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List of Abbreviations

ADR	Alternative Dispute Resolution
All ER	All England Reports
A.C.	Appeal Cases
CAA	Civil Aviation Authority
C.A.C.A.	Court of Appeal Civil Appeal
CADER	Centre for Arbitration and Dispute Resolution
C.L.R.	Commonwealth Law Reports
CPA	Civil Procedure Act
E.A.	East Africa
EAC	East African Community
E.A.C.A.	East Africa Court of Appeal
ETA	Electronic Transactions Act
E.W.C.A.	England and Wales Court of Appeal
f.a.q.	fair average quality
F.O.R.	free on rail
ICSID	International Convention on the Settlement of Investment Disputes
H.C.B.	High Court Bulletin
H.C.C.S.	High Court Civil Suit
J	Justice
JA	Justice of Appeal
K.A.L.R.	Kampala Law Reports
K.B.	Kings Bench
KCCA	Kampala City Council Authority
K.L.R.	Kenya Law Report
KY	Kabaka Yekka
Legco	Legislative Council
NDA	National Drug Authority
Q.B.	Queen's Bench

List of Abbreviations

SACCO	Savings and Credit Cooperative Society
S.C.C.A.	Supreme Court Civil Appeal
T.L.R.	Times Law Reports
T.C.C.	Technology Construction Court
UDB	Uganda Development Bank
U.L.R.	Uganda Law Reports
UNLF	Uganda National Liberation Front
UPC	Uganda People's Congress
UVRI	Uganda Viral Research Institute
UWA	Uganda Wildlife Authority
W.L.R.	Weekly Law Reports

Preface

The primary objective of *IEL Contracts: Uganda* is to present the readers the general principles of the law of contract generally and specific contracts in particular. In addition to outlining background information on Uganda, including historical aspects of the law of contract, this monograph examines relevant legislation and case law from Uganda and some commonwealth jurisdictions on nature and formation of the contract, consideration, conditions of substantive validity, defects of consent, contents of a contract, privity of contract, termination of contract, and remedies. After interrogating general principles governing contracts in Uganda, this monograph delves into an analysis of specific contracts, namely: agency; bailment; gaming and wagering; sale of goods; building contracts, hire of work and skills; lease, commercial and agricultural leases; compromise settlement; suretyship; pledge; loans; contracts with the government and other public administrations; contract of partnership; and quasi-contracts. This monograph is written in a simple, readable, friendly and accessible form. It is written in such a way that it may be easily read by lawyers, law students, non-lawyers, including business people, and all those interested in matters concerning contracts.

I am grateful to my colleague, Associate Professor Dr Ronald Kakungulu Mayambala who showed me a call by International Encyclopaedia of Laws (IEL) for submission of a manuscript on *IEL Contracts: Uganda*. Thank you, Ronald, for your collegiality. I also thank Dr Benson Tusasirwe, my co-teacher of the Law of Contract, for assisting me with some of the materials for this monograph. I am also grateful to Mr Francis Birikadde who partially assisted in editing the manuscript. I also wish to pay tribute to all the past and present students of the Law of Contract, whom I have taught at university and college levels for over thirty years.

Finally, I express my sincere appreciation to my wife, friend and lover, Anne, for always tolerating my very busy and demanding academic work with its associated tight deadlines. To our children, Faith, Brenda, Rhona, and Jenkins. Thank you for being lovely and cooperative children. To my sister Mary, whom we brought up from infancy, for acquiring satisfactory levels of education and serving as a good example to our children. To our grandchildren, Elaine, Liam, Liana; those of Mary (Chloe, Branice, Shanice, Ariana); and those yet to be born, I pray and believe that you will take education and hard work seriously. To God be the glory.

Prof. Dr Ben Kiromba Twinomugisha

Preface

General Introduction

§1. The General Background of the Country

1. Uganda is a land locked country, which sits astride the equator in East Africa, and neighbours South Sudan in the north, Democratic Republic of Congo (DRC) and Rwanda in the West, Tanzania in the South and Kenya in the East. The country is approximately 241,551 square kilometres in size. Land and water respectively occupy approximately 200,523 and 41,023 square kilometres.[1]

2. The state of Uganda may be traced to 1894 when it was declared a British protectorate. Uganda gained independence from Britain on 9 October 1962. At the time of independence, Uganda had a vibrant economy, which was adversely affected by subsequent political upheavals lasting for over twenty years. The first elections were held in 1961, and Benedicto Kiwanuka was appointed as Chief Minister. Later, through the UPC-KY alliance, Edward Mutesa, the Kabaka (King) of Buganda, and Milton Obote were appointed President and Prime Minister respectively.

3. In 1966, Milton Obote suspended the Constitution and assumed all government powers. In 1967, a new constitution was promulgated. The 1967 Constitution abolished kingdoms, declared Uganda a Republic and gave the President more powers.

4. In 1971, Milton Obote was deposed in a military coup by Idi Amin, who ruled Uganda ruthlessly by decree for eight years. The Amin regime was characterized by economic decline, social disintegration, massive and horrendous human rights violations. The independence of the judiciary was completely eroded, and the Chief Justice, Ben Kiwanuka was murdered by the regime.

5. In April 1979, Amin was removed from power through a war led by the government of the Republic of Tanzania supported by Ugandan exiles. After the overthrow of Idi Amin, the Uganda National Liberation Front (UNLF) elected Yusuf Lule as President who was later replaced by Godfrey Binaisa.

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1. For a detailed description of the geography of Uganda, *see* E. Kasimbazi & A. Kibandama, *Environmental Law in Uganda* 19–20 (2d ed., Kluwer Law International BV 2018); D.D. Ntanda Nsereko, *Criminal Law in Uganda* 21–22 (Kluwer Law International BV 2015).

6. In 1980, the country held the first elections, and Milton Obote returned as the President of Uganda. Obote's second regime could not carry out any meaningful socio-economic development largely because of the insurgency that ravaged the country until 1985, when he was overthrown by one of his generals, Tito Okello.

7. In 1986, the Tito Okello regime was overthrown by the NRA/M led by Yoweri Museveni, who has ruled Uganda for almost thirty-four years. Albeit there have been some human rights violations, compared to the previous regimes, Museveni's regime has recorded relative economic growth. The regime has established favourable legal and policy frameworks that promote private sector led growth, including creating conditions that promote foreign direct investment. Pursuant to the treaty establishing the East African Community (EAC), Uganda is now a member of the EAC, alongside Kenya, Rwanda, Tanzania, Burundi and South Sudan.[2]

§2. Legal Family

8. Like Kenya and Tanzania, within the EAC, Uganda's legal family is the common law, which is applied alongside principles of equity and customary law. Rwanda has a mixed legal system of civil law, common law and customary law. The legal system of Burundi is based on civil law and customary law. South Sudan's legal system is anchored in statutory and customary law.

§3. Primacy of Legislation

9. Primacy of legislation is a characteristic of the legal system in Uganda. The Constitution and the legislation, as illustrated under sources of law below, take precedence over case law and international law. Uganda is a dualist state. Thus, for any international treaty or instrument to be legally binding on Uganda, it must be ratified and domesticated by an Act of Parliament.

§4. The Position of the Judiciary

10. The judiciary is one of the three arms of the government, the others being, the executive and the legislature (parliament). The judiciary is charged with the administration of justice in the country. According to the Constitution, judicial power 'is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the values, norms and aspirations of the people'.[3]

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2. For a detailed discussion of Uganda's political, economic, social and cultural characteristics, *see* E. Kasimbazi & A. Kibandama, *supra*, pp. 21–30; DD. Ntanda Nsereko, *supra*, pp. 22–25.
3. Article 126(1).

11. In adjudicating cases, whether civil or criminal, the courts shall be guided by the following principles: 'justice shall be done for all irrespective of their social or economic standing; justice shall not be delayed; adequate compensation shall be awarded to victims of wrongs; reconciliation between the parties shall be promoted; and substantive justice shall be administered without undue regard to technicalities'.[4]

12. In the exercise of judicial power, all courts 'shall be independent and shall not be subject to the control or direction of any person or authority'.[5]

13. Judicial officers shall enjoy immunity in the exercise of judicial power and shall not be liable to any action or suit for any act or omission committed during the execution of their judicial functions.[6]

14. Judicial power shall be exercised by the courts of judicature, which comprise of the Supreme Court, the Court of Appeal, High Court and 'such subordinate courts as Parliament may by law establish, including Qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament'.[7]

15. In terms of hierarchy, the Supreme Court is the highest court, followed in descending order, by the Court of Appeal/Constitutional Court, the High Court and subordinate courts, including magistrates' courts. The High Court, shall, 'subject to the provisions of this Constitution, have unlimited jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law'.[8]

16. In Uganda, the superior courts of record – Supreme Court, Court of Appeal and High Court – set precedents. Decisions by the Supreme Court are binding on all lower courts,[9] including the Court of Appeal, while those of the Court of Appeal are binding on the High Court and all subordinate courts. The decisions of the High Court are binding on all lower courts, including magistrates' courts.

17. Precedents by the above Ugandan courts are legally binding authorities, while foreign precedents are persuasive. However, foreign precedents, especially from England and other commonwealth countries, are heavily relied upon by our

4. Article 126(2)(a)–(e).
5. Article 128(1).
6. Article 126(4).
7. Article 129(1)(a)–(c).
8. Article 139(1).
9. Article 132(4) of the Constitution provides as follows: 'The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.'

courts in the handling of contract cases. This is largely because most of the precedents form part of the common law, which may be applied by our courts, in accordance with what they feel are in the best interests of the people. In any case, the Contracts Act, 2010, is largely a codification of the principles of common law as they have developed over time.[10]

§5. Distinction Between Public Law and Private Law

18. The distinction between public and private laws lies in their impact. Public law affects society or the general public and the State. Public law includes administrative law, constitutional law, criminal law and international law. Private law affects individuals and private institutions, such as families, families and businesses. Public law includes contracts law, tort law, commercial law, company law, family law and property law. In Uganda, there is no special realm for 'administrative contracts'.

§6. Distinction Between Civil Law and Commercial Law ('Commercial Contracts')

19. Civil law has been defined as '[a] body of rules that delineate private rights and remedies, and govern disputes between individuals in such areas as contract, property and family law; distinct from criminal or public law'.[11] Civil law is 'influenced significantly by Roman law, especially contained in the Juris Civilis, as distinct from the common law and canon or ecclesiastical law'.[12] Civil law covers property and personal relations while commercial law regulates commercial acts and relations. Commercial law 'is a body of law that regulates the conduct of persons, merchants, and business who are engaged in trade, sales, and commerce'.[13] Thus, commercial law is related to business or commercial transactions such as sales, banking, investment and insurance. However, the distinction between civil and commercial contracts, with different rules for each, which is made in some civil law systems such as in Burundi and the Democratic Republic of Congo, is not made in Uganda.

10. The Long Title of the Contracts Act describes it as: 'An Act to codify the law relating to contracts and to provide for other related purposes.'
11. https://legaldictionary.thefreedictionary.com/civil+law (accessed 3 Jun. 2020).
12. https://dictionary.cambridge.org/dictionary/english/civil-law (accessed 3 Jun. 2020).
13. The Legal Match, *What Is Commercial Law?*, https://www.legalmatch.com/law-library/article/what-is-commercial-law-html (accessed 3 Jun. 2020).

Chapter 1. Introduction to the Law of Contracts

§1. Definition of Contract

20. The Contracts Act[14] defines a 'contract' as 'an agreement enforceable by law',[15] which is 'made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound'.[16] Hodgin defines a 'contract' as 'a legally binding agreement made between two or more parties'.[17] According to Treitel, a contract is 'an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties'.[18] According to Atiyah, the law of contract 'is part of the law of obligations, that is to say, it is concerned with obligations which people incur to others as a result of the relations and transactions in which they become involved'.[19] Thus, there should be an agreement before a contract is established.

§2. Historical Background of the Law of Contracts

21. The law of contracts in Uganda can be traced to British colonial rule. To ease the administration of the colony and promote the interests of the colonial power, English law of contracts and all other branches of law were introduced and made applicable in Uganda through the provisions of the 1902 Order in Council. This Order in Council provided that hence forth, the law applied by courts in Uganda would be ordinances passed by the legislative council (Legco), applied acts, the common law, doctrines of equity and statutes of general application in force in England as at 11 August 1902, subject to local circumstances. The Order in Council also stated that the courts may apply local customs and usages known as African customary law, so long as the given custom or usage was not inconsistent with written law and was not repugnant with natural justice, equity and good conscience. The day, 11 August 1902, came to be known as the reception date, because it was the day when Uganda received English Law and applied it as its own. By the stroke of a pen, the common law of contract, developed over centuries under peculiar conditions of England, was copied by the pre-industrial societies such as Uganda.

22. Since there was no customary law of contract acceptable by the English magistrates and judges in Uganda at the time, the concession in the law allowing customary law became useless. Instead, an alien law of contract became applicable in courts. From that time to independence, what was actually applied was not the common law of contract but the Indian Contract Act, which was a codification of

14. Act 7 of 2010.
15. Section 2.
16. Section 10(1).
17. R.W. Hodgin, *Law of Contract in East Africa* 12 (Kenya Literature Bureau 1975).
18. G.H. Treitel, *The Law of Contract* 1 (10 ed. Sweet & Maxwell, 2003).
19. P.S. Atiyah, *An Introduction to the Law of Contract* 1 (5th ed. Clarendon Press 1995).

the Indian Common Law of Contract. Interestingly, in most cases, the judges in India would disregard that Act and apply the English common law directly.

23. After independence, the Indian Contract Act ceased to apply in Uganda and was replaced by the Contract Act, Cap. 75. This Act was not an exhaustive codification of the law of contract. It only made the English Law of Contract applicable to Uganda, and was a throw-back to the colonial era. It was repealed by the Contracts Act, 2010 (hereinafter 'the Act'), which is also largely a codification of English Common Law of Contract.

§3. Classification of Contracts

24. According to the Contracts Act,[20] a contract may take four forms: it may be oral,[21] written, partly oral and partly written,[22] or may be implied from the conduct of the parties.[23] However, the Act also provides that any contract, whose subject matter exceeds 25 currency points (equivalent to Uganda Shillings (UGX) 500,000) shall be in writing.[24] In *John Kaggwa v. Kolin Insaat Turizm & Others*,[25] where the plaintiff sued the defendants for breach of an oral contract for payment of a commission of USD 500,000, the court held that the contract was unenforceable.

25. The Contracts Act provides that a contract must in writing where it is: in the form of a data message, accessible in a manner usable for subsequent reference and otherwise in words.[26] The Contracts Act further provides that contracts of guarantee and indemnity shall be in writing.[27] However, there is a contradiction given that the interpretation section of the Act provides that a contract of guarantee may be oral or written.[28] In *Karangwa v. Kulanju*,[29] Madrama J, in attempting to harmonize the legal position, held that section 10(6) which uses the expression 'shall be in writing' is mandatory, while section 68 that uses the word 'may' is permissive. Thus, the court held that any contract of guarantee which exceeds 25 currency points shall be in writing while that which is less than 25 currency points may be oral.

26. In addition to being oral or written, contracts may be express, implied, executed or executory, contingent, unilateral or bilateral, void or voidable.

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20. Act 7 of 2010.
21. Section 10(2).
22. For an example of a case involving a partly oral and partly written contract, *see B. M. Technical Services Ltd v. Crescent Transporters Ltd* S.C.C.A. No. 8 of 2002; [2003] K.A.L.R. 40.
23. Section 10(2).
24. Section 10(5) and schedule to the Act.
25. HCT-00-CC-0318.
26. Section 10(3)(a)–(c).
27. Section 10(6) and (7). For the definition and the law governing indemnity and guarantee, *see* Part VIII of the Act.
28. Section 68.
29. Civil Appeal No. 3 of 2016.

27. In an express contract, terms are expressly agreed upon by the parties, either orally or in writing, at the time of formation of the contract. In an express contract, parties expressly make promises to each other. According to the Contracts Act, '[a] promise is express, where an offer or an acceptance of a promise is made either verbally or in writing'.[30] For example, K offers to sell to M a car at UGX 20 million, and M accepts to purchase it at the indicated price. Both parties sign an agreement to that effect thus concluding their contract.

28. An implied contract may be implied from the promises of the parties or the circumstances of the case and or the conduct of the parties. According to the Contracts Act, '[a] promise is implied, where an offer or an acceptance is not made either verbally or in writing'.[31] For example, where John walks into a bar and takes a bottle of soda, a contract may be implied from his conduct and he must pay for the drink. A contract may also be implied from correspondence between the parties. In *Karmali Tarmohamed and Another v. I. H. Lakhani & Co.*,[32] a contract was made by correspondence, but the date for completion was not fixed. The appellant's counsel alleged that there was neither a complete nor a finally concluded agreement, which specific performance could have been decreed. That the use of the words, 'Please contact our Mombasa office for preparation of formal documents … ' in the telegram accepting the applicant's offer indicated that it was not a final acceptance and that the expression, '... payment to be effected within seven months … ' in the applicant's offer indicated further that no concluded agreement had been reached, as it left the date of completion and the method of payment open.

29. In dismissing the appeal, the court held that if a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is no binding agreement until the instrument has been a drawn up. That the whole of the correspondence or documents must be considered and a document which, taken alone, appears to be an absolute acceptance of a previous offer, does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communications. The court held further that the correspondence, in the present case, amounted to a complete offer and acceptance and the fact that the respondents desired it to be put into more formal legal shape did not make the contract conditional or relieve either party from liability under it. That even if the completion date was unspecified or uncertain, this would not render the contract unenforceable.

30. An executed contract is a contract in which the promises are made and completed immediately. Nothing remains to be done by either party since the transaction is completed at the moment the agreement is made. However, with an executory contract, the promises are not fully performed and they are to be executed in future.

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30. Section 9(2).
31. Section 9(3).
32. [1958] E.A. 567.

31. The Contracts Act defines a 'contingent contract' as 'a contract to do something or not to do something where an event collateral to the contract does or does not happen'.[33] A contingent contract requires three essentials: there should be an uncertain event; this event must be collateral to the contract; and the performance of the contract depends upon the contingency. Examples of contingency contracts include contracts of insurance, indemnity and guarantee.

32. The Contracts Act provides that, '[a] contract to do something or not to do a particular thing where an uncertain future event on which the contract is contingent, happens, shall not be enforced except where and until that happens, and where the event becomes impossible, the contract shall become void'.[34]

33. The Act also provides that, '[a] contract to do something or not to do a particular thing where an uncertain future event on which the contract is contingent does not happen, may be enforced after the happening of that event becomes impossible, but not before'.[35] The Act also provides that, '[w]here a future event on which a contract is contingent is the way in which a person is to act at an unspecified time, the event shall become unattainable where that person does anything which renders it impossible for him or her to act within a definite time or under further contingencies'.[36]

34. On contract contingent on happening of specified event within a specified time, section 31 of the Act provides as follows.

(1) A contract to do something or not to do a particular thing, which is contingent on the happening of a specified or uncertain event within a specified time, becomes void where:
   (a) at the expiration of the time fixed, the event has not happened; or
   (b) before the time fixed, the happening of the event becomes impossible.
(2) A contract to do something or not do a particular thing, which is contingent on the fact that a specified event or uncertain event does not happen within a fixed time, may be enforced:
   (a) when the time fixed for the happening of the event expires, and the event has not happened; or
   (b) before the time fixed expires, where it becomes certain that the event will not happen.

35. A unilateral contract is a contract where only one party to the contract makes a promise to the other party. Unlike a bilateral contract, a unilateral contract involves only one party making a promise, which the other party will accept or reject. It is an agreement with one promise. One party promises a future action if the other party performs whatever is requested of him.

33. Section 2.
34. Section 28.
35. Section 29.
36. Section 30.

36. A bilateral contract is an exchange of promises. In other words, all the parties make a promise to the other to do or not to do something. One makes a promise to do or not to do something for the other's promise to do or not to do something. For example, James offers his home for sale, and Tom agrees to pay UGX 200 million to purchase the house. In other words, each party promises to perform an act in exchange for something else. It is a reciprocal agreement where each party agrees to offer something in return.

37. A void contract is defined as 'an agreement that is not enforceable by law'.[37] An example of a void contract is an agreement to commit an unlawful act. For example, Bonnie enters into an agreement with Jane to poison Angella on the understanding that after completing the mission, he would be paid UGX 10 million. Such a contract is void *ab initio* (from the beginning) and is unenforceable. An agreement may be valid with all the essential elements but may become void due for example to external circumstances or change in the law. For example, David contracts to supply maize to Odinga in Kenya. Before delivery, the Kenyan Government enacts a regulation banning the importation of maize to Kenya in order to protect local production. Such agreement though valid on the face of it becomes void and is thus unenforceable.

38. A voidable contract means 'an agreement which is enforceable by law at the option of a party to a contract but not at the option of the other party and a contract which ceases to be enforceable by law and which becomes void when it ceases to be enforceable'.[38] Thus, a voidable contract is a contract which may appear to be valid and has all the necessary elements to be enforceable but has some type of flaw that could cause one or both of the parties to avoid the contract. The contract is legally binding but could become void. Examples include agreements procured without consent of a party through duress or coercion, undue influence, fraud or misrepresentation.[39]

§4. Contract and Torts

39. Contract is based on the consent of the parties while tort occurs by the intrusion or wrong to one party. Tort is a civil wrong that causes a party to suffer loss or harm or injury resulting in legal liability for another. In contract, the rights and obligations of the parties are created by consent of the parties, while in tort, they are imposed by the courts. However, some aspects of contract law are informed by the values and standards attributed to the law of tort. In both contract and tort, the primary object of legal proceedings is compensation of the injured or wronged party, unlike criminal law where the object is punishment of the offender.

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37. Section 2.
38. *Ibid.*
39. Section 16(1). *See also Nilecom Ltd v. Kodjo Enterprises Ltd*, Civil Suit No. 0018 of 2014.

§5. Contract and Quasi-contract

40. In the context of this book, 'quasi-contract' refers to a relation resembling a contract. The major difference between a contract and a quasi-contract is that the latter is not a contract at all. Whereas in contract, obligations are created by the parties, in quasi-contract, obligations are imposed by law to prevent unjust enrichment. A quasi-contract may only be relied upon in court in the absence of a contract – either express or implied – covering the same subject matter that already exists. A quasi-contract is separate from the agreement between the two parties.

41. A quasi-contract is aimed at enforcing fairness to prevent one party from benefitting unjustly. The court may order a party to pay restitution to the wronged party for example on a *quantum meruit* basis. However, for the court to order a remedy, the plaintiff must have provided a service or given an item with value to the defendant, with an implied promise that he would receive payment in exchange. The defendant must have agreed to this promise and received the item or service but failed to pay. The plaintiff must show why it is unfair for the defendant to receive the item or service without paying for it.

§6. Contract and the Law of Property

42. A contract refers to enforceable agreements between the parties while property law is about real estate (also known as real property or immovables or realty) for example land and buildings, and personal property (movables or personality) such as motor vehicles. There is an intersection between contract and the law of property in cases of a contract for the sale and purchase of real estate or personal property. Land transactions in Uganda are largely governed by the Constitution, the Land Act and the Mortgage Act.

§7. Contract and Trust

43. A contract is a legally binding agreement between two or more individuals or entities who exchange valuable promises. A trust is a fund created by the owner, called a settlor or donor or grantor who transfers property to a trustee who holds it for the benefit of a designated beneficiary (*cestui que trust*). A trust is a proprietary fiduciary relationship while a contract is personal. A contract is a common law, personal obligation resulting from a regulated agreement between the parties while trust arises from equity and confers property rights on the beneficiary that can be enforced against both the property itself and a third party. A contract is valid if supported by valuable consideration while a beneficiary under a trust can enforce a trust albeit he has not provided any consideration.

44. Because of the privity doctrine, a contract is usually not enforced by third parties, who are treated as strangers to the contractual relationship. However, under a trust, the beneficiary, who is a stranger to the trust agreement can sue on it. A trust

agreement is a document that spells out rules that a settlor wants the trustee to follow in respect of property held in trust for the beneficiaries. A trustee is a fiduciary that owes the highest fiduciary duty under the law to protect trust assets from unreasonable loss for the trust's beneficiaries. A person who intermeddles in the trust property is a *trustee de son tort* and may be sued by the beneficiary for intermeddling in the property.

45. A trust can thus arise from contract in two instances. First, it can be based on an agreement between the settlors (e.g., husband and wife for the benefit of their children). Second, transfer of assets to a trustee may be based on agreement between the settlor and the trustee. Nevertheless, a trust need not be based on a contract, for example one arising out of a will (testamentary trust). The main legislation governing contracts is the Contracts Act, 2010, while trusts are governed by the Trustees Act, 1954 and the Trustees Incorporation Act, 1939.

§8. Good Faith and Fair Dealing

46. Unlike in many civil law systems, the concept of good faith and fair dealing is not part of Ugandan Law as such. However, in their contracts, parties may expressly agree that they shall, in the implementation of their contracts, act in good faith. Good faith and fair dealing may be implied into contracts, for example insurance, partnership and other contracts, where a fiduciary duty exists or is presumed between the parties.

§9. Style of Drafting

47. Generally, there is no specific requirement in so far as drafting contracts is concerned. However, as a matter of practice, the contract should contain the names of the parties, description of the subject matter, consideration, signatures or seal of individuals or corporations respectively. The contract should also contain a date and be witnessed by a lawyer or other individual.

§10. Sources of the Law of Contracts

48. The Constitution takes precedence over all laws, including international law. The Constitution is the 'supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda'[40] and where 'any other law or any custom is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void'.[41] In simple terms, the supremacy of the Constitution means that it takes

40. Article 2(1) of the Constitution.
41. Article 2(2) of the Constitution.

precedence over all laws in the country. Thus, the law of contracts must conform with the provisions of the Constitution, short of which, it may be declared void or nullified by the Constitutional Court.[42]

49. Next in precedence is principal or primary legislation, which refers to statutes passed by the Parliament of Uganda and formally assented to by the President.[43] The Parliament has the authority to make law,[44] and any other law, including subsidiary legislation must be made under the authority of the legislature. Laws made by the Parliament take precedence over other laws including case law. Uganda is a dualist state, and for any international treaty or convention to be binding on the country, it must be ratified – tabled before Parliament – as per the Ratification of Treaties Act, 1998 and domesticated by an Act of Parliament. The principal legislation governing the law of contracts is the Contracts Act, 2010. Other statutes applicable to the law of contracts include: Judicature Act, Cap. 13; Sale of Goods and Supply of Services Act, 2017; Illiterates Protection Act, Cap. 78; Companies Act, Cap. 110; Motor Vehicle (Third Party Risks) Act, Cap. 214; Electronic Transactions Act (ETA), No. 8 of 2011; Electronic Signatures Act, No. 7 of 2011 and the Evidence Act, Cap. 6.

50. Common law and equity are also applicable in Uganda. These are principles of English law applied in Uganda by virtue of the Judicature Act, Cap. 13,[45] to supplement the existing written law. Common law is that part of English law based on the concept of *stare decisis*, which literally means to stand by decisions and not to disturb what has been settled. The concept means that a judicial decision has established a precedent. Where a court of record, having competent jurisdiction, has decided a controversy and has in a written opinion set forth the rule or principle that formed the basis of its decision, that rule or decision will be followed by the courts in deciding subsequent cases. Subordinate courts will be bound by the rule set forth in the decision.

51. Equity refers to the expressions of values that promote fairness, justice and reasonableness in social relations. Equity is developed to address the unfairness and inadequacies in the application of common law. According to the Judicature Act, common law and doctrines of equity shall be applied in the administration of justice in Uganda 'only insofar as the circumstances of Uganda and of its people permit, and subject to such qualifications as circumstances may render necessary'.[46] As

42. Article 137 of the Constitution.
43. Article 91(1).
44. Article 79.
45. Section 14(3).
46. Section 14(2)(b)(i) and (3) of the Judicature Act. *See also* s. 11(1) of the Magistrates Courts Act, Cap. 16. In *Nyali v. A.G.* [1955] 1 All ER 646, Denning L.J. cautioned that albeit common law 'has many principles of manifest justice and good sense which can be applied with advantage to people of every race and colour all the world over', it can only be applied in foreign land such as Uganda 'with considerable modifications'. For a discussion of the relationship between common law and Ugandan law, *see* D.J. Bakibinga, *Law of Contract in Uganda* 4–6 (The Written Word Publications 2013).

shall be illustrated in this monograph, most, if not all case law on contract law in Uganda has a foundation in common law and doctrines of equity.

52. It should be pointed out that case law is largely found in law reports (hard and soft versions) and some textbooks, journals and scholarly papers. However, some of the cases may be unreported. Examples of law reports referred to in this monograph include: Kings Bench (KB); Queen's Bench (QB); Weekly Law Reports (WLR); All England Reports (All ER); Appeal Cases (AC); Times Law Reports (TLR); Technology Construction Court (TCC); Commonwealth Law Reports (CLR); East Africa Law Reports (EA); Uganda Law Reports (ULR); East African Court of Appeal Reports (EACA); Kenya Law Reports (KLR); High Court Bulletin (HCB) and Kampala Law Reports (KALR).

Part I. General Principles of the Law of Contract

Chapter 1. Formation

§1. Agreement and Quid Pro Quo (Reciprocity)

53. The Contracts Act, 2010, requires that for there to be a contract, there must be an agreement, voluntarily arrived at by the parties.[47] Consent of the parties is underlined throughout the process of negotiation and conclusion of the contract. There must be a mutual exchange of promises – the offer and acceptance. The principle of reciprocity requires that there should be mutual consideration that passes between two parties to a contract, thereby rendering the agreement valid and binding. Parties enter into an agreement mutually or reciprocally thus making the obligation of a party correlative to the obligation of the other. Most bilateral contracts involve an exchange of promises between the parties with one performance being given in return of another.

54. Obligations are reciprocal where a simultaneous exchange of promises is envisaged. The Contracts Act defines 'reciprocal promises' as 'promises that form the consideration or part of the consideration for each other'.[48] Reciprocity under Ugandan contracts law requires that there should be quid pro quo – the giving or exchange of one valuable thing for another. In addition to agreement, each party should provide valuable consideration in support of each other's promise.

I. Offer and Acceptance

A. Offer

55. A person seeking to enforce a contract must prove the existence of an offer. The Contracts Act defines an offer as 'the willingness to do or to abstain from doing anything signified by a person to another, with a view to obtaining the assent of that other person to the act or abstinence'.[49] In simple terms, an offer is an expression of

47. Section 10(1).
48. Section 2.
49. *Ibid.*

willingness to contract on certain terms made with the intention that a binding contract will exist once the offer is accepted.[50] The offer may be made orally or in writing, or implied from the conduct of the person making the offer, namely the promisor or offeror.[51]

56. An offer may be made to a specific person or group of persons or to a great number of people. In the famous case of *Carlill v. Carbolic Smoke Ball Co*,[52] which has been cited with approval in a number of Ugandan cases such as *Jean Francis Diva v. Habitat*,[53] the plaintiff bought a medical preparation called 'The Carbolic Smoke Ball' in response to an advertisement by the defendants that they would pay GBP 100 to any person who contracted influenza after using the smoke ball in the prescribed manner and for a specified period. They further stated that to show their sincerity, they had deposited GBP 1,000 with the bank out of which the payments would be made. The plaintiff bought one of the smoke balls and used it in the manner prescribed but contracted influenza. She sued for the GBP 100. The defendants argued that there was no agreement. They raised a number of arguments. They argued, first, that there was no offer; that the advert was a mere trade puff, that is to say, an obviously exaggerated statement that is mere sales talk. Second, that even if there was an offer, the same was not capable of being accepted, because it was not addressed to a specific person. That an offer cannot be made to the whole world. Finally, that even if there was an offer, the plaintiff never communicated her acceptance thereof to the defendants.

57. The court rejected all the above arguments, explaining that a public advertisement may or may not constitute an offer depending on the wording. That if it is categorical enough, then it can amount to an offer. That an offer can be made to the whole world and be a valid offer in relation to those members of the public who take it up. Finally, that by performing the conditions of the offer, the plaintiff had thereby accepted the offer.

58. In *Flomera Nalongo v. Luwero Town Council*,[54] the plaintiff applied to the defendant for a lease of land in the town council. The defendant made a lease offer to her. In the lease offer, there was a clause, 'subject to the land being available and free from dispute at the time of the survey'. The plaintiff accepted the offer and paid the requisite fees and rent and was issued with a receipt. When she took surveyors to the land, they found another person who claimed to be the true owner of the land. Citing *Carlill's* case above, the court held that there was a conditional offer by the

50. *See* P. Richards, *Law of Contract* 14 (5th ed. Pearson Education Limited 2002); B.K. Twinomugisha, *Principles of the Law of Contract in Uganda* 21 (Makerere University 2018).
51. Section 2 of the Act defines 'promisor' as 'the person who makes the offer'. It should however be noted that the Act does not use the term 'offeror', while the two words (offeror and promisor) tend to be used by judges interchangeably.
52. [1892] 2 Q.B. 484.
53. H.C.C.S. No. 823 of 1993.
54. H.C.C.S. No. 303 of 1993; [1995] IV K.A.L.R. 24.

defendants to make a contract with the plaintiff. Since there was another claimant to the land, and thus the land was not available and free from dispute, there was no binding contract.

