passing of Property in Unascertained or Future Goods.	7	Assignment 10
Module 4 Unit 1	Unit 1 – Transfer of title by non-Owner.	8	Assignment 11
Unit 2	Exemption to the Doctrine of <i>Nemo Dat Quo Non Habeat</i>	8	Assignment 12
Module 5 Unit 1	Unit 1 - Duties of the Seller.	9	Assignment 14
Unit 2	Duties of the Buyer.	9	Assignment 15
Unit 3	Remedies of the Seller	10	Assignment 16
Unit 4	Remedies of the Buyer.	10	Assignment 17
Unit 5	Factors Affecting liability under contract of Sales of Goods.	11	Assignment 18
Module 6 Unit I	Definition of E-Commercial Contracts	12	Assignment 19
Unit 2	Formation of E-Commercial Contract	12	Assignment 20
Unit 3	Various Payment Devices	12	Assignment 21

## HOW TO GET THE MOST FROM THIS COURSE

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

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

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the Learning Outcomes of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you

come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

## **TUTORS AND TUTORIALS**

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

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

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

- You do not understand any part of the study units or the assigned readings;
- You have difficulty with the self-assessment exercises;
- You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

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

## **SUMMARY**

This course deals with development of sale of goods law, nature and definition of sale of goods, the subject matter of sale of goods, formation of the sale of goods contract; sale of goods distinguished from other commercial transactions, essential elements of a contract of sale of goods, formalities for the formation of a contract of sale of goods, terms of contract, exclusion clauses, fundamental terms and fundamental breach.

Concept of property and passing off property; duties of the seller; duties of the buyer; effect of contract; remedies; e-commercial contracts, formation of e-commercial contract , various payment devices

**MAIN  
COURSE**

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## **MODULE 1 INTRODUCTION**

### **UNIT 1 DEVELOPMENT AND SOURCES OF SALE OF GOODS LAW**

- 1.1 Introduction
- 1.2 Learning Outcomes
- 1.3 Development and Sources of Sale of Goods Law
  - 1.3.1 Development of Sale of Goods Law
  - 1.3.2 Sources of Sale of Goods Law in Nigeria
- 1.4 Summary
- 1.5 Reference/Further Readings/Web Source
- 1.6 Possible Answer to Self-Assignment

#### **1.1 Introduction**

The contract of sale of goods is one of the oldest forms of commercial transaction globally, from the practice of trade by barter to the introduction and use of legal tender. The applicable law over the years has evolved to its present stance. From the introduction of the bill in England to its application in Nigeria is the focus of this unit. The understanding of the evolution of sale of goods law is necessary to appreciate the past and the present reality as it pertains to sale of goods and the various sources of sale of goods law in Nigeria.

#### **1.2 Learning Outcomes**

At the end of this unit you are expected to be able to:

- trace the historical development of sale of goods law
- discuss the development of sale of goods law
- identify the sources of sale of goods law in Nigeria.

#### **1.3 The Development and Sources of Sale of Goods Law**

##### **4.3.1 The Development of Sale of Goods Law**

The contract of sale of goods is one of the earliest and most important forms of commercial contract. The modern law is traceable to the 19<sup>th</sup> century. In 1889, Sir Mackenzie Chalmers drafted the Sale of Goods Bill which Lord Hershell introduced to the House of Lord in United Kingdom for evaluation and criticism. The bill metamorphosed into Sale of Goods Act, 1893. The Sale of Goods Act, 1893 greatly influenced the USA's Uniform Sales Act, 1906 which was replaced by Uniform Commercial Code, 1952. The English Sale of Goods Act 1893 has gone

through series of amendments and these amendments are codified in the Sale of Goods Act, 1979. The Act regulates the English contract law and UK commercial law in respect of goods that are sold and bought.

In Nigeria, sales of goods is governed by the provision of the Sale of Goods Act, 1893. The Act is a statute of general application in force in England before 1900 received into Nigeria through local statutes (Section 45 of the Interpretation Act Cap 19 Laws of Federation of Nigeria 2004). Prior to the Nigerian independence from the British government in 1960, various Acts of British Parliament were made for or extended to Nigeria being a British colony. The Sale of Goods Act, 1983 is one of such laws that continue to apply even after independence. The Act is applicable across the federation except in the states where they have their Sale of Goods laws. States that have their Sale of Good Law include Lagos and Sates in the former Western Region where the Sale of Goods Act has been repealed and replaced by the Sale of Goods Law, 1959. In order words, States of the Northern and Eastern regions are presently using Sale of Goods Act, 1893. It is pertinent to note that even in States that have Sale of Goods Law, the provisions are similar and identical with the Act (See *Berende v Usman* (2004) 12 FWLR0 (PT 241) CA 453, 477.

The regulation of sales of goods in Nigeria is not limited to the Sale of Goods Act and State laws. The rules of Common Law and the principles equity including the Merchant usage which are not inconsistent with the express provisions of the Sale of Goods Act, 1893 or State Laws are also applicable. This is made possible by section 45 of the Interpretation Act of 1965 (Cap 19 LFN 2004) that provides thus:

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

The effect of the provision above is that principle of common law equity and statute of general application will continue to apply subject to any law made by the federal government. While it is not expressly stated in the above provision the supremacy of the Sale of Goods Law enacted by a State in Nigeria, the issue was settled by the Court in *Henry Stephens Engineering v Complete Home Enterprise Nig. Ltd* (1987) 1NSCC 21. The Supreme Court held that the judgment of the lower courts were valid only because they were in accordance with the provision of the then existing local statute which section 15(2) of the Sale of Good Law of Lagos State. Like other States, section 15(2) of the Lagos Sale of

Goods Law was a reenactment of the exact wordings of section 14(2) of the Sale of Goods Act, 1893.

Another worrisome issue is the use of Statute of general application, years after independence and years of democratic dispensation in Nigeria. The prime duty of the parliament is law-making and one would have expected that by now that Nigeria Sale of Good Act should have been enacted by the National Assembly and domesticated by all the States of the federation.

### **4.3.2 The Sources of Sale of Goods Law in Nigeria**

The above discussion clearly reveals the various sources of sale of goods law in Nigeria to include:

- 1) Sale of Goods Act 1893 – This is a statute of general application in force in England before 1 January 1900. It is an English Statute received into Nigeria by local statute.
- 2) Sale of Goods Laws enacted by States in Nigeria.
- 3) Rules of Common Law – such as the general principle of contracts.
- 4) Principles of equity.
- 5) The law merchants.
- 6) Case Law/Precedent: The court often in the course of interpreting statutes creates body of legal principles. By doctrine of precedent, decision of a higher court is binding on a lower court. Section 62 of Sale of Goods Act validates the application of 3-5 sources above.

#### **SELF-ASSESSMENT EXERCISE 1**

Examine the development of sale of goods law in Nigeria.

## **1.4 Summary**

This unit examines the development of sales of goods law, the application of the Sale of Goods Act in Nigeria, the enactment of sale of Goods law in different states in Nigeria and application of rule of Common Law and principle of Equity to sale of goods in Nigeria. Although, the contract of sale of goods is one of the earliest forms of commercial contract, the modern law in this area of law is traceable to the 19<sup>th</sup> century. The applicable laws to sales of goods in Nigeria include the Sale of Goods Acts and States' Sale of Goods Laws.

### 1.5 Reference/Further Readings/Web Sources

The Sale of Goods Act, 1893

The Sale of Goods Act 1979 (c 54) of the United Kingdom

Akanki E A, *Commercial Law in Nigeria* (University of Lagos Press, 2007) 267

George Etomi, *An Introduction to Commercial Law in Nigeria: Text, Cases and Materials* MIJ Professional Publisher 2014) 144.

Fagam P.K. 'Sale of Goods' Akanki E A (Ed) *Commercial Law in Nigeria* (University of Lagos Press, 2007) 267

Moneylenders Law, Cap. M7, Laws of Cross River State of Nigeria, 2004 and

Moneylenders Law, Cap. M7, Laws of Lagos State of Nigeria, 2003

### 1.6 Answer to Self-Assessment Exercise

The contract of sale of goods is one of the earliest and most important forms of commercial contract. The modern law is traceable to the 19<sup>th</sup> century when in 1889, Sir Mackenzie Chalmers drafted the Sale of Goods Bill which Lord Hershell introduced to the House of Lord in United Kingdom for evaluation and criticism. The bill metamorphosed into Sale of Goods Act, 1893. The Sale of Goods Act, 1893 greatly influenced the USA's Uniform Sales Act, 1906 which was replaced by Uniform Commercial Code, 1952. The English Sale of Goods Act 1893 has gone through series of amendments and these amendments are codified in the Sale of Goods Act, 1979. The Act regulates the English contract law and UK commercial law in respect of goods that are sold and bought. In Nigeria, sale of goods is governed by the provision of the Sale of Goods Act, 1893. Section 45 of Interpretation Act made possible the application of English Law in Nigeria. States in Nigeria have also enacted Sale of Goods Law which is a replica of the Sale of Goods Act. It also regulated by principle of common law and equity.

## **UNIT 2 NATURE AND DEFINITION OF SALE OF GOODS**

- 2.1 Introduction
- 2.2 Learning Outcomes
- 2.3 Nature and Definition of Sale of Goods
  - 2.3.1 Nature of Sale of Goods
  - 2.3.2 Definition of Sale of Goods
- 2.4 Summary
- 2.5 Reference/Further Readings/web sources
- 2.6 Possible Answer to Self-Assessment Exercise

### **2.1 Introduction**

The contract of sale of goods is a special kind of contract. Not all transfer of goods qualifies a sale of goods. There are certain elements that make the sale of goods a unique kind of contract. This unit examines the nature and definition of sale of goods.

### **2.2 Learning Outcomes**

At the end of this unit, you should be able to discuss the meaning and nature of contract of sale of goods.

### **2.3 Nature of Contract of Sale of Goods**

The nature of contract of sale of goods is that it is an agreement between the seller and the buyer for the sale of goods in which the transfer of property in the goods from the seller to the buyer must be for a money consideration call the price. It is a specialised area of contract that involves the sale of goods. The sale of goods is essentially a part of law of contract. Consequently, the laws regulating sales of goods do not exclude the general rules relating to the general contract. Therefore, the principles of offer and acceptance, consideration and other elements of a valid contract must be present in a contract of Sale of Goods. It is special because in addition to the above ordinary elements of general contract, goods and money consideration must be present in every sale of goods contract.

#### **2.3.1 Meaning of Sales of Goods**

The question therefore is what is sales of goods? Sales of goods is defined in section 1(1) of the Sale of Goods Act, 1893 as “A contract

whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price”.

This implication of the above definition as noted above is that two other elements: the sale object of goods and money consideration, must also be present together with the ordinary elements of a contract for a contract of sale of goods to be valid. Furthermore, the above definition envisages two situations namely: contract of sale and agreement to sell (Section 62(1) of the Act).

- 1) A contract of sale: This is a sale of goods in which the property in the goods is transferred from the seller to the buyer at the time of sale. It "includes a bargain and sale as well as a sale and delivery" (See Section 61(1) of the Act).
- 2) An agreement to sell: This is where the transfer of the property takes place at a future time or upon condition upon occurrence of an event. The property only passes upon lapse of such time or a fulfillment of certain conditions that crystalizes into the transfer of property in the goods to the buyer (see section 1(4) of the Act).

A typical example is a contract for the sale of goods yet to be manufactured because the property in the goods cannot pass until they are manufactured and ascertained.

Therefore, the sales of good is either absolute or conditional (see section 1(3) of the Act). The recognition of these two forms of contract of sales is further emphasized and made clearer by section 1(3) of the Act which states that, where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an agreement to sell.

In *Bello v Adefowope* (1974) NCLR 153, 158-159, Bakare J in drawing a distinction between the two classes of contract of sales noted that agreement to sell is an executory contract of sale which contract is pure and simple, in which a *jus in persona* is created, while sale, an executed contract is a contract plus conveyance in which a *jus in rem* is created.

#### **SELF-ASSESSMENT EXERCISE 2**

Critically undertake an appraisal of the nature and meaning of Sales of Goods contract.

## 2.4 Summary

We examined the true nature of contract of sale of goods and the meaning of sale of good under the Act A contract of sale of goods arises where the seller transfers or agrees to transfer property in good in exchange of money consideration called the price. This makes the contract of sale of goods a special kind.

## 2.5 Reference/Further Readings/Web Source

The Sale of Goods Act, 1893

The Sale of Goods Act 1979 (c 54) of the United Kingdom

Akanki E A, *Commercial Law in Nigeria* (University of Lagos Press, 2007) 267

George Etomi, *An Introduction to Commercial Law in Nigeria: Text, Cases and Materials* MIJ Professional Publisher 2014) 144.

Fagam P.K. ‘Sale of Goods’ Akanki E A (Ed) *Commercial Law in Nigeria* (University of Lagos Press, 2007) 267

## 2.6 Answer to Self-Assessment Exercise

The answer should address the nature and meaning of Sale of Goods contract. The transfer of property in the goods is the nature. Sale of goods is defined in section 1(1) of the Sale of Goods Act, 1893 as “A contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price”.

## **UNIT 3 THE SUBJECT MATTER OF SALE OF GOODS**

- 3.1 Introduction
- 3.2 Learning Outcomes
- 3.3 Subject Matter of Sale of Goods
  - 3.3.1 Definition of Goods
  - 3.3.2 Classification of Goods
- 3.4 Summary
- 3.5 Reference/Further Readings/Web Source
- 3.6 Answer to Self-Assessment Exercise

### **3.1 Introduction**

The contract of sale of goods is a special kind of contract because it demands of additional elements of money consideration for the subject matter, goods. This unit focuses on the subject matter of contract of sale of goods and its classification.

### **3.2 Learning Outcomes**

At the end of this unit, you shall be able to discuss and analyse the subject matter of sale of goods and its classification.

### **3.3 Subject Matter of Sales of Goods**

The demand by the Act that the subject matter of the contract of sales of goods must be goods begs the question of what the meaning of goods and its classification is.

#### **3.3.1 Definition of Goods**

The term “goods” is defined by section 62(1) of the Act to include all chattels personal other than things in action and money, ... all corporeal, moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Therefore, the term goods under sale of goods law means things other than land or real property, choses in Action and money. The various components of goods listed by the Act are further examined below.

