

# CPA

**Certified Public Accountant Examination**

**Stage: Foundation F1.2**

**Subject Title: Introduction to Law**

**Study Manual**



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**INSTITUTE OF  
CERTIFIED PUBLIC ACCOUNTANTS  
OF  
RWANDA  
Foundation F1.2**

**F1.2 INTRODUCTION TO LAW**

First Edition 2012

This study manual has been fully revised and updated  
in accordance with the current syllabus.

It has been developed in consultation with experienced lecturers.

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## **Stage: Foundation 1**

### **Subject Title: F1.2 Introduction to Law**

#### **Aim**

The aim of this subject is to ensure that students have an understanding of the law relating to the accountant and the ability to identify problems that require the advice of a legal professional.

#### **Business Laws as an Integral Part of the Syllabus**

The legal principles learnt in this subject are relevant to students throughout their professional accounting studies. In particular *Introduction to Law* is an essential foundation for the study of *Company Law*.

Knowledge gained from this subject will also be particularly relevant in the further study of *Auditing, Audit Practice and Assurance Services, Financial Accounting, Financial reporting, Advanced Financial reporting* and *Strategy and Leadership*.

#### **Learning Outcomes**

On successful completion of this subject students should be able to:

- Distinguish between and describe sources of law
- Interpret, describe and discuss aspects of the law of property  
Interpret, describe and discuss aspects of the law of contract and of sale of goods and supplies of services
- Interpret, describe and discuss aspects of the law relating to negotiable instruments and insurance
- Recognise if and when more specialist legal knowledge is required and identify the source of that expertise.
- Describe, discuss and explain aspects of company law relating to the structure of business entities and of their commercial relationships.

## **Syllabus:**

### **1. Nature, Purpose and Classification of Law**

- Nature and purpose of law
- Classification of Law
- Law & Morality
- Ethics and the Law

### **2. Sources of Law**

- The Constitution
- Legislation
- Statutes of general application
- Substance of common law and doctrines of equity
- Judicial precedent

### **3. Administrative Law**

- Separation of Powers
- Natural Justice
- Judicial control of the Executive
- Administrative Legislation
- Arbitration

### **4. The Court System**

- Courts and tribunals: composition, jurisdiction
- Structure, composition and jurisdiction of courts justice
- Subordinate Courts

### **5. Law of Persons**

- Legal Personality
- Types of persons: natural person, artificial person
- Sole proprietorships
- Partnerships
- Unincorporated Associations
- Limited Companies

### **6. Law of Tort**

- Nature of tortious liability
- General defences in the law of tort
- Negligence
- Nuisance
- Trespass
- Vicarious liability
- Occupier's liability
- Limitation of action
- Defamation

## **7. Law of Contract**

- Nature of a contract
- Classification of Contracts
- Formation of Contracts
- Terms of a contract, conditions, warranties and exemption clauses
- Vitiating factors: mistake, misrepresentation, duress, undue influence, illegality, illegal contracts
- Discharge of contract
- Remedies for breach of contract
- Limitation of actions

## **8. Sale of Goods**

- Nature of the Contract
- Formation of the Contract
- Terms of the Contract
- Transfer of property in goods
- Rights and duties of the parties
- International contracts of sale

## **9. Agency**

- Nature and creation of agency
- Types of Agents
- Authority of an agent
- Rights and duties of the parties
- Termination of agency

## **10. Hire Purchase**

- Nature of the contract
- Formation of the contract
- Terms of the contract
- Rights and duties of the parties
- Termination of the hire purchase contract

## **11. Insurance**

- Nature of the contract
- Formation of the contract
- Principles of Insurance

## **12. Negotiable Instruments**

- Nature and characteristics
- Negotiability and transferability
- Types: cheques, promissory notes, bills of exchange
- Rights & Obligations of the parties

### **13.The Law of Property**

- Definition of property (real and personal property: movable and immovable property, intellectual and intangible property, trademarks, copyrights and patents)
- Ownership of property
- Freehold and leasehold interests
- Leases
- Mortgages and charges
- Foreclosure
- Rights & Restrictions on another's property

# ***STUDY UNIT 1. GENERAL INTRODUCTION TO LAW***

## **SECTION 1. MEANING OF THE LAW AND OTHER KEY CONCEPTS**

### **A. DEFINITION OF LAW**

For a better understanding of the course, some key words need to be defined, the first of these being 'Law' itself. The word 'Law' can have several meanings depending on one's point of view. However, two of them are the most important as far as the definition of Law is concerned. The rest are complementary and they are useful as well because the word 'Law' can be viewed in different ways. Also in Law, there is generally a presumption that where a clause or rule refers to he or she (similarly, him or her) either refers to the other inclusively.

Law, in its general sense, is a set of rules of conduct prescribed by a controlling authority and having a binding force. The phrase 'prescribed by a controlling authority' means that the controlling authority declares with authority that something should be done or should not be done or that a rule should be followed. Law having a binding force means that the law is that which must be followed by citizens and where the people don't abide by it, sanctions are attached. Sanctions mean the penalties or punishments for someone who has done wrong or who has not respected the law. Having a character of a rule of conduct implies that it commands what is right and what is wrong.

Law, in its second meaning, is referred to as a scientific subject studying the wide and heterogeneous body of rules regulating human conduct. In this case, it is also called the Science of Law.

In another perspective, law is referred to as objective or subjective. Objective law is a set of rules governing persons' conduct in a society, enacted and sanctioned by the public authority. It is in this way that we say that Rwandan law, Belgian law etc., or criminal law, Civil law.

Subjective law refers to the prerogatives or rights bestowed (given) to a person by the objective law (above). These are rights or privileges belonging to a particular person or a group because of their importance or social position. A human being is endowed with a number of rights that he or she enjoys in his relationship with others; for example, a human being has the right to property, the right to privacy, freedom of speech etc. Subjective law is what we would call subjective rights. The reason why we call it a subjective right is because a right cannot exist on its own. It needs somebody that has the right. It is an issue of who owns what. The one who owns is the subject and what is being owned is the right.

In another way, law is said to be positive or natural positive law or legal position meaning a hierarchy of laws made by man, applicable in a given place at a given time. This is manmade law. Rwandan positive law is the whole body of different rules applicable in Rwanda today.

Natural law is a body of ideal rules of human conduct considered as superior to those of positive law and compulsory even to the legislator. Natural laws are usually used to justify the legal rule (positive law) this is because every single law is related to a pure moral law,

which is to say that a legal rule is a result of a moral law. An example is that the legal rule (positive law) against murder originated from the natural law of 'don't kill' which has been in existence since time immemorial.

Summarizing this development on the definition of the law, one can say that Law might be understood as a set of rules which are generally obeyed and enforced within a politically organised society. In other words, law is a body of rules for the guidance of human conduct which are imposed upon and enforced among the members of a given state. The law is really necessary in each society.

## **B. PURPOSE OF THE LAW**

The establishment of laws in society is necessary to protect the rights of individuals and to ensure the good order, functioning and survival of the society. In effect, what the law is trying to do is to provide answers to the myriad of everyday problems that can arise in society. The solutions to such problems must accord with objectives that are judged by the community to be socially desirable. The problems arise in the first place because of the conflicting interests of individuals and groups within the society and the necessity to ensure the functioning and survival of the society itself. The more civilized a community becomes, and the greater the industrial and scientific progress it makes, the more laws it must have to regulate the new possibilities it is acquiring.

What the law does, in attempting to prevent and resolve conflict in society, is to:

- control social relations and behaviour;
- provide the machinery and procedures for the settlement of disputes;
- preserve the existing legal system;
- protect individuals by maintaining order;
- protect basic freedoms;
- provide for the surveillance and control of official action;
- recognize and protect ownership and enjoyment of the use of property;
- provide for the redress (compensation) of harm;
- reinforce and protect the family;
- facilitate social change.

## **C. LAW AND MORALITY**

There is a connection between legal laws laid down by a state and certain other norms of behaviour known as laws of morality. From a legal perspective the essential difference between these two sets of rules exists in their respective enforcement. Legal rules are enforced in the courts. Rules of morality depend for their observance upon the good conscience of the individual and the force of public opinion. In any society it is usual to find the rules of morality observed by the majority of its members reflected in the legal laws of that society. The contents of morality, or ethics, and law overlap to a great extent, e.g. murder, theft and slander; but there are many rules of morality and ethics which the law does not seek to enforce, such as the commandment to honour our parents; and many legal rules which are not intrinsically moral, such as the husband's general liability to pay tax on his wife's income.

## **D. LAW AND ETHICS**

Ethics (*also known as Moral Philosophy*) is the science of the rules of moral conduct which should be followed as being good in themselves. There is a close relationship between law and ethics, but there are important differences.

First of all, whereas law is enforced by the organs of the state, ethics are not. While the commands of the law are imposed from without (heteronymous) and enforced by sanctions primarily exterior, the final decision in moral issues is left to each man's personal conscience, and the sanctions lie in one's own heart (save that, where a rule of ethics coincides with one of positive morality, public opinion may provide a sanction). Secondly, law concerns itself primarily with the external behaviour of a person, his overt acts, being interested in the state of his mind, his intention or his motive as a rule only where it manifests itself in an act. Ethics on the other hand, concerns itself primarily with the state of a person's mind, with his thoughts and desires, and is interested in his acts in the main only in so far as they reveal the state of his mind.

Thirdly, whereas law imposes its commands in the interests of the community, the laws of ethics are imposed for their own sake, to achieve virtue. While the Law aims at the doing of justice and the maintenance of peace and order in the community, the aim of ethical theory is the perfection of character; institution of law has to do with the regulation of conduct.

To a large extent law and ethics overlap, but they do not coincide.

## **SECTION 2. CLASSIFICATION OF LAW**

### **A. SUBSTANTIVE AND PROCEDURAL LAW**

Substantive law sets out the rights and duties governing people as they act in the society and specifies remedies to back up those rights. Duties tend to take the form of a command. "Do this" or "Do that" or "Do not do that". For example, the Rwanda labour code tells employers that they must not discriminate amongst people in hiring and employment on the basis of race, colour, religion, sex, etc. substantive law also establishes rights and privileges, e.g. freedom of speech, the right to self-defence.

Procedural law establishes the rules by which substantive law is enforced. It does not define rights or duties, but merely implements them. Rules as to what cases a court can decide how, a judgment of a court is to be enforced are part of procedural law.

### **B. CRIMINAL AND CIVIL LAW**

Criminal law consists of rules prohibiting anti-social conduct as well as certain deviant behaviour. It aims to shape people's conduct along lines which are beneficial to society, by preventing them from doing what is bad for society. In Rwanda as elsewhere, these prohibitions are listed in the penal code and a number of subsidiary legislation. Also forming part of the criminal justice system are courts, which adjudicate questions of criminal liability, as well as the police force and other enforcement agencies which exist not only to maintain law and order but also to detect and prosecute violations against the criminal law. It is the

society through Government employees called public prosecutors that bring court action against violators. If a person is found guilty of the crime such as theft, the person will be punished by imprisonment and or a fine. When a fine is paid, the money goes to the side of the government, not to victim of the crime.

Civil law lays down rules, principles and standards which create rights and duties and specifies remedies to back up those rights. The duties are owed by one person (including corporations) to another. Actions for the breach of civil duty must be brought by the injured party himself or his representative. Generally, the court does not seek to punish the wrongdoer but rather to compensate the injured party for the harm he or she has suffered. For instance, if someone carelessly runs a car into yours that person has committed a civil wrong (tort) of negligence. If you have suffered damages you will be able to recover to the extent of the damages suffered.

Note that although civil law does not aim to punish, there is an exception. If the behaviour of someone who commits a tort is outrageous, that person can be made to pay punitive damages (also called exemplary damages). Unlike a fine paid in a criminal case, punitive damages go to the injured party.

Sometimes, the same behaviour can violate both the civil law and the criminal law. For instance, a person whose careless driving causes the death of another may face both a criminal prosecution by the state and a civil suit for damages by survivors of the deceased. If both suits are successful, the person would pay back society for the harm done through a fine and or a sentence, and compensate the survivors through the payment of the money damages.

## **C. MAIN DIVISIONS OF LAW**

Broadly, law can be divided into two broad categories

### **1. International law**

This is sometimes called the law of nations, and consists of rules governing the relations between states. The basic principles are recognition of the sovereign state, known as *pacta sunt servanda* (Latin for "agreements must be kept")- Public international law is the most well-known branch of International law which regulates legal relations between states and the manner in which international organizations operate. International law is the set of rules generally regarded and accepted as binding in relations between states and nations. It serves as the indispensable framework for the practice of stable and organized international relations. International law differs from national legal systems in that it only concerns nations rather than private citizens. National law may become international law when treaties delegate national jurisdiction to supranational tribunals such as the European Court of Human Rights or the International Criminal Court. Treaties such as the Geneva Conventions may require national law to conform.

International law is consent based governance. This means that a state member of the international community is not obliged to abide by international law unless it has expressly consented to a particular course of conduct. This is an issue of state sovereignty.

The term "international law" can refer to three distinct legal disciplines:

- Public international law, which governs the relationship between provinces and international entities. It includes these legal fields: treaty law, law of sea, international criminal law, the laws of war or international humanitarian law and international human rights law.
- Private international law addresses the questions of (1) which jurisdiction may hear a case, and (2) the law concerning which jurisdiction applies to the issues in the case.
- Supranational law or the law of supranational organizations, which concerns regional agreements where the laws of nation states may be held inapplicable when conflicting with a supranational legal system when that nation has a treaty obligation to a supranational collective.

The two traditional branches of the field are:

- jus gentium — law of nations
- jus inter gentes — agreements between nations

## 2. National law

This is the law of a particular country and it is divided into various branches:

### a) Public law

Public law is that branch of the law concerned with the organization of the state and state agencies and corporations as well as their relations with private individuals. Constitutional law, tax law, public finance, public liberties, administrative law, criminal law is all public law subjects.

### b) Private law

Private law on the other hand, is that branch of the law which governs the relationship of individuals inter se. There are divisions in this branch of law:

- **Law of persons** (including family law): This branch of law deals with the legal status of natural persons, such as minors and insane persons, and involves factors influencing capacity, such as age, marriage and nationality. Family law deals with the law of domestic relations and the legal rules for family relationships, such as marriage, divorce, guardians.
- **Law of "things"**. This branch is divided into categories:
  - ✓ **Law of property:** this is a branch of law that is concerned with real rights and deals with ownership and possession, and various real rights in a thing belonging to another, such as servitudes, mortgages, pledges and liens.
  - ✓ **Law of succession:** This deals with what happens to a person's estate upon death. In testamentary succession, the deceased leaves a valid will. In intestate

succession, there is no will at all, or part of the estate of the deceased was not disposed of by will.

- ✓ **Law of obligation:** This branch of law deals with personal rights, and is divided into two categories.
  - ✓ **Law of contract:** a contract is defined as a binding agreement between two or more persons by which one or more of them agrees to give something, or to do something, or not to do something. It is therefore an agreement intended to create or extinguish personal rights between persons.
  - ✓ **Civil liability.** This is a branch of general duty imposed by law which will ground an action for damages by any person to whom the duty was owed who has suffered harm in consequence of the breach. The duty is owed to persons generally and is imposed independently of the will of the parties.
  - ✓ **Business law:** There is no simple categorization of laws that fall under business law, since much of this law also falls into other categories. However, business law may include laws relating to insurance, labour law, bankruptcy, and agency, sale of goods, taxation, negotiable instruments, company law, carriage, and law of banking.
- **Procedural law:** This branch of law deals with the rules that govern **how** actions may be brought under the law. There are two divisions:
- a) **Civil procedure:** This sets out the rules of how persons can bring action against others in a civil court.
  - b) **Criminal procedure:** This sets out procedure on how a criminal court operates, the powers of judges in criminal matters, and how persons can be brought before a criminal court.
- **Law of evidence:** This sets out the rules of how evidence may be introduced and proved in a civil or criminal court.
- **Conflict of laws:** This branch of law prescribes rules for settling an issue before a Rwandan court if the events at issue are so connected to a foreign country that the foreign country's system of law has to be considered in resolving the matter.

### SECTION 3. CHARACTERISTICS OF A LEGAL RULE

A legal rule is binding, meaning that it requires you to do something or not to do something. 'Binding' also means that it is supposed to be followed by all citizens.

A legal rule is binding in time and space. On the one hand, a legal rule is said to be binding in space when it is for example applicable to Rwanda and not to Britain. On the other hand, a legal rule is binding in time, when it exists from a certain date to a certain date. It is possible that a public (state) authority can vote for a law and it exists for two years and it is then replaced by a new one.

A legal rule is always general. This means that it applies to persons in general but not to a particular individual. A legal rule cannot regulate one specific person. A law which regulates one person is not a legal rule. That law can't or doesn't exist.

However, a legal rule can apply to a certain class of individuals. Some rules are applied to some specific categories of people. This is the diversification of rules. An example is when a law can apply to men and women doing military service, people doing commercial activities or to employers.

A legal rule is permanent. It means that it is applicable or not interrupted between its inception and its end. This characteristic of permanency of a legal rule refers to its applicability during its life (its existence).

A legal rule can be private or public. Private law is a body of legal rules that regulate private individuals and their relations. Public law is that which regulates relations between private persons and the public (state) authority.

A legal rule generally regulates human conduct. This is why it is general and abstract (it is concerned with general ideas or principles rather than specific issues)

A legal rule normally means a general and abstract provision stipulating how beings should behave. The generalizing and impersonality of a legal rule are an important guarantee against arbitrariness (unfairness)

A legal rule also distinguishes itself from other rules by the nature of its sanction. The sanction of a legal rule is exercised by the public (state) authority. The phrase 'sanction' here should be understood as the official permission, approval or acceptance of a legal rule which is the duty of the state (authority)

On the other hand, an ethical rule (principles about what is right and wrong) bears an internal sanction. This means that it is the internal conscience which leads someone to decide what is right (what to do) and what is wrong (what not to do)

An ethical rule can also bear the social sanction but not the one exercised by a public authority. This means that it is society which accepts and approves the ethical rule. It is clear that the law cannot rely on such a sanction (of the society) because of its inefficiency to impose respect and order in the society.

As to religious rules, they are applicable to believers and are sanctioned by church leaders, which are also different from legal sanctions because they come from a public authority and are vested with coercive force.

However, it is worthy to mention that, if one of the ethical or religious rules is at the same time sanctioned by the public authority, it becomes a legal rule even if it is still an ethical or religious rule. This is why some legal rules are also ethical rules, creating some confusion between law and ethics.

## **SECTION 4. SANCTIONS OF A LEGAL RULE**

There are three main types of sanctions attached to a legal rule:

- Criminal sanctions
- Civil sanction
- Disciplinary sanctions

### **A. CRIMINAL SANCTIONS**

Criminal sanctions are applied when the legal rule that was violated is concerned with the public interest (the social order) In this case; the violation is held to be an offence or infraction. Sanctions or punishment in the case of a criminal conduct (offense) do range from some francs of fine to the temporary and life imprisonment and the death penalty.

### **B. CIVIL SANCTIONS**

Civil sanctions concern violations of a legal rule protecting private interests. The violation in this case is concerned to be an attack on individual interests protected by the violated rule. Civil sanctions aimed at restoring the situation prevailing before the violation. They are also referred to as damages or reparations.

### **C. DISCIPLINARY SANCTIONS**

Disciplinary sanctions are such as those extended to employees of the civil service, judges and other magistrates as well as soldiers who do not conform to the duties of their functions. These sanctions range from the warning, temporary suspension and in extreme cases the exclusion from service.

## **SECTION 5. MAJOR LEGAL SYSTEMS (FAMILIES) OF THE WORLD**

Every country in the world has its own laws and sometimes laws co-exist within the same state. Despite these variations laws can be classed into types under a limited number of general categories. The following legal systems have been identified in the world:- The Common law tradition, the Civil law or Romano- Germanic tradition; the Socialist law tradition and Muslim law tradition.

- a) **Common law system.** The common law family embraces the law of England and legal systems of the English type. Its wide expansion throughout the world came as a result of colonization or expansion. Most English-speaking countries in the world are common law jurisdictions. The essential features of the common law system are the following. It is basically judge made law. The common law was formed primarily by judges who had to resolve individual disputes. Secondly, the legal rule in the common law system is one which seeks to provide the solution to the case in hand. It does not seek to formulate a general rule of conduct.

- b) Civil law system.** Originating from continental Europe the civil law system has spread to the countries of Latin America, Francophone and Lusophone African countries, the countries of the near East, Japan and Indonesia. Colonization and voluntary reception contributed for this wide spread. French law stands out as the prototype of the civil law systems of laws. This is so because the Napoleonic codes have served as model codes for other countries. The main features of the civil law system are following. Firstly all civil law jurisdictions adopted the legal technique of condition. Secondly, the legal rule seeks to formulate a general rule of conduct as opposed to address the case in hand (cf Common Law).
- c) Socialists legal system.** Prior to 25<sup>th</sup> October 1917 (the October Revolution) Russian law could be said to belong to civil law family. Since then, law in Russia has taken a different path based on Marxism-Leninism. So that today, it is current to speak of socialist legal theory; a socialist law with its own distinctive structure and system of administering justice. The primary function of Soviet law is to organize the nation's economic forces and to transform the behaviour and attitude to an infringement on the interests of private persons or an insult to the code of morality. This position is bound to change when states previously subject to soviet law have adopted European Union market economic policies (capitalism).
- d) Muslim legal system.** Muslim law is not an independent branch of knowledge or leaning. It is only one of the facts of Islamic religion itself; Islam is first of all a religion, then a state, and finally a culture. The Islamic religion includes, firstly, theology which established dogma and states exactly what a Muslim must believe. Secondly It includes the 'sharia' ('the way to follow') which lays down rules of behaviour for believers. Since Muslim law is an integral part of the Islamic religion no authority in the world is qualified to change it.

## ***STUDY UNIT 2. SOURCES OF LAW***

There are two kinds of Sources of law: material and formal sources.

### **SECTION 1. MATERIAL SOURCE OF LAW**

#### **A. DEFINITION.**

The material sources are the sources of inspiration of law. In other words, it is what is at the origin of the legal provision.

There are, for example, historical sources. The 'right' keeps the memory of its past, it is marked by a rather great continuity, a rather great stability. On certain essential questions (contract law, right of the responsibility, etc.), the applicable rules come to us from the old right (the canonical right, Roman law, habits). The historical sources are significant. Concurrently to this core, there is also a very great mobility of the right. The Parliament votes each year on tens of laws. Jurisprudence evolves/moves also rather quickly. It is not thus enough to know the history of the right, even if this one is significant.

It is necessary to distinguish two types of sources: material sources and formal sources.

#### **B. VARIOUS MATERIAL SOURCES**

##### **1. Social standards**

The 'right' very often endeavours to re transcribe social rules to transform them into legal provisions. Example: the question of the homosexual couples and its legal recognition: gradually society admits the existence of the homosexual couples and more and more reserves a legal framework for them. , today, the PACS (Civil Pact of Solidarity). Of course, the right is not always in phase with society, there can sometimes be a rather long time between the evolution of manners and the evolution of the laws (e.g. 1975 only: lifting of the prohibition of abortion).

##### **2. The economic theory**

More and more economic science takes importance in our society and more and more the right takes as a starting point the economic theory, p. ex.<sup>1</sup> for tax or revenue duty, the environmental right, etc.

##### **3. Religions**

They play a rather weak and indirect role, today in France, primarily through the historical tradition. It is not the case in other countries of the world (p. ex.: Muslim countries).

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<sup>1</sup> P ex. Per example or for example and is the same as e.g.

## **C. VALUE OF THE MATERIAL SOURCES**

The material sources are, themselves, never obligatory. They inspire the legal provisions, but they are not themselves legal provisions.

They can be however taken into account to interpret a legal provision and they can clarify the direction.

## **SECTION 2. FORMAL SOURCES**

We have two main types of formal sources of law. Obligatory and Auxiliary sources

### **A. OBLIGATORY SOURCES OF LAW**

These are the principal sources of law. In a narrow sense, laws are statutes enacted by the parliament and promulgated by the president of the Republic.

In a broader sense, the Law mean all legal rules of written law formulated in a general way by means of exercising legislative power or even executive power.

The laws have a general impact, emanating from public power and are obligatory for all individuals found in a given society.

Here, we have national laws at the country level, and international laws on the international level.

We will first examine national laws.

### **1. SOURCES OF NATIONAL LAWS**

The laws are ranged, according to their hierarchy, as following:

- The constitution;
- The organic law;
- The ordinary law;
- The Decree law, etc.

#### **1.1. The constitution**

At the national level, the constitution comes at the first position. The constitution is a set of rules which form the fundamental law of a state with which all other laws have to be in conformity. This means that when there is a conflict between constitutional provisions and any other law of the country, the former prevails.

For G. Burdeau, the constitution occupies a central place in a system of the rule of law. A certain philosopher M. Kamto wrote:

“A democracy should not be a government by peoples, but a government by the law”. This is what is called the rule of law. In this sense, it coincides with a “democratic state” on condition that “the law really expresses the general will of the public”.

Rwanda has only one constitution, which was adopted through the referendum of 26<sup>th</sup> May, 2003.

## **1.2. The organic laws**

Besides the constitution, there are organic laws, which rank immediately below the constitution. Within the hierarchy of laws, organic laws come after the constitution.

An organic law is adopted with a view to specifying or completing the constitution and other laws. There are organic laws in Rwanda. This is the case of the organic law No 08/96 of 30/08/1996 on the organization of prosecutions of crimes constituting the crime of genocide or crimes against humanity committed between 1<sup>st</sup> October 1990 and 31/12/1994, the organic law on the organization and functioning of Gacaca jurisdictions, and so many others.

According to 93(6) of the Rwandan constitution, organic laws shall be passed by a majority vote of three fifths of the members present in each chamber of Parliament.

Organic laws have a legal force superior to ordinary laws. It is the constitution, which determines the areas reserved for organic laws. We can cite the:

- Conditions of acquisition, retention, enjoyment and deprivation of Rwandan nationality (art. 7 const.)
- The organization of education in Rwanda (art. 40 const.)
- The modalities for the establishment of political organizations, their functioning, the conduct of leaders, the manner in which they shall receive state grants as well as the organization and functioning of the forum of political organizations (art. 57(2) const.)
- The internal regulations concerning each chamber of parliament (art. 73 const.) i.e. each chamber of parliament shall adopt an organic law establishing its internal regulations.
- The conditions and the procedures by which parliament controls the actions of the government.
- The organization and jurisdiction of courts.

## **1.3. Ordinary laws**

Ordinary laws, which are most frequent, are voted by the absolute majority of seating parliamentarians of each chamber. It is the constitution that determines the relevant areas for ordinary laws. These areas are many compared to those of organic laws. The quorum required for each chamber of parliament is at least three fifths of its members (art.66(1) const.).

## **1.4. Decree Law**

In case of the absolute impossibility of parliament holding session, the president of the republic during such period promulgates decree laws adopted by the cabinet and those decree laws have the same effect as ordinary laws (art. 63(1) Const.).

These decree-laws become null and void if they are not adopted by parliament at its next session. This is in conformity with article 63(2) constitution.

## **1.5. Orders of Presidential, prime ministers and other public authorities.**

### **1.5.1. Presidential orders**

The president of the republic exercises his functions as the head of the executive Power by way of Presidential Decrees.

According to article 112 of the constitution, the President of the Republic shall sign presidential orders approved by the cabinet, and the prime minister, ministers, and ministers of state and other members of government responsible for their implementation countersign these orders.

### **1.5.2. Orders of the Prime minister and others public authorities**

The prime minister signs orders of the prime minister relating to the appointment and termination of senior public servants mentioned by article 118(10) of the constitution.

Ministers, ministers of state and other members of cabinet implement laws relating to matters for which they are responsible by way of orders (art.120 (i) const)

The prefects of provinces can enact administrative and police regulations (art 21 of the law no 43/2000 concerning the organization and functioning of the province) in the same way, the District council has the power to enact the regulations of the District in the areas of politics, security, taxes (art23 of the law no 04/2001 of 13/1/2001 concerning the organization and functioning of the province) in the same way, the District council has the power to enact the regulations of the District in the areas of politics , security , taxes ( art.23 of the law no.04/2001 of 13/1/2001 concerning the organization and functioning of the District).

## **2. SOURCES OF INTERNATIONAL LAW**

The sources of international law are actually the same as the sources of public international law which were discussed earlier. Because these sources were elaborated in detail, not much detail will be provided under this section. Mention can just be made that the classical formulation of sources of international law is article 38 of the statute of the international court of justice. The article sets out four sources and these are:

- International conventions, whether general or particular, establishing rules expressly recognized by contesting states;
- The general principles of law recognized by civilized nations;
- International customs, as evidence of a general practice accepted as law .... Judicial decisions and the teachings of most highly qualified practioners of law in various nations, as subsidiary means for the determination of rules of law.

### **B. AUXILIARY SOURCES OF LAW**

The auxiliary sources of law are jurisprudence, doctrine, general principals of law and equity.

## **1. Custom (as a source of law)**

A custom is generally defined as a set of a people's way of doing things which has acquired an obligatory force in a given social group and which is practiced over a relatively long time period. Customs are practices or usages of a given society. Customary law is unwritten. It has to be considered as legally binding on (obligatory by) the people in the society.

A custom is not created as a written law, a unique act, but by a repetition of similar practices especially with the conception that it has a binding (obligatory) force. The essential elements of a custom are therefore.

- The usage
- Binding force
- The social consensus
- The time in which it is applicable

But the first two are the ones that are most frequently cited as the ones that form a custom. It is also important to point out that custom can inspire the legislator when modifying or completing an existing law or when judges are regulating new cases where the existing laws are not clear or incomplete. Custom can also help for the comprehension of a legal text. However, it is important to indicate that custom is applicable in the absence of law; And when they are not contrary to the constitution, laws, regulations, public order and good morals.

These laws are the principal sources of law. Custom is just a subsidiary source of law, in the sense that they can inspire the judge and help him in the comprehension of legal texts.

## **2. General principles of law.**

These are principles of law common to the legal systems of the world. In Rwanda, examples of general principles of law are:

- the principle of double jeopardy
- that law provides for the future and does not have a retroactive effect.
- The principle of permanence and continuity of the state
- It is presumed that no-one is ignorant of the law.

In hierarchy, general principles of law are inferior to the Law. Some of them are already part of the Rwandan penal code. In general, general principles of law are not as direct a source of law as the laws they inspire the judge and they are resorted to in the absence of the law.

## **3. Jurisprudence (Decided case law)**

Jurisprudence means the set of decisions rendered by courts and tribunals. In Romano-Germanic legal systems, jurisprudence doesn't bind the judge. The decisions of courts and tribunals don't have a general field of application. Judges' decisions are only binding on those parties involved in the case. If a judge is seized with a new case, he is not obliged to

comply with decisions made on similar cases in the past (precedent). This means that in a new case, he may rule differently from his previous decision.

This led some people to say that jurisprudence is not strictly speaking a source of law.

However, even though the jurisprudence doesn't have a legal value or a legal binding force, it exercises an unquestionably factual influence that guides the judge to rule in a given way. We refer to this influence as *defacto* authority of jurisprudence .

In a common – law legal system, the situation is different. Jurisprudence does constitute a binding source of law .we refer to it as Precedent. A common – law precedent has a binding force on the judge. He cannot easily depart from it.

#### **4. Doctrine**

By doctrine, we mean legal scholars' opinions on critical questions of law. In the wider sense, doctrine refers to publications of persons deeply involved in the study of law. These are law professors, senior judges, eminent lawyers, etc.

Doctrine serves to understand the positive law better, which means those rules applicable in a given society at a precise time. Doctrine serves also to inspire possible law reforms by proposing rules that should be enacted by the legislator. Although doctrine is not a principal source of law, it constitutes a subsidiary impact on the law. It exercises an important influence even though it is not a binding source of law. It guides the judge by promoting reasons for deciding in a certain way. On the other hand, doctrine guides the legislator when enacting laws. He can either consult legal works (publications) of scholars or ask them to participate in the legal process as experts. The authority attached to doctrine relates somehow to the reputation of the scholar himself. The more reputable he is in his field and publications, the more his opinion will be of influence.