B. Offers and Invitations Treat

59. It is necessary to distinguish an offer from an invitation to treat or bargain. By making an offer, a person signifies his or her readiness to be bound by the terms in the offer. Burrows has defined an 'invitation to treat' as 'an expression of willingness to negotiate. A person making an invitation to treat does not intend to be bound as soon as it is accepted by the person to whom it is addressed'.[55] Whereas in an offer, the person makes a final declaration of his or her intention to be legally bound, with an invitation to treat, the person is merely seeking to initiate negotiations. The person responding to an invitation to treat thereby makes an offer.

60. In *Afro Traders and Farmers (U) Ltd v. Gailey and Roberts (U) Ltd*,[56] the plaintiff sold to the defendant one coffee peeler and another machine in 1980 at a total cost of UGX 385,300. The defendant paid a deposit of UGX 272,659. The defendant took delivery of the coffee peeler but failed to pay the balance on the machine within the time stipulated in the contract. In 1983, the plaintiff sent to the defendant a cheque of the outstanding balance and purported to collect the machine. The defendant rejected the payment on ground that he had sold it to someone else. It was held that the plaintiff's request for information about the peeler and machine amounted to an invitation to treat and when the defendant made out the proforma invoice, they thereby made an offer to sell the two machines to the plaintiff at the prices stated on the invoice. The plaintiff accepted that offer by making part payment. Other examples below illustrate how the courts have, over the years, handled the distinction between an offer and invitation to treat.

61. The question is: Does *Carlill* case apply to all advertisements and notices? The decision in the *Carlill* case that the advertisement was an offer is unique to a situation where the statement is a conditional promise; where there is a unilateral offer. However, most advertisements do not fall within the *Carlill* category. The courts have held that such advertisements are not offers but statements inviting further negotiations. They are treated as invitations to treat. In *Harris v. Nickerson*,[57] an auctioneer advertised that certain goods would be sold at a certain location on a certain date. The plaintiff went to the sale point, but all the lots he was interested in had been withdrawn. He sued the auctioneer for his loss of time and expenses. It was held that the advertisement of the auction was merely a declaration of intent to hold a sale and did not amount to an offer capable of being accepted. That the advertisement was merely an invitation to treat and thus the plaintiff's claim would not succeed.

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55. A. Burrows, *Offer and Acceptance: A Casebook on Contract* 5 (2d ed. Hart Publishing 2009).
56. [1983] H.C.B. 48.
57. (1873) L.R. 8 Q.B. 286.

62. Whether an advertisement gives rise to a contract may depend on the circumstances of a particular case. The court may look at the events following the advertisement. For example, in *Kibona Enterprises v. Departed Asians Property Custodian Board & Another*,[58] the plaintiff saw an advertisement in a newspaper for the sale of property by the first defendant, a department of the Ministry of Finance. The plaintiff bid for the purchase of the property and was declared the successful bidder, whereupon it deposited 10% of the value of the property, which was one of the conditions of the bid. The plaintiff proceeded to prepare development plans. The plaintiff was later informed by the first defendant that the sale agreement had been cancelled because the sitting tenant had to be given the first opportunity to purchase the property. The issues before the court were whether there was a valid contract and whether the first defendant breached that contract. The court held that where one person makes a firm offer, which is accepted by the other in all terms, a valid contract is established. Since the plaintiff saw an advertisement pursuant to which he bid successfully for the purchase of the property and paid, there was a valid contract.

63. The display of goods either in a shop window or within a shop itself does not amount to an offer but an invitation to treat. In *Fisher v. Bell*,[59] a price-marked flick knife was displayed for sale in a shop window. The seller was prosecuted under the Restriction of Offensive Weapons Act 1961, which made it an offence to sell such items. The seller was acquitted, and the court held that the display of an article with a price on it in a shop window is merely an invitation to treat and not an offer for sale, the acceptance of which constitutes a contract.

64. Another example of an invitation to treat is where goods are displayed in the shelves of a supermarket or self-service store. In *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd*,[60] the defendants were being prosecuted under the Pharmacy and Poisons Act, 1933 (UK), on the ground that they had allowed the sale of a certain poison to be carried out without the supervision of a registered pharmacist. The arrangement in the shop was that a customer on entering was given a basket, and he or she was then free to walk around the shop selecting items from the shelves. The customer would then proceed to the cash desk, where he or she was required to pay for them. There was a registered pharmacist near the cash desk who was authorized to prevent a customer removing any drug from the shop. The pharmaceutical society alleged that the goods on the shelves were offers to sell which the customer accepted by placing the goods in the basket. That the sale took place at that point and not at the cash desk under the supervision of the registered pharmacist. It was alleged that Boots were, therefore, in breach of the law mentioned above and had thus committed an offence. The court held that the goods on the shelves were only invitations to treat and that it was a customer who made an offer to buy when he presented the goods for payment at the cash desk. At this point, the person at the cash desk or the registered pharmacist could accept

58. H.C.C.S. No. 663 of 1996.
59. [1961] 1 Q.B. 394.
60. [1952] 2 All ER 459.

or reject that offer. Thus, the sale took place under the supervision of the registered pharmacist and no criminal offence had been committed.

65. In Uganda, like many other places, auctioneers put advertisements in newspapers announcing that they will be selling certain goods on a certain date. The first question is whether the auctioneer's request or advertisement for bids is an offer at law, which will be converted into an agreement with the highest bidder. In *Payne v. Cave*,[61] it was held that a call for bids amounts to an invitation to treat and that the bids themselves are offers, which the auctioneer is free to accept or reject. In the *Harris v. Nickerson* case above,[62] the plaintiff failed to recover damages for loss suffered in travelling to the advertised venue of an auction sale which was cancelled. The court held that his claim was an attempt to make a mere declaration of intention a binding contract.

66. The above legal position is recognized by the Sale of Goods and Supply of Services Act, 2017, which provides that 'a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and until that announcement is made any bidder may retract his or her bid'.[63]

67. Thus, an advertisement or call by an auctioneer for bids is an invitation to treat. So, when a person attends the auction and bids, he or she is making an offer, which may be accepted or rejected. In auction sales, goods may be sold with or without a reserve price. In *McManus v. Fortescue*,[64] it was held that where the auctioneer purports to accept a bid that is lower than the reserve price, there is no contract.

68. Private enterprises and government agencies may procure goods or services through the tender process. They may issue requests for tenders for supply or delivery of goods and services under certain conditions. This may be through a notice published in a newspaper or other widely circulating media. Suppliers interested in providing those goods or services will then submit a tender, which is sometimes called a bid or quotation or expression of interest. The question is whether the notice or advertisement calling for tenders amount to an offer. Is the private enterprise or government agency obliged to sell to the highest bidder? In *Spencer v. Harding*,[65] where the defendants offered to sell their stock by tender, the court held that they had not undertaken to sell to the person who made the highest bid, but they were inviting offers which they could accept or reject as they deemed fit. However, in *Harvela Investments Ltd v. Royal Trust of Canada (CI) Ltd*,[66] where the defendants made it clear that they were going to accept the highest bidder, it was held that this

61. (1789) 3 Term. Rep. 148.
62. (1873) L.R. 8 Q.B. 286.
63. Section (1)(b).
64. [1907] 2 K.B. 1.
65. (1870) L.R. 5 C.P. 561.
66. [1986] A.C. 207.

was an offer that was accepted by the person who made the highest bid and that the defendants were bound to sell to the highest bidder.

69. Thus, an invitation for tenders for the supply of goods and services is not an offer as such but an invitation for offers to be submitted. Thus, the 'tender' is an offer, which can be accepted or rejected as the case may be. Any potential supplier to a government agency should carefully study the procurement law (the Public Procurement and Disposal of Public Assets Act, 2003, as amended and regulations made thereunder) before bidding.

70. In respect of ticket sales, the key questions here are: was it intended that the ticket or receipt should amount to a contractual document? How and when was the receipt or ticket issued? In *Chapelton v. Barry UDC*,[67] it was held that a sign placed by some chairs for hire constituted an offer, which the plaintiff accepted when he took two of the chairs. The court observed that the terms and conditions on the tickets formed no part of the contract, since they were handed out after the contract was concluded. However, passenger tickets have been held to be contractual documents on ground that the issuing of the ticket by a bus conductor or ticket office clerk is an offer, which is accepted by taking the ticket. In *Wilkie v. London Passenger Transport Board*,[68] Lord Green noted that on a bus, a contract is made when the intending passenger 'puts himself either on the platform or inside the bus'.[69]

71. In *Thornton v. Shoe Lane Parking Ltd*,[70] the plaintiff went to park his car in the defendant's car park. At the entrance, there was a sign which set out the charges and stated: 'All cars parked at customer's risk'. As customers drove in, a light changed from red to green, and a ticket ejected from an automatic issuing machine. Lord Denning stated:

> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it; but it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money in the machine; the contract was concluded at that time. It can be translated into an offer and acceptance in this way. The offer is made when the proprietor of the machine holds out as being ready to receive the money. The acceptance takes place when the customer puts the money in the slot. The terms of the offer are contained in the notice placed on or near the machine, stating what is offered for the money. He (the customer) is not bound by the terms printed on the ticket because the ticket comes too late. The contract had already been made.[71]

67. [1940] 1 K.B. 532.
68. [1947] 1 All ER 258.
69. *Ibid.*
70. [1971] 1 All ER 686.
71. *Ibid.,* p. 690.

72. It would therefore seem that whether the ticket or receipt issued is a contractual document largely depends on the circumstances of each case. For example, in *Mendelssohn v. Normand Ltd*,[72] the garage attendant gave the plaintiff a ticket with printed conditions on it. The plaintiff had been to this garage many times, and he had always been given a ticket with the same wording. Every time he had put it into his pocket and produced it when he came back for the car. It was held that he may not have read the ticket but that did not matter. That it was a contractual document and since he accepted it without objection, he must be taken to have agreed to its terms.

C. Communication of Offer

73. How is an offer communicated? The Contracts Act provides that '[t]he communication of an offer is made by an act or omission of a party who proposes the offer, by which that party intends to communicate the offer or which has the effect of communicating the offer'.[73] An offer cannot take effect until it has been received by the offeree as he or she cannot accept something of which he or she is not aware. In *Taylor v. Laird*,[74] the plaintiff, a captain of a ship, was employed to command a steamer up to river Niger at a rate of GBP 50. The plaintiff took the ship as far as Dagbo, but refused to proceed further. He later helped to work the ship home and claimed wages for his work. The court held that the owners of the ship were entitled to receive payment as the plaintiff's offer to help to bring the ship back to its home was not communicated to them. That they were not given an opportunity to either accept or reject his offer.

D. Revocation of Offer

74. An offer cannot last forever. According to the Contracts Act, '[a]n offer may be revoked at any time before the communication of acceptance is completed'.[75] Thus, the offeror can only revoke the offer if the offeree has not yet accepted it, since no legal obligation exists until this event occurs. The offeror must communicate the notice of revocation to the offeree.[76] In *Routledge v. Grant*,[77] it was held that where a defendant made an offer to purchase the plaintiff's house and gave him six weeks to accept the offer, he was free to revoke and withdraw his offer before the six weeks had passed.

75. In *Byrne v. Tienhoven*,[78] the defendants posted a letter in Cardiff on 1 October offering to sell a quantity of tinplate to the plaintiffs in New York. The offer was

72. [1970] 1 Q.B. 177.
73. Section 3(1).
74. [1856] 1 H. & N. 266.
75. Section 5(1).
76. Section 6(a).
77. (1828) 4 Bing. 653.
78. (1880) 5 C.P.D. 344.

received by the plaintiffs on 11 October, and they immediately accepted it by telegram and confirmed their acceptance by a letter posted on 15 October. On 8 October, the defendants had posted a letter withdrawing their offer, but this was not received by the plaintiffs until 20 October. It was held that the contract had come into existence when the telegram was sent on 11 October and that the letter of revocation sent on 8 October had no effect on the validity of the contract, since it was only effective when received on 20 October, after a legally binding contract had already come into existence.

76. Exceptions to the rule that revocation must be communicated to the offeree include where the latter does not inform the offeror of a change in address. The rule will also not apply where an offer has been made to the general public, for example, in a newspaper. Certainly, it would be difficult if not impossible to communicate the revocation to every person who had read the offer.

77. Revocation of an offer may be communicated through a third party. In *Dickinson v. Dodds*,[79] on 10 June, the defendant offered to sell his house to the plaintiff for GBP 800 adding, 'This offer to be left over until Friday 12th June, 9 am.' On Thursday, 11 June, the defendant sold the house to someone else and that evening the plaintiff was informed that the house had been sold. Before 9 a.m. on 12 June, the plaintiff handed to the defendant a formal letter of acceptance. The court held that the plaintiff's claim could not succeed since he was aware that at the time he accepted the offer, the defendant no longer intended to sell the house to him.

78. The Contracts Act provides that an offer is revoked by 'lapse of time prescribed in the offer, for its acceptance, or, where time is not prescribed, by the lapse of a reasonable time without communication of the acceptance'.[80] What is reasonable depends on the circumstances of the case, especially the subject matter of the contract. For example, an offer to sell perishable goods such as pineapples would lapse after a fairly shorter period compared to a quantity of iron bars.

79. The Contracts Act further provides that an offer may be revoked by 'the failure of the acceptor [offeree] to fulfill a condition precedent to acceptance'.[81] For example, Joan may offer to sell a car to Denis within two months provided she finds a plot of land where to invest the proceeds of sale. In such a situation, the offer to sell is conditional upon finding of the plot of land. A condition precedent may be implied in an offer. For example, in an offer to purchase goods, it is an implied condition that they will remain substantially in the same condition as they were in when the offer was first made.

80. In *Financings Ltd v. Stimson*,[82] the defendant having seen a car at the premises of the dealer, decided to buy it on hire purchase. He signed a form supplied

79. (1876) 2 Ch. D. 463.
80. Section 6(b).
81. Section 6(c).
82. [1962] 3 All ER 386.

by the dealer which stated that the hire purchase agreement became binding only when signed by the plaintiffs, the finance company. The defendant paid a first instalment of GBP 70 and took the car away on 18 March. The defendant was dissatisfied with the car's performance and, on 20 March, returned it and told the dealer that he was no longer interested in purchasing it. On 25 March, the plaintiffs signed the agreement, thereby purporting to accept the offer of the defendant. On the night of 24–25 March, the car was stolen from the premises of the dealer and badly damaged. The plaintiffs eventually sold the car and claimed damages from the defendant who counterclaimed for his first instalment of GBP 70. It was held that the defendant would succeed since by returning the car to the dealer, he had revoked his offer and thus no contract was concluded between the parties. The court also observed that on the facts of the case, there was an implied condition in the defendant's offer that the car would remain in substantially the same condition until the time of acceptance. Since the damage occurred before acceptance, the plaintiffs were not in position to accept the offer which had lapsed due to the fact that the implied condition had not been complied with.

81. An offer may also be revoked by 'the death or insanity of the offeror, where the fact of the death or insanity comes to the knowledge of the acceptor before acceptance'.[83] The effect of death or insanity varies according to the nature of the particular contract. Where the contract requires the personal services of the offeror, death will automatically revoke the offer. For example, if a dancer offers to personally perform at Nuzi Hostel and dies on the eve of the function, the offer is revoked. In *Dickinson v. Dodds* above, Mellish LJ in an obiter dictum was of the view that if a man who makes an offer dies, the offer cannot be accepted. However, where the offer is not for personal services, for example, an offer to sale land, it may be carried out by the legal representatives of the deceased.[84]

82. Although in England the effect of insanity was treated in the same way as death, since the middle of the nineteenth century, there has been a growing recognition of the capacity of insane persons to make contracts, at least in some circumstances. Clearly, the offer would be revoked if a person was incapable of understanding the nature and consequences of his or her act at the time of making the offer. The offer would also be terminated where the offeree knows of the insanity of the offeror. Like death, the insanity of the offeror must be brought to the attention of the offeree.

83. According to the Contracts Act, communication of revocation is complete, 'as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it'.[85]

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83. Section 6(d).
84. *See, for example*, *Bradbury v. Morgan* (1862) 1 H. and C. 249.
85. Section 4(3)(a).

84. One way by which an offer comes to an end, but is not canvassed by the Act, is when the offer is rejected by the offeree through what is known as a counter-offer. It was stated above, that acceptance must be unqualified. Thus, any attempt to introduce a new term does not amount to acceptance of an offer, but becomes a counter-offer. The effect of the counter-offer is to destroy the original offer. The counter-offer operates as a rejection of the original offer. In *Hyde v. Wrench*,[86] the defendant offered to sell his farm for GBP 1,000. The plaintiff at first made a counter-offer of GBP 950, but two days later attempted to accept the original offer by agreeing to pay GBP 1,000. The defendant refused to complete the sale, and the plaintiff sued. It was held that no contract existed since by his letter offering GBP 950, the plaintiff had made a counter-offer, the effect of which was to reject the original offer. The latter was not available for him to accept two days later.[87]

85. In *Steven Byaruhanga v. Mbarara Municipal Council*,[88] the respondent decided to sell its houses in Kakoba Housing Estate to the sitting tenants who were required to pay 10% of the value of the property immediately and the balance within one year. However, the sitting tenants (applicants) offered to pay the balance within two years. The court cited *Hyde v. Wrench* above and held that in law, a counter-offer operates as a rejection of the original offer. A rejection of the original offer means that no contract is concluded, since there is no acceptance. That since the defendants indicated that the applicants must pay the balance within one year, and yet the applicants counter-offered to pay it within two years, it meant that no contract was concluded between the applicants and the respondents.

E. Acceptance

86. The Contracts Act defines 'acceptance' as 'an assent to an offer made by a person to whom the offer is made'.[89] The Act also provides that the acceptance should be 'absolute and unqualified; and expressed in a usual and reasonable manner, except where the offer prescribes the manner in which it is to be accepted'.[90] According to the Act, '[w]here an offer prescribes the manner in which it is to be accepted and the acceptance is not made in that manner, the offeror may, within a reasonable time after the acceptance is communicated to him or her, demand that the offer is accepted only in the prescribed manner'.[91] Where the offeror does not demand the manner of acceptance, 'the offeror shall be deemed to have accepted the manner of acceptance offered by the offeree'.[92]

87. The legal position above indicates that the assent must be in response to the offer and must precisely match the terms of the offer. The acceptance must be

86. (1840) 3 Beav. 334.
87. On counter-offer, *see also Uganda Telecom Ltd v. Tanzanite Corporation* [2005] E.A. 351.
88. [1995] IV K.A.L.R. 62.
89. Section 2.
90. Section 7(1)(a) and (b).
91. Section 7(2).
92. Section 7(3).

unequivocal and unconditional. Mere acknowledgement of the offer is insufficient; there must be a communication of the acceptance to the offeror.

F. Communication of Acceptance

88. How is an acceptance communicated? According to the Contracts Act, 'communication of acceptance is made by an act or omission of a party who accepts the offer, by which that party intends to communicate the acceptance or which has the effect of communicating the acceptance'.[93] The Contracts Act further provides that communication of an acceptance is complete, 'as against the offeror, when it is put in a course of transmission to him or her so as to be out of the power of the acceptor'.[94] The communication is complete 'as against the acceptor, when it comes to the knowledge of the offeror'.[95]

89. Communication of the acceptance may be done orally or in writing, or by data message, or inferred from conduct. In *Taylor v. Allon*,[96] it was held that acceptance by conduct can only be effective if the offeree performed the act in question with the intention of accepting the offer. Where the offer prescribes a particular mode of acceptance, conduct does not amount to acceptance unless the stipulated mode has been complied with.

90. In *Holwell Securities Ltd v. Hughes*,[97] it was held that some objective or external manifestation of acceptance must be communicated to the offeror. In *Powell v. Lee*,[98] the defendant appointed the plaintiff a headmaster of a school. The terms of the appointment were never officially communicated to the plaintiff, though he got to know of the appointment from a person who had no authority to communicate the same. Later, the appointment was revoked, and he sued. It was held that there was no contract, since the defendant's acceptance of the plaintiff's offer of service had not been communicated to him.

91. In *Entores v. Miles Far East Corporation*,[99] it was held that acceptance has to be not only communicated but also received by the offeror. Lord Denning illustrated the situation using the following example: A shouts an offer to B across a river, and A does not hear the reply because of the noise of an aircraft flying overhead. In such a situation, there is no contract. Lord Denning stated that an offeror cannot deny receipt of acceptance if it is his own fault that he did not get it.

92. The offeror may impose the mode of acceptance. The question is whether the offeror can render a person contractually liable within the terms of the offer, by not

93. Section 3(2).
94. Section 4(2)(a).
95. Section 4(2)(b).
96. [1966] 1 Q.B. 304.
97. [1974] 1 W.L.R. 155.
98. (1908) 99 L.T. 284.
99. [1955] 2 Q.B. 327.

requiring him or her to communicate his acceptance before becoming a party to the contract? The general rule is that silence does not amount to an acceptance. In *Felthouse v. Bindley*,[100] A wrote to B offering him a sum of money for his horse saying, 'If I hear no more, I consider him to be mine.' B did not reply, and it was held that his silence did not amount to an acceptance despite the wording of the offer. Acceptance must be by positive conduct.

93. The rule that acceptance must be communicated to the offeror does not apply where the offeror proposes in the offer that the acceptance may be sent by post. The rule regarding acceptance by post is that acceptance is complete the moment the acceptance letter, correctly addressed to the offeror, is posted. In *Adams v. Lindsell*,[101] the defendants wrote to the plaintiffs on 2 September offering to sell them wool on certain terms and requested a reply 'in course of post'. The letter containing the offer was wrongly addressed and was received only on 5 September. Consequently, the letter of acceptance was received on 9 September, two days later than would have been expected by the defendants. On the day before the letter of acceptance was received, the defendants sold the wool to another person. The issue before the court was whether a contract of sale had been entered into before 8 September when the wool was sold to another person. The court held that the offer had been accepted as soon as the letter of acceptance had been posted. That the contract was in existence before the sale of the wool to another person notwithstanding that the letter of acceptance had not been received by the defendant, who was thus liable for breach of contract.

94. The postal rule may be justified on the ground that if the offeror explicitly indicates that acceptance by post is sufficient, then he or she should bear the consequences of the postal rule. The rationale of the rule is that once a person posts the letter, he or she ceases to have control over its transmission. He or she can neither recall the mail nor influence the speed of its transmission. He or she therefore should not be made to bear the consequences of its delay. However, courts have over the years illustrated how the operation of the postal rule may be circumvented. In *Henthorn v. Fraser*,[102] it was held that the postal rule applied only where it was reasonable for the offeree to use the post as a means of communication. In *Household Fire and Carriage Accident Insurance Co. v. Grant*,[103] Bramwell J noted that the postal rule could be avoided by a prudent offeror saying, 'Your answer by post is only to bind when it reaches me.' That in such a situation, if the letter is of acceptance is posted but does not reach the offeror, then there is no contract. The offeror may also specifically provide for a particular mode of communication. In *Manchester Diocesan Council for Education v. Commercial and General Investments Ltd*,[104] the court stated:

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100. (1862) 11 C.B. (N.S.) 869. *See also Allied Marine Transport Ltd. v. Vale Do Rio Doce, The Leonidas* [1985] 2 All ER 796.
101. (1818) 1 B. & Ald. 681.
102. [1892] 2 Ch. 27.
103. (1879) 4 Ex. D. 216.
104. [1969] 3 All ER 159.

> An offeror may by the terms of his offer indicate that it may be accepted in a particular manner … [A]n offeror who, by the terms of his offer insists on acceptance in a particular way is entitled to insist that he is not bound unless acceptance is effected or communicated in that particular way, although it seems probable that even so, if the other party communicates his acceptance in some other way, the offeror may, by conduct or otherwise, waive his right to insist on the prescribed method of acceptance. Where, however, the offeror has prescribed a particular mode of acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of opinion that acceptance communicated to the offeror by another mode which is no less advantageous to him will conclude the contract. … If an offeror intends that he shall be bound in some particular manner, it must be for him to make this clear.[105]

95. It follows from the above that where the offeror provides a particular mode of communication, it must be complied with by the offeree. However, an acceptance by a different mode may be sufficient provided that it is more or equally expeditious as the method requested by the offeror. For example, in *Tinn v. Hoffman & Co.*,[106] where the offeree was requested 'to reply by return of post', the court held that an equally expeditious mode was sufficient.

96. In situations of instantaneous methods of communication, such as the telephone and the telex, which has however been superseded by other means such as fax and email, the rule that acceptance takes place only when the offeror knows of it applies. In *Entores v. Miles Far East Corporation*,[107] the plaintiffs were a company based in London who were dealing with the defendants, an American company, with agents in Amsterdam. Both parties possessed telex equipment. Using the equipment, the plaintiffs offered to buy goods from the defendants' agents. The agents accepted the offer also by telex. Subsequently, a dispute arose between the parties, and the plaintiffs wished to serve a claim on the defendants alleging breach of contract. This was only possible if the contract had been made in England. The court held that the parties were in the same position as they would have been if they had been in each other's presence. Consequently, the contract was entered into when the acceptance by the agents was received in London by the plaintiffs, not when the telex was sent in Amsterdam, which would be subject to Dutch law. Lord Denning opined, though obiter dictum, that the same principles in this case applied to acceptance by telephone.

97. According to the Contracts Act, the offeree may revoke the acceptance 'at any time before the communication of the acceptance is complete'.[108] Communication of revocation of acceptance is complete, 'as against the offeree, when it comes to his or her knowledge'.[109]

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105. *Ibid.*
106. (1873) 29 L.T. 271.
107. [1955] 2 Q.B. 327. *See also Brinkibon Ltd v. Stahag Stahl* [1983] 2 A.C. 34.
108. Section 5(2).
109. Section 4(3)(b).

G. E-commerce

98. A comment on offer and an acceptance in the context of e-commerce is in order. In today's IT driven environment, correspondence via Internet has a significant impact on how business is conducted, and consequently, the formation of contracts. Many people and entities in the country are increasingly buying goods such as motor vehicles through the Internet. They correspond through email. In case of a dispute, courts have to determine whether there was a valid contract. The first question is what is the status of the supplier's website? Second, does it represent an offer or an invitation to treat? Using the case of *Pharmaceutical Society of Great Britain* above, one may argue that the goods on the website constitute an invitation to treat, and the offer is made when the buyer submits his or her details to the seller.

99. The second question concerns the status of the electronic communication between the supplier and the buyer. Can a chain of email correspondence constitute a binding contract between the parties? According to the Act, a written contract may be in the form of a data message.[110] The ETA[111] defines a data message as data generated, sent, received or stored by computer means and includes voice, where the voice is used in an automated transaction, and a store record.[112] The ETA provides that '[i]nformation shall not be denied legal effect, validity or enforcement solely on the ground that it is wholly or partly in the form of a data message'.[113] According to the ETA, the requirement for a document to be in writing is fulfilled if it is in the form of a data message and accessible in a manner which is usable for subsequent references.[114] The ETA further provides that '[a] contract shall not be denied legal effect merely because it is concluded partly or wholly by means of a data message'.[115] The ETA also provides that '[a] contract by means of a data message is concluded at the time when and the place where acceptance of the offer is received by the person making the offer'.[116]

100. In *Dian GF International Ltd v. Damco Logistics Uganda Ltd*,[117] where an email addressed to the plaintiff was to the effect that goods are transported at the owner's risk, counsel for the plaintiff attacked the email on grounds of its authentication. Madrama J observed that the ETA applies modern practices at the point of admissibility of evidence as far as the requirement for authentication is concerned. That the principles upon which email evidence may be admissible are analogous to the traditional grounds under the Evidence Act[118] for the admissibility of evidence. On authentication as required by the ETA, the judge stated:

110. Section 10(3)(a).
111. Act 8 of 2011.
112. Section 2.
113. Section 5(1); s. 5(2)(a) and (b). For comparative purposes, *see also* s. 83 J & K of the Kenya Information and Communications Act, 2009, Cap. 411A.
114. Section 4.
115. Section 14(1).
116. Section 14(2).
117. H.C.C.S. No. 161 of 2010.
118. Cap. 6.

> It follows that before admissibility, the document has to meet the requirements of authentication or identification. This is a process of verification that establishes that the document is what it purports to be i.e. that the email was made by the author indicated therein and is unaltered except for the change in the document generated automatically such as adding the date and time in case of email and address.[119]

101. In *Tecno Telcom Ltd v. Kigalo Investments Ltd*,[120] it was also held that materials obtained by the respondent from the Internet qualify to be a data message which is admissible under section 8 of the ETA. However, the data message must comply with authenticity requirements under section 7 of the ETA. In *Golden Ocean Group Ltd v. Salgaocar Mining Industries & Another*,[121] the court held that a series of emails could create a binding contract. Clarke J stated:

> As to good commercial sense, it seems to me highly desirable that the law should give effect to agreements made by a series of email communication, which follow, more clearly than many negotiations between men [and women] of business, the sequence of offer, counter offer and final acceptance by which, classically, the law determines whether a contract has been made.[122]

102. Another interesting question in the realm of e-commerce is: what is the status of an unsigned email? As pointed out above, the Act does not require that an agreement should be signed in order to amount to a valid contract.[123] However, according to the ETA, '[w]here a law requires a signature or provides for consequences where a document is not signed, the requirement is fulfilled if an electronic signature is used'.[124] The Act further provides that '[a]n expression of interest may be in the form of a data message and may be without an electronic signature as long as it is possible to infer the interest of the person from the data message'.[125]

103. In *Forcelli v. Gelco Corp*,[126] a one of Greene's email message contained her printed name at the end thereof as opposed to an electronic signature as defined by the Electronic Signatures and Records Act. The email message text ended with the words, 'Thanks, Brenda Greene'. The court held that this in effect meant that she signed the email message and thus met the requirements of the Act. That where an email message contains all material terms of a settlement and manifestation of mutual accord, and the party or his or her agent types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email may amount to subscribed writing.

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119. *Dian GF International Ltd*, *supra*, p. 21.
120. [2013] 2 E.A. 376.
121. (2011) E.W.H.C. 56.
122. Paragraph 63. *See also Nicholas Prestige Homes v. Neal* [2010] E.W.C.A. Civ. 1552.
123. *See* s. 10.
124. Section 5(6).
125. Section 18. *See also* ss 3 and 4 of the Electronic Signatures Act, 2010.
126. 2013 N.Y. Slip Op 05 437 [109 A.D. 3d 244].

104. If an email or chain of emails clearly states an offer for entering into a transaction and the other party responds by email accepting the terms, then the courts are likely to find that a valid contract has been formed. Thus, it is important for contracting parties to carefully negotiate the terms of their proposed agreements via email. They should take appropriate precautions to avoid entering unintended or unwanted legally binding arrangements. It is important to include phrases such as 'this email is not an offer capable of acceptance'; or 'this email does not indicate an intention to enter into an agreement'; or a statement to the effect that they are still negotiating and shall not be bound until a written agreement is signed by the parties. The latter is known as an 'agreement subject to contract' and is not legally binding. The mere fact that an actual signature has not accompanied the email does not matter provided the circumstances lead to an inference that there was a firm offer by one person, which was accepted by the other.

105. Like the postal mail, one cannot recall or influence the transmission of email once sent. A critical question that arises in respect of email acceptance is whether the postal acceptance rule applies to emails, so that acceptance by email is effective as soon as the same is sent and not necessarily when the offeror receives or opens it. The Contracts Act is silent on the question whether an acceptance by email becomes valid when successfully sent. The courts in Uganda and many other jurisdictions have also not clearly decided this question. Some commentators have argued that email is a digital version of the normal post, and thus the postal acceptance rule should apply to contracting through use of email.[127] However, others are of the view that the general rule which governs acceptance of offers will apply, and acceptance which is sent by email will not be effective until it is communicated to the offeror.[128] Given the controversy surrounding acceptance by email, it may be safer for the offeror to clearly use words in the offer that leave no doubt that the acceptance will not be complete unless he or she receives it and notifies the offeree.

II. Intention to Create Legal Relations

106. People make all manner of promises or even enter into agreements daily. But the question is: does the mere presence of an agreement and consideration result into a contract? In addition to an agreement – offer and acceptance – and consideration, there must be a third essential element: 'the intention to be legally bound'.[129] The parties must have an intention to create legal relations. Some promises may be binding as a matter of honour, but may not amount to a cause of action

127. *See, for example*, Marwan Al Ibrahim et al., *The Postal Acceptance Rule in the Digital Age*, 2 J. Intl. Com. L. Tech. 1, http://www.jictl.com/index.php/jict/article/viewfile/18/17 (accessed 22 Aug. 2016).
128. *See, for example*, Kathryn O'Shea & Kylie Skeahan, *Acceptance of Offers by E-mail – How Far Should the Postal Acceptance Extend?*, 13 Queensland U. Tech. LJ (1997), https://lr.law.qut.edu.au/article/view/446 (accessed 22 Aug. 2016).
129. Section 10(1). *See also Pal Agencies (U) Ltd v. Soroti Municipal Council and Another* H.C.C.S. No. 351 of 2009; *Begumisa Enterprises Ltd v. Maersk* H.C.C.S. No. 83 of 2008.

in the eyes of the law. In *Brooker v. Palmer*,[130] Lord Greene MR stated that, '[t]he law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negate any intention of any kind'.[131]

A. Domestic or Social Agreements

107. Although agreements of a domestic or social nature may have an outward appearance of a contract, no such presumption is made. However, the intention of the parties is largely obtained from the language used and the circumstances in which they use it. Regarding social and domestic agreements, the leading case in this area is *Balfour v. Balfour*,[132] where a husband who was a civil servant based in Sri Lanka took his wife to England. Eventually he had to return to Sri Lanka, but his wife had to stay in England for medical reasons. He agreed to pay her GBP 30 per month for maintenance during his absence. When he failed to pay the allowance, she sued. The court held that her action would fail because the parties had no intention of creating a legally binding agreement. The court held that where the parties were husband and wife, the presumption was that there was no intention to create a contract, and the burden was on the wife to rebut such presumption.