**1) Chattel Personal:**

These are tangible personal things such as car, clothes, shoes and animals. They are regarded as goods. This excludes real property also known as chattel real and things attached to the land such as minerals except separated from the land as goods. *Things in action* are intangible such as shares and negotiable instruments as well as money are not regarded as goods. Oviethara notes that “the definition is clear that real property, chattel real, choses in action and money are not goods. Where money becomes antiquity, it will be goods” (Oviethara, Sale of Goods Law (1996 Malthouse Press Ltd) 4). Money can only qualify as goods when it is being sold as old currency over and above its face value.

**2) Emblements:**

These are products of the land which do not grow naturally but are the annual results of agricultural labour of man or a combination of man’s skill and machine. They include maize, maize potatoes etc (Akanki EA 269). They are regarded as goods.

**3) Industrial Growing Crops:**

They also known as *fructus industrialis* and they include thing grown by industry of man. It is like emblements but it has wider scope than the emblements because it is not limited to crops that are produced annually. They are regarded as goods.

**4) Things Attached to and Forming Part of the Land:**

These are also called *fructus naturalis*. They include things that growing naturally on the land such as grass, timbers, traditional palm tree, Raffia palm tree, etc. They are regarded as goods only if severed from the land before sale or agreed to be severed before sale.

**3.3.2 Classification of Goods**

Goods, the subject matter of contract of sale of goods may be classified into the following:

**1) Existing Goods**

These are goods that are owned or possessed by the seller at the time of contract. They are goods actually in existence when the contract is made. Existing goods may either be specific or unascertained.

## 2) *Specific Goods*

These are goods identified and agreed upon at the time the contract of sale was made (section 62 of the Act). For example, if Mr. James walked into a car shop and buys a 2009 Rhumba Motor Boat with Engine number 10465 and chassis number AB60421. The car is specific goods. See *Mary Ajayi v Alice Ebun* (1964) MNLR 4.

## 3) *Ascertained Goods*

The Act did not define ascertained goods. It is the opposite of specific goods. It means those goods identified in accordance with the agreement after the contract of sale of goods is made. The difference between ascertained and specific goods is the time of identification of the goods. The identification time for specific goods is during the contract of sale while ascertained goods, the identification is after the contract of sale of goods is made.

## 4) *Unascertained Goods (Goods Sold by Description)*

As the name implies, these are goods sold by description, meaning they are not identified, agreed upon or ascertained at the time of the contract but are included in a particular class of goods. A good example is sale of “30 inches of 18 kilogrammes mahogany wood”. It covers:

- (a) *The sale of purely generic goods*
- (b) *The sale of part of a whole or larger quantity of goods*
- (c) *The sale of goods to be manufacture, acquired or grown by the seller*

## 5) *Future Goods*

These are futuristic goods. They are goods not yet in existence or goods in existence but not yet acquired by the seller. That is to say, goods yet to be acquired or manufactured by the seller after the contract have been made. In *Howell v Coupland* (1876) 1 Q.B. 258, the plaintiff contracted with the defendant to buy 200 tons of potatoes to be grown specifically from the defendant’s land. The court held the contract to be a sale of specific goods, despite the fact that they were not existing goods.

### **SELF-ASSESSMENT EXERCISE 3**

Examine the concept of ‘goods’ and its classification

### 3.4 Summary

The unit exposed the learners to the understanding of the definition of goods, the disparities between different types of goods and the explanation of different categories of goods. This unit has exposed learners to the subject matter of sale of goods. The classification of goods into various categories such as the specific goods, future goods, existing goods and ascertained or unascertained goods was also thoroughly discussed.

### 3.5 References/Further Reading/Web Source

Laws of the Federation, 1990 Hire Purchase Act, Cap 169.

Sale of Goods Act, 1893.

Rawlings, Commercial Law, University of London Press, (2007)

Okany, Nigerian Commercial Law, Africana – Fep Publishers Limited, (1992).

#### 3.5 Answer to Self-Assessment Exercise

The term “goods” is defined by section 62(1) of the Act to include all chattels personal other than things in action and money, ... all corporeal, moveable except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The classification include existing, specific, ascertain, unascertained and future

## **UNIT 4 SALE OF GOODS DISTINGUISHED FROM OTHER COMMERCIAL TRANSACTIONS**

- 4.1 Introduction
- 4.2 Learning Outcomes
- 4.3 Sale of Goods Distinguished from Other Commercial Transactions
  - 4.3.1 Gift
  - 4.3.2 Exchange
  - 4.3.3 Bailment
  - 4.3.4 Hire purchase
  - 4.3.4 Loan
- 4.4 Summary
- 4.5 Reference/Further Readings/Web Source
- 4.6 Answer to Self-Assessment Exercise

### **4.1 Introduction**

To the layman any transfer of goods from person to another and sale of any item qualify as sale of goods. There are certain commercial transactions that are related to sale of goods but which in context differ. This unit focuses on drawing a clear demarcation between a contract of sale of goods and other commercial transactions that many persons mistakenly regard as sale of goods.

### **4.2 Learning Outcomes**

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

- distinguish between contract of sale of goods and other related commercial transactions.
- analyse the salient features of contract of sale of goods and other related commercial transactions.

### **4.3 Sale of Goods and Other Transactions**

Sale of Goods is distinguishable from other similar commercial transactions. Some of these related transactions include exchange, bailment, hire purchase, gift, and loan.

#### **4.3.1 Sale and Exchange**

The consideration required under section 1(1) of the Act must be money whereas an exchange involves a transfer of goods for other goods. A

contract of exchange simply means the giving of goods to the person in exchange for the other person's goods known as trade by barter. In other words, money, which is a prerequisite for a contract of sale, is not involved in a contract of exchange. In exchange of goods for goods, the property in the goods passes without any money consideration

The issue that may arise where goods are exchange for part goods and part money is as to whether such transaction could be regarded a sale of goods transaction. In *Adridge v. Johnson* ((1857) 7 E&B 885), A made a deal with K to exchange 32 bullocks for 100 quarters of barley. They valued the bullocks at £6 each which came to the total of £192 in all and the barley at £215 and agreed that the difference of £23 would be paid in cash. The court held the transaction to be a contract of sale of goods

### **4.3.2 Sale and Bailment**

A bailment is a transaction under which goods are delivered by one party (the bailor) to another (the bailee), on certain specified terms, which generally provide that the bailee is to have possession of the goods and subsequently redeliver them to the bailor in accordance with his instruction. The property in the goods is not intended to and does not pass on delivery of possession to the bailee, and in fact remains with the bailor, though it may sometimes be the intention of the parties that it should pass in due course, as in the case of ordinary hire purchase contract.

In sale, on the other hand, there is usually an indication that the property in the goods would pass to the other party in the transaction. In other words, in a contract of bailment there is no transfer of property in the goods from the bailor to the bailee, whereas in the case of sale, the property in the goods should be transferred from the seller to the buyer

### **4.3.3 Sale and Hire Purchase**

Generally, contracts of hire purchase resemble contract of sale very closely, and indeed in practically all cases of hire-purchase, the ultimate sale of the goods is the real object of the transaction. The distinction between them is very clear and extremely important at this initial stage.

A contract of sale involves two parties, the buyer and the seller, whereas a hire purchase transaction most cases involve three parties to it, namely, the seller of the goods who sells them to finance a company, which in turn leaves the goods on hire purchase terms to the hirer (who may not become the buyer if he defaults or refused to exercise his option to purchase).

Under a hire purchase transaction (as it shall be seen later) the hirer,(who may or may not become the buyer) has possession of the goods and is entitled to their use, although he is not the owner.

#### **4.3.4 Sale and Gift**

A gift is an immediate, voluntary and gratuitous transfer of any property from one person to another. In other words, it is a transfer of property without any consideration. If no valuable consideration is given, gift is not a sale. Delivery is essential to make a gift of a chattel at common law valid unless by deed.

Sometimes, problems arise with regard to transactions in which what is regarded as “free” gift is offered as a condition of entering into some other transaction. In *Esso Petroleum Ltd. v Commissioner of Customs and Excise* (1976) 1 ALL ER 117 or 1 WLR 1, a promotion scheme of supplier offered a “free” medallion to every motorist who bought four gallons of petrol. The question arose whether the medallion was itself the subject of a sale or indeed of a contract at all. A majority of the House of Lord held that there was no “sale”, but was divided on the question whether this was because there was no consideration or whether there was no contract at all but merely the promise of a gift, for want of any intention to create a legally binding relationship.

#### **4.3.5 Sale and Loan**

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

#### **SELF-ASSESSMENT EXERCISE 4**

Critically examine sale of goods and other related transactions.

### **4.4 Summary**

Through this unit, learners have been able to know the distinction between sale of Goods and exchange, bailment, hire-purchase, gift and loan. This unit has exposed learners to the distinction between sale of goods and other commercial transactions like exchange, bailment, hire-purchase, gift and loan.

#### **4.5 References/Further Readings/Web Source**

Sale of Goods Act, 1893.

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

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

Okany, Nigerian Commercial Law, 1992.

John Alemo Musa Agbinika and Josephine Aladi Achor Agbonika, Sale

of Goods, 2009

#### **ANSWER TO SELF-ASSESSMENT EXERCISE**

The answer will cover differentiating sale from loan, bailment in which there is no transfer of property in the goods as is the case of sale of goods.

## **UNIT 5 ESSENTIAL ELEMENTS IN THE FORMATION OF CONTRACT OF SALE OF GOODS**

- 5.1 Introduction
- 5.2 Learning Outcomes
- 5.3 Essential Elements in the Formation of Contract of Sale of Goods
  - 5.3.1 Offer
  - 5.3.2 Acceptance
  - 5.3.3 Consideration
  - 5.3.4 Intention to Create of Legal Relation
  - 5.3.5 Goods
  - 5.3.6 Price
- 5.4 Summary
- 5.5 Reference/Further Readings/Web Source
- 5.6 Answer to Self-Assessment Exercise

### **1.1 Introduction**

The creation of a contract for the sale of goods is a matter governed by the general principles of contract as they exist either under common law or as modified by statutory provisions and the sale of goods law. It follows therefore, that a proper grounding on the basic principles of contract is a condition precedent to the appreciation of the principles governing the creation of the contract of sale of goods. As noted earlier, contract of sale of goods is special kind as it demands of additional two elements to the ordinary elements of a valid contract. In *Metibaiye v Narelli* ((2009) 16 NWLR (PT 1197) 326, 346-347), Aboki JCA held that “the elements of a valid contract are offer, acceptance, consideration, intention to create legal relationship and capacity”. These elements are the focus of this unit.

### **1.2 Learning Outcome**

At the end of this unit you should be able to discuss the basic ingredients or elements required for the creation of a valid sale of goods contract.

### **1.3 Essential Elements in the Formation of Contract of Sale of Goods**

#### **5.3.1 Capacity to Buy and Sell**

The parties – the seller and buyer must possess the legal capacity to make a contract of sale of goods. As required, under the general law

governing capacity to enter into a valid contract, both parties to a sale of goods contract must have the requisite capacity to enter into the contract relationship. Section 2 of the Act leaves the regulation of capacity to be governed by the general law of contract and provides that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent and lack capacity, he or she must pay a reasonable price for them (See Infant Relief Act 1874 and infant Law 1959, Child Rights Act, *Labinjo v Abake* (1924) 5 NLR 33 and *Peters v. Fleming* (1840) 6).

The Proviso to section 2 of the Act defines necessaries as “goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery”. However, for an infant to be liable for supply necessaries it must be established that such supplies of goods is suitable to the infant’s condition of life and that he had no adequate supply of them already (*Nash v Inman* (1908) KB 1).

### 5.3.2 Offer

An offer may be defined as a definite undertaking or promise, made by one party with the intention that it shall become binding on the party making it as soon as it is accepted by the party to whom it is addressed. The person making the offer is called the offeror, and the person to whom it is addressed, the offeree. See *Orient Bank (Nig.) Plc v Bilante Int’l Ltd* (1997) 8 NWLR (Pt 515) 76; *Carlill v Carbolic Smoke Ball Co.* (1893) 1 Q.B.253. The distinction between an offer and invitation to treat is that offer serves to bind the parties upon its acceptance, while invitation to treat merely initiates a negotiation which may or may not lead to an offer. (See *BFI Croup Corp. v Bureau of Public Enterprise* (2012) 7 SC Pt 111; *Gibson v Manchester City Council* (1979) UKHL 6).

The display of goods in shelves, in a shop, supermarket and the advertisement of goods in newspaper, circular and trade catalogue are regarded as an invitation to treat. An offer can be made expressly or by conduct (impliedly). However, for a proposition to amount to an offer capable of acceptance, it must satisfy three conditions.

- 1) It must be definite, certain and unequivocal
- 2) The proposition must emanate from the person liable to be bound if the terms are accepted by the offeree.
- 3) The offer must be communicated to the offeree.

The circumstances that may lead to the termination of an offer are death, lapse of time, rejection by the offeree, and revocation.

## Acceptance

Acceptance is defined as the final expression of assent to the terms of an offer by the offeree. It is an agreement of the offeree to enter into legally binding contract with the offeror (See *Akinyemi v Odu'a Investment Co. Ltd.* (2012) 1 SC (Pt IV) 43). Thereby, by acceptance, the offeree indicates his intention and willingness to be bound by the terms of the offer from the offeror. When an offer is accepted, it is transformed to a promise and a breach of it will give rise to an action.

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

### 1) Conditions for Validity of Acceptance

The following conditions must exist for an acceptance to be valid.

- a) The acceptance must be unqualified. *Hart v Mills* (1846)15 L.J. Exch 200.
- b) An acceptance must not be conditional. See *Odufundade v Ososami* (1972) U.I.L.R. 101
- c) An offer can only be accepted by the person to whom it is made or by his agent duly authorized. But where an offer is made to the public at large, any member of the public may accept it (see *Carlill v Carbolic Smokeball Co.*(supra).
- d) An acceptance must be made not only with full knowledge of the offer but also in reliance on it. The question is whether acceptance in ignorance of offer can be enforced. Affirmative answer was given in *Neville v Kelly* (1962) 12 CBNS, 740) and *Gibson v Proctor* ((1981) 64 LT. 594). But these decisions have be criticize and the criticism upheld in the United State, Australia and South Africa.
- e) Acceptance must be communicated
- f) Acceptance may be affected in the following circumstances:
  - i. If the offeror prescribes or indicates a particular method of acceptances, and the offeree accepts in that way. There will be a contract, even though the offeror does not know of the acceptance.
  - ii. Acceptance communicated to a duly authorized agent of the offeror is effective in law.
  - iii. Where acceptance is governed by the rule in *Adams Lindsell* (1818)1 B and Ald 681, i.e, acceptance made

by postal correspondence, e.g, by letter or telegram. Here, where the acceptance is by post it is complete as soon as it is posted. Delay in transit or loss of the letter of acceptance does not affect the validity of the contract.