In conclusion, one can say that although doctrine is not a principle source of law, it plays a significant role, as the opinion submitted by eminent lawyers on a subject of law can be useful in case it is put forward and followed in courts, because it can help in the comprehension of a legal text.

#### **5. Equity**

The regulation of 14 May 1886 foresees that in case there is a matter that is not provided by a legal text, the disputes without solutions in local customs will be solved according to general principles of law and equity.

Equity, which is based on the general feelings of justice, allows the judge, in case of silence of law or a legal gap, to make judgements conforming to common sense and feelings of justice. The notion of equity has a vague character and the judge is not bound by any certain precise rule but he has the power to decide according to the circumstances but without arbitrariness (unfairness) . This means that he has to apply equity with fairness. Certain legal provisions give examples of how equity can be applied ( art 34,142, of the civil code iii , art.82 of the penal code )

Equity is not itself a source of law. It is a means available to the judge when he is supposed to give a judgement without applying a determined legal rule.

### **SECTION 3. SOURCES OF RWANDA BUSINESS LAW**

#### **A. INTERNATIONAL SOURCES**

The role of international treaties is unknown in civil law. The implications of international conventions on commercial law have been compounded by recent developments and increasing interdependence in international commercial activities. Some might even argue that the result of these developments might have had led to a uniform (unified) international law. The implications of international conventions on Rwandan commercial law are both direct and indirect.

Direct implication happens when a convention or an agreement becomes part of domestic law or provides the basis for domestic law of similar content (e.g. the decree of December 10<sup>th</sup>, 1951 which deals with cheques and the decree of July 28<sup>th</sup>, 1934 which deals with the bill of exchange the promissory note and protests). The content of both laws are based on the Geneva Conventions of June 7<sup>th</sup>, 1930 and of March 19<sup>th</sup>, 1931, which deal with cheques and bills of exchange.

Indirect implication of international conventions can be found in the adoption by Rwanda of the Vienna Convention on the International Sale of Goods ( the United Nations Convention on Contracts for the International Sale of Goods) of April 1980, which deals primarily with external trade relations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, etc.

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Below are some examples of international conventions related to international trade.

- 1995- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit;
- 1988- United Nations Convention on International Bills of Exchange and International Promissory Notes;
- 2001- United Nations Convention on the Assignment of Receivables in International Trade;
- 1991- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;
- 2005- United Nations Convention on the Use of Electronic Communications in International Contracts.

## B. DOMESTIC SOURCES

Currently, there is no commercial law code in Rwanda. However, some disparate laws do exist:

- Decree of 2 August 1913 on traders and proof of commercial engagements;
- Decree of 12 January 1920, on pledge of business, discount and the pledge of commercial bills;
- Decree of 27 July 1934 on bankruptcy and *preventive legal settlement to bankruptcy*;
- Decree of 10 December 1951 on uniform law on cheques;
- Law n°07/2009 of 27th April 2009 relating to companies, amending the law no 06/1988 of 12th February 1988.
- Law N° 50/2007 Providing for the establishment, organization and functioning of Cooperative Organizations in Rwanda;
- Law n° 10/2009 of 14/05/2009 on mortgages;
- Law n° 12/2009 of 26/05/2009 relating to commercial recovery and settling of issues arising from insolvency;
- Law n°40/2008 establishing the organization of Micro Finance activities;
- Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters;
- Law n° 35/91 on the organization of internal trade as modified and supplied to date;
- Law n° 11/2009 of 14/05/2009 on security interest in movable property.
- Ministerial order n° 01/MINICOM of 08/05/2009 determining small private limited company;
- Ministerial order n° 02/09/MINICOM of 08/05/2009 relating to businesses of low income;
- Ministerial order n° 03/09MINICOM of 08/05/2009 determining fees for registration of companies' business activities.
- Law 45/2011 of 25/11/2011 Governing Contracts

It is advisable that the student acquaints himself with the above ministerial orders, laws and decrees.

## ***STUDY UNIT 3. ADMINISTRATIVE LAW***

### **SECTION 1. MEANING**

As a scientific subject or discipline, Administrative law is an autonomous branch of public law comprising the special rules concerning the organisation and functioning of the administration, the activities of the administration and also litigation should be understood as the processes of taking claims to court in non-criminal cases.

Private law rules don't govern controversies (disagreements) within the jurisdiction of administrative law. The reason of this independence of administrative law is that the administration, serving a public interest, can't be subject to the same rules as individuals. This is why there are special rules different from those applied to private individuals and in some countries; administrative disputes are adjudicated by special courts called 'administrative courts'.

### **SECTION 2. SEPARATION OF POWERS**

The State is composed of three branches which are the following:

- The Legislature
- The Executive
- The Judiciary

According to article 60(2) of the Constitution of the Republic of Rwanda, these three branches are separate and independent from one another but are all complementary.

#### **1. The Legislative branch: the Rwandan Parliament**

According to article 62 of the constitution, it is stated that legislative power is vested in a parliament consisting of two chambers:

- The chamber of Deputies, whose members shall have the title of 'Deputies'
- The Senate, whose members shall have the title of "Senators".

Parliament deliberates on and passes laws. These may be ordinary laws or organic laws. Within the hierarchy of laws, an organic law ranks immediately beneath the constitution. Organic laws are adopted with a view to specifying or completing provisions of the constitution. Parliament legislates and oversees executive action in accordance with the procedure determined by the Constitution (art. 62 const.).

Every member of the Parliament represents the whole nation and not just those who elected or nominated him or her or the political organisation on whose ticket he or she stood for election. (Art. 64(1)) before taking office, members of parliament shall take oath before the

President of the Republic and, in case of his or her absence, before the president of the Supreme Court. (Article 65(1))

The Bureau of each chamber of parliament is made up of the president and two vice-presidents. This is in conformity with the constitution (art. 65(5) const.)

The office of a Parliamentarian shall not be compatible with being a member of the Cabinet.

An organic law determines offices which are incompatible with the office of a parliamentarian. (article 68(2 & 3) const. but see Art 116 Const. and below) It is also stipulated that no one shall at the same time be a member of the chamber of Deputies and of the senate (Article 68(1) const.). The chamber of Deputies shall be composed of 80 members. The members of the chamber of Deputies shall be elected for a five year term. Candidates may be presented by a political organisation or may stand independently.

The Senate shall be composed of twenty six (26) members serving for a term of eight (8) years and at least 30% (thirty percent) of whom are women. Note should be made that the sittings of each chamber of parliament are public.

The right to initiate legislation shall be concurrently vested in each Deputy and the Executive acting through the cabinet (art. 90 const.). The law is sovereign in all matters (art. 93(1)) Organic laws govern all matters reserved for them by the constitution as well as matters that require related special laws (art 93(2) const.).

An Organic law cannot contradict the constitution neither may an ordinary law or decree law contradict an organic law nor a Decree contradict an ordinary law. (Article 93(3) const.).

In voting a bill, there must be a separate vote on each article as well as a vote on the entire bill (article 93(4) const.). A vote on the entire law is conducted by calling each parliamentarian by name and the parliamentarian votes by replying in a loud voice.

## **2. The Executive branch**

The President of the Republic is the Head of state. He or she is the guardian of the constitution and guarantees national unity. He or she guarantees the continuity of the state, the independence and the territorial integrity of the Country and the respect of international treaties and agreements. (Article 98 const.)

The President of the Republic has the right to address the nation. (Art. 98 const.).

According to article 101 of the constitution, the President of the Republic is elected for a term of seven years renewable only once. This means that under no circumstances shall a person hold the office of the president of the Republic for more than two terms. (art 101 (const.) If the office of the President is vacant before the term expires, elections are organised within a period not exceeding ninety days (Art . 107(3) const. ).

In case the President dies or is permanently unable or otherwise chooses not to assume office, new elections are held. In that case, the acting president will be the president of the senate, in the absence of the president of senate, the speaker of the Deputies and in the absence of both, the duties are assumed by the Prime Minister (art. 105(3) and 107(1) const.)

The office of the President is incompatible with the holding of any other elective public office, public function or any other civilian or military employment or professional activities (art. 106 cons.)

The President of the Republic is the commander-in-chief of the Rwanda Defence Forces (Art. 110 cons.). He can declare war from his own initiative and he can as well sign agreements temporarily or permanently to stop the war (Art. 110 const.).

He or she accredits Ambassadors and special envoys to foreign states and the ambassadors accredited to Rwanda Present their credentials to him or her (Art. 114 const.). He or she shall make appointments of senior public service and military offices as determined by the constitution and other laws (Art. 112)

The cabinet shall comprise the Prime Minister, Ministers of state and other members who may be determined by the President of the Republic (Art. 116(1) Const.).

The Prime Minister shall be nominated, appointed and removed from office by the President of the Republic (Art. 116(2) const.). Other members of cabinet shall be appointed and removed from office by the President of the Republic upon proposed by the Prime Minister (Art. 116(3) const.).

According to Art. 117 const., the cabinet implements national policy agreed upon by the President of the Republic and the cabinet. It is accountable to the President of the Republic and to the parliament (Art.117 (2) const.).

### **3. The Judiciary**

#### **A. INTRODUCTION**

Judicial power is exercised by the Supreme Court and other courts established by the constitution and other laws. (Art140 (1) const.).

The Judiciary is independent and separate from the legislative and executive branches of government. (Art. 140 (2)).

Justice is rendered in the name of the people and nobody may be a judge in his or her own cause. (Art. 140(4) const.).

Judicial decisions are binding on all parties concerned, be they public authorities or individuals. They shall not be challenged except through ways and procedures determined by law (Art. 140(3) const.).

Every court decision shall indicate the grounds on which it is based. (Art 141(2) const.) Courts apply orders and regulations only where they are not inconsistent with the constitution and other laws. (Art. 141(3) const. ).

In the exercise of their function, judges follow the law and only the law (Art. 142(2)).

## **B. JUDICIAL ORGANISATION AND COMPETENCE**

### **B.1. Ordinary courts**

#### **a) Lower instance courts**

There is established a lower instance court for sector councils. The court is to exercise jurisdiction within the administrative boundaries of the sector council. In criminal matters lower instance courts are competent to hear offences whose sentence a term of imprisonment does not exceed five (5) years. They are not competent to hear offences relating to the violation of traffic rules.

As regards civil disputes lower instance courts have original jurisdiction to hear and determine:

- Disputes between natural or artificial (legal) persons whose monetary value does not exceed three million (3,000,000Rwf), except civil actions related to insurance as well as those seeking damages for loss occasioned by an offence tried by another court:
- Disputes related to land and livestock and their succession:
- Disputes related to civil status and family
- Disputes related to immovable property other than land which does not exceed 3 million Rwf of monetary value and its succession.
- Disputes related to movable property which does not exceed 3million Rwf of monetary value and its succession.

Note that judgments rendered by lower instance courts in both criminal and civil matter can be reviewed by the same court or appealed to the higher instance courts. The exception is cases whose monetary value does not exceed Rwf fifty thousand (50,000). In this case the lower instance court shall serve as the final court of appeal.

#### **b) Higher instance courts**

There is a higher instance court in district councils. Each court has specialized chambers: the juvenile chamber, the administrative chamber and the labour chamber.

In criminal matters higher instance courts shall have jurisdiction to try offences whose sentence is a term of imprisonment exceeding five (5) years except where the law reserves the offence to other courts; they have jurisdiction to try traffic offences and person placed in the first category accused of crimes of genocide and other crimes against humanity committed between 1<sup>st</sup> Oct. 1990 and 31<sup>st</sup> Dec. 1994.

In civil cases, higher instance courts have jurisdiction to hear cases on the first instance that are not triable by other courts. They shall have competence to hear on first instance case related to insurance regardless of the value of the claim.

Note that the specialized chambers of higher instance courts shall hear administrative cases relating inter alia, to actions for damages arising from contractual liability, government officials and its parastatals.

In its appellate jurisdiction the court can hear appeals against judgment rendered on first instance by lower instance courts within their respective jurisdiction.

The provincial or city of Kigali court can review its judgment or appeal to the Higher court.

### **c) The Higher court**

There is established a higher court whose seat is in the city of Kigali. Its jurisdiction covers the entire territory of the republic. The higher court shall have four (4) chambers in other parts of the republic namely: Musanze, Nyanza, Rwamagana and Rusizi. The jurisdiction of the chamber that operates at Musanze is equal to the jurisdiction of the higher instance court in Musanze and Rubavu. The jurisdiction of the chamber that operates at Nyanza is equal to the jurisdiction of the higher instance court Muhanga, Huye and Nyamagabe. The jurisdiction of the chamber that operates at Rwamangana is equal to the jurisdiction of the higher instance court of Ngoma and Nyagatare. The jurisdiction of the chambers that operates at Rusizi is equal to the jurisdiction of the higher instance court of Rusizi and Karongi. Finally cases originating from the territorial jurisdiction of the higher instance court of Nyarungenge, Kabuga and Gicumbi shall be tried at the seat of the high court of the republic.

The high court exercises both original appellate jurisdictions. In the exercise of the original jurisdiction, the high court has competence to hear specific criminal cases, administrative cases and civil matters; its jurisdiction is limited to the execution or enforcement of authentic deeds executed by foreign authorities as well as foreign judgments. In the exercise of its appellate jurisdiction, the higher court has jurisdiction to hear appeals from civil cases heard on first instance by a higher instance court. It also hears specific appeals on second instance from higher instance courts. In addition, it hears appeals from decisions taken by arbitration tribunals.

The high court also hears appeals from criminal cases tried on first instance or appellate level from higher instance courts.

Note that the high court of the republic has competence to review its own decision. A dissatisfied party can appeal to the Supreme Court.

### **d) Supreme Court**

The Supreme Court is the highest court in the Republic of Rwanda. The Supreme Court directs and co-ordinates the activities of the lower courts. The court has jurisdiction over the territory of the Republic of Rwanda. Its decision is not subject to appeal except in terms of a prerogative of mercy or the revision of a judicial decision.

The Supreme Court exercises ordinary and special jurisdiction. In the exercise of ordinary jurisdiction the court is the court of last resort for appeal for trials heard by the high court of the republic in the first degree and in the second degree provided inter alia, the award of damages equals or exceeds twenty million francs (20,000,000) or the subject matter in disputes equals or exceeds twenty million francs (20,000,000).

In the exercise of its special jurisdiction the supreme court has, inter alia, exclusive jurisdiction to try in the first and final degree, the president of the republic, the president of the senate, the president of the chamber of deputies, the president of the supreme court and the prime minister for offences committed during their terms of office, whether such offences

relate to the exercise of their public duties or their private matters, regardless of whether they are still or have ceased to hold office.

## **B.2. Specialized courts**

### **a) Military courts**

Military tribunals have competence to try all offences committed by all military personnel except offences which constitute a threat to national security and murder committed by soldiers. They also have competence to try all military personnel accused of the crime of genocide and crimes against humanity committed between October 1<sup>st</sup> and December 31<sup>st</sup> 1994 that places them in the first category.

Judgments rendered by a military court may be reviewed by the same court or appealed to the military high court.

The military high court exercises both original and appellate jurisdiction. In that exercise of its original jurisdiction, the military high court shall try all offences which constitute a threat to national security and murder committed by soldiers. However, if, during judgment, the court finds that the elements of the offences constitute manslaughter instead of murder, it shall nonetheless hear the case.

In its appellate jurisdiction the court hears appeals from cases tried by the military court. Cases heard in the first instance by the military high court may be reviewed by the same court or appealed to the Supreme Court. If the case was heard in the second instance by the military high court, the case will be appealed to Supreme Court provided the sentence passed by the military high court is equal to or exceeds ten (10) years of imprisonment.

### **b) Commercial courts**

Other specialized courts are commercial courts. They will be examined in the next chapter.

## ***STUDY UNIT 4. THE BUSINESS DISPUTES RESOLUTION***

### **SECTION1: REVIEW OF KEY CONSTITUTIONAL PROVISIONS REGARDING THE COURT SYSTEM**

As said above, there are several Constitution provisions related to the Court System. The Constitution and other laws are clear about the ordinary courts and specialized courts. Ordinary courts are the Supreme court, the High court and the Intermediary courts and the primary courts.

Specialised courts are Commercial courts, and the Military courts. Military courts comprise the Military Tribunal and the Military High Court - see previous chapter.

### **SECTION 2. Rwandan Commercial justice system**

#### **2.1. Background and chronology of the establishment of commercial courts in Rwanda**

As said, the Rwandan judicial system comprises ordinary and specialized courts. Ordinary courts include the Supreme Court, the High Court, Intermediate Courts and Primary Courts. Specialized courts include Gacaca Courts, Military Courts, and Commercial Courts.

The long process that led to the establishment of commercial courts can be summed up in the following table.

**Table 1: Chronology of the establishment of commercial courts in Rwanda**

Activities	Time
Creation of the Rwandan Law Reform Commission	May 2001
Law Reform Commission drafts new laws	July 2001-December 2003
Law Reform Commission presents new laws to the Cabinet	January 2004
Parliament adopts new law on courts, judges and civil and criminal procedure	April-July 2004
Cabinet admits failure of assessors in enhancing commercial litigation	End of 2004-Early 2005
Cabinet establishes Business Law Reform Cell	October 2005
Superior Council of the Judiciary selects 22 local judges for the commercial courts	July-December 2005
Draft law establishing commercial courts adopted	December 2007

Draft law establishing commercial courts goes through legislative process	December 2007-March 2008
Eight local judges leave for specialized course in South Africa	February 2008
Publication of law establishing commercial courts. Procedural rules law is published the same day	March 1, 2008
Law dealing with arbitration and conciliation in commercial matters enters into force	March 6, 2008
Swearing in of 2 Mauritian judges as President of the Commercial Court and President of the commercial court of Nyarugenge	May 2, 2008
Commercial courts become fully operational	March 15, 2008

As indicated in the table above, on 16<sup>th</sup> December 2007, the Parliament enacted Law No. 59/2007 of 16/12/2007 establishing commercial courts and determining their organization, functioning and jurisdiction.

## **2.2. Organization structure of commercial courts**

The Law provides for four commercial courts. Of the 4 courts, 3 are lower commercial courts, namely Nyarugenge Commercial Court, Huye Commercial Court and Musanze Commercial Court, and one is the Commercial High Court.

Judges of the Commercial Court consist of the President, the Vice President and at least five other judges. The President and the Vice President are appointed by a Presidential Order after approval by the Senate. They can only be removed from office in specific circumstances as provided for by the Constitution. Other judges of the Commercial Court along with judges of Commercial Courts are appointed by the President of the Supreme Court upon approval by the Superior Council of the Judiciary.

The President of the Commercial High Court and the President of the commercial court are responsible for the organization and effective performance of their respective courts.

In this regard, they shall take all necessary decisions for the speedy trial of cases by avoiding any factors which may cause delays in adjudicating the cases. In particular, they are responsible for organizing and determining the functioning of their courts including monitoring the performance and conduct of judicial personnel.

## **2.3. Jurisdiction of commercial Courts**

Commercial courts have a limited jurisdiction. Such courts are competent to try commercial cases. In order to determine the jurisdictional scope of commercial courts, the Law provides a

list of commercial matters. According to Article 3 of the Law establishing commercial courts, commercial matters refer to commercial, financial, fiscal and other matters closely related to them regarding:

- disputes arising from commercial contracts or commercial activities between persons or business entities;
- disputes arising out of the use of negotiable instruments such as cheques, bills of exchange and promissory notes;
- disputes relating to transactions between persons and financial institutions;
- disputes related to liquidation, dissolution and recovery of limping business firms;
- cases related to insurance litigation but not including compensation claims arising out of road accidents by litigants who have no contract with the insurance firms;
- claim related to fiscal disputes;
- claims related to transport litigation;
- any dispute that may arise between persons who own or manage registered entities and commercial institutions and these include:
  - members of the Board of directors;
  - directors;
  - shareholders;
  - auditors;
  - liquidators;
  - managers of the property of a bankrupt business firm.
- cases arising from bankruptcy;
- cases related to intellectual property including trademarks;
- cases related to registration and deregistration of businesses;
- cases related to appointment or removal of auditors responsible for auditing the books and accounts of a firm;
- cases related to competition and consumer protection.

Problems may arise from the determination of the jurisdiction of commercial courts based on a commercial list. Indeed, a list of commercial issues is not comprehensive and question of jurisdiction may arise in some cases so as to decide jurisdiction. Thus, it is necessary to formulate clear and efficient rules in order to avoid such problems.

As to the in-value jurisdiction of commercial courts, the Law provides that Commercial Courts deal with all commercial disputes with a value below 20 million Rwandan francs and non-monetary commercial matters. The Commercial High Court decides at first instance all cases with a value above 20 million Rwandan francs and hears appeals from interlocutory interim orders and judgments of the Commercial Courts at the first level. The Supreme Court hears appeals against decisions of the Commercial High Court.

The territorial jurisdiction of the Commercial High Court and Commercial Courts is provided in an annex to the Law establishing Commercial Courts.

#### ***2.4. Qualified judges for dealing with commercial litigation***

Judges dealing with commercial litigation shall have sufficient experience in trade issues and the relevant laws of different business activities. For satisfactory and effective commercial

litigation, it is important to train group of judges, lawyers and experts to deal with commercial litigations and legislations, and to set suitable training program for this end.

Considering that without improved professional standards the new commercial justice system would not be effective and efficient, the Government of Rwanda recognized the urgent need to have qualified judges to deal with commercial litigation. In this regard, Article 6 of the Law establishing commercial courts provides that, apart from permanent professional judges, Commercial Courts and the Commercial High Court shall have equally specialized judges operating on temporary basis and governed by an employment contract. In addition, the specialized judges may be of Rwandan nationality or of foreign nationality and shall be highly qualified in commercial law matters with experience of three years in judicial matters for those with at least a doctorate degree, and an experience of five years for those with a bachelor's degree.

In order properly to staff the Commercial High Court and Commercial Courts, in May 2008, the Supreme Court succeeded in recruiting two Mauritian judges who were sworn in as President of the Commercial High Court and the Nyarugenge Commercial Court. These judges had the advantages of holding a mixed background in common law and civil law.

On the other hand, recruited judges undertook specialized studies in commercial law, the goal being to have specialized judges in all Commercial Courts and the Commercial High Court.

### ***2.5. Proceedings relating to commercial cases***

On 11<sup>th</sup> September 2007, the Parliament passed Law No. 45/2007 modifying and complementing No. 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure. The 2007 Law contains amendments to the law 2004. The law includes a new chapter on proceedings in commercial cases. This chapter comprises three sections on the initiation of a case, preliminary hearing and substantive hearing of the case, respectively.

#### **A. INTIATION OF A CASE**

The registrar receives and registers the claim in the commercial case register.

The plaintiff or his or her legal representative shall file a written commercial claim in form of a **Plaint**.

The **Plaint** shall:

- 1° specify in form of conclusions the remedies sought;
- 2° identify the names of the parties to the suit or other persons connected to it;
- 3° contain a summary of the nature of the claim in form of short numbered paragraphs and indicating the grounds on which it is premised;

The **plaint** is accompanied by the following documents depending on their availability:

1° a list of witnesses and a brief summary of evidence each witness shall give;

2° an expert report that the plaintiff wishes to use as evidence;

3° any other document the plaintiff wishes to refer to.

The defendant must deliver a written statement of defence within 14 days of receiving the initial complaint.

## **B. PRELIMINARY HEARING**

An important innovation of the 2007 above-mentioned law is that the judge has a duty to organize, within 21 days of receiving the defendant's answer to the complaint, a preliminary hearing with both parties. The preliminary hearing aims at making interlocutory orders on issues that may hinder the hearing of the case; it allows the judge to prepare for the proceedings and for the admittance of evidence. Also in the preliminary hearing, the judge may refer the parties to arbitrators or mediators in commercial matters; refer the matter to the mediation committee if the subject matter lies in its competence or jurisdiction; and pass a judgment in respect to a matter without going into the substantive hearing after consultative hearing after consulting to the parties.

After the preliminary hearing, a date for the substantive hearing is fixed and communicated to the parties.

## **C. RULES ON ADJOURNMENTS**

The rules on adjournments – extra time to comply with procedural requirements – are meant to avoid delaying tactics. It is in this line that there shall be no adjournment of a preliminary hearing unless a sufficient reason is presented to court at least five working days before the hearing date.

The law also addresses the issue of the adjournment of a case. In this regard, the trial judge may at his or her own discretion or upon request of any of the parties adjourn the case or take any order deemed necessary. If the judge grants a party extra time and it later turns out the request was not genuine and meant only to delay the process, the judge can impose damages, which must be paid before the next hearing. If they are not paid, a further penalty applies.

## **D. SUBSTANTIVE HEARING**

At the substantive hearing of the merits, the parties present their evidence. The trial judge may during this hearing, after examining the evidence of witnesses or their opinions, make an order whether such evidence is sufficient. He may also encourage skilled people on the subject matter to seek dialogue with the parties with the view of making them settle the matter or appoint an expert to examine on behalf of court any report of skilled persons or other evidence presented to court and to report to court on a date fixed by the trial Judge.

Upon request by the parties, the trial judge may pass judgment based on the written submissions or written submissions or any other evidence without a hearing.

### **E. INCREASED EFFICIENCY OF COMMERCIAL COURTS**

As provided for by Article 11 of the law establishing commercial courts, the President of the Supreme Court set up a Committee to advise her on expeditious disposal of commercial cases. The Committee consists of 11 members: 4 judges (one from each commercial court and one from the Commercial High Court); one person representing the Ministry of Justice; one person from Rwanda Development Board; one advocate from the Bar Association; one from the Chamber of Industry; one from banks and another one from professional services. Members of the Committee should hold office for a period of 3 years.

As an Order of the President of the Supreme Court spells it out, the Committee shall have the following attributions:

- Analyse the reasons that may cause the delay in the adjudication of commercial cases and advise on measures to remedy that
- Advise on modifications of the law to be carried out so that commercial cases are tried expeditiously
- Analyse the gaps in providing various services to people who come to the commercial courts and provide advice on how to fix that.
- To perform any other duty assigned to the Committee or as the Committee may determine in the furtherance of its mission

The committee found out that according to reports prepared by the Commercial High Court, adjudication of commercial cases is generally speedy. However, after a thorough review of the Law on Commercial Courts and the Law relating to civil, commercial, labour and administrative procedure, the Committee found out that there are some shortcomings that have to be addressed in order to avoid an accumulation of new arrears.

## **SECTION 3. Arbitration**

### **1 Introduction**

In Rwanda, new law on commercial arbitration and conciliation was established in 2008 as Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters.

Article 3 (2) of Rwandan law on arbitration defines arbitration as “a procedure applied by parties to the disputes requesting an arbitrator or a jury of arbitrators to settle a legal, contractual or another related issue”.

Arbitration refers to a process in terms of which the parties to a dispute voluntarily and jointly ask a third party, the arbitrator, to hear both sides of their dispute and make an award that they undertake in advance will be final and binding. The fact that the arbitrator settles the

dispute by making a legally binding award distinguishes arbitration from mediation and negotiation. For this reason, arbitration is more similar to litigation, as both are command processes where a decision is imposed on the parties, in contrast to negotiation, which is consensual in nature. But, in contrast to litigation, the arbitrator's award arises from the consent of parties to accept the award, not from the power of the court imposing an order.

## **2. Significant features of arbitration**

Four significant features of commercial arbitration are singled out for now, although they will be the subject of a brief comment later. These features are :

- The agreement to arbitrate;
- The choice of arbitrators;
- The decision of the arbitral tribunal;
- The enforcement of the award.

## **3. The agreement to arbitrate**

An agreement by parties to submit to arbitration any dispute or difference between them is the starting point of the process in both national and international arbitration. If there is to be a valid arbitration, there must first be a valid agreement to arbitrate. Arbitration is a contractual process in the fact that it is based on an agreement between the parties, by opposition to some cases where arbitration is imposed in statute, such as provided for in Switzerland by article 89 of the Statute on health care insurance for disputes between doctors and health insurers, or as provided in France by Article 761-5 of the labour law code for certain disputes in the field of journalism.

The Rwandan law on arbitration defines the arbitration agreement. The long Article 9 of the above-mentioned law provides:

*“Arbitration agreement is an agreement by both parties to submit to arbitration all or certain disputes which arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The arbitration agreement shall be in writing. An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, in a written form basing on the conduct of the parties themselves, or based on other means. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be used for subsequent reference; Electronic communication refers to any communication that parties make by means of data message; Data message refers to any information written, sent, received or stored by electronic, magnetic, optical and other means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegraph, telex or telefax. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. The reference*

*in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract”.*

#### **4. The choice of arbitrators**

One of the features that distinguishes arbitration from litigation is the fact that the parties to an arbitration are free to choose their own tribunal. Sometimes, it is true; this freedom is unreal, because the choice may be delegated to a third party such as an arbitral institution. However, where the freedom exists, each party should make sensible use of it. A skilled and experienced arbitrator is one of the key elements of a fair and effective arbitration.

#### **5. The decision of the arbitral tribunal**

It is not uncommon for a settlement to be reached between the parties in the course of arbitral proceedings. However, if the parties cannot resolve their dispute, the task of the arbitral tribunal is to resolve the dispute for them by making a decision, in the form of a written award.

An arbitral tribunal does not have the powers or prerogatives of a court of law, but it has a similar function to that of the court in this respect, namely that it is entrusted by the parties with the right and the obligation to reach a decision which will be binding upon them.

The power to make binding decisions is of fundamental importance. It distinguishes arbitration as a method of resolving disputes from other procedures, such as mediation and conciliation which aim to arrive at a negotiated settlement. The procedure that must be followed in order to arrive at a binding decision by way of arbitration may be described as judicial. An arbitral tribunal is bound to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.

#### **6. The enforcement of the award**

Once an arbitral tribunal has made its award, it has fulfilled its function and its existence comes to an end. The tribunal's award, however, gives rise to important and lasting legal consequences. Although it is the result of a private arrangement and is made by a private arbitral tribunal, the award constitutes a binding decision on the dispute between the parties. If it is not carried out voluntarily, the award may be enforced by legal proceedings both locally (that is to say, in the place in which it was made) and internationally.

The registration or deposit of award is a *sine qua non* requirement for an award to be recognized and enforced in Rwanda. However, no fee is paid for that registration or deposit for recognition of arbitral awards sought in Rwanda.

According to article 395 of the law establishing Commercial, civil, social and administrative procedure code, the party seeking recognition shall deposit the duly authenticated original award or duly certified copy thereof; and the original agreement or duly certified copy thereof at the president of the higher instance court's office and request the executory stamp on the deposited award. Article 396 of the same law, states that the President has 8 days to make a decision concerning that recognition.

In 2008 Rwanda ratified the New York convention on Recognition and Enforcement of foreign arbitral awards and became the 143<sup>rd</sup> State party to the convention.

The New York convention provides for a simpler and effective method of enforcement of obtaining recognition and enforcement of foreign awards. It is mainly due to the provisions of the New York convention that arbitration has become a very attractive alternative to traditional litigation. It is one of the widest accepted international conventions. It has significantly simplified the enforcement of foreign awards and harmonized the national rules for the enforcement of foreign awards.

## **7. Matters excluded from arbitration**

The subject matter of a dispute must be arbitrable in order for legitimate arbitration to take place. According to article 47 para 5 of Rwandan law on arbitration provides that a party can appeal against an award if:

*“The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matter beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside”.*

Arbitration is not permissible in following matters:

- Matrimonial causes;
- Matters relating to status;
- Criminal cases

## **8. Difference between arbitration and litigation**

There are a number of important differences between arbitration and litigation, namely Cost and Expeditiousness; Confidentiality; Flexibility; Impartiality.

### Cost and Expeditiousness

It is a common, albeit not always true assumption, that arbitration is cheaper and less time consuming than litigation. Can arbitration be faster and less expensive? The answer to this question is ‘most certainly.’ However, this is not always the case. Arbitration just like any other adversarial process may be expensive and time consuming especially if one of the parties is willing and able to spend considerable resources to defend its position and can exploit dilatory tactics to his or her benefit. In some aspects, the very characteristics that make arbitration more appealing than litigation are the same aspects that frame its disadvantages. For instance, the fact that it is flexible and dependant on the mutual consent of both parties may create time delays and incidental costs.