108. In spite of the decision in *Balfour v. Balfour*, agreements between husband and wife may result in legally binding relations depending on factors such as the conduct of the parties and the circumstances of each case. For example, in *Merritt v. Merritt*,[133] the husband left the matrimonial home, which was in the joint names of husband and wife and subject to a mortgage, to live with another woman. The husband and wife met and had a discussion in the former's car where he agreed to pay the latter GBP 40 a month out of which she had to discharge the outstanding mortgage payments on the house. The wife refused to leave the car unless the husband reduced the agreement in writing. The husband wrote and signed a note which stated: 'In consideration of the fact that you will pay all charges in connection with the house … until such time as the mortgage repayment has been completed I will agree to transfer the property into your sole ownership.' After the wife had paid off the mortgage, the husband refused to transfer the house to her. The court held that the agreement was binding, since the parties intended to create legally binding relations. The court distinguished the case of *Balfour v. Balfour* on the grounds that the parties were separated. That where they have separated, it is generally considered that they intended to be bound by their agreements. In any case, the written agreement was further evidence of an intention to be bound.

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130. [1942] 2 All ER 674.
131. *Ibid.,* p. 677.
132. [1919] 2 K.B. 571. For social agreements not concerning husband and wife or parents and children, *see, for example*, *Simpkins v. Pays* [1955] 3 All ER 10.
133. [1970] 2 All ER 760.

109. In *Pettitt v. Pettitt*,[134] Mrs Pettitt inherited a house in which she and her husband lived. The husband spent GBP 800 on improvement of the property. She sold the house in 1961 and purchased another property which was transferred into her name alone. There was some money left from the sale which she gave to her husband to purchase a car. They lived in the house for four years and then divorced. He claimed that he had a beneficial interest in the property based on the improvements made to the new house. He estimated that he had spent GBP 723 and claimed to be entitled to GBP 1,000 from the proceeds of the sale. It was held that the improvements allegedly made by Mr Pettitt were insufficient to create an interest in the property. The court accepted the principle enunciated in *Balfour v. Balfour*, but observed that although many agreements between husband and wife are not intended to be legally binding, performance of such agreements may give rise to legal consequences.

110. Challenges of ascertaining contractual intention in social or domestic agreements may also occur in relations between parents and children. For example, in *Jones v. Padavatton*,[135] a mother promised to pay her daughter 200 per dollars month if she gave up her job in the USA and went to London to study for the Bar. The daughter was reluctant to do so as she had a well-paying job with the Indian embassy in Washington. However, the mother persuaded her that it would be in her interest to leave the job and join her in Trinidad as a lawyer. This initial agreement was not working, since the daughter believed that 200 dollars was in USD whereas the mother meant Trinidad dollars, which was about half of what she was expecting. This meant the daughter could only afford to rent one room for herself and her son to live in. With a second agreement, the mother purchased a large house so that the daughter could rent out other rooms and use the income as her maintenance. The daughter then married and did not complete her studies. The mother sought possession of the house.

111. The issue before the court was whether there was a legally binding agreement between the mother and the daughter. The court held that there was no intention to create a legal relationship between the parties and gave the mother possession of the house. Lord Salmon agreed with the majority decision but on different grounds. He argued that the initial agreement was a binding contract that was intended to last for a reasonable time in order to allow the daughter to pass her Bar examinations. The judge based his decision on the fact that he thought it inconceivable for the daughter to give up a lucrative job without an existing enforceable promise for financial support. However, with the lapse of five years and given that she had still not passed the examinations, he maintained that the contract had come to end. His Lordship observed that the second agreement was so ambiguous and uncertain that it could not be described as a contract. There was nothing in the second agreement nor was there available evidence to suggest that the mother intended to renounce her right to possess her house and use it as she pleased.

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134. [1970] A.C. 777.
135. [1969] 1 W.L.R. 328.

B. Commercial Agreements

112. In commercial agreements, there is a presumption that there is an intention to create a legally binding relationship, which may of course be rebutted with strong evidence. One of the ways of rebutting this presumption is by including an express statement indicating that the agreement is not to be binding in law. For example, in *Jones v. Vernom's Pools Ltd*,[136] the plaintiff attempted to claim money which he alleged had been won in a football pool. Each coupon contained words, 'Binding in honour only.' The court held that the words were sufficient to rebut the presumption, and the plaintiff's action would fail.

113. Another case involving a clause expressly ruling out contractual intention is *Rose and Frank Co. v. J R Crompton and Bros*,[137] where an English company agreed to sell certain carbon copy materials in the USA through a New York based firm. The transaction, which was made in writing, gave the plaintiff the sole rights to market and sell the products in the USA and Canada for a period of three years with an option to extend the period. The document contained a clause that was described as an 'Honourable Pledge Clause', and which provided: 'This arrangement is not entered into … as a formal or legal agreement and shall not be subject to legal jurisdiction to the law courts either of the United States or of England.' The original agreement began in July 1913, but at the end of the three-year period the option to extend was exercised and as a result, the agreement was to last until March 1920. In 1919, the defendants terminated the agreement and failed to give appropriate notice as required by the agreement, and also refused to fulfil orders received by them prior to their decision to terminate the agreement. It was held that with regard to the orders already received there was a separate and binding contract which the defendants were bound to fulfil. With regard to the grant of selling rights, the court held that since the parties had specifically declared that the document was not to give rise to legally binding relations, then none could exist. Consequently, there was an obligation to give orders or to receive them, but once they were given and accepted, the defendants were bound to execute the order. Scrutton LJ stated:

> It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside

136. [1938] 2 All ER 626. *See also Appleton v. H Littlewood Ltd* [1939] 1 All ER 626.
137. [1923] 2 K.B. 261.

> intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean.[138]

114. Thus, in commercial agreements, there is a presumption that the parties intended to create legally binding relations. This can be attained by inserting a statement to that effect in their agreement. However, the statement to exclude legal relations should be unequivocal. Where the statement is ambiguous, the burden of proving the contractual intention lies heavily on the party who asserts it.

III. Consideration

A. Consideration in Uganda's Legal System

1. Nature of Consideration

115. Consideration is part of the legal system in Uganda. Although offer, acceptance and intention to be legally bound may connote the existence of an agreement, in Uganda, these elements alone are not sufficient in the formation of a valid contract. There should be consideration, which largely refers to a mutual exchange of promises. There should be quid pro quo. Consideration denotes the 'bargain' element of a contract. The Contracts Act codifies the definition of valuable consideration in *Currie v. Misa*,[139] and defines consideration as 'a right, interest, profit or benefit accruing to one party or forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party'.[140]

116. The Contracts Act also defines a 'consideration for a promise' as 'where at the desire of a promisor, a promisee or any other person does or abstains from doing or promises to do or to abstain from doing something'.[141] From the foregoing, it can be seen that consideration is the price for which the promise of another person is bought or received. It signifies some benefit or advantage going to one party or some loss or detriment suffered by the other party. In order to enforce a promise, the promisee must show what he or she did for the promisor or suffered at the latter's request. The definition of consideration is an embodiment of principles, which are examined below.

117. There are two types of consideration: executed and executory. Executed consideration occurs when one of the parties does whatever he or she is required to do under the contract. In this situation, he or she is said to have executed his or her side of the bargain. Executory consideration is where one or both parties promise(s)

138. *Ibid.,* p. 288.
139. (1875) L.R. 10 Ex. 153.
140. Section 2.
141. *Ibid.*

to perform an act or acts in future. For example, where X promises to deliver a car to Y, and the latter promises to pay two weeks after delivery.

118. The general rule is that past consideration has no consideration. For example, John travelled abroad. While he was away, Tom, one of his neighbour's sons, washed his car without any instructions whatsoever from John. As soon as John returned, he told Tom, 'Good boy, you are so kind! I surely will reward you.' Next day, Tom demanded UGX 20,000 from John. The latter refused to pay. Tom wants to sue him for breach of contract. In such a situation, Tom's consideration of washing the car is past in relation to a promise for a reward made by John and thus his claim cannot succeed. In *Roscorla v. Thomas*,[142] the plaintiff had negotiated the purchase of a horse from the defendant for a certain price. Subsequent to the agreement, the defendant assured the plaintiff that the horse was 'sound and free from vice'. In fact, the horse proved to be vicious, and the plaintiff sued for breach of the promise. It was held that his action would fail since the defendant's assurance was only supported by past consideration.

119. In *McArdle*,[143] according to the father's will, his children were to be left his house upon the death of their mother. While the mother was alive, one of the children and his wife lived in the house with her. The wife, during this period, made substantial alterations and improvements on the property. In gratitude, the children signed a document which stated, 'in consideration of your carrying out certain alterations and improvements to the property, we hereby agree that the executors shall repay you from the estate, when distributed, the sum of GBP 488 in settlement of the amount spent on such improvements'. It was held that the alterations and improvements completed before the signing of the undertaking by the children amounted to past consideration and her claim for that GBP 488 would fail.

120. Like most general rules, there are exceptions to the past consideration rule. In the first place, where a service is performed at the request of the beneficiary, who then subsequently promised to compensate the person responsible, the promise, though supported by past consideration, is enforceable. Hence, in *Lampleigh v. Brathwait*,[144] the defendant had killed another man and requested the plaintiff to secure a pardon from the king. The plaintiff invested a lot of effort and expense to secure the pardon for the defendant who subsequently promised to pay the plaintiff GBP 100. When the defendant failed to pay, he was sued on his promise. Basing on the past consideration rule, the efforts by the plaintiff were in the past, and thus his action should have failed. However, it was held that the original request by the defendant contained an implied promise that he would reward and reimburse the plaintiff for his efforts. The court observed that both parties must have assumed throughout their negotiations that the services were to be paid for.

142. (1842) 3 Q.B. 234.
143. [1951] Ch. 669.
144. (1615) Hob. 105.

121. In *Re Casey's Patents*,[145] A and B wrote to C informing him that they were to give him one-third of the profits that had been earned from an invention for which C was largely responsible. A and B refused to pay, and C sued. The court adopted the legal position in *Lampleigh v. Brathwait* and ruled in C's favour, since from the commencement of C's services, it was implied that he would be compensated for his work. Thus, the mere fact that the promise was subsequent to the performance of the services is immaterial provided that there is some kind of understanding between the parties of some form of compensation. In fact, 'a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor'[146] is recognized by the law.[147] In *Pao On v. Lau Yiu Long*,[148] Lord Scarman stated the rule as follows:

> An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act is to be remunerated further by a payment or the conferment of some other benefit and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance.[149]

122. Another exception concerns negotiable instruments such as bills of exchange. A bill of exchange is defined by the Bills of Exchange Act[150] as 'an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum of money to or to the order of a specified person or to bearer'.[151] An example of a bill of exchange is a cheque. According to the Bills of Exchange Act, an antecedent debt, which would normally be regarded as past consideration, would be a good consideration for a bill of exchange.[152]

2. Consideration Should Have Some Economic Value

123. Albeit consideration should have some economic value, the courts will not inquire into whether the consideration given by the parties is adequate or not. The courts are interested in knowing whether the consideration has an economic value.[153] According to the Contracts Act, '[a]n agreement to which the consent of a

145. [1892] 1 Ch. 104.
146. Section 20(1)(b), Contracts Act.
147. *Ibid.*
148. [1975] 3 All ER 65.
149. *Ibid.,* p. 68.
150. Cap. 68.
151. Section 2(1).
152. Section 26(1)(b).
153. *See, for example*, *Chappel & Co. Ltd v. Nestle Co. Ltd* [1960] A.C. 87.

promisor is freely given is not void merely because the consideration is inadequate'.[154] Thus, X may sell a Toyota Premio worth UGX 15 million for a laptop bag worth UGX 500,000. The law also recognizes gifts given by a donor to a donee.[155] In the absence of any vitiating factor, the court will uphold the contract.

124. The law is not concerned with bad bargains except where a party alleges that there were vitiating factors, such as fraud, mistake, duress/coercion or undue influence. In this vein, the Act provides that 'the inadequacy of consideration may be taken into account by the court in determining whether the consent of a promisor was freely given'.[156] In *Boney Katatumba & 3 Others v. Shumuk Springs Development Ltd & 3 Others*,[157] the court stated:

> It is trite law that while consideration need not be sufficient for there is nothing to stop a man from selling his house even for a match-stick so long as he does so voluntarily, it is the position of the law that where insufficient consideration is pleaded then that pleading would point to the fact [or possibility?] of the absence of genuine consent.[158]

3. Performance of Obligations Imposed by Law or Existing Contractual Relationship

125. The question is: can a person sue for payment for performing a duty imposed by law? In *Collins v. Godefroy*,[159] the plaintiff gave evidence at a trial, and the defendant promised to pay him a certain fee. It was held that the plaintiff could not recover the promised money, as he had not provided consideration for the promise. It was held that since he was obliged by law to attend the trial, his consideration was insufficient to support the defendant's promise. However, where the plaintiff does an act beyond the scope of his or her duty, that act may be held to amount to sufficient consideration.

126. In *Glassbrook Brothers v. Glamorgan County Council*,[160] a colliery manager applied for police protection for his mine during a strike. He insisted that the mine could only be protected by having police officers billeted on the premises. The police officers considered that the colliery could be adequately protected by units of police officers patrolling the area in the vicinity of the mine. However, they agreed to billet officers at the premises provided the manager agreed to pay the specified rate. The manager refused to pay the bill for the protection, arguing that the police protection amounted to insufficient consideration, since the police were already

154. Section 20(3).
155. Section 20(2).
156. Section 20(4).
157. H.C.C.S. No. 126 of 2009.
158. *Ibid.*
159. (1831) 1 B. & Ad. 950.
160. [1925] A.C. 270.

under a public duty to protect the premises. Citing the case of *England v. Davidson*,[161] the House of Lords held that while it was true that the police were under a public duty to protect the premises, they were entitled to exercise their discretion as to the level of protection required. That if the police considered that the premises would adequately be protected by an external force, then the level of security over and above that, amounted to good and sufficient consideration to support the mine manager's promise to pay.

127. What is the legal position where a person performs a duty imposed by a special relationship or contract between the parties? In *Stilk v. Myrick*,[162] the plaintiff entered into a contract to sail a ship from London to the Baltic and back. During the voyage, two members of the crew abandoned work, and the captain promised to divide the wages due to these two men between the rest of the crew since he had been unable to find replacements. On returning to London, the captain refused to pay the extra wages. He argued that the plaintiff had done no more than that which he was contractually obliged to do and thus had not provided sufficient consideration for the extra wages. The court agreed with the defendant since the two men had done nothing more that they had originally agreed to do. However, in *Hartley v. Ponsonby*,[163] where the facts were similar to *Stilk v. Myrick*, the court held that the plaintiff's claim would succeed since many crew had deserted the ship and it had become dangerous to proceed. Given that the remaining crew were willing to undertake the extra hazard, then they were entitled to the extra pay promised.[164]

128. The plaintiff may perform or promise to perform, an obligation already imposed upon him by a contract previously made, not between him and the defendant, but between himself and a third party. The rule here is that a promise to perform an obligation owed to a third party is sufficient consideration provided the promise benefits one person and the other suffers a detriment.

129. In *Shaldwell v. Shaldwell*,[165] the plaintiff's uncle wrote congratulating him on his engagement and promised to pay him GBP 150 per annum until such time he was earning GBP 600 as a barrister. The plaintiff married and sued his uncle's executors on the promise. The defendants argued that, as the plaintiff was already bound to marry before the uncle wrote his letter, there was no consideration for his promise. It was held that even though the plaintiff was already contractually bound to marry, this was nevertheless good consideration for the uncle's promise. Erle CJ stated that there was a detriment to the plaintiff because he 'may have made the most material changes in his position and have incurred pecuniary liabilities resulting in embarrassment, which would be in every sense a loss if the income which

161. (1840) 11 Ad. & El. 856.
162. (1809) 2 Camp. 317.
163. (1857) 7 E. & B. 872.
164. For a more detailed discussions of the ramifications of the rule, *see North Ocean Shipping Co. Ltd v. Hyundai Construction Co. Ltd* [1979] Q.B. 705; *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd* [1990] 1 All ER 512.
165. (1860) 9 C.B.N.S. 159.

had been promised should be withheld'[166] and that it was a benefit to the uncle, because the marriage was 'an object of interest with a near relative'.[167]

130. In *New Zealand Shipping Co. Ltd v. A M Satterthwaite & Co. Ltd, The Eurymedon*,[168] the plaintiff made an offer to the defendant that if the latter unloaded the plaintiff's goods, which the defendant was already obliged to do by virtue of a contract with a third party, the plaintiff would not hold the defendant liable for any damage to the goods. The court held that the existing contractual duty owed by the defendant to the third party could amount to consideration for the promise of the plaintiff.

4. Part Payment of a Debt

131. The general rule at common law is that all debts must be paid in full, and any creditor is not bound to accept part payment of a debt in satisfaction of the whole amount owed. In *Pinnel's* case,[169] Pinnel sued Cole for GBP 8 and 10 shillings due on 11 November 1600. Cole's defence was that, at Pinnel's request, he had paid him GBP 5 and 2 shillings and 6 pence on 1 October 1600, and that Pinnel had accepted this payment in full satisfaction of the original debt. The court decided in favour of Pinnel and stated:

> Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, hawk or robe, etc. in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc. might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction. … The payment and acceptance of parcel before the day in satisfaction in regard of circumstance of time; … [part payment] of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. … [It is] … sufficient satisfaction.[170]

132. It can be seen from *Pinnel's* case that payment of a lesser sum of money does not amount to satisfaction of the whole debt. However, where a new element, for example, a different place of payment or time, a different currency or some change in the nature of consideration offered, is introduced at the request of the creditor, part payment amounts to sufficient consideration.

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166. *Ibid.*
167. *Ibid.*
168. [1975] A.C. 154.
169. (1602) 5 Co. Rep. 117a.
170. *Ibid.*

133. In *D & C Builders Ltd v. Rees*,[171] the plaintiffs did work for the defendants for which they were owed GBP 482. The plaintiffs demanded for payment for about six months and were in financial distress. Knowing their financial difficulties, the defendant's wife offered them GBP 300 in full settlement. She also told them that if the money was not accepted, the plaintiffs would receive nothing. The plaintiffs reluctantly accepted the cheque of GBP 300, but when it was duly honoured, they sued for the balance of the original debt. Basing on the rule in *Pinnel's* case, the court held that their claim would be successful. Lord Denning stated:

> It is a daily occurrence that a merchant or tradesman, who is owed a sum of money, is asked to take less. The debtor says he is in difficulties. He offers a lesser sum in settlement, cash down. He says he cannot pay more. The creditor is considerate. He accepts the proffered sum and forgives him the rest of the debt. The question arises: is the settlement binding on the creditor? The answer is that in point of law, the creditor is not bound by the settlement. He can the next day sue the debtor for the balance, and get judgment. … Now suppose that the debtor, instead of paying the lesser sum in cash, pays it by cheque. He makes out a cheque for the amount. The creditor accepts the cheque and cashes it. Is the position any different? I think not. No sensible distinction can be taken between payment of a lesser sum by cash and payment of it by cheque. The cheque, when given, is conditional payment. When honoured, it is actual payment. It is then just the same as cash. If a creditor is not bound when he receives payment by cash, he should not be bound when he receives payment by cheque.[172]

134. The rule in *Pinnel's* case has been criticized as capable of producing harsh and unfair results. Why should a creditor who has benefited from a prompt part payment of his debt insist on payment of the whole debt? The harshness of the rule in *Pinnel's* case has been partly mitigated by the development of the doctrine of equitable or promissory estoppel.

135. In *Central London Property Ltd v. High Trees Ltd*,[173] in September 1939, the plaintiffs leased a block of flats to the defendants at a ground rent of GBP 2,500 per annum. In January 1940, many of the flats became vacant because of the prevailing war conditions and the plaintiffs, taking into account these factors, agreed in writing to reduce the ground rent to GBP 1,250 'for the duration of the war'. From 1940 to 1945, the defendants continued to pay the reduced rent. In 1945, the flats were again full, and in 1946, the receiver sought to revert to the original contract rate and also to recover arrears representing the balance forfeited under the above arrangement. It was held that the arrangement as to the reduced rent was only intended to apply while war conditions affected the letting of the flats and so the landlord was entitled to revert to the contract rates from the end of the war. Lord Denning observed that that there was no consideration for the plaintiff's promise to

171. [1966] 2 Q.B. 617. *See also Foakes v. Beer* (1884) 9 App. Cas. 605.
172. *Rees* case, *supra,* p. 623.
173. [1947] K.B. 130.

reduce the rent and that if the defendants had sued on that promise they would have failed. However, the court applied the doctrine of estoppel and allowed the receiver to recover the full rent for the last two quarters of 1945 and for future years. Lord Denning followed the decision in *Hughes v. Metropolitan Rail Co*,[174] where it was held that if a person makes to another a clear and unambiguous representation of fact intending that other person to act on it, if that representation turns out to be false, and if that other person acts upon it to his prejudice, the representor is 'estopped' from denying the truth.[175]

136. For the doctrine of estoppel to apply, a number of conditions must be met. First, the promise or representation as stated in *High Trees* case above must be clear and unequivocal, which should relate to the enforcement of legal rights. It must be intended to be acted upon, and in fact, the other party, in the belief of the truth of the representation, acted upon it. In *Ajayi v. R.T. Briscoe Nigeria Ltd*,[176] Lord Hodson stated that for the doctrine of promissory estoppel to apply, the other party should have altered his position.

137. Second, the doctrine acts only as a defence (a shield) and not as a cause of action (a sword). In *Combe v. Combe*,[177] a wife commenced proceedings for divorce against her husband. The latter promised to allow her GBP 100 per annum free of tax as maintenance. The divorce was granted, but the husband never paid. The wife sued the husband on his promise. Though the court held that there was no consideration for the husband's promise, it relied on the doctrine of estoppel as enunciated in *High Trees* case and gave judgment in favour of the wife. Byrne J held that the husband had made an unequivocal promise to make annual payments, intending the wife to act upon it and since she had acted on it, her claim would succeed. It can be seen that the trial court treated estoppel as a cause of action. On appeal, the decision was reversed and the court stated:

> The principle stated in *High Trees* case … does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which take place between the parties.[178]

138. In *Pan African Insurance Co (U) Ltd v. International Air Transport Association*,[179] the court observed that the doctrine of estoppel prevents a party against whom it is set from denying the truth of the matter.

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174. (1877) 2 App. Cas. 439.
175. *See also Century Automobiles Ltd v. Hutching Biemar Ltd* [1965] E.A. 304; *Nurdin Bandali v. Lombak Tanganyika Ltd* [1963] E.A. 304.
176. [1964] E.A. 566.
177. [1951] 2 K.B. 215.
178. *Ibid.*
179. HCT-00-CC-MA-086-2006.

5. Consideration Must Be Lawful

139. It is trite that consideration in support of a contract must be lawful. According to the Contracts Act, consideration is unlawful where it is forbidden by law; or is of such a nature that, if permitted would defeat the provisions of any law; or is fraudulent; or involves or implies injury to a person or the property of another person; or is declared immoral or against public policy by a court.[180]

B. Gratuitous Promises

140. A gratuitous promise is a promise that cannot be enforced because there is no consideration. The general rule is that for a contract to be legally binding, it must be supported by consideration. Thus, the major difference between a binding contract and a gratuitous promise is the existence, or lack of consideration.

141. According to the Contracts Act, '[a]an agreement made without consideration is void'.[181] However, where the agreement 'is expressed in writing and registered with the Registrar of Documents Act and is made on account of natural love and affection between the parties standing in a near relation with each other',[182] such an agreement is enforceable, in spite of absence of consideration.

142. The Contracts Act also explicitly recognizes 'the validity of any gift given by a donor to a donee'.[183] In *Joy Mukube v. Willy Wambuwu*,[184] Wangutusi J outlined the essential conditions of a gift to include: the absence of consideration; the donor and donee; the subject matter; and transfer and acceptance. In *Muyingo v. Lugemwa & 2 Others*,[185] Luswata J found that there was no consideration, but a gift of the suit land was made with free will by the first defendant as donor and accepted by the plaintiff and thus there was a valid contract between the parties. Thus, gratuitous promises – promises of 'natural love and affection' and gifts – are enforceable irrespective of the fact that there may be no consideration.

C. 'Natural Obligations'

143. A natural obligation is 'one which in honor and conscience binds the person who has contracted it, but which cannot be enforced in a court of justice'.[186] It has also been defined as 'an obligation that has no legal basis and hence does not give a right of action to enforce its performance. It is based on equity, morality and

180. Section 19(1)(a)–(e). *See also* ss 26 and 27 of the Act.
181. Section 20(1).
182. Section 20(1)(a).
183. Section 20(2).
184. HCT-04-CV-CA-0055/2005.
185. H.C.C.S. No. 24 of 2013.
186. https://legal-dictionary.thefreedictionary.com/Natural+obligation (accessed 3 Jun. 2020).

natural law and should be voluntary.'[187] As a general rule, natural obligations are not legally binding in Uganda. However, under the Contracts Act, an agreement 'made on account of natural love and affection between the parties standing in a near relation with each other'[188] and 'any gift given by a donor to a donee'[189] are legally enforceable.

IV. Modifications of the Contract

144. Modification of a contract occurs when the parties agree to change or vary any of the terms of the original agreement, including the consideration. In this respect, the Contracts Act provides as follows:

> Where any right, duty, or liability would arise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind the parties to the contract.[190]

145. In *Spear Motors Ltd v. Banyankore Kweterana*,[191] the appellant and respondent entered into a contract for the appellant to supply a Mercedes Benz lorry, and the appellant paid in full. This was immediately prior to the overthrow of the Obote II government. The lorry arrived in the country immediately after the overthrow of Obote regime, and the appellant, fearing that the lorry might be looted, sold it to another party. In June 1987, the appellant and the respondent held a meeting and agreed that the appellant should supply a similar lorry to the respondents. By March 1988, the lorry had not been replaced, and the respondents filed a claim in the High Court for a decree of specific performance or the current price of the lorry. The trial judge granted the decree of specific performance or reimbursement of money able to purchase a similar lorry on the market. The Supreme Court held that section 55 of the then Sale of Goods Act allowed parties to vary their contract, *inter alia*, by express agreement. That the meeting of June 1987 between the parties led to a new agreement by which the appellant and the trial judge was correct to grant the decree of specific performance.

146. A contract may be modified either before signing or after the contract is formally agreed to by the parties. For modification or variation of a contract to be considered valid, all parties must agree to the alteration of the contract. However, the parties must be careful not to contravene the parol evidence rule to the effect

187. PhiLawGov, *Natural Obligations*, https://philawgov.wikia.org/wiki/Natural_obligation (accessed 3 Jun. 2020).
188. Section 20(1)(a).
189. Section 20(2).
190. Section 67.
191. [1994] III K.A.L.R. 70.

that once the terms of a contract are reduced into writing, any extrinsic evidence meant to contradict, vary, alter, or add to the express terms of the agreement is generally inadmissible.[192]

§2. Formal and Evidential Requirements

I. Formal Requirements

A. Contracts under Seal

147. A contract under seal 'is a formal contract which does not require any consideration and has the seal of the signer attached'[193] and 'must be in writing or printed on paper. It is conclusive between the parties when signed, sealed or delivered'.[194] In Uganda, the sealing of a contract is not a legal requirement for a valid contract. Under the Companies Act, 2012, contracts by a company may be under the common seal of the company; may be oral or written.[195]

B. 'Solemn' Contracts

148. Solemnity is a 'formality established by law to render a contract, agreement, or other act valid'.[196] Solemnity of contract 'is the concept that two people shall enter into any contract which they want and that the resulting contract is enforceable if formalities are observed. Such contracts should be enforceable as well as respected. This concept enables two persons to be free and entitled to make whatever contract or agreement they wish.'[197] Solemn contracts thus require formalities for their validity. In Uganda, a contract is valid, provided the key essentials exist: agreement (offer and acceptance); capacity; consideration; intention to create legal relations; and legality of object of the contract. Instead of 'solemnity of contract', 'freedom of contract' is used under the Ugandan legal system. In other words, so long as the foregoing essential exist, and the contract is entered into freely and voluntarily with the consent of the parties, it will be enforced by the courts.

192. *Muthuri v. National Industrial Credit Bank Ltd* [2003] K.L.R. 145.
193. US Legal, *Contract under Seal Law and Legal Definition*, https://definitions.uslegal.com/c/contract-under-seal/ (accessed 3 Jun. 2020).
194. *Ibid.*
195. Section 50(1)–(3).
196. https://legal-dictionary.thefreedictionary.com/solemn (accessed 3 Jun. 2020).
197. https://definitions.uslegal.com/s/solemnity-of-contract/ (accessed 3 Jun. 2020).

II. Evidential Requirement: Proof

A. The Parol Evidence Rule

149. The parol evidence rule is to the effect that evidence cannot be admitted (or even if it is admitted, it cannot be used) to add to, vary or contradict a written instrument.[198] Thus, the presumption is that where a contract is reduced into writing, no oral evidence will be allowed to add to, vary or contradict the written form. According to the Evidence Act, when terms of a contract have been reduced to the form of a document, no evidence shall be given in proof of the terms of that document except the document itself.[199] The Act also provides that where the terms of the contract have been reduced into a document, 'no evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms'.[200]

150. The parol evidence rule is only a presumption – that when parties opt to reduce their contract into writing, they include all the intended terms in the written document. However, oral evidence may, in the interests of justice, be admitted where the words are unclear[201] or where the agreement is partly oral and partly written.[202] Consequently, there are a number of exceptions to it. In *Gillespie Bros. & Co. v. Cheney, Eggar & Co.*,[203] Lord Russell stated:

> Although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with express written agreement.[204]

151. According to the Evidence Act, oral evidence in respect of the document regarding vitiating factors such as fraud, intimidation, illegality, lack of capacity, lack of failure of consideration, or mistake in fact or law may be admitted.[205] Oral evidence may also be admitted where there is 'any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent its terms'.[206] It may also be admitted where there is 'any separate oral agreement, constituting a

198. *Jacobs v. Batavia and General Plantation Trust* [1924] 1 Ch. 287.
199. Section 91 of the Evidence Act, Cap. 6.
200. Section 92.
201. *Shine Pay (U) Ltd v. Sarah Kagoro & Another,* HCT-00-CC-CS-0548 of 2004; *Hajji Suliman v. Samu Nalumansi Nalongo & another* H.C.C.S. No. 558 of 1989.
202. *Obwana v. Malaba Town Council*, Civil Appeal No. 139 of 2013.
203. [1896] 2 Q.B. 59.
204. *Ibid.*, , p. 65.
205. Section 92(a). *See also Cheleta Coffee Plantations Ltd v. Mehlsen* [1966] E.A. 203.
206. Section 92(b).

condition precedent to the attaching of any obligation under any such contract'.[207] It may also be admitted to prove a custom or trade usage in order to give meaning to what the parties intended.[208] It may also be admitted where the contract is made partly in writing and partly by word of mouth.[209]

152. According to Hodgin, oral evidence may also be admitted 'if the written document is silent on the particular point covered by the oral agreement'.[210] It may also be admitted 'if it serves as a condition precedent to the written agreement'.[211] Oral evidence may also be admitted where the written contract appears to be ambiguous or defective.[212] It may also be admitted if the purpose is to show that the written contract does not truly reflect the intention of the parties.[213]

B. Function of the Notary

153. A notary public may administer oaths and affidavits, statutory declarations and witness, attest to, authenticate the execution of certain documents, including contracts. The licensure of notaries public is governed by the Notaries Public Act, Cap. 18. The Minister may direct the Chief Registrar of the High Court to issue a licence to any person who has satisfied the Minister that he is entitled to function as a notary public in England, Scotland or Northern Ireland or an advocate of not less than five years' standing.[214] The applicant for enrolment as a notary public shall, on payment of the prescribed fee, be issued a certificate.[215] Magistrates and registrars are entitled to exercise the powers and duties of a notary public by virtue of their offices.[216] Like an advocate, a notary public's certificate may be cancelled or he may be suspended from practice due to misconduct.[217] Commissioners for Oaths, may, by virtue of the Oaths Act, Cap. 19, take affidavits and administer oaths.[218]

III. Burden of Proof

154. According to the Evidence Act, '[w]hoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he

207. Section 92(c).
208. *See* s. 92(e) of the Evidence Act, Cap. 6.
209. *Walker Property Investments (Brighton) Ltd v. Walker* [1947] 177 L.T. 204.
210. Hodgin, *supra*, n. 17, p. 110.
211. *Ibid.*
212. *See, for example*, *Marie Ayoub & Others v. Standard Bank of South Africa & Another* [1961] E.A. 743; *In the Estate of Shamji Visram & Another v. Shanker Prasad Bhatt* [1965] E.A. 789.
213. *See, for example*, *Gailey and Roberts (Tanganyika) Ltd. v. Salum* [1962] E.A. 376.
214. Section 1(a) and (b).
215. Section 2.
216. Section 3.
217. Section 4.
218. Section 11.

or she asserts must prove that those facts exist'.[219] The Evidence Act further provides that, '[w]hen a person is bound to prove the existence of any fact, it said that the burden of proof lies on that person'.[220] Thus, in civil proceedings, including contractual disputes, where a party alleges breach of contract, the burden of proof lies on the one who alleges and in this case the plaintiff, or the defendant where a counterclaim is raised. In *Shine Pay (U) Ltd v. Sarah Kagoro*,[221] Justice Yorokamu Bamwine stated:

> In law, a fact is said to be proved when court is satisfied as to its truth. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When such party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof, that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on a balance of probabilities.[222]

A. Distinction Between 'Obligation of Means' and 'Obligation of Result'

155. In Uganda, like other jurisdictions, the law of contracts is largely based on obligations. A contractual obligation means that a person has to comply with or fulfil the directives stated or given in the agreement between the parties. Thus, contractual obligations are those duties that each party is legally responsible for in a contract. However, whereas Burundi, the Democratic Republic of Congo and Rwanda distinguish between 'obligation of means' and 'obligation of result', Uganda does not have that distinction.