- iv. Where the offeror himself expressly or impliedly states the need for communication.
- v. Communication of acceptance is waived impliedly, i.e, is deemed to be waived where it is to take the form of the performance of an act, as in the case of unilateral contracts.

## 2) Modes of Communication

- a) Where a particular mode is prescribed. The mode must be used.

However, in *Manchester Diocesan Council for Education v. Commercial and General Investment Ltd.* (1969)3 ALL E.R. 1593, Buckley, J, approved this view that the offeree could employ an equally or more expeditious mode than that prescribed by the offeror, if it cannot be expressly shown that the offeror had only one mode of acceptance in mind. Yet, a lot depend on the LEARNING OUTCOME for the prescription of the particular mode of acceptance of offer.

- b) Where no particular mode is prescribed, the offeree is expected to respond according to the nature of the offer. If the offer is made orally, oral acceptance suffices.
- c) Where Acceptance is By Post. Herschell, L.J. in *Henthorn v Fraser* (1892)2 Ch. 27, at page 33 stated thus;

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

### 5.3.3 Consideration

The most illustrative and applied definition of consideration is that of Lush J., in *Curie v Misa* (1875) L. R. 10 Exch 153 at 162 where he said: A valuable consideration in the eye of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other. Thus consideration does not only consist of profit by one party but also exist where the other party abandoning some legal rights in the present, or limits his legal freedom of motion in the future as an inducement for the promise of the first. So it is irrelevant

whether one party benefits but enough that he accepts the consideration that the party giving it does thereby undertake some burden or lose something which is in contemplation of law may be of value.

The following rules are applicable to consideration.

- 1) A moral obligation does not constitute consideration. See *Eastwood v Kenyon* (1840) 11 A & E 438.
- 2) Consideration must Move from the Promisee.
- 3) Consideration may be executory or executed but must not be past.

Past consideration is subject to two exceptions: debt barred by statute could be revived by acknowledgement and antecedent debts or liability is a valuable consideration for a bill.

- 4) Consideration must have value but need not be adequate.
- 5) Consideration must not be illegal.
- 6) A promised to perform an existing obligation (imposed by law or contract) is not a consideration

See *Gbadamosi v Mbadiwe* (1964) 2 All N.L.R. 19; *Egware v Shell BP Petrol Development Company of Nigeria* (Unreported) Midwestern High Court, Suit NO. VHC/36/70 delivered on April 30, 1971; *U.T.C. v Hauri* (1940) 6 W.A.C.A. 148.

### 5.3.4 Intention to Create Legal Relation

There is the view that the intention between the parties to a contract does not form the bedrock of the formation of a contract. On this, Professor Williston stated that:

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

This quotation above has led to the categorization of agreement into two: domestic and social engagements on one part and commercial transactions on the other part.

#### 1) Domestic and Social Engagements

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

Agreements are made every day in domestic and social life where the parties do not intend to invoke the assistance of the courts, should the engagements not be honoured. A promise to offer to trim a friend's garden should not result in litigation. It is therefore obvious that in addition to the phenomena of agreement and the presence of consideration, a third contractual element – the intention to create legal relations exists.

In *Balfour v Balfour* (1919)2 K.B 571 a Briton was employed by the Government of Ceylon. He returned home on leave with his wife, but the wife was unable to go back to Ceylon with him because of ill-health. He then promised to make her an allowance of £30 a month until she joined him. When he failed to make this payment, she sued him to enforce the promise. The court of Appeal held that there was no contract between the parties. As a natural consequence of their relationships, spouses make numerous agreements involving payment of money and its applications to the household themselves and their children.

In contradistinction to *Balfour v Balfour* is *McGregor v Mc Gregor* (1888)21 Q.B.D. 424, in that case it was held that when spouses are not living in amity, particularly when their relationship has degenerated to the level of mutual hostility and distrust, an agreement between them would be binding.

However, where the performance of a domestic or social engagement involves great sacrifice on the part of one or both parties, the presumption against the presence of contractual intention may be rebutted, particularly where the plaintiff has performed his own part of the agreement. In *Parker v Clark* (1960)1 W.L.R. 286, on the invitation of the defendant, who was the plaintiff's uncle, the plaintiff and his wife sold their house and moved into the defendant's house, it was also agreed that the Parkers would share the living expenses with the Clarkes and that Clarke would leave the house to Parker in his will. After quarrels between the couples, the Clarkes attempted to evict the Parker on the ground that the agreement was not a binding one. It was held to be binding.

## 2) Commercial Agreements

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

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

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

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

### 5.3.5 Goods

This is the subject matter of sale of goods. For detail discussion of this element see unit 4 above. The subject of sale of goods must be goods for a contract of sale of goods to be valid.

### 5.3.6 Price

The Act requires that the consideration for the transfer of property in the goods must be money called price. Therefore, an exchange of goods for goods is not a sale of goods; rather it is trade by barter. However, the practice where the consideration is partly by goods and partly by money that transaction qualifies for sale of goods (See *Aldridge v Johnson* (*supra*)).

Section 8 of the Act provides for the mode of determining price which may be fixed by the contract or may be left to be fixed in an agreed manner or be determining by the course of dealing between the parties and where the price is not determined by any of those modes the buyer is to pay reasonable price. What is reasonable price depends on facts of each case. In *Matco Ltd v Santer Fe Development Co. ltd* (1971)2 N.C.L.R.1, it was held that the burden was on the seller to prove that the price he demanded was reasonable.

The section covers an existence of contractual relationship which fails to state the agreed price. But this may well be the evidence that parties are yet to reach an agreement (a *consensus ad dem*) which is an essential element of contract of sale of goods as was upheld in *May and Butcher Ltd v R* (1934) 2 KB, 17. In contrast, in *Foley v Classique Coaches Ltd* (1934) 2KB 1, an agreement to supply petrol at a price to be agreed by the parties was enforced. The rationale for decision was that the price agreement formed part of the larger agreement by the parties. Section 9 of

the Act provides for the fixing of price of goods by a third party and the implication of failure to comply.

**SELF-ASSESSMENT EXERCISE 5**

Critically examine the essential elements of a valid contract of sale of goods.

## **5.4 Summary**

The most important message in this unit is that in certain essential elements or ingredients are required to create a contract of sale of goods, like other forms of contract, parties must have the capacity, offer, acceptance, consideration, intention to enter into a contract; goods must be the subject matter and money consideration called price. There is no particular pattern, and it is generally governed by the Sale of Goods Act of 1893 which, being a statute of general application is applicable in Nigeria.

## **5.5 References/Further Readings/Web Source**

Sale of Goods Act, 1893.

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

Igweike, Commercial Law- Sale of Goods (2001)

Okany, Nigerian Commercial Law, 1992.

## **5.6 ANSWER TO SELF-ASSESSMENT EXERCISE**

They are offer, acceptance, consideration and intention to enter into legal relationship.

## **UNIT 6      FORMALITIES FOR THE FORMATION OF A CONTRACT OF SALE OF GOODS**

- 6.1 Introduction
- 6.2 Learning Outcomes
- 6.3 Formalities for the Formation of a Contract of Sale of Goods
- 6.4 Summary
- 6.5 Reference/Further Readings/Web Source
- 6.6 Answer to Self-Assessment Exercise

### **6.1 Introduction**

The creation of contractual relation such as a contract sale of goods may require a particular form or variety of forms for its creation. This unit focuses on the formality or formalities require under the Act in forming a contract of sale of goods.

### **6.2 Learning Outcome**

At the end of this unit, you will be able to discuss the formalities required to form a contract of sale of goods.

### **6.3 Formalities for the Formation of a Contract of Sale of Goods**

The Sale of Goods Act does not provide for special formalities in making a contract of sale of goods. Section 3 of the Act titled formalities for the contract provides that:

Subject to the provisions of this Act and of any statutes in that behalf, a contract of sale may be made (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

The above provision provides for any of the following formalities in making a contract of sale.

- 1) By seal: This is a sale by deed,
- 2) Agreement without seal,
- 3) Oral agreement: not in writing,

- 4) Partly oral and partly in writing or
- 5) By conduct of the parties

The section is subject to any provision of this Act or and other law that requires a special form in creating contract of sale of any particular goods. It specifically in it proviso subjects this section to laws regulating companies or corporations.

#### **SELF-ASSESSMENT EXERCISE 6**

Examine the formalities for the formation of contract of sale of goods in Nigeria.

### **6.4 Summary**

The unit exposed the learners to the formalities for the formation or creation of contract of sale of goods. The Act provide for varieties of forms including oral, written, combination of oral and written agreement or by the conduct of the seller and buyer

### **6.5 References/Further Reading/Web source**

Laws of the Federation, 1990 Hire Purchase Act, Cap 169.

Sale of Goods Act, 1893.

Rawlings, Commercial Law, University of London Press, (2007)

Okany, Nigerian Commercial Law, Africana – Fep Publishers Limited, (1992).

### **6.6 ANSWER TO SELF-ASSESSMENT EXERCISE**

The formalities are:

- i. By seal: This is a sale by deed,
- ii. Agreement without seal,
- iii. Oral agreement: not in writing,
- iv. Partly oral and partly in writing or
- v. By conduct of the parties

## **MODULE 2        TERMS OF CONTRACT AND EXCLUSION CLAUSE**

### **UNIT 1        TERMS OF A CONTRACT**

- 1.1 Introduction
- 1.2 Learning Outcomes
- 1.3 Main content
  - 1.3.1 A Term of the Contract
  - 1.3.2 Express Terms
  - 1.3.3 Condition
  - 1.3.4 Warranty
  - 1.3.5 Representation
  - 1.3.6 Implied Terms
- 1.4 Summary
- 1.5 References/Further Readings/Web Source
- 1.6 Answer to Self-Assessment Exercise

#### **1.1 Introduction**

In the process of negotiating and entering into a contract many things are said and some of them eventually constitute terms and conditions usually inserted into the body of the contract documents by the parties to the contract. Others are regarded as mere representation or statement with no contractual legal value. The terms and conditions form the basis of every contract. Some of these terms are usually express while others are implied from a variety of situations and circumstances depending on the nature of the contract.

#### **1.2 Learning Outcome**

At the end this unit you are expected to be able to discuss what constitute terms and conditions of a contract, classes of terms of contract and the major difference between a term of the contract and a mere representation.

#### **1.3 A Term of the Contract**

The major consequence of establishing a contractual relation is the establishment of rights and obligations of parties. Usually, it is expected that after the parties have satisfied all the essential requirements of a valid contract, it will still be necessary to determine the extent of the obligations which the contract creates. To do this, three things must be done.

Firstly, it is necessary to determine what the terms are that the parties have expressly included in the contract. It is important to note that the rights and obligations of the parties under a contract are determined by reference to the content of the contract. In other words, the terms of the contract control the operation of the contract. Secondly, the relative importance of those terms must be evaluated. Thirdly, it may be necessary to ascertain some additional terms which a statute, the courts and custom may imply into the contract.

### **1.3.1 Distinction between a Term of Contract and a Mere Representation**

For the purpose of distinguishing and identifying terms of contract and a mere representation of three independent tests have been designed. They are as follows:

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

In applying this text, statements made at the preliminary stages of the negotiations are usually not to be regarded as terms of the contract, but mere representations. It is assumed that the longer the time lapse between the time the statement was made, and the time the contract was concluded, the more likely would it be regarded as a mere representation and vice versa.

#### **2) Reduction of the terms to writing.**

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

#### **3) One party's superior knowledge.**

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

### **1.3.2 Express Terms**

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

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

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

- 1) Parol evidence may be adduced to prove a custom or trade usage whose implications the parties have, or may reasonably be deemed to have, tacitly assumed.
- 2) Parol evidence is adduced to show that the operation of the written contract was subject to an agreed antecedent condition - a condition precedent which had not occurred.
- 3) Parol evidence is adduced to prove that the written agreement was not the whole contract.
- 4) Parol evidence may be given to prove some invalidating cause outside the written contract itself, e.g. fraud, illegality, misrepresentation, mistake, incapacity or absence of consideration.

### 1.3.3 Conditions

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

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

A condition precedent is one which must occur or be fulfilled before an obligation or right created by the contract can be enforced. In *PYM v Campbell* (1910) K.B. 1012 where under a written contract, the defendant's promise to buy a share in the plaintiff's invention was, by an unwritten understanding made subject to the approval of a third party. It was held that, until the approval was given, the defendant was under no obligation to buy. In other words, the contract was unenforceable in the

absence of the desired approval which was the condition precedent. A condition subsequent on the other hand is a statement of the circumstances in which the obligations under a contract may be prematurely terminated after the transaction has been embarked upon. In *Head v Tattersall* (1971)L.R. 7 Exh. 7, the plaintiff bought a horse of a particular description from the defendant, with the understanding that the plaintiff could return it, up to the following Wednesday, if it did not answer the description. The description failed and the plaintiff returned the horse within the time. It was held that although a contract had come into existence, the option to return operated as a condition subsequent and the plaintiff was therefore entitled to cancel the contract and return the horse.

### 1.3.4 Warranties

Warranty ordinarily denotes a binding promise, but when it is used in a narrower and technical sense, it means a subsidiary term in a contract (i.e a term of minor importance) a breach of which gives no right to repudiate the contract, but only a right to an action for damages for the loss sustained. It is described in the Sale of Goods Act, 1893 section62 as:

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

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

### 1.3.5 Representation

When a statement is made by the seller of goods to the buyer, relating to the goods, the statement may be mere representation which helps to induce the buyer to enter into the contract or a term of the contract i.e a statement which constitutes part of the contract itself. It is not easy to distinguish whether a statement is a mere representation or a part of the contract (See the 3.1 above for the test).