Although litigation has been described as ‘a machine in which you enter as a pig and come out as a sausage’. one would not be far from right by defining some international arbitration procedures in the same way. Moreover, it is not uncommon for lawyers to take control of the proceedings in complex international commercial arbitrations. This may come about as a result of the arbitrators’ efforts to instil trust in the arbitration process. Arbitrators give both parties the opportunity to fully present their case. Unlike in litigation where a case could summarily be dismissed, arbitration does not have the remedies found in judicial systems that are created to limit the development of frivolous cases. Consequently, there are no measures such as motions to dismiss or motions for summary judgment. The non-existence of such measures is an advantage for the claimant but a rather costly disadvantage for a defendant confronted with an unwarranted claim.

Furthermore, another factor that could lead to the high cost of arbitration is the number of extensions granted by arbitrators. Arbitrators are often very generous with the amount of time they grant parties to submit various pleadings. While this may be in line with making sure that both parties are treated fairly or that due process is adhered to, the result is that it amounts to significant delays in conducting the arbitration.

Additionally, there is usually a great amount of difficulty in arranging a timetable that will accommodate the schedule of the members of the arbitral tribunal, the legal representatives or witnesses, if the situation warrants it.

Moreover the panel of arbitrators for complex international commercial contracts is usually three; each of whom has to be well paid hence increasing the cost of arbitrations. This cannot be compared to the minimal court fees one encounters in litigation.

Although a party who has the intention to drag out the arbitration, may have a great chance of doing so particularly at the commencement of the proceeding, the cost of arbitration is often a great advantage if parties co-operate and keep expenses to a minimum.

### **Confidentiality**

Many people view the private nature of arbitration as a main advantage. Due to the fact that court proceedings are open to the public; many business people prefer arbitration to litigation. Unless otherwise agreed, awards in arbitral proceedings are confidential and the proceedings are closed to the public. This is considered important especially to parties who wish to protect trade secrets. Moreover, in the interest of protecting present or future commercial transactions, many business people deem any publicity of an on-going dispute as detrimental to their reputation.

### **Flexibility**

The arbitration process is hailed for its inherent procedural flexibility. Unlike court proceedings which are rigid, arbitral proceedings offer greater flexibility in international commercial transactions. Parties get to choose their own arbitrators, in addition to having the independence to customize the arbitration proceedings to suit their wishes. Although parties may choose an already established arbitral institution with its own set of rules of procedure, the parties have a choice to decide on whether or not they want a totally different procedure that better serves their needs. If both parties cooperate and decide that they both want a

speedy arbitration, the flexibility of arbitration can be used to their advantage to achieve that goal. Moreover, parties may even choose to have 'fast track' arbitration – an option that is offered by institutions such as the International Chamber of Commerce and the London Court of International Arbitration.

Another reason for the preference of arbitration over litigation by business parties is that many legal problems arise due to the possibility of several legal systems clashing hence complicating matters even more. It may be hard for the parties to find the most ideal place to file their suit. This may lead to a party embarking on a venture in search of a jurisdiction that may be more sympathetic to its interests. 'Forum-shopping' as this venture is often called, may be based on the search for a jurisdiction that is likely to be biased in favour of the party choosing that jurisdiction (for instance the anticipation of large amounts in damage awards).

Should the national courts of different countries claim to have jurisdiction over the same dispute, parallel litigation in more than one court may be a consequence, which would not only affect the parties heavily in costs but could potentially force them to defend themselves in multiple courts concurrently; not to mention the ordeal of having to cope with 'competing anti-suit injunctions.' This was the case in *Laker Airways Ltd V. Sabena Belgium World Airlines*. Furthermore, if the problem of conflict of jurisdiction is not resolved, the various courts presiding over the dispute may render conflicting judgments on the same matter.

### **Impartiality**

One of the main reasons parties opt for arbitration over litigation is the fear the national courts will be biased in favour of their own citizen or the advantage of the home litigant in issues such as knowing the system, procedural rules, etc. Therefore, proceeding on the assumption that the arbitral tribunal will be fair and impartial and will not take the nationality of the parties into consideration, parties choose arbitration over litigation.

If any of the parties reasonably suspects that an arbitrator lacks the necessary degree of objectivity or that the arbitrator will not be fair and impartial in performing his duties, then that party can object on those grounds. Some have posited this as a disadvantage of arbitration in that a party can use this as a delaying tactic by 'raising unwarranted objections' or attempt to disturb what could otherwise be a smooth arbitration proceeding by filing an application midway through the proceedings. However this may not be something to worry about depending on whether the parties' arbitration is under the auspices of an institution with rules safeguarding against such conduct. Institutions such as the International Commercial Court (ICC) have rules where parties have to follow certain procedures in making such objections (which have to be well founded). Moreover, those objections have to be made in within a specific period if the party's application is to be considered on the specified grounds.

## ***STUDY UNIT 5. LAW OF PERSONS***

According to the law a “**person**” is defined as a “being” that can have rights and duties or obligations, and that has, therefore, capacities to play a part in the life of a given community.

Rwandan law distinguishes between two classes of persons: **the natural person** or human being, and **the moral person**. Moral persons, called also “juristic persons”, are social associations representing a group of interests. Such organisations can be either a group of individuals such as a state, company and association, or a group of properties/individuals such as foundations.

These associations are governed:

- either by public law, in the instances of entities such as the state, provinces, districts, and public corporations;
- or by private law, such as companies, associations of natural persons and foundations.

Natural persons and moral persons are vested with juridical personality.

### ***1. Juridical or legal personality***

#### **A. PRINCIPLE**

“**Juridical or legal personality**” of a person refers to his ability to have rights and duties.

A human being, without any discrimination, is recognised as a legal subject who possesses legal personality, without distinction of sex, race, colour, religion, nationality or social condition.

**Human beings are the only legal subjects recognised by the law.** This principle implies that things and animals are legal objects and cannot be legal subjects (active or passive).

There was a time in history when a human being could be considered as an object instead of a human being: those were slaves. Slaves were legal objects like objects. Slavery has been abolished all over the world. A human being does not ask for juridical personality. It is recognised as a matter of right. But a moral person must always demand juridical personality given by an authorised organ. The moral person, as a legal subject may only carry out acts relating to its object.

Legal personality has a beginning and an end.

## **B. THE BEGINNING OF LEGAL PERSONALITY: BIRTH OF A NATURAL PERSON**

**According to Art.15 of Family code (FC)**, a natural person's personality begins at birth. However, the potential interests of the unborn child may be protected from his/her conception. Whenever there is a situation which can be to the advantage of a child, the child shall be deemed to have been born from the time of conception (art.16 FC). Provisions of this article enable the child born alive and viable to claim his/her rights from the time of conception, and that will be the case in matters relating to successive rights.

It appears thus that rights are conferred on the unborn child at birth, if he is born alive and viable. However, there are rights that are to be protected before birth; we can mention the right to life. From the time of conception, the unborn child is recognised as having the right to life. This is the reason for repression and punishment of medical abortion.

What about the date of conception? This is a complex question of proof. In other words, how can one determine the exact time of conception?

In trying to solve that complex question, the law established an irrefutable presumption: the child is presumed to have been conceived between the 300<sup>th</sup> day and the 180<sup>th</sup> day before his birth (Art.17 FC), so that his rights can easily be established.

## **C. THE END OF LEGAL PERSONALITY: DEATH**

The legal personality of a person is terminated by death or by absence. In law, if the missing person has been absent for 9 to 12 years, he is presumed to be dead.

**1. Principle.** The legal personality, recognised by a person alive, is ended by death; the human being is considered a legal subject from birth to death (Art. 15 FC). Dead persons cannot possess (have) rights. Nevertheless, Rwandan law admits:

- Protection of the deceased's body and burial place;
- Respect of the deceased's names and protection against defamation;
- Respect of the deceased's will after his death.
- 

But in fact, respect of the dead and his memorial celebration is done in the interest of the survivors' honour.

**2. Proof of death.** In principle, death is proved by the identification of the deceased's body. A situation can arise where a person disappears, but nevertheless there are circumstances justifying his death, even if his body was not found or identified. In such a situation, any interested party may approach the competent tribunal to grant a presumption of death order with regard to the person. This is called "declaration of death"(Art.19-20 FC).

**3. Determination of the moment of death.** It is always important and obligatory to determine the moment of death. This is for practical reasons: for example, succession falls

open at the time of death. The date of death can be certain or presumed. The presumption is applied to cases of co-deceased persons (Art. 18 FC) and “declaration of death”.

Death is also presumed in the case of long absence of a person and this presumption shall be followed by a judgement declaring his death.

## ***2. Legal identification of physical persons***

Identification of a person serves to distinguish people from others while exercising their rights. According to article 57 of the family code, “a physical person is **identified by gender, ethnicity, name, given name, residence and domicile**”.

On these elements, we must add “**nationality**” in order to distinguish a Rwandan citizen from a foreigner. It is also important to add “**the place and date of birth (age)**”.

Although, in this chapter, nationality is one of the elements identifying a person, it will be dealt with in a separate section.

## **A. GENDER, AGE AND THNICITY**

### **1. Gender and age**

There are legal effects related to gender and age :

Examples :

- marriage is only allowed between two persons of different sexes (art.17 FC);
- the husband is the head of the conjugal community (art. 206 FC);
- The incapacity of a person of minor age;
- Under the former Family Code - the incapacity of the married woman; the new code gives a man and a woman full capacity without distinction.

### **2. Ethnicity**

Family code considers ethnicity as an element for identifying a physical person, even though there is no right attached to it; especially in as far as the status and capacity of a person are concerned.

At the moment of adoption of the Family Code, the upholding of ethnicity as an element for identifying a person was justified by the former regime as a fundamental element to implement the so-called policy of “ethnic and regional balance”.

Today, **ethnic background is no longer an element of identification of a person**, since it was first repealed by the Arusha Peace Agreement of August 4<sup>th</sup>, 1993, and later by the 2003 Rwandan Constitution. It is formally prohibited to mention that element in the identity card, or in any other document related to civil status.

## **B. NAME AND GIVEN NAMES (ART 58-72 FC)**

### **1. Notion and principle**

Name is a term used to specify a person in his/her social and legal life in exercising his/her rights and fulfilling his/her duties.

This means of individualisation is composed of various elements having different importance, and governed by different regulations:

- A **surname** and one or more potential **given names** (Art.58 FC) ;
- In practice, individuals are sometimes given nick names ;
- Individuals also may decide to use a **pseudonym** or pen-name ;
- In some societies, there are **qualifications based on either religion** (e.g. Muslims), or **nobility** (e.g. In European feudalism: Prince, Duke, Count, Viscount, Baron, and Knight).

### **2. Surname and given name**

Unlike some societies where the individuals take up family surnames, in Rwanda, a personal name is given to an individual upon his/her birth: **surname**.

The legislator gives **reasons to justify why a personal name is maintained instead of a family name**:

- Most of Rwandan names are closely related to previous circumstances of their parents' life;
- Some names are ridiculous and are against good morals;
- There are some names which are not suitable for females (e.g. *Mfizi* –Bull, *Gasekurume* – Goat, *Semubi* – The Ugly.);
- Attribution of family surnames is no more than a blind obedience to foreign traditions.
- It is unanimously known that Rwandan culture, regardless of potential nicknames, officially attributes one surname and if need be one given name.

A surname is given within a period of 15 days after birth. The given name(s) is (are) not compulsory. The given name(s) is (are) given at the same time as the surname.

In the same family, given names are personal. It is not allowed to take one's father's, mother's, brothers' or sisters' given names while they are still alive so as to avoid confusion among individuals.

The name given to a child is communicated to the civil status officer at the time of birth declaration. In practice a surname is given to a new-born child by his/her father on the 8<sup>th</sup> day after birth, in case of father's absence, this is done by one of the close male relative, member of the family council.

Birth declaration (notice) is done (given) by the father, in his absence by the mother, in their absence by one of the ascendants or close relatives, or any person having assisted in the birth, or any other person that finds a new-born.

The married woman retains her maiden name on official documents. She may however, for personal reasons, use her husband's name if she so wishes.

Clergymen and religious personnel also retain their surnames and given names on official documents.

Surnames and given names must not be against morality and good morals.

### **3. Nickname**

A nickname is an unofficial name used by friends and by the public and adds to his/her name.

Nicknames are very common. They are not official, therefore cannot be written on certificates of civil status.

### **4. Pseudonym**

Pseudonym is a borrowed name that a person uses to conceal his/her real name. This is often done by artists, writers, sportsmen, warriors and politicians.

Pseudonym has no regulation and has no official value. Because it is useful in completing identity, people are used to mentioning it on certain certificates. Pseudonym can lead to birth of a right similar to commercial names and be protected against usurpation.

### **5. Legal characteristics of a name**

The name is characterised by the following three elements:

- Immutability;
- Imprescriptibility;
- Unavailability.

#### **(1) Immutability**

The name is imposed on a person. None shall officially take/adopt a name or a given name which is different from the one mentioned on the birth certificate (Art.62 FC). A person cannot change his/her name at will.

Changing a name is only authorised by the Minister of Justice on request of any interested person in conformity with the prescribed legal procedure (Art.65-70 FC).

#### **(2) Imprescriptibility**

The person's name is not subject to extinguishing or acquisitive prescription.

### (3) Unavailability

The person's name is not subject to commercial transaction. It's beneficiary cannot pass it (on) to another neither can he/she generally allow another person to use it. However, an individual's name attributed to the commercial exploitation can be passed to another person as a commercial name.

## 6. Protection of the right to a name

Any person has a right to use his name in order to identify him/herself, even though the usage may cause prejudice to the other person; for example, in the case of homonymy - sharing the same name. However, the attempt to create confusion is to be avoided, otherwise, there would be abuse of rights that can result in liability.

A person may request third parties to address him/her using his/her real name, and rectify it on certificates where his/her name might have been incorrectly written. It is the "action of claiming a name" or an "action of rectifying a certificate" or an "action of claiming a status".

The bearer of a name can prevent other persons from using it, especially when there is a likelihood that it could lead to material or moral damage. After death of the bearer, the right is passed to the surviving spouse and successors.

## C. DOMICILE AND RESIDENCE

### 1. Notions

According to article 78 FC, the domicile of a person is "*a place where he/she has his/her principal establishment, and where he/she can possibly be reached at any time either directly or through an intermediary, or where he/she is registered*".

**Domicile** is the place where a person is legally deemed to be permanently present for the purpose of exercising his/her juridical activities. In a way it is the person's registered office.

According to article 73 FC, a person's residence is "*a place where a physical person is habitually based*". It is actually the permanent place where a person lives.

A place where a person lives is assumed to be his/her residence unless it is proved that he/she has another residence elsewhere (art.74 FC).

The meaning that emerges from those two definitions is that residence is a factual notion. Domicile is a legal notion and it is determined by legal provisions. **Registration in "population register" and an "identity card" provide an official evidence of a domicile.**

A domicile can be a residence. In this case, the domicile and the residence are interchangeable. But the domicile can also be located in a place different from that of residence.

The terms "domicile and residence" in their current usage, or in their official usage or juridical usage, are very often confused. For example, in the field of criminal law, when we

talk of ‘violation of domicile’, it can be taken to mean violation of domicile, as well as residence, housing or lodging of a person, even for a single night.

## **2. Practical importance of domicile and residence**

The *lex loci domicilii* of a person plays an important practical role:

### **(1) Importance in the law of procedure**

In several cases, the domicile of the defendant determines the competent jurisdiction “*ratione loci*”, unless the law provides otherwise.

In case notice or summons can not be given to a person, domicile is the place where he/she can be notified as regards procedural acts.

### **(2) Importance in the civil law**

Some legal acts regarding family matters must or can be accomplished at the place of domicile; e.g. marriage, adoption, tutorship.

The succession falls open at the deceased’s domicile.

The domicile is the central place of a person’s financial interest, in the event of measures to be taken as regards his patrimony, e.g. the debt payment is normally done at the debtor’s domicile. The determination of a person’s residence plays also an important practical role:

- The residence can sometimes replace the domicile when the latter is not fixed or known.
- Residence and domicile can also stand in direct position to each other as regards legal effects. For example, marriage can be celebrated by the civil status officer not only at one of the spouses’ domicile but also at one of their residences.

## **3. Legal characteristics of domicile and its determination**

**Necessity and uniqueness of domicile:** “*Every person must have one and only one domicile*” (Art.79 FC). However, domicile can be transferred following certain administrative procedures (Art.80 FC).

The family code distinguishes three categories of domicile: domicile of choice, domicile by operation of law, and domicile by election.

## D. CIVIL STATUS

Every physical person is legally characterised by a set of qualities or attributes to which legal consequences are attached. That set of qualities is known as **the civil status of a person**. The civil status of a person distinguishes him from all other entities. The **civil status of a person** therefore personifies him and determines his role in the society and distinguishes him from all other entities, as far as the enjoyment and exercise of civil rights are concerned. The civil status determines civil rights of a person.

The person's status is composed of political, familial, and individual elements.

The **political elements** (or the **political status**) determine the legal status of a person towards the national community. Hence, nationals (or citizens) are distinguished from foreigners within the national community; and foreigners are not systematically accorded similar political rights as citizens. Citizenship gives the right to participate in public life and enables him/her to take part in institutions exercising political power within the state.

**Familial elements of the person's status** determine his/her position *vis-à-vis* his/her family members. The legal status of a person confers upon him/her rights and obligations. The legal status of a person depends on his/her state of a spouse, father, child, brother or sister, married or single, aunt or uncle, grand-mother or grand-father, cousin, brother-in-law or sister-in-law

**Individual elements of a person's status** depend on factors such as age, gender, and mental state. Such elements influence the person's capacity of exercising his/her rights.

In some societies, race, religion, profession, social condition and wealth play a role in determining the person's legal status, nevertheless, this situation is no longer common with the growth of the spirit of equality among human beings. In Rwanda, such elements do not have legal effect.

**In the narrow sense**, civil status is the base of a person's identification; it is at least made up (composed) of a name, age, filiations, gender and nationality.

**In the usual administrative practice**, the person's civil status is often confused with his/her state of being married or single.

## ***STUDY UNIT 6. LAW OF TORT***

### **SECTION 1. The Liability for personal acts**

#### **1.1. The wrongful act or fault**

##### **1.1.1. Culpability**

The culpability can consist in the fault as violation of a rule, as a fault without a violation of a rule or abuse of authority.

##### **A. Fault, violation of a rule**

A fault, violation of a rule can concern civil, penal, administrative rules...Example: to steal something from somebody (fault, violation of criminal law); to injure somebody (fault, violation of civil and criminal law).

##### **B. Without a violation of a legal text**

Without a violation of a legal text, one can commit a fault. This fault is defined as a behaviour which an ordinarily diligent, prudent, honest person or one mindful of fulfilling social duties, placed in similar circumstances would not have committed (e.g. behaviour of the good father of family).

##### **C. abuse of authority**

This is a fault that is committed by a person in the exercise of his duties. For example, a head of a certain Department who obliges his/her secretary to stay at work beyond office hours in order to have a sexual relationship.

##### **1.1.2. Imputability**

It is not sufficient that the act was illegal; it must be attributable to somebody (the wrongdoer) who has the conscious and free will to do the act. The conscience, capacity and free will are the three components of imputability.

#### **1. 2. The damage**

In order for the victim to be indemnified, there has to be not only the fault but also the damage. This is the harm to be repaired. Below, we are going to examine the kinds of damage and its character in written law.

##### **1. 2.1. Various kinds of damages**

##### **A. Material damage**

This is damage on one's patrimony. It is defined as attack on one's patrimony arising from bodily injury, death or damage to property.

##### **B. Moral damage**

The moral damage is the extra-patrimonial damage. It is a damage which does not concern ones patrimony.

Type: an attack against one's personality (an attack against one's names e.g. changing someone's name from KILA to KILLER; attack against one's honour or the attack on the reputation of a person, or his feelings of affection. e.g. saying that one is a prostitute when she is not; etc.

### **1. 2.2. Characteristics of the reparable damage;**

- The damage must be actual and certain;
- The damage must consist in violation of a legitimate interest (legally protected interest);
- The damage must be direct;
- The damage must be personal.

#### **A. The damage must be actual and certain**

The damage to be certain means that there is no doubt of its reality. In order to be compensated, the victim must prove the existence of the damage which he suffered. This damage must be certain at the time when the judge is evaluating it in order to facilitate him.

The eventual damage cannot be indemnified. For example, a father of a child who was killed in an accident cannot claim the compensation related to the benefits invoking that his child could be a President because he was intelligent.

#### **B. THE DAMAGE MUST CONSIST OF THE VIOLATION OF A LEGITIMATE INTEREST (LEGALLY PROTECTED INTEREST**

The damage which the victim claims must be a legitimate damage. It is the interest which is protected by the law that will be considered. For example, the owner of a property has a right to request for indemnity because he has a right to property (interest protected by the law). On the contrary, an illegitimate interest that is not protected by the law cannot be indemnified. For example, a lady living with a boyfriend (without a marriage relationship) cannot claim compensation because of the damage that arises from the death of her lover (boyfriend). This damage is not a violation of an interest protected by the law.

#### **C. THE DAMAGE MUST BE DIRECT**

The damage to be compensated must be the direct and immediate continuation of a faulty behaviour. This characteristic makes it possible to put aside the reparation of many other consequential damages, which perhaps, could not have been caused by the fault of the author of the damage. For example, if the School of Finance and Banking (SFB) unjustly fires its lecturer Dr MUSEMAKWELI, he can claim damages because of the illegal expulsion. But if Dr MUSEMAKWELI becomes angry (as a result of the expulsion), and beats and injures his child, he cannot claim compensation from SFB saying that the anger leading to a slap and injury was caused by SFB act of expulsion. The injury was an indirect damage compared to the SFB's action.

## **D. THE DAMAGE MUST BE PERSONAL.**

The victim must have personally suffered the damage. Thus one must prove that s/he is victim of the damage. If the action causes damage to various persons, each of them must prove his/her personal damage.

### **1.3. The causal relationship**

The victim must establish that there is a direct, certain and immediate relationship between the fault and the damage which has been suffered.

## **SECTION 2. Liability for acts committed by others**

### **2. 1. The responsibility of parents for the acts of their children**

#### **2.1.1. Principle**

According to article 260 (2), “the father, and the mother, after the death of the father, is liable for the damage caused by their children residing with them”. This liability is established except if the father or mother prove that they did all they could to prevent the action of the child (art. 260, 5)

#### **2.1.2. Conditions for this liability - of parents for the acts of their children**

Article 260 imposes a numbers of conditions for this liability to exist, namely:

- The damage must be caused by the child
- The child must be residing with the parent (article 260(2))
- The damage must be caused by the personal act of the child

### **2.2. Liability of masters for wrongs of their domestic and agent**

#### **2. 2. 1. Principle**

According to Art. 260 (3) CC III<sup>2</sup>, a master/”*commettant*” is liable for acts of the domestic (home maid) and agent (worker), if the acts fall within the functions for which they were employed. A “*commettant*” is a French word meaning someone who asks another to do something on his behalf. This is a kind of indirect liability (for the master/*commettant*) because the primary liability for the acts of the domestic and agent (worker) is born by them.

#### **2.2.2. Conditions for the liability of a master/*commettant* for wrongs of a domestic and agent (worker) respectively**

- Relationship of subordination

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<sup>2</sup> Civil Code Book iii

- The fault of the domestic or agent (worker)
- The damage is supposed to be caused to a third party, that is to say, any other person other than the master/*commettant*
- A relationship between the act of the domestic or agent and the functions which they do

E.g. A domestic who injures somebody who is near him while he is cutting a fish.

### **2.1.3. The liability of teacher and craftsman for the acts of their students and apprentices respectively**

#### **A. PRINCIPLE**

According to article 260 (4) CC III, teachers and craftsmen are responsible for the damage caused by their students and apprentices respectively.

A teacher is not only one who teaches but also someone who has the role of direction and supervision within an educational establishment. A craftsman is one who gives a professional training to the apprentice.

#### **B. CONDITIONS FOR THERE TO BE THIS CIVIL LIABILITY**

- the most important condition is one of time. The law indicates that the damage for which the craftsman and teacher are liable is that which was caused by the student or apprentice while the latter was under the supervision of the former.
- the act which caused the damage must be the fault of the student or apprentice

The law only talks about teacher and student, craftsman and apprentice. It does not prescribe that the student or apprentice must be minors.

However, the law creating the National University of Rwanda provides that professors and lecturers in university are not liable for the actions of their students (article 39 (2) of the Decree law no 33/76 of 16/09/1976).

- the damage for which teachers and craftsmen are liable are those caused by the students and apprentices against third parties or those committed between themselves.
- There must be a relationship of artisan and apprentice. This is usually by way of contract of apprenticeship.

### **2.1.4. Liability of the damage caused by things.**

In the section below, we will study the liability for the damage caused by animals (art. 261 (2) of CC III); ruins of buildings (art. 262 of CC III) ; and for lifeless things ( art. 260, Para 1).

#### **A. LIABILITY FOR THE DAMAGE CAUSED BY ANIMALS**

##### **1. Principle**

According to article 261 CC III, the owner of the animal or one who uses it during the time of its usage, is liable for the damage which the animal has caused, whether it was kept by him, escaped or lost. Therefore, the legally liable person is either the owner, or one who keeps it (the keeper).

## **2. Conditions of application of this liability**

These conditions concern the animal and the one liable for it.

### **2.1. The concerned animal and its behaviour**

Here, the concerned animal is one that is domestic or even wild if the latter was caught and made domestic.

These animals may be dangerous or harmless. We therefore consider all animals without distinction of their zoological nature: domestic animals or others (dog, goat, pig, cat, monkey, rabbit, bees in hives, etc.)

- The behaviour of the animal is also important, and it must be a positive one. The animal must do a positive act.

### **2.2. The liable person**

According to article 261 CC III the liable person is the owner of the animal which caused the damage or its keeper while it is being used by him.

In general, the owner of the animal (this is why the law firstly cites him or her) or its keeper. The keeper can be “an independent keeper” or “a professional keeper”

#### **1° an independent keeper**

This is the owner or the hirer of the animal. When the owner of the animal hires it out, it means that he has transferred all the care and duty towards the animal to another person. Then if the animal causes damage to someone, the hirer is liable and must indemnify the victim.

Another situation is when the owner of the animal loses its custody, for example when it has been stolen. Then the thief becomes the keeper of the animal and the liable person. But someone who abandons the animal cannot be considered as the one who loses its custody and will therefore be liable for its damage.

#### **2° the professional keeper**

Someone who takes care of an animal on a professional level is considered to be its keeper and will therefore be liable under article 261 CC III. An example could be a veterinarian who treats the animal and is liable for the damage which it causes during the time when the animal is under his care.

Also, someone in a circus who trains animals while exercising, dancing, running, etc., is liable for the damage caused by these animals while they are under his care.

### **2.1. Liability for the damage caused by the ruins of a building**

### 2.1.1. The principle

According to article 262 CC III, the owner of the building is liable for the damage caused by its ruins when the ruins were caused by a result of default of maintenance or a construction defect.

Here, the owner of the building is liable, contrary to the case of the animal (article 261CC III) where the owner and others may be liable for the damage caused by the animal.

#### A. Necessary condition

According to article 262 CC III, three conditions have to be met in order to establish the liability of the owner of the building.

a) There must be a building. The primary meaning of a building should be understood as a normal construction.

b) the damage must be caused by the ruins of the building: in other words, when the building or a part of the building falls. This is different from the building in ruins, meaning that building has already fallen. The article (article 262 CC III) does not apply in this second case.

c) the origin of these ruins can either be caused by the default of maintenance or a construction defect.

Article 262 CC III does not consider other causes of ruins like those falling because of a fire, or car accident.

#### B. DEFENCES

a) *case of force-majeure if it is not caused by* default of maintenance or a construction defect.

b) *The exclusive fault of the victim*

There is an exclusive fault of the victim when the latter knows the deteriorating situation of the building (for example if the owner posts the sign clearly indicating that the building is in ruins) and the victim sustains an injury after passing nearby.

#### C. LEGAL ACTIONS OF THE OWNER

The owner can have legal actions against:

1. The architect or entrepreneur in case of default in construction

But this kind of action is prescribed after 10 years from the time the owner receives the building (article 439 CC III)

2. The tenant if the owner proves that there was default of maintenance (a failure of an obligation resulting from the contract).

## ***STUDY UNIT 7. LAW OF CONTRACT***

### **SECTION 1. General overview on Contract**

#### **1.1. The scope of the law governing contract**

The article one of the new legislation governing contracts has defined the scope of the law in order to clarify the parts of the Civil Code Book III that will remain applicable after the new law becomes into force. The provisions of article one to article 248 of the Civil Code book III will be repealed. The other parts of the Civil Code Book III are still under review and there will be new laws completing the legal framework governing Obligations in Rwanda such as Tort liability Law and special contracts

#### **1.2. Interpretation principle**

The law governing contract refers to the Common Law and it is usual in the common Law drafting rules to have an interpretation section establishing definition of basic terms appropriate for the Law to be drafted.

Article 2 of the new law, No. 45/2011 of 25/11/2011 Governing Contracts, gives definitions for some basic terms such as contract, promise, promisor, and promise and beneficiary.

1° **“contract”**: a promise or a set of promises the performance of which the Law recognizes as obligation and the breach of which the Law provides a remedy; ...

It is a definition from the American Restatement of Law, Second, Contracts:

A **contract** is an **agreement** entered into voluntarily by **two parties or more** with the **intention** of creating a legal obligation, which may have elements in writing, though contracts can be made orally. The remedy for breach of contract can be "damages" or compensation of money. In equity, the remedy can be specific performance of the contract or an injunction. Both of these remedies award the party at loss the "benefit of the bargain" or expectation damages, which are greater than mere reliance damages, as in promissory estoppel. The parties may be natural persons or juristic persons. A contract is a legally enforceable promise or undertaking that something will or will not occur. The word promise can be used as a legal synonym for contract. **although care is required as a promise may not have the full standing of a contract, as when it is an agreement without consideration.**

A promise is a manifestation by the promisor of an intention to act or to refrain from acting that thereby gives the promisee reasonable grounds to believe the promisor is making a commitment to so act or refrain. All terms defined in this article refer to the American Restatement of law.

### **1.3. Requirements of a contract**

The four basic requirements of a valid contract are as follows: Mutual assent, capacity, legality of purpose and consideration. The new law governing contracts enumerates the basic requirements in its article 2 but without any comprehensive definition. They are developed in the chapter on formation of contracts.

#### **1.3.1 Mutual assent**

The parties to a contract must manifest by words or conduct that they have agreed to enter into a contract. The usual method of showing mutual assent is by an offer followed by an acceptance

#### **1.3.2 Capacity**

The parties to a contract must have contractual capacity. Certain persons such as adjudicated incompetents have no legal capacity to contract while others such as minors, incompetent persons, and intoxicated persons have limited capacity to contract. All others have fully contractual capacity.

#### **1.3.3 Legality of Purpose**

The purpose of the contract must not be criminal, tortuous or otherwise against the public policy. An illegal contract is unenforceable.

#### **1.3.4 Consideration**

Each party to a contract must intentionally exchange a legal benefit or incur a legal detriment as an inducement to the other party to make a return promise.

### **1.4. Classification of contracts**

Article 3 gives the standards classifications of the Common Law contract law according to various characteristics such as method of formation, content, and legal effect.

The standard classifications are (1) express or implied contracts; (2) bilateral or unilateral contracts; (3) valid, void, voidable or unenforceable contracts, and (4) executed or executory contracts. The article 3 mentioned the three first categories and some additional categories from the Civil Code Book III such as gratuitous contracts or formal contracts.

The classifications are not mutually exclusive. A contract may be express, bilateral, valid, executor and informal.

#### **1.4.1 Bilateral and unilateral contracts**

A bilateral contract results from the exchange of a promise for a return promise whereas a unilateral contract results from the exchange of a promise either for performing an act or for refraining from doing an act. The interpretation section gives the following definition: A

bilateral contract is a contract in which the parties have reciprocal obligations and unilateral contract as a contract in which obligees do not have obligations.