§3. Liability and Negotiations

I. Pre-contractual Liability

156. Under the Ugandan legal system, parties are free to negotiate their transactions without the risk of pre-contractual liability. Under the rule of offer and acceptance, there is no contractual liability until a contract is made by the acceptance of an offer. Before the acceptance, the offeror is free to revoke the offer. Thus, as a general rule, unlike in civil law jurisdictions, the question of liability during negotiations does not arise. However, a person may be liable under misrepresentation. For example, if such person fraudulently misrepresents his or her interest in a given transaction, he or she may be liable for fraudulent misrepresentation. He or

219. Section 101(1).
220. Section 101(2).
221. HCT-00-CC-CS-0548 of 2004.
222. *Ibid.*, p. 2.

she may also be sued for unjust enrichment, not under contract, but in quasi-contract. The person has a duty to make restitution of benefits received during negotiations. He or she cannot be allowed by the court to unjustly appropriate benefits to his or her own use.

II. Breakdown of Negotiations

157. Unlike in civil law jurisdictions such as Democratic Republic of Congo and Burundi, where parties are expected to exhibit good faith in negotiations, there is no general rule in Uganda and other common law countries requiring parties to negotiate in good faith. Thus, a claim based on a breakdown in negotiations may not succeed except for restitution under quasi-contract.

Chapter 2. Conditions of Substantive Validity

§1. Capacity of the Parties

158. In addition to offer, acceptance, intention to be legally bound and consideration, the parties should have sufficient legal capacity to enter into the contract. The presumption is that all parties to a contract have the power to enter into a contract. A sane, sober person of contractual age has capacity to make a valid contract. Whether the parties had sufficient legal capacity to enter a particular contract depends on whether the party is a natural person or an artificial person, that is, a corporation.

I. Natural Persons: Minors

159. According to the Contracts Act, a person has capacity to contract where he or she is 18 years or above; of sound mind; and not disqualified by any law to which he or she is subject.[223] The Act further provides that 'a person of sixteen years or above has the capacity to contract as provided under article 34(4) and (5) of the Constitution'.[224] However, a child who is under 16 years shall not enter any contract to perform work that is likely to be hazardous or to interfere with his or her education or to be harmful to his or her health or physical, mental, spiritual, moral or social development.[225]

160. The Employment Act, 2006, also prohibits the engagement of a child 'in employment or work which is injurious to his or her health, dangerous or hazardous or otherwise unsuitable'.[226] In fact, employment of children 'in any business, undertaking or workplace' is prohibited.[227] However, children under 14 years can do 'light work carried out under supervision of an adult aged over eighteen years, and which does not affect the child's education'.[228]

161. The aim of the law is to protect minors from entering into unfair contracts, but also protecting adults in their dealings with minors, provided they act in a fair and reasonable manner. The general rule at common law was that a contract made by a minor or infant was voidable at his or her option. This had two implications. In the first instance, a contract entered into by an infant was valid and binding unless and until he or she repudiated it before, or within a reasonable time after, the attainment of majority age. In the second instance, other contracts were not binding upon the infant unless ratified by him or her when he became an adult. However, two

223. Section 11(1)(a)–(c). In respect of the sale of goods and supply of services, *see* s. 4(1)(a)–(c) of the Sale of Goods and Supply of Services Act, 2017.
224. Section 11(2).
225. Article 34(4).
226. Section 26(4).
227. Section 32(1).
228. Section 32(2).

types of contracts were treated as exceptions to the general rule: contracts for necessaries and beneficial contracts of service.

162. At common law, minors are obliged to pay for goods or services necessary to maintain them in their particular station of life. The Act has, under the part on relations that resemble contracts [quasi-contracts], adopted this rule and stated:

> Where a person incapable of entering into a contract or anyone whom that person is legally bound to support, is supplied by another person with necessaries suited to the condition [station] in life of that person or of anyone that that person is legally bound to support, the person who furnishes the supplies is entitled to reimbursement from the property of the person who is incapable of entering into a contract.[229]

163. The Sale of Goods and Supply of Services Act[230] also provides that 'where necessaries are sold or delivered to a person under eighteen years, … he or she must pay a reasonable price for the necessaries'.[231] 'Necessaries' are defined as 'goods or services suitable to the condition in life of a person under eighteen or other person, and to his or her actual requirements at the time of the sale and delivery'.[232]

164. A plaintiff who seeks to render an infant liable for necessaries must prove that the goods are capable of being necessaries; the minor has not already been adequately supplied with such items at the time of delivery; and the goods have been sold and delivered.

165. Whether the goods are capable of being necessaries is largely a question of law. The court considers whether in the circumstances of the case, the good in question is capable of being a necessary. The onus is on the plaintiff to prove that the goods are of a description reasonably suitable to the person in the station of life of the minor. In *Ryder v. Wombwell*,[233] it was held that a pair of cuff-links worth GBP 25 and an antique goblet worth 15 guineas could not amount to necessaries for an infant with an income of GBP 500 per year. In *Nash v. Inman*,[234] it was held that where a minor is adequately supplied with the item in question, the supplier cannot recover.

166. The notion of necessaries applies to not only goods but also services such as education. In *Roberts v. Gray*,[235] the defendant, an infant, who desired to become a professional billiard player, made a contract with the plaintiff, a leading professional, by which the parties agreed to accompany each other on a world tour and to

229. Section 57.
230. Cap. 82.
231. Section 4(3).
232. Section 4(4).
233. (1868) L.R. 4 Exch. 32.
234. [1908] 2 K.B. 1.
235. [1913] 1 K.B. 520.

play matches together in the principal countries. The plaintiff spent much time and trouble and incurred certain liabilities in the course of making the necessary preparations. A dispute arose between the parties and before the tour began, the defendant repudiated the contract. The court treated the contract for education, which covers any form of instruction, as being one for necessaries, and awarded the plaintiff GBP 1,500.

167. A contract may be declared void by the courts if its terms are harsh and onerous on the minor. In *Fawcett v. Smethurst*,[236] a minor hired a car in order to transport some luggage. Although on the face of it the contract for hire was a necessary, it was held to be void since it was considered that a term rendering the minor absolutely liable for any damage to the car whether or not caused by his neglect was harsh and onerous.

168. At common law, a minor or infant may be bound by a contract of apprenticeship or of service, as it is to his or her benefit or advantage that he or she should acquire the means of earning his or her livelihood. Thus, a beneficial contract of service such as a contract of apprenticeship, education or of employment, is prima facie binding on a minor provided it is substantially for his or her benefit. In this regard, the Contracts Act states:

> Where a person lawfully does anything for another person or delivers anything to another person, not intending to do so gratuitously and the other person enjoys the benefit, the person who enjoys the benefit shall compensate the person who provides the benefit in respect of or to restore, the thing done or delivered.[237]

169. For the plaintiff to succeed in a claim against the minor, the latter should have 'had an opportunity of accepting or rejecting the benefit'.[238] Indeed, the contract should have been entered into freely and voluntarily and be beneficial for the minor. Thus, the court looks at the contract as a whole, weighs the onerous against the beneficial terms, and then decides whether the balance is in favour of the minor. In *De Francesco v. Barnum*,[239] a girl aged 14 years, bound herself by an apprenticeship deed to the plaintiff for seven years to be taught stage dancing. She agreed *inter alia* that she would not marry during the apprenticeship and would not accept professional engagements without the plaintiff's consent. He agreed to pay her very little money and was not obliged to maintain her. The plaintiff could also terminate her contract without notice when he wished. The court found that the girl was at the absolute disposal of the plaintiff and held that the contract was unduly harsh and onerous and thus it was unenforceable.

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236. (1914) 84 L.J.K.B. 473.
237. Section 58(1).
238. Section 58(2).
239. (1890) 45 Ch. D. 430.

170. In *Clements v. London and North Western Rail Co.*,[240] an infant was employed by a railway company as a porter. He agreed to join the company's insurance scheme and to relinquish his right of suing for personal injury under the Employers' Liability Act 1880. The scheme was more favourable to him than the Act since it covered more accidents for which compensation was payable, although it fixed a lower scale of compensation. The court held that the agreement as a whole was beneficial for him and was thus binding. However, in *Cowern v. Nield*,[241] it was held that a trading contract was not binding on the infant although it was for his benefit.

171. For a beneficial contract of service to be valid, it should either be a service or apprenticeship contract or at least analogous to such a contract. According to the Employment Act, 2006, a contract of service is 'any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship'.[242] The Act defines a contract of apprenticeship as a contract of service as:

(a) where there is an obligation on the employer to take all reasonable steps to ensure that the employee is taught and acquires, the knowledge and skills of that industry, by means of practical training received in the course of the employer's employment; and
(b) where there is a provision for formal recognition of the fact that the employee has acquired the knowledge and skills, intended to be acquired when the employee has done so.[243]

172. In *Doyle v. White City Stadium*,[244] the court held that a contract between a minor professional boxer and the British Boxing Board of Control which stated that he would lose his purse if he was disqualified was valid in that it not only encouraged a clean fight but also promoted the proficiency of the infant in the art of boxing. In *Chaplin v. Leslie Frewin (Publishers) Ltd*,[245] a minor agreed, in return for royalties on the book which would be published, to tell his story to a publishing company. The court held that the contract was binding on the minor since it was analogous to a contract of service.

173. There are other contracts where a minor acquires an interest in some subject matter of a permanent nature, for example, contracts to take a lease, to buy shares or to enter a partnership. These contracts are voidable, that is, they are valid and binding upon a minor unless he or she repudiates them during infancy or within reasonable time after becoming an adult. The question here is: what is a reasonable time? The answer to this question depends on the particular circumstances of each

240. [1894] 2 Q.B. 482.
241. [1912] 2 K.B. 419.
242. Section 2.
243. *Ibid.*
244. [1935] 1K.B. 110.
245. [1966] Ch. 71.

case. In *Edwards v. Carter*,[246] a marriage settlement was executed by which the father of the intended husband agreed to pay GBP 1,500 a year to the trustees, who were to pay it to the husband for life and then to the wife and the child of the marriage. The intended husband, an infant at the time of the settlement, executed a deed binding him to vest in the trustees all property that he might acquire under the will of his father. A month later, he came of age and three and a half years later he became entitled to an interest under his father's will. More than a year after his father's death, that is, about four and half years after he came of age, he repudiated his agreement. It was held that his repudiation was too late and thus ineffective.

174. An infant who repudiates a voidable contract is no longer liable to honour future obligations. However, the question is: is he or she liable for those that have already accrued at the time of his or her repudiation? Repudiation is the equivalent of rescission, which is retrospective in its operation. It terminates the contract and restores the situation to the position in which it stood before the contract was entered into.[247] According to the Contracts Act, '[w]here a person at whose option a contract is voidable, rescinds it, the other party to the contract need not perform any promise contained in the contract'.[248] However, '[a] party who rescinds a voidable contract shall, if that party received any benefit from the other party to the contract, restore the benefit to the person from whom it was received'.[249] The latter position is shared by some authors who are of the view that a minor who repudiates or rescinds a tenancy agreement or lease, remains liable for accrued debts, for example arrears of rent.[250]

175. A minor who repudiates a contract and attempts to recover any money paid to the defendant must show that he or she has suffered a total failure of consideration.[251] The minor must prove that he or she has not received any part of what he or she was promised.[252]

176. Another situation relevant for the discourse on contractual capacity is where a minor presents himself or herself as an adult in a certain transaction. In *Leslie v. Sheill*,[253] a minor induced an adult to lend him money by fraudulently misrepresenting that he was of full age at the time of the contract. The minor was sued to recover the money. It was held that the adult could not claim the money. In *Stocks v. Wilson*,[254] it was held that where a minor has obtained goods or property by fraud, but has sold or exchanged them, he or she is accountable for the proceeds.

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246. [1893] A.C. 360.
247. *See Abram Steamship Co. v. Westville Steamship Co*. [1923] A.C. 773; *North Western Rail Co. v. McMichael* (1850) 5 Exch. 114.
248. Section 53(1).
249. Section 53(2).
250. *See, for example*, P. Richards, *Law of Contract* (Pearson Education Ltd, 2002), p. 84.
251. [1923] 2 Ch. 452.
252. *See Corpe v. Overton* (1833) 10 Bing. 252.
253. [1914] 2 K.B. 607.
254. [1913] 2 K.B. 235.

What is clear is that if a minor obtains money, property or goods by misrepresenting his age, he can be compelled to restore it so long as the same is traceable in his possession under the equitable doctrine of restitution.

II. Natural Persons: Persons of Unsound Mind or Drunkards

177. According to the Contracts Act, for purposes of contracting, 'a person is said to be of sound mind, if at the time of entering into the contract, that person is capable of understanding the contract and of forming a rational judgment as to its effect upon his or her interests'.[255] The Contracts Act also provides that '[a] person who is usually of unsound mind but occasionally of sound mind may enter into a contract during periods when he or she is of sound mind'.[256] The Contracts Act further provides that '[a] person who is usually of sound mind but occasionally of unsound mind may not enter into a contract during periods when he or she is of unsound mind'.[257]

178. From the above legal provisions, it can be seen that any attempt by the person of unsound mind to dispose of his or her property does not bind him or her. With respect to contracts other than those to dispose of the property, the mental incapacity must be such that the affected person did not fully understand the transaction in question and the other contracting person must be aware of that incapacity. A contract made in such circumstances is voidable at the option of the incapacitated party. The burden of proving that he or she could not fully appreciate what he or she was doing, and that the other person was aware of his mental disability, lies on the mentally incapacitated person.

179. According to the Contracts Act, a contract entered into by a person of unsound mind may be voidable on grounds of undue influence, since 'the mental capacity of the other party is temporarily or permanently affected by reason of … mental … distress'[258] and 'the burden of proving that the contract was not induced by undue influence shall be upon the party in a position to dominate the will of the other party'.[259] A contract induced by undue influence 'may be set aside absolutely or where the party who was entitled to avoid received a benefit under the contract, upon such terms and conditions as may seem just to court'.[260] Where the concerned person ratifies the contract on being cured of his or her condition, then he or she will become absolutely bound by the contract.

255. Section 12(1).
256. Section 12(2).
257. Section 12(3).
258. Section 14(1) and (2)(c).
259. Section 14(3).
260. Section 16(5).

180. Like minors, persons of unsound mind are liable for contracts for necessaries. The Sale of Goods and Supply of Services Act provides that, 'where necessaries are sold and delivered to … a person who by reason of mental incapacity or drunkenness is incompetent to contract, he or she must pay a reasonable price for the necessaries'.[261]

III. Corporations

181. Corporations have capacity to enter into contracts. In this subsection, the term 'corporation' refers to statutory corporations and companies. A statutory corporation may be established by Act of Parliament or other legislations and is usually owned by the government while a company is incorporated under the Companies Act[262] by one or more people.[263] The capacity of a statutory corporation to enter into contracts is usually contained in the relevant legislation. Like a company, a corporation is a body corporate with capacity to, *inter alia*, sue and be sued, enter contracts, and generally own property.

182. Like a statutory corporation, a company is an artificial person and acts through natural persons such as directors. Thus, according to the Companies Act, '[a] company may make a contract, by execution under its common seal or on behalf of the company, by a person acting under its authority, express or implied'.[264] The contract may be written or oral.[265] The doctrine of ultra vires limits the capacity of the company to enter into certain contracts. The company's powers are set out in the objects clause of the memorandum of association, which has to be filed with the registrar of companies.

183. Before the coming into force of the 2012 Companies Act, any contract entered into ultra vires (contrary to) the objects in the memorandum, would be declared void and could neither be ratified by the shareholders nor be enforced by a third party. In *Ashbury Railway Carriage Co. v. Riche*,[266] the objects of the appellant company, as stated in the memorandum of association, were to carry on business as engineers and to make and sell all kinds of railway plant and rolling stock. The directors contracted to assign a concession they had bought for the construction of a railway in Belgium to a Belgian company. However, the court found that the company was not formed for the purpose of constructing railways. It was held that the contract entered into was void since it was ultra vires the objects of the company as set out in the memorandum. The court further held that the situation could not even be saved by the majority of shareholders passing a resolution to ratify it.

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261. Section 4(3).
262. Act No. 1 of 2012, which came into force on 1 Jul. 2013.
263. Section 4(1).
264. Section 50(1).
265. Section 50(2)–(4).
266. (1875) L.R. 7 H.L. 653.

184. The purpose of the ultra vires doctrine is to protect investors, creditors and third parties dealing with the company. However, the Companies Act, 2012, has made substantial changes to the scope of the lawful acts of the company, the protection offered to third parties, the duties of directors and the rights of shareholders. Thus, the Companies Act provides that the 'validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything contained in the company's memorandum'.[267] This Act further provides that any act that is beyond the company's capacity may be ratified by the company by a special resolution.[268] However, the resolution 'shall not affect any liability incurred by the directors or any other person and any relief from the liability must be agreed to separately by special resolution'.[269]

185. With respect to the capacity of directors, the Companies Act provides that '[t]he power of the board of directors to bind the company or authorize others to do so in favour of a person dealing with the company in good faith shall not be limited by the company's memorandum'[270] and 'a person shall be presumed to have acted in good faith unless the contrary is proved'.[271] Although what amounts to 'bad faith' is not defined, it is certainly the opposite of good faith and involves dishonest, misleading, deceptive or even fraudulent acts or refusal or neglect to perform one's obligations by some sinister or ulterior motive. A party to a transaction is no longer obliged to make inquiries as to whether the transaction entered into by the company is one which is permitted by the memorandum of association.[272]

186. A final question in this area of the law concerns pre-incorporation agreements. A pre-incorporation agreement is an agreement entered into by a promoter of a company before it is formed. The question here is: can a company which is not in existence enter an enforceable contract on behalf of the company? At common law, pre-incorporations agreements were not legally binding on the company. In *Kelner v. Baxter*,[273] it was held that before a company comes into existence, it has no legal status to attain contractual rights. That even after incorporation, the company cannot ratify a contract purportedly entered on its behalf. However, promoters may be held liable on contracts they purport to enter. In *Newborne v. Sensolid*,[274] the court held that the proper approach is to determine whether the promoter was intended in the circumstances, to be a party to the contract or not. That in the circumstances of this particular case, Newborne intended to deal only with the company. Given that the company was not yet in existence, it was not bound by the contract.

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267. Section 51(1).
268. Section 51(3).
269. Section 51(4).
270. Section 52(1).
271. Section 52(2)(b).
272. Section 53.
273. (1866) 2 L.R. 2 C.P. 174.
274. (1954) 1 Q.B. 45.

187. The rigid common law position on pre-incorporation agreements can produce unfair results. For example, X obtains a loan of UGX 1 million from Y in order to prepare the memorandum and articles of association, and pay registration fees for the company, X Co. Ltd. After the company is duly incorporated and starts business, Y demands her money from X Co. Ltd. The company refuses to pay. Can she sue X Co. Ltd or X in his personal capacity as a promoter of the company? The Companies Act has tried to mitigate the consequences of the common law rule and provides that, '[a] contract which purports to be made on behalf of a company before the company is formed, has effect, as one made with the person purporting to act for the company'.[275] The Act also provides that a company may adopt a pre-incorporation contract made on its behalf, and where such contract is adopted, the liability of the promoter shall cease.[276] Thus, X remains liable to pay Y until the contract is adopted or ratified by X Co. Ltd.[277]

§2. Defects of Consent

I. Mistake (Distinction from Value; Distinction from Motive)

A. Nature of Mistake

188. Although the courts exalt the doctrine of freedom of contract and are reluctant to interfere in bargains entered into by the parties, they may intervene if it can be shown that genuine consent of the parties to the agreement was non-existent. One of the circumstances under which the courts may intervene is where there is a mistake of the parties. According to the Contracts Act, consent of the parties may be vitiated, *inter alia*, by mistake.[278] A mistake is an erroneous belief, at contracting, that certain facts are true. Where one or both of the parties are mistaken as to the terms of the contract, there is no *consensus ad idem*, and thus no agreement. It should be noted from the outset that unlike in civil law jurisdictions such as Democratic Republic of Congo and Burundi, in Uganda, there is no distinction of mistake from value and motive.

189. A mistake may be one of fact or one of law. Regarding a mistake of fact, which may occur where both parties are under common or mutual mistake, or where only one of the parties is mistaken (unilateral mistake), the Contracts Act provides as follows:

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275. Section 54(1).
276. Section 54(2) and (3).
277. *See Phonogram Ltd v. Lane* [1982] Q.B. 939; *Braymist Ltd v. Wise France Co. Ltd* [2002] E.W.C.A. Civ. 127; [2002] 3 W.L.R. 322.
278. Section 13(e).

> Where both parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, consent is obtained by mistake of fact and the agreement is void.[279]
>
> A contract is void where one of the parties to it operates under a mistake as to a matter of fact essential to the contract.[280]

190. Under common law, only a mistake of fact could vitiate a contract. However, according to the Act, '[w]here a contract is entered into by mistake in respect of any law in force in Uganda, the contract is void'.[281] The Contracts Act also provides that '[a]n erroneous opinion as to the value of the things which form the subject matter of an agreement shall not be deemed a mistake as to a matter of fact'.[282] There are three major types of mistake: common mistake, mutual mistake and unilateral mistake.

B. Common Mistake

191. Common mistake occurs where both parties are mistaken as to a matter of fact essential to the agreement.[283] Common mistake arises in cases of *res extincta* or *res sua*. The former is a mistake as to the existence of the subject matter of the contract. Here, both parties wrongly believe that the subject matter of the contract exists, yet it had ceased to exist at the time the contract was made. It is important to distinguish *res extincta* from *res sua*, which refers to a situation where a party contracts to buy something which in fact belongs to him or her. Both *res extincta* and *res sua* generally render a contract void. However, if the action is based in equity, *res sua* will render the contract voidable. For example, in *Cooper v. Phibbs*,[284] a nephew leased a fishery from his uncle who died. When the lease was due for renewal, the nephew did so with his aunt. It later transpired that the uncle had given the nephew a life tenancy in his will. It was held that the lease was voidable for mistake since the nephew already had a beneficial ownership right to the fishery.

192. In respect of *res extincta*, the Sale of Goods and Supply of Services Act, 2017, provides that, '[w]here there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is entered into, the contract is void'.[285] For example, X offers to sell a car to Y and the latter accepts and a contract is signed by the parties. Unknown to both parties, the car had been destroyed by fire the previous day. There is no doubt that there is an agreement but it was made under a mistaken belief that the subject matter, namely, the car exists. Thus, the contract is void for mistake.

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279. Section 17(1).
280. Section 17(2).
281. Section 18.
282. Section 17(3).
283. Section 17(1).
284. (1867) L.R. 2 H.L. 149.
285. Section 7. *See Leslie and Anderson Ltd. v. Vallabhdas Kalidas and Co. Ltd* 17 E.A.C.A. 30.

193. In *Couturier v. Hastie*,[286] the plaintiffs sold a cargo of corn to the defendant. Unknown to either party, a few days before the contract was made, the cargo, which was on board a ship, had overheated and started to ferment, and as a result the captain had sold the cargo in order to prevent it from deteriorating further. The buyer contended that since the subject matter of the contract – the corn – had ceased to exist prior to entering into the contract, then the contract was void and he was not liable to pay the price. The vendor, however, argued that the contract was based on the handing over of the shipping documents and that the defendant had not simply bought a cargo of corn but a whole venture in which he took all the risks regarding the shipment of the cargo. The court held that the contract contemplated that the goods sold actually existed, and since they did not, the seller could not be required to deliver the goods, and the buyer had no obligation to pay for them. Lord Cranworth stated that at the time they made the contract, the parties contemplated that there was, actually in existence, a cargo to be bought and sold, but in fact, at that time, there was no such cargo. The buyer therefore was entitled to repudiate the contract.

194. Where the common mistake relates only to the quality of the subject matter, as opposed to its very existence or ownership, this is not considered to be so fundamental as to vitiate the contract. Hence the Contracts Act provides that 'an erroneous opinion as to the value of the things which form the subject matter of the agreement shall not be deemed a mistake as to a matter of fact'.[287]

195. In *Bell v. Lever Bros. Ltd*,[288] the appellant was appointed chairman of one of the subsidiaries of the respondent company. He subsequently engaged in certain private business activities in breach of his service contract for which he could have been dismissed without compensation. The parties subsequently entered into another agreement by which the appellant agreed to resign his position prematurely in return for the sum of GBP 30,000 by way of compensation for loss of office. Neither party was aware that it was open to the company to dismiss the appellant without compensation. Both parties believed erroneously that a fresh agreement was necessary to discharge the service contract. On discovering the mistake, the company sought to recover the amount GBP 30,000 on the grounds that the compensation agreement was void for mistake. The House of Lords held that the compensation contract was valid and binding and the mistake of the parties was insufficient to render the contract void. Lord Atkin stated that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the contract had already been broken and could have been terminated otherwise. That for an operative mistake such as common mistake to arise, there had to be a mistake as to a fundamental assumption on which the contract was based and which both parties considered to be the basis of the agreement. The court was of the

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286. [1843-60] All ER Rep. 280. *See also McRae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377.
287. Section 17(3).
288. [1932] A.C. 161. *See also Sapra Studio v. Kenya National Properties Ltd,* Civil Appeal No. 68 of 1983 (Court of Appeal, Kenya); *Great Peace Shipping Ltd v. Tsavliris (International) Ltd* [2002] 4 All ER 689.

view that in order for the mistake to qualify to nullify a contract, the mistake must make the thing essentially and radically different from the thing as it was believed to be. Thus, the common mistake can void a contract only if the subject matter was sufficiently fundamental to render its identity different from what was contracted, making the performance of the contract impossible.

196. According to the Contracts Act, a mistake as to a matter of fact essential to the agreement renders the contract void.[289] In *Galloway v. Galloway*,[290] the parties believing themselves to be married entered into a separation agreement by which the man undertook to pay money as maintenance to the woman. It then transpired that they had never been married in the first place; so, the man stopped paying. The woman sued him but failed to recover because the separation was void for mistake. There could not be a separation agreement when there had never been a union in the first place.

197. In *Ocharm Plumbers and Associates Ltd v. Drury (U) Ltd*,[291] the parties had entered into a subcontract in the mistaken belief that there was a principal contract between the defendant and Uganda Wildlife Authority (UWA). It was held that where the mistake goes to the root of the contract, it renders the contract void. Bamwine J stated:

> From the evidence presented to court, by the time the plaintiff and the defendant entered into the impugned agreement, the matter between the defendant and UWA was in the lawyers' speak, still subject to contract. It appears to me that the defendant had been merely declared the evaluated bidder for the job. Excited by that prospect, the defendant went ahead to subcontract the work to the plaintiff. There was nothing definite about the deal. An offer made subject to contract … means that the matter remains in negotiation, and there is no contract until a final contract is executed. … What happened in my view, comes within the meaning of common mistake in law in that at the time of the agreement, the main contract between the defendant and UWA was not in existence and yet both parties assumed that it was.[292]

C. Mutual Mistake

198. Mutual mistake occurs where the parties are at cross purposes as to the identity of the subject matter of the contract. For example, Joan offers to sell to Ban a 2010 Toyota Carina car, and Ban accepts believing that he is buying a 2010 Toyota corona car. In such a situation, the contract is void because there is no meeting of minds: the offer and acceptance of Joan and Ban respectively do not coincide. In

289. Section 17(1) and (2).
290. (1914) 30 T.L.R. 531.
291. H.C.C.S. No. 723 of 2006.
292. *Ibid. See also Steven Mwesezi & Another v. Akright Projects Ltd* H.C.C.S. No. 250 of 2009; *Sheikh Brothers Ltd v. Arnold Julius Ochsner & Another* [1957] E.A. 86.

Raffles v. Wichelhaus,[293] there was a contract for the sale of 125 bales of cotton 'to arrive ex *Peerless* from Bombay'. There were two ships named *Peerless* leaving Bombay at about the same time. The buyer meant one while the seller meant the other. It was held that the contract was void for a fundamental mistake of fact that had prevented the formation of agreement and that the offer and acceptance of the parties had failed to coincide.

199. The party seeking to rely on a mutual mistake has to show that there was a degree of ambiguity that it is impossible, on applying the objective test of a reasonable man, that the parties intended to be bound by one set of terms or the other. Would a reasonable or sensible person take the agreement to mean what each of the parties – for example Joan and Ban above – intended to mean? It should be noted that it is the court to decide whether the facts of a given case give rise to mutual mistake.

200. In *Smith v. Hughes*,[294] the defendant, a racehorse owner, wished to purchase a quantity of oats. A sample of the oats was inspected and the defendant agreed to purchase the whole amount. When the oats were delivered, it was discovered that they were green, that is that season's oats. When sued for the price, the defendant contended that the contract was void for mistake. It was held that on an objective test of a reasonable man, there was a valid contract. The court found that the seller had not misrepresented the oats as being old. There was also no suggestion that there was a term of the contract to this effect. The purchaser could not establish a mistake on the basis of the fact that he had been careless and consequently misled himself as to the nature of the oats. Blackburn J stated:

> If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[295]

201. It follows from the case of *Smith v. Hughes* that if from the whole evidence and circumstances of the case, a reasonable man would infer the existence of a contract, the court, notwithstanding the material mistake, will hold that the contract in question is binding on the parties.

202. A related mistake concerns possibility of performance. When parties to a contract enter into it believing that it is capable of performance, while in fact it is not so, there is a mistake of fact as to the possibility of performance. For example, X agrees to pay UGX 5 million to Y so that Y can marry Z. While entering into the contract, X and Y think that Z is alive but Z died three years ago. Here, the mistake

293. (1864) 2 H. & C. 906.
294. (1871) L.R. 6 Q.B. 597.
295. *Ibid.,* p. 607. *See also Scriven Bros. & Co. v. Hindley & Co*. [1913] 3 K.B. 564.

as to the possibility of performance is seen soon after formation of the contract. Such contract is void on the ground of impossibility.

D. Unilateral Mistake

203. The distinguishing feature of unilateral mistake is that one party knows or ought to have known that the other party is mistaken. For this type of mistake to operate, there must be a mistake as to the nature of the promise made by the other party. The mistake should induce the other party to enter into the contract. For example, X makes an offer to Y and he is aware that Y is fundamentally mistaken as to the nature of the promise contained in the offer. In such a situation, the court may hold that there was no contract. In *Hartog v. Colin & Shields*,[296] the defendants made an offer in writing to sell to the plaintiff 30,000 Argentinian hare skins, the price being quoted in pence per pound. Immediately before this offer, the parties had negotiated in terms of pence per piece, that is, pence per skin, as was usual practice in the trade. The offer was accepted before the defendants discovered that they had made a mistake in expressing the offer. The defendants refused to deliver the skins, claiming that there was no binding contract. The plaintiff sued for breach of contract. The court held that there was no contract since the buyer must be taken to have known the mistake made by the sellers in the formulation of their offer.

204. A unilateral mistake may also occur where a party is mistaken as to the identity of the person contracted with and the other party is aware of that mistake. In order for the mistake to operate, the identity of the other party must be of fundamental importance to the innocent party. Whether the identity of the other party is fundamental or not is a question of fact. For example, Ahmed accepts an offer to sell goods to Kenneth, a rogue, who pretends that he is Paul. Kenneth, having obtained the goods, sells them to an innocent third party, Adrisi. It is clear that Adrisi will not have acquired a good title to the goods since under the Sale of Goods and Supply of Services Act,[297] the principle expressed in the Latin maxim, *nemo dat quod non habet* (*nemo dat* rule), that is, no person can pass what he does not have, applies. Kenneth does not have any title to pass to anyone, including Adrisi. The latter has to surrender the goods to Ahmed and look for Kenneth. However, in such a situation, the rogue may disappear and even if Ahmed traced him, he may not have any coin! Since time is of the essence, Ahmed must take steps to show that he intends to rescind the contract with Kenneth as soon as he discovers the deception perpetrated upon him. He may show such intention by for example informing the police.