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

false or not.

### **1.3.6 Implied Terms**

Generally, apart from express terms i.e. oral or written agreements of parties, contracts entered into by parties may also be governed by implied terms. Implied terms are terms implied in the contract, and they, like express terms may assume the character of conditions or of warranties. In certain circumstance it may be difficult to ascertain the intention of the parties without resorting to these implied terms. This is particularly so when it is remembered that, it is not in every contractual relationship that the parties will remember to express all the terms which they intended to govern their contractual arrangement. These implied terms may be discussed under three major groups namely:

#### **1) Terms Implied by the Courts**

Generally, it is not the duty of the court to make a contract for the parties. However, in very exceptional circumstances, whenever it is desirable to effectuate the intention of the parties as may be gathered from their express terms, the court may imply a term into their contract. But, the circumstances for implying such a term must be established to be necessary. In *Hutton-Mills v Nkansah II and Ors* (1940)6 W.A.C.A.32, the court was called upon to imply a term in the written agreement, that the express powers conferred on the respondents under a power of attorney to determine certain concessions and dispose of them also empowered them to collect arrears of rent. The court declined to do so, as the provisions of the power of attorney were clear, and to imply a term as urged by the respondents could not be said to be necessary for the proper functioning of the contract.

#### **2) Terms Implied by Law or Statute.**

Contractual terms may also be implied by law or statute. Among outstanding examples are the implied terms contained in section 4 of the Hire Purchase Act, 1965 and in section 12-15 of the Sale of Goods Act, 1893. For States in the former Western Region of Nigeria, where the English Act does not apply, provisions corresponding to section 12-15 above are contained in sections 13-16 of the Sale of Goods Law, 1959. These provisions are separately dealt with in the next unit.

#### **3) Terms Implied by Custom and Usage**

As a rule, firmly established local mercantile custom and usages may be

implied in a contract, although not expressly provided in the contract by the parties. Thus, in *Hutton v Warren* (1836)1 M and W 466, it was proved that, by a local custom, a tenant was bound to farm according to a certain course of husbandry and that, on quitting his tenant, he was entitled to a fair allowance for seed and labour on the arable land. The court held that, the lease made by the parties must be construed in the light of this custom.

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

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

#### **SELF-ASSESSMENT EXERCISE 7**

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

## **1.4 Summary**

The pivotal role played by the knowledge of the distinction between a term of a contract and a mere representation; the importance of express terms in the nature of conditions and warranties and the necessity of implied terms in the absence of specific terms on a variety of subjects makes this unit a vital one in the knowledge of the basic ingredients of contract relating to commercial transactions. The concept of terms of a contract as shown above usually forms the bedrock on which a valid contract is built. Apart from the basic requirements of an offer, acceptance, consideration and intention to create legal relations, where the parties are silent on the terms intended to govern the contract at hand, there is likely to be a breach of the contract by either of the parties thereto. Therefore, the terms of a contract, particularly in relation to commercial transaction are very important.

### **1.5 References/Further Readings/Web Source**

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

Sagay; “Nigeria Law of Contract.” Ibadan (1999).

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

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

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

### **1.6 Answer to Self-Assessment Exercise**

- 1) The three tests adopted over the years in distinguishing a term of a contract from a mere representation are.
  - i. At what stage of the transaction was the crucial statement made?
  - ii. Reduction of the terms to writing.
  - iii. One party’s superior knowledge.
- 2) Express terms of a contract are terms specifically agreed on by the contracting parties.
- 3) The distinction between conditions and warranties is that a breach of condition is a fundamental breach that can lead to repudiation of the contract while a breach of warranties gives a right to damages.
- 4) The various heads under which an implied term could be invoked are: i) custom, ii) trade usage and iii) law and statute.

## UNIT 2 TERMS IMPLIED BY STATUTE

- 2.1 Introduction
- 2.2 Learning Outcomes
- 2.3 Terms Implied by Statute
  - 2.3.1 Time
  - 2.3.2 Title
  - 2.3.3 Description
  - 2.3.3 Fitness for Particular Purpose
  - 2.3.4 Merchantable Quality
  - 2.3.5 Sale by Sample
- 2.4 Summary
- 2.5 References/Further Readings/Web Source
- 2.6 Answer to Self-Assessment Exercise

### 2.1 Introduction

Certain terms are implied by statute, the Sale of Good Act into the contract of sale of goods whether or not the parties make reference to such terms in the contract. Such terms relates to relevance of time of payment, right to sell, quiet possession, freedom from encumbrance, fitness for purpose, quality of good and compliance with sample. These terms are provided in section 10 to 15 of the Sale of Goods Act.

### 2.2 Learning Outcome

At the end of this unit you will be able to discuss the terms implied into contract of sale of goods by statutes.

### 2.3 Terms Implied by Statute

The statutory provisions on implied terms are provided in sections 10 to 15 Of the Sale of Goods Act. These terms are examined below.

#### 2.3.1 Time

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

ship to arrive as agreed was a breach of condition as to time.

### **2.3.2 Title**

Section 12 of the Sale of Goods Act deals generally with implied condition as to title. The first part deals with condition as to title, the second and the third deal with warranty relating to quiet possession and freedom from encumbrances.

### **2.3.3 Right To Sell**

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

### **2.3.4 Quiet Possession**

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

### **2.3.5 Freedom from Encumbrance**

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

### **2.3.6 Description**

Section 13 provides that where goods are sold by description, there is an implied condition that the goods shall correspond with the description, and if the sale is by sample, as well as, by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not correspond with the description. Description are words used to indicate or refer to the quality, quantity or attribute of the goods. See **Re Moore and Co Ltd v. Landauer and Co.(2 KSB 519), Varley v. Whipps (1900) 1 Q.B 513**. The buyer's remedy for breach of this condition is either to claim damages or to reject the goods. The right of rejection is exercisable even when the goods are merchantable.

This is mostly applicable where the buyer has not seen the goods

offered to him and would only on the description of the goods as was in the case of **Varley v. Whipps**. On the other hand it applies where the buyer has seen the goods but relies on the seller's assessment of the goods. See **Grant v. Australia Knitting Mills Ltd (1936) AC 85** and **Reardon Smith Line Ltd v. Ynguar Hansen-Tangen (1976) 1 WLR 989**.

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

### 2.3.7 Fitness for Particular Purpose

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

- 1) The buyer must make known (expressly or by implication) to the seller, the particular purpose for which he wants the goods. See **Khalil and Dibbo v. Mastrionikolis (1948) 12 WACA 462**. Where the goods are used for only one purpose, it will be deemed to have been impliedly made known to the seller. See **Priest v. Last (1949) 12 WACA 462** where a hot water bottle which burst while in use was held to be unfit for the particular purpose for which it was bought. See **Osemobor v. Niger Biscuit Co Ltd (1973) 2 NCLR, 382**
- 2) The buyer must have relied on the seller's skill and judgement. See **Grant v. Australia Knitting Mills** (supra) contrast with **Ijomo v. Mid Motors Nigeria Ltd** (Igweike Page 50)

### 2.3.8 Merchantable Quality

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

- 1) The purchase must have been by description, and this include a sale under trade name
- 2) The goods must be such that the seller deals in
- 3) Where the buyer examines the goods, his rights under section 14(2) are destroyed as regards defect which such examination ought to have revealed. Where there is opportunity for the buyer to examine, he will be deemed to have examined

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

### 2.3.9 Sale by Sample

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

**SELF-ASSESSMENT EXERCISE 8**

Critically analyse the terms implied by statute in contract of sale of goods.

### 2.4 Summary

At the end of this unit, you have been introduced to the key terms associated with the Sale of Goods Act as contained in section 10 to 15. The place of time in contract of sale of goods, implied conditions and warranties and effect of examination by buyer in a sale by description and sample. Certain terms are implied by the statute notwithstanding whether or not the parties make reference to it in their contract. The implication is that such term will apply to all contracts of sale of goods whether or not parties remember to mention it in their contract. This makes it almost impossible for sellers to knowingly defraud an innocent purchaser.

## **2.5 References/Further Readings/Web Source**

Sale of Goods Act, 1893.

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

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

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

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

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

## **2.6 Answer to Self-Assessment Exercise**

The answer will cover the implied term as contain in sections section 10 to 15 of the Sale of Goods Act.

## **UNIT 3      EXCLUSION CLAUSES, FUNDAMENTAL TERMS AND FUNDAMENTAL BREACH**

- 3.1 Introduction
- 3.2 Learning Outcomes
- 3.3 Exclusion Clauses, Fundamental Terms and Fundamental Breach
  - 3.3.1 Exemption Clauses
  - 3.3.2 The Concept of Fundamental Terms
  - 3.3.3 Fundamental Breach
- 3.4 Summary
- 3.5 References/Further Readings/Web Source
- 3.6 Answer to Self-Assessment Exercise

### **3.1 Introduction**

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

### **3.2 Learning Outcome**

At the end of this unit, you should be able to identify and discuss exclusion clause, fundamental terms and fundamental breach

### **3.3 Exclusion Clauses, Fundamental Terms and Fundamental Breach**

The three concepts, exclusion clauses, fundamental terms and fundamental breach, are examined below.

#### **3.3.1 Exemption Clauses**

An exemption clause or exclusion clause is a term in a contract which seeks to exempt one of the parties from liabilities in certain events. Where the term merely limits (rather than wholly excludes) liability, it is called a limiting clause. However, the governing principles are the same in both cases. The courts have, over the years, made appreciable success in controlling unreasonable exemption clauses, and have fully developed principles which govern their validity.

### 3.3.2 The Concept of Fundamental Terms

The courts have in recent years developed the concept of “fundamental term” which insists that the operation of an exemption or limiting clause will be subject to the doctrine of fundamental terms. Under this doctrine, no person is allowed to take shelter under the provisions of an exemption clause, notwithstanding how wide the clause is expressed, if the breach of the contract is substantial and affects the very purpose of the contract. In every contract, there is some central obligation, the non-fulfillment of which renders the contract meaningless. See *Karoles (Harrow) Ltd V Willis (1956)2 ALL E.R. 866*.

### 3.3.3 Fundamental Breach

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

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

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

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

#### SELF-ASSESSMENT EXERCISE 9

Effects of fundamental breach on exemption clause:

The position in Nigeria and UK

### **3.4 Summary**

Exemption clauses, the concept of fundamental term and fundamental breach are principally interwoven to the extent that there is no way a discussion on one will not necessarily affect the other. This, therefore, is what the learner should look out for. Exclusion clause, limitation terms fundamental terms and fundamental breach are all technical terms used in the creation of a contract in commercial transactions. A proper understanding of this term will be of immense advantage to the learners.

### **3.5 References/Further Readings/Web Source**

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

Friedman, G.H.L. (1984). Law of Agency, 7th Edition. London: Butterworths.

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

### **3.6 Answer to Self-Assessment Exercise**

The effect is that exemption clause is inapplicable where there is a fundamental breach. This is the position in Nigeria and UK. Student should provide cases in Nigeria and UK.

## **MODULE 3      PASSING OF PROPERTY**

### **UNIT 1      THE CONCEPT OF PROPERTY**

- 1.1 Introduction
- 1.2 Learning Outcomes
- 1.3 The Concept of Property
  - 1.3.1 Transfer of Property to the Buyer
  - 1.3.2 Property and Possession
- 1.4 Summary
- 1.5 Reference/Further Readings/Web Source
- 1.6 Answer to Self-Assessment Exercise

#### **1.1 Introduction**

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

#### **1.2 Learning Outcome**

At the end of this Unit, you should be able to distinguish between the possessory title and status of a seller.

#### **1.3 Concept of Property**

In a contract of sale, the seller agrees to transfer his interest in the goods. The seller in most cases who was in possession would transfer a possessory title, and the fact of the possession would be strong evidence of ownership. The concept of transfer means to transfer “dominion” i.e. the highest possible rights enjoyed by the owner of goods to the buyer. Under Section 62(1) of the Sale of Goods Act, “Property” means general property in the goods and not merely a special property.

##### **1.3.1 Transfer of Property to the Buyer**

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

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

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

### **1.3.2 Property and Possessions**

“Property” in goods means the ownership of or the title to the goods. Possession, on the other hand, is as a rule, the physical control or custody of goods. Transfer of property in goods is not dependent on the transfer of possession of the goods.

#### **SELF-ASSESSMENT EXERCISE 10**

Discuss the concept of ownership and possession in sale of goods law.

### **1.4 Summary**

This unit has revealed the underlying facts of the concept of property in sale of goods and the interest of the seller after transfer of goods. It also discusses the fact that the “Property” in goods means the ownership of or the title to the goods while “Possession”, means physical control in goods. It is possible, as illustrated earlier, for the possession of certain goods to vest in one person, whilst the ownership vests in another.

### **1.5 References/Further Reading**

Hire Purchase Act. Cap 169, Laws of the Federation, 1990  
Sale of Goods Act, 1893.

Rawlings (2007) Commercial Law, University of London Press  
Okany, Nigeria Commercial Law, Africana-Fep Publisher,  
Limited, 1992.

### **1.6 Answer to Self-Assessment Exercise**

Ownership connotes transfer of property in the goods while possession being in custody and physical control of the goods.

## UNIT 2 PASSING OF PROPERTY IN SPECIFIC GOODS

- 2.1 Introduction
- 2.2 Learning Outcomes
- 2.3 Passing of Property in Specific Goods
  - 2.3.1 Rule 1 on Passing of Property in Unconditional Sale of Specific Goods
- 2.4 Summary
- 2.5 References/Further Readings.

### 2.1 Introduction

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

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

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

### 2.2 Learning Outcomes

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

- explain the meaning of passing of property in specific (ascertained) goods.
- understand how the property in specific goods passes at the time a contract is made.
- explain why the passing of property in specific goods is subject to the overriding provision laid down by Section 17(1) of the Act.

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

## 2.3 Passing of Property in Specific Goods

### 2.3.1 Rule I On Passing of Property in Unconditional Sale of Specific Goods

Unless a different intention appears, there are rules for ascertaining the intention of the parties as to the time of which the property in the goods is to pass to the buyer. The first of the rules came out in *R. V. Ward Ltd (1967)* 1 G.B. 534. In that case, Diplock L. J. suggested as follows;

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

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

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

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

#### 1) Unconditional Contract

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

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

contracts subject to a condition precedent. By Rule 1, contracts, deals with contracts not subject to such conditions.