The Common Law tradition followed by the American Restatement defined an unilateral contract as one where one party promises a benefit if the other performs an act. The second party has no obligation to perform but if he does, a contract is formed.

In Common Law, where it is not clear whether a unilateral or bilateral contract has been formed, the courts presume that the parties intended a bilateral contract.

#### **1.4.2 Express and implied contract**

Parties to a contract may indicate their assent by conduct implying such willingness. Such a contract formed by conduct is an implied contract or more precisely, an implied in fact contract. In contrast, a contract in which the parties manifest assent in words is an express contract.

Both are contracts, equally enforceable. The difference is merely the manner in which the parties manifest their assent.

#### **1.4.3 Valid, void, voidable, and unenforceable contracts**

By definition a *valid contract* is one that meets all of the requirements of a binding contract. It is an enforceable promise or agreement.

A *void contract* is not a contract at all such as an agreement entered into by an incompetent person or by physical compulsion.

A *voidable contract* on the other hand, is not wholly lacking legal effect. A voidable contract is a contract; however, because of the manner in which the contract was formed or lack of capacity to it, the law permits one or more of the parties to avoid the legal duties created by the contract. If the contract is voided, both parties are discharged of their legal duties under the agreement.

A party may also have power to ratify a voidable contract and thereby eliminate any power to extinguish the legal relations arising from the contract. Consequences of avoidance may differ, depending on the circumstances. The party who avoids the contract may, in the circumstance, be entitled to be restored to as good a position as that which he occupied immediately before entering the contract; or depending on the circumstances, may be left in the same condition as before the contract. If a party cannot be restored to substantially the same original position, the Court may decide there is no power of avoidance.

In some circumstances, the power of avoidance may be lost by unreasonable delay in manifesting election to avoid or in returning benefits received under a contract

#### **1.4.4 Unenforceable contract**

A contract that is neither void nor voidable may nonetheless be unenforceable. An enforceable contract is one for the breach of which the law provides no remedy. For example,

in the application of the law of limitations or prescription, after the statutory time period has passed, a contract is referred to as an unenforceable contract, rather than void or voidable.

#### **1.4.5 Formal contracts**

Some types of contracts, which may be called “Formal Contracts”, are subject in some aspects to special rules that differ from some of the rules that govern contracts in general; contracts under seal, negotiable instruments, negotiable documents, and letters of credit, those formed by electronic means.

#### **1.4.6 Gratuitous contracts**

It is a type of contract from the Civil Code Book III which should be equivalent to a contract without consideration.

#### **1.4.7 Quasi contracts**

There are in Civil Code Book III provisions on quasi contracts. , these are at common law implied in law contracts which were not included in the previous classifications for the reason that quasi contracts are not contracts at all. There will be a specific law on quasi contracts, the draft bill is already prepared under the Ministry of Justice to avoid injustice. The term contract is used because the remedy granted for the breach of a quasi contract is similar to one of the remedies available for the breach of contract on a restitution basis.

#### **1.4.8 Promissory Estoppel**

The new law is silent on the concept of promissory estoppel but it is an important concept in Common Law.

As a general rule, promises are not enforceable if they do not meet all the requirements of a contract. Nevertheless, in certain circumstances at Common Law, the courts enforce non-contractual promises under the doctrine of promissory estoppel in order to avoid injustice. Promissory estoppel requires:

1. an unequivocal promise by words or conduct
2. evidence that there is a change in position of the promisee as a result of the promise (reliance but *not necessarily to their detriment*)
3. inequity if the promisor were to go back on the promise

In general, estoppel is 'a shield not a sword' . It cannot be used as the basis of an action on its own, equally, it does not extinguish rights.

## **SECTION 2. Contract formation**

### **2.1. Requirements regarding parties**

For the contract formation, there must be at least two parties, a promisor and a promisee, but there may be multiple promisors and promisees.

### **2.2. Requirements relating to the capacity to contract**

Everyone is regarded as having legal capacity to enter into contracts unless the law, for public policy reasons, holds that the individual lacks such capacity. It is the case for minors, persons under guardianship, mentally ill or 'defective'.

#### **2.2.1 Minors**

A minor also called infant is a person who has not attained the age of legal majority. At common law, a minor was an individual who had not reached the age of twenty-one years. Today, the age of majority has been changed by statute in nearly all jurisdictions, usually to age eighteen. In Rwanda, except otherwise provided, the age of majority is twenty-one years. In commercial matters, the majority is sixteen years while for the employment contract, the majority is eighteen.

A minor's contract whether executed or executory is voidable at his guardian's option. Thus the minor is placed in favoured position by having the option to disaffirm the contract or to make it enforceable.

The exercise of the power of avoidance, called disaffirmance, releases the minor from any liability under the contract.

On the other hand, after the minor becomes of age, he may choose to adopt or ratify the contract, in which case he surrenders his power of avoidance and becomes bound by his ratification.

A minor may disaffirm a contract within a reasonable time after coming of age as long as he has not already ratified the contract. Determining reasonable time depends on circumstances such as the nature of the transaction and whether either party has caused delay. Some jurisdictions prescribe a time period within which the minor may disaffirm the contract.

A minor has the option of ratifying a contract after reaching the age of majority. Ratification makes the contract binding from the beginning (*ab initio*). Once effected, ratification is final and cannot be withdrawn; further more, it must be in total, validating the entire contract

Contractual incapacity does not excuse a minor from an obligation to pay for necessities such as food, shelter, medicine and clothing that suitably and reasonably supply his personal needs.

### **2.2.2 Person under guardianship**

If a person is under guardianship, his/her contract is void and of no legal effect. Nonetheless, a party dealing with an individual under guardianship may be able to recover the fair value of any necessities provided to him/her.

### **2.2.3 Mental defect**

The parties to a contract must have a certain level of mental capacity if a person lacks such capacity, he is mentally incompetent and the contract entered into by such a person is voidable

A person is mentally incompetent if he is unable to comprehend the subject of the contract, its nature and its foreseeable consequences. Contracts entered into may be ratified or disaffirmed during a lucid period.

### **2.2.4 Intoxicated persons**

The provisional draft had a provision on intoxicated persons that had been considered as covered by the provision on mental illness or defect but in other jurisdictions, intoxicated persons are treated separately because the courts are even more strict with intoxicated persons due to its voluntary nature. The intoxicated person regaining his capacity must act promptly to disaffirm and generally must offer to restore the consideration he has received. Individual persons who are taking prescribed medicine or who are involuntarily intoxicated are treated the same as the person with mental illness or defect.

## **2.3. Mutual assent; an offer followed by an acceptance**

Though each of the requirements for a valid contract is essential to its existence, mutual assent is so basic that frequently a contract is referred to as an agreement between parties. Mutual assent of parties consists of an offer by one party followed by acceptance by the other party.

The way in which parties usually show mutual assent is by offer and acceptance. One party makes a proposal (offer) by words or conduct to the other party who agrees by words or by conduct to the proposal (acceptance).

The important thing is what the parties indicate to one another, by spoken or written words, by conduct, electronic means, or even by failure to act in some circumstances.

The law applies an objective standard and is concerned only with the assent or intention of a party as it reasonably appears from his words or actions. The law of contract is not concerned with what a party may have actually thought or the meaning that he intended to convey even if his subjective understanding or intention differed from the meaning he objectively indicated by words or conduct.

### 2.3.1 Offer

#### Definition and essentials of an Offer

An offer is a manifestation of a willingness to enter into a contract made in a manner so as to justify another person in understanding that his or her assent is invited and will conclude the contract.

The person making an offer is the offeror and the person to whom the offer is made the offeree.

An offer needs not to take any particular form to have legal effect. It may propose the formation of a single contract by a single acceptance or formation of a number of contracts by separate acceptance.

In case of doubt, an offer is to be interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.

To be effective however, it must be communicated, manifest intent to enter into a contract and sufficiently certain and definite.

#### Invitation to Treat

**Invitation to treat** (also known as an **invitation to bargain** in the United States) is a contract law term. It is derived from the Latin phrase *invitatio ad offerendum* and means "inviting an offer". It suggests in other words an expression of willingness to negotiate on something but it does not mean that the person making the invitation is bound to go through with the transaction as they would be if they were making an offer.

A shop owner displaying their goods for sale is generally making an invitation to treat (*Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401). They are not obliged to sell the goods to anyone who is willing to pay for them, even if additional signage such as "special offer" accompanies the display of the goods.

Generally, advertisements are invitations to treat, so the person advertising is not compelled to sell to every customer. In certain circumstances however, an advertisement can be treated in legal terms as an offer, as occurred in the British case of *Carlill v Carbolic Smoke Ball Company* [1893].

For an offer to be capable of becoming binding on acceptance, it must be definite, unambiguous, and final. If it is rather a preliminary move as part of a negotiation process which may lead to a contract, it is not an offer but an **invitation to treat**. An offer may, or may not, result in such a situation. The offerer must have been initiating negotiations from which an agreement may or may not in time result. An invitation to treat cannot therefore be responded to by a legal act of acceptance as no offer in a legal sense has been made. Rather the recipient of the invitation to treat may respond and in their turn therefore makes an offer themselves to which the party initiating the invitation to treat can therefore respond to potentially create a legal contract by their acceptance.

## **Communication of an Offer**

To provide his part of the mutual assent required to form a contract, the offeree must know about the offer; he cannot agree to something about which he has no knowledge. Accordingly, the offeror must communicate the offer in an intended manner.

## **Intent to enter into a contract**

To have legal effect, an offer must manifest intent to enter into a contract. The intent of an offer is determined objectively from the words or conduct of parties. The meaning of either party's manifestation is based on what a reasonable person in the other party's position would have believed.

It is important to distinguish language that constitutes an offer from that which merely invites offers.

If a communication creates in the mind of a reasonable person in the position of the offeree an expectation that his acceptance will conclude a contract, then the communication is an offer. If it does not, then the communication is a preliminary negotiation.

## **Definiteness and certainty of an offer**

Even though a manifestation of intention is to be understood as an offer, it cannot be accepted so as to form a contract, unless the terms of the purported contract are reasonably certain or can be made reasonably certain from the manifestation of parties in the circumstances.

The terms are reasonably certain if they provide a sufficient basis for determining the existence of a breach and for providing an appropriate remedy.

Part performance may remove the uncertainty of terms and establish an enforceable contract and action, in reliance on an agreement, may make a contractual remedy appropriate even though uncertainty is not removed.

Missing terms may be supplied by course of dealing, usage of trade, but in most cases, material terms would include the subject matter, price, quantity, quality, terms of payment and duration.

## **Duration of an offer**

An offer confers upon the offeree a power of acceptance which continues until the offer terminates.

The ways in which an offer may be terminated, other than by acceptance are through Lapse of time, revocation, rejection, counteroffer, death or incapacity of the offeror or the offeree, destruction of the subject matter to which the offer relates and, subsequent illegality of the type of contract the offer proposes.

(1) *Lapse of time*: "The offeree's power of acceptance is terminated at the time specified in the offer, or if no time is specified, at the end of a reasonable time". The offeror may specify

the time within which the offer is to be accepted. Unless otherwise terminated, the offer remains open for the specific time. Upon the expiration of that time, the offer no longer exists and cannot be accepted and any purported acceptance of an expired offer will serve only as an offer.

If the offer does not state the time within which the offeree may accept, the offer will terminate after a reasonable time. Determining a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

The provisional draft stated that unless otherwise indicated by the language or circumstances, an offer sent by email is reasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received - referring to the restatement, section 41 and the Uniform Commercial Code 1-303 but this provision was removed during the legislative process as a detail that would be not really applicable in a Rwandan context. For the same reason, article 48 of the provisional draft has been removed:

“If a communication of an offer to the offeree is delayed, the period within which a contract can be created by acceptance is not thereby extended if the offeree knows or has reason to know of the offer, even though the delay is due to the fault of the offeror ; but if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows nor has reason to know that there has been delay, a contract can be created by acceptance within the period of delay which would had been permissible if the offer had been dispatched at the time that its arrival seems to indicate”.

(2) *Rejection of an offer*: An offeree is at liberty to accept the offer as he sees fit. If he decides not to accept it, he is not required to reject it formally but may simply wait until the offer lapses or terminates. Therefore, rejection by the offeree may consist of express language or may be implied from language or conduct.

A manifestation of intent not to accept an offer is a rejection unless the offeree manifests an intention not so to treat it, as by announcing he will merely take the offer under advisement.

A communicated rejection terminates the power of acceptance. From the effective moment of rejection which is, in common jurisdictions, the receipt of the rejection by the offeror, the offeree may no longer accept the offer.

(3) *Revocation*: The offeror generally may cancel or revoke an offer at any time prior its acceptance. An offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the purported contract but an offeree’s power can be terminated by indirect communication as when the offeror takes definite action inconsistent with an intention to enter into the purported contract and the offeree acquires reliable information to that effect.

An offer made to the general public is revoked only by giving to the revocation publicity equivalent to that given to the offer if no better means of notification is available.

Certain limitations however restrict the offer’s power of acceptance but were removed from the final voted bill.

*Option contracts:* An option is a contract by which the offeror is bound to hold open an offer for a specified period of time. It must comply with all the requirements of a valid contract, including the offeree's giving of consideration to the offeror.

*Irrevocable offer of unilateral contracts:* Where the offer contemplates a unilateral contract, injustice to the offeree may result if revocation is permitted after the offeree has started to perform the act requested in the offer and has substantially but not completely performed the requested act.

*Revocation of an offer proposing multiple contracts:* An offer contemplating a series of independent contracts by separate acceptances may be effectively revoked so as to terminate the power of acceptance for future contracts, though one or more of the proposed contracts have already been formed by the offeree's acceptances.

(4) *Counteroffer:* A counteroffer is an offer made by an offeree to his offeror relating to the same matter as the original offer but on terms or conditions different from those contained in the original offer. It is not an acceptance of the original offer, but by indicating an unwillingness to agree to the terms of the offer, it generally operates as a rejection. But It may also operate as a new offer – the counteroffer.

An offeree's power of acceptance is terminated by his making of a counter-offer, unless the counteroffer manifests an intention of the offeree that the original offer remains open or the offeror has manifested a contrary intention

A rejection or counter offer by mail or telegram does not terminate the power of acceptance until received by the offeror.

(5) *Death or incompetency:* The death or incompetency of either the offeror or the offeree ordinarily terminates an offer. On his death or incompetency, the offeror no longer has legal capacity to enter into a contract; thus all outstanding offers are terminated. Death or incompetency of the offeree terminates also the offer, because an ordinary offer is not assignable and may be accepted only by the person to whom it was made.

The death or incompetency of the offeror or the offeree however does not terminates an offer contained in an option because of the consideration given.

(6) *Destruction of the subject matter:* Destruction of the specific subject matter of an offer terminates the offer. A offers to sell a car to B. the Car is destroyed by fire in the night. The next morning B accepts the offer. There is no contract because the offer was terminated before the acceptance of B.

(7) *Subsequent illegality:* Subsequent illegality is illegality taking effect after the making of an offer but prior to acceptance. A subsequent illegality legally terminates the offer.

### **2.3.2 Acceptance of an offer**

Acceptance of an offer is a manifestation of assent to the terms of the offer made by the offeree in a manner invited or required by the offer.

An offer can be accepted only by a person to whom it is intended. It must comply with the terms of the offer as to the promise to be made or the performance to be rendered.

### **Modes of acceptance**

The offeree's acceptance may be by performance or by return promise.

An offer can be accepted by rendering performance only if the offer invites such a performance. Even if the offer invites acceptance by performance, the rendering of a performance does not constitute an acceptance if within a reasonable time and before the offeree performs relevant acts, he exercises reasonable diligence to notify the offeror of non-acceptance.

### **Notification of acceptance**

Where an offer invites an offeree to accept by rendering a performance like in case of unilateral contract, no notification to the offeror is necessary to make such an acceptance effective unless the offer requests such a notification.

Article 22-2 provides for an exception to the principle in respect to the requirement of good faith during the course negotiations.

If the offeree has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the offeror is not obligated, unless the offeree exercises reasonable diligence to notify the offeror of the acceptance, the offeror learns of the performance within a reasonable time or the offer indicates that notification of acceptance is not required.

In case of acceptance by promise, it is essential that the offeree exercise diligence to notify the offeror of acceptance or that the offeror receive the acceptance within a reasonable time, except where acceptance by silence is possible.

### **Acceptance by silence**

An offeree is generally under no legal duty to reply to an offer. Silence or inaction therefore does not indicate acceptance of the offer. However, by custom, usage, course of dealing, the offeree's silence or inaction by an offeree may operate as an acceptance. Thus, the silence or inaction of an offeree can operate as an acceptance and cause a contract to be formed where by previous dealings the offeree has given the offeror reason to understand that the offeree will accept all offers unless the offeree sends notice to the contrary.

Silence operates as an acceptance also where the offeree takes benefits from the offer with reasonable opportunity to reject them and reason to know that they were offered with expected consideration.

Silence may also operate as an acceptance where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept.

But care must be taken. Simply putting into the offer a term such as “If I do not hear from you I shall assume you have accepted the offer” may not be, in common law, the same as a silent acceptance.

### **Time when acceptance takes effect**

The new law governing contract has no specific provision specifying the issue but generally an acceptance is effective upon dispatch unless the offer specifically provides otherwise; such as the offeree uses an unauthorized means of communication or the acceptance follows a prior rejection.

Article 62 of the provisional draft removed was clear on the principle of acceptance upon dispatch in the following terms:

*“Unless the offer provides otherwise:*

- *An acceptance made in a manner and by medium invited by an offer is effective as put out of the offeree’s possession, without regard to whether it is ever reaches the offeror ; but*
- *An acceptance under an option is not effective until received by the offeror.*

Then, it is clear that the offer is effective on receipt while the acceptance is effective on dispatch.

Acceptance by telephone or similar medium of substantially instantaneous two way communication is governed by the principles applicable to acceptance where the parties are in the presence of each other.

### **Reasonableness of medium of acceptance**

Unless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions at the time and place the offer is received. It is also called “authorized means of communication”.

Historically, authorized means of communication was either the means the offeror expressly authorized in the offer or, if none was authorized, the means the offeror used in presenting the offer.

If in reply to an offer by mail, the offeree places in the mail a letter of acceptance properly stamped and addressed to the offeror, a contract is formed at the time and place that the offeree mails the letter. This assumes that the offer was open at that time. The reason for this rule is that the offeror by using the mail implicitly authorized the offeree to use the same means of communication. It is immaterial if the letter of acceptance goes astray in the mail and is never received.

## **2.4. Consideration**

### **2.4.1 Consideration and cause**

The concept of consideration is slightly different from the concept of cause used in Civil Law. The doctrine of consideration ensures that promises are enforced only where the parties have exchanged something of value in the eye of the law. Gratuitous promises, those made without consideration, are not legally enforceable except under some circumstances.

A performance or a promise by the promisee is a consideration if it is established as such by the promisor and is given by the promisee in exchange for that promise.

The consideration exchanged for the promise may be an act, forbearance to act, or a promise to do either of these.

The law does not regard the performance of, or the promise to perform a pre-existing legal duty, public or private, as a consideration.

The consideration for a promise must be either a legal detriment to the promisee or a legal benefit to the promisor. The promisee must give up something of legal value, or the promisor must receive something of legal value in return for the promise.

Legal benefit means the obtaining by the promisor of that which he had no prior legal right to obtain.

### **2.4.2 Adequacy of consideration or mutuality of obligation**

The law will regard the consideration as adequate if the parties have agreed to the exchange. The requirement of legally sufficient consideration is therefore not at all concerned with whether one party received disproportionately more or less than he gave or promised to give. Such facts however may be relevant to the availability of defence such as fraud, duress or undue influence or certain remedies such as specific performance.

The provisional draft was clear on the issue of adequacy of consideration contemplated in article 35 of the voted law:

*“If the requirement of consideration is met, there is no additional requirement of*  
*(1) a gain, advantage, or benefit to the promisor or a loss, disadvantage or detriment to the promisee,*  
*(2) equivalence in the values exchanged ; or*  
*(3) mutuality of obligation.”*

### **Rules governing consideration**

Consideration must not be in the past: If one party voluntarily performs an act and the other party then makes a promise, the consideration for the promise is said to be in the past. Past consideration is regarded as no consideration at all.

Example, John gives Susan a lift home in his car after work. On arrival Susan offers John 1,000 francs towards the petrol but, finding that she has not any change, says she will give him the money next day at work.

In this example, John cannot enforce Susan's promise to pay 1,000 francs because the consideration for the promise (giving the lift) is in the past. John would have given Susan the lift home without expecting payment and also there was no bargain between the parties.

***Re McArdle (1951) Ch 669 Court of Appeal (in UK)***

Mr McArdle died leaving a house to his wife for her lifetime and then to his children. While Mrs. McArdle was still alive, one of the children moved into the house. The wife made improvements to the house costing £ 488. After the work had been completed, all the children signed a document in which they promised to reimburse the wife when their father's estate was finally distributed. The court of appeal held that this was a case of past consideration. The promise to pay £ 488 to the wife was made after the improvements had been completed and was, therefore, not binding. The rule about past consideration is not strictly followed. If, for example, a person is asked to perform a service, which he duly carries out, and later a promise to pay is made, the promise will be binding.

***Re Casey's Patents, Stewart v. Casey (1892)***

Casey agreed to promote certain patents which had been granted to Stewart and another. (A patent gives the holder exclusive right to profit from an invention) Two years later Stewart wrote to Casey promising him a one-third share of the patents in consideration of Casey's efforts. It was held that Stewart's original request raised an implication that Casey's work would be paid for the later letter merely fixed the amount of the payment.

Consideration must move from the promisee: An action for breach of contract can only be brought by someone who has himself given consideration. A stranger to the consideration cannot take advantage of the contract, even though it may have been made for his benefit.

***Tweddle V Atkinson (1861)***

John Tweddle and William Guy agreed that they would pay a sum of money to Tweddle's William, who had married Guy's daughter. William Guy died without paying his share and William sued his late father – in-law's executor (Atkinson). His claim failed because he had not provided any consideration for the promise to pay.

*Consideration must not be illegal.* The courts will not entertain an action where the consideration is contrary to a rule of law or is immoral.

*Consideration must be sufficient but need not be adequate.* It must be possible to attach some value to the consideration but there is no requirement for the bargain to be strictly commercial. If a man is prepared to sell his Jaguar car for £1, the court will not help someone who complains of making a bad bargain. The following are examples of cases where the consideration was of little value, but, nevertheless, it was held to be sufficient.

***Thomas v Thomas (1842)***

After the death of her husband Mrs. Thomas agreed to pay rent of £1 a year in order to continue living in the same house. It was held that the payment of £ 1 was valid consideration.

A person who promises to carry out a duty which he is already obliged to perform is in reality offering nothing of value. The consideration will be insufficient. However, if a person does

more than he is bound to do, there may be sufficient consideration. The promise may involve a public duty imposed by law.

### ***Hartly v Ponsonby (1857)***

When almost half of the crew of a ship deserted, the captain offered those remaining £40 to complete the voyage. In this case, the ship was so seriously undermanned that the rest of the journey had become extremely hazardous. It was held that this fact discharged the sailors from their existing contract and left them free to enter into a new contract for rest of the voyage.

## **2.4.3 Contracts without consideration**

Certain transactions are enforceable even though they are not supported by consideration.

### **Promises to perform prior unenforceable obligations**

These situations include promises to pay debts barred by prescription, debts discharged in insolvency proceedings, voidable obligations and moral obligations.

### **Promise for benefit received**

The article 39 of the law governing contracts has made enforceable promise without consideration for benefit received based on the concept of promissory estoppel.

The practice at Common Law is to make enforceable promises for benefit received based on the doctrine of promissory estoppel. The doctrine makes gratuitous promises enforceable to the extent necessary to avoid injustice. The doctrine applies when a promise that the promisor should reasonably expect to induce detrimental reliance and does induce such action or forbearance.

Promissory estoppel does not mean that a promise given without consideration is binding because of change of position on the part of the promisee. Such a change of position in justifiable reliance on the promise creates liability if injustice can be avoided only by the enforcement of the promise

### **Promise modifying existing contract**

A promise modifying a duty under a contract not yet fully performed is binding;

- (1) If the modification is fair and equitable in view of circumstances not anticipated when the contract was made;
- (2) If it is provided by specific law;
- (3) In case of material change which results into the change of obligations for both parties.

### **Contracts under seal**

Under the common law, when a person desired to bind himself by deed or solemn promise, he executed his promise under seal. No consideration for his promise was necessary.

Article 41 of Itegeko No. 45/2011 Ryo Kuwa 25/11/2011 Ringengo Amasezerano

(Law No. 45/2011 of 25/11/2011 Governing Contracts refers to this practice in the followings terms:

**Article 41: Validity requirements for contracts without consideration**

A promise without consideration is binding if:

1° it is in a written form and signed;

2° the document containing the promise is delivered to the promisee;

3° the promisor and the promisee are named in the document or are otherwise identified.

The provisions above raised debates among Rwandan lawyers and most jurisdictions have eliminated the practice.

**2.5. A mandatory writing form for some contracts**

**2.5.1 Contracts within the statute of frauds**

Although most contracts do not need to be in writing to be enforceable, it is highly desirable that significant contracts be written. Written contracts avoid many problems and the process of setting down contractual terms in a written document also helps to clarify the terms and bring to light the problems the parties might not otherwise foresee.

But still the principle is the freedom of contracts except for some contracts said to be “within the statute of frauds”. To be enforceable the contracts within the statute of frauds must be evidenced by a signed writing.

In most Common Law jurisdictions, the contracts called “within the statute of frauds” are as follows:

- (1) Promises to answer for a duty of another;
- (2) Promises of an executor or administrator to answer personally for a duty of the decedent whose funds he is administering;
- (3) Agreements upon consideration of marriage;
- (4) Agreements for transfer of an interest in land;
- (5) Agreements not to be performed within one year;

A sixth type of contract within the original English statute of frauds applied to contracts for sale of goods.

Article 42 refers to the practice and enumerates contracts under risk of frauds that should be evidenced in writing:

- (1) Contract the duration of which exceeds one year
- (2) Contract for the sale of an interest in land;
- (3) Contract to act as a surety.
- (4) Contract for the sale of goods for the price of 50,000Rwf or more;
- (5) Contract for the sale of securities.

## **2.5.2 Requirement**

Most modern jurisdictions require that the contract be evidenced in writing to be enforceable. The purpose in requiring writing is to ensure that the parties have actually entered into a contract. It is, therefore not necessary that the writing be in existence when parties initiate litigation; it is sufficient to show the memorandum existed at one time, even if the parties themselves view it as having no legal significance.

The provisional draft had details on compliance with the requirement removed in the final voted bill, specifying that the note or Memorandum must

- (i) Specify the parties to the contract
- (ii) Specify with reasonable certainty the subject matter of the contract and the essential terms of the unperformed promise and,
- (iii) be signed by the party to be charged or by his/her agent.

## **3. Vitiating and illegality**

In addition to requiring agreement through offer and acceptance, the law requires that the agreement be voluntary and knowingly. If these requirements are not met, then the agreement is either voidable or void.

This part deals with situations in which the consent manifested by one of the parties to the contract is not effective because it was not knowingly and voluntarily given. We consider four such situations in this part: mistake, misrepresentation, duress, undue influence and the case of illegality for which the contract is unenforceable.

### **3.1 Mistake**

‘Mistake’ is a belief that is not in accord with the facts. The cases on mistake as a vitiating factor fall into two main groups: In the first, the parties make the same mistake: e.g. both think that the subject matter exists when it does not; in the second, one of the parties is mistaken.

#### **3.1.1 Various kinds of mistakes**

Mistake is of two basic types, i.e. mutual mistake and unilateral mistake.

Common or mutual mistake: Common mistake occurs when both parties are mistaken as to the same set of facts. “Where a common mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party, unless he/she bears the risk of the mistake”.

Mistake of one party or unilateral mistake: A unilateral mistake occurs when only one of the parties is mistaken. “Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange

of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake if:

- (1) The effect of the mistake is such that enforcement of the contract would be unconscionable; or
- (2) the other party had reason to know of the mistake or his fault caused the mistake”.

### **3.1.2 Assumption of risk of mistake**

A party who has undertaken to bear the risk of a mistake will not be able to avoid the contract, even though the mistake (which may either be common or unilateral) would have otherwise permitted the party to do so.

“A party bears the risk of a mistake when:

- (1) the risk is allocated to him by agreement of the parties; or
- (2) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient”.

### **3.1.3 Effect of the mistake**

*Principle:* The feature which is common to the two situations of mistake (common mistake and unilateral mistake) is that the mistake must be fundamental (where the parties are mistaken as to the existence of the subject matter) so that a party cannot rely on a ‘mistake’ which has led him merely to make a bad bargain. Then the principle is that a fundamental mistake makes the contract void.

*Effect of fault of party seeking relief:* The principle is that “[a] mistaken party’s fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation (..), unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing”.

This rule does not, however, apply to a failure to read a contract. As a general proposition, a party is held to what he signs. The signature authenticates the writing, and s/he cannot repudiate that which s/he voluntarily approved. Generally, one who assents to a written offer or contract is presumed to know its contents and cannot escape being bound by its terms merely by contending that s/he did not read them; his/her assent is deemed to cover unknown as well as known terms.

## **3.2. Misrepresentation**

Another factor affecting the validity of consent given by a contracting party is misrepresentation, which prevents assent from being knowingly given.

A misrepresentation may be:

- (1) a misleading conduct or an assertion that is not in accord with the facts;
- (2) an action intended, or known to be likely, to prevent another from learning a fact;

- (3) a person's non-disclosure of a fact known to him/her, where he/she knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

### **3.2.1 Types of misrepresentation**

There are two distinct types of misrepresentation:

- (1) fraudulent or material misrepresentation; and
- (2) misrepresentation as an inducing cause.

*Fraudulent or material misrepresentation:* A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker:

- (1) knows or believes that the assertion is not in accord with the facts; or
- (2) does not have the confidence that he states or implies as to the truth of the assertion; or
- (3) Knows that he does not have the basis that he states or implies for making the assertion.

A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.

*Misrepresentation as an inducing cause:* A misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent. It is an intentional misrepresentation of material fact by one party to the other, who consents to enter into a contract in justifiable reliance on the misrepresentation.

### **3.2.2 Prevention from formation of a contract due to misrepresentation**

If a misrepresentation as to the character, or essential terms, of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.

### **3.2.3 Effect of misrepresentation**

If a party's manifestation of assent is induced by misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

## **3.3 Duress**

A person should not be held to an agreement s/he has not entered voluntarily. Accordingly, the law will not enforce any contract induced by duress, which in general is any wrongful or unlawful act or threat that overcomes the free will of a party.

Ordinarily, the acts of threats constituting duress are themselves crimes or torts. But this is not true in all cases. The acts need not be criminal or tortious in order to be wrongful; they merely need to be contrary to public policy or morally reprehensible. For example, if the threat involves a breach of a contractual duty of good faith and fair dealing, it is improper.

Moreover, it generally has been held that contracts induced by threats of criminal prosecution are voidable, regardless of whether the coerced party had committed an unlawful act. Similarly, threatening the criminal prosecution of a close relative is also duress. To be distinguished from such threats of prosecution are threats that resort to ordinary civil remedies to recover a debt due from another. It is not wrongful to threaten a civil suit against an individual to recover a debt. What is prohibited is threatening to bring a civil suit when bringing such a suit would be abuse of process.

### **3.3.1 Types of duress**

Duress is two basic types, i.e. physical impulsion and improper threats.

*Physical compulsion:* The first type, physical duress, occurs when one party compels another to manifest assent to a contract through actual physical force, such as pointing a gun at a person or taking a person's hand and compelling him to sign a written contract. "If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent".

This type of duress, while extremely rare, renders the agreement void.

*Improper threats:* The second and more common type of duress involves the use of improper threats or acts, including economic and social coercion, to compel a person to enter into a contract. "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim".