205. In *Car and Universal Trading Co. Ltd. v. Caldwell*,[298] a car was sold and delivered to a rogue whose cheque was dishonoured the next day, by which time the rogue had disappeared with the car. In an attempt to recover the car, the owner

296. [1939] 3 All ER 566.
297. Section 29(1).
298. [1964] 1 All ER 290.

informed the police and the Automobile Association. The rogue then sold the car to a buyer who purchased it in good faith. The court held that by informing the police and the Association, the owner had made it clear that he intended to rescind the contract. Consequently, the rogue no longer had any title to the goods to pass to the garage or to the innocent buyer. The latter had to return the car to the owner. According to the Sale of Goods and Supply of Services Act, 2017, if the owner [Ahmed] does not act fast and rescind, 'the buyer [Adrisi] acquires a good title to the goods, provided that he or she buys them in good faith and without notice of the seller's defect in title'.[299] Thus, Ahmed may be able to trace and recover the goods if he can prove that Adrisi was not a *bona fide* purchaser in that he knew of the defect in title of Kenneth.

206. The person alleging a mistake of identity must prove a number of things. In the first instance, he or she must show that there was an intention to contract with some other person rather than the rogue and that the latter knew of this intention. In *King's Norton Metal Co. Ltd. v. Edridge, Merret & Co. Ltd*,[300] a rogue by the name of Wallis established a business under the name of Hallan & Co. with the sole intention of defaulting the plaintiffs. He had letterheads drawn up and printed which depicted the firm as having some substance. He then obtained goods from the plaintiffs after sending an order on one of the letter headed papers. Waillis then sold the goods to the defendants, who bought them in good faith. The plaintiffs sued the defendants alleging that the contract with Hallam & Co. was void for mistake and that the defendants had not acquired any title to the goods. The court rejected their claim since there was no mistake as to identity. They had intended to contract with Hallam & Co., which they believed was a solvent and substantial business and thus creditworthy, and that was the party they had in fact contracted with. In any case, the court observed that the plaintiffs had failed to show that there was some other person with whom they had intended to do business.

207. A party alleging a unilateral mistake as to identity must also show that at the time of contracting, the identity of the person he or she was dealing with was of fundamental importance to him or her. In *Cundy v. Lindsay*,[301] a rogue established a business by the name of Blenkarn at 37 Wood Street and sent an order for goods to the plaintiffs. The order was signed by the rogue in such a way that it looked like their name Blenkiron and Co. which traded at 123 Wood Street, a firm which the plaintiffs knew to be highly respectable. The plaintiffs accepted the order and dispatched the goods to 'Messrs Blenkiron and Co., 37 Wood Street'. The rogue, having received the goods, sold them to the defendants, who took them in good faith. The plaintiffs attempted to recover the goods from the defendants. The House of Lords held that their claim would succeed since they had intended only to contract with Blenkiron and Co. and nobody else. The court stated that the identity of the person they were to contract with was of fundamental and crucial importance at the time of entering the contract.

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299. Section 30.
300. (1897) 14 T.L.R. 98.
301. (1878) 3 App Cas 459. *See also Mamujee Bros v. Awadh* [1969] E.A. 520.

208. The case of *King's Norton* can be distinguished from *Cundy v. Lindsay* because in the former case, the plaintiffs were unable to show that they meant to contract with Hallam & Co., and not with Wallis and there was no other entity in question. In *Cundy v. Lindsay*, there was clear confusion as to which two distinct entities had been contracted with.

209. In *Phillips v. Brooks*,[302] a rogue named North went into the plaintiff's shop and asked to see some jewellery (pearls and rings). He selected pearls at GBP 2,500 and a ring at GBP 450. He produced a chequebook and wrote a cheque for GBP 3,000. As he signed the cheque, he said 'you see who I am; I am Sir George Bullough'. This name was well known in London at the time. The plaintiff checked the directory for the address given by the rogue and found it to be the correct address of Sir George. The plaintiff asked the rogue whether he would like to take the jewellery with him and he replied: 'You had better have the cheque cleared first; but I should like to take the ring as it is my wife's birthday tomorrow'. The rogue took the ring with him. When the plaintiff presented the cheque, it bounced. In the meantime, North pawned the ring with the defendants who took it in good faith and advanced him GBP 350. The plaintiff brought an action to recover the ring or its value. It was held that the plaintiff intended to contract with the person in front of him and his action should fail. That while he believed that he was dealing with Sir George Bullough, he would have contracted with anyone present in the shop. In any case, the contract had already been completed when the question of identity arose. The rogue had selected the articles and offered to buy them. The plaintiff had accepted the offer and the rogue was writing the cheque when the question of identity arose. Thus, the identity of the person in front of the plaintiff was not of fundamental and crucial importance before or at the time of contracting.

210. Other cases that illustrate challenges regarding proving unilateral mistake as to identity are *Ingram v. Little*[303] and *Lewis v. Averay*[304] whose facts were very similar. In the former case, a swindler called on the plaintiffs in response to their advertisement for the sale of a car. Although the plaintiffs had refused to part with the car in exchange of a cheque, they later changed their minds and accepted the cheque after the swindler had convinced them that he was a certain Mr P.G.M. Hutchinson of Stanstead House, Stanstead Road, Caterham, Surrey. The plaintiff had checked the name and address in a telephone directory, and it was with the person of that name and address that they intended to deal. The cheque bounced and the car was traced to the defendants, who had taken it in good faith and paid for it. The plaintiffs brought an action to recover the car or its value. It was held that the plaintiffs' action should succeed since their offer was made to the person whom the swindler pretended to be, namely, Mr P.G.M. Hutchinson, and the swindler knew this. Given that the offer was not capable of being accepted by the swindler, there was no contract for the sale of the car.

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302. [1919] 2 K.B. 243.
303. [1961] 1 Q.B. 31.
304. [1972] 1 Q.B. 198.

211. In *Lewis v. Averay* above, a rogue posing as Richard Greene, a well-known film actor, called upon the plaintiff and offered to buy his car which was advertised for sale at GBP 450. The plaintiff accepted the offer, and was given a cheque, signed R.A. Green, for GBP 450. Suspecting that the cheque might be worthless, the plaintiff resisted a proposal that the car should be removed at once. In order to show that he was indeed Richard Greene, the rogue produced a special admission pass to Pinewood Studios bearing an official stamp. Satisfied with this, the plaintiff let the rogue take the car in exchange for the cheque. A few days later, the plaintiff discovered that the cheque was stolen and that it was worthless. In the meantime, the rogue sold the car to the defendant who paid GBP 200 for it in good faith. The rogue then disappeared. The county court found in favour of the plaintiff. However, the Court of Appeal followed *King's Norton* and *Phillips v. Brooks* and disagreed with *Ingram v. Little* and held that despite his mistake, the plaintiff had concluded a contract with the rogue. That although the contract between the plaintiff and the rogue was avoidable for fraud, it could not be avoided now that the defendant had obtained good title since he bought the car in good faith and without notice of the fraud. He failed to avoid the contract in time by alerting the relevant authorities as happened in *Car and Universal Trading Co. Ltd.* above.

212. In *Citibank NA v. Brown Shipley and Co. Ltd & Another*,[305] a rogue claimed to be a signatory on a company account held with the plaintiff bank. The rogue telephoned the defendant bank and asked to purchase some foreign currency which he would pay for by a banker's draft drawn on the company account held by the plaintiff. The rogue telephoned the plaintiff requesting the banker's draft, which it handed to a 'messenger' whom the plaintiff thought was from the company. In exchange for the draft, a forged letter of authority was given. The draft was then paid to the defendant who, after confirming that the draft had in fact been issued by the plaintiff, paid the cash to the rogue. In due course, the defendant presented the draft to the plaintiff bank and was subsequently paid. When the fraud was eventually discovered, the plaintiff bank brought an action to recover the value of the draft from the defendant. The action was based on the allegation that title had never passed to the defendant bank as it could not derive a good title from the rogue and that there was no contract between the two banks. It was held that the fact that the plaintiff had mistakenly dealt with a rogue instead of the company, which the plaintiff bank thought they were dealing with, did not prevent the existence of a contract between the two banks. Although the court agreed that the rogue had no title because of mistaken identity, it found that he was a 'mere conduit'. Consequently, it was held that title did not pass from the rogue to the defendant.

213. Unilateral mistake may arise as to the nature of a document signed or sealed. The general rule is that a person is bound by his or her signature to a document and he or she cannot say that he or she did not understand the document or that it was too technical or too difficult to read. However, the plaintiff may argue that he or she was mistaken as to the class or nature of the document itself.

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305. [1991] 2 All ER 690.

214. In *Saunders v. Anglia Building Society*,[306] the plaintiff, a widow, had made a will leaving all her possessions, including her leasehold house, to her nephew, Walter Parkin. She gave the deeds of the house to the nephew in order to raise money on it. She made it a condition that she should remain in occupation until she died. When Parkin told his friend, the first defendant, that the plaintiff had bequeathed him the house, they agreed that the first defendant, who was heavily indebted, could use it to raise some money. A document was drawn up by solicitors stating that the widow was selling the house to the first defendant for GBP 3,000. The understanding between Parkin and the first defendant was that after the plaintiff appending her signature, no purchase price would be paid over, and the first defendant would mortgage the property to raise the money. The first defendant took the document to the plaintiff and asked her to sign. She did not read the document because she had broken her reading glasses. She asked him what it was about, and he replied: 'It is a deed of gift for Wally (Parkin) for the house'. She thought at the time that Parkin was going to borrow money on the deeds and that the first defendant was arranging this for him. After the plaintiff had signed the document, no money was paid to her, although the document provided that she acknowledged receipt of GBP 3,000 paid by the first defendant. The latter then obtained a loan of GBP 2,000 from the second defendant, a building society, on the security of the deeds. The first defendant defaulted on the instalment payments to the building society, which sought to take possession of the house. The plaintiff pleaded *non est factum*, that is, that it was not her deed.

215. The trial court held that the assignment was not her deed and ordered the building society to deliver the title deeds to the plaintiff. The Court of Appeal held that the plea of *non est factum* could not be supported and the executrix of the plaintiff's estate appealed to the House of Lords, which affirmed the decision of the Court of Appeal and rejected the claim. The House of Lords held that the document she signed was not materially different from the one she intended to sign, that is, one transferring the property to the nephew. That she was mistaken only as to the contents and not the character or nature of the document. Lord Reid stated that there must be a heavy burden of proof on the person who seeks to plead *non est factum*. He or she should have taken all reasonable precautions in the circumstances. According to Lord Reid, the defence of *non est factum* is available not only to those persons who are unable to read due to blindness or illiteracy or senility[307] but also to those who may not understand the purport of a document due, for example to inadequate education provided they took reasonable precautions.

216. In an earlier case of *Foster v. Mackinnon*,[308] the defendant, a senile man with poor sight, was induced to sign a document, which he was told was a guarantee. In fact, it was a bill of exchange upon which the claimant ultimately became entitled. It was held that the plea of *non est factum* would succeed: the defendant, who had not been negligent, was not liable on the bill.

306. [1971] A.C. 1004.
307. *Thoroughgood's* case (1582) 2 Co. Rep. 9a.
308. (1869) L.R. 4 C.P. 704.

217. It is important to point out that the Illiterates Protection Act[309] protects illiterates who have signed or put marks on documents. An illiterate, in relation to a document, is defined as 'a person who is unable to read and understand the script or language in which the document is written or printed'.[310] According to this Act, before an illiterate signs or appends his or her mark on the document, it should be read over and explained to him or her. The person writing it should:

> write on the document his or her own true and full name and address as witness, and his her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate has appended his or her mark, and that he or she was instructed to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate.[311]

E. Effect of Mistake

218. A person affected by mistake may rescind the contract. As with all equitable remedies, the remedy of rescission is granted at the discretion of the court. In *Solle v. Butcher*,[312] the plaintiff agreed to lease a flat from the defendant at a rent of GBP 250 per annum. At the time of entering into the contract, both parties believed that the premises were not governed by the Rent Restriction Act. In fact, the Act applied and the maximum rent that could be charged under the law was only GBP 140 per annum. The plaintiff sought to recover the excess rent. The court dismissed the plaintiff's claim that since the defendant had made substantial improvements to the flat, he could have applied to have the rent increased to GBP 250. The court held that the lease should be set aside and the defendant be allowed to renegotiate a lease that would reflect the new rent. The plaintiff had an option of accepting the new lease or withdrawing from the contract. Lord Denning stated:

> It is now clear that a contract will be set aside if the mistake of one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of the offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake … A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental, and that the party seeking to set aside was not himself at fault.[313]

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309. Cap. 78.
310. Section 1.
311. Section 2. *See also* s. 3.
312. [1950] 1 K.B. 671. *See also William Sindall plc v. Cambridgeshire County Council* [1994] 1 W.L.R. 1016.
313. *Solle v. Butcher, supra*, p. 691.

219. The remedy of rescission will be lost where *restitutio in integrum* is not possible; or where the granting of the remedy would deprive a third party of his or her rights; or where it is not sought within a reasonable time.

220. A party labouring under a mistake may seek the remedy of rectification. This remedy is granted by the court at its discretion. Rectification arises where a written document does not represent the agreement entered into by the parties. The remedy applies only where there is an error apparent on the face of the record: it does not apply to a mistake as to the subject matter of the contract. For example, both X and Y agree that the price for a car is UGX 10 million and the document reads UGX 1 million. For a party to obtain rectification, the agreement must have failed to reflect the agreement of the parties. He or she must adduce evidence to prove that the document does not reflect the common intention of the parties at the time of entering into the contract. The disparity between what was agreed upon and what was recorded should be obvious. [314]

221. A person who has paid some money or delivered a thing under mistake also has a remedy under quasi-contract. The Contracts Act provides that, '[a] person to whom money is paid by mistake or to whom anything is delivered by mistake shall repay or return the money or thing delivered'.[315]

II. Misrepresentation

A. Nature of Misrepresentation

222. The Contracts Act makes it clear that misrepresentation is one of the factors that adversely affect the consent of the parties to a contract.[316] Before attempting the definition of misrepresentation, it is important to understand a 'representation'. A representation may be defined as a statement of fact, made by one party to the contract (the representor) to another (the representee), during negotiations leading to a contract, which though incorporated into the contract, is nevertheless one of the factors which induce the representee to enter into the contract. Where a representation turns out to be false, there is a misrepresentation. The Contracts Act defines a misrepresentation as:

(a) a positive assertion made in a manner which is not warranted by the information of the person who makes it or an assertion which is not true, though the person who makes it believes it to be true;
(b) any breach of duty which without an intent to deceive gains an advantage to the person who commits it or anyone who claims under that person by misleading another person to his or her prejudice or to the prejudice of anyone claiming under that person; or

314. *See, for example*, *Joscelyne v. Nissen* [1970] 2 Q.B. 86.
315. Section 60.
316. Section 13(d).

(c) causing however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject to the agreement.[317]

223. Thus, a misrepresentation may be defined as a false statement of fact that induces the person to whom it is made to enter into a contract. As Furmston points out, 'a misrepresentation is simply a representation that is untrue'.[318] In *Fred Nuwagaba v. Ade Musana Kaguma*,[319] the court held that a misrepresentation is a statement of fact that is made by a party to contract and is untrue and has the object of inducing the representee to enter into a contract.

224. In order to succeed in action of misrepresentation, the representee should have been induced and relied on the representor's statement or assertion. In *Non-Performing Assets Recovery Trust v. S.R. Nkabulaand and Sons Ltd*,[320] the appellant, a successor in title to Uganda Development Bank (UDB), by an assignment in compliance with Non-Performing Assets Recovery Trust, advanced a loan to the respondent in form of a tractor. Massey Ferguson had already been offered, but by the time the respondent took advantage of the loan, Massey Ferguson tractors were not available. Instead, he took a Steyr tractor. The respondent partly paid the loan but later refused further repayment on the ground that the tractor with which he was supplied was defective. He also argued that he had been induced by the officials of UDB to take this tractor by a combination of non-disclosure of material information, which was at the material time available to UDB concerning the non-suitability of the Steyr tractors. The trial judge dismissed the suit. On appeal, the issue was whether the respondent relied on misrepresentation of the bank in accepting the tractor. The Court of Appeal held that the respondent did not rely on the misrepresentation of the officials of the bank in accepting the Steyr tractor, but on its own independent careful investigations concerning the technical reliability of the Steyr tractor and thus the claim for relief based on misrepresentation could not succeed.

225. It is necessary to distinguish statements of fact from mere statements of opinion because for a statement to amount to a misrepresentation, it must be a statement of fact. Furmston defines a statement of opinion as 'the statement of a belief based on grounds incapable of actual proof'.[321] In *Bisset v. Wilknson*,[322] the vendor of a farm, when asked how many sheep he thought the farm could take, declared that in his judgment it would support 2,000 sheep. In fact, the farm had never held any sheep. It was held that the statement was a mere honest statement of opinion

317. Section 2.
318. M.P. Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* 340 (16th ed. Oxford University Press 2012).
319. H.C.C.A. No. 42 of 2012. *See also Francis Paul v. Namwandu Muteranwa*, Civil Appeal No. 20 of 2014.
320. [2007] U.L.R. 548.
321. Furmston, *supra*, p. 342.
322. [1927] A.C. 177.

and not a statement of fact. Thus, the action for misrepresentation failed. In *Dimmock v. Hallet*,[323] it was held that the description of land as 'fertile and improvable' did not constitute a misrepresentation.

226. A statement as to the state of a person's mind may be a statement of fact. Thus, a statement of intention that induces a person to enter into a contract is actionable as a misrepresentation of fact if it can be shown that the maker knew that his or her promise would not be carried out. In *Edgington v. Fitzmaurice*,[324] the defendants, who were directors of a company, issued a prospectus inviting members of the public to subscribe for debentures. The prospectus contained statements that the debentures were issued for the purpose of obtaining funds to purchase horses and vans, to complete alterations to the company's premises and to develop the company's business. In fact, the main purpose in raising money by the issue of debentures was to pay off debts. The plaintiff, who bought shares relying on the prospectus, brought an action for misrepresentation. The defendants argued that since the statement related to future plans, it could not amount to a misrepresentation. That a representation is only a statement of purportedly existing facts, not a promise about the future. That a promise about the future is only actionable if it gets incorporated into the contract, yet by its nature, a misrepresentation does not get incorporated into the contract. The Court held that the statement was not simply a future promise but an assertion of the intentions of the company, and since at the time the statement was made the company had already made a decision to spend the proceeds from the shares differently, it was therefore a misrepresentation. That the plaintiff could rescind the contract since there was misrepresentation of fact.

227. A false statement as to the law is not actionable misrepresentation because everyone is presumed to know the law. However, if the person making the statement is a professional, for example an advocate, making the statement to his or her client in a professional capacity, and it turns out to be an incorrect statement of the law, he may be held liable for professional negligence.[325]

228. The question is: Does silence amount to a misrepresentation? Misrepresentation is a positive assertion of fact and, accordingly, the general rule is that silence does not amount to a misrepresentation. In fact, in respect of fraud, which is a critical aspect of fraudulent misrepresentation, the Contracts Act states:

> For the purposes of this Act, mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, it is the duty of the person keeping silence to speak, or unless the silence is, in itself, equivalent to speech.[326]

323. (1866) 2 Ch. App. 21.
324. (1885) 29 Ch. D. 459.
325. *See Kirima Estates (U) Ltd v. Korde* [1963] E.A. 637, relying on *Hedley Byrne & Co. v. Heller & Partners Ltd* [1964] A.C. 932.
326. Section 15(2).

229. Where the representor keeps silent, the contract remains valid if the representee 'had the means of discovering the truth with ordinary diligence'.[327] However, there are a number of exceptions to the general rule. First, where a party makes a false statement under the belief that it is true, he or she is under an obligation to disclose the truth should he or she subsequently discover that he or she was mistaken. For example, in *With v. O'Flanagan*,[328] a doctor was negotiating for the sale of his medical practice and made certain representations regarding the income that could be earned from it. At the time the representations were made, the figures given were true. The doctor subsequently fell ill and the income from the practice substantially decreased. This change of fortunes was not made known to the purchaser who simply purchased basing on the original figures. It was held that the purchaser could succeed in an action for misrepresentation since the doctor should have declared the change in the circumstances.

230. Second, where the statement made is only half of the truth. Though a party is legally entitled to remain silent about some material facts, if he or she chooses to speak, he or she must make a full and frank statement. In *Dimmock v. Hallett*,[329] a landlord selling property which he disclosed in the negotiation as fully let was held to be under an obligation to reveal that in fact the tenants had served him notice of intention to vacate.

231. Third, contracts *uberrimae fidei* (utmost good faith) impose a duty of disclosure of all material facts. A contract *uberrimae fidei* is one where all the material facts are in the possession of one party and not the other, yet the other party needs to base on these facts to make the decision whether or not to enter into the contract and on what terms. In such a case, the party having knowledge of the material facts has a duty of disclosure. A material fact is something which would influence a reasonable person in making the contract. Examples of such contracts include insurance contracts and family settlements. In *Joel v. Law Union and Crown Insurance Co.*,[330] the insured took out a life insurance policy with the respondent company. He filled in a proposal form and the answers to the questions therein were to form the basis of the contract. These answers were correctly stated. Subsequent to this, but before the formal execution of the policy, a doctor asked him other questions, two of which were incorrectly answered. However, the incorrect answers were not fraudulently made. Unfortunately, the insured later committed suicide. Fletcher Moulton LJ stated:

> The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized

327. Section 16(2).
328. [1936] Ch. 575.
329. (1866) L.R. 2 Ch. App. 21. *See also Nottingham Brick and Title Co. v. Butler* (1889) 16 Q.B.D. 778.
330. [1908] 2 K.B. 863. *See also Oriental Fire and General Assurance Ltd v. Govinder and Others* [1908] E.A. 863; *Lambert v. Co-operative Insurance Society* [1975] 2 Lloyd's Rep. 485.

> that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But the question always is, was the knowledge [of the material fact] you possessed such that you ought to have disclosed it?[331]

232. Where there is a fiduciary relationship between parties to a contract, for example the relationship between advocate and client, doctor and patient, and bank manager and client, a duty of disclosure will arise. If one party fails to disclose a material fact, the contract may be avoided.[332]

B. Fraudulent Misrepresentation

233. One of the types of misrepresentation is fraudulent misrepresentation. The Contracts Act neither explicitly defines fraud nor fraudulent misrepresentation. However, the Act partly defines misrepresentation, *inter alia*, as 'a positive assertion made in a manner which is not warranted by the information of the person who makes it or an assertion which is not true, though the person who makes it believes it to be true'.[333] Fraud is one of the factors that may vitiate the consent of the parties to a contract.[334]

234. According to the Contracts Act, consent is induced by fraud where a party with the intention of deceiving the other party or inducing him or her to enter into the contract commits any of the following acts: makes a suggestion to a false fact and does not believe it to be true; conceals a fact while he or she has knowledge or belief of the fact; makes a promise without any intention of performing it; does any act intended to deceive the other party; or commits any act or omission declared fraudulent by any law.[335] The fraud or misrepresentation must have caused the other party to consent to the contract.[336]

235. Fraudulent misrepresentation was defined by Lord Herschell in *Derry v. Peek*,[337] as a false statement that is 'made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless as to whether it be true or false'.[338] As the court observed, absence of an honest belief is essential to constitute fraud. Carelessness of itself does not amount to dishonesty, but where a person acts recklessly, the court may find dishonesty in that he or she could not reasonably have believed in the truth of his or her statement. However, it has to be shown that the recklessness of the

331. *Joel v. Law Union and Crown Insurance Co., supra*, p. 870.
332. *See Lambert v. Co-operative Insurance Society* [1975] 2 Lloyd's Rep. 485.
333. Section 2.
334. Section 13(c).
335. Section 15(1)(a)–(e).
336. Section 16(3).
337. (1889) 14 App. Cas. 337.
338. *Ibid.,* p. 374.

defendant was such that it amounted to a disregard for the truth so that he or she could be taken to have acted fraudulently.[339]

236. The burden of proof is on the party who alleges fraud. However, as most legal practitioners will tell you, it is difficult to prove fraud.[340] An action based on fraud must not be taken lightly because fraud is a very serious matter. As observed in *Le Lievre v. Gould*,[341] 'a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind'.[342] In *Foster v. Charles*,[343] it was held that motive is irrelevant in an action in deceit: provided the plaintiff proves that he or she acted on a false representation that the defendant did not believe to be true, the latter is liable even if he or she had a good motive.

C. Negligent Misrepresentation

237. Another type of misrepresentation is negligent misrepresentation. The Contracts Act does not explicitly define negligent misrepresentation. However, the Act partly defines misrepresentation as 'any breach of duty which without an intent to deceive gains an advantage to the person who commits it or anyone who claims under that person by misleading another person to his or her prejudice or to the prejudice of anyone claiming under that person'.[344] Before the case of *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*,[345] common law recognized only fraudulent and innocent misrepresentations. However, an action could lie in equity for negligent misrepresentation if there was a fiduciary relationship between the parties, for example a solicitor and a client.[346]

238. In *Hedley Byrne* case above, which extended the common law tort of negligence to negligent misstatements, the plaintiffs were asked for credit by a certain company and decided to seek advice as to the financial standing of the company from the defendants, the company's own bankers. The defendants, who were aware of the reasons for which the plaintiffs were seeking advice, carelessly stated that the company was financially sound. The House of Lords held that although the defendants owed the plaintiffs a duty of care, they were not liable because of the disclaimer in the correspondence which stated that the advice was given 'without responsibility'. However, the court stated that it would be possible for a defendant to be liable for a plaintiff's loss where there was a special relationship. Although the

339. *See Thomas Witter Ltd v. TBP Industries Ltd* [1996] 2 All ER 573.
340. On the difficulty of proving fraud in misrepresentation, *see, for example*, *Akerhielem v. De Mare* [1959] E.A. 476.
341. [1893] 1 Q.B. 491.
342. *Ibid.*, p. 498.
343. (1830) 7 Bing. 105.
344. Section 2.
345. [1964] A.C. 465.
346. *Nocton v. Lord Ashburton* [1914] A.C. 932.

court did not define what amounts to a 'special relationship', there should be a sufficient degree of proximity between the parties, especially between professional men and women whose business involves the giving of advice to clients, such as accountants, auditors, lawyers, engineers, estate agents, architects and surveyors.[347] A special relationship may, however, also exist where the representor has superior knowledge and experience to that of the representee.[348]

D. Innocent Misrepresentation

239. The third type of misrepresentation is innocent misrepresentation. The Contracts Act does not expressly define innocent misrepresentation. However, it partly defines misrepresentation as 'causing however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject to the agreement'.[349] Innocent misrepresentation is thus that type of misrepresentation that is neither fraudulent nor negligent. It is confined to those misrepresentations that are made in the honest but mistaken belief that they are true. Such statements must not have been made carelessly, because carelessness is inconsistent with faultlessness or honesty.[350]

E. Remedies for Misrepresentation

240. Upon discovering that the statement made by his or her counterpart, on which he or she based to enter into the contract was actually untrue, the representee has a number of remedies depending on the type of misrepresentation and the circumstances generally, which are explained as follows.

241. One of the remedies available to a representee is rescission of the contract. The general rule is that the effect of misrepresentation is to render the contract not void, that is, not enforceable by law,[351] but voidable, which means that the contract is enforceable by law at the option of the party to the contract.[352] The contract is still valid and subsisting until the representee decides to rescind it, that is to say, set it aside. However, the contract is not voidable if the representee 'had the means of discovering the truth with ordinary diligence'.[353]

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347. *See, for example*, *Winther v. Arbon Langrish and Southern Ltd* [1966] E.A. 292; *Caparo Industries Plc v. Dickman & Others* [1990] 1 All ER 568; *Yianni v. Edwin Evans & Son* [1982] Q.B. 438; *Mutual Life and Citizens' Insurance Co. Ltd v. Evatt* [1971] A.C. 793.
348. *See Esso Petroleum Co. Ltd v. Mardon* [1976] 2 All ER 5.
349. Section 2.
350. *See* Alfred Hill, *Damages for Innocent Misrepresentation*, 73(4) Colum. L. Rev. 679–748 (1973); Leon Green, *Innocent Misrepresentation*, 19(3) Va. L. Rev. 242–252 (1933).
351. For the meaning of void agreement, *see* s. 2 of the Contracts Act.
352. *Ibid.*
353. Section 16(2).

242. On discovering the misrepresentation, the representee may decide to affirm or to rescind the contract. By affirmation, he or she will have decided to carry on with the contract. Regarding affirmation, the Act provides that '[a] party to a contract, whose consent is obtained by fraud or misrepresentation, may, where that party thinks fit, insist that the contract is performed and that he or she is put in the position he or she would have been if the representations made, had been true'.[354]

243. Rescission is available for fraudulent and negligent misrepresentation, the reason being that as a result of the misrepresentation, there is no *consensus ad idem*. The aim of rescission is *restitutio in integrum*, that is, to put the parties back to their original position as though the contract had not been made. According to Hodgin, 'when the court orders rescission it means that the two parties give back and take back whatever was the subject matter of the contract'.[355] Thus, where a party cannot be returned to his or her original position – that is, *restitution in integrum* is not possible, the remedy of rescission is not available.

244. What happens where for example, the representee has incurred other expenses? In respect of fraudulent misrepresentation, common law awarded damages. Regarding innocent misrepresentation, damages were not available. However, the courts made an award, not of damages, but of an indemnity. The representee was awarded a sum equal to the expenses or obligations incurred as a result of the misrepresentation. An indemnity is basically money paid by the representor in respect of expenses incurred in complying with the terms of the contract.[356] According to the Contracts Act, an indemnity holder – the representee – is entitled to recover from the representor damages and costs.[357]

245. The remedy of rescission may be lost under a number of circumstances. First, the remedy may be lost through affirmation. As pointed above, a party may elect to affirm the contract after finding out the truth of the situation.[358]

246. Second, the remedy of rescission may be lost through lapse of time. This occurs where there is inordinate delay between the making of the contract and the discovery of the truth and the attempt to rescind. However, rescission is not barred by lapse of time where the misrepresentation is fraudulent. In misrepresentations other than fraudulent misrepresentation, rescission must take place within a reasonable time. In *Leaf v. International Galleries*,[359] the plaintiff bought a painting which he believed to be a genuine Constable on the basis of a misrepresentation by the defendants. However, five years when he decided to sell the car, the plaintiff discovered that it was not a Constable and decided to rescind the contract on grounds

354. Section 16(4).
355. Hodgin, *supra,* p. 121.
356. On the difference between indemnity and damages, *see Whittington v. Seale-Hayne* (1900) 82 LT 49.
357. Section 69(a)–(c).
358. *See Long v. Lloyd* [1958] 1 W.L.R. 753; *Peyman v. Lanjani* [1985] Ch. 457.
359. [1950] 1 All ER 693.

of innocent misrepresentation. It was held that although there was no evidence that the plaintiff had affirmed the contract, he was barred by lapse of time from rescinding the contract.

247. Third, as pointed out above, a party cannot rescind the contract where *restitutio integrum* has become impossible. This may happen if by the time he or she discovers the misrepresentation, the representee has already consumed the goods, the subject matter of the contract, or has resold them or irreversibly changed their identity, for instance turning raw materials into finished products. For example, where the representee is induced to buy shares basing on a misrepresentation and the value of the shares falls substantially before he rescinds the contract, the remedy of rescission becomes meaningless.[360]

248. The remedy of rescission may also be lost where an innocent third party has acquired an interest in the subject matter of the contract. It is thus important for the representee to rescind the contract as soon as he or she discovers the fraud, since this will prevent the third party from acquiring the title to the subject matter of the contract and enable the representee to recover the goods.[361]

249. The representee may decide to seek compensation or damages, which may be available for both fraudulent and negligent misrepresentation. The representee may thus claim damages for fraudulent misrepresentation in the tort of deceit. The injured party may recover all the direct loss incurred as a result of fraudulent misrepresentation, regardless of foreseeability, provided there is a causal link between the statement and the loss.[362] The representee may also claim damages for negligent misrepresentation in the tort of negligence. The purpose of damages is to restore the victim to the position he or she occupied before the misrepresentation had been made. At common law, damages were not available for innocent misrepresentation. However, in England, the Misrepresentation Act, 1967, reformed the law on misrepresentation and the court may, exercise its discretion and award damages in lieu of rescission.[363]

III. Improper Pressure

250. Any agreement obtained by threats or undue or improper persuasion or pressure is insufficient. Where a party is coerced into a contract by threats or undue or improper pressure that adversely affects the notion of free consent, he or she should not be bound by that contract. In Uganda, improper pressure is viewed from

360. *See, for example*, *Armstrong v. Jackson* [1917] 2 K.B. 822.
361. *See, for example*, *Car and Universal Finance Co. Ltd v. Caldwell* [1965] 1 Q.B. 525.
362. *See Doyle v. Olby (Ironmongers) Ltd* [1962] 2 Q.B. 158; *Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769.
363. Section 2(2).

the lens of duress/coercion and undue influence. This section examines the nature and scope of the common law and equitable concepts of duress/coercion and undue influence respectively.