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

It is submitted that, for a sale of goods contract to be enforceable, it must be without conditions. In England, these difficulties appear to have been taken care of by the provision of Section 4 of the Misrepresentation Act, 1967, which provides that, “where the contract is for specific goods, the property passes to the buyer. In the light of this, it may not be necessary to give an unnatural construction to the words “unconditional contract” in Section 18 Rule 1, in order to avoid depriving a buyer of his right to reject goods. It is noteworthy that this is a foreign authority and may only be helpful in the interpretation of the term “unconditional contract”.

## 2) **Specific Goods**

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

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

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

The courts have been strict in interpreting the word “specific” under Rule 1. For instance in, in *Kursell V Timber Operators and Contractors Ltd* (1972) 1 K. B. 298, the plaintiff sold to the defendants all the trees in Latvian forest of certain measurement, on a particular date for €225,500 and the defendant were given 15 years within which to remove the timber. Soon afterwards, the Latvian Assembly passed a law confiscating the forest. The question that arose was whether the sale was that of specific goods within rule 1 as the pass property in them or not.

The Court of Appeal held that the property in the trees had not passed to the defendant as the tress of the specified dimensions were not

sufficiently identified, because not all the trees in the forest were to pass but only those conforming to the stipulated measurements.

### 3) Deliverable State

By the provision of Section 18 Rule 1 another requirement is that the goods must be in deliverable state. This means that the goods must be in a deliverable state in order to enable property to pass. Section 62(4) provides the meaning of this term. It states that;

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

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

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

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

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

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

There appears to be a difficulty in getting a clear definition of the term “deliverable state”. It does not appear that there is any known local authority on this matter but there are foreign authorities. In *Kursell V Timber Operator* (supra), the court of Appeal decided that not only was the timber not specific but could also not be regarded as being in a “deliverable state”. The question now is what constitutes goods in a “deliverable state”. Again, in *Underwood Ltd V Burgh Castle Brick and Cement Syndicate* (1921) All ER 575, the plaintiffs’ sellers agreed

to sell a condensing machine to the defendants. The machine weighed 30tons and was bolted to and embedded in a cement floor. Under the term of contract, the plaintiffs were to dismantle the machine, a task which cost them €100 and took about 2 weeks. While the engine was being bided on a railway truck, it was damaged. The plaintiffs would only be entitled to sue for the price if the property had already passed before the time of damage.

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

#### **SELF-ASSESSMENT EXERCISES 11**

1. Umar sold a car to Yinus which they were required to use for his graduation. The car was delivered to the Yinus' premises but was stolen before it could be tested. At what point does the property in the car pass.

## **2.4 Summary**

In this unit, the learner, has been able understand the following passing of property in specific (ascertained) Goods; meaning of Rule 1 of Section 18; the issues regarding the meaning of; unconditional Contract; specific Goods; and deliverable State. The phrase “unconditional contract” appears nebulous within the purview of Section 18 Rule. The general view is that it is a contract that does not contain a condition precedent or condition subsequent that have effect of suspending performance of the contract or the passing of property.

## **2.5 References/Further Reading/Web Source**

Hire Purchase Act. Cap 169, Laws of the Federation.  
Sale of Goods Act, 1893.

Rawlings, Commercial Law, University of London Press, 2007.  
Okany Nigeria Commercial Law, Africana-Fep Publisher,  
Limited, 1992

## **2.6 Answer to Self-Assessment Exercise**

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

## **UNIT 3      RULES ON PASSING OF PROPERTY IN CONDITIONAL SALE OF SPECIFIC GOODS**

- 3.1 Introduction
- 3.2 Learning Outcomes
- 3.3 Rules on Passing of Property in Conditional Sale of Specific Goods
  - 3.3.1 Rule 2
  - 3.3.2 Rule 3
  - 3.3.3 Rule 4
- 3.4 Summary
- 3.5 References/Further Readings
- 3.6 Answer to Self-Assessment Exercise

### **3.1 Introduction**

The application of the rules in Section 18 depends upon the existence of the intention of the parties. This is usually discernible from evidence. According to Rule 1, the fact that the time of delivery or the time for the payment of the price is postponed does not prevent the property from passing when the contract is made.

In an ordinary sale in a shop, property does not pass until the parties have agreed in the mode of payment. And in big departmental shops, where the buyer usually goes round the shop to collect items he wishes to buy, property does not pass until the price is paid. It should be noted that Rule 1 does not take the time of payment as crucial since it may be postponed.

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

### **3.2 Learning Outcome**

By the end of this unit, you should be able to explain how Rules 2, 3, and 4 deal with conditional sale of specific goods in contradistinction to Rule 1 which deals with unconditional contracts of sale of goods.

### 3.3 Rules on Passing of Property in Conditional Sale of Specific Goods

#### 3.3.1 Rule 2

Rule 2 provides as follows:

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

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

It is only when it is for the seller to put the goods in a deliverable state that the Act draws that inference. For example, if Inyang sells a house to Bitrus and agrees to replace the roof with a new one, property will not pass until Bitrus has notice that this has been done.

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

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

#### 3.3.2 Rule 3

Rule 3 provides as follows:

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

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

Thus, for instance, an agreement to sell a fairly used Peugeot car at a price entire sack of cocoa at so much per ton does not pass the

ownership of the car to the buyer until the seller has tested the car and the buyer has been informed.

Under Rule 3, goods do not acquire the character of being in a deliverable state until the seller has done all that he was supposed to do, including measuring or testing them.

If the seller of specific goods in a deliverable state is required to carry out some procedure to ascertain the price, such as weighing testing or measuring, property will not pass until that has been done and the buyer notified.

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

### 3.3.3 Rule 4

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

—

- (a) *When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:*
- (b) *If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time, What is a reasonable time is a question of fact.*

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

The two arms of Rule 4 shall be discussed.

#### 1) **Signifying his approval or adopting the transaction.**

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

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

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

The case of *Kirkham v Attend borough* (1897)1 Q. B. 201 is an example of “an act adopting the transaction”. There, the plaintiff, allowed W to have jewelry on sale or return and W pawned the jewelry with A, the defendant. The plaintiff brought an action to recover the jewelry from the defendant. It was held that, the action must fail as W’s act of pawning the jewelry was “an act of adopting, and therefore, the property in the jewelry passed to him, so that K could not recover it from A.

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

## **2) Elements or Ingredients of Rule 4(B)**

### **(a) Retention of goods where time is specified:**

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

### **(b) Retention of goods where no time is specified:**

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

### **(c) Rejection of the goods:**

Property will pass under Rule 4(B), if the buyer does not give notice of rejection within either the stipulated time or within a reasonable time, if time is stipulated. Though there is no duty on the buyer to return the goods in order to prevent the goods from passing. The buyer may therefore be liable for detinue if he holds unto the goods after notice of rejection.

### **(d) Evidence of contrary intention:**

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

#### **SELF-ASSESSMENT EXERCISES**

- (a) Tunde expresses an interest to buy a particular car owned by Joke for N1 million provided it will be suitable for his nephew to use in Lagos traffic. Joke agrees that Tunde can take the car for 10 days in order to determine its suitability. After a week the car breaks down. Is Tunde liable for the price?
- (b) Would your answer be different if Tunde had used the car himself on a number of occasions and had travelled a long distance with it.

### **3.4 Summary**

This unit has revealed the main intents of Rules 2, 3 and 4, of Section 18 that they deal with conditional sale of specific goods and that the Rules input in them certain factors negating the application of Rule 1 of Section 18 which deals basically with unconditional sale of specific goods. Rule 2 of Section 18 deals with goods not in deliverable state, whilst Rule 3 of Section 18 deals with what the seller of specific goods in a deliverable state is required to carry out. Rule 4 of Section 18 deals with where goods are “delivered to the buyer on approval or sale or return”, in this instance, property passes when the buyer signifies acceptance or does an act adopting the transaction or retains the goods beyond the time fixed by the agreement for a decision without giving notice of rejection, or if no time is fixed, retains the goods beyond a reasonable time (rule 4(b)).

### **3.5 References/Further Reading/Web Source**

Hire Purchase Act. Cap 169, Laws of the Federation.  
Sale of Goods Act, 1893.

Rawlings, Commercial Law, University of London Press, 2007.

Okany Nigeria Commercial Law, Africana-Fep Publisher, Limited, 1992.

### **3.6 Answer to Self-Assessment Exercise**

1. Rule 3 provides as follows:

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

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

2. Yes, because that was the agreed condition precedent.

## UNIT 4      **PASSING OF PROPERTY IN UNASCERTAINED OR FUTURE GOODS**

- 4.1 Introduction.
- 4.2 Learning Outcome.
- 4.3 Passing of Property in Unascertained or Future Goods
  - 4.3.1 Property cannot pass until goods are ascertained
  - 4.3.2 Passing of property is dependent upon the intention of the parties
  - 4.3.3 How are goods ascertained?
  - 4.3.4 When does property pass?
  - 4.3.5 Delivery to a carrier
- 4.4 Summary
- 4.5 References/Further Readings.

### **4.1 Introduction**

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

- 1) Goods to be manufactured or grown by the seller: these are necessarily future goods and are defined in section 5 (1) of the Act as goods to be manufactured or acquired by the seller after making the contract of sale. In *Howell v. Coupland* (1876) 1 Q.B. 258, the court held that a sale of 200 tons of potatoes to be grown on a particular piece of land was a contract of sale of future goods.
- 2) Purely generic goods: these are goods sold by description, but which are not identified or agreed upon at the time of the contract but are included in a particular class of goods. For example where the seller promises to deliver 100 Abuja Yam tubers, if the seller does not have enough yam tubers of the description under reference to appropriate to the contract, it must necessarily be a case of future goods.
- 3) An unidentified portion of a specified whole: where the seller has enough quantity to appropriate to the contract, the goods may be categorised as an unidentified portion of a specified whole. For example, a party may assert “20 cartons out of 30 cartons of beer now in my store”.

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

*Rule 5—*

- (a) *Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.*
- (b) *Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.*

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

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

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

## **4.2 Learning Outcome**

At the end of the Unit you should be able to explain the concept of passing off “unascertained” or “future goods”.

## **4.3 Passing of Property in Unascertained or Future Goods**

### **4.3.1 Property Cannot Pass Until Goods Are Ascertained**

The fundamental rule in Section 16 of the Act is that  
*“where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.”*

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

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

The court held that the defendant was not liable because the property in the fish had not passed to the defendant before the boxes were earmarked and they were therefore still at the sellers risk when they deteriorated. See also in a *Re Goldcorp Exchange Ltd* (1994) 3 W.L.R.199.

#### **4.3.2 Passing of Property is Dependent upon the Intention of the Parties**

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

Section 17 (2) states that:

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

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

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

However, section 18 sets out five rules for ascertaining the intention of the parties, where their intention cannot be made out under section 17

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

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

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

#### **4.3.3 How Goods Are Ascertained**

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

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

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

In *Wait and James v Midland Bank* (1926) 31 Comm. Cas. 172, the plaintiff sold off their bulk leaving a balance of 850 quarters, property in the goods could not pass because the goods had not been separated.

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

It may be stated that what will constitute unconditional appropriation will vary according to the goods under consideration and the general

circumstances of the case. The following illustrations may be used as guide.

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

#### ***4.3.4 When Does Property Pass***

Section 18 Rule 5(1) states that property in the goods passes to the buyer in a contract of unascertained or future goods only after the goods are conditionally appropriated and Rule 5 (1) provides that the assent required for the appropriation may either be express or implied assent of the other party to the contract.

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

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

#### ***4.3.5 Delivery to a Carrier***

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

Thus in *Badische Anilin and Soda Fabrik v Basle Chemical Works* (1898) A.C.200, the House of Lords held that the posting of the ordered goods vested the property in the buyer at the moment of posting, This, in effect, transfers the risk in the goods to the buyer while the goods is in

the cause of post. It becomes clear from this case that the time when the property passed (when the goods are posted) depends on whose agent the carrier is.

Where the seller is required to ship the goods to the buyer, there is an assumption that the shipment is an unconditional appropriation with the consent of the buyer. Although, under Rule 5(2), delivery of goods to a carrier for transmission to the buyer is deemed to be an appropriation of the goods to the contract and not the passage of the risk in the goods, if it does, the goods will be at the buyer's risk during the course of post.

### **SELF-ASSESSMENT EXERCISE 13**

- 1) Evaluate the distinction between ascertained goods and unascertained or future goods, critically evaluate.

## **4.4 Summary**

In this Unit, learners have been introduced to Section 16 of the Act which deals with unascertained goods that will not pass to the buyer except ascertained with clear intention of the parties. Section 18 Rule 5 (1) has also been discussed. This section deals with unascertained goods, property in the goods passes to the buyer. Property does not pass until the goods are ascertained. Once the goods are ascertained then property passes with parties' intention. Although delivery of goods to a carrier for transmission to the buyer is deemed to be an appropriation of the goods to the contract in line with Rule 5(2).

## **4.5 References/Further Reading/Web Source**

Sale of Goods Act, 1993

Rawlings, Commercial Law, University Of London Press, 2007.

M.C.Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited 1992.

Hire Purchase Act, CAP 169

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

## **4.6 Answer to Self-Assessment Exercise**

Property passes for ascertain goods but property passes for unascertained goods when they become certain.

## **MODULE 4      TRANSFER OF TITLE TO NON-OWNER**

### **UNIT 1      TRANSFER OF PROPERTY BY NON-OWNER**

- 1.1 Introduction.
- 1.2 Learning Outcome
- 1.3 Transfer of Property by Non-Owner
  - 1.3.1 Nemo Dat Quod Non Habet
  - 1.3.2 General Exception
- 1.4 Summary
- 1.5 References/Further Readings/Web Source

#### **1.1 Introduction**

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In some situations, a person who has either no property or whose rights are defective disposes of goods in circumstances that enable the innocent buyer to acquire rights to the exclusion of the true owner. Generally a person cannot transfer a better title than he has himself. This is captured in the latin maxim *nemo dat quod non habet* which means that no one can give what he or she does not have. The purpose of this rule is to protect the interest of the property owners.