Though the threat may be explicit or may be inferred from words or conduct, in either case it must leave the victim with no reasonable alternative.

This type of duress makes the contract voidable at the option of the coerced party.

### **3.3.2 Assumption of strength and intelligence**

The fact that the act or threat would not affect a person of average strength and intelligence is not important if it places fear in the person actually affected and induces her to act against her will. The test is subjective, and the question is this: Did the threat actually induce assent on the part of the person claiming to be the victim of duress?

### **3.3.3 Effect of duress**

If a party's manifestation of assent is induced by duress, the contract is void in case of physical compulsion, and voidable at the option of the coerced party in case of improper threats.

## **3.4 Undue Influence**

Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in

assuming that the person will not act in a manner inconsistent with the welfare of the party being persuaded.

### **3.4.1 Cases of undue influence**

Undue influence may be found in contracts between those in relationship of trust and confidence that is likely to permit one party to take unfair advantage of the other, such as *relationships of guardian-ward, trustee-beneficiary, agent-principal, parent-child, attorney-client, physician-patient, and clergy-parishioner*. The weakness or dependence of the person persuaded is a strong indicator of whether the persuasion may have been unfair.

### **3.4.2 Effect of undue influence**

If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

## **3.5 Illegality**

The law refuses to give full effect to contracts which are illegal (or affected by illegality) because they are contrary either to law or public policy.

### **3.5.1 Unenforceability of contracts contrary to the law**

One of the ways in which the offer may be terminated other than acceptance is the 'subsequent illegality of the type of contract the offer proposes'. A contract is illegal if the mere making of it amounts to a criminal offense, or if the contract has its object the commission of a crime, or if one party to the other's knowledge intended to use the subject matter for an illegal purpose.

### **3.5.2 Unenforceability on grounds of public policy**

Contracts are contrary to public policy if they have a clear tendency to bring about a state of affairs which the law regards as harmful. A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

*Weighing a public policy against enforcement of a term:* In weighing a public policy against enforcement of a term, account is taken of:

- (1) the strength of that policy as manifested by legislation or judicial decisions;
- (2) the seriousness of any misconduct involved and the extent to which it was deliberate; and
- (3) the directness of the connection between that misconduct and the term.

*Bases of public policies against enforcement:* A public policy against the enforcement of promises or other terms may be derived by the court from:

- (1) legislation relevant to such a policy; or
- (2) the need to protect some aspect of the public welfare such as a restraint of trade; an impairment of family relations; and an interference with other protected interests;

(3) failure to comply with a licensing, registration or similar requirement.

### **3.5.3 Exceptions to unenforceability**

There are two categories of exceptions to unenforceability, i.e. excusable ignorance and performance if intended use is improper.

*Excusable ignorance:* If a promisee is excusably ignorant of facts or of legislation of a minor character, of which the promisor is not excusably ignorant and in the absence of which the promise would be enforceable, the promisee has a claim for damages, but cannot recover damages for anything that he has done after he learns of the facts or legislation.

*Performance if intended use is improper:* If the promisee has substantially performed, enforcement of a promise is not precluded on grounds of public policy because of some improper use that the promisor intends to make of what he obtains unless the promisee:

- (1) acted for the purpose of furthering the improper use; or
- (2) knew of the use and the use involves grave social harm.

## **SECTION 3. END OF CONTRACTUAL OBLIGATIONS**

The subject of discharge of contract concerns the termination of contractual duties. Whatever causes a binding promise to cease to be binding is a discharge of the contract. In general there are various kinds of discharge of the contract: mainly we have performance by the parties, agreement of the parties to terminate the contractual obligation, happening of a condition and impossibility of performance.

### **1. Condition**

A condition is an event whose happening or non-happening affects a duty of performance under a contract. Some conditions must be satisfied before any duty to perform arises; others terminate the duty to perform; still others either limit or modify the duty to perform. A condition is inserted in a contract to protect and benefit the promisor. For example, A promised to pay 100,000Rfws provided that such amount is realized from the sale of an automobile, provided that the automobile is sold within sixty days. This condition is known as a precedent condition. That is, a contract that is subject to a future event, there cannot be a transfer of property because the future event has not yet occurred. In this case, the risk shall always remain with the debtor of an obligation since transfer of property has not yet been done.

It may also be a subsequent condition when a condition will terminate the contract. Subsequent condition occurs, despite the fact that the contract will have been formed; the occurrence of the subsequent condition renders the contracts without effect. In that case, the risk shall remain with the debtor. The law says if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or duty to pay damages for breach, that duty is extinguished if the event occurs, unless the occurrence

of the event is the result of a breach by the obligor or the occurrence does not subject the obligor to a materially increased burden.

A fundamental difference between the breach or non-performance of a contractual promise and the failure or non happening of condition is that, a breach of contract subjects the promisor to liability. It may or may not, depending on its materiality, excuse the non-breaching party's performance of his duty under the contract. The happening or non-happening of a condition, on the other hand, either prevents a party from acquiring a right or deprives him of a right but subjects neither party to any liability.

Conditions may be classified by how they are imposed. They may be express or implied in fact condition and implied in law condition:

*Express conditions:* An express condition is explicitly set forth in language. No particular form of words is necessary to create an express condition, as long as the event to which the performance of the promise is made subject is clearly expressed. An expressed condition is always preceded by words such as "provided that", "on condition that", "if", "as soon as", etc.

*Implied in fact condition:* implied in fact conditions are similar to express conditions in that they must fully and literally occur and that they are understood by the parties to be part of the agreement. They differ in that they are not stated in express language; rather they are necessarily inferred from the terms of the contract, the nature the transaction, or the conduct of the parties. Example: thus if A, for 100,000Rfws contracts to paint the B's house any colour B desires, it is necessarily implied in fact that B will inform A of the desired colour before B begins to paint. The notification of choice of colour is an implied in fact condition, as an operative event that must occur before A is subject to the duty of painting the house.

*Implied in law condition or constructive condition:* implied in law condition is imposed by law to accomplish a just and fair result.

It differs from an express condition and implied in fact in two ways:

(1) it is not contained in the language of the contract or necessarily inferred from the contract  
(2) it need only be substantially performed. For Example: A contracts to sell a certain tract of land to B for 2,000,000 Rwf, but the contract is silent as to the time of delivery of the deed and payment of the price. According to the principle, the contract implies that payment and delivery of the deed are not independent of each other. The courts will treat the promises as mutually dependent of the deed of A to B is a condition to the duty of B to pay the price. Conversely, payment of the price by B to A is a condition on the duty of A to deliver the deed to B.

*Concurrent conditions:* concurrent conditions occur when the mutual duties of performance are to take place simultaneously. In this case, the performance under a contract is concurrent.

*Condition precedent:* A condition precedent is an event that must occur before performance is due under a contract. In other words, immediate duty of one party to perform is subject to the condition that some event must first occur.

*Condition subsequent:* A condition subsequent is an event that terminates an existing duty. For example, when goods are sold under terms of sale or return the buyer has the right to return the goods to the seller within a stated period but is under an immediate duty to pay the price unless the parties have agreed on the credit. The duty to pay the price is terminated by a return of the goods, which operates as a subsequent condition.

## **2. Discharge by Performance**

The performance signifies that the parties have dutifully carried out their respective obligations, thus freeing themselves from further liability. The basic rule is that the parties must perform their obligation in exact accordance with the agreed terms of the contract. The contract must be performed at the time and place agreed upon. If no time is agreed then it must be completed within a reasonable time and that will obviously depend upon the circumstance of the particular case.

### **2.1 Date and time of performance**

Contractual obligations must be performed in the time stipulated whether expressly or by implication. When a specific date or a specified time is mentioned, then it is said that “time is of the essence” of the contract and completion in accordance with the time or date becomes a condition going to the very foundation of the contract. But sometimes when there has been an extension the beneficiary of it may argue that even if time was of the essence, the creditor had abandoned that condition by allowing an extension. In this case for example, **B** may order furniture from **S** to be delivered on April 30<sup>th</sup> 2011. The consignment was not ready by that date but **B** extended the date to May 10<sup>th</sup>. It was still not available and therefore **B** cancelled the order. **S** Nevertheless proceeded to deliver on May 12<sup>th</sup>. **B** refused to accept delivery. In this case the time will be considered as not being of the essence; the court may set for an extra time (a respite or days of grace) and moratorium damages may be charged after a notice. In a case such as this, the wording of the “agreement” to the extension is very important.

The basis of “notice” is that time has not been made the essence of the contract is especially important. The court will not allow one party suddenly to turn to the other and say “time has gone, the contract is at an end”. When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is of the essence, it is clear that, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence. When no time stipulated, performance must occur within reasonable time, determined by reference to particular circumstances of the case.

### **2.2 Substantial Performance**

In response to the harsh consequences that may result from entire contracts, the courts developed the doctrine of substantial performance permitting recovery of contract price where the plaintiff has substantially performed their obligations under a contract. If one party has substantially completed his side of the bargain, leaving a minor omission or fault, the court may accept such performance as discharging his obligations, subject to the innocent party’s right to deduct a sum to cover the fault.

This is illustrated by this example. X built a bungalow For Y the price to be paid by installments. On completion Y withheld the balance due on the basis that there were some structural defects. The Court may allow the builder's claim that he had substantially completed the contract. In determining whether a failure to render, or to offer, performance is material, the following circumstances are significant:

- (1) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (5) the extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

However, a defendant may still maintain the right to claim damages for any loss suffered as a result of the plaintiff's failure to strictly adhere to their contractual obligations.

### **2.3 Divisible performance**

Sometimes, it may be possible for the court to view the obligations between the two contracting parties not as one entire contract but consisting of a number of individual and separate obligations. It may be also the same when one person contracts several obligations in one contract.

The law says that where the whole of one party's performance can be rendered at one time, it is due at one time, unless the language or the circumstances indicate the contrary. Where only part of one party's performance is due at one time, the other party's performance can be so apportioned that there is a comparable part that can also be rendered at that time, it is due at that time, unless the language or the circumstances indicate the contrary.

If there is failure to perform all, it does not affect the obligations to pay for what has been completed. For example, A transporter can agree to transport goods for so much per ton. If A in fact carried less than the agreed amount, the court can hold that A was entitled to claim for what he had carried, at the rate per ton subject to the other party's right to sue for not carrying the overall tonnage agreed upon.

### **2.4 Prevention of performance by one party**

If the promisee prevents the promisor from performing his obligations under the contract, this will excuse the promisor from performance and the promisee cannot thereafter rely on non-performance as a basis for a contractual claim or as a defence to a claim brought by the promisee. This is the principle of "*exceptio non adimpleti contractus*".

It may be that one party is willing to release the other from completing the contract as originally agreed. If such can be assumed from the circumstances of the case, then the party

that has performed part of his obligations is entitled to claim on a quantum meruit. The other party must, however, be in a position freely to decide to accept partial performance. If it is forced upon him by the behaviour of the other party then no claim will be allowed. In some cases, the innocent party can sue for damages for breach of claim on a quantum meruit.

The example is the case *Sumpter v. Hedges* (1898 *Queen's Bench division – English contract law*). The plaintiff agreed to build on the defendant's land premises for a lump sum of £565. He completed work valued at £333 and then abandoned the contract. The buildings were completed by the defendant. The plaintiff's claim for the work done before abandoning the contract was dismissed. The defendant had no real option but to finish the work. The plaintiff was allowed to claim for materials delivered as part of the original contract

As the court said: "He is not bound to keep unfinished a building which, in an incomplete state would be a nuisance on his land".

### **3. Discharge by agreement**

After the formation of contract, but prior to complete performance, parties may wish to bring their contractual rights and obligations to an end. Often this will be due to a change in circumstances of one or both parties and may also be used as part of a dispute resolution mechanism between parties.

In order to effectively terminate an existing contract, a new agreement must meet all criteria of a binding contract. In such a situation each releases the other party from performing. In that way each has given consideration to the other, namely the release, and the second agreement discharges the first. If one party has performed, or partly performed his obligations, in this case it is not sufficient for him merely to say that he releases the other person. The reason being that the other person has given no consideration to be executed as his contractual obligations, in other words the second agreement is not a contract at all.

One way round, the problem is to make the release under seal. A contract under seal or a deed does not require consideration. There are certain formalities to be followed however for the deed to be valid. A method of obtaining the discharge in this situation where one party has performed or party performed his obligations is by accord and satisfaction, the party that has not performed his original obligation now offers new consideration to be released from the original contract. The other party can now accept the new consideration. The requirement of consideration under this kind of contract causes certain difficulties. If the discharges are under seal, only then is the consideration requirement avoided.

A related problem is that of waiver. In the present context this signifies that one party is prepared to waiver or vary the terms of the original agreement. The problem, of course, is what consideration the other party provides. The courts have been eager to enforce such alterations in the contract because they reflect normal business or commercial tendencies. In so doing however, the rules are not particularly clear or logical. Perhaps the most satisfactory way of explaining the situation is to say that the courts apply an equitable principle. If X agrees to waive certain obligations owed by Y and Y therefore alters his position accordingly, then it would be inequitable to allow X immediately to revert to the original agreement. That

X should be permitted to demand compliance at some future date is also a valid requirement if the principles of equity are to be maintained.

The situation is illustrated by this decision in example. R agreed to build a car for D within seven months, time being of the essence. The car was not ready but D agreed to extend the date of delivery. After a further three months, D explained that if it was not completed within four weeks he would cancel the order, this in fact happened. The court held that by allowing an extension of time D had waived the original terms of the contract and therefore could not go back on that. But he could reintroduce a reasonable date for completion and as R had failed to comply with that date then D was entitled to repudiate the contract.

The agreement may also take the form of a novation. Novation recognizes the possibility that one party to contract can release the other and substitute a third person who then undertakes to perform the released person's obligations. If an obligee accepts, in satisfaction of the obligor's duty, a performance offered by the obligor that differs from what is due, the duty is discharged. Thus by agreement of the three parties a new contract replaces the original contract. A novation is a contract that is itself accepted by the obligee in satisfaction of the obligor's existing duty. The substituted contract discharges the original duty and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty.

Another type of novation can occur where the parties remain the same but a new contract is substituted for the old. If an obligee accepts in satisfaction of the obligor's duty a performance offered by a third person, the duty is discharged, but an obligor who has not previously assented to the performance for his benefit may in a reasonable time after learning of it render the discharge inoperative from the beginning by disclaimer.

#### **4. Frustration or impossibility**

The doctrine of frustration deals with the allocation of risks and losses which occur as result of an unanticipated change in circumstances occurring after parties have entered into a contract. Frustration generally arises when a contracting party refuses to perform or has failed to perform its obligations in whole or in part because performance of the contract has become either physically impossible, illegal or is no longer commercially viable. The law says that where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption, on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

The principle is, once the parties had agreed to their various obligations and the contract was valid, then nothing should be recognized as permitting one part to go back on his word. The attitude, being strict, was that the parties should have provided for the happening of future difficulties in the wording of the original agreement. If not then, it was his own fault for not so providing and he must bear the consequences.

The case *Paradine v. Jane* ([1947] EWHC KB J5 is an English contract law case) illustrates this situation. The defendant had leased a farm from the plaintiff. He was unable to pay the rent because a German Prince had "invaded the realm with a hostile army", occupied the farm

and thus prevented him from making any profits from which he would have paid the rent. The court allowed the plaintiff's action arguing that the defendant had agreed to pay and as he had not provided against such eventualities in the agreement, then he should bear the loss. It is not sufficient merely to show that conditions have changed so that one party is released. That party must prove the existence of the frustration and its effects on the contract. Here the court decided that the parties did not contract on the footing that the goods were to come from Germany.

In the nineteenth century in England the courts began to adopt a more lenient approach to the problem. There is a difference of opinion as to the reasoning behind what has been termed the Doctrine of Frustration. The two commonly accepted approaches are either that there is an implied term in every contract that should the performance become impossible then the parties should be relieved from their obligations, or that the event that occurs so fundamentally alters the courts to release the parties from the bargain. Perhaps the most useful course to adopt is to review the judgments in an effort to gauge when the courts will invoke the doctrine.

#### **4.1 Events that may frustrate**

There are number of events that the courts have recognized which have rendered a contract radically different from that which was contemplated. When determining whether the doctrine of frustration operates in any particular case, consideration should be given to the terms of the contract, the nature of the event that has occurred and the type of contract involved; then an assessment may be made of whether or not the operation of the contract following the event is radically different from that originally contemplated.

##### **(1) Destruction of something essential**

If the continuing existence of a thing or a person is assumed by both parties as the foundation of the contract, the destruction of that thing or a person may invoke the doctrine of frustration. In one of the earliest cases on frustration, in *Taylor v. Caldwell*, the defendants let a certain music hall to the plaintiffs. Before the dates of the proposed concerts, the hall was accidentally destroyed by fire. The court held that the contract was frustrated.

##### **(2) Non- occurrence of an essential event**

If the occurrence of an essential event is assumed by both parties as the basis of their contract relationship, the non occurrence of that event may invoke the doctrine of frustration.

##### **(3) Impossibility of performance**

If, as a result of a supervising event, a contract becomes impossible to perform, either physically or commercially, the doctrine of frustration may operate to discharge the contract. An interesting question of precedent arises out of the East African Court of Appeal decision in *Victoria Industries v. Ramanbhai Bros (1961 E.A. 11)*. A Ugandan company had agreed to ship maize via Lake Victoria to Mwanza. While part of the shipment was being loaded E.A. Railways refused to accept the shipment. The court held that the railway's behaviour frustrated the contract as there was no alternative or feasible route.

#### **(4) Events causing delay or making performance more expensive**

Events which merely delay performance or render it more expensive than contemplated will not frustrate a contract. However, where delay or increased expenses is such that the contract becomes one that is radically different from that contemplated by the parties the doctrine of frustration may operate. However, sometimes as we said earlier, courts have to assess and decide to consider or to disregard this theory. This illustrates clearly the situation. The facts were that groundnuts were sold and were to be shipped from the Sudan to Germany. Obviously, the route would have been through the Suez Canal. Owing to the invasion of Egypt by Israel the Canal was blocked and the sellers argued that the contract was now frustrated. This argument was not accepted. The court refused to imply a term that the voyage must be via Suez. They considered that the contract could still be performed by going round the Cape of Good Hope. The extra expense was not to be regarded as a frustrating event. In this decision they seem to have forgotten that whenever the performance of the contract can be more expensive the doctrine of frustration may operate.

#### **(5) Changes in the law or government intervention**

A subsequent change in the law may frustrate a contract, even if it does not render performance of the contract illegal, provided it substantially affects the parties so that the contract becomes different in nature from that contemplated by the parties. This may be, for example, an interdiction from selling some kind of commodities in a given area or time.

If government rules, regulations or enactments prevent one party from fulfilling his obligations the contract is frustrated. The article 95 (of the Law 45/2011 Governing Contracts) says that if the performance of a duty is made impracticable by having to comply with a new domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

#### **(6) Death in contracts involving personal performance (*intuitu personae*)**

If the contract can be regarded as one that requires the personal service of one party and that party dies or it becomes physically impossible or illegal for him to complete his obligations, then it is regarded as a frustrating event. The law says that if the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

For instance, if a law graduate had signed a contract to work for a firm of advocates and the Government then decided that all such graduates must spend one year at the Institute of Legal Practice Development before starting their carrier, then the original contract of employment would be frustrated because of the incapacity of that graduate.

### **4.2 Situation preventing the frustration**

There cannot be a frustration when parties have contemplated a supervening event and made provision for it in their contract. There is also no frustration when the event was caused by one of the parties to the contract. If there is an event that has destroyed the basic on which the

contract was made the party seeking to rely on frustration must prove affirmatively the occurrence of that the event. Once done, it is then for the other party to show that the event was due to the neglect or negligence of the party claiming frustration.

Two East African Appeal cases illustrate the workings of the rule. In *Howard and Co.(Africa) Ltd. V. Burton*, the plaintiffs had agreed to supply the defendants with mid-day meals for their labourers. The labourers however objected to the meals and the fact that deductions were made from their wages to cover part of the cost. The defendants allowed the men to choose and the result was that the number of meals required dropped from 2,500 to almost nil. The plaintiff sued for breach of contract and the defendants pleaded frustration. The court allowed the plaintiffs action, arguing that it was the defendants positive act of allowing their labourers to choose that led to the decline in numbers and the subsequent failure on their part to take delivery of the agreed quantities.

### **4.3 Consequences of frustration**

The effect of frustration is to terminate a contract automatically. Consequently, there is no need for either party to elect to terminate. Where a contract is terminated in future that the accrued rights and obligations remain. Thus, money paid under a frustrated contract for services to occur in the future could not be recovered, nor could recompense be obtained for services rendered where payment only fell due after the frustrating event. However, if one part has gained an advantage under the contract before the frustrating event, for instance by way of part performance of the contractual obligations, then the court may order payment to be made by the party benefited on the basis of the undue enrichment.

## **5. Discharge by breach**

A breach of a contract may bring it to an end; in other words, may discharge, or terminate the contract. When one party fails to perform his obligations or performs them in a way that does not correspond with the agreement, the innocent party is entitled to a remedy. What form the remedy will take depends on what type of breach the guilty party has committed. In all cases the innocent party is entitled to claim damages, but only in two situations can the contract be regarded as discharged and thus freeing him from performing his own obligations.

### **5.1 Fundamental breach**

In deciding whether there has been a fundamental breach of the contract it is necessary to ask whether it is a condition or a warranty that has been broken. We can examine if that condition is a major term of the contract and breach of such a term allows discharge of the contract, and that a warranty is a minor term that attracts only an award of damages. If the breach goes to the root of the contract and affects its commercial viability, it is said to discharge the contract.

This can be illustrated by this Court decision in *Mohamed Anwar v. Marjaria and Others*. The plaintiff had purchased eleven second hand tractors and spares from the respondents. He signed a document that stated that the tractors were "seen and fully inspected on the description ... no other liability is taken whatsoever by the seller." When the plaintiff went to collect the tractors two were missing and others had been stripped of their spare parts. Nevertheless he removed the tractors on an undertaking that what was missing would be

replaced. This was not done and the appellant stopped payment and when sued for the price he alleged that he had repudiated the contract and, in addition, that the consideration had totally failed.

Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated. The seller agreed to deliver milk daily for a period of one year. After eight days the buyer refused to accept more deliveries on the grounds that the milk had not passed through a refrigerator cooler. The buyer obtained the backing of the Public Health Inspector that the milk was not fit for human consumption and then sued for breach of contract.

## **5.2 Repudiation**

A repudiatory breach is any form of conduct by a party that evinces an intention not to be bound by the contract. Examples include expressly refusing to perform part or all of a contract, or insisting that the other party perform the contract in a manner that it does not require or sanction. It may also take the form of a continued failure to perform the contract. This occurs when one party either expressly or impliedly intimates that he will not honour his side of the bargain. Obviously this can happen at the moment performance is due or before that time, when prior warning is given that the obligations will not be performed it is called anticipatory breach. The law says “Repudiation shall be made by:

- (1) a statement by the obligor to the obligee indicating that the obligor will commit a breach.
- (2) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach”.

The repudiation may be anticipatory. The anticipatory breach occurs when the guilty party repudiates the contract before the date on which they were due to perform their obligations and the innocent party elects to discharge the contract as a result. Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach. Where performances are to be exchanged under an exchange of promises, one party’s repudiation of a duty to render performance discharges the other party’s remaining duties to render performance. In such a situation the innocent party can sue at once, or wait until the time of performance is due and sue then. If he decides on the last course of action, it is possible for the guilty party to “reform” and complete his part of the contract. It may even be that something occurs to prevent the original innocent party from completing his own obligations.

Similarly the innocent party, if he decides not to act on the anticipatory breach but wait until the date the performance was due, must show that he was able and willing to perform his part of the agreement. If the innocent party decides to treat the other party's behaviour as anticipatory breach, he may be allowed to ask the court for a decree of specific performance so that the court may compel the guilty party to perform. It is no defence to argue that the cause of action does not arise until the final date for performance is due. The obligor's failure to provide within a reasonable time such assurance of due performance may be treated as a repudiation.

### **5.3. Effects of breach**

As was said earlier, the effects of breach of contract vary depending on the seriousness of the breach and also on how the innocent party decides to react towards the breach. The remedies available are discussed in the next Chapter. A breach by non-performance gives rise to a claim for damages for total breach only if it discharges the injured party's remaining duties to render such performance.

## **6. Rescission**

Parties to a contract can file an action requesting for its nullity or rescission if there was error, fraud or violence. An agreement of rescission is an agreement under which each party agrees to discharge all of the other party's remaining duties of performance under an existing contract. An agreement of rescission discharges all remaining duties of performance of both parties. It is a question of interpretation whether the parties also agree to make restitution with respect to performance that has been rendered.

Rescission of the contract extinguishes not only the rights of the parties therein but also those of their successors in title. The rule is "*resoluto jure dantis resolvitur jus accipientis*", but to a certain extent third parties are protected. When a lease has been granted by an owner whose right of ownership is afterwards rescinded in the case of the sale of an immovable object, the seller cannot get the sale rescinded against an onerous purchaser whose right is transcribed unless the seller has preserved his privilege by transcribing it.

In principle the rescission works '*ex tunc*', i.e. it returns matters to the state of the moment of the conclusion of the contract or, sometimes, of a later date in the case of non-retrospective effect the rescission works '*ex tunc*', i.e. the day of the issue of the writ, or, sometimes, the day of the judgment or even the day of the enforcement of the judgment. *Ex tunc is the Latin for "from the outset"*

The impossibility of restitution in successive contracts, is due to the nature of the property (e.g. the enjoyment of the premises) or the use which was made of it (e.g. a pipe-line delivers oil over several months, but the oil is stocked in huge reservoirs; or fertilizer is spread in the fields). The criterion proposed by Marcel Fontaine in order to define the exceptions to the principle of the retrospective effect of the rescission is the divisibility of the contract. The rescission has a retrospective effect to the moment of the conclusion of the contract each time that the non-performance affects the whole of the contract; the rescission will be limited up until the date of the serious no-performance which does not overturn the reciprocal utility of what was performed earlier to the common satisfaction of both parties. If this criterion is

accepted, the starting point of the non-retrospective rescission will not be the same in all cases. It is the date on which a party judged that the contract ceased to fulfil its function.

## ***STUDY UNIT 8. SALE OF GOODS***

### **SECTION 1. Definition**

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price in the form of money.

A contract of sale may be absolute or conditional. In an absolute sale the property in the goods passes from the seller to the buyer immediately and nothing remains to be done by the seller. Sale at a counter in the shop is an absolute sale. In a conditional contract of sale the property in the goods does not pass to the buyer absolutely until a certain condition is fulfilled.

The term contract of sale comprises two things:

- Sale, and
- Agreement to sell

Where the seller transfers the property in the goods immediately to the buyer there is a sale. But where the transfer of the property in the goods is to take place at a future time or subject to some condition(s) thereafter to be fulfilled, the contract is called an agreement for sale.

An agreement for sale becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. Every sale originates in an agreement to sell. It is an agreement to sell which gives birth to a sale. On a sale, the agreement of sale is completely exhausted and ceases to exist.

### **SECTION 2. Essentials of contract of sale**

- A contract
- Between two parties
- To transfer or agree to transfer the property/title in goods
- For a price, that is money consideration.

#### **2.1. A contract**

The word contract means an agreement enforceable at law. It presumes free consent on the part of the parties who should be competent to contract. A compulsory transfer of goods under any Nationalization Act is not a sale. The agreement must be made for a lawful consideration and with a lawful object. In other words all the essential elements of a valid contract must also be present in a contract of sale.

#### **2.2. Two Parties**

To constitute a contract of sale, there must be a transfer or agreement to transfer the property in the goods by the seller to the buyer. It means that there must be two persons one the seller and the other the buyer. The buyer and the seller must be two different persons, for a man cannot purchase his own goods. The parties must be competent to contract.

**Example:** A partnership firm was dissolved and the surplus assets including some goods were divided among the partners. The Tax Officer wanted to tax this as a sale.

The court held that this was not a sale as partners were themselves joint owners of the goods and they could not therefore be both sellers and buyers. Moreover there was no money consideration.

There are certain exceptions to the rule that the same person cannot be a purchaser and a seller. These are:

- Where person's goods are sold in execution of a decree, he may himself buy them.
- A part owner can sell his share to the other part owner so as to make the other part owner the sole owner of the goods.
- Where a Pawnee sells the goods pledged with him on non-payment of bill money, the pawnor may himself buy such goods

### **2.3. Transfer of property**

In a contract of sale there should be a transfer or an agreement to transfer the absolute or general property in the goods sold. It contemplates the transfer of ownership in the goods. Though passing the title in the goods is an essential ingredient of sale, physical delivery of goods is not essential. The sale of goods contemplates the transfer of the general property or title in the goods from the seller to the buyer.

### **2.4. Goods**

The subject matter of the contract of sale of goods must be the goods, the property in which is to be transferred from the seller to the buyer. Goods of any kind except immovable goods may be transferred. It does not include money and other actionable claims. The seller must be the owner of the goods the ownership of which is sought to be transferred.

### **2.5. Price**

To constitute a valid contract of sale, consideration for transfer must be money paid or promised. Where there is no money consideration the transaction is not a contract of sale as for instance goods given in exchange for goods as remuneration for work or labour. However, an existing debt due from the seller to the buyer is sufficient. Further there is nothing to prevent the consideration from being partly in money and partly in goods or some other articles of value. For example when an old car is returned to the dealer for a new one and the difference is paid in cash that would also be a sale.

It may be noted no particular form is necessary to constitute a contract of sale. A contract of sale may be made in writing or by words of mouth or may be implied from the conduct of the parties.

## **SECTION 3. Distinction between a sale and an agreement for sale**

The distinction between sale and an agreement for sale is very necessary to determine the rights and liabilities of the parties to a contract. The main points of distinction are:

### **1. Transfer of property**

In a sale the property in the goods passes from the seller to the buyer at the time the contract is made. But in an agreement for sale the transfer of property takes place at some future time or until some condition is fulfilled.

In other words in a sale the buyer becomes the owner of the goods immediately at the time of making the contract. In an agreement for sale the seller continues to be the owner until the agreement for sale becomes a sale.

## **2. Nature of the contract**

An agreement to sell as an executory contract, is a contract pure and simple and no property passes, whereas a sale is an executed contract plus a conveyance.

## **3. Risk of loss**

In a sale the buyer immediately becomes the owner of the goods and the risk as a rule passes to the buyer; under an agreement to sell, the seller remains the owner and the risk is with him. Thus under a sale if the goods are destroyed the loss falls to the buyer even though the goods are in the possession of the seller. But under an agreement to sell, the loss will fall on the seller even though the goods are in the possession of the buyer.

## **4. Consequences of the breach**

On breach of an agreement to sell by the seller, the buyer has only a personal remedy against the seller. But if after a sale, the buyer breaks the contract (e.g. resells the goods) the buyer may sue him for delivery of the goods or damages.

In an agreement to sell, if the buyer fails to accept the goods the seller may sue for damages only and not for the price. On a sale if the buyer does not pay the price, the seller may sue him for the price.

## **5. Insolvency of the buyer**

In a sale if the buyer is adjudged an insolvent, the seller in absence of lien over the goods is bound to deliver the goods to the official receiver or any government appointee for that purpose. The seller will however, be entitled to a rateable dividend for the price of the goods. In an agreement to sell, when the buyer becomes insolvent before he pays for the goods, the seller need not part with the goods.

## **6. Insolvency of the seller**

In a sale if the seller becomes insolvent the buyer is entitled to recover the goods from the official receiver or any government appointee for that purpose as the property of the goods is with the buyer. In an agreement to sell, if the buyer has already paid the price and the seller becomes insolvent, the buyer can claim only a rateable dividend and not the goods.

## **7. General and particular property**

An agreement to sell creates a right "*in personam*" while a sale creates a right "*in rem*". In case of an agreement to sell the buyer and the seller get remedy against each other in case of

a breach of an agreement. The agreement for sale creates a right with which only the contracting parties are concerned and not the whole world, whereas in case of a sale the buyer gets an absolute right of ownership and this right of the buyer is recognized by the entire world.