A. Duress/Coercion

251. Although the Contracts Act does not use the term duress, it provides that consent of the parties to the contract is not free where it is obtained by coercion,[364] which is defined as 'the commission or threatening to commit any act forbidden under any law or the unlawful detaining or threatening to detain any property, to the prejudice of any person with the intention of causing any person to enter into any agreement'.[365]

252. Duress at common law means actual violence or threats of violence to the person. These are threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal, that is, it must be a threat to commit a crime or a tort. Thus, in order to amount to duress or coercion, it should be shown that the threats were to commit an unlawful act and had the intention of causing the aggrieved party to enter the contract. At common law, for the plaintiff to successfully plead duress, it had to be duress of his or her person and not his or her property.[366] However, under the Contracts Act, threats to detain his or her property may amount to coercion.[367]

253. Although at common law, the notion of duress does not extend to goods or other property, courts have developed what is known as economic duress. Where there is undue pressure, the courts may intervene. For example, in *D & C Builders Ltd v. Rees*,[368] Lord Denning refused to invoke estoppel on grounds that the wife, who knew that the builders were in urgent need of money, exerted improper pressure to compel them to accept a sum, which was substantially less than the one they were owed.

254. In *Occidental Worldwide Investment Corporation v. Skibs a/s Avanti, The Sibeon and the Sibotre*,[369] Kerr J rejected the old view that restricted duress to physical violence. He stated that contracts concluded under some form of compulsion may amount to duress. That the court must be satisfied that the consent of the other party was overborne by compulsion that deprived him of any intention to conclude a contract, which depends on the facts of each case. The learned judge observed that one of the factors to be considered is whether the party relying on the duress made any protest at the time or shortly thereafter.

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364. Section 13(a).
365. Section 2.
366. *See Atlee v. Backhouse* (1838) 3 M. & W. 633; *Skeate v. Beale* (1840) 11 Ad. & El. 983.
367. Section 2.
368. [1966] 2 Q.B. 617.
369. [1976] 1 Lloyd's Rep. 293. *See also North Ocean Shipping Co. Ltd v. Hyundai Construction Co. Ltd, the Atlantic Baron* [1979] Q.B. 705.

255. In *Pao On v. Lau Yiu Long*,[370] Scarman LJ ruled that there are certain criteria that are relevant in determining whether the plaintiff voluntarily signed or entered into a contract. That in determining whether there was coercion of will such that there was no consent, it is necessary to ask a number of questions. First, did the person alleged to have been coerced into making a contract protest or not? Second, did he have an alternative course open to him such as an adequate legal remedy? Third, was he independently advised? Lastly, did he take steps to avoid the contract after entering it? The decision of Kerr J in *Occidental Worldwide Investment* case above, which was largely confirmed by Scarman LJ in *Pao On* case above, was applied by Mulyagonja Kakooza J in *Steven Seruwagi Kavuma v. Barclays Bank (U) Ltd*,[371] where the judge held that the applicant was not induced to sign the consent judgment by duress.

256. In another case of *Makubuya E. William t/a Polla Plast v. Umeme (U) Ltd*,[372] where the plaintiff contended that he signed a document in which he undertook to clear outstanding electricity bills under duress, Madrama J stated that for economic duress to be made out, the pressure must be unlawful; it must be a wrongful act of force which overcomes the free will of a party. That the defendant did not exert unlawful pressure since it was exercising its lawful right to disconnect electricity as the plaintiff had a huge outstanding bill. In *Liberty Construction Co. Ltd v. Lamba Enterprises Ltd*,[373] it was also held that in order to amount to economic duress, the pressure complained of must be illegitimate and improper.[374]

B. Undue Influence

257. Under the notion of improper pressure, it is necessary to consider the concept of undue influence. Undue influence exists where a contract has been entered into as a result of pressure, which falls short of amounting to duress.[375] The Contracts Act provides that, 'a contract is induced by undue influence where the relationship subsisting between the parties to a contract is such that one of the parties is in a position to dominate the will of the other party and uses that position to obtain an unfair advantage over the other party'.[376]

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370. [1975] 3 All ER 65. For a discussion of this case, *see Boney Katatumba & 3 Others v. Shumuk Springs Development Ltd & 3 Others* H.C.C.S. No. 126 of 2009.
371. Misc. Application No. 0634 of 2010 (Arising from Civil Suit No. 0332 of 2008); *Esther Nakulima v. Ann Nandawula Kabali,* Misc. Application No. 235 of 2013 (Arising from Civil Suit No. 277 of 2012).
372. H.C.C.S. No. 534 of 2012.
373. H.C.C.S. No. 215 of 2008.
374. *See also Atlas Express Ltd v. Kafco (Importers and Distributors) Ltd* [1989] 1 All ER 641; *Vantage Navigation Corporation v. Suhail and Sand Bahawn Building Materials LLC (The Alev)* [1989] 1 Lloyd's Rep. 138.
375. *See Allcard v. Skinner* (1887) 36 Ch. D. 145.
376. Section 14(1).

258. In *Hassanali Issa & Co. v. Jeraj Store*,[377] the court held that undue influence only arises in contract where one of the parties is in position to dominate the will of the other and uses that position to obtain an unfair advantage. According to the Contracts Act, a party is in a dominant position where he or she 'holds a real or apparent authority over the other party';[378] or he or she 'stands in a fiduciary relationship with the other party';[379] or 'the mental capacity of the other party is temporarily or permanently affected by reason of age, illness, mental or bodily stress'.[380]

259. A fiduciary relationship arises where a party has duties involving good faith, trust, special confidence and candour towards another party.[381] The Contracts Act provides examples of such a relationship, which include attorney and client,[382] guardian and ward, principal and agent, executor or administrator and heir, trustee and beneficiary[383] or landlord and client.[384] Other examples, which have been recognized by the courts, include parent and child,[385] and religious leader or adviser and disciple or parishioner.[386]

260. In *Allcard v. Skinner*,[387] the plaintiff, a woman of about 35 years of age, was introduced by her spiritual adviser, N, to the defendant, a lady superior of an institution known as 'The Sisters of the Poor'. N was the spiritual director and confessor of this sisterhood. Three years later, the plaintiff became a sister and took the vows of poverty, chastity and obedience. The vow of poverty was strict as it required the absolute surrender of all individual property. Part of the vow of obedience included an undertaking not to seek advice from any person without leave of the lady superior. The plaintiff was a sister for eight years until 1879 by which time she surrendered property amounting to GBP 7,000 to the defendant. She left the sisterhood by which time all the money had been spent by the defendant on the institution leaving a balance of only GBP 1,671. Six years later, the plaintiff sued for the recovery of the GBP 1,671 on the grounds that it had been obtained by the defendant's undue influence.

261. The court found that no personal pressure had been exerted on the plaintiff and no unfair advantage was taken of her position. However, the court held that her gift was made under a pressure that she could not resist and she did not receive independent advice. That at the time of the gift, the plaintiff was bound by her vows, and the rules of the sisterhood, which obliged her to make absolute submission to

377. [1967] E.A. 555.
378. Section 14(2)(a).
379. Section 14(2)(b).
380. Section 14(2)(c).
381. Section 14(5).
382. *See Wright v. Carter* [1903] 1 Ch. 27.
383. *See Benningfield v. Baxter* (1886) 12 App. Cas. 167.
384. *Ibid.*
385. *Powell v. Powell* [1900] 1 Ch. 243.
386. *Allcard v. Skinner* (1887) 36 Ch. D. 145.
387. *Ibid.*

the defendant, who was the lady superior. Lindley L.J observed that '[t]he influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful … '.[388] The judge defined undue influence as 'some unfair and improper conduct, some coercion from outside, some form of cheating and generally though not always, some personal advantage obtained by the guilty party'.[389]

262. Thus, the courts may intervene where a contract was entered into due to undue or improper pressure placed on one of the parties by the other party who is in a dominant position in order to gain unfair advantage. It should be noted that the extent to which the courts intervene depends on whether the undue influence is actual or presumed.

263. Actual undue influence arises where there is no special relationship between the parties. In such a case, the party alleging undue influence must affirmatively prove that the contract was entered into as a result of actual influence exerted. In *Williams v. Bayley*,[390] a son issued to his bank a number of promissory notes upon which he had forged the endorsements of his father. In order to save his son from prosecution, the father was forced to give security for the debts of the son. It was held that the father's agreement with the bank had been extracted by virtue of undue influence being exerted on the father.

264. The Act requires that the party should have used his or her dominant position 'to obtain an unfair advantage over the other party'.[391] The question is: does a party who alleges actual undue influence have to prove unfair advantage? In *Bank of Credit and Commerce International SA v. Aboody*,[392] it was held that the plaintiff must establish that he or she had suffered a manifest disadvantage. However, in *CBIC Mortgages plc v. Pitt*,[393] it was held that manifest disadvantage was not required in cases of actual undue influence, which according to Lord Browne-Wilkinson, is a species of fraud. In addition to proving that there was influence, the victim must show that it was undue.[394]

265. Under presumed undue influence, the victim must show that there is a fiduciary relationship – a relationship of trust or confidence between himself and the wrongdoer. Once the relationship is proved, undue influence is presumed to have occurred. The victim is not obliged to prove undue influence. He or she only needs to show that there is a confidential or fiduciary relationship. After proving the existence of the relationship of trust and confidence, the onus shifts to the other party to prove that the plaintiff entered the contract freely and voluntarily. For example, he

388. *Ibid.,* p. 186.
389. *Ibid.*
390. (1866) L.R. 1 H.L. 200.
391. Section 14(1).
392. [1990] 1Q.B. 923.
393. [1993] 4 All ER 433.
394. *Dunbar Bank plc v. Nadeem* [1998] 3 All ER 876.

or she may adduce evidence to show that the plaintiff received independent advice on the transaction. However, such advice must be competent and made with full knowledge of all the facts of the case.[395]

266. In *Lloyds Bank Ltd v. Bundy*,[396] the defendant was an elderly farmer whose only asset consisted of a farmhouse that was also his home. The defendant and his son were customers of the plaintiff bank. The son operated a limited company, which was also a customer of the plaintiff bank. The company ran into financial difficulties and the defendant gave a guarantee, which was secured by a charge over the farmhouse. The company ran into further difficulties and the defendant executed a further guarantee and charge in favour of the bank. The company's business failed to improve and the son went to the bank for more money. The assistant bank's manager and the son went to the defendant. The assistant bank manager took with him forms of a guarantee and a charge already prepared for the defendant's signature. The assistant manager realized that the defendant relied on him to advise on the transaction 'as bank manager'. He knew that the defendant's farmhouse was his only asset. In order to help his son's business, the defendant executed the forms which the assistant manager had produced. Approximately five months later, a receiving order was made against the son. The bank attempted to enforce the guarantee and charge against the defendant through possession of the house. The defendant pleaded undue influence based on the fact that there was a long-standing relationship between himself and the bank. He argued that he had placed confidence in the bank and looked to it for financial advice.

267. The trial judge gave judgment for the bank and the defendant appealed. It was held that there was a confidential relationship between the defendant and the bank, which imposed on it a duty of fiduciary care, that is, to ensure that the defendant formed an independent judgment on the proposed transaction before committing himself. That the bank should have advised the defendant to obtain independent advice whether the company's affairs had any prospect of becoming viable. Consequently, the bank was in breach of its fiduciary duty and the guarantee and charge were set aside and the action for possession was dismissed.

268. The relationship between the bank and its customers does not ordinarily give rise to a presumption of undue influence. Thus, the case of *Lloyds Bank Ltd* above is exceptional and should cautiously be read within the confines of its own facts.

269. In *National Westminister Bank v. Morgan*,[397] a husband and wife were joint owners of their family home. The husband was unable to meet the repayments due under a mortgage over the house. The mortgagee commenced proceedings for possession of the house. In order to save the house, the husband entered a refinancing arrangement by a legal charge in favour of a bank. The bank manager visited the

395. *See Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127.
396. [1975] 3 All ER 757.
397. [1985] A.C. 686.

home so that the wife could execute the charge. The wife told the bank manager that she had little faith in her husband's business ability and that she did not want the charge to cover his business liabilities. The bank manager assured her that the charge secured only the amount advanced to refinance the mortgage. Notwithstanding that this assurance was given in good faith, it was incorrect. The terms of the charge extended to all of the husband's liabilities to the bank. The wife did not receive independent legal advice before signing the charge. The husband fell into arrears with payments and the bank obtained an order for possession of the home. Soon afterwards, the husband died. The wife appealed against the order for possession and contended that the charge should be set aside as it had been signed based on undue influence from the bank. The bank argued that undue influence could be raised only when the transaction was manifestly disadvantageous to the defendant. It contended that the refinancing arrangement had averted the earlier possession by the previous mortgagee and that this was manifestly advantageous to the wife.

270. The Court of Appeal gave judgment in favour of the wife on the grounds that there was a presumption of undue influence based on the special relationship of the parties, which the bank was unable to rebut because of the failure to advise the wife to seek independent legal advice. However, the bank appealed to the House of Lords, which allowed the appeal and decided that possession of the house should be given to the bank. The court held that a transaction could not be set aside on grounds of undue influence unless it was shown that it was to the manifest disadvantage of the person subjected to the dominating influence. That on a meticulous examination of the facts, the bank had not crossed the line to where a presumption of undue influence existed. In any case, the court observed that the transaction had not been unfair to the wife since the bank had allowed her and the late husband to stay in the house on favourable terms. Thus, the transaction was to their advantage and the bank had no duty to ensure that the wife received independent advice.

271. An important question is whether unconscionable bargains amount to undue influence. Unconscionable bargains or contracts are manifestly unfair, exorbitant, harsh and contrary to common conscience. The Contracts Act provides as follows:

> Where a party who is in a position to dominate the will of the other party, enters into a contract with that other party and the transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that the contract was not adduced by undue influence shall be upon the party in a position to dominate the will of the other party.[398]

272. In *Nipun Norattam Bhatia v. Crane Bank Ltd*,[399] Kiryabwire J observed that the Civil Procedure Act (CPA)[400] prevents courts from enforcing payment of interest that is harsh and unconscionable because the award of interest is guided by

398. Section 14(3).
399. Civil Appeal No. 75 of 2006.
400. Cap. 71.

established principles: it may be at the court rate, or commercial rate, or central bank rate. Where the interest is set by the parties in their contract, it should not be harsh and unconscionable. The CPA provides as follows:

> Where an agreement for the payment of interest is sought to be enforced, and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for payment of interest at such rate as it may think just.[401]

273. The Tier 4 Microfinance Institutions and Money Lenders Act, 2016, also allows court to reopen money-lending transactions and revise interest rates that are considered harsh and unconscionable[402] or where 'the transaction is such that a court of equity would give relief'.[403]

274. Over the years, the courts of equity have developed mechanisms to provide a just outcome where a bargain or contract is clearly unconscionable and the other legal concepts such as duress, misrepresentation and mistake do not provide an adequate remedy. For example, in *Alpha International Investments Ltd. v. Nathan Kizito*,[404] Arach Amoko J found the rate of 240% per annum excessive and very harsh and reduced the interest to 24%.

275. In *Lloyds Bank Ltd* above,[405] Lord Denning MR examined various categories of unconscionable bargains and stated that the court would grant relief to a party who has been taken unfair advantage of because of inequality of bargaining power.[406] Although Lord Denning noted that the general rule is that '[n]o bargain will be upset which is the result of the ordinary interplay of forces [that is, if entered into freely and voluntarily]',[407] he cautioned:

> [T]here are cases in our books in which the courts will set aside a contract, or transfer of property, when the parties have not met on equal terms, when the one who is so strong in bargaining power and the other is so weak that, as a result of common fairness, it is not right that the strong should be allowed to push the weak to the wall.[408]

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401. Section 26(1).
402. Section 89(1)(c).
403. Section 89(1)(d).
404. H.C.C.S. No. 131 of 2001.
405. [1975] 3 All ER 757. *See also Clifford Davis Management Ltd v. WEA Records Ltd* [1975] 1 All ER 237.
406. For an analysis of the doctrine of unequal bargaining power, *see* C. Carr, *Inequality of Bargaining Power*, 38 M.L.R. 463 (1975); L.S. Sealey, *Undue Influence and Inequality of Bargaining Power*, 34 C.L.J. 21 (1975); P. Slayton, *The Unequal Bargain Doctrine: Lord Denning in Lloyds Bank v. Bundy*, http://www.lawjournal.mcgill.ca/userfiles/other/461549.04.pdf (accessed 20 Oct. 2015).
407. *Lloyd's Bank Ltd, supra,* p. 770.
408. *Ibid*.

276. The learned judge noted that the consideration of moving from the bank was grossly inadequate and the relationship between the bank and the father was one of trust and confidence. He stated:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate. When his bargaining power is grievously impaired by reason of his own deeds or desires, or by his own ignorance or infirmity coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue', I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal.[409]

277. The above discussion illustrates the point that the courts will intervene where a party with a stronger bargaining power or in a dominant position seeks to take undue advantage of the weaker party. As the Contracts Act clearly provides, where the transaction appears to be unconscionable or where evidence is adduced to that effect, the burden of proving that the weaker party was not unduly influenced to enter into the transaction lies with the stronger or superior party.[410]

IV. Gross Disparity

278. Gross disparity is where there is an unusual significant difference between the obligations of each party at the time of conclusion of the contract. According to the UNIDROIT Principles of International Commercial Contracts, a party may avoid a contract where there is gross disparity between the obligations of the parties that give one party an unjustifiably excessive advantage.[411] The concept of gross disparity, which is known in civil law, is not explicitly recognized in common law jurisdictions such as Uganda. However, questions of grossly unfairness or unconscionable bargains are handled by the courts through the lens of undue influence as illustrated above.

409. *Ibid.*, p. 765.
410. Section 14(3).
411. Article 3.2.7.

§3. Other Conditions of Validity

I. Existing and Licit Cause

279. The concept of 'existing and licit cause', which is recognized under civil law, does not exist in Uganda's legal system. However, for a contract to be enforceable by the courts, there must be a lawful (licit) object and consideration.

II. Determined or Determinable, Possible and Licit Object

280. Under civil law, a valid object of the contract must be possible, licit and determined or determinable. Albeit the concept of determined or determinable, possible and licit object is not expressly recognized under common law, the object of the contract must not only be lawful, it should also be capable of being performed.

III. Initial Impossibility

281. This occurs when the contract is invalid from formation. When this happens, there are no obligations or rights created from the beginning. Where there is initial impossibility to perform, the contract is void. The Contracts Act defines a void agreement as 'an agreement that is not enforceable by law'.[412] For example, in *Couturier v. Hastie*,[413] where parties contracted under the mistaken belief that the subject matter was available, the contract was held to be void since by the time they entered into the agreement the corn had fermented.

IV. Illegality and Public Policy

A. Nature of Illegality

282. Like many other concepts, illegality may be difficult to define. However, an illegal contract may be defined as an agreement or promise which, by its nature, is prohibited by law. The consideration and or object of the agreement or promise is illegal. The general rule is that courts will not enforce an illegal contract. For example, John promises Kenneth UGX 4,000,000 if the latter pours acid on Japina's face. Kenneth ambushes Japina at her gate and pours the acid on her face, which becomes totally deformed. Kenneth demands the money from John and the latter refuses to pay. In such a situation, the formation and performance of the agreement is against the law, which criminalizes the illegal act. Thus, the courts cannot enforce such an illegal agreement.

412. Section 2.
413. [1843-60] All ER 280.

283. The Contracts Act provides that a consideration or an object of an agreement is unlawful if it is forbidden by law; or is of such nature that, if permitted would defeat the provisions of any law; is fraudulent; or involves or implies, injury to a person or the property of another person; or is declared immoral or against public policy by a court.[414] The Contracts Act further provides that an agreement whose object or consideration is unlawful is void, and no suit can be brought in respect of that agreement.[415]

B. Contracts Prohibited by Law

284. Where a contract is prohibited by law, such a contract is illegal and unenforceable. In this context, law refers to statutes made by parliament, decrees and statutory instruments (rules and regulations) made by the executive and other organs such as local governments, which are authorized by parliament to make laws known as subsidiary legislation. There are a number of statutes that prohibit certain transactions. For example, under the Land Act, non-citizens are prohibited from owning *mailo* or freehold land.[416] A non-citizen can only be granted a lease not exceeding ninety-nine years.[417] Now, supposing X agrees to sell to Y, a German, freehold land. Y pays UGX 100,000,000. X signs transfer forms in favour of Y but the Registrar of Titles refuses to register the transaction. Such a contract is illegal and any claim based on it is not enforceable.

285. In *Singh v. Kulubya*,[418] the respondent, an African, was the registered proprietor of three plots of 'mailo' land, which he purported, by agreement to lease, for years to the appellant, a non-African. The consents of the Lukiiko as required by section 2(d) of the Possession of Land Law and the Governor as required by section 2 of the Land Transfer Ordinance were not obtained for any of the three transactions. The respondent purported to recover possession of the plots. The trial judge dismissed the suit on the ground that both parties were *pari delicto* and that, as a result, the respondent was not entitled to recover possession of the plots. On appeal by the respondent, the Court of Appeal allowed the appeal and ordered that the appellant be evicted from the plots and hand over possession to the respondent. On appeal to the Privy Council, it was held that the appellant, as a non-African had no right without the consent of the Governor to occupy or enter possession of the land or to enter any contract to take the land on lease. That since the agreements were unlawful, no lease interest vested in the appellant. The respondent's right to possession was in no way based upon the purported agreements and he required no aid

414. Section 19(1)–(e).
415. Section 19(2).
416. Section 40(4).
417. Section 40(1) and (3) of the Land Act, Cap. 227. A non-citizen for purposes of this provision is defined under section 40(7)(a)–(e) of the Act.
418. [1963] E.A. 408.

from the illegal transactions in order to establish his case. That although the respondent had offended by being party to the illegal and ineffective agreements, considerations of public policy did not demand the failure of his claim. That on the contrary, such considerations pointed to the necessity of upholding it in order to eject a non-African who was in unlawful occupation. In dismissing the appeal, the court held that the respondent was not obliged to found his claim on the illegal agreements into which he had entered. He was not in *pari delicto* with the appellant since he was a member of the protected class.

286. It is also an offence for a non-citizen to acquire land using fraudulent means, and the penalty on conviction is 1,000 currency points (UGX 20,000,000) or imprisonment not exceeding three years or both.[419] The Land Act also prohibits the sale, exchange, transfer, pledge, mortgage or lease of land, on which the person ordinarily resides with his or her spouse except with prior written consent of that spouse[420] which consent shall not be unreasonably withheld.[421] Such a transaction is void. However, where a person enters into the transaction in good faith, he or she 'shall have the right to claim from any person with whom he or she entered into the transaction any money paid or any consideration given by him or her in respect of the transaction'.[422] A transaction, which also denies women or children or persons with disability 'access to ownership, occupation or use of any land or imposes conditions which violate articles 33 [women's rights], 34 [children's rights] and 35 [rights of persons with disabilities] of the Constitution on any ownership, occupation or use of any land shall be null and void'.[423]

287. The Employment Act[424] also prohibits payment of wages other than in legal tender.[425] It also declares invalid any employment contract by which the employer imposes on the employee 'any agreement or condition as to the place where, or the manner in which, or the person with whom, any wages paid to an employee shall be expended'.[426]

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419. Section 92(1)(a) and (2).
420. Section 39(1)(a)–(c); s. 38A; and Regulation 64 of the Land Regulations 2004, SI 100 of 2004, which provides that the recorder or registrar shall not register any transaction where the consent has not been procured except where there is an order of a tribunal or a court to dispense with that consent. Lack of spousal consent renders the transaction void. *See, for example*, *Alokait Immaculate Osuna v. Engineering Trade Links Ltd & Another* Misc. App. No. 39 of 2014 (Arising from Civil Suit No. 593 of 2012); *Alice Okiror & Another v. Global Capital Save (2004) Ltd & Another* H.C.C.S. No. 149 of 2010; *Enid Tumwebaze v. Mpeirwe Stephen & Another* H.C.C.A. No. 0039 of 2010.
421. Section 39(5).
422. Section 39(4).
423. Section 27.
424. Act 6/2006.
425. Section 41(1).
426. Section 43(3).

288. The Tier 4 Micro Finance and Money Lenders Act, 2016,[427] which repealed the Money Lenders Act,[428] also prohibits contracts for lending money without a moneylender's licence.[429] It also renders illegal any contract, which 'provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract'.[430]

289. In *Jamba Soita Ali v. David Salaam*,[431] the plaintiff had advanced a loan to the defendant which he failed to pay back. It was held that since the plaintiff was carrying out the business of moneylending without a moneylender's licence as required by the Money Lenders Act, any agreement or contract between him and the defendant was illegal and could not be enforced by court.[432]

290. The Constitution also provides that no agreement or contract or document to which government is a party shall be concluded without legal advice of the Attorney General.[433] In *Nsimbe Holdings Ltd*,[434] the Court of Appeal held that contracts to which the government of Uganda is a party must be concluded with the advice of the Attorney General. Thus, a contract entered into without the advice of the Attorney General may be declared unconstitutional and thus void and unenforceable.

291. The law also prohibits gaming or wagering and betting in Uganda without a licence. Gaming and betting are governed by the Lotteries and Gaming Act, 2016,[435] which establishes the National Lotteries and Gaming Board that is charged with supervision, regulation, establishment and management of lotteries in Uganda.[436] The Act defines gaming as 'the playing of a game of chance for winnings in money or money's worth and for the avoidance of doubt, includes gambling'.[437] According to the Act, '[a] person shall not establish or operate a casino or provide gaming or betting machine without a licence established under this Act'.[438] Any person who carries out gaming or betting without a licence commits an offence under the Act.[439] According to the Contracts Act, '[a]n agreement made by way of an unlicensed wager is void'.[440] The Act defines a 'wager' as a 'promise to pay money or other consideration on the occurrence of an uncertain event'.[441] Thus,

427. Act 18.
428. Cap. 273.
429. Section 84(1)(a) and (b).
430. Section 7(1).
431. H.C.C.S. No. 400 of 2005.
432. *See also Naks Ltd v. Kyobe Senyange* [1982] H.C.B. 52; *Litchfield v. Dreyfus* [1906] 1 K.B. 584.
433. Article 119(5).
434. [2002] 2 E.A. 366.
435. Act 7.
436. Section 2.
437. Section 1.
438. Section 26.
439. Section 67.
440. Section 24(1).
441. Section 24(2).

contracts for gaming or wagering, which are both forms of gambling, are illegal in Uganda if carried out under a person or entity without a licence.

292. Contracts in restraint of trade are also prohibited by law. Furmston defines a contract in restraint of trade as 'one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he chooses'.[442] For example, John has been employed by Amina Ltd, a wine manufacturing company, for the last five years. When he was joining the company, he signed a contract that contained the following clause: 'The employee shall, after leaving his employment, not compete with the employer by setting up a similar business to that of the employer or work for a rival trader or company.' What is the legal effect of such a contract? Is such a provision enforceable?

293. The general rule is that a contract in restraint of trade is prima facie void, but becomes enforceable if it is proved that the restraint is reasonable in the circumstances. The 1995 Constitution provides that '[e]very person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business'.[443] Thus, a contract that restricts an employee on leaving his employment from working for another employer or setting up a rival business will be declared void unless the first employer can show that the restriction is reasonable in scope.[444]

294. The Contracts Act provides that '[a]n agreement which restrains a person from exercising a lawful profession, trade or business of any kind, is to that extent void, unless the restraint is reasonable in respect to the interests of the parties concerned and in respect to the interests of the public'.[445] In *Giella v. Cassman Brown & Co. Ltd*,[446] it was held that contracts in restraint of trade are generally invalid but a partial restraint in a contract of employment may be valid if it is reasonable in the interests of both parties.

295. In order to be considered reasonable, the restraint must not exceed 'what is reasonably necessary to protect a proprietary interest of a promisee'.[447] The Contracts Act further provides that the burden of proving that a restraint is reasonable in respect to the interests of the parties lies on the promisee while the promisor has the burden to prove that it is unreasonable in respect of the interests of the public.[448]

296. In *Nordenfelt Guns and Ammunition Co*.,[449] a machine gun manufacturer sold his business and agreed in the contract of sale to restrict his future business

442. M.P. Furmston, *supra*, p. 507.
443. Article 40(2).
444. *See Giella v. Cassman Brown & Co. Ltd* [1973] E.A. 358; *Putsman v. Taylor* [1927] 1 K.B. 741.
445. Section 21(1).
446. [1973] E.A. 358.
447. Section 21(2).
448. Section 21(3).
449. [1894] A.C. 535.

activities in that business worldwide for twenty-five years. The covenant was held to be valid and binding. Lord MacNaghten stated:

> The true view at the present time I think is this: The public have an interest in every person's carrying on his trade freely, so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is no way injurious to the public.[450]

297. From the discussion above, the following principles can be discerned. First, a contract in restraint of trade is prima facie void. Second, for the restraint of trade clause to be valid and binding, it must be reasonable. It is a matter of law for the court to decide whether any special factors exist which may or may not justify the restraint. Third, the restraint must be reasonable not only as regards the parties to the contract but also as to the interests of the public. Fourth, the onus of proving that the restraint is reasonable lies on the person – for example the employer of John above – alleging it to be so. The employee has the burden to prove that the restraint is unreasonable, that is, it is unconstitutional – violating his economic rights – or contrary to public interest and thus void on this basis.

298. A contract in restraint of trade can only be regarded as reasonable if it is designed only to protect the legitimate or proprietary interest of the promisee. In *Herbert Morris Ltd v. Saxebay*,[451] the court observed that in contracts for the sale of a business, together with its goodwill, it is proper for the purchaser to restrain the vendor or seller from acting in competition with the business he had just sold to the purchaser given that the goodwill is a proprietary interest legitimately capable of protection. The court further noted that in contracts of employment, although it is not legitimately possible for an employer to prevent a former employee from acting in competition with him, the employer is able to prevent him from making use of trade secrets acquired during his period of employment. The employer can also preclude the former employee from soliciting his former employer's customers.

299. Thus, in order for a restraint of trade clause to be upheld by the courts, it must be reasonable 'in respect to the interests of the public'.[452] The concept of 'public interest' has no precise definition. In *Wyatt v. Kreglinger and Fernau*,[453] in June

450. *Ibid.*, p. 565.
451. [1916] A.C. 688.
452. Section 21(1).
453. [1933] 1 K.B. 793.

1923, the defendants wrote to the plaintiff, who had been in their service for many years, intimating that upon his retirement they would give him an annual pension of GBP 200 subject to the condition that he did not compete against them in the wool trade. The plaintiff's reply was lost, but he retired the following September and received the pension until June 1932, when the defendants refused to make further payments. The plaintiff sued them for breach of contract. The defendants denied that any contract existed, and also alleged that if a contract existed, it was void as being in restraint of trade. The court held in favour of the defendants and agreed that the restraint was too wide and, in any event, it was contrary to the public interest. The court was of the view that the contract was injurious to the interest of the public since by restraining the plaintiff from engaging in the wool trade, the community would be deprived of services from which it might derive advantage. But does not this case stretch the concept of public interest beyond the realm of reality? To what extent was the public affected by this restraint?

300. It can be seen from the above that when the restraint is too wide, the court will declare it void. In assessing the reasonableness of the restraint, the courts will have regard to the scope of activities it prohibits, the geographical area to which it applies and the duration for which it will be in force. Hence, in *Giella v. Cassman Brown & Co. Ltd*,[454] a clause which prohibited the erstwhile employee from engaging in similar business to that of the employer 'within a radius of ten miles from the centre of the post offices of Nairobi, Mombasa, Kampala, Jinja, Arusha and Dar-es-Salaam' was held to be too broad and therefore unreasonable.

301. In *Attwood v. Lamont*,[455] the defendant was a cutter and head of the tailoring department. The restraint was for a radius of 10 miles from the plaintiffs' business forbidding the defendant from engaging in the 'trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdashery, gentleman's, ladies or children's outfitter'. The defendant set up business as a tailor more than ten miles away but he did business with people within the 10-mile radius. The court held that the restraint was unenforceable since it was worded too widely. Younger, LJ stated that '[a]s the time of restriction lengthens or the space of its operation grows, the weight of the onus on the covenant to justify it grows too'.[456] However, in the *Nordenfelt* case above, twenty-five years was found to be reasonable, considering the nature of the business in question.[457]

302. The restraint in trade should also not be excessive in respect of the area to which the restriction applies. In *Mason v. Provident Clothing Co*,[458] a canvasser who had been employed to sell clothes in Islington was restrained from entering into similar business within 25 miles of London. The restraint was held to be too wide

454. [1973] E.A. 358.
455. [1920] 3 K.B. 571.
456. *Ibid.*
457. *See also Fitch v. Dewes* [1921] 2 A.C. 158.
458. [1913] A.C. 724.

and unreasonable given the covenantor's limited sphere of influence in his employment. However, in *Forster & Sons Ltd v. Suggett*,[459] a restraint by a works manager, who had acquired knowledge of a secret glass-making process, not to engage in glass-making anywhere within the United Kingdom was held to be reasonable. In *Dias v. Souto*,[460] the defendant sold a shop in Zanzibar that specialized in merchandise for the expatriate community. The restriction was that he should not open a similar business within the Zanzibar Protectorate. He opened a shop in Pemba but it was held that the restraint was valid.