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

#### **1.2 Learning Outcome**

At the end of this unit, you are expected to be able to discuss and analyse the concept of Transfer of Property by “Non-Owner” and identify the relevant section under the Act.

#### **1.3 Transfer of Property by Non-Owner**

##### **1.3.1 Nemo Dat Quod Non Habet**

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

If a seller of goods has no property in the goods and does not sell with the prior consent or authority of the owner, then he cannot transfer a good title in the goods. This general rule is expressed in the latin maxim

nemo dat quod non habet (no one can give what he has not got). The Act in Section 21(1) states that where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.

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

Such a situation could occur where a thief sells a stolen car to an innocent purchaser, or a person misguidedly sells to an innocent buyer a car that is the subject of a hire purchase contract and is therefore the property of the finance company. In effect, the main point of Section 21 is that a person who is not the owner of a property cannot transfer title.

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

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

An agreement to sell before the seller gets a good title, does not preclude the buyer after the seller has got a good title. In *Anderson v. Ryan*, a car dealer agreed to sell a car to which he had no title, but before the car was delivered he had obtained title. It was held that Section 21 did not apply because for the original agreement was not a sale but only an agreement to sell. It seems that, even if the seller had purported to sell the car before he had obtained title, his subsequent acquisition of the title would have gone to feed the contract.

### **1.3.2 General Exception**

#### **1) Sales under Agency**

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

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

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

In *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd* (1949) 1 KB 322, Denning LJ explained that in the development of law, two principles have striven for mastery. The first is for the protection of property, no one can give a better title than he himself possesses. The second is for the protection of commercial transaction: the person who takes in good faith and for value without notice should get a good title.

Note that the first condition can be overridden by the second.

**SELF-ASSESSMENT EXERCISE 14**

1. What general principles apply where a person acquires goods from a person who is not the owner?

**1.4 Summary**

The general rule is that a buyer cannot acquire a better title than that of the seller. This rule can be overridden in particular situations where someone, who takes in good faith and for value without notice, will acquire good title and will, therefore, be able to resist the claims of the original owner. In conclusion, merely being in possession of goods or even document of titles does not in itself, amount to the person having a good title to sell. However, one of the main exceptions to this is where the person has authority to sell, either genuine or otherwise. Section 21 (1) of the Act has done a great deal in protecting the owner of the goods from fraudsters, while section 61 (1) of the Act also protects the innocent buyer with good faith through the principle of Principal and Agent relationships. This is done to protect commercial transaction.

**1.5 References/Further Reading/Web Source**

Sale of Goods Act.

Rawlings, (2007) Commercial Law University Of London Press

Okany (1992) Nigerian Commercial Law, Africana .FEP Publishers Limited.

Hire Purchase Act, CAP 169

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

### **1.6 Answer To Self-Assessment Exercise**

Student should discuss the principle of *nemo dat quo non habet* exemption to the doctrine.

## UNIT 2      EXEMPTION TO THE DOCTRINE OF NEMO DAT QUO NON HABET

- 2.1 Introduction.
- 2.2 Learning Outcome.
- 2.3 Special Exemption to the Doctrine of Nemo Dat Quo Non Habet
  - 2.3.1 Estoppel
  - 2.3.2 Sale by a Person with Voidable Title
  - 2.3.3 Sale by a Seller in Possession
  - 2.3.4 Sale by a Buyer in Possession
  - 2.3.5 Sale in Market Overt
  - 2.3.6 Sale by Court Order
- 2.4 Summary
- 2.5 References/Further Readings/Web Source

### 2.1 Introduction

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

At the outset, it must be emphasized that the general rule is well enunciated in the Section 21 (1) of the Act where goods are sold by a person who is not their owner, and does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller in this circumstance.

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

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

### 2.2 Learning Outcome

At the end of this unit, you should be able to learner to discuss the different types of the exemption to the rule of *nemo dat quo non habet* using judicial authorities.

## 2.3 Special Exemption to Nemo Dat Quo Non Habet

### 2.3.1 Estoppel

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

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

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

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

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

On the other hand, it may be otherwise if it could be shown that the owner has breached the duty of reasonable care owed to the third party and that this induced the third party to buy the goods so that the negligence was the proximate cause of the buyer's loss.

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

### 2.3.2 Sale by a Person with Voidable Title

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

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

The law of contract governing void and voidable contracts applies in the instant cases. If property has not passed from the seller to the rogue and thereafter to the innocent buyer then section 23 will not apply here. See *Cunday v. Lindsay*, (1878) 3App Cas 459; *Lewis V. Averay* 1972 1QB, 198.

### 2.3.3 Sale by a Seller in Possession

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

For the second buyer to acquire good title, the seller must deliver possession of the goods or documents of title. merely contracting a second sale is not sufficient to give title to the second buyer. In *Michael Gearson (Leasing) Ltd v. Wilkinson* (2001) QB 514, Machinery was sold to a finance company and leased back to the seller, who then sold it to a second finance company and leased back. At all times, the machinery remained in possession of the seller. It was held that the seller's acknowledgement to the finance company that the machines were being held on its behalf amounted to a delivery.

### 2.3.4 Sale by a Buyer in Possession

Section 25 (2) of the Act states that:

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

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

In *Cahn v. Pocketts Channel Steam Packet Co. Ltd*(1889) 1 QB 647, a seller of copper transmitted a bill of exchange for the price together with the bill of lading to the buyer, X . X did not signify acceptance, but endorsed the bill of lading to the plaintiffs in accordance with a contract for resale of the Copper already made. In other words, he did not accept the bill of exchange but transferred the bill of lading. It was held that, was someone who had agreed to buy the goods and since the plaintiffs had taken the transfer of the bill of lading in good faith and without the knowledge of the original owner’s rights, they obtained a good title on the copper under 25 (2) of the Sales of Goods Act.

### 2.3.5 Sale In Market Overt

The word market overt was been defined by Jervis, J in *Lee v. Bayes* (1856) 18 CB 599 as an open, public and legally constituted market. Note that an unauthorized market does not qualify as a market overt. To constitute a sale in a market overt, it must be shown that the sale took place within the premises of the market, during ordinary business day, provided it is a sale of goods of the kind normally sold in the market.

Not only must the sale be in a market overt and the whole transaction effected there, it is vital to show that the sale was open and public. In *Reid v. Metropolitan Police Commissioner* (1973)2 AER 97, the sale of stolen goods took place in a market overt in the morning when the sun had not risen and it was still only half light. The court held that the goods should have been sold in day time when all who passed could see the goods.

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

### 2.3.6 Sale by Court Order

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

Consequently, a court bailiff acting in compliance with such an order may exercise a valid power of sale.

#### SELF-ASSESSMENT EXERCISE 15

1. Briefly explain some types of exemptions to the rule of *nemo dat quod non habet*.

## 2.4 Summary

In summary it is important to note that someone who has no title to goods cannot pass the goods to another as enunciated in the general rule of *nemo dat quod non habet*. By this, a person cannot give what he does not have. The innocent purchasers of such goods are protected by the provisions of the Sale of Goods Act. It pertinent to note that there are many exemptions to the *nemo dat quod non habet* rule but some, not all of them have been discussed in this unit others not discussed are sale by Mercantile Agent which is not protected under the Sale of Goods Act. It is however worthy to note that once one of the exemptions to the general rule is applied and the good is passed, a good title will pass to the innocent buyer without notice of the original owner of the goods.

## 2.5 References/Further Reading/Web Source

Sales of Goods Act.

Rawlings, Commercial Law University Of London Press (2007).

Okany Nigerian Commercial Law, Africana .FEP Publishers Limited  
(1992)

Hire Purchase Act, CAP 169

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

## **2.6 Answer to Self-Assessment Exercise**

The exemption to the Doctrine of Nemo Dat Quo Non Habet that  
students should cover are

- i. Estoppel
- ii. Sale by a Person with Voidable Title
- iii. Sale by a Seller in Possession
- iv. Sale by a Buyer in Possession
- v. Sale in Market Overt
- vi. Sale by Court Order

## **MODULE 5      DUTIES OF AND REMEDIES FOR THE SELLERS AND THE BUYERS**

### **UNIT I      DUTIES OF THE SELLER**

- 1.1 Introduction.
- 1.2 Learning Outcome
- 1.3 Duties of the Seller
  - 1.3.1 Duty to Deliver Goods at the Right Time
  - 1.3.2 Duty to Pass a Good Title
  - 1.3.3 Duty to Supply Goods of the Right Quantity
- 1.4 Summary
- 1.5 References/Further Readings.
- 1.6 Answer to Self-Assessment Exercise

#### **1.1 Introduction**

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

- 1) Delivery by the seller
- 2) Acceptance by the buyer
- 3) Payment by the buyer

The duty of one party is the right of the other. Section 27 of the Sale of Goods Act provides for the rights and duties of both the seller and the buyer. It states that it is the duty of the seller to deliver the goods and that of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

#### **1.2 Learning Outcome**

At the end of this unit, you should be able to explain the duties of the seller of goods in a sale of goods transaction as provided in the Sale of Goods Act.

## **1.3 Duties of the Seller**

### **1.3.1 Duty to Deliver Goods at the Right Time**

Delivery is the voluntary transfer of possession from one person to another. See Section 62(1). It does not necessarily mean transportation. Transfer of possession may be actual or constructive or conceptualized as legal possession. It could also be attornment, this occurs where the goods are in possession of a third party, and delivery takes place when the third party acknowledges to the buyer that he holds on his behalf.

Stipulation as to time is of essence in the contract of sale of goods. It does not depend on terms of the contract but in the case of *Hartley v. Hymans* (1920) All E.R 328, the court held that in ordinary commercial contracts for the sale of goods, the rule is that time is prima facie of the essence in the contracts.

If the time for delivery is fixed by the contract, then failure to deliver at that time will be a breach of condition which justifies the buyer in refusing to take the goods or where the seller fails to collect the goods on the appointed day, the seller will be entitled to repudiate the contract.

Where no date is fixed in the contract, delivery by the seller must be within a reasonable time which will be determined by matters such as the nature of the goods.

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

### **1.3.2 Duty to Pass Good Title**

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

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

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

Note that the definition of a contract for sale in section 2(1) does support the idea that the passing of property is the key issue.

Finally, where the seller does not have title to the goods, the buyer may, nevertheless, acquire good title under one of the exceptions to the *nemo dat quod non habet* rule. See *Barber v. NWS Bank Plc* (1996) 1 WLR 641.

### **1.3.3 Duty to Supply Goods of The Right and Satisfactory Quality**

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

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

With reference to satisfactory quality, section 14(2B) will be helpful. It states that; "the quality of goods includes their state and condition and the following:

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

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

#### **SELF-ASSESSMENT EXERCISES 16**

1. Discuss the duties of sellers.

### **1.4 Summary**

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

### **1.5 References/Further Reading/Web Source**

Sales of Goods Act.

Rawlings, Commercial Law University Of London Press 2007.

Okany Nigerian Commercial Law, Africana .FEP Publishers Limited,  
1992.

Hire Purchase Act, CAP 169

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

### **1.6 Answer to Self-Assessment Exercise**

The answer should cover the following duties:

Duty to deliver goods at the right time

Duty to pass good title

Duty to supply goods of the right and satisfactory quality

## UNIT 2 DUTIES OF THE BUYER

- 2.1 Introduction
- 2.2 Learning Outcome
- 2.3 Duty to pay the Price
  - 2.3.1 Duty to accept the goods
  - 2.3.2 Acceptance and Examination
- 2.4 Summary
- 2.5 References/Further Readings
- 2.6 Answer to Self-Assessment Exercise

### 2.1 Introduction

Once an agreement with respect to goods has occurred between two or more people for the purpose of business, they both have duties to fulfill as buyer and seller of such good. It is however important to note that these duties are paramount to the success of the business transactions and will also enhance the growth of commercial transactions world over. Payment for the goods is a major duty of the buyer as well as the duty to accept the goods as transacted after the seller fulfills its duty in the transaction. In this unit, the duty of the buyer is discussed as it is as paramount as the duties of the seller of the goods.

### 2.2 Learning Outcomes

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

- distinguish between the duties of the buyer from that of the seller and
- give a detailed explanation of the duties of the buyer to the seller.

### 2.3 Duty to Pay the Price

It is the primary duty of the buyer to pay for the price of the goods supplied to him. Payment for the goods and delivery of the goods are concurrent conditions and the buyer is not entitled to claim possession of the goods unless he is ready and willing to pay the price in accordance with the contract.

Section 28 of the Act states that:

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

It is important therefore that the principle of cash on delivery is implicit in a contract of sale, if the buyer pays by cheque or any negotiable

instrument that is regarded as a conditional payment, because if the cheque is dishonoured, the seller may sue for the instrument or for the price of the goods.

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

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

### **2.3.1 Duty to Accept the Goods**

This is also one of the major duties of the buyer, the duty to accept the goods in accordance with the terms of the contract. In this instance, acceptance in essence involves taking possession of the goods by the buyer. And delivery of the goods by the seller is of the essence in the contract.

Note that if the buyer fails to take delivery in time, that will not justify the seller in selling the goods to another person, unless the delay is clearly unreasonable to justify the seller to conclude that the buyer has repudiated the contract.

### **2.3.2 Acceptance and Examination**

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

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

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

#### **SELF-ASSESSMENT EXERCISES 17**

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

## **2.4 Summary**

It is important to note that the duties of the buyer are paramount in the contract between the buyer and the seller in the contract of sale of goods. The duty of the buyer is the acceptance of the goods and the payment of the said goods. In some instances, the conduct of the buyer may make him forfeit his right of rejection after examination of the goods. The duties of the buyer are important in the contract of sale especially in C.I.F and F.O.B contract. The most important amongst them is the duty to examine and accept the goods and also the duty to pay for the goods. It is pertinent to note that the duties of the buyer are concurrent with those of the seller in any contract of sale.

## **2.5 References/Further Reading/Web Source**

Sales of Goods Act.

Rawlings, Commercial Law University Of London Press (2007)

Okany Nigerian Commercial Law, Africana .FEP Publishers Limited (1992).

Hire Purchase Act, CAP 169  
Sofowora General Principles of Business and Coop Law, Soft  
Associates (1999).