#### **8. Right of resale**

In an agreement for sale, the property in the goods remains with the seller and he can dispose of the goods as he likes, although he may thereby commit a breach of his contract. In a sale, the property is with the buyer and as such the seller cannot resell the goods. If he does so, the buyer can recover the goods sometimes even from third parties.

## ***STUDY UNIT 9. AGENCY***

Modern business is becoming more complex day by day. As such it is not possible for an individual to carry out business singly. He must necessarily depend on others for the efficient running of the business.

He must delegate some of the powers to another. The person who acts on behalf of another or who has been delegated the authority is called an agent. The person who authorizes another to act is called the principal. The contract which creates the relationship of principal and agent is called 'agency'. The law of agency is based on the principle, "what a person does by another, he does by himself".

### **SECTION 1. Agency: Definition and key features**

Agency is a relationship between two parties created by agreement express or implied. The relationship of agency arises wherever one person called the agent has authority to act on behalf of another called the principal. The concept of agency emphasizes that one person brings two other persons into a legal relationship. It is this power of creation of a relationship between the principal and the third parties that the essential importance of agency lays. It may be noted that an agent is not a mere connecting link between the principal and the third parties. He has the power to make the principal answerable to the third parties for his conduct.

The relationship of agency is based upon a contract. The contract may be either express or implied. The essentials of agency are as follows:

1. There should be the appointment by the principal of an agent
2. The principal should confer authority on the agent to act for him
3. The authority conferred must be such as will make the principle answerable to third parties.
4. The object of the appointment must be to establish relationship between principal and third parties.
5. The relationship of agency, being based on confidence between the principal and the agent, deems that no consideration is necessary.

### **SECTION 2. Agent**

#### **2.1. Definition**

Every person who acts for another is not an agent. A person does not become an agent on behalf of another merely because he gives him advice. A person can be an agent when he is authorized to act for the principal. To be an agent "the person employed must be authorized to do any act for another or to represent in dealings with third parties." The person for whom such act is done or who is so represented is called the principal.

## **2.2. Who may be an agent?**

Any person can be an agent. In other words even a minor can be employed as agent and the principal shall be bound by the acts of such an agent. But no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal. Thus, if an agent is to be held reliable to the principal he must be a major and of sound mind.

## **2.2. Who may be a principal?**

A person who is a major and who is of sound mind can employ another person as an agent. A person who is of the age of majority and is of sound mind can become a principal. Thus a minor cannot become a principal

## **2.3. Types of agents**

The term agent applies to anyone who by authority performs an act of another, and includes a great many classes of persons to who distinctive names are given. There may be various types. The important one are classified as under:

### **1. Express or implied agents**

An express agent is one who is appointed verbally or by writing. An implied agent is one whose appointment is to be inferred from the conduct of the parties.

### **2. General, special or universal agents**

A general agent is one who is employed to transact generally all the business of the principal in regard to which he is employed. A special agent has only authority to do some particular act or represent his principal in some particular transaction. A universal agent is one who is authorized to transact all the business of his principal of whatever kind and to do all the acts which the principal can lawfully do and can delegate.

### **3 Agent or Sub –Agent**

An agent derives his authority directly from the principal .A sub–agent derives his authority from the agent who has been appointed to do the act.

One broad classification of agents is Mercantile or commercial agents and non-Mercantile or non-Commercial agents.

Mercantile Agents: the following are some of the important types of mercantile agents:-

1. Factor; A factor is a mercantile agent to whom possession of goods is given for sale. Generally speaking he is a person to whom the goods are consigned for sale by a merchant residing abroad, or at a distance from the point of sale. He usually sells the goods in his own name. He cannot barter or pledge the goods. He has a general lien for the balance of account as between himself and the principal.
2. Auctioneer: An auctioneer is an agent who is appointed to sell goods at a public auction for remuneration. He may or may not be entrusted with the possession or control of the goods which he sells. He may be agent both for the seller and the buyer. The auctioneer can sue for the purchase price in his own name.
3. Broker: A broker is a mercantile agent who is employed to make contracts for the purchase and sale of goods for a commission called brokerage. A broker unlike a

factor is not entrusted with the possession of the goods. Even the documents of title are not made over to him. His business is to find purchasers for those who wish to sell, and sellers for those who wish to buy. His duty is to bring parties together to bargain or to bargain for them in various matters. He makes contracts in the name of his principal and not in his own name. He is a mere negotiator or, in a sense, a middleman.

4. **Commission Agent:** A commission agent is a mercantile agent who in consideration for a certain commission engages to purchase or sell goods for his principal. He sells and buys goods in the market on the best terms and in his own name. His only interest in the transaction is his commission. All profits and losses accrue to the principal
5. **Del credere Agent:** A Del credere agent is an agent who in consideration of an extra remuneration guarantees to his principal the performance of the contract by the other party. This Del credere commission is a higher reward than is usually given in the form of commission. He occupies the position of the guarantor as well as of an agent. But his liability is secondary and arises only on the insolvency or failure of the other party. A Del credere agent is appointed generally when the principal deals with persons about whom he knows nothing.
6. **Banker:** The relationship between a banker and the customer is either that of debtor and creditor or of an agent and principal. When the banker advances money to his customer as a loan, banker is the creditor and the customer is the debtor. But the banker acts as an agent of his customer when he buys or sells securities, collects cheques, dividends, bills etc. on behalf of his customer

### 1. **Non-Mercantile agents**

Non-Mercantile agents include counsel, solicitor, guardian, promoter, wife, receiver, insurance agent etc.

## **SECTION 3. Creation of agency**

An agency may arise in different ways. It need not be created expressly and may be inferred from the circumstances and conduct of the parties. Any agency may be constituted in the following ways.

1. By express agreement,
2. By implication in law i.e., from the conduct of the parties or from the necessity of the case; and
3. By ratification

### **3.1. Agency by express agreement**

A contract of agency may be created by an express agreement. When a principal appoints an agent either by words spoken or written to represent and act for him, an express agency is created. No particular form or set of words is required for appointing an agent. When a person gives the power of attorney to another person, an express agency is created.

### **3.2. Agency by implication**

The relationship of principal and agent need not be expressly constituted and can arise by implication of law as well. Authority to act as an agent can be inferred from the nature of the business, the circumstances of the case, the conduct of the principal or the course of dealings

between the parties. Thus if a person realizes rent and gives it to the landlord, he impliedly acts for the landlord as an agent.

**Example:** A owns a shop at Remera, living himself in Kabuga and visiting the shop occasionally. The shop is managed by B and he is in the habit of ordering goods from C in A's name, for the purpose of the shop and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purpose of the shop.

Implied agency includes:-

- (a) Agency by estoppel;
  - (b) Agency by holding out;
  - (c) Agency by necessity.
- (a) Agency by estoppel: In many case an agency may be implied from the conduct of the parties though no express authority has been given. Thus where the principal knowingly permits to act in a certain business in his name or on his behalf, such a principal is estopped from denying the authority of the supposed agent to bind him.
- (b) Agency by holding out: Where a person permits the other by a long course of conduct to pledge his credit for certain purposes, he is bound by the act of such person for pledging his credit for similar purposes, though in some cases without the previous permission of his master. This is a case of agency by "holding out ". Similarly where a husband holds out his wife has having his authority by words or conduct and a third party advances to the wife on the faith of such conduct; the husband is liable for the debts.
- (c) Agency by necessity: Sometimes extraordinary circumstances require that a person who is not a really agent should act as an agent of another. In such a case although there might not have been an express or implied authority to do an act, the law implies such an authority in favour of that person in account the necessity that has arisen.

However before an agency of necessity can be inferred, the following conditions should be fulfilled:-

- There should be real and definite necessity for the creation of the agency.
- It should be impossible to obtain the principal's instructions.
- The person acting as an agent should act bona fide and in the interest of the parties concerned.

### **3.3. Agency by ratification**

All acts of an agent done in the discharge of his duties and within the scope of his authority is binding upon the principal. Acts performed by an agent beyond the scope of his authority are not binding upon the principal. However the principal may in such case either adopt or reject the act of the agent. In case the principal adopts the acts of the agent done without his authority, he is said to have ratified that act. On ratification the act of the agent becomes the act of the principal and he becomes bound by the same whether be to his loss or advantage.

## ***STUDY UNIT 10. INSURANCE***

### **SECTION 1. DEFINITION OF THE CONTRACT OF INSURANCE AND INSURER**

A contract of insurance is a contract whereby a person called insurer undertakes, against payment of a premium or more, to provide a person named insured or beneficiary a cash benefit in case of realization of a determined risk<sup>3</sup>.

Another definition is not directly oriented to the contract of insurance but to “Insurance Business” which is a business of undertaking liability of loss, damage, compensation, disease, health as well as reinsurance business in accordance with laws and agreements<sup>4</sup>.

Scholars say that the contract of insurance is any contract whereby one party assumes that risk of an uncertain event, which is not within his control, happening at a future time, in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs<sup>5</sup>.

The last definition given by the doctrine is more complete because it is précising that the risk could be uncertain, not within the control of the insured and happening at a future time.

Now let us talk about the definition of the insurer as an active moral person involved into financial sector as a non bank financial institution.

An insurer is a party that accepts the risk of loss in return for a premium (payment of money) and agrees to compensate the insured against a specified loss<sup>6</sup>.

### **SECTION 2. COMMON TYPES INSURANCE AND THEIR ROLE**

Insurance can be divided into seven major categories. These categories are: life insurance<sup>7</sup>, fire insurance, casualty insurance, social insurance, marine insurance, inland marine insurance, and fidelity and surety bonding insurance<sup>8</sup>.

In Rwanda there are five following private insurers: SONARWA (Société Nouvelle d'Assurances du Rwanda), SORAS (Société Rwandaise d'Assurances), CORAR (Compagnie de Réassurance et d'Assurances Rwandaise), COGEAR (Compagnie Générale d'assurances et Réassurances Au Rwanda) and Phoenix of Rwanda Assurance Company S.A.

Insurance has been referred to as the handmaiden of industry. Leave alone reducing loss, damage and stress in community to more agreeable levels, the insurance companies of

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<sup>3</sup> Art. 1al 1 of the order n0 20/75 on insurance in *J.O.* of 1975

<sup>4</sup> Art. 2 (1) Of Law n°52/2008 of 10/09/2008 governing to the organization of insurance business in *O.G* n° special of 31 March 2009

<sup>5</sup> JOHN BIRDS; *Birds' modern insurance law*, ed. Sweet & Maxwell, London, 2007, p. 9

<sup>6</sup> GORDON W. BROWN (et al); *Business Law with UCC Applications*, 11<sup>th</sup> ed. McGraw-Hill, p.939

<sup>7</sup> Some say Assurance – refers to a Certain Event i.e. death, and only the time is uncertain. Life Insurance is for a specified time period and after that time, the policy expires.

<sup>8</sup> NORBERT J. MIETUS (et al); *Applied Business Law*, 12<sup>th</sup> ed. South- Western Publishing CO, 1982, p. 442

Rwanda have played an important role in mobilization of savings and investments in the social sector in the past 25 years.

The services offered by Insurance companies in Rwanda are evidencing remarkable growth in the range and nature of insurances provided by this dynamic industry.

The focus has been to stick to the traditional roles of insurance in community, which are to spread risk, and if the risk materializes, to spread the resulting loss but at the same time making diverse the range of products provided. Incidental to this task, but increasingly a significant subordinate task of insurance in itself, has been the management of risk and the prevention of loss.

The Insurance companies offer various types of services ranging from life, retirement fund, medical fund, automobile, to property coverage<sup>9</sup>.

The cost of retirement was so far covered by the Rwandan social security fund which is a public institution; but the draft law governing the organization of pension scheme foresees a voluntary pension scheme which will be covered by any insurer.

By providing contingent promises insurers offer a risk management tool enabling those who are least able to bear the risk to transfer, at a cost, those risks to those who are able to manage them. With the vulnerabilities to natural disasters in this region, people are exposed to their risks and consequent income fluctuations. Taking insurance cover can offset this.

As custodians of people's savings, banks are risk averse and not suited to take on general insurance risks. Life insurance companies mobilize savings from the household sector and channel them to the corporate and public sectors. The key difference between banks and life insurers is that the maturity of liabilities in banks is generally shorter than those of life insurance companies. This enables life insurers to play a large role in long-term financing. At the same time, life insurers' portfolios are typically more liquid than those of banks, making them less prone to liquidity crises.

For insurers, the risks that impact on their ability to pay can be classified into three main categories – technical risks, asset risks and other. Technical risks arise from the very nature of the insurance business hinging on the determination of liabilities. Insurance liabilities are estimated using actuarial or statistical techniques, based on probability using past experience and making assumptions about the future. If these calculations are incorrect, liabilities would be understated or premiums would be undercharged, both would distort the insurer's true financial position and lead to liquidity or even solvency problems. Under-pricing, unforeseen or inadequately understood events and insufficient reinsurance are all examples of technical risks. On the asset side, insurers face market risk, credit risk and to a lesser degree, liquidity risk. Other risks include legal and operational risks.

On top of all the risks, the heterogeneous nature of the insurance industry – with life and non-life insurers as well as reinsurers – and the wide range of risks even for insurers in the same country or market, all add to the difficulty in insurance supervision.

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<sup>9</sup> *Insurance in Rwanda*, see <http://www.guideafrica.com/rwanda/insurance-rwanda/insurance-in-rwanda.html>

### **SECTION 3. CATEGORIES OF INSURANCE BUSINESS**

Insurance business is divided into two categories; long term insurance business and short term insurance business<sup>10</sup>.

Categories of insurance business provided by the Law governing the organization of insurance business comprise classes as specified under subparagraphs 2 and 3 of the article 2 of the regulation n°05/2009 of 29/07/2009 on licensing requirements and other requirements for carrying out insurance business.

According to this regulation Long-term insurance business refers to insurance business of all or any of the following classes, namely:

- a) ordinary life insurance business,
- b) industrial insurance business,
- c) treasury bonds investment business,
- d) any business carried on by the insurer as incidental to any class of business abovementioned.

Short-term insurance business refers to insurance business of any class not being long-term insurance business. This is the non exhaustive list:

- a) Motor insurance business comprising commercial Lines and personal lines
- b) Property insurance business comprising fire and natural forces, aviation – aircraft, and marine – ships
- c) Miscellaneous comprising damage to property, expropriation and confiscation of property, insurance contracts primarily designed to cover the interests of any natural person against loss or damage to immovable and movable property as well as specified property as a result of fire, explosion, storm, water and certain natural forces, (excluding the risks of riot, strike, war and nuclear energy, accidental incident or any other unforeseeable event), transportation insurance business, accident and health insurance, liability insurance, engineering insurance business, guarantee insurance business...

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<sup>10</sup> Art. 4 Of Law n°52/2008 of 10/09/2008 governing to organization of insurance business in *O.G* n° special of 31 March 2009

# ***STUDY UNIT 11. NEGOTIABLE INSTRUMENTS***

## **SECTION 1: Definition and distinct characteristics of negotiable instruments**

### **1. Definition**

The negotiable instrument refers to a promissory note, bill of exchange or cheque payable either to order or bearer. These three instruments are usually characterised as negotiable instruments.

Some writers have attempted to define a negotiable instrument as: “ the property in which it is acquired by anyone who takes it bona fide, and for value” notwithstanding any defect of title in the person from whom he took it. Another useful definition is given by Thomas who states that “ an instrument is negotiable when it is, by a legally recognised custom of trade or by law, transferable by delivery or by endorsement and delivery, without notice to the party liable, in such a way that a) the holder of it for the time being may sue upon it in his own name, and b) the property in it passes to a bona fide transferee for value free from any defect in the title of the person from whom he obtained it”.

These definitions clearly reveal the true nature of negotiable instruments. A negotiable instrument is a transferable document either by the application of the law or by the custom of the trade concerned. The special feature of such an instrument is the privilege it confers on the person who receives it bona fide and for value. To possess good title thereto, even if the transferor had no title or had effective title to the instrument.

Negotiable instruments are a practical creation by merchants to facilitate transfer of funds and payment. They serve as a medium of payment more convenient than the traditional silver and gold coins. Today, negotiable instruments have become more sophisticated and modernized. The legal relationship created by negotiable instruments is similar to those of debtor and creditor. The issuer is a debtor, i.e. agrees to pay the particular sum of money, while the recipient is in turn a creditor, i.e. the negotiable instrument is a proof of his entitlement, against the issuer, of the particular sum specified in the negotiable instrument.

The creditor: holder of the bill: can negotiate the bill, i.e. exchange the value specified in the bill as a consideration for the conclusion of a contract, e.g. use of the bill to pay for a business transaction. The new holder of the bill acquires the same rights against the original issuer not so much different from the first holder. Such transactions have led the legislature to articulate detailed legal regimes to deal with the type of negotiable instruments as well as the rights and duties of their issuers, holders and guarantors.

### **2. Different kinds of negotiable instruments**

#### **A. BILL OF EXCHANGE**

A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or, to the bearer of the instrument.

The essential requisites of bill of the exchange are:

1-It must be in writing;

2-It must be containing an “order to pay”;

3- The order to pay must be unconditional. The order is not conditional by the reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

4- It must be signed by the maker

5-The drawee must be certain. A person is certain although he is miss-pelt or designated by description only.

6-The sum payable must be certain. The sum payable may be certain although it includes future interest or is not payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instrument, the balance unpaid shall become due.

7-The order must be to pay money only

8-the payee must be certain

The following is an example of a bill of exchange:

Kigali 1-10-05	
30.66.200 Rs. 10.500	
On demand pay to M/s Mugenzi Enterprises Kigali, or order a sum of Rwandan Francs Ten Thousand Five Hundreds only for Value received.	
To Ngirimana M/s Gakire. Mount Road, Kigali.	Sd/-

## **B. PROMISSORY NOTE**

A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

The essential requisites of a promissory note are:

- 1-It must be in writing
- 2-It must contain an undertaking to pay.
- 3-The undertaking to pay must be unconditional
- 4-It must be signed by the maker.
- 5-it must undertake to pay a certain sum
- 6-The undertaking must be to pay in money only.
- 7-the payee must be certain.

These are promissory notes:

1-I promise to pay B or order Rwf.500.

2-I acknowledge myself to be indebted to B in Rwf. 1,000 to be paid on demand for value received.

Specimen of promissory note:

Kigali 6-07-2009	
<table border="1"><tr><td>RFr.6.000</td></tr></table>	RFr.6.000
RFr.6.000	
On demand I promise to pay Mr. Mugenzi or order a sum of Rwandan Francs Six Thousands only.	
<table border="1"><tr><td>Ngirimana Stamp</td></tr></table>	Ngirimana Stamp
Ngirimana Stamp	
Sd/-	

### C. A CHEQUE

A cheque is a bill of exchange drawn on a specified banker and expressed to be payable otherwise than on demand.

Specimen of cheque

Bank de Kigali	
No. H/SB 362507	
Date 25 <sup>th</sup> march 2009	
Kigali	
RFs.500/-	
Pay to Mr. Majaliwa .....or bearer Rwandan Francs Five Hundred only.....	
L.F.	
Account N°.5628	Sd/-

#### a) Distinguishing features of cheque, bill of exchange and promissory note

Based on the above statutory definitions, the followings are the distinguishing features of the three negotiable instruments indicating the similarities and contrasts between them:

##### *i) Instruments in writing*

The law requires that a cheque, bill of exchange or promissory note must be an instrument in writing. It does not specify any particular material on which it is to be written. Though law does not prohibit a negotiable instrument written with a pencil, in practice the bankers do not accept such instruments because of risk involved. Alterations therein may be easily made which cannot be detected.

##### *ii) Unconditional order/promise*

A cheque and a bill of exchange contain order to the drawee whereas a promissory note contains a promise by the maker to his creditor. Thus the main difference between a cheque and a bill on the one hand and a promissory note on the other is that the cheque and the bill contain an order from the creditor to the debtor to pay a sum of money while the promissory

note contains an undertaking or promise made by the debtor to his creditor to pay the sum specified therein.

However, there is one common feature of a promissory note, cheque and a bill. The promise in the former and the order in the latter must be an unconditional one, i.e., the payment should not be made dependent upon the happening or occurrence of a particular event or on the fulfilment of any requirement. But if the time for payment of the amount (or any of its instalments) is expressed to be on the lapse of a certain period after the occurrence of a specified even, the promise or order to pay is not deemed 'conditional' provided the event is certain to happen according to ordinary expectation of mankind, although the time of its happening may be uncertain. Thus, a distinction may be made between an event, which is bound to take place according to human expectation, and the one, which may or may not at all take place. For example, the death of a particular person is an event which shall definitely take place; its timing may be uncertain. But the marriage of a person, or his departure to or return from a foreign country are events, which are uncertain to take place. The words in cheque or the bill must be in the nature of an order rather than a request, though it is not necessary that the word 'order' is specifically mentioned therein. Words of courtesy, if any, such as 'please' do not make the instrument invalid on this ground. The words in the promissory note should also amount to an unconditional promise to pay the specified amount; otherwise it will not be treated as a promissory note.

*iii) The drawer of a cheque or bill*

The main difference between a cheque and a bill is that the former is always drawn on and is payable by a banker specified therein, whereas a bill of exchange may be drawn on any person, firm or company. Thus only a customer of a bank having a current or a savings bank account is entitled to draw a cheque on his bank, i.e., the particular branch of a bank where he has opened his bank account. The name and address of the drawer bank are specifically printed on the cheque form. A seller generally draws a bill of exchange on his customer, or by a creditor on his debtor. Sometimes accommodation bills are also drawn to help a familiar party.

*iv) The amount of the instrument must be certain*

The order of the drawer of a cheque or a bill and the promise by the writer of a promissory note must be to pay a certain sum of money to be paid must be certain and specified both in words and figures. In most cases its stated that the sum must be certain although-

It includes future interest, or

It is payable at an indicated rate of exchange, or

It is according to the course of exchange,

The instrument provides that on default of payment of an instalment, the balance unpaid shall become due.

The amount may be mentioned in a foreign currency as well, provided the rate of conversion of the domestic currency into foreign currency is stated by the drawer or is left to be decided according to the market conditions.

v) *The instalment must be payable either 'to order' or 'to bearer'*

1° Payable to order

A promissory note, bill of exchange or cheque is payable to order if it is expressed to be so payable or if it is expressed to be payable to a particular person and does not contain words which prohibit its transfer or which indicate an intention that it shall not be transferable. For example, if a cheque is drawn as “pay to be transferable”. For example, if a cheque is drawn to Madam Lal” its payment may be made to Madam Lal or any other person as per his order. The cheque can be endorsed, even if it does not contain the words “or order”. But if the cheque is drawn as “pay to Madam Lal only” shows the intention of the drawer to restrict its further transfer. Such a cheque shall be payable to Madam Lal only.

If a negotiable instrument, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option. For example, if a bill of exchange is expressed as ‘pay to the order of Ghanshyam or order’, it is still payable to Ghanshyam or if he so chooses to the person specified by him.

2° Payable to bearer

A promissory note, bill of exchange or cheque may be payable to bearer

If it is expressed to be so payable, or if the only or the last endorsement is an endorsement in blank. This means a cheque payable to ‘to order’ becomes a bearer cheque if it is endorsed in blank.

If the word ‘bearer’ printed on a cheque form is scored off, it does not make the cheque non-transferable or non-negotiable, nor does it render it payable only to the payee. Such a cheque remains payable to order and is negotiable as such.

vi) *The payee must be a certain person*

The person to whom payment of the instrument is to be made must be certain. The payee is considered as certain person for this purpose even if he is misnamed or designated by description only. The term ‘person’ includes, besides individuals, bodies corporate, local authorities, societies and associations of persons, etc., and cheques may be drawn payable to the Registrar, principal, director, secretary etc., of these institutions.

vii) *The payee may be more than one person*

A negotiable instrument may be made payable to two or more payees jointly or it may be made payable in the alternative to one of two or more or one of some of several payees. For example, a cheque may be payable to;

Ram and Hari

Or

Ram or Hari

In both these cases, it is payable to a certain person.

*viii) The time of payment*

A cheque is always payable on demand, though words to this effect are not mentioned therein. A bill may be payable at sight or after a period of time specified therein. A promissory note or a bill of exchange in which no time for payment is specified is payable on demand. If a bill is payable after a certain period it must be accepted by a drawee. But no such acceptance is necessary in case of a cheque. If a cheque is a post-dated cheque, it does not constitute an order to the banker till the date specified therein approaches. Banks do not make payment of such cheques before the date given in the cheque.

*ix) Signature of the drawer or promissor*

A negotiable instrument is valid only if it bears the signature of the drawer/promissor. In case of a cheque, the signature of the drawer must tally with his specimen signature given to the banker at the time of opening his account.

*x) Delivery of the instrument is essential*

A promissory note, bill of exchange and cheque is a negotiable instrument. The making, acceptance or endorsement of such an instrument is completed by delivery. This means that a negotiable instrument is deemed to have been drawn, when it is written by the person concerned and delivered to the other party to whom it is meant. Delivery may be either actual or constructive.

*xi) Stamping of promissory notes and bills of exchange is necessary*

Some systems require that the promissory note and the bills of exchange must be stamped. This is not required in case of a cheque. The value of stamp depends upon the value of the note or the bill and whether it is payable on demand or at a future date. A note or bill without stamp cannot be admitted in evidence. It may be stamped either before or at the time of its execution.

1° Transferability and negotiability

Transferability is a characteristic of any property. It also gives a right to the possessor of the property to transfer it to anyone with or without consideration, provided he can establish that he is a true owner and in that capacity he has exercised his right of transfer.

Negotiability is a characteristic of any property. It gives a right to the possessor of the property to transfer it to any body but for consideration. Here the negotiator is not required to establish his credentials. It is the negotiator who has to accept the property in good faith.

2° Differences between Transferability and negotiability

Transferability and negotiability are not the same. They convey different meanings. The followings are the differences between the two:

1 - Transferability is the part of negotiability. Negotiation without transfer either by simple delivery or by endorsement stands meaningless. Transferability, as a characteristic, is complete in itself. It is only exchange of hand, which is an act and which needs performance.

2 - Negotiation is an expression of faith and confidence. Transfer, on the other hand, is a process.

3 - Negotiation parts faith in other rights and thus even if the owner is not having a good title it does not affect the rights and title of the negotiation. Transfer is exchange of hands. Here possession is transferred. Transferability rights need a lawful and unchallengeable title.

4- 'Not Negotiable' marked documents lose all essential features of negotiability. 'Not transferable' marked documents can also be transferred to the person whose name is mentioned therein.

## **SECTION 2. Distinct characteristics of negotiable instruments**

In most cases an instrument may be negotiable either by Statute or by usage.

Five characteristics are to be considered as necessary to constitute a negotiable instrument, instrument of payment or credit.

### **1. Negotiability**

It refers to the ability to transfer entitlements under the negotiable instrument from one person to another in such a manner to constitute from the transferor a holder of the negotiable instrument. Negotiability, therefore, allows for more simplified and easy circulation. It has the advantage of security in the sense that the rights of the holder are not dependent on the transferor once the instrument is negotiated. As we examine specific types of negotiable instruments, we will discover that the law distinguishes between various types of negotiability. For example, a bill of exchange payable to bearer is negotiated by mere delivery, whereas a bill of exchange payable to order is negotiated by endorsement of the holder of the bill and completed by delivery.

### **2. Monetary value**

Negotiable instruments contain a continued commitment by the issuer to pay the stipulated sum of money. A simple statement of an object of a specified monetary value is not enough to render a document a negotiable instrument.

### **3. Commitment to pay**

Negotiable instruments contain a continued commitment by the issuer to pay the stipulated sum of money. A simple transfer of credit payable to holder is not enough if the issuer does not guarantee payment

#### **4. Short-term title**

In order to facilitate a simple exchange of title, the credit stipulated in the negotiable instrument must cover an easily obtainable and transferable payment. Long-term titles seem to complicate such an easy transfer. There are however, no hard and fast rules as to what constitutes a short-term title. The fact that the bank sets dates within which a cheque is to be cashed, is not to be taken as a measurement criterion in this regard.

#### **5. Usage and collection of title in payment**

One of the consequences of negotiability is that negotiable instruments can be used and explained in a similar to that of ordinary money. The title to some or most negotiable instruments include most of the foregoing requirements. The prime example is that of a bill of exchange (*lettre de change*) which may be defined as “an unconditional order in writing, addressed by one person to another, signed by the person giving it, “requiring the person to whom it is addressed to pay on demand or at fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.”

Another example of a negotiable instrument is that of a promissory note (*billet à ordre*) which is a written document by virtue of which the drawer undertakes the obligation (promises) to pay to the order of the beneficiary a sum of money at a prescribed date. The same qualifications can be found in a warrant which is a promissory note guaranteed by one person on the merchandises deposited with a store.

There are number of possibilities as to the types of financial documents which might qualify as negotiable instruments. To distinguish which is clearly part of these instruments, the three main characteristics, identified earlier, must be maintained: negotiability, a prescribed sum, and a commitment to pay.

The cheque, not recognized as a negotiable instrument under Rwandan law, resembles a bill of exchange in a number of ways, as we will notice it in the following examination of the rule governing cheques. The main distinguishing characteristic of the cheque is that it is drawn on a bank and payable on order. The other distinction between the cheque and a bill of exchange relates to the type of law governing both. Unlike most jurisdictions, Rwandan legislature has opted for two separate laws to govern cheques and negotiable instruments. The doctrine, however, does not seem to maintain such a distinction

It's also important to note that the followings are presumptions related to negotiable instruments:

##### **a) Consideration**

Every negotiable instrument shall be presumed to have been made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred was accepted, endorsed or transferred for consideration. In *Shanmuga Rajeswara Sethupathi versus Chidamabaram Chettiar 1938 (India)*, it was held that where a promissory note had been given, consideration should be presumed and that the burden of proving that no consideration passed was upon the maker of the promissory note.

**b) Date**

Every negotiable instrument bearing a date is presumed to have been made or drawn on such date.

**c) Time of acceptance**

Every accepted bill of exchange is presumed to have been accepted within a reasonable time after its date and before its maturity.

**d) Time of transfer**

Every transfer of negotiable instrument is taken to have been made before its maturity.

**e) Order of endorsement**

The endorsements appearing upon a negotiable instrument are presumed to have been made in the order in which they appear thereon.

**f) Stamp**

It is presumed that a lost promissory note, bill of exchange or cheque was duly stamped.

**g) Holder in due course**

It is again presumed that a holder of a negotiable instrument is holder in due course. However, where the instrument has been obtained from its lawful owner or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

**6. Distinction between promissory note and bill of exchange**

Promissory note differs from a bill of exchange in the following respects:

Bill of Exchange	Promissory Note	Cheque
There are three parties the drawer, the drawee and the payee- although only one and the same person may fill two of these capacities.	There are only two parties the maker (debtor) and the payee (creditor)	Three parties (the drawer, the drawee which is a bank and the beneficiary)
It contains an unconditional order to the drawee to pay according to the drawer's	A note contains an unconditional promise by the maker to pay the payee.	Unconditional order to pay the beneficiary

directions.		
The drawee or his agent must accept a bill payable after sight before it is presented for payment.	No prior acceptance is needed	Not only is Acceptance is not needed, but also the cheque is not entitled to days of grace
The liability of the drawer is secondary and conditional upon non-payment by the drawee.	The liability of the maker or drawer is primary and absolute.	The liability of the maker or drawer is primary and absolute.
Notice of dishonour must be given by the holder to the drawer and the immediate endorsers to hold them liable thereon.	No notice of dishonour need be given	Notice of dishonour is not necessary. The parties thereon remain liable, even if no notice of dishonour is given.
The maker or drawer does not stand in immediate relation with the acceptor or drawee.	The maker of the note stands in immediate relation with the payee	The maker or drawer does not always stand in immediate relation with the drawee.

## **A. DEFINITION OF CERTIFIED CHEQUE**

A cheque is a certified title by which a person called a drawer calls upon a banker (drawee) or any other institution authorized to carry out banking activities to pay to another person called a beneficiary (payee), a specified sum of money either to the beneficiary, to his order, or to bearer. Note that the cheque is always payable on demand or upon presentation.