303. Contracts that that seek to oust the jurisdiction of the courts are also contrary to the law. At common law, a contract to oust the jurisdiction of the court is contrary to public policy and thus void.[461] This has been codified in the Contracts Act, which states: '[a]n agreement which restricts a party absolutely, from enforcing his or her rights under or in respect of a contract, by legal proceedings or which limits the time within which the party may enforce his or her rights is void to that extent'.[462] However, where the parties provide in their agreement that they will resolve their dispute through arbitration, such a contract is legal and enforceable provided that it does not deprive the parties of their right to have their case heard before the ordinary courts of law.[463] In *Lee v. The Showmen's Guild of Great Britain*,[464] Lord Denning stated:

> Parties cannot by contract oust the ordinary courts from their jurisdiction. They can, of course, agree to leave questions of law, as well as of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void.[465]

C. Contracts Contrary to Public Policy

304. A number of contracts may be illegal because they are not concordant with public policy. At common law, a contract which was contrary to the common good or public policy or injurious to society was held to be illegal. Even under the Contracts Act, the contract is illegal if the consideration or object is declared immoral

459. (1918) 35 T.L.R. 87.
460. [1960] E.A. 669.
461. *See Bennett v. Bennett* [1952] 1 All ER 413.
462. Section 22(1).
463. *See* s. 22(2)(a) and (b).
464. [1952] 2 Q.B. 329.
465. *Ibid.*, p. 342.

or against public policy by a court. In the Kenyan case of *Christ for All Nations v. Apollo Insurance Co. Ltd*[466] the court, analysing the scope of the concept of public policy, stated:

> Public policy would cover anything that was either inconsistent with the constitution or the laws of Kenya, whether written or unwritten, that was against the national interest of Kenya, or was contrary to the laws of Kenya, whether written or unwritten, that was against the national interest of Kenya, or was contrary to justice and morality.[467]

305. An obvious example of illegality is a contract to commit a crime and the courts will not enforce it. This is because the law does not allow a person to benefit from his or her own crime. In *Beresford v. Royal Insurance Co. Ltd*,[468] it was held that relatives of a deceased person who had committed suicide could not claim GBP 50,000 under an insurance policy. Lord Macmillan was of the view that '[t]o enforce payment in favour of the assured's representative would be to give him a benefit, albeit in a sense a post-mortem benefit; the benefit, namely of having by his last and criminal act provided for his relatives or creditors'.[469] In *Allen v. Rescous*,[470] it was also held that a contract to commit an assault was illegal and void.

306. Contracts that seek to prejudice the administration of justice are contrary to public policy and thus illegal and unenforceable. Where a party attempts by means of a contract to prevent the force of the law, or to subvert the cause of justice, such a contract is illegal. In *Egerton v. Brownlow*,[471] the court stated that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void. For example, an agreement to suppress prosecution of a crime will be declared illegal and void. Similarly, an agreement by a witness not to give evidence in court will not be enforced by the courts.[472]

307. Contracts of maintenance and champerty are also contrary to public policy. A contract of maintenance arises where a person encourages and supports a course of litigation in which he or she has no interest.[473] Champerty is a contract where a person is given assistance in bringing an action, either financially or by the provision of evidence, in return for a share in the rewards arising from the action if successful. The general rule is that an agreement tainted by maintenance or champerty is void as being contrary to public policy. In *Shell (U) Ltd & Others v. Rock Petroleum & 2 Others*,[474] Mulyagonja Kakooza J held that champerty agreements, which

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466. [2002] 2 E.A. 366. *See also National Social Security Fund & Another v. Alcon International Ltd* S.C.C.A. No. 15 of 2009.
467. *Ibid*.
468. [1937] 2 K.B. 197.
469. *Ibid.*, p. 210.
470. (1677) 1 K.B. 169.
471. (1853) 4 H.L. Cas. 1.
472. *See, for example*, *Harmony Shipping Co. SA v. Davis* [1979] 3 All ER 177.
473. *See Re Trepca Mines Ltd* (No. 2) [1963] Ch. 199.
474. Misc. App. No. 645 of 2010.

are known among lay persons as buying into another's law suit or sharing in the spoils of litigation, are illegal at common law.

308. In *Kawamara Sam v. Richard Jjuko*,[475] the defendant engaged the plaintiff as his agent to pursue his claim of UGX 216,000,000 against the Government of Uganda, which was awarded to him as compensation by the High Court at an alleged commission of UGX 45,000,000. When the plaintiff sought to enforce the transaction, Kiryabwire J held that this was a champerty agreement, which 'is a contract by which one person agrees to finance another's litigation in return for a share in the proceeds, the former having no genuine or substantial interest in the outcome' and that such agreement is contrary to public policy and thus illegal and void. The learned judge cited the House of Lords decision of *Trendex Trading Corp v. Credit Suisse*,[476] where the court held that the assignment of a cause of action will be void as against public policy where the assignee does not have a sufficient interest to justify pursuit of the proceedings for his own benefit. What amounts to 'sufficient interest' is a question of fact. For example, a relative or friend who is acting from motives of charity or has a common interest with the person assisted can be said to have a sufficient interest in the matter.

309. Another category of contracts that contravene public policy are contracts that tend to corrupt public life. The law seeks to prevent the sale of public office or the diversion of salaries accruing to such offices through either assignment of mortgage.[477] Thus, a contract to procure a title for a person in consideration of a money payment is illegal and void. In *Parkinson v. College of Ambulance*,[478] the secretary of a charitable society promised the plaintiff that he would procure him a knighthood at GBP 3,000. The plaintiff paid but did not receive the title, which was in the powers of the government to give. He sued for the recovery of the money and the court held that the substance of the agreement was illegal.

310. Contracts to defraud revenue also contravene public policy. A contract to defraud a body such as Uganda Revenue Authority (URA) or a local authority such as Kampala City Council Authority (KCCA) of its revenue is illegal. In *Miller v. Karlinski*,[479] the terms of a contract of employment were that the employee should receive a salary of GBP10 weekly and repayment of his expenses, but that he should be entitled to include in his expenses account the amount of income tax due in respect of his weekly salary. He sued for arrears and the court held that the income tax arrangements were a fraud on the revenue and thus he could not enforce the sum owed.

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475. H.C.C.S. No. 294 of 2009.
476. [1982] A.C. 679. *See also Jennifer Simpson v. Norfolk & Norwich University Hospital NHS Trust* [2011] E.W.C.A. Civ. 1149.
477. *See Blachford v. Preston* (1799) 8 Term. Rep. 89.
478. [1925] 2 K.B. 1.
479. [1945] 62 T.L.R. 85. *See also Alexander v. Rayson* [1936] 1 K.B. 169.

311. Contracts that are sexually immoral also contravene public policy. In *Jones v. Randall*,[480] Lord Mansfield held that an immoral contract is illegal. According to Furmston, the law 'concerns itself with what is sexually reprehensible'.[481] For example, an agreement to procure a prostitute for X would be illegal since prostitution is prohibited in Uganda.[482] Similarly, a prostitute cannot sue for his or her fees. An agreement to let out a house for use in child sex is also clearly illegal and unenforceable. A purported marriage agreement between persons of the same sex would also be declared contrary to public policy. In any case, the Constitution expressly prohibits same sex marriages.[483] An agreement to marry a minor may also be held to be contrary to public policy. According to the Constitution, only '[m]en and women of the age of eighteen years and above have the right to marry'.[484] Thus, any contract to marry a minor would be declared unconstitutional and contrary to public policy and thus void.

312. Similarly, a betrothal agreement would also be contrary to public policy. For example, in *Vishram Dhanji v. Lalji Ruda*,[485] where the respondent's son and the appellant's daughter in 1938, being each a few months old, were betrothed in India according to the rights and customs of the Hindu Community. Following the betrothal, certain ornaments and clothing were given by the respondent to the appellant for the prospective bride according to Hindu custom. The proper law to be applied was the law of India (India Contract Act) and if the contract was valid by its proper law, it would be enforced in Kenya. When she was 12 years, the appellant's daughter was informed of the betrothal but she indicated that she did not wish to marry the respondent's son. When she was 15 years, the respondent was informed, either by her or her father that the betrothal was broken off. The respondent sued for damages for breach of contract and the Indian Supreme Court awarded general and special damages and ordered the return of certain ornaments to the respondent.

313. On appeal, it was held that the suit was not maintainable. The court observed that to hold that a parent or guardian under such circumstances was entitled to recover damages would be to extend the remedies of breach of such contracts further than had ever been done by the courts in India. Briggs JA stated that an action in Kenya against the father of a prospective bride for breach of a marriage contract made by him on her behalf based on the proposition that the father could compel his daughter to marry as he had agreed would not succeed as it was contrary to public policy.

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480. (1774) 1 Cowp. 37.
481. M.P. Furmston, *supra*, p. 456.
482. For the offences concerning prostitution, *see* ss 136–139 of the Penal Code Act, Cap. 120.
483. Article 31B.
484. Article 31(1).
485. [1957] E.A. 110.

D. Effect of Illegality

314. The question is: what is the effect of illegality on a contract? The Contracts Act provides that '[a]n agreement whose object or consideration is unlawful is void and a suit shall not be brought for the recovery of any money paid or thing delivered or for compensation for anything done under the agreement'.[486]

315. At common law, the general rule is also that illegality renders contract void ab initio and is thus treated by the law as if it had not been formed at all. No remedy is available to either party. In *Active Automobile Spares Ltd v. Crane Bank & Another*,[487] it was held that it is trite law that courts will not condone or enforce an illegality. In this case, the appellant had claimed a refund of USD 97,000. The court held that both parties were in *pari delicto* in the illegal transaction and the court could not order the return of the money.

316. In *Gordon v. Metropolitan Commr*,[488] it was held that no person can claim any right or remedy in an illegal transaction in which he has participated. In *Holman v. Johnson*,[489] Lord Mansfield also stated that no person who is aware of an illegality within a contract can enforce it and any money paid or property transferred under that contract is irrecoverable. In *Makula International v. His Eminence Emmanuel Cardinal Nsubuga*,[490] it was held that an illegality once brought to the attention of the court overrides all matters including pleadings and all admissions made.

317. In the *Active Automobile Spares Ltd case* above,[491] the Supreme Court also emphasized the point that courts will not condone or enforce an illegality. The court cited the case of *Scott v. Brown Doering,*[492] where Lindley L.J. stated:

> *Exturpi causa non oritur actio*. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence by the plaintiff proves the illegality the court ought not to assist him.[493]

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486. Section 19(2).
487. S.C.C.A. No. 21 of 2001.
488. [1910] 2 K.B. 716.
489. (1775) 1 Cowp. 341.
490. [1982] H.C.B. 11. *See also* the Kenyan case of *Heptulla v. Noor Mohamed* [1984] K.L.R. 580.
491. S.C.C.A. No. 21 of 2001.
492. (1982) 2 Q.B. 724.
493. *Ibid.*, p. 728.

318. The Contracts Act provides four exceptions to the general rule. In the first instance, where 'the plaintiff was ignorant of the illegality of the consideration or object of the agreement at the time the plaintiff paid the money or delivered the thing sought to be recovered or did the thing in respect of which compensation is sought'.[494] However, the plaintiff cannot argue that he or she was not aware that under the law the transaction in question was illegal, since *ignorantia juris neminen excusat*, that is, ignorance of the law is no excuse.[495] He or she can only plead that he was unaware of the facts rendering the transaction illegal.

319. The second exception is where 'the illegal consideration or object had not been effected at the time the plaintiff became aware of the illegality and repudiated the agreement'.[496] In *Kearley v. Thomson*,[497] it was held that recovery ceases to be possible once the illegal object has commenced, whether or not it is completed. The repudiation or withdrawal from the agreement must be voluntary.[498]

320. The third exception is 'where the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence'.[499] In *Hughes v. Liverpool Victoria Legal Friendly Society*,[500] the plaintiff was induced by the fraudulent misrepresentation of the defendant's agent to take out insurance policies against the lives of persons in whom she had no insurable interest, on the basis that such policies were valid and legal. In fact, such policies were illegal and invalid. However, the court held that she could recover the premiums paid in respect of the policies. Thus, where the parties are not *pari delicto*, the innocent party may recover what has been paid under the contract. Fourth, where 'the agreement is declared illegal by any written law, with the object of protecting a particular class of persons of which the plaintiff is one'.[501]

321. It is necessary to comment on the common law doctrine of severance, which amounts to the removal of the illegal elements of the contract, leaving behind a valid and enforceable agreement. Where only part of the contract is illegal, the whole contract will not be void if the portion that is illegal can be severed from the rest of the contract. The Act provides as follows:

> Where a person makes a reciprocal promise, firstly to do a certain thing which is legal, and, secondly, under specified circumstances, to do a certain thing which is illegal, the promise to do the legal thing shall be a contract but the promise to do an illegal thing shall be a void agreement.[502]

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494. Section 19(2)(a). *See also Bloxsome v. Williams* (1824) 3 B & C 232.
495. *See J W Allan (Merchandising) Ltd v. Cloke* [1963] 2 All ER 258.
496. Section 19(2)(b). *See also Cowan v. Milbourn* (1867) L.R. 2 Ex. 230.
497. (1890) 24 Q.B.D. 742.
498. *See Bigos v. Bousted* [1951] 1 All ER 92.
499. Section 19(2)(c). *See also Re Mohmoud and Ispahini* [1921] 2 K.B. 716.
500. [1916] 2 K.B. 482.
501. Section 19(2)(d). *See also Kiriri Cotton Co. v. Dewani* [1960] A.C. 192.
502. Section 26.

322. The Contracts Act further provides that '[w]here an alternative promise, one part of which is legal and the other part illegal, is made, only the legal part may be enforced'.[503] However, an objectionable part of a contract can be severed only where it leaves the remaining part grammatically correct and capable of standing alone.[504] The objectionable part must also not form the main part of the contract since the effect of the severance would be to remove the central aspect or main purpose of the contract.[505] The Act also seems to express doubt on the application of the doctrine of severance by providing that '[w]here a part of a single consideration for one or more objects, or one of several considerations for a single object is unlawful, the agreement is void'.[506]

V. Unenforceable Contracts

323. A Contract may be unenforceable because it is invalid, void or illegal. However, there are those contracts that are valid but merely unenforceable by law for various reasons. For example, a conditional contract, whose enforceability depends upon fulfilment of a certain condition or requirement. Failure to fulfil such condition or requirement may render the contract unenforceable by the courts. Such a contract is not void. Thus, as between the parties, the contract remains valid but is not enforceable by the courts.

§4. The Consequences of a Defect of Consent or a Lack of Substantive Validity

I. Avoidance of the Contract: Nullity

324. The remedy of avoidance of the contract, which is recognized in civil law systems, is not explicitly provided for in Uganda's contract law. In Uganda, a contract may be rescinded or terminated for example on the grounds of misrepresentation, mistake, duress/coercion or undue influence. A contract may be void for example for common mistake.

II. Retroactive Effect of Avoidance or Nullity

325. In civil law systems, avoidance or nullity of a contract takes retroactive effect. Similarly, in common law jurisdictions such as Uganda, rescission is retroactive/retrospective in effect. Thus, the rights and duties of the parties under the contract are retrospectively extinguished.

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503. Section 27.
504. *See Goldsoll v. Goldman* [1915] 1 Ch. 292.
505. *See Attwood v. Lamont* [1920] 3 K.B. 571.
506. Section 19(3).

III. Damages

326. Damages are a monetary compensation for loss or injury suffered. One of the consequences of a defect in consent due to mistake, misrepresentation, duress/coercion or undue influence is that the aggrieved party may be awarded damages.

Chapter 3. The Contents of a Contract

327. Once a contractual relationship has been established, the courts have to extract the actual contents (terms) of the contract from the oral or written statements or promises made by the parties. According to the Contracts Act, the promises may be express or implied.[507] The courts look at what the parties have agreed to undertake in the contract. Usually, the parties expressly agree on the terms of the contract. However, the law, either by statute or trade usage, may imply further terms into a contract. A court may also imply terms into a contract to give commercial efficacy to the contract or where it is of the opinion that such term would have been included but was either omitted due to an oversight by the parties, or its existence was taken as a given.

§1. The Different Clauses

I. Ascertaining of Express Terms

328. Express terms are those that have been specifically mentioned and agreed upon by both parties at the time the contract is made. They are directly acknowledged by the parties. Express terms can be either oral or written. The Contracts Act provides that '[a] promise is express, where an offer or an acceptance of a promise is made either verbally or in writing'.[508] Express terms of a contract may thus consist of those oral or written statements made by the parties to one another during negotiations leading to a contract and by which they intend to be bound. Where a dispute arises from an oral contract, the task of the court is to determine what the parties have agreed upon from the evidence put before it. In case of a written contract, the court decides the issues concerning the interpretation of a particular term or terms within the contractual document. As Furmston observed, where a contract has been reduced into writing, 'the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement'.[509] Oral evidence can only be admitted subject to the limits of the parol evidence rule.

329. It is necessary to distinguish representations from contractual terms. It may be easy to establish what the oral or written statements of the parties are. However, not all these statements amount to terms of the contract. These statements may amount either to terms of the contract or mere representations. A representation is only an inducement to persuade the other party to enter into a contract, and is not a term of the agreement. If the representation is not complied with, a party cannot successfully sue for breach of contract. However, where a person makes an untrue statement, which induces the other party to enter into a contract, he or she may be liable for misrepresentation.

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507. Section 9(1).
508. Section 9(2).
509. M.P. Furmston, *supra*, p. 113.

330. Thus, the court has to determine whether a statement amounts to a term or is a mere representation. In order to make the distinction, the courts apply what is known as the objective test. The court seeks an answer to the following question: What would a reasonable man understand to be the intention of the parties, having regard to all the circumstances? Thus, whether a statement amounts to a term or representation depends on the circumstances of each case. Over the years, the courts have developed a number of tests to help in making this decision as illustrated below.

331. The greater the time gap between the making of the statement and the concluding of the contract, the more likely that the statement may be held to amount to a mere representation. The key question here is: at what stage of the transaction was the relevant statement made? In *Routledge v. McKay*,[510] the parties were discussing the possible purchase and sale of the defendant's motorcycle. Both parties were private persons. The defendant, taking the information from the registration book, said on 23 October that the motorcycle was a 1942 model. On 30 October, a written contract of sale was made, which did not refer to the model year. It was later established that the motorbike was in fact a 1930 model. It was held that the interval between the making of the statement and conclusion of the contract was too wide to give rise to the inference that the oral statement was incorporated into the contract. The statement therefore was a mere representation, and an innocent one at that and, accordingly, the claim for damages would fail.

332. A statement may be regarded as a term of the contract if the aggrieved party treated it as so important that he or she would not have entered the contract but for this statement. Likewise, if the speaker conducts himself or herself in such a way that he or she appears to guarantee what he or she is saying, then his statement will be treated as a term of the contract.

333. In *Bannerman v. White*,[511] the defendants agreed to purchase hops to be used for making beer. Prior to the negotiations, the defendants had indicated that they did not wish to purchase hops that had been treated with sulphur. The plaintiff produced samples and the defendants inquired whether sulphur had been used and they were assured that it had not. In fact, five acres out of a total of 300 acres had been treated with sulphur. The defendants argued that they had stressed the importance of their need for untreated hops and that since the seller must have been aware of the treatment of the five acres, this was a term of the contract. However, the plaintiff argued that the statement as to the non-use of sulphur had arisen in preliminary negotiations and was thus not a term of the contract. It was held that the statement that the hops had not been treated with sulphur was a term of the contract rather than a representation as the defendants had communicated the importance of the statement and relied on it. They were thus entitled to repudiate the contract.

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510. [1954] 1 All ER 855.
511. (1861) 10 C.B.N.S. 844. *See also Couchman v. Hill* [1947] 1 All ER 103; Oscar *Chess Ltd v. Williams* [1957] 1 All ER 325; Dick *Bentley Productions Ltd v. Harold Smith (Motors) Ltd* [1965] ER 65.

334. There may be an oral agreement, which is later reduced into writing. If the written agreement omits some of the contents of the erstwhile oral agreement, the inference drawn by the courts is that the excluded provisions were not intended to be contractual terms. However, the court may read the oral statement and a later document and treat them as one comprehensive contract. In *Birch Paramount Estates Ltd*,[512] the defendants made a statement regarding the quality of a house that was being sold. The court regarded the defendants' statement as part of the concluded contract and held that the plaintiff's claim for damages would succeed.

335. In order to determine whether a statement amounts to a term or a representation, the court may inquire into whether the person who made the statement had special or superior knowledge or skill or expertise as compared with the other party. Where the court finds that the representor had special skill or expertise, it is more likely to hold that the statement amounts to a term of contract. In *Birch Paramount Estates Ltd* case above, where the defendants told the plaintiffs that they had particular knowledge to the extent that the plaintiff thought there was no need to cross-check the defendant's information, it was held that the defendant's statement amounted to a term of the contract.[513] In *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd*,[514] a motor dealer made an untrue statement to a private purchaser that a car had done only 20,000 miles since being fitted with a new engine and gear box. In fact, the car had done almost 100,000 miles. The purchaser eventually found the car to be unsuitable and the mileage false. It was held that the statement was a term of the contract since the defendants were in a better position to know the truth of the statement than the plaintiff.

336. In another case of *Oscar Chess Ltd v. Williams*,[515] the plaintiff purchased a second-hand Morris car on the basis that it was a 1948 model. The registration document stated that it was first registered in 1948. The following year, her son used the car as a trade in for a brand new Hillman Minx which he was purchasing from the plaintiff. The son stated that the car was a 1948 model and on that basis the plaintiff offered GBP 290 off the purchase price for the Hillman. Without this discount, the defendant would not have been able to go through with the purchase. Eight months later, the plaintiff found out that the car was in fact a 1939 model and worth much less than thought. The plaintiff brought an action for breach of contract, arguing that the date of the vehicle was a fundamental term of the contract giving rise to repudiation and a claim of damages. It was held that the statement relating to the age of the car was not a term but a representation. That the representee, the plaintiff, as a car dealer, had the greater knowledge and would be in a better position to know the year of manufacture than the defendant. However, this case should be distinguished from *Oscar Chess Ltd v. Williams* case. Lord Denning said that whereas in *Oscar Chess*, the defendant was negligent, in *Dick Bentley*, there was no negligence.

512. [1956] 16 E.G. 396.
513. *See also Schawel v. Read* [1913] 2 I.R. 81; *Harling v. Eddy* [1951] 2 K.B. 739.
514. [1965] 2 All ER 65.
515. [1957] 1 W.L.R. 370.

337. If a court considers that a statement does not amount to a term but is a mere representation in the principal contract, it may nevertheless find that it amounts to a term of a collateral contract. The concept of a collateral contract was summarized by Lord Moulton in *Heilbut & Co. v. Buckleton*,[516] as follows:

> It is evident, both in principle and on authority, that there may be a contract the consideration for which is the making of some other contract. [A statement such as,] 'If you will make such and such contract, I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.[517]

338. In *City and Westminster Properties (1934) Ltd. v. Mudd*,[518] the defendant had rented the plaintiff's shop for six years. There was a small room annexed to the shop, where the defendant used to sleep, and the plaintiffs knew this fact. The defendant negotiated a new lease, and the plaintiffs inserted a clause restricting the use of the premises to 'showrooms, workrooms and offices only'. The plaintiff's agent orally assured the defendant that if he accepted the lease with this clause, he would still be allowed to sleep on the premises. He signed the lease based on this assurance. However, the plaintiffs brought an action for forfeiture of the lease on ground that he had broken the covenant restricting the use of the premises. It was held that albeit the defendant had broken the covenant, he could rely on a collateral contract made before the lease was signed as a defence. The court observed that the contract protecting the tenant was separate from the lease.

II. Implied Terms

339. Most of the major obligations of the parties are usually expressed in the document itself. However, they may overlook certain primary obligations or not cater for all the eventualities that may accrue from the execution of the contract. Consequently, in certain circumstances, terms may be implied or read into the contract by courts and by statute as explained below. According to the Contracts Act, a promise is implied, 'where an offer or an acceptance is not made either verbally or in writing'.[519]

340. Terms may be implied by the courts. However, the courts do not readily imply terms into a contract. They are reluctant to interfere into the obligations of the parties, which have been agreed upon freely and voluntarily. However, they may imply terms into the contract, where they feel that it is necessary to give effect to

516. [1913] A.C. 30.
517. *Ibid.*, p. 36.
518. [1959] Ch. 129.
519. Section 9(3).

the presumed but unexpressed intention of the parties. In *Sarah Kawino v. Rutaisire*,[520] it was held that although the courts may imply terms providing the machinery to carry out the intention of the parties, the latter must prove the existence of the alleged contract in order for the court to adequately determine their intention. The intention of the parties may be gathered from a trade custom or usage or the course of dealing between the parties. According to the Contracts Act:

> Where any right, duty, or liability would arise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom of the usage if the custom would bind both parties to the contract.[521]

341. The circumstances under which a usage may be implied into a contract were elaborately set out in *Harilal Shah & Another v. Standard Bank Ltd*,[522] where Newbold P stated:

> A trade usage may be described as a particular course of dealing between the parties who are in a business relationship, which course of dealing is so generally known to all persons who normally enter into that relationship that they must be presumed to have intended to adopt that course of relationship and to have incorporated it into their contractual relationship unless by agreement it is expressly or impliedly excluded. Before a course of dealing can acquire the character of a trade usage it must, first, be so well known to the persons who would be affected by it that any such person when entering into a contract of a nature affected by the usage must be taken to have intended to be bound by it; secondly, it must be certain in the sense that the position of each of the parties affected by it is capable of ascertainment and does not depend on the whims of the other party; thirdly, it must be reasonable, that is, that the course of dealing is such that reasonable men would adopt it in the circumstances of the case; and finally, it must be such as is not contrary to legislation or to some fundamental principle of law. A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well known and has been acted on generally by persons affected by it. A usage is not proved merely by the evidence of persons who benefit from it unsupported by other evidence. Where a particular usage has acquired sufficient general or local notoriety, judicial notice may be taken of it … Where a trade usage is proved to exist, then, unless expressly or impliedly excluded, it is presumed to have been incorporated into the contract between the parties and this is so even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it.[523]

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520. [1994] VI K.A.L.R. 132; H.C.C.S. No. 75 of 1993.
521. Section 67.
522. 1967 (1) A.L.R. Comm. 209.
523. *Ibid.*

342. In *Mankuleyo v. Otis Elevator Co. Ltd*,[524] the plaintiff's contract of employment with the defendant did not contain express terms relating to the length of the contract or to payment during absence from work due to illness. Shortly after starting work, the plaintiff suffered an injury which kept him away from work for about a month, and during this time, he did not receive full pay. After nine months' employment, the defendants terminated the contract by paying four months' salary in lieu of notice. The plaintiff sued for damages for wrongful termination of employment; arrears of salary wrongfully deducted during illness; and damages for injury to his knee. It was held that whether a servant is entitled to be paid during short periods of absence depends entirely on the terms of the contract. That when it is known that in practice wages during illness are not paid by the master to servants employed in a capacity similar to the plaintiff, it is an implied term of the contract that wages are not paid during the plaintiff's illness.

343. The courts may imply a term into a contract in order to give business efficacy to the contract. In *The Moorcock*,[525] there was a contract between the defendants, who owned a wharf and jetty, and the plaintiffs by which the parties agreed that the plaintiffs' vessel, The Moorcock should be unloaded and reloaded at the defendants' wharf. The Moorcock was, accordingly moored alongside the wharf but, as the tide fell, it ran aground and sustained damage due to the unevenness of the river bed at that point. The plaintiffs sued for damages for breach of contract. It was held that there was an implied term in the contract that the defendants would take reasonable care to see that the berth was safe. Bowen LJ stated that implied terms are founded upon the presumed intention of the parties in order to give the transaction such efficacy as both parties must have intended it to have. In *Reigate v. Union Manufacturing Co. Ltd*,[526] Scrutton LJ stated:

> The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, it is such a term that it can be confidently said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case?', they would have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.'[527]

344. It can be seen from *Reigate* case above that a term will not be implied into the contract merely on the basis of reasonableness. Although in *Liverpool City*

524. [1969] E.A. 568.
525. [1886-90] All ER Rep. 530.
526. [1918] 1 K.B. 592.
527. *Ibid.*, p. 598.

Council v. Irwin,[528] Lord Denning argued that a term could be implied simply on the grounds that it would be reasonable to do so, his approach was rejected by the House of Lords and Lord Cross stated:

> [I]t is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the terms is necessary to give – as it is put – 'business efficacy' to the contract and that if its absence had been pointed out at the time both parties – assuming them to have been reasonable men – would have agreed without hesitation to its intention.[529]

345. The officious bystander test may not be applied where one of the parties does not know the term that is to be implied into the contract.[530] The test will also fail where there is uncertainty as to whether both parties would have agreed to the term that had been omitted in the contract.[531]

346. Terms may also be implied by statute. At common law, judges generally refused to recognize any term, which had not been expressly inserted in the contract. The general rule at common law in respect of sale of goods was expressed in the Latin maxim, *caveat emptor*, that is, buyer beware.[532] In the absence of fraud, and provided the buyer inspected the goods, prior to purchase, he or she could not complain of defects discovered in the goods bought. The buyer had to rely on his or her judgment and did not expect the seller to guarantee quality of the goods unless it was expressly provided for in the contract. However, over the years, the caveat emptor rule was modified and courts began implying terms in contracts. For example, in *Parker v. Palmer*,[533] it was held that in a sale of goods by sample, it was an implied term of the contract that the bulk should correspond with the sample. In *Gardiner v. Gray*,[534] it was held that it is an implied term of the contract that the goods must not only correspond with the description but also must be of merchantable quality.

347. The above common law rules were codified in the 1893 English Sale of Goods Act. In Uganda, the rules were also codified in the Sale of Goods Act,[535] which is a replica of the aforesaid English statute and has been repealed by the Sale of Goods and Supply of Services Act, 2017. This Act governs the sale of goods and supply of services, which are specialized branches of the law of contract. The Act

528. [1976] 2 All ER 39.
529. The test set out by Lord Cross is known as the 'officious bystander test'. *See also Sirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206*; Finchbourne Ltd v. Rodrigues* [1976] All ER 581; *Campling Bros. and Vanderwal Ltd v. United Air Services Ltd*. 19 E.A.C.A. 155; *Gardner v. Coutts & Co.* [1967] 3 All ER 1064.
530. *See Spring v. National Amalgamated Stevedores and Dockers Society* [1956] 2 All ER 221.
531. *See Shell (UK) Ltd v. Lostock Garages Ltd* [1976] 1 W.L.R. 1187.
532. For the discussion of the limits of *caveat emptor*, *see* B.K. Twinomugisha, *Protection of the Consumer in the Sale of Goods Act*, The Uganda Law Focus 72 (2001).
533. (1821) 4 B. & Ald. 387.
534. (1815) 4 Camp. 144. *See also Jones v. Bright* (1829) 5 Bing. 533.
535. Cap. 82.

defines a contract of sale of goods as a 'contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price'.[536] Thus, there cannot be a sale of goods unless there is a valid contract.

348. Certain terms may be implied in a contract of sale of goods or supply of services. The terms implied may be conditions or warranties. A condition is a major term whose breach entitles the buyer to repudiate the contract and reject the goods. A warranty is a minor term of the contract, whose breach entitles the aggrieved party to sue for damages. The buyer may, however, decide to treat a breach of condition as a breach of warranty, and thus not repudiate the contract but sue for damages.[537] Whether the term breached is a condition or warranty depends on the construction of the contract[538] and the circumstances surrounding the contract. The implied terms under the Act are briefly considered below but are discussed in detail in the chapter on sale of goods.

349. First, there are implied terms as to title. The Sale of Goods and Supply of Services Act provides that in a contract of sale of goods, there is:

> an implied condition on the part of the seller that in the case of a sale, he or she has a right to sell the goods, and that in the case of an agreement to sell he or she will have such right at the time when the property is to pass.[539]

350. This means that the seller has a duty to pass a good title to the buyer. The main purpose of the section is to oblige the seller to transfer the property or title to the goods to the buyer. The seller should also ensure that the goods sold are free from encumbrances and the buyer has quiet possession of the goods sold.[540]

351. Second, there is the implied condition as to description. The Sale of Goods and Supply of Services Act provides as follows:

> Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.[541] Where the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.[542]

352. Thus, the seller should ensure that the goods sold correspond with the description. A sale may be said to be by description if words are used to identify the goods sold. The goods may be identified by description. For example, Jennifer sells

536. Section 2(1).
537. Section 12(1).
538. Section 12(2).
539. Section 13(1).
540. Section 13(2)(a) and (b).
541. Section 14(1).
542. Section 14(2).

to John 'Ugandan Arabic coffee'. The goods may also be identified by sample and description, for example, the sale of 'Ugandan cotton warranted as to sample'. The goods may also be sold by sample only, for example, where the seller produces a sample of shoes and the buyer says, 'Send me 200 pairs of those'.