## 2.6 Answer to Self-Assessment Exercise

- 1) In *Bekederemo v. Colgate-Palmolive (Nig)* 1976, a clause in the contract stipulated that “all purchases of the company’s goods by the distributor shall strictly be for cash payments: provided that the company will grant up to thirty days credit after delivery of goods by the company to the distributors within which the distributors shall effect payment in full for all goods received.” The seller supplied goods on nine occasions in 1972 for which the buyer could not pay cash on all occasions thereby leaving a substantial balance. Notwithstanding this, the buyer insisted that he was entitled to further supplies of goods, and that the seller’s failure to supply him amounted to breach of contract. The court held that the seller’s duty to supply the goods and the buyer’s obligation to accept them and pay immediately or within thirty days (if credit was granted) were concurrent and correlative duties. The buyer therefore could not insist on deliveries when he was unable to pay for them.

- 2) The answer should

Duty to pay the Price

Duty to accept the goods

Acceptance and Examination

## UNIT 3      REMEDIES OF THE SELLER

- 3.1 Introduction
- 3.2 Learning Outcome
- 3.3 Remedies of the Seller
  - 3.3.1 Personal Remedies (Rights in personam)
  - 3.3.2 Real Remedies (Rights in rem)
- 3.4 Summary
- 3.5 References/Further Readings/Web Source

### 3.1 Introduction

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

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

It is important to note that the remedy under the two heads is immense and will be discussed briefly for the purpose of this unit. The personal remedy of the seller against the buyer is the right of payment and right to damages. It is a personal right which a third party who benefits from the goods will not share as against the real remedy of the seller.

### 3.2 Learning Outcome

At the end of the unit, you should be able to distinguish between a personal remedy and real remedy of the seller against the buyer.

### 3.3 Remedies of the Seller

#### 3.3.1 Personal Remedies

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

They are action for the price and action for damage.

### 1) **Action for the Price**

An action for the price is an action in debt. The seller has the right to bring an action for the price. This action could come in two folds under section 49 of the Act:

- (a) If property has passed and the buyer has wrongfully failed to pay according to the terms of the contract. This is well enunciated under section 49(1) of the Act. In this instance, the seller can sue for the price of the goods. In *Colley v. Overseas Exporters Ltd* (1921) 3 KB 302, X sold to Y a quantity of leather F.O.B Liverpool, the goods being unascertained at the date of sale. Y instructed X to send the goods to Liverpool for shipment on the vessel (K) and X did so. The K and other ships substituted could not take the leather for which reason the leather remained at the dock for two months. X then brought an action against Y for the price. It was held that, as the property in the goods had not passed to Y and that there was no agreement for the price payable on a certain date in respect of delivery.
- (b) If the contract stipulates a date for payment without requiring delivery and the buyer wrongfully fails to pay, then the seller can bring an action for the price of the goods. See Section 49 (2) of the Sales of Goods Act.

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

### 2) **Action for Damages**

Under 50 (1) of the Act, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller will have an action for damages for non acceptance. The action may be brought whether the property in the goods has passed or not to the buyer. Note that the measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract. See Section 50 (2).

In *Thompson Ltd. v. Robinson (Gunmakers) Ltd* (1955) Ch.177. A contracted to buy a vanguard motor car from B, who were car dealers. A then refused to accept delivery. There was no shortage of Vanguard. It was held that B was entitled to damages for the loss of their bargain, i.e

the profit they would have made as they have sold it less than what they would have sold it. The seller was obliged to mitigate their loss by reselling the goods and could not claim for loss. If there is a market for the goods, the presumption is that damages will be the difference between the contract price and the market price at the time when the goods ought to have been accepted, or at the time of refusal to accept if time is not fixed for acceptance.

### 3.3.2 Real Remedies

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

#### 1) Rights of the Unpaid Seller

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

#### 2) Unpaid Sellers Lien

The unpaid seller's lien is the right to retain possession of the goods until payment, even if the title has passed to the buyer. A lien is a right to retain possession of goods until payment or tender of the whole price is made. The lien is available where an unpaid seller is in possession and section 41 (1) of the Act provides that:

- (a) where the goods have not been sold on credit
- (b) where it has been sold on credit and the term of it has expired or
- (c) where the buyer has become insolvent.

The lien may be exercised against part of the goods where the rest have been delivered unless delivery indicates an agreement to waive the lien.

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

- (a) where part of the price has been paid (s38 (1) (a) )
- (b) where the seller has obtained judgement for the price of the goods (s43(2) )

- (c) where the seller is in possession as agent or bailee of the buyer.

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

- (a) where the buyer has paid or tendered the whole of the contract sum (s38(1) (a) )
- (b) where the buyer lawfully obtains possession of the goods. In this instance, the lien does not revive if the seller regains possession.
- (c) by waiver of the lien (S43(1) (c) )

### **3) Rights of Stoppage in Transit**

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

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

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

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

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

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

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

#### 4) **Rescission and Re-sale**

A contract of sale is not rescinded by the exercise of the rights of lien or stoppage. Here, the buyer may be able to require delivery on tendering payment of the price. Where property in the goods has passed to the buyer, it will not revert in the seller merely because they exercise the right of lien or stoppage. Note that the seller must terminate the contract before property in the goods will revert. The property will revert in the seller if they exercise the right of resale. This is a right that arises if the seller defaults in which case the original sale contract is rescinded (S48 (4)). This right may also arise in (S48 (3)) as follows:

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

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

#### **SELF-ASSESSMENT EXERCISE 17**

- (a) Briefly outline the remedies available to a seller under the rights in *rem*.

### 3.4 Summary

The seller can bring actions against the buyer for price where property has passed and the buyer has wrongfully failed to pay or for damages where the buyer wrongfully fails to accept and pay for the goods. The seller also has a right against the goods: the unpaid seller's lien permits the seller to retain possession of the goods until payment, while the right

of stoppage allows the unpaid seller to stop goods in transit where the buyer has become insolvent and also he may be able to exercise the right of resale. In summary, the seller has rights to the goods, that is right in rem and also right in *personam*, which is of paramount importance, and they are remedies available to the seller. The seller has a right to the price or right to damages in a situation where he has exercised his right of resale, he can only sue for damages in that regard.

### **3.5 References/Further Reading/Web Source**

Sales of Goods Act

Rawlings, Commercial Law University Of London Press (2007).

Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited (1992).

#### **1.6 Answer to Self-Assessment Exercise**

The answer should cover right of lien, stoppage, rescission and resale

## **UNIT 4     REMEDIES OF THE BUYER**

- 4.1 Introduction.
- 4.2 Learning outcome.
- 4.3 Remedies of the Buyer
  - 4.3.1 Recovery of the Price
  - 4.3.2 Rejection of the goods
  - 4.3.3 Acceptance
  - 4.3.4 Damages
- 4.4 Summary
- 4.5 References/Further Readings/Web Source

### **4.1 Introduction**

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

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

### **4.2 Learning Outcome**

At the end of the Unit, you will be able to:

- a) discuss the remedies available to a buyer in a sale of goods contract.
- b) understand and explain the remedies available to buyer of goods in a sale of goods contract.

### **4.3 Remedies of the Buyer**

#### **4.3.1 Recovery of the Price**

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

#### **4.3.2 Rejection of the Goods**

The buyer can repudiate the contract if the seller is in breach and the breach goes to the root of the agreement. That is, the breach is a breach

of condition and not warranty. Breach of contract may arise in the following ways:

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

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

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

- (a) the buyer has accepted the goods (S11(4))
- (b) the buyer is unable to return the goods; where the goods has passed into the possession of a sub-buyer and cannot be recovered.
- (c) that there is a breach of a warranty
- (d) there is short or over delivery and the shortfall or excess is not material (S30 (D)). Here there is no requirement for unreasonableness.

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

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

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

### **4.3.3 Acceptance**

The buyer loses the right to reject the goods if all or part of the goods is accepted, unless the contract permits rejection after acceptance. (Section 35)

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

### 4.3.4 Damages

Any claim the buyer may have for damages a distinction must be made between a claim for failure to deliver and a claim relating to goods that have been delivered.

Failure to deliver may cause loss and the buyer could bring an action for damages (S51 (1)).

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

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

#### **SELF-ASSESSMENT EXERCISE 18**

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

### 4.4 Summary

The buyer can reject goods for defective delivery, breach of an implied or express condition, or serious breach of an innominate term, unless

they have accepted the goods or where there is a minor breach. Rejection does not necessarily constitute rescission of the contract and it may be possible for the seller to cure a defective delivery. The buyer in a sale of goods contract may be able to withhold payment of the price where the seller fails to deliver, or may be able to bring an action in damages for non-delivery. Wrongful rejection of the goods may be treated by the seller as a repudiation of the contract.

#### **4.5 References/Further Reading/Web Source**

Sales of Goods Act.

Rawlings, Commercial Law University Of London Press (2007).

Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited (1992).

Hire Purchase Act.

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

### 1.6 Answer to Self-Assessment Exercise

a. The buyer can legally reject the supply because of the breach of the fundamental term, the size of the plank.

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

b. Generally, a buyer loses the right to reject the goods if all or part of the goods is accepted, unless the contract permits rejection after acceptance. (Section 35). Where a breach justifies rejection, unless there is agreement to the contrary, the buyer may reject all of the goods or may take those that are not defective, or may take some of the defective goods and reject the rest (S35A (2)). In *J & H Ritchie Ltd v. Lloyd Ltd*.

## **UNIT 5      FACTORS AFFECTING LIABILITY UNDER CONTRACT OF SALE OF GOODS**

- 5.1 Introduction
- 5.2 Learning Outcome
- 5.3 Factors Affecting Liability under Contract of Sale of Goods
  - 5.3.1 Risk and Frustration
  - 5.3.2 Mistake
- 5.4 Summary
- 5.5 References/Further Readings/Web Source
- 5.6 Answer to Self-Assessment Exercise

### **5.1 Introduction**

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

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

### **5.2 Learning Outcome**

By the end of this unit you should be able to understand the factors that may affect the contract of sale of goods through risk, frustration and mistake.

### **5.3 Factors Affecting Liability under Contract of Sale of Goods**

#### **5.3.1 Risks and Frustration**

##### **1) Risk**

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

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

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

## 2) Frustration

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

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

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

### 5.3.2 Mistake

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

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

In *Couturie v. Hastie* (1856) 5H.L.C. 673, the defendant was a *del credere* agent who sold, on behalf of the plaintiffs, a cargo of corn shipped from Salonika. Before the date of the sale, the cargo had been

lawfully sold by the master of the ship. The purchaser repudiated the contract, and the plaintiff sued the agent, whose liability depended on whether the purchaser would have been liable. It then held that, the defendant was not liable and that the contract was void for mistake.

**SELF-ASSESSMENT EXERCISE 19**

1. The general principle of law of contract is that where a contract has been frustrated, the rights and obligations of the parties are terminated and remain in the position they were at the time when the frustrating event occurred. Critically examine this assertion with decided cases and relevant statutes of the law.
2. Sheron sold goods to Benson with the notion that the goods were still in existence, but at the time of the contract the goods was no longer in existence. Advise Benson.

**5.4 Summary**

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

**5.5 References/Further Reading/Web Source**

Sales of Goods Act.

Rawlings, Commercial Law, University Of London Press, (2007).

Okany, Nigerian Commercial Law, Africana .FEP Publishers Limited, (1992).

Hire Purchase Act.

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

**5.6 Answer to Self-Assessment Exercise**

- a. Student should provide a critical examination of frustration with decided cases and relevant statutes of the law.
- b. The contract is void by mistake , *Couturie v. Hastie*.

## **MODULE 6      E-COMMERCIAL CONTRACTS AND VARIOUS PAYMENT DEVICES**

### **UNIT 1      DEFINITION AND FORMATION OF E- COMMERCIAL CONTRACT**

- 1.1 Introduction
- 1.2 Learning Outcomes
- 1.3 Definition and Formation of E-Commercial Contract
  - 1.3.1 Definition E-Commercial Contract
  - 1.3.2 Formation of E-Commercial Contract
- 1.4 Summary
- 1.5 Reference/Further Readings/Web Source
- 1.6 Answer to Self-Assessment Exercise

#### **1.1 Introduction**

Today's world is driven by ICT and internet. The internet age means that virtually everything except where physical contact is required can be initiated and completed online without any physical contact. The mode of commercial transaction has evolved over the years from trade by barter, to use of legal tender and today's e-commerce. Commercial contracts such as contract of sale of goods can be concluded without the buyer and seller meeting physically with each other. This has brought faster means of conducting business transactions, different from that of paper and face to face transactions as the steps that are necessary to conclude and form an e-contract is different and may be considered more technical than usual traditional contracts. Therefore, the focus of this unit is on definition and formation e-commercial contract.

#### **1.2 Learning Outcome**

At the end of this unit, you will be able to understand and discuss the meaning and formation of e-commercial contract.

#### **1.3 E-Commercial Contract**

##### **3.1 Definition of E-Commercial Contract**

E-contracts are contracts that are executed and enacted by a software system in the sense that they are not concluded by face to face communications i.e. the "seller and buyer" or "supplier and consumer" do not meet in person to form, negotiate and execute the terms of their contract. E-contract is also called distance or online contract. Distance contracts are contracts concerning goods or services concluded between

a supplier and a consumer under an organised distance sales which for the purpose of the contract, makes use of one or more means of distance communications such as internet, e-mails, telephones and so on up to and including when the contract is concluded. (McMahon Legal).

USLegal states regarding e-contract as follows:

E- Contract any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract. The US Uniform Computer Information Transactions Act provides rules regarding the formation, governance, and basic terms of an e-contract. Traditional contract principles and remedies also apply to e-contracts.

Akintude defined electronic contract as a piece of information, communications, or correspondences in an electronic document, creating obligations between two or more correspondents that are enforceable or otherwise recognisable at law. It is a settle principle of law that generally there is no specific form in which a contract may be created. Thus, in *U.B.N. Plc. v Ogunsiji* (( 1 NWLR (Pt. 1334) 1 at p. 13) the court held that it is elementary law that a contract may be demonstrated by the conduct of the parties, as well as by their words and deeds or by the documents that passed between them. The present reality is that contract can be created orally, in writing, by conduct or by online communications, a process which we call online or electronic contract.