A drawer is the person who draws/creates the cheque and is a creditor of the drawee. The drawee is the person on whom the cheque is drawn, i.e., the one supposed to effect payment. The payee is the person for whose benefit the cheque is drawn, that is why he is regarded as the beneficiary.

The relationship between the two is contractual in nature. It is a debtor and creditor relationship whereby the creditor who is the drawer (customer) is obliged to deposit money with his banker (drawee) who has the duty to repay the money upon demand by virtue of cheques drawn by the customer. Therefore, the drawer must fulfil his obligation so as to make it obligatory for the drawee to pay when asked to do so.

## **B. CONTENTS OF THE CHEQUE**

There are six requisites (important elements) to be present when one is creating a cheque. The cheque must contain the following: the word "cheque" in both text and title, an order to pay a specified sum of money, the person to be paid (payee) place of payment, date and place of drawing and lastly the signature of the drawer.

The fact that the word cheque must be evident in both text and title implies that if a bill contains all the requirements for a cheque but is not headed "cheque" then the bill is not a cheque and vice versa. Note that the title refers to the heading while the text refers to the content of the cheque.

Although one of the requisites of a cheque is that the payee must be mentioned, this is not always the case given that the same law recognizes bearer cheques.

The essence of date of drawing seems to be to assist in the computation of time within which the cheque must be presented for payment which is 60 days for cheques drawn in Rwanda and 120 days for cheques drawn abroad payable in Rwanda.

The drawer's signature is very important. A drawer becomes liable when he signs and delivers the cheques. However, the signature may be replaced by an authentic declaration certifying the willingness and capacity of the drawer. For a drawer to incur liability on the cheque, he must have the capacity to contract.

## **C. REQUIREMENTS FOR CREATION OF A CHEQUE**

There are two important requirements of with regards to requirements of substance.

-The first is the existence of disposable funds and the second is the existence of a drawee. Who disposes of the funds upon the drawers order.

Before drawing a cheque, the drawer must ensure that he has enough funds in his account except where there is an agreed overdraft. Rwandan law does not recognize post-dated cheques. As such, the moment a cheque is drawn, the payee has the right to present it for payment at any time provided the time period for presentation for payment has not elapsed.

-Second, the drawee is always a banker or an institution authorised to handle operations involving cheques and who must be designated on the cheque and his duty is to honour the customer's cheque up to the amount of his credit balance or agreed overdraft if any. Should the bank dishonour the cheque, the holder cannot sue the drawee (bank) on the cheque, since there is no privity of contract (no contractual link) between them. However, he may sue the drawer or subsequent endorsers.

Note that a cheque drawn on an institution other than one authorized to carry out banking services is an invalid cheque.

## **D. FORMS OF CHEQUES**

Three types of cheques are recognized under Rwandan law. The determination of the form depends on how the beneficiary is indicated in the cheque. A drawn to named person with the clause "to the order", to a name.

**a) A cheque payable to named person with or without clause "to order"**

This kind of cheque may take three different forms.

**a) It may be "pay x or order", "pay x", or "pay to the order of x".** This implies that x may negotiate the cheque to someone else by endorsement.

This type of cheque has advantages over the others. Compared to a cheque payable to a named person with clause "not to order" it can be transferred by simple endorsement and delivery, whereas the other one cannot be transferred. It is at the same time safer than the bearer cheque. Anyone in possession of a bearer cheque holds a good title and has the power to negotiate it. As regards the order cheque, only the named person has a good title and is the only one who can endorse it. Therefore, in case of loss or theft, the true holder of an order cheque holds a better title.

**b) Cheque payable to a named person with clause "not to order"**

This kind of cheque can only be presented for payment by the person whose name is indicated on the cheque. The holder of such a cheque cannot transfer it because it is non-negotiable in form. However this cheque may be endorsed by a drawee and this is only done in case the drawee owns several establishments such that he draws a cheque to one and endorses it to another.

The advantage of this cheque lies in the fact that whereas a cheque payable to a named person may be stolen since it is transferable, this kind of cheque cannot be of any use to someone who may steal it or one who may find it in case of loss because the drawee does not verify the signature but the identity of the holder.

**c) Cheque drawn payable to Bearer**

This kind of cheque is either drawn with an indication "payable to bearer" or it may be left blank. The holder of such a cheque may either cash it or negotiate it to someone else. Negotiation may be by simply transferring (simple delivery) the cheque to another person in which case it remains a bearer cheque or it may indicate the name of the person by endorsement, which changes the cheque to an order cheque.

**E. GUARANTOR OF PAYMENT**

The drawer is the guarantor of payment. A guarantor is a person who promises to pay for something if the person who should pay does not. By virtue of drawing and issuing the cheque the drawer becomes firstly liable as guarantor of payment. However, there are also secondary guarantors of payment who are endorsers.

**F. NEGOTIABLE CHARACTER OF A CHEQUE**

Negotiation is the transfer of a negotiable instrument (cheque) in such a form that the transferee becomes a holder. A holder is a person in possession of a cheque that is properly endorsed to him, i.e., meets all the legal requirements for endorsement.

Note that only a cheque payable to order or to bearer is negotiable. While an order cheque may be negotiable by endorsement, a bearer cheque may be negotiated by simple delivery.

Endorsement may designate the transferee. When it does not designate the transferee, it is referred to as endorsement in blank.

Endorsement may be made on the back of a cheque or on a separate sheet attached to the cheque (this is usually done where there are several endorsements on the back of the cheque and there is no space left for further endorsements).

The law provides that the cheque is payable upon presentation or demand. A cheque presented for payment before the date of issue is payable on the day of presentation. In other words, the date on which the cheque is presented is deemed to be the date of payment. It follows that from the date the cheque is issued it may be presented for payment immediately or at a future date regardless of whether it is post-dated, undated or antedated.

For a cheque issued and payable in Rwanda, presentation for payment should be done within 60 days while cheques issued abroad but payable in Rwanda should be presented within 120 days. After the expiry of this period, if the cheque is presented for payment and it is dishonoured, the bearer of the cheque may not have recourse against the drawer on the cheque, although he may sue him on the original debt.

The amount specified on the cheque must always be indicated in both letters and figures and in case of any discrepancy between the two, the amount in letters shall be presumed to be payable. In practice cheques with differing amounts in letters and figures are returned unpaid.

Furthermore, where there are several amounts denoted on the cheque, the lesser amount shall be the one payable. The rationale being to forestall alterations that may be made on the cheque before, if one is ever going to alter the amount specified on the cheque, he/she would have to put an amount that is greater than the original one. The provision is to protect the drawer.

It is the duty of the banker who pays an endorsed cheque to examine the regularity of the endorsement, but not to establish that the signatures are correct. The drawee is also required to verify the dates of payment to ascertain if the time allowed for presentation for payment has not expired, and if it has expired, if no revocation or opposition to payment has been made.

In case of a cheque drawn to bearer, without any endorsements, the drawee will examine the drawer's signature and the amount specified to confirm that there are no alterations or forgeries done. With respect to a cheque payable to named person, the drawee will verify the identity of the payee in addition to what has been mentioned above.

Crossing is a special restriction on the payment of the cheque, which is usually effected by drawing two parallel lines across the cheque. The implication is that the cheque must not be paid across the counter.

This special restriction on payment takes two forms, i.e., there are two kinds of crossing: general crossing and special crossing. It is general crossing when two parallel lines are drawn

across the cheque with nothing mentioned. General crossing implies the cheque in question can only be paid through a bank account and not across the counter. Special crossing is when a specific bank is named between the parallel lines. The implication is that the cheque must be paid to the banker named in the crossing.

General and special crossing give additional protection to the holder in case of theft, for the thief may not have a bank account and even if he has, the time involved in clearing the cheque enable the drawer to stop payment. In addition it is easier to trace the thief.

A general crossing may be transformed into a special crossing but the converse does not apply. It should be noted that if the banker fails to observe the crossing, the banker is liable to the drawer for any loss suffered by the drawer.

Default of payment may be defined as absence of payment implying the cheque is not paid upon presentation and yet it fulfils all the legal requirements and is presented within the period allowed by law. Usually there is default of payment when the drawer does not have sufficient funds on his account. Sometimes, there is wrongful dishonour and this is when the drawee by mistake refuses to pay a cheque drawn on him by his customer when the funds are available.

The effect of default of payment is that the holder may seek redress against the drawer and subsequent endorsers either jointly or severally. The holder's redress may be one of protest and attachment or seizure of moveable properties.

A protest is a formal statement in writing made at the request of a holder of a cheque, in which it is declared that the cheque was on a certain day presented for payment, and that such payment was refused, and stating the reasons, if any, given for such refusal. For this right (right of protest) to accrue to the bearer of an unpaid cheque, the bearer must have contested non payment in one of three ways: by notarial act (i.e. the statement in writing be made under the hand and seal of a notary (protest), Declaration by the drawee (banker) dated and written on the cheque indicating date of presentation, Declaration by a clearing-house (NBR) stating that the cheque was presented with the time allowed by law and that it was returned unpaid.

Note that a protest is made on the cheque itself or on a separate sheet attached to the cheque and must be delivered to the parties concerned. The rationale is to give either the drawer or drawee time to cure the mistake as the case may be.

The protest is required to be made within the time for presentation of the cheque for payment. However if presentation is made on the last day within this period, the time is extended to the next working day. However, if there is delay in making a protest, the time may be extended by the courts provided the plaintiff could establish exceptional circumstances.

As regards the place where the protest is to be made, the place shall be the location of the bank where the cheque is payable.

The holder of an unpaid cheque is required to give notice of default of payment to the drawer and/or subsequent endorsers within four working days from the date the protest or declaration was (re-)established. Similarly, the drawer or endorser who has been given notice is required to notify the rest or the next endorser or drawer within two working days from the date he was notified.

Conservatory attachment is the act or process of seizing a person's property by virtue of a judicial (court) order, and bringing the same into the custody of the court, for the purpose of securing a debt or claim of the creditor in the event where judgment is rendered. This act will prevent the owner from disposing of the property in anticipation of its judicial sale.

The unpaid bearer may attach the property (moveable) of the drawer and endorsers by obtaining an order of the court of first instance of the place where the property is located. Note that this remedy is available only to the bearer of an unpaid cheque who has protested default of payment. However, the property can be sold after a judgment in execution has been passed authoring the judicial sale of the property. The bearer of an unpaid cheque who seizes the property of the drawer or endorsers acquires a privilege over other creditors of the owner.

While the drawer and the endorsers are individually and collectively liable to the bearer of an unpaid cheque, the banker is liable to the drawer in case of wrongful dishonour.

The bearer may claim from the person he has sought redress: the amount specified in the cheque, interest from the date of presentation calculated at 6%, fees of protest or declaration and the expenses of giving notices and a commission of 1/3 of the original sum, in case it is justified, in the absence of any agreement to the contrary.

Opposition of payment implies stopping payment. It is usually done by the drawer of the cheque informing the drawee that the cheque in question should not be paid upon presentation. Opposition is required to be made by registered letter.

Opposition can be allowed if the cheque is lost, if its title is obtained fraudulently, or if the bearer has been declared bankrupt or incapacitated.

When a drawer bank does certify a cheque, it substitutes its undertaking to pay the cheque and becomes primarily liable for payment of the cheque. At the time a cheque is certified, the bank usually debits the customer's account for the amount of the bank. It also adds its signature to the cheque to show that it has accepted primary liability for paying it. The bank's signature must appear on the cheque.

The bearer of an unpaid cheque has a time of six (6) months in which to institute an action in court against the drawer and endorsers. Computation of time starts from the date of expiry of the time allowed for the presentation of the cheque for payment. Actions by persons obliged by the cheque against one another, that is, drawers and endorsers are also valid within six months.

Issuing cheque without sufficient funds to cover the cheque constitutes a crime punishable under Art. 435 PC by imprisonment of 3 months to 5 years and or a fine of up to 300.000 Frw.

## ***STUDY UNIT 12. THE LAW OF PROPERTY***

Property law or the law of property is the area of law concerned with the study of the legal relations between persons with respect to things. The things in question are, as economists convince us, scarce resources, for where things are in abundance there is no need for rules to regulate for their access and control. The law of property comprises the rules as to how persons can acquire, dispose of and lose rights to such things, various types of rights which may be acquired, the way in which such rights can be held, and how far the rights of access and control of a particular thing are against third parties.

### **SECTION 1. Definition of property**

What is Property? How should we identify and describe the ownership of property? If someone owns property, what is the range of things he may do with it? Possess it? Use it?

Sell it? Destroy it? What limits does the law place upon a person's enjoyment of property in order to protect the public interest catered for by civil code Book II. How is this right (ownership) compared with other legal rights such as contract rights, civil rights to bring an action in tort-which are covered by Rwandan civil code Book III and others?

Consider, for example, a type of property important to most of us. Notice a car that Mr. Mugabo drives. If we describe him as the "owner", does that tell us everything we may want to know about his legal rights with respect to that car? Who else may have a claim to that car? Perhaps his parents loaned or gave it to him, or perhaps he bought it from an auto dealer. If a bank loaned Mr. Mugabo some money to finance his purchase of the car, does that bank own an interest in a car? If Mr Mugabo lends his car to his friend for a week while he is on vacation or on a mission outside the country, does his friend have a property right in the car? If Mugabo is married, does his wife have any legal right with respect to the car? To what extent may the state, on behalf of Mr. Mugabo's fellow citizens, regulate Mugabo's use of the car? Should we take it as an infringement on Mr. Mugabo's property rights? Such are the questions to be answered by this part of the course - Property law.

In the popular lay sense, the term "property" usually refers to tangible things. A person's property, we say, consists for example; his car, furniture, clothing, tools, and the like. Land ownership and intangible property, such as bank deposits, stocks, and bonds are also often imagined as ownership of things. In the study of law, the term "property" often is used in a legal sense different from the popular image as referring to a thing.

Different authors have attempted to define what the term "property" means, and among them, we note a few.

To begin with, the two French authors<sup>11</sup> in trying to figure out what the term "bien" means. Note that, the term has at least two meanings; the moral and legal meaning. From the moral point of view, the term refers to what is appreciated - good as opposed to bad. The second-legal meaning is **anything useful that satisfies the material needs of man or simply a good.**

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<sup>11</sup> P. Malaurie et L. Aynès, *Les Biens*, 2<sup>e</sup> éd., Defrénois-Éditions juridiques associées, Paris, 2005, p.1.

Sir William Blackstone, an eighteenth-century English barrister in his commentaries as a guide for laymen wrote; “The third absolute right, inherent in every English man, is that property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land... There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any individual in the universe.”<sup>12</sup>

These words of Sir William Blackstone leads us to the Latin Maxims which shows the dismemberment of property rights into; *Usus* (use), *Fructus* (Enjoyment) and *Abusus* (disposal) which we shall talk about later in this course. He also brings a relationship to our article 14 of Rwandan Civil Code Book II, which states that: “ownership is the right to dispose of a thing in an absolute and exclusive manner, except for the restrictions that result from the law, or from the real rights belonging to others.” This, we shall talk about later in this course.

The American Law Institute in 1936 in its Restatement of what property is, notes; “The word “property” is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations”.<sup>13</sup>

The word “property” in this restatement is used to denote legal relations between persons with respect to a thing. The thing may be an object having a physical existence or it may be any kind of an intangible<sup>14</sup> nature such as a patent right or a debt that your debtor owes you. This definition brings us to something great in our course of property law - the legal relationship of this thing (property) with a person. This is the centre of our interest.

Nicole Hendeber-Bouvier, a French author of the book “*Droit Civil et Commercial*” defines “property” as a set of rights and obligations that a person has over a thing. These rights and obligations must be of Economic value. They consist of all the property which is represented at the same time by the things and rights that we have over those things.<sup>15</sup>

Property in its most technical legal sense is an intangible concept, signifying the rights, privileges, and powers that the law recognizes as vested in an individual in relation to things tangible or intangible, as distinguished from the things themselves. It includes every interest any one may have in anything that may be the subject of ownership, including the right to freely possess, use enjoy, and dispose of the same.<sup>16</sup> The sum of all these proprietary rights under English law for example is distinguished as “title’ to property. In its popular usage, the term “property” refers to objects that may be the subject of ownership - both physical objects capable of being reduced to **possession** (infra) and such intangible items as **goodwill** (*the positive impression that people may be having in a business for example*).

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<sup>12</sup> J.C Smith et. al., Property-case and Materials, Aspen publishers, New York, 2004 Pg 2.

<sup>13</sup> Idem

<sup>14</sup> Tangible or intangible/corporeal or incorporeal property will be discussed later in this course.

<sup>15</sup> N.B. Huedeber, Droit civil et commercial, 5<sup>e</sup> edit, Paris, Presse Universitaire de France, 2002, Pg.1113.

<sup>16</sup> Micheal. P. Litka , « Interests in real property », Business Law, (1970, Harcourt, Brace& World Inc.), p.640

Proprietary rights are exclusive rights<sup>17</sup> of the individual owner and are protected against infringement by others. In the last analysis, these rights represent a relationship between the owner and other individuals with respect to objects that are capable of being owned.

Third parties must be able to know what rights the owner or the usufructuary have on that property.

To summarize all the above definitions in a metaphoric manner, property today is often taken to be like a “bundle of rights” or, more vividly, a “bundle of sticks” with each stick representing some separable aspect of the total - which total is the property. This metaphor, drawing on sources like the Restatement and that of Sir William Blackstone, emphasizes that property is not an all-or-nothing proposition, but a number of different aspects of control which may be examined separately. Complete ownership of a property means that one person has all the sticks (rights) with respect to a thing. He may open the bundle and divide the sticks (rights), resulting in shared ownership with several people each having some sticks (rights).<sup>18</sup>

So, property is an aggregate of rights that a person has against a thing tangible or intangible, that are protected by the state through its laws. This thing upon which a person exercises these rights must be of economic value and subject to acquisition.

### **1. Property and Patrimony**

Whereas property has been exhaustively defined, at times it is confused with another interesting term - "Patrimony".

Patrimony is wider than Property. Property itself is a subset of Patrimony. From the moment a child is born, he/she owns the patrimony even though he/she owns no property. The patrimony owned by this child is based on the property in his/her being a person.

John Locke, an English philosopher in his writing on the two treatise of Government wrote "though the Earth and all inferior creatures be common to all men, yet every man has a property in his own person. This, nobody has any right to but himself".... Locke says that "every man has a property in his own person" , from which it immediately follows that " the labour of his body, and the work of his hands .....are properly his."

If it makes sense to say that one owns his/her body, then, on the embodiment theory of personhood, the body is quintessentially a personal property because it is literally constitutive of one's personhood. If the body is property, then objectively, it is property for personhood. This line of thinking leads to a property theory for the tort used in common law of assault and battery. So the interference with my body is an interference with my personal property.

The idea of property in one's body presents some interesting paradoxes. In some cases, bodily parts can become fungible commodities (to be talked about in details later), just as other personal property can become fungible with a change in its relationship with the owner : For example, Blood can be withdrawn and used in transfusion; hair can be cut off and used by wigmakers, body organs like the kidney can be transplanted.

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<sup>17</sup> Art. 1 of the Rwandan Civil code book 2.

On the other hand, bodily parts may be too "personal" to be property at all. We have an intuition that property necessarily refers to something in the outside world, separate from oneself. Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line, still the idea of property seems to require some perceptible boundary, at least in so far as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system.

Patrimony is composed of the present property (rights) and the future, something important to distinguish it from the definition of property. Article 1 of the decree law regarding hypothecs<sup>19</sup> in Rwanda provides that "All the property of a debtor, present and to come, constitute the common pledge of his creditors..."

This means that, the pledge is on his patrimony which is the present property and the property to be acquired later. On the other hand, article 1 of the civil Code Book II categorizes the property as "property or real rights are of three kinds: the rights to claim or obligation, the real rights and the intellectual rights".

To say that something is "property" only begins the analysis. The next question is which rights accompany ownership of this property. At one time, property was considered as a thing subject to the complete control of its owner. This pushes away the notion of personhood in the composition of property. More recently, property has been, as already given, defined as a bundle of sticks – a collection of individual rights which, in certain combinations, constitute property. But these rights are talked of in relation to a person. They are rights entitled to this person over a thing. Nonetheless, even before that thing to which this person is entitled some rights, this person has the patrimony.

To a lawyer, patrimony is quite distinct from property which forms part of the patrimony. Patrimony covers also the "property to be" that is, the property that will in future, belong to the person.

Hence, the patrimony, which is considered to be a combination of rights and obligations, is inseparably linked to the personality. This means that it forms part of the other two elements: pecuniary and the juridical universality. From this come some other outcomes. On one hand, the patrimony of a person, understood as a set, responding to the obligations upon this person, his creditors can even seize his property that was acquired after the birth of their claim (art. 1 of the decree law on hypothecs). On the other hand, the idea of universality functions in what we call "real subrogation". This means that the different property constituting the universality can change but, the universality remains.

The new property will replace the old one, and it will be subjected to the same legal regime as the one which it replaced. Thus the real subrogation guarantees the juridical stability situation. This is why the patrimony of a debtor constitutes the general pledge of his creditors. Since the Civil Code does not explicitly give what the term patrimony is and what it entails, some authors (e.g. Aubrey and Rau both teachers of civil law) are used in a bid to show the link between the patrimony and a person.

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<sup>19</sup> In Roman and Scots law an Hypothec is a Mortgage; in other words, a legal right over a debtor's property that however remains in the debtor's possession

They put forward four principles:

1. Only persons can have patrimony. You cannot think of patrimony without thinking of a person to whom this patrimony is attached.
2. Each person necessarily has patrimony, because he/she is able to have the rights and obligations.
3. The patrimony remains attached to the person as long as his personality is still valid. It cannot therefore be transferred ( *intransmissible entre vifs*). A person can transfer some of the rights which he possesses over something e.g. his rights of ownership of an immovable, but the acquirer acquires the right transferred, not the patrimony.
4. A person cannot have more than one patrimony. Like the personality, patrimony cannot be divided. What is divided or transferred is the right(s).

## **2. Property and things/ Things and Rights**

What are things? This fundamental question is as old as the Earth. It was first put to light by the western philosophy through the Greeks in the 7<sup>th</sup> Century before Jesus Christ. Such a question of what a thing is has a multiple meaning. Things can be objects - a stone, a piece of wood, and others which are important in our daily lives. But what one notices is that all things cannot go as they wish. Some rules will have to be applied to their transfer and ownership. This is based on the economic principle of scarcity, and to some extent, in order to keep law and order/harmony in society.

Things have got a double meaning:

The restricted meaning of a thing is anything that can be acquired, which can be seen (visible), etc., which can be given or transferred from a hand to another. To the extended meaning of a thing, it means everything, transaction; all of which, that surrounds us, the acts, the events and happenings in this world are all things. It is this combination and wider meaning of a thing (often referred to as property) that interests a lawyer.

The law also cannot ignore these two meanings of the term "thing". For example art. 260 of our (Rwandan) civil code Book III stipulates that "we are not only liable for the prejudice caused by our own acts, but also to those which are caused by persons who are under our control, or things which are under our supervision..." Of course, a herdsman, just like the owner of a Cow will be responsible for the damages caused by this Cow. Here, this animal becomes a thing. So a thing is not restricted to be only objects. It can be a house, air, insect; in short a multiple of things as can be in the prairies during the summer season.

Property in Economic terms is something that can be used directly or indirectly for Economic gain for example, for the acquisition of money, or in exchange for another thing. Legally, the term property is a right itself over something. For example, a right over the bicycle that you own, the right you possess to acquire certain things. In short, it means patrimonial rights. However, legislators sometimes use the word "thing" to mean property (e.g. art 12 and 31 *bis* CCB II) which draws a major confusion between the two terms (thing and a property) in our Civil Code.

Article 12 of the Civil Code Book II stipulates that "all "things" ( which can also be replaced by property) without an owner belong to the state in respect of customary rights over them by

the indigenous people, and subject of what will be said later on about the right of occupation". Here, the word "things " can as well be understood as property which does not have the owner (master). So in a word, " things " and " property" in our code are confused and are often used interchangeably.

### **3. Patrimonial and Extra- Patrimonial rights**

A person can have either patrimonial rights over a thing or an extra-patrimonial right over a given situation.

#### **A. PATRIMONIAL RIGHTS**

A number of rights are considered to be patrimonial. These will include the right of ownership or the right to claim like the right of the landlord to claim his rent for the house he owns. Patrimonial rights are always of Economic value and always gauged in terms of money. They have an exchange value: they can be acquired by the new owner mainly through their exchange for other rights. They can be transmitted to inheritors and to the legatees of their owner (or holder): they can be seized by their creditors, they are stricken by prescription whether acquisitive or extinctive one.

Among the patrimonial rights, there are those which are more attached to the person (owner/ holder) than others. This is why, such rights cannot be exercised by the unpaid creditors of their holder when the former (the creditors), by way of protecting their general pledge over the property of their debtor, exercise what is termed as "oblique action".

Art 64 of the Civil Code Book III stipulates that « Creditors can exercise all rights and actions of their debtor, save for those which are exclusively attached to his person». Here we should know that, although these rights are patrimonial in nature, they have either personal or family character that their exercise will call for other considerations of moral order to which only the debtor can know and appreciate their value.

Thus, the creditors cannot use the oblique action to exercise the suppression action or to attack the alimony (*pension alimentaire*) meant for the debtor, or stand in revocation for the donation between spouses.

Although the law is silent, an analogous question is put over the topic of the "Paulian action" which allows creditors to attack by themselves all the fraudulent acts accomplished by their debtor and which prejudice their rights. However, as a solution in such a case, the fraud is a behaviour worse off than a simple negligence to the extent that the moral and personal considerations that justify the exclusion of the oblique action disappears in favour of the need to sanction the act of fraud.

#### **B. EXTRA-PATRIMONIAL RIGHTS**

By considering the direct object of these rights, one can say that they are not of Economic value. For example, the right to acquire natural parenthood to a person, parents' rights over the "person "and property of their child (attributions of the parental authority), the right of an author of a book to decide to publish it or not: we call these extra-patrimonial rights as

opposed to patrimonial ones whose direct object or reason is to ensure the protection of the pecuniary or monetary value and which have, within themselves, the monetary value.

Family rights (e.g. parental authority) are extra-patrimonial rights. In all legal systems, family life (rights) will ensure the satisfaction of sexual needs, to oversee the duty to procreate, the education of the children and to ensure that the life together as spouses flourishes. Each person in this family life enjoys and is a creditor to that right, but from which, no economic gain is waited for.

Contrarily to the patrimonial rights, extra-patrimonial rights are not seized and are not transmissible to the heirs or legatees of their holder, creditors can benefit from them and such rights are imprescriptible, whether acquisitive or extinctive prescription.

## **SECTION 2. Real rights**

Property rights or real rights are exercised by an individual over a thing, movable or immovable. The bearer of a real right exercises it directly over a thing without interference of anybody on the thing on which he has custody. They are different from the Obligations or rights which are also referred to as personal rights. An obligation may be defined as a legal bond between two persons by which one is bound to the other to perform an act or to abstain from doing an act, or to create a right over something or to transfer its ownership. A personal right is thus the right that a person named a creditor has against another person named debtor by which the former (creditor) may compel the latter (debtor) to do, to refrain from doing or to give something. Among the real rights recognised by the Rwandan Civil Code Book 2, one can mention: Ownership, usufruct, servitudes, superficies, emphyteusis, etc.

### **1. Ownership**

#### **A. INTRODUCTION AND DEFINITION**

Definition: « Ownership is the right of disposing of things in the absolute and exclusive manner, subject to any restriction of the law and the real rights belonging to other persons» (art.14 CCBI). The same article also provides that «Restrictions of the right of ownership resulting from the relationship between neighbours are established in the title concerning charges on Land».

The first paragraph of this article corresponds to art.544 of the French code which provides that «Ownership is the right to enjoy and dispose of things in an exclusive and absolute manner provided that it does not violate the established rules and regulation».

After the abolition of the Feudal privileges by the French Revolution of 1789 and after the consequent declaration of the human and citizens rights, ownership was acknowledged as an absolute inviolable and a sacred right. None can be deprived of this right save only when the public necessity legally constituted so requires, and subject to a condition of prior and fair indemnification or compensation.

Since then to date, the concept of the right of ownership is considered as a total and an exclusive right strictly reserved to the usage and enjoyment of individuals. Rwandan

constitution recognizes the ownership right where it says «Every person has a right, to private property, whether personal or owned in association with others» (Art. 29 of Rwandan constitution, J.O No. special of 04/06/03).

The same article also insists on the inviolability of the right of ownership by saying «Private» property, whether individually or collectively owned, is inviolable.

The right to property may not be interfered with except in public interest, in circumstances and procedures determined by law and subject to fair and prior compensation» art.19 (2) and (3) respectively.

## **B. THE HISTORY OF THE OWNERSHIP RIGHT**

Individual ownership has for centuries been the basis for the Economic systems and policies for all civilized peoples of the world. In the primitive societies however, only moveable objects meant for personal use such as clothing, arms, domestic utensils, ornaments, etc. were the ones reserved for individual ownership. Land belonged to the whole tribe, family or briefly, belonged to no-one in particular.

Such collective ownership of property is self-explanatory since, the only way of life was by hunting, fishing and collecting fruits from natural forests. This required no individual ownership of land or waters as it would as a consequence reduce your chances of extended hunting, fishing and fruit collecting. Families or tribes could however, restrict their hunting, fishing or fruits collecting but no individual in isolation from others could do it.

Even when life transformed into that of cultivating and rearing domestic animals, individual ownership was not so sudden. There was collective farming and collective rearing of animals in divisions of at least families. Little by little, constant cultivations by the same family on the same land naturally turned such a land to the family land and later, to be owned individually.

To the Romans, it started during the reign of king NUMA (715-673 BCE) who introduced the temporary sharing of land by individuals to cultivate it and enjoy the fruits from it, but as soon as the harvesting was over, the land turned to collective ownership and awaited for redistribution/sharing for the next season. Slowly by slowly, land which was given to an individual could be cultivated by the same individual season after season, and consequently built a house on the same land to facilitate his works on that land. From this, individual ownership of land was reached, for which the *Pater familias* was responsible. So the present day individual ownership of property descends directly from the *dominium ex jure quiritium* organized by law referred to as the *12 tables*.

That dominium conferred to the one having this land, invested in him an exclusive, sovereign and perpetual right over that property with the three elements; *jus utendi*, *fruendi*, and *abutendi*.

### **C. CHARACTERISTICS OF THE RIGHT OF OWNERSHIP**

The right of ownership is an absolute right:

- It is exclusive in a sense that only the owner exercises his/her right over the property (thing) save for usufruct and servitudes
- It is individual or personal in that only the ownership has the right. However, there are some cases of collective ownership such as in successions or in co-ownerships (also matrimonial regime under common property, or community of acquired property after marriage).
- It is a right that gives freedom to the owner to use his/her property in any way he/she feels fitting. But in this case, case law has developed some limitations;
- The right of ownership is perpetual in that it lasts as long as the property upon which this right is exercised still exists. The right to ownership cannot be lost by the mere non use of the property. However, the owner who does not use his/her property may lose the ownership right to a third party who possesses it or who occupies it by the mere fact of acquisitive prescription (to be talked about later on possession).

### **D. ABUSE OF THE RIGHT**

The owner is not allowed to use his/her property with an intention of damaging or injuring the neighbours. Where this is established, the court will rule for the payment of damages to the neighbour equivalent to the prejudice caused, as well as the civil interests.

For example, 1. Raising or erecting a wall of 3 metres high to hide the sight of the neighbour's house. 2. Letting the household discharges, e.g. foul water etc., into your neighbour's compound.

### **E. PREROGATIVES OF THE OWNERSHIP RIGHT**

Ownership right is the most complete real right one can talk about because it is the only one which accords to its owner all the three prerogatives; ie *Usus*, *Fructus* and *Abusus*. Art.1 of the civil code Book II makes an introduction of the concept of ownership and the related rights such as superficiary, emphyteusis, and servitude – *see below*

The same article (art.1CCBII) also mentions the dismemberment of this right of ownership where it talks of the right to use and habitation as well as the right to usufruct.