## 1) Issues and Sources of Conflict

### (a) Issues Arising from E-Commercial contract:

The issues commonly associated with e-commercial contract include:

- various steps that are necessary for the formation of a distance contract,
- the various prior information that is required to be given by the supplier to a consumer by various laws,
- the issue of domain names,
- the issue of whether the subject matter of the contract is one of goods or services and what the law provides,
- the issues of performance in a contract such as part- performance and the consequences of non-performance by parties to the contract in relation to services that a consumer is entitled to such as delivery services, maintenance services, refund,
- the rights and duties of both parties to a contract,

- remedies that are available to the consumer in the case of disputes that may arise,
- different requirements of an information service provider in relation to distance contracts and the provisions of information society services.

(b) **Sources of conflict:**

The likelihood of conflict is inevitable in distance contracts because disputes are likely to arise as a result of the fact that such contracts are concluded by electronic means which are not completely efficient as they have their disadvantages. The first is the issue of conflict of laws and jurisdiction arising on the ground that either party will want to enforce the law that will give more redress to them.

Secondly, the fact that a site has an '.ng' domain name does not mean that it trades from within Nigeria, or that the company operating it is registered or established in Nigeria. Also, for security reasons most web servers are kept geographically separate from the physical undertaking of the business.

### 3.2 Formation of E-Contracts

The issue of formation of e-contracts is one that is of great contention till date because there are different ways by which e-contracts are concluded and their principles are different from paper transactions. The three common ways in which e-contracts are formed are by:

- (a) exchange of emails and attachments,
- (b) ordering on-line for goods which were advertised in a website and
- (c) Electronic data interchange (EDI) network exchange. EDI is the practices of electronically communicating information that was traditionally communicated on paper, such as purchase orders and invoices. Technical standards for EDI exist to facilitate parties transacting such instruments without having to make special arrangements.

It is a basis requirement that for a contract to come into existence, there must be an offer made by the 'offeror or supplier' to 'offeree or consumer' and an acceptance has to be communicated back to the offeror before a contract can be said to be in existence.

According to **Andrew D. Murray**, the two basic methods of electronic contracting are:

- a) Electronic mail, or E-mail: This is digital equivalent of a letter. It may be typed, sometimes attached, addressed and then send to your desired recipient. It can be used to make an offer or to communicate acceptance. It can be used for advertisements and circulars.
- b) Click – Wrap Method: This method is used by the webpage operator to place an advert on its page called a web-advertisement, offering a product or service for sale (which constitute an invitation to treat). On this webpage will be a hypertext order form which the customer will fill out. At the end of this form will be a button saying ‘submit’ or ‘I Accept’, or something similar. When the customer clicks this button, they submit their order to the Web site operator. This is like taking the goods to the cash register in a shop, except that the cashier will usually be a computer instead of a person.

However, whichever method is used for the formation of an electronic contract, it is important that the five essential ingredients of a valid and enforceable contract as recognised by the law are present. These essential elements are: offer, acceptance, consideration, capacity to contract and intention to create legal obligation. The absence of these element make such agreement or the alleged unenforceable as affirmed in the case of *Metibaye v. Narelli International Ltd.* (2009) 16 NWLR (Pt.467) 326; *B.F.I.G. v. B.P.E* (2008) ALL FWLR (Pt.416) 1915.

#### SELF-ASSESSMENT EXERCISE 18

Critically examine the definition of e-contract and its formation

### 1.4 Summary

E-commercial contract is driven by the emergence of technologies. It has brought changes to the way parties’ contract, yet the basic elements for the formation of a valid contract must be present for a valid in e-contract.

### 1.5 Reference/Further Reading/Web Source

Adam, K.I., “E-Commerce: Issues and challenges for the Nigerian Law”  
University of Ilorin Law Journal (2014) Vol 1, 97-107.

Anthony Idigbe “Legal and Institutional Framework For E-Commerce  
In Nigeria” Being lead discussant paper delivered at Bankers  
House, PC 19 Adeola Hopewell St., V/I, Lagos June 2010 June.

Adejoke O. Oyewuni, “The ICT Revolution and Commercial Sectors in  
Nigeria: Impacts and Legal Interventions” (2012) Vol 5, No.2,  
British Journal of Arts and Social Science. pp.234-247

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in Nigeria, September 19, 2017

Andrew Murray, *Information Technology Law: The Law and Society*  
(Oxford University Press 2016)

USLegal, E-Contract Law and Legal Definition  
<<https://definitions.uslegal.com/e/e-contract/>>

E-Contract Law and Legal Definition available at  
<<https://definitions.uslegal.com/e/e-contract/>>

McMahon Legal <http://mcmahonsolicitors.ie/distance-contracts/>  
J. Lloyd, *Information Technology Law Ian* (Oxford University Press  
2014).

### 1.6 Answer to Self-Assessment Exercise

The answer should reflect that the formation of an electronic contract, it is important that the five essential ingredients of a valid and enforceable contract as recognised by the law are present. These essential elements are: offer, acceptance, consideration, capacity to contract and intention to create legal obligation. The absence of these element make such agreement or the alleged unenforceable as affirmed in the case of *Metibaye v. Narelli International Ltd.*

## **UNIT 2      REGULATION OF E-COMMERCIAL CONTRACT IN NIGERIA**

- 2.1 Introduction
- 2.2 Learning Outcomes
- 2.3 Regulation of E-Commercial Contract in Nigeria
- 2.4 Summary
- 2.5 Reference/Further Readings/Web Source
- 2.6 Answer to Self-Assessment Exercise

### **2.1 Introduction**

The advent of this special species of commercial transactions has necessitated the need for law regulating to govern and ensure the homogeneity of the conditions under which such transactions are made through the internet

### **2.2 Learning Outcomes**

At the end of this unit, you are expected to be able to discuss the relevant laws regulation e-commercial contract in Nigeria.

### **2.3 Regulation of E-Commercial Contract in Nigeria**

The laws regulating e-commercial contract in Nigeria are discuss below.

- (a) **National Information Technology Development Agency Act, 2010** and
- (b) **Cyber Crimes (Prohibition, Prevention, Etc.) Act, 2015 Section 17 of the Cyber Crimes Act 2015** which provides effective legal recognition of Electronic Signature and provides legal sanction for forgery, misrepresentation and falsification.
- (c) Other relevant bills that are still pending include Electronic Transactions Protection Bill of 2010; Electronic Commerce (Provision of Legal Recognition) Bill 2008; Electronic Fraud (Prohibition) Bill of 2008; Computer Security and Protection Bill of 2009; Nigerian Antitrust (Enforcement, Miscellaneous Provisions, etc) Bill 2008; Security Communication Interception and Monitoring Bill of 2009; National Internal Security Bill of 2009; Cyber Security and Data Protection Agency (Establishment) Bill of 2008.
- (d) Other relevant sections of other laws which aid the enforceability of electronic contract are:

- **Section 4 of the Statute of Frauds 1677** which provides that no action shall be brought on some types of contract unless it be in writing and signed.
- **Section 84 of the Evidence Act 2011** which provides for the admissibility of computer-generated evidence.
- **Section 93(3) of the Evidence Act 2011** which acknowledges that an electronic signature satisfies the rule of law as to signature
- (e) **Section 47 of the CBN Act** which makes any physical or electronic record of transactions that is in a format approved by the Bank to constitute sufficient proof of such transactions.

#### **SELF-ASSESSMENT EXERCISE 20**

Discuss the regulation of e-commercial contract in Nigeria

## **2.4 Summary**

The unit enumerated the existing legal framework regulating the e-commercial contract in Nigeria. It also identified bill awaiting the assent of the President in Nigeria. The emergence of e-commercial contract brought with it new issues that required law to regulate. Nigeria has taken steps in this regard but there are some bills addressing other remaining issues awaiting the assent of the President to become law.

## **2.5 Reference/Further Reading/Web Source**

Adam, K.I., "E-Commerce: Issues and challenges for the Nigerian Law"  
*University of Ilorin Law Journal Vol 1* 97-107 at 98

Anthony Idigbe SAN (2010 June). *Legal and Institutional Framework For E-Commerce In Nigeria* Being lead discussant paper delivered at Bankers House, PC 19 Adeola Hopewell St., V/I, Lagos

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<http://www.letregualtionstoolkit.org/en/sections.html>.

P.C. Obutte, 'ICT Laws in Nigeria: Planning and Regulating a Societal Journey into the future' *Potchefstroom Electronic Law Journal* (2014) 17(1) 419-451

Ikenga K. E. Oraegbunam, 'The Internet and its Facility for Criminality: Some Unique Difficulties for Investigation and Prosecution'

(2014). Vol. 5. Nnamdi Azikiwe University Journal of International Law and Jurisprudence 12

Electronic Contract And Its Enforceability In Nigeria September 19, 2017 Martylda's Law Blog

USLegal, \ E-Contract Law and Legal Definition available at <https://definitions.uslegal.com/e/e-contract/>

## **2.6. Answer to Self-Assessment Exercise**

The answer should cover the relevant laws such as National Information Technology Development Agency Act, 2010 and Cyber Crimes (Prohibition, Prevention, Etc.) Act, 2015 Section 17 of the Cyber Crimes Act 2015, Evidence Act, CBN Act, etc.

## **UNIT 3 THE VARIOUS PAYMENT DEVICES**

- 3.1 Introduction
- 3.2 Learning Outcomes
- 3.3 Various Payment Devices
- 3.4 Summary
- 3.5 Reference/Further Readings/Web Source
- 3.6 Answer to Self-Assessment Exercise

### **3.1 Introduction**

In commercial transaction there are various devices developed to ease the payment of goods and services. The traditional devices are now complemented and in some cases replaced by the electronic payment devices. This unit examines these various payment devices.

### **3.2 Learning Outcome**

At the end of the unit you should be able to discuss and analysis the various payment devices.

### **3.3 Various Payment Devices and CBN Regulation**

#### **3.3.1 Various Payment Devices**

The various devices are examined below.

#### **1) Cheque:**

It is a bill of exchange drawn on a banker, payable on demand. In operation, it is a mandate or authority by a bank customer called the drawer to his or her bank to pay the named person called the drawee from customer's account with the bank. Cheque is basically negotiable instruments. However, the Bills of Exchange Act 1882 provides that a cheque may be crossed. If endorsed by the words 'not negotiable', it means that the cheque cannot be negotiated. If the words 'account payee' or 'account payee only' is endorsed on a cheque it means that the it cannot be passed from one person to another person.

#### **2) Credit Card:**

A credit card is a thin rectangular slab of plastic or metal issued by a financial company, that lets cardholders borrow funds with which to pay for goods and services. It is a small rectangular plastic card issued by a bank, building society, and other financial company that allows the holder to borrow funds from them to purchase goods or services. Credit

cards impose the condition that cardholders pay back the borrowed money, the interest and any additional agreed charges . Today, credit card is the most popular payment methodologies for buying consumer goods and services globally.

### **3) Debit Card:**

A debit card is a plastic payment card like credit card that can be used instead of cash and deducts money directly from a consumer's account when use to make a purchase unlike credit card. The main advantage is that it eliminates the need to carry cash when making purchases. A debit card is also called bank card, plastic card or check card.

### **4) A luncheon voucher (LV):**

This is a paper or electronic ticket (voucher) used by some employees in the United Kingdom to pay for meals in private restaurants. Initially, it was introduced by companies to subsidise midday meals (luncheons) for their employees without having to run their own canteens. Cambridge dictionary defines it as ‘a type of ticket given to people by their employer that they can use instead of money for buying meals in some restaurants’. There are presently different types of vouchers such as fuel vouchers.

### **5) Point of Sale (POS) System**

A POS System consists of software and hardware used to manage business. It may be used to analyse and order your inventory, employees, customers, and sales. Also, it is used for receiving of payment of goods and services. Traditionally, POS systems an on-site server which requires that it could only run in a specific area of your store and uses desktop computer, cash register, receipt printer, barcode scanner, and payment processor. However, since early 2000s, owing to the technological breakthrough with the advent of cloud-based storage and computing, the mobility of POS technologies has become a reality.

### **6) Automated Teller Machine (ATM)**

An automated teller machine (ATM) is an electronic banking outlet provides self service to customers by allowing customers to complete basic financial transactions without the aid of a branch representative or teller. To use this system, one must have either a credit or debit card.

### **7) Mobile Point of Sale (MPOS)**

System Mobile Point of Sale systems (mPOS) are becoming increasingly popular because of its mobility breaking barrier of distance. It can be used at regular retailer stores and by street merchants at town fairs. A Mobile Point of Sale system performs the same functions as a traditional cash register except that it's portable. It can be plugged into a smartphone or touch-screen tablet's audio jack or charging port. The portability and connectivity to the internet make possible its mobility and opened up a world of opportunities for businesses, particularly small businesses.

### 3.3.2 Central Bank of Nigeria (CBN) Rules and Regulations

The CBN produces Rules and Regulations to ensure appropriate governance, management and operation of the payment systems infrastructure. Therefore, the following are produced by the CBN

- 1) Revised Nigeria Bankers' Clearing Rules
  - 2) Operational Rules and Regulations for the Nigeria Central Switch (NCS)
  - 3) Regulatory Framework for Mobile Payments Services in Nigeria
  - 4) Nigeria Direct Debit Scheme
  - 5) Guidelines on Nigeria Banks Clearing and Settlement System
  - 6) Guidelines for Cheque Truncation in Nigeria
  - 7) Standards and Guidelines on Automated Teller Machine (ATM) Operations in Nigeria
  - 8) Guidelines on Point of Sale (POS) Card Acceptance Services
  - 9) Guidelines on Stored Value/Prepaid Card Issuance and Operations
  - 10) Guidelines on Electronic Banking in Nigeria
- These new guidelines are available on the CBN website.

#### **SELF-ASSESSMENT EXERCISE 20**

Examine the various payment devices and the steps taken by the CBN at regulating them.

### 3.4 Summary

This unit examined the various payment devices and identified the CBN regulation of these devices. The technological advancement heralded unprecedented shift in the mode of payment of goods and services. The emergence of online and mobile banking and other payment devices requires the CBN to evolve and develop new regulations aim at ensuring appropriate governance, management and operation of the payment systems.

### 3.5 Reference/Further Readings/Web Sources

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### 3.6 Answer to Self-Assessment Exercise

The answer should cover various payment options available, the CBN regulations on these payment options as well as an assessment of the strength and weakness of such regulations.