In principle, the full owner of a property must be having all the three mentioned sub rights which compose the ownership right (*Usus*, *Abusus* and *Fructus*).

#### **1. *Usus* -The right to use**

As already seen from above (as per the provisions of art.1 (2) the right to use is a real right. A person is free to use his property e.g. a house, by occupying it or a farm by cultivating it, or any kind of use of your property.

Negatively, in a sense, though, some authors have asserted that this right also includes the right of not using your property; the right not to occupy your house, the right not to consume the goods that you have, the right not to drive your car, and others.

Note: whether to use or not to use your property in the way that is convenient to you must go hand in hand with the observation of the limitations provided by the Law.

Such limitations to this prerogative include those established to meet the interests of good neighbourliness like the legal servitudes (e.g. a charge imposed on an immovable by the law), limitations concerning the sight of your neighbours, the paths, the plantations, etc.

Other limitations include those which are there for the general interests as in

- urbanization - construction licences, land development plans,, protection of Memorials or historic sites;
- Hygiene and sanitation rules - stopping people from rearing animals in towns and cities, disposal of waste etc.);
- Agricultural policy of the Ministry of Agriculture and Animal Resources regarding how a given type of land will be used;
- Expropriation due to the public utility of your property (e.g. Land for the construction of a road or a public school or market).

Such limitations apply to or affect all the prerogatives of the right of ownership.

## 2. ***Fructus***- Right to enjoy fruits

The right to enjoy fruits from your property or from the property on which you exercise the real right. *Here fruit is a general term and not solely agricultural produce, although the legal term grew from this base.*

This is the right of harvesting all the fruits that are given by that property. From this, a distinction should be made between fruits that are harvested or acquired periodically without changing the state or substance of the thing (property), and the products, the “harvesting” of which do transform the property such as in the case of mining stones from a quarry to be used in road construction or mining cassiterite to make tin where the property can be destroyed.

Fruits have been divided into; Natural fruits like those harvested from Natural trees or even timber from those trees: civil fruits such as rent from a real property e.g. a house or land, interest (income) from the money saved in a bank, etc.; and then, there are “industrial” fruits which are mostly from the works of man (man’s labour) such as the agricultural produce or any other produce that is not of a regular basis and which diminishes totally **or periodically**.

## 3. ***Abusus*** - Right to dispose of your property

The right to dispose of your property can either be physical or legal. The physical disposition of property can be for example by deciding to destroy or demolish your house when you want to use the parcel on which it is built for another purpose. The legal disposition on the other hand, is where you decide for partial or full alienation of the right on your property for example by allowing other people to use your land or house through e.g. donation or through a sale contract.

It (Abusus) should not be confused with the usus - right to use. Abusus involves the transfer of right of ownership to another person whereas in usus, the ownership remains in the same hands even when someone else is using the property.

#### **F. EXTENT OF THE RIGHT OF OWNERSHIP**

Ownership of a thing whether moveable or immovable means that the one with this right has the right to use and enjoy the fruits of his/her property - in short, the property and all that comes from it. The owner of Land for example has the right to use and enjoy all that is above and below this land unless the law provides otherwise. Under Rwandan law however, the owner of the Land does not have an inalienable right to control what is being done above or below the ground at such a height or such a depth in which he has no interest of "opposition" (art.16 (2)).

As a limitation to the rights of ownership, again, the same article provides that the owner of the soils (Land) has no rights over the water or the substance which could be subject of concessions under the laws relating to mines. In other words, you cannot claim ownership of a piece of Land which is rich in minerals and which can be turned to a mine or quarry.

Articles 261 and 262 of the civil code Book III also bring forward another kind of limitation on the right to use your property despite the freedoms we are entitled to through the ownership right. The two articles caution us to use our property -animals or objects - prudently and diligently. Where this is not observed, we, the owners of such property are answerable to the Law. So, the freedom of using our property the way we like is somewhat limited.

Laws, rules or instructions often limit peoples' freedom in the exercise of their ownership right to the new acquirer of the property. The right to alienation of your property can also be hampered by a contract already signed over it e.g. mortgage, etc.

As mentioned earlier, the ownership right stays as long as the property itself stays. The mere fact of alienation of the property does not extinguish the ownership right but rather, a transfer of ownership from one person to another. However, where this property has been abandoned (mainly moveable property), and someone else occupies it or takes possession, the new occupant/possessor may take the ownership right through the acquisitive prescription established by the law. In this case, it is not a transfer of ownership since the new possessor cannot tell who the former owner was, for example. before the property was abandoned.

## G. ACQUISITION OF OWNERSHIP THROUGH ACCESSION

### 1. Definition and general concept of *accession*

Accession<sup>20</sup>, in law, means a method of acquiring property (which itself was adopted from the Roman law), by which, in things that have a close connection with or dependence on one another, the property of the principle draws after it the property of the accessory, according to the principle, “*accessio cedet principali.*”<sup>21</sup> The ownership of a thing, whether it be real or personal (English law), movable or immovable (French law), carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or by artificial means; this is called the right of accession.<sup>22</sup> Accession may take place either in a natural way, such as the growth of fruits or the pregnancy of animals, or in an artificial way as where a building has been constructed on a given piece of land.<sup>23</sup>

The French law<sup>24</sup> provides the same where it says that ownership of a thing, whether movable or immovable accords to its owner the right to whatever comes out of it, whether by natural or by artificial means. Such a right is recognized under French law as the right of accession.<sup>25</sup> According to art. 552 of the French civil code, ownership of land goes with the right on what is under and above it. Notwithstanding some exceptions, this would mean that whatever would be found under your piece of land, on your land, or above it would automatically belong to you - the owner of the land. In this case, land is the principle object and so, following the Latin maxim; *accessio cedet...*, mentioned above, all that is accessory to it will belong to the owner of the principle.

But what about where no principle object can be identified from the accessories, for example when there is a mixture of two liquids to produce another, or where the two solids are mixed up to the extent that you cannot identify the new from the original property (commixtures)? If we could take Bridge's<sup>26</sup> definition of the term accession, there would necessarily be a dominant thing to which the other is attached or which ‘swallows’ the accessory, in which case, the application of the principle; *accessio cedet...* would easily fit. Bridge defines Accession in the following words;

*“accessio is the joining of a subordinate thing to a dominant one, so that the identity of the subordinate becomes submerged in the dominant.”*<sup>27</sup>

However, it should be noted that, accession takes different forms, some of which are too complicated to judge what the principle is. These forms include for example, movables to an

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<sup>20</sup> The word “Accession” etymologically comes from a Latin word, *accedo,ere*; which means, to go, or to approach, itself deriving from *cedo,ere*; go+ *ad*=towards.

<sup>21</sup> <http://en.wikipedia.org/wiki/accession>;

<sup>22</sup> <http://www.lectlaw.com/def.htm>.

<sup>23</sup> <http://www.babylon.com/definition/Accession/English>.

<sup>24</sup> Article 546 of the French Civil code

<sup>25</sup> MALAURIE, P., et AYNES, L., *Les biens* (2004), Paris, Defrenois, p.115.

<sup>26</sup> BRIDGE, M., Op. cit., note 1.

<sup>27</sup> Ibid., p.106

immovable (fixtures), movable to movables (specification), liquids to liquids or solids with other solids (confusion or commixture).<sup>28</sup>

## **2. Acquisition of ownership right by accession under Rwandan law**

Under Rwandan law, accession can be seen in two aspects; the natural prolongation of your ownership right and the other, a mode of acquisition. What interests us here is the second aspect. According to art. 21CCBII, ownership of a thing whether moveable or immovable gives the right to all its produces. The article continues to say that, the fruits of a thing, even if separated from it, continue to belong to the owner of a thing, unless the law provides otherwise. The following article (art.22 CCBII), stipulates that «ownership of a thing, whether moveable or immovable, gives the right to whatever becomes united to or incorporated to, either in a natural or artificial manner. »

Contrary to the above, art.23 CCB II expressly puts it that the owner of land who made some construction on his land but used materials that did not belong to him, cannot claim any fruits from his property save only when he has made the reimbursement of the value that is equivalent to the material used in the development of his property, the materials which did not belong to him.

«The owner of the land who has made buildings, works or plantations with materials or vegetation which do not belong to him, must pay the value there of; he may also be condemned to pay damages, if there be any, but the proprietor of the materials or the vegetation has no right to take them away.»

Regarding animals, where the two i.e. a bull and a cow do not belong to the same owner, what will be produced from their mating will belong to the one who owns the female cow. The solution here will be given by art.22 CCBII. However, the owner of a bull can claim some amount of money from the owner of a cow for the bull's services to the cow but he cannot claim ownership of the calf to be produced.

## **3. Accession by incorporation**

It should be reminded that, by the term accession, the legislators refer themselves to the Roman expression «**accession cedit principali**». The problem with accession is to solve a conflict of the real rights where two things, belonging to different owners, are united or incorporated into one.

The solution here is that the one who enjoys the principal or real rights will automatically enjoy the accessory rights.

Art.24 of CCBII clarifies this by adding that, the one who incorporated the constructions or other works to the land that is not his, but who did it in good faith and using his materials has to be reimbursed for the cost of his materials as well as his labour.

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<sup>28</sup> Op. cit., note 7.

If the construction was done not in good faith (bad faith), then, the owner of land on which, for example the house was built (fixed), may ask him or her to remove his/her materials or construction. This depends on the choice of the owner of the land.

**Alluvion:** In short, this means the deposit of waters either of a lake or a river. Art.26 CCB II provides that, «the deposit of earth or left dry that may form on the bank of a lake or a stream navigable or floatable belongs to the state. The one that is formed on the bank of a lake or a stream that is not floatable or navigable belongs to the owner of the adjacent land. »

## ***2. Dismemberment of the right of ownership***

Dismemberment is the act of transferring or dividing one's rights or some of them over a property to another person who is not the owner of that property. Usufruct, use, servitudes, superficies and emphyteusis are some of the dismemberments of the right of ownership over a given property.

### **A. USUFRUCT**

This right combines the two rights embedded in the right of ownership (i.e. usus and fructus). The usufructuary is a person who has and exercises the right to use and enjoy the fruits from a property that does not belong to him. The one who exercises this right is however bound by another obligation of preserving the property's substance for its owner. It should be noted that, where the owner did not give the usufruct for commercial purposes, it should be maintained because if the fruits from it are used for commercial gains, these gains will be for the real owner of the property. This is in line with the principle that, the usufructuary cannot gain more than the real owner gains.

### **B. SERVITUDE**

This is the right a person is entitled to on a property (Land) that is not his/hers due to the circumstances surrounding that property. These include the right of passage through another person's land so that he/she may reach his or her own Land, the right to water resources on another person's land, or the right to channel the running water through another person's land below your own. The right to another person's land which emanates from the nature of the terrain is provided for by the law or from mutual agreement between the concerned parties.

### **C. SUPERFICIES**

The Rwandan civil code defines superficies as a right to enjoy an immovable belonging to another person and to dispose of all buildings, wooded areas, trees and other types of plants joined to land. It can be created free of charge or by onerous title (art.76CCII).

On this right, one can be tempted to say that the superficies behaves totally like the one having a full ownership of a given property but which is just limited to a given period of time (not exceeding 50 years).

Article 77CCII stipulates that, superficies can never be established for a term exceeding fifty years. And if a longer period had been stipulated, it has to be shortened to meet that provision (a term not exceeding 50 years).

The superficiary also has the right to enjoy and dispose of buildings, wooded areas, trees and other types of plants that existed on the same land to which he/she is a superficiary, at the time his/her right (superficie) began. So, the contract for the superficiary is not only for the benefit of what will be harvested in future but also the present accessories or immoveables which are incorporated in or destined to that land (art.79 CCII(3)).

However, as provided for by art.82 CCII, at the termination of his/her right, the superficiary cannot remove all that belonged to him/her which was either found there, or from the works of his hands but which are still joined in the land, or even to claim compensation for the property left on that land. But, as an exception to this, for the constructions he/she has constructed, though he/she cannot remove them, but at least can claim from the proprietor an indemnity fixed at three-quarters of their (constructions) actual value.

During this period of superficie, when there is any kind of use made of the property that affects the rights of the proprietor, the superficiary has a duty to inform the proprietor in timely manner. This is provided for in order to allow the proprietor to ensure his/her rights are not abused.

In principle, all superficieses have to be registered but the superficieses which do not exceed nine (9) years are not subject to registration (art.85 CCII).

#### **D. EMPHYTENSIS**

Emphyteusis is a right just like the superficie which, for a certain period of time, grants to a person a full benefit and enjoyment of an immovable property (Land) owned by another person, provided he/she does not endanger the existence of this immovable and this carries with it a right or even an obligation to put constructions, works or plantations thereon and in due-course, durably, increases the land's value (art.62CCII).

It should be noted clear that, the duties mentioned above that go hand in hand with the acquisition of the Emphyteutic right does not in any way exonerate the Emphyteutic leasee from paying some rent to the real proprietor as agreed upon in their contractual provisions (normally paid annually).

An Emphyteusis cannot, according to Rwandan law, be established for a term exceeding ninety-nine years (99 yrs). Where a longer term has been stipulated, it must be shortened and brought down to meet the ninety-nine years. Within this period of emphyteusis, the Emphyteuta is free to use and enjoy the immovable (land) in any way he likes just as any good owner. He/she can hunt, fish, extract rocks, clay or other similar materials from the immovable and can cut down trees for the purposes of building or making improvements on the property. An Emphyteuta has the right to change the nature and purpose of an immovable where he/she wants to increase its value (art.64(3) CCII). Though the Emphyteutic leasee is free to extract rocks, clay and the like, the law (art. 65 CC.BII) does not allow him/her to open mines, quarries, and peat bogs which were unopened at the time his/her emphyteusis was acquired.

As an Emphyteuta, he/she can dispose of his/her right, mortgage or hypothec in the immovable or even impose servitudes on this immovable for the duration of his enjoyment.

The civil code (art.71 CCBII) provides for the situations where the Emphyteuta can be deprived of his/her right over the property and instead pay some damages to the real proprietor. These situations include;

- 1) Where the Emphyteuta is in default of paying three consecutive annual rents, or even for any default of payment, if the emphyteuta became bankrupt or insolvent.
- 2) Where the emphyteuta showed grave negligence in executing his charge of maintenance and raising the value of the immovable (Land) and lastly,
- 3) For any serious abuse of his right of enjoyment.

In as regards to what follows after the termination of the Emphyteutic period, the procedure and the rules are the same as those for the superficiary, even to what concerns the buildings and other constructions erected by the emphyteuta.

An Emphyteuta has to be given an emphyteutic title from the state, subject to the application of art.36 of civil code Book II. The registration of any transfer of property involving emphyteusis on state land is made by inscription of hypothecs (art.74 (2) CCII).

### **SECTION 3. OVERVIEW OF THE 2005 ORGANIC LAW ON LAND USE AND MANAGEMENT IN RWANDA**

#### **1. Introduction**

The land Use and Management Law seeks to address a number challenges to Rwanda's land regulations, including land insecurity, industrialization, and unsustainable plot size. It emphasizes commercial exploitation through large-scale farms that produce cash crops and announces a consolidation goal that will force famers with multiple, non adjacent small plot to merge their holdings with others. It also creates an apparatus for the systematic registration of all land and for issuing private titles, in a dramatic shift away from the previous system of state ownership. The 2005 Land Use and Management Law formally abolishes every form of customary tenure, but especially *Ubukonde* (article 86). The objective of the law is to ensure better land management while conferring security on the existing occupants of the land.

Drafters of the land Use and Management Law were urged to respond to some outstanding points. Here is a summary:

#### ***2. Land categorization in Rwanda***

Pursuant to the present law on the management and use of land in Rwanda, land is categorized in different ways; 1) Urban and Rural land which is defined as that land that is confined within the boundaries of towns and municipalities as established by the law. It should be reminded that, after the reform in the administrative structures of 2006, towns and municipalities exist no more. The law accords to the president a prerogative to issue a presidential order determining any additional area considered to be urban land and which is adjacent to the already established urban land.

2) Individual land is another category. Art.11 of the organic law considers the individual land to be that land that has been acquired through custom, written law (e.g. through contract or succession etc.) which excludes public land or that that belongs to any administrative entity.

3) State Land which includes that of public domain which consists of all the land that is meant to be used by the public or land that is reserved for organs of state services as well as national land reserved for environmental protection (arts.12 and 13) and that of private domain of the state which consists all other land that is excluded from that of public domain (arts. 14 and 15). Such land that falls within the private domain is that state owned land that is not included in state land that is reserved for public activities, infrastructures, and that land that does not belong to districts, City of Kigali or to individuals.<sup>29</sup> In addition to the different categories of land that are enlisted under art. 14 of this law, it also goes without mention that Escheat land<sup>30</sup> is also included under this category.

4) District land is that which is meant for the public activities of the District. It should be noted here that the District can have both the land that falls to the public domain as well as that of the private domain (arts.17 and 18 respectively).

### **3. General Principles**

#### **A. LAND IS THE COMMON HERITAGE OF PAST, PRESENT AND FUTURE GENERATION (ARTICLE 3 OF THE LAND LAW)**

Land is the most important productive asset owned by most Rwandan households. For this precious heritage to be sustained, it requires two things in particular. First, everyone has rights and obligations regarding the land. Second, the State must act to guarantee this heritage for the benefit of present and future generations. Thus, there is both an individual and a State responsibility for ensuring that land is properly managed and used. Again this principle relies heavily on rational management and use of land in favour of the country's development.

The State is still recognised as having overall responsibility for the proper management of land, in order to implement its development strategy for the benefit of its people and ensure their food security. As part of the drive to obtain optimal benefit from this most significant of the country's resources, the law specifically requires landowners to cultivate or improve their property and contains provisions for the State to expropriate land where its owners fail to take advantage of it and leave it unused for an extended period of time.

#### **B. EQUAL ACCESS TO LAND**

In article 4, the land law addresses gender imbalances in customary land tenure confirming that any form of discrimination in matters of land ownership, including gender discrimination, is prohibited. The first step in this direction has already been achieved in with the 1999 Law on Matrimonial Regimes and Succession which allowed women to inherit the

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<sup>29</sup> Art. 14 of the Organic law on the use and management of land.

<sup>30</sup> A piece of land without any person having particular rights over it; whether it was never owned or was abandoned by its owners for a longer period and it became vacant or it is impossible for an individual to own it. (art. 2 (9)). Escheats can also be, as the law on succession of December 1999 provides, that land that had been owned by someone who died intestate and did not have any kin, relatives, or anybody to claim over the land that is left by the deceased (decurus). Such land after the stipulated period of publicity will become escheat and owned by the state.

property of their husbands where previously, it had traditionally passed to the husbands' heirs (article 70). Further in the text, the Land law reminds us that only legally married women and their children can inherit (article 36). More, however, is required – notably, education for the population as a whole, and the introduction of appropriate administrative procedures to ensure that these newly acquired rights are disseminated, implemented and respected.

It is nevertheless good to note that the present law opens ownership rights to nationals just as to foreigners, to physical as to moral persons. The procedure for the authentic acquisition of ownership (with authentic documents) as the present law suggests is determined by the Minister having land in his/her attributions.

### **C. EQUAL PROTECTION OF THE RIGHTS OVER THE LAND ACQUIRED FROM CUSTOM AND THE RIGHTS ACQUIRED FROM WRITTEN LAW**

Even though the 2005 Land Law abolishes every form of customary tenure, it still recognises rights over land acquired from custom pending the registration thereof. Thus article 7 states that: 'This organic law protects equally the rights over the land acquired from custom and the rights acquired from written law. With regard to law, owners of land acquired from custom are all persons who inherited the land from their parents, those who acquired it from competent authorities or those who acquired it through any other means recognized by national custom whether purchase, gift, exchange and sharing'.

#### **4 . Innovative features of the 2005 land law**

##### **A. THE CREATION LAND COMMISSIONS AND LAND BUREAU AT EACH LEVEL OF ADMINISTRATION**

In the process of the acquisition of land, the 2005 Land Law provides for the creation of national, provincial and district-level land commissions to conduct land regulation. Article 8 requires that at each level of administration, these authoritative bodies include women.

The law provides for the establishment of a land bureau at every district level (art.31) that is tasked with the land registration exercise. Such a bureau is headed by the Lands officer whose role can be equated to that of the *conservateur des titres foncier* in the previous law. Except for the general ones, other tasks and functioning of the land bureau are supposed to be determined by the order of the minister having land under his or her attributions, which order is not in place at the moment.

##### **B. UNIVERSAL REGISTRATION OF LAND**

The land law also states that the 'Registration of land a person owns is obligatory' (article 30). More specifically, Land Officers will be appointed to 'keep land registers and issue certificates approving ownership of land' (article 31). This is a significant shift away from the previous land tenureship practice, in which only a fraction of all land was titled. This universal registration will provide land users with more certain rights and thereby promote investment of labour and capital in increased productivity, and the sustainable development and management of land resources. In addition land registration could extend the tax base in rural areas.

Article 32 provides for the documents that will have to accompany the application for the registration of your land. These include those that provide the full identity of the applicant and expressly indicating his/her marital status. Where it is for the married person whose matrimonial regime is the community of the property, the full identity of the spouse will also be required. This is quite logical as this would mean shared ownership of the same property. The description of the land whose registration is sought is also a prerequisite just as having justifying documents from the local authorities concerned to prove that the applicant is truly the owner.

There are various problems attached to the registration of land in Rwanda, among which we note the following:

a) The population has not yet been sensitized to or educated regarding the registration of their lands. They have no interest in this exercise since they are convinced, even without the registration; the land that was given from their forefathers automatically belongs to them.

b) They also claim that the registration exercise itself is not only complicated but especially the transfer of ownership where one wants to dispose of his/her land. When you sell or give away a portion of the registered land, it will be necessary to call for the new certificate and registration of the transfer of this ownership. If the land is not re-registered the ownership will remain with the one who sold or transferred it. So, such legal complications and perceived difficulties limit the people's rush to register.

c) Another problem is the delay in this exercise caused by lack of the technical staff to effect it.. This is accompanied by lack of suitable and effective equipment to facilitate the exercise, such as computers, suitable software and other accessories which would otherwise simplify the work.

d) Last but not the least, is the fear of taxes. A tax is imposed on every immovable that has been registered. This tax has to be paid annually and whenever such an immovable is sold, a duty or deposit of 6% of the total cost of that immovable is given to the administrative authority where this property is located.<sup>31</sup> This does not encourage registration. It should however be noted that, there is an express will by the government to scrap this percentage and replace it with a flat rate not exceeding 20.000Rwf.

### **C. CONSOLIDATION AND COMMERCIALISATION OF RURAL LAND**

Scattered settlements, lack of land law and policy need a framework for the use and management of land. Land should be managed by written law and appropriate mechanisms. The land Use and Management Law grants the state the power to consolidate land 'to improve rural land productivity' and delegates authority to establish procedures for consolidation to the Ministry of Agriculture (article 20). Articles 61 and 62 impose productivity requirements on tenants. Article 63 designates 'the relevant authorities' as the promulgators of criteria by which to assess productivity. Articles 73 and 74 confer local and

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<sup>31</sup> Generally, this should be the district as it used to be in the previous law. However, the tendency of decentralization and considering the current trend, it is obvious that in a few years such activities and therefore the charges will be for the sectors since they have already taken over most activities that were previously being performed by districts.

national-level officials with authority to impose sanctions on landowners who are not sufficiently maximizing productivity and to confiscate unexploited land.

These measures indicate a clear policy shift towards commercial exploitation over subsistence farming. This land consolidation would come down to encouraging increased production through formation of adjacent plots with similar crops. Nobody will lose their plots but each person will have the responsibility to register his/her plot separately (see article 20).

Another new issue under this new law is that, one is not that free to “alienate” his piece of land in any way as he/she may wish. Where one owns a parcel of one or less hectare, he/she cannot reduce or divide it further (art.20 (3)). In other words, he cannot for example sell any piece of it save where the parcel was not meant for agricultural purposes. Implicitly, one can conclude that where that piece of land was meant for settlement purposes for example, sale of part will not be forbidden. Where the land is meant for agriculture, the owner of land that is between one and five hectares will only be free to divide his/her land upon authorization from the land commission at the level of jurisdiction where the land is situated; (*Section four of chapter three (art 31-32) is dedicated to land registration*).

## **D. TRANSFER OF RIGHTS OVER LAND**

The land law authorizes landowners to freely transfer rights over the land. Thus ‘Rights’ based on Land may be transferred through different individuals or it may be guaranteed through succession; it may be guaranteed gratuitously, leased or sold; it may be mortgaged according to requirements and procedures provided for by ordinary civil law’ (article 34). However, for the family interest’s sake, final transfer of rights on land by sale, donation or exchange by a representative of the family requires the prior consent of all other members of the family who are joint owners of such rights. This consent is indicated by a document signed or finger printed by the concerned people, and done before a registrar of civil status or before the registrar of lands of which he or she shall record in his or her registers (articles 35 and 37).

## **5. Rights and obligations of the landowner**

### **A. NATURE OF RIGHTS OVER LAND**

The principle states that every Rwandan should have the right to access land without any discrimination. However, the right to access the land and the right to own land are very different. The land law says of ownership over land but when we look at its provisions, we find that this is not complete ownership (Article 3); one could argue that the real nature of these rights is that of long-term leases. For example article 5 of the Organic law states that ‘Any person or association with legal personality that owns land either through custom, or who acquired it from competent authorities or who purchased it are allowed to own it on long term lease in conformity with provisions of this organic law’. However, ‘ Any person whether a Rwandan or a foreigner who invested in Rwanda, or an association with legal personality shall enjoy full rights of ownership of land reserved for residential, industrial,

commercial, social or cultural and scientific services (article6). Even for this category, the State retains rights to expropriation (with compensation) due to public interest (article 3).

Under this system, the State retains its ownership of the land but “loans” it to an individual for an extensive period (For exact term of land leases see articles 6 and 7 of the Presidential Order N° 30/01 of 29/06/2007 Determining the exact number of years of land lease). This gives the individual the necessary sense of security to encourage investment in the land but allows the government more easily to dictate how the land should be used and managed. Nonetheless, even with long- term leases, come rights which can be sold, exchanged or mortgaged in much the same way as rights of ownership.

## **B. SCOPE OF RIGHTS OVER LAND**

Rights based on Land may be transferred through different individuals or it may be guaranteed through succession; it may be guaranteed gratuitously, leased or sold; it may be mortgaged according to requirements and procedures provided for by ordinary civil law (article 34). The State recognizes the right to freely own land and shall protect the owner from being dispossessed of the land whether totally or partially (art.56).

The land law states that ‘all buildings, crops and other works found on land are presumed to have been performed by the owner of the land using his or her money or otherwise, and are presumed to be his or hers in case there is no proof to the contrary. However, this does not prohibit any other person to own buildings, crops or any other works on other persons' land in procedures provided for by law’ (art. 57) In addition the law entitles any person deprived of land ownership to receive a fair and prior compensation, such expropriation must be in public interest, which itself is left to the appreciation of the authorities concerned (whether national or local authorities) (art. 67).

## **C. LIMITATIONS OF RIGHTS OVER LAND**

The ownership of land under the new organic law governing the management and use of land in Rwanda is without doubt limited in some respects. First, the landowner has no right over minerals or any other wealth underground; they belong to the State. However, he or she is allowed before others to enjoy rights of their exploitation upon his or her request and if he or she is capable (article 55). Secondly, the landowner(s) shall enjoy full rights to exploit his or her land without prejudice to laws related to human settlement, general land organization and use. For example a landowner cannot freely decide to plant trees on a land earmarked for housing invoking his or her ownership rights or building houses on a land not earmarked for that purpose (article 54). Thirdly, a landlord shall not hinder underground activities or those in the space above his or her land when such activities are of general interest. If such activities cause any loss to him or her, he or she shall always receive appropriate compensation (article 67). Lastly, the landlord shall not act against other people's rights by refusing access to his or her neighbours homes when there is not any other way, blocking water that is naturally flowing through his or her land from other persons' land above his or hers, or refusing other people to draw water from a well found on his or her land unless he or

she can prove that such a well has been dug or built by him or her; unless it is considered to be necessary( article 60).

#### **D. OBLIGATIONS OF THE LANDOWNER**

The landowner, as well as any other user of the land is obliged to obey laws and regulations regarding protection, conservation and better exploitation of the land (article 61). Assignment, concession and lease contracts shall specify conditions to be fulfilled for the conservation, and exploitation of the land in accordance with the intended use of the land (article 59).

Landowners shall always respect clauses in the national general land organisation and utilisation plan (article 66). They also have an obligation to pay land tax determined by a specific law (article 68). They also have an obligation to register their land (article 30).

#### **6. Prescription term relating to land rights acquisition**

Prescription has a particular meaning in the Rwandan context. In general, some acquire land by prescription if they are the uncontested occupant for a certain period specified by law and genuinely believe during that period that no one else has any rights to the land, e.g. they believe it is vacant or voluntarily abandoned. In Rwanda, the notion of acquiring land by “prescription” refers to the rights acquired by those who took over the properties of the Rwandans who fled into exile in 1959 and during the sixties and seventies. The 1993 Arusha Peace agreement stated that anyone who has been absent from Rwanda for more than ten years should not reclaim their property if it has been occupied by someone else (Article 4). This was agreed by the warring parties at that time because they knew that there would be massive social tension if people who had fled the country decades earlier suddenly returned and tried to reclaim their properties. However, this provision is quite controversial in law because it cannot be said that the refugees left their homes voluntarily and relinquished rights to their property. Moreover because of the occurrence of genocide in 1994, part of provisions of the Arusha Accords became inoperative. However since 1996 the government addressed the issue in a way to improving social harmony. Thus in some provinces, it facilitated the sharing of land between the land occupiers and the returnees. Still a law was needed to regulate the question.

Accordingly the 2005 Organic Law, “in matters related to land, the right to pursue landlordships shall be prescribed for thirty (30) years)” (article 70). “Persons, who by force, or through fraudulent means, occupy vacant and escheat land or other people's land, cannot invoke the interests of the right to prescription to claim that the right to pursue the land extinguished(*sic*), prescribed or that they have full ownership, even if they have occupied it for a period longer than the period of prescription.” (article 71). Persons who own other people's property, whether borrowed land for use or residential houses found on that land shall not definitively own the land due to reasons of prescription whatever the length of the period of time of their occupation (article 72 para. 1). Among the members of the same family, there shall be no extinction of rights of prescription. If a person disappears, although he or she spends a long time, at any time he comes back he can pursue his or her rights in accordance with the family civil code (article 72, para. 2). This provision aims at protecting the family

interests. The 2005 Land Law recognises land sharing which was conducted from the year nineteen ninety four (1994) and states that holders of such land shall enjoy the same rights as those under customary holdings. However, matters related to this sharing of land are not subject to compensation that is provided for by this organic law (article 87).

## **7. Penalties**

The current law provides for both administrative as well as penal sanctions. Of the administrative sanctions is the confiscation of the degraded or unexploited land. Such sanctions will be imposed following the reports that will have been given by the land commission that will have monitored the use of the land by the owner. The owner will however, after proving the capacity to exploit the confiscated land, have a right to repossess this land through a request that will be submitted to the lands commission (art.78). The penal sanctions on the other hand will include imprisonment as provided for by the penal code and this law, as well as fines.

## **8. Settlement of disputes over land rights**

Matters arising from land disputes are heard by competent courts and through procedures provided for by law. Before the matter is taken to the court, the parties to the dispute are required to seek a solution of the problem from the mediation committee at Sector level. This concerns the land that has no authentic title deeds (article 53).

Extra-contractual or tort obligations arise from one's act or omission which causes a damage to someone or his/her property (for example, from wilful acts or negligence). Extra-contractual obligations are subdivided into tortuous and quasi-tortuous obligations.

- Example of tortuous liability arising from intentional homicide, voluntary injury, etc. (Art. 258 CC B II);

-Examples of quasi-tortuous (non-intentional) civil liability/obligation results from negligence, civil action arising from non-intentional homicide (manslaughter), involuntary injury, etc.