353. Third, there is the implied condition as to quality and fitness for purpose. The Sale of Goods and Supply of Services Act provides that the seller should ensure that 'the goods supplied under the contract are reasonably fit for that purpose'[543] where he or she 'sells goods of a description which it is in the course of the seller's business to supply'.[544] The buyer should have expressly or by implication made known to the seller the purpose for which the goods are required.[545] The buyer should have relied on the seller's skill and judgment.[546] There is also an implied condition that the goods supplied are of satisfactory quality.[547]

354. Fourth, there is the implied condition as to sample. According to the Sale of Goods and Supply of Services Act, a contract is one for sale by sample, 'where there is a term in the contract, express or implied, to that effect'.[548] Three conditions are implied into this type of contract. First, the bulk must correspond with the sample regarding quality of the goods.[549] Second, the buyer must have a reasonable opportunity of comparing the bulk with the sample.[550] Third, the goods must be free of any defect rendering their quality unsatisfactory, which a reasonable examination of the sample would not reveal.[551]

III. Standard Terms and Exemption Clauses

355. Standard terms are those terms that are set by one of the parties, and the other party has little or no ability to negotiate their alteration and is thus placed in a 'take it or leave it' position. An exemption clause, which is sometimes referred to as an exclusion or limitation clause, seeks to enable one of the parties to the contract to exclude or limit his or her liability. The justification for these clauses is based on freedom of contract: that parties are free to negotiate whatever terms they like. A party who feels that a term of the contract is unfair or harsh is free to reject it. Once a party signs an agreement containing a harsh exclusion clause, he or she is bound by it! However, exemption clauses presume that both parties have equal bargaining power, which is of course not true. It is certainly unfair to assume that an average consumer has any bargaining power when dealing with large corporations such as banks, manufacturers, even retailers. For example, X purchases a

543. Section 15(2).
544. Section 15(2)(a).
545. Section 15(2)(b).
546. *Ibid.*
547. Section 15(3).
548. Section 17(1).
549. Section 17(2)(a).
550. Section 17(2)(b).
551. Section 17(2)(c).

fridge from a supermarket in town. She is given a receipt with words such as: 'Goods once sold are not returnable'. How often does a customer read the small print on the receipt? John may enter a bus from Kampala to Arua and he is issued a ticket with a clause in small print: 'Luggage carried at owner's risk. The bus owner shall not be liable for any loss or damage to property of any passenger.'[552] It is difficult for him to walk to Arua – a distance of about 473 kilometres. He must board a bus. A client may also go to a bank for a loan. He is given a standard mortgage deed to sign. He is in need of money: he must sign, however unfair the terms are! In all these examples, it is a 'take it or leave it' situation. There is limited or no opportunity to bargain in standard form contracts.[553]

356. Perhaps, the unfairness of exclusion clauses was best illustrated by Lord Denning, MR in *Mitchell (Chesterhall) Ltd v. Fimmey Lock Seeds Ltd*,[554] where the defendant agreed to supply to the plaintiff GBP 30 of Dutch winter cabbage seed for GBP 201.60. An invoice sent with the delivery was considered part of the contract and limited liability to replacing 'any seeds or plants sold' if it were defective (clause 1), and excluding all liability for loss or damage from use of the seed (clause 2). Around 63 acres of crops failed, and GBP 61,513 was claimed for loss of production. The issues before the court were: (1) whether the limitation clause should be integrated to cover the seeds actually sold, given that they were wholly defective and did not do a seed's job at all; (2) whether under section 2(2) of the Unfair Contract Terms Act, 1977, the limitation was unreasonable.

357. The trial judge held that what was sold was not seed at all, and thus the exclusion clause that was attached to what was sold had no effect. In the Court of Appeal, the majority agreed with the trial court and held that the limitation clause was invalid and did not apply because what was sold was not seed. However, Lord Denning dissented and argued that the clause did apply to limit liability for the seeds sold although the seeds were defective. The House of Lords also held that the clause was unreasonable and dismissed the appeal. Although Lord Denning dissented in the Court of Appeal, he made a strong statement about the unfairness of the exclusion clauses in the context of freedom of contract. Below is what he said, which still holds true even today in countries such as Uganda, with regard to exemption clauses:

> None of you nowadays will remember the trouble we had – when I was called to the bar – with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or time tables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them and or knew what was in them. No matter how unreasonable they were, he was bound.

552. These clauses may also be found on air tickets. *See, for example*, *Ethiopian Airlines v. Alfred Gborie* H.C.C.A. No. 32 of 1998.
553. On the types of standard form contracts, *see* the statement by Lord Diplock in *Schroeder Music Publishing Co. Ltd v. Macaulay* [1974] 3 All ER 616, p. 624.
554. [1982] E.W.C.A. Civ. 5; [1983] 2 A.C. 803.

> All this was done in the name of 'freedom of contract'. But the freedom was only on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it'. The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it after some time. When the courts said to the big concern, 'You must put in clear words', the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.[555]

358. Over the years, it was realized that there was need to protect the consumer since equality of bargaining power is largely a myth. Consequently, the modalities developed by the courts to limit or restrict or in some instances prevent the operation of exemption clauses in certain circumstances are considered below.

359. A party relying on an exclusion clause must show that it amounts to a term of a contract. He or she must show that the clause has been incorporated into the contract. The clause may be incorporated into the contract by signature; by notice; or by a previous course of dealing between the parties.

360. The general rule, which was laid down in *L'Estrange v. Gracoub*,[556] is that when a document containing contractual terms is signed, then, in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he or she has read the document or not. In this case, the plaintiff purchased an automatic vending machine. The purchase was made on terms set out in a document stated to be a 'Sales Agreement'. The plaintiff signed the document but did not bother to read it. The court found that a number of terms were 'legible but in regrettably small print'. It was held that the plaintiff was bound by the terms of the agreement since the exclusion clause exempted him from liability. Thus, the defendants were not liable even if the vending machine was not fit for the purpose for which it was sold.

361. The contractual terms on tickets have always been held to be sufficient notice to the holders receiving them without objection. In *Mendelssohn v. Normand Ltd*,[557] the garage attendant gave the plaintiff a ticket with printed conditions on it. The plaintiff had been to this garage many times and he had always been given a ticket with the same wording. Every time he had put it into his pocket and produced it when he came back from the car. It was held that he may not have read it but that did not matter. That it was plainly a contractual document and as he accepted it without objection, he must be taken to have agreed to it. In *McCutcheson v. David Mac Brayne Ltd*,[558] it was held that when a party assents to a document forming the

555. *Mitchell (Chesterhall) Ltd*, *supra*, p. 820.
556. [1934] 2 K.B. 394.
557. [1970] 1 Q.B. 177.
558. [1964] 1 All ER 437.

whole or part of his contract, he is bound by the terms of the document, read or unread, signed or unsigned, simply because they are in the contract.

362. The principles in *Mendelssohn* and *McCutcheson* were applied in *Kenya Airways Ltd v. Ronald Katumba*,[559] where the respondent lost his luggage but could not read the ticket. Although the respondent was protected under the Illiterates Protection Act,[560] Mpagi-Bahigeine, JA held that it is well settled that the fact that the respondent could not read would not exonerate him from his obligation under the contract. That the appellant made the offer by tendering the ticket to the respondent which he duly accepted fully, thus undertaking to be bound by its terms.

363. An exemption clause may be struck down by the courts if a party can show that the contents of the documents were misrepresented to him or her. In *Curtis v. Chemical Cleaning and Dyeing Co. Ltd*,[561] the plaintiff took her dress to the defendants for cleaning. She was given a receipt to sign and she asked what it was for. She was informed that it was to exempt the defendants from certain types of damage, especially damage to beads and sequins. Based on this explanation, she signed the receipt. However, the clause was a general exemption which excluded liability for any damage, howsoever arising. When the dress was returned, it was found to be badly stained. The defendants sought to rely on the clause to escape liability. The court held that the plaintiff's action would succeed. The defendants could not rely on the clause since the plaintiffs had been induced to sign the document by the misrepresentation as to the scope of the clause.

364. Regarding unsigned documents, the general rule is that a party to a contract is bound by its terms, including an exclusion clause, provided reasonable notice of those terms is brought to his or her attention. What is reasonable depends on a number of factors. In the first place, the unsigned document, for example, a receipt or ticket, must be a contractual document. In *Chapelton v. Barry UDC*,[562] the plaintiff hired a deck-chair and, after payment, was given a ticket. He did not read the ticket, which stated on its back that the Council would not be liable for any damage or injuries suffered by the hirer while using the chair. There was a defect on one of the chairs, which injured him when he sat on it. He claimed damages for the injuries. The court held that the ticket was not a contractual document but a mere voucher or receipt which no reasonable man could regard as otherwise. Thus, the Council could not rely on the exemption clause to escape liability.

365. If the unsigned document is to be regarded as being an integral part of the contract, reasonable notice of the exclusion clause must be brought to the attention of the other party. In *Parker v. South Eastern Railway Co.*,[563] a bag was left at a luggage office. The plaintiff paid a fee and was a given a ticket which contained a

559. C.A.C.A. No. 43 of 2005.
560. Cap. 78.
561. [1951] 1 K.B. 805.
562. [1940] 1 K.B. 532.
563. (1877) 2 C.P.D. 416. *See also Thornton v. Shoe Lane Parking Ltd* [1971] Q.B. 163; *Spurling v. Bradshaw* [1956] 2 All ER 121.

limitation clause on the back. The plaintiff's bag got lost. The plaintiff claimed the value of the bag and its contents, which exceeded the limit on the ticket. The defendant relied on the clause but the plaintiff denied knowledge of it. It was held that for the defendant to be able to rely on the clause, it had to show that it had taken reasonable steps to bring the clause to the attention the plaintiff's notice. Since it had not done this, it could not rely on the clause.

366. In *Thompson v. L M & S Railway Co*.,[564] an illiterate plaintiff was given an excursion ticket, which had a clause excluding liability for injury. She suffered injuries during the journey and claimed damages. It was held that since reasonable notice had been brought to her attention, it was immaterial that she could not read, and was thus bound by the clause.

367. In *Olley v. Marlborough Court Ltd*,[565] a husband and his wife booked into a hotel and paid for one week's stay in advance. They went to their room where they found a notice stating that 'the proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody'. The wife had a number of valuable fur coats which she had left in the room and which were subsequently stolen. When sued, the defendants relied on the exemption clause. It was held that the contract had already been entered into before the notice of the exemption clause had been brought to the plaintiff's attention.

368. In *Stella Twinebirungi v. Akamba Public Service Ltd*,[566] Kiryabwire J allowed the enforcement of an exclusion clause exempting liability where the same had been brought to the attention of the plaintiff.

369. The court may infer notice from the previous dealings between the parties. In *Spurling v. Bradshaw*,[567] the defendant dealt for many years with the plaintiffs, who were warehousemen. He delivered to them for storage eight barrels of orange juice. After a few days, he received a document from them acknowledging receipt of the barrels and referring on its face to clauses printed on the back. One of the clauses exempted the plaintiffs from any loss or damage occasioned by the negligence, wrongful act or default of themselves or their servants. When the defendant decided to collect the barrels, he found them empty and refused to pay the storage charges. When sued by the plaintiffs, he counterclaimed for negligence, although the plaintiffs defended themselves on the basis of the exemption clause. The defendant argued that since the document was sent to him after the conclusion of the contract, it could not form part of the contract. However, the defendant admitted that in his previous dealings with the plaintiffs, he had been sent such a document though he

564. [1930] 1 K.B. 41.
565. [1949] 1 K.B. 532. *See also Lewis Ralph Dodd v. Chandrakant Nandha* [1971] E.A. 58.
566. H.C.C.S. No. 24 of 2004.
567. [1956] 2 All ER 121. On previous course of dealing, *see also McCutcheson v. David Mac Brayne Ltd*. [1964] 1 All ER 430.

had never bothered to read it. The court held that the terms and conditions were part and parcel of the contract by virtue of the previous course of dealings between the parties.

370. There should be a course of dealing between the parties and this cannot be established if they have only contracted with each other on a few occasions over a long period of time. For example, in *Hollier v. Rambler Motors (AMC) Ltd*,[568] it was held that three of four occasions in a period of five years was insufficient to establish a course of dealing. However, where an exemption clause is implied into the contract by a trade usage, it is not necessary to show that there was a course of dealing.[569]

371. In *La Rosa v. Nudrill Pty Ltd*,[570] it was held that it is a question of fact and degree as to whether the parties, by their conduct, have incorporated a term into their contract by a previous course of dealing.

372. In the construction of exemption clauses, the courts are guided by a number rules. The general rule is that exclusion clauses are to be construed or interpreted *contra proferentem*. The rule comes from the Latin maxim: *verba charterum fortius accipiantur contra proferentem* – the words of a charter are to be strictly construed against the *proferens*, that is to say, against those they are intended to favour. This means that the clauses are construed restrictively against the party relying on them.[571] In *Andrews Bros. (Bournemouth) Ltd v. Singe & Co*,[572] there was a contract to purchase 'new Singer cars'. The contract contained a clause which excluded 'all conditions, warranties and liabilities implied by statute, common law or otherwise'. One of the cars delivered by the dealer was a used car. When sued for damages, he sought to rely on the exemption clause. It was held that the term regarding 'new Singer cars' was an express term and thus the exemption clause, which only excluded liability for implied terms did not protect the dealer.[573] In case of any doubt as to the meaning and scope of the exemption clause, the ambiguity will be interpreted against the party who is relying on it.[574]

373. In every contract, certain obligations are considered to be core terms. They are the very essence of the contract. In their absence, there is no contract in reality. In *The Containers Ltd v. Kencon*,[575] the appellants contracted to sell and the buyers to buy, a quantity of rat traps in monthly instalments over a year. The appellants agreed that the respondents would have the sole distributorship of the rat traps during the period. It was held that the sole distributorship was a fundamental term of

568. [1972] Q.B. 71.
569. *See, for example*, *British Crane Hire Corporation Ltd v. Ipswich Plant Hire Ltd* [1975] Q.B. 303.
570. [2013] W.A.S.C.A. 18.
571. *Baldry v. Marshall* [1925] 1 K.B. 260.
572. [1934] 1 K.B. 17.
573. *See also Omer Saleh Audalih & Another v. A. Besse & Co*. (Aden) Ltd [1960] E.A. 907.
574. *Rutter v. Palmer* [1922] 2 K.B. 87.
575. [1971] E.A. 216.

the contract. That the breach by the appellant of the term entitled the respondents to repudiate even though it occurred after the respondent's refusal to accept the goods.

374. The general rule, then, is that exemption clauses that seek to exclude liability for a fundamental breach are ineffective: a party cannot excuse himself or herself from performing obligations which are fundamental to the contract. For example, where Benson contracts to sell to Daniel 30 bags of cassava but delivers 30 bags of beans, he may be found to have breached a fundamental term of the contract.

375. In *Karsales (Harrow) Ltd v. Wallis*,[576] the defendant inspected a second-hand car, found it to be in good condition and decided to buy it on hire purchase terms. The hire purchase agreement contained a clause which stated that 'no condition or warranty that the vehicle is roadworthy or as to its condition or fitness for any purpose is given by the owner or implied therein'. The car was delivered at night. While it appeared to be the car the defendant had inspected, daylight revealed that the car was a mere shell. The cylinder head and pistons were broken, valves were burnt out and it was incapable of self-propulsion. The defendant rejected the car and refused to pay the hire purchase instalments. The plaintiffs sought to rely on the exemption clause. It was held that there was a fundamental and substantial deviation between the thing contracted for and that which was actually delivered. Since there was a fundamental breach of the contract, the plaintiffs could not rely on the clause to exempt themselves from liability.

376. Whether a particular breach is fundamental or not depends upon the facts of each case. The burden of proving that there is a breach of a fundamental term lies on the party alleging it.[577] There has also been a debate as to whether the doctrine of fundamental breach is a substantive rule of law or merely a rule of construction. Whereas in *Karsales* case above, Lord Denning was of the view that it is a rule of law, in *Suisse Atlantique v. Rotterdamsche*,[578] the House of Lords held that it was a rule of construction. In *Photo Production v. Securicor*,[579] there was a contract for provision of security services by Securicor at the plaintiff's factory. The security guard's negligence caused the destruction of the plaintiff's factory by fire. The contract contained a clause that excluded liability for negligence of Securicor's workers. In the Court of Appeal, Lord Denning held that the doctrine of fundamental breach as in *Karsales* case applied and thus Securicor was liable. Securicor appealed and Lord Wilberforce rejected Lord Denning's approach and opted for a rule of construction approach.[580]

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576. [1956] 2 All ER 866.
577. *See Hunt and Winterbotham (West of England) Ltd. v. BRS (Parcels) Ltd.* [1962] 1 All ER 111; *Levision & Another v. Patent Steam Carpet* [1977] 3 W.L.R. 90.
578. [1966] 2 All ER 61.
579. [1980] A.C. 827.
580. *See also SDV Transami (U) Ltd v. Nsibambi Enterprises*, C.A.C.A. No. 56 of 2006; [2008] U.L.R. 497; *Swift Commercial Establishment Ltd v. New Uganda Securiko Ltd* H.C.C.S. No. 0340 of 2013.

377. In *Thunderbolt Technical Services Ltd v. Apedu Joseph & Another*,[581] the claim against the defendants was for special, general and exemplary damages. On 8 November 2007, the plaintiff entered into a contract with the second defendant for the provision of security services on the plaintiff's business premises. The premises were broken into with the connivance of the defendant's employee. The defendants sought to rely on a limitation clause that limited liability to only UGX 550,000. Counsel for the plaintiff argued that the defendant could not rely on the clause as there was breach of a fundamental term. Counsel for the second defendant argued that basing on freedom of contract, the plaintiff is bound by the limitation clause. Kiryabwire, J found that there was a fundamental breach of contract and stated:

> To my mind the contract was for the provision of guard services to avoid *inter alia* theft at the plaintiff's premises but the same persons who were to provide the required protection failed in their obligations to the extent that an employee of the second defendant abandoned his duty post. Clearly, this is not a mere breach of contract but a fundamental breach of contract.[582]

378. In construing the limitation clause, the learned judge cited the cases of *Suisse Atlantique* and *Photo Production* above and held that the second defendant was exempted from liability to the plaintiff beyond UGX 550,000 and stated:

> When dealing with exemption clauses, the entire contract has to be looked at as a whole and where the clause is completely clear and adequate to cover the defendant's position and such is its intention, then the clause applies. I find that on the true construction of these limitation liability clauses in this case, they expressly cover the second defendant from liability for theft and fundamental breach.[583]

379. In *Gentex Enterprises Ltd v. Security Group (Uganda) Ltd*,[584] the plaintiff and defendant entered into an agreement for guard services. The defendant provided the guards and in 2006, the plaintiff's premises were broken into and UGX 38,700,000 was stolen. One of the deceased's guards who had been deployed to guard on the night in question was missing, and his gun was found abandoned at the premises. Counsel for the defendant invoked an exclusion clause and relied on *L'Estrange v. Gracoub* above. The contract stated that it was subject to the conditions printed overleaf. There were thirteen clauses in small print and clause 4 stated:

> The company undertakes no liability for any loss or damage to property or any person whatsoever or bodily injury sustained by the client or his/its servants or agents whatsoever or howsoever caused by its employees whilst performing

581. HCT-00-CC-CS-340-2009. *See also Ethiopian Airlines v. Alfred Gborie and Another* H.C.C.A. No. 32 of 1998.
582. *Ibid.*
583. *Ibid.*
584. H.C.C.S. No. 45 of 2007.

their duties within the scope of their employment PROVIDED ALWAYS that any liability of the company hereunder shall not exceed in the aggregate sum of 800,000 shillings.

380. The court found that there was a provision at the bottom of the conditions for both parties to sign but the contract which was tendered in court was not signed by any of the parties. The front page of the contract which was filled in with a pen was signed by both parties. Just before the space provided for the client's signature, there was a sentence to the effect that: 'I confirm that I have read and accept the terms and attendant conditions overleaf'. Justice Hellen Obura observed that there is no doubt that the condition in clause 4 just like all others were tailored to suit the defendant's interest. Given that it was a standard form contract designed by the defendant, the plaintiff did not participate in negotiating and drafting it. It was held that the defendant had fundamentally breached the service contract for provision of security services and could not rely on the clause to escape liability. The court relied on *Levision & Another v. Patent Steam Carpet,*[585] where it was held that an exemption clause does not give exemption for a fundamental breach of the contract and the burden is on the party seeking to rely on the clause to prove that it was not guilty of a fundamental breach and if it failed to discharge that burden then it cannot rely on the clause to exempt itself from liability. In this case, Lord Denning MR stated that effect should not be given to an exclusion clause if it is unreasonable, particularly in standard form contracts where there is inequality of bargaining power.

381. The burden of proving a fundamental breach lies on the party alleging it. In *East African Road Services Ltd v. J.S. Davis and Co. Ltd*,[586] the respondent consigned certain goods to the appellant, a carrier, from Nairobi to Tanganyika. None of the goods were delivered and the respondent sued the applicant claiming damages for loss of the goods. At the trial, no evidence was given for non-delivery. The appellant relied on an exemption clause and on the face of it, the loss was within the terms of the clause and the appellant was not liable. However, it was common ground that the exemption clause could not be relied upon if there had been a fundamental departure from the performance of the contract by the applicant. The trial court gave judgment to the respondent. On appeal, the issue was whether the burden of proof lay on the respondent to prove that there had been a fundamental breach of the contract or on the appellant as a carrier to prove otherwise. It was held that the burden of proving that there was a fundamental breach of the performance of the contract was on the respondent and it had failed to do so. The appellant was entitled to rely on the exemption clause, which was equally applicable whether in contract or in tort. The non-delivery of goods was not in itself a fundamental breach.

382. In yet another case of *Schluter & Co. Ltd v. Railway Corporation & Others*,[587] the plaintiff claimed damages from the defendant in respect of a consignment of coffee destroyed by fire after a road accident. The coffee was delivered to

585. [1977] 3 W.L.R. 90.
586. [1969] E.A. 259.
587. [1957] E.A. 157.

the first defendant under an owner's risk consignment note and the first defendant contracted with a third company for its transport by road to Mombasa. The first defendant relied on the exemption clause in the consignment note and upon the exemption given by section 33 of the East African Railways Corporation Act. The plaintiff alleged fundamental breach, and that the exemption clause only protected the first defendant when it was itself transporting the goods. It was held that mere non-delivery does not amount to a fundamental breach of a contract. Thus, there had been no fundamental breach of the contract and the exemption clause applied. The court observed that it was not possible to contract out a statutory protection.

383. It is important to point out that given the tight statutory provisions, it may be difficult for a party to successfully rely on an exemption clause to escape liability for breach of the implied terms under the Sale of Goods and Supply of Services Act, 2017. The Act provides that '[a]n express warranty or condition shall not replace a warranty or condition implied by this Act'.[588] The Act also provides that, '[w]here any right, duty or liability would arise under a contract of sale or supply of services by implication of law, it shall not be negatived or varied by express agreement or by the course of dealing between the parties or by usage'.[589]

IV. Penalty Clauses

384. The doctrine of freedom of contract requires the courts to respect the bargains of the parties and thus their right to determine and stipulate in the contract the levels of compensation payable in the event of a breach. However, the courts may step in to regulate the awards of damages especially where the damages have no relationship to the loss actually suffered. One of the areas in which the courts may intervene is where the sums mentioned in the agreement amount to what are known as penalties. A penalty clause is a provision in a contract that stipulates an excessive pecuniary charge against a defaulting party.

385. The parties may decide to make a genuine pre-estimate of the losses they may encounter in case there is a breach of contract. They may agree that certain sums will be payable in case of a breach. Where the sums payable are a genuine pre-estimate of the loss, the courts will support claims of such sums. These sums are known as liquidated damages. Damages are unliquidated when they have not been expressly agreed upon by the parties.

386. The pre-2010 Contracts Act position, expressed at common law and applied by the Ugandan courts, was that where the sums agreed by the parties to be payable are not based on a genuine pre-estimate of the losses and are usually excessive, they may amount to penalties as contradistinguished from liquidated damages, which

588. Section 19.
589. Section 67.

amount to compensation. The basis on which the courts decided whether a pre-estimated sum is a penalty or not was laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd*[590] as follows:

(1) A sum will be a penalty if it is extravagant having regard to the maximum possible loss that may be sustained by the breach.
(2) If the contract imposes a liability on a party to pay a sum of money and failure to do so results in that party incurring liability to pay a larger sum, then the latter will be regarded as a penalty. In such cases, it is possible to measure fairly and precisely what the loss will be, and thus the liability to pay the larger sum must of necessity clearly be a penalty.
(3) If a single sum is payable upon the occurrence of one or several breaches of the contract, some being serious, some being minor, then that sum will raise the presumption of its being a penalty.

387. However, even when handling penalties, the courts in England, were, due to the dictates of freedom of contract, cautious. For example, in *Export Credits Guarantee Department v. Universal Oil Products Co.*,[591] Lord Roskill stated:

> My Lords, one purpose, perhaps the main purpose, of the law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiffs as a result of the breach by the defendants. But it is not and never has been for the courts to relieve a party from the consequences of what may, in the event, prove to be an onerous or possibly even imprudent commercial bargain.[592]

388. In this vein, the Contracts Act provides as follows:

> Where a contract is breached, and a sum is named in the contract as the amount to be paid in case of a breach or where a contract contains any stipulation by way of a penalty, the party who complains of the breach is entitled, whether or not actual damage or loss is proved to have been caused by the breach, to receive from the party who breaches the contract, reasonable compensation not exceeding the amount named or the penalty stipulated, as the case may be.[593]

389. Thus, where the penalty clause is freely agreed upon by the parties, the courts will uphold it. In *Harry Ssempa v. Kabagambire David*,[594] the plaintiff claimed a liquidated sum of UGX 65,000,000 plus a monthly penalty of UGX 2 million, interest, general damages and costs of the suit. The defendant challenged the

590. [1915] A.C. 79. *See also Guaranty Discount Co. Ltd v. Ward* [1961] E.A. 285.
591. [1983] 2 All ER 205.
592. *Ibid.*, p. 222.
593. Section 62(1).
594. H.C.C.S. No. 408 of 2014.

amount UGX 2 million penalty clause. The court upheld the penalty since the parties had agreed. Thus, the court will award reasonable compensation not exceeding the amount or penalty mentioned in the agreement.

390. In *Deluxe Enterprises Ltd v. Uganda Leasing Co. Ltd*,[595] the parties entered into a Master Vehicle Lease Agreement for the leasing of four motor vehicles for a term of four years commencing on 24 February 1999. The total capital cost of the vehicles was UGX 333,293,199. The monthly rental for the vehicles was UGX 10,148,778 plus 17% VAT. The appellant defaulted on the payment of the rental sums, and on 22 November 1999 the lease agreement was determined by the respondent company which took possession of the vehicles. The appellant, *inter alia*, challenged the rent and interest as excessive and wanted a refund. In dismissing the appeal, the judge held that that the clause in question was not a penalty clause but a representation of the losses the respondent was to incur in case of termination of the contract. Ngonda Ntende JA stated as follows:

> It is clear that the common law doctrine of penalties has been overtaken by this provision [section 62 of the Contracts Act] and the doctrine of freedom of contract. Penalties are enforceable. However, what is prohibited is the innocent party receiving from the party that breaches the contract an unreasonable compensation exceeding the amount named in the penalty stipulated in the agreement. It is irrelevant whether the party has suffered any damage or loss. Section 62(2) provides that the penalty may provide for an interest on the amount of compensation paid.[596]

V. Arbitration Clauses

391. Arbitration is a form of alternative dispute resolution (ADR), whereby disputes are resolved outside the courts. According to Kakooza, ADR 'is a structured process under which the parties to a dispute negotiate their own settlement with the help of an intermediary who is a neutral person and trained in the techniques of ADR'.[597] Arbitration is often used in the resolution of commercial disputes, including contractual disputes. Not all disputes between the parties to a contract may end up in court. Parties may include in their agreement an arbitration clause to the effect that any dispute concerning the application and or interpretation of the contract shall be referred to an arbitrator or arbitrators mutually agreed upon by the parties. In some jurisdictions, there may be a requirement that parties should go to court for the enforcement of an arbitration award. Like most other forms of ADR, arbitration

595. Civil Appeal No. 13 of 2004.
596. *Ibid.*
597. A.C.K. Kakooza, *Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects*, 7(2) Uganda Living L.J. 268–294 (2010).

has a number of advantages. Arbitration allows the parties to choose their own arbitrator with the necessary expertise. Arbitration is also usually faster than litigation in court.[598]

392. There are a number of legislative provisions relating to arbitration in Uganda. The Judicature Act[599] provides for situations when matters may be referred to a special referee or arbitrator who is granted powers to inquire and report on any civil cause or matter.[600] This includes court annexed arbitration as distinguished from consensual arbitration subject to the existing agreement before the parties.

393. The major legislation that governs arbitration is the Arbitration and Conciliation Act,[601] which is aimed at amendment of the law relating to arbitration, international commercial arbitration and enforcement of arbitral wards. The Act establishes the Centre for Arbitration and Dispute Resolution (CADER),[602] which *inter alia*, assists parties and counsel with a pre-drafted model of arbitration clauses and other relevant advice. According to the Act, arbitration 'means any arbitration whether or not administered by a domestic or international institution where there is an arbitration agreement'.[603] An arbitration agreement is defined as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.[604] The arbitration agreement 'may be in the form of an arbitration clause in a contract or in the form of a separate agreement',[605] and it shall be in writing.[606] The agreement is in writing 'if it is contained in – a document signed by the parties; or an exchange of letters, a telex, a telegram or other means of telecommunication which provides a record of the agreement'.[607] According to the Act, '[t]he parties shall determine the number of arbitrators. If the parties fail to determine the number of arbitrators … there shall be one arbitrator'.[608] The parties may, in their agreement name the place of arbitration.[609] The language to be used in arbitration proceedings shall be English unless the parties agree to an interpreter.[610]

394. The parties usually agree that the decision of the arbitrator shall be final and binding. The parties 'agree to be bound by the resulting decision, rather than taking the case to ordinary courts of law'.[611] Thus, courts are barred from intervening in matters governed by the Arbitration and Conciliation Act unless expressly provide

598. For a discussion of the advantages and disadvantages of arbitration, *see* Kakooza, *supra*, 1–2.
599. Cap. 13.
600. Sections 26–32.
601. Cap. 4.
602. Section 67.
603. Section 2.
604. *Ibid.*
605. Section 3.
606. *Ibid.*
607. *Ibid.*
608. Section 10.
609. Section 20.
610. Section 21(1).
611. Kakooza, *supra*, p. 1.

for by the Act.[612] However, arbitration does not oust the jurisdiction of the courts since an aggrieved party may apply to court for judicial review. According to the Act, a party may orally apply to the High Court to set aside an arbitral award where that party proves that: 'a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under a law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside'.[613]

395. The aggrieved party may also furnish proof that: 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless the agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act; the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or the arbitral award was not in accordance with the Act'.[614] An arbitral award may also be set aside by the court where it finds that 'the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or the award is in conflict with the public policy of Uganda'.[615]

396. Unless an arbitral award is set aside, it shall, on application by an interested party, be recognized and enforced as if it were a decree of the court. An arbitration award includes the ICSID Convention award, which is 'an arbitration award rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States'.[616]

§2. Interpretation

397. Because of the dictates of freedom of contract, courts are reluctant to interfere with what the parties have agreed upon. However, in the course of handling commercial disputes, courts may have to interpret or construe clauses or words used in a contract. In *Atom Outdoor Ltd v. Arrow Centre (U) Ltd*,[617] Stella Arach Amoko J held that the primary object of interpretation is to ascertain the intention of the parties, which is obtained from the language used in the agreement.

612. Section 9.
613. Section 34(2)(i)–(iv).
614. Section 34(2)(v)–(vii).
615. Section 34(2).
616. Section 45.
617. H.C.C.S. No. 448 of 2003.

398. The interpretation process is based on the objective view of a reasonable man, given the context in which the parties made their agreement. The court may look at the ordinary grammatical meaning of the words used in the agreement and the context in which such words were used. Where technical or scientific words are used, the court may look at relevant literature in which such words have been defined. The court may also look at the interpretation sections of the relevant statute such as the Contracts Act, 2010, and the Sale of Goods and Supply of Services Act, 2017, for the meaning of certain words used in a given contract.[618]

399. The courts apply a purposive and commercial approach in the interpretation of contracts by looking at the overall purpose of the clause and the contract as a whole, the facts and circumstances known or assumed by the parties at the time the contract was made and commercial common sense. In interpreting exemption clauses, the courts may choose to interpret a particular clause restrictively as per the *contra proferentem* rule.

§3. Conditional Contracts

400. A conditional contract may be defined as an agreement that is enforceable only if another agreement or clause is performed or if another specific condition is satisfied. For example, where the sale or the purchase of a plot of land in Kololo depends on planning permission being granted by Kampala Capital City Authority (KCCA). Thus, the contract is performed only after the planning permission – a condition precedent – has been obtained.

401. In *Stephen Wakida v. Violet Edith Nkata Lugumba & Another*,[619] there was an agreement for sale of land at UGX 13 million to be paid in three instalments. The third and final instalment was to be paid by the purchaser 'after completion of evicting squatters from the land'. The court held that eviction was a condition precedent, and since the seller had failed to satisfy the condition, she was obliged to refund the purchase price.

618. *See, for example*, *Karangwa v. Kulanju*, Civil Appeal No. 3 of 2016.
619. Civil Suit No. 31 of 2004.

Chapter 4. Privity of Contract

§1. The Rule of Privity of Contract

402. The rule that consideration must move from the promisee basically means that a party can only successfully enforce a promise if it is proved that he or she provided consideration in support of the promise. This rule is a corollary to the rule of privity of contract, which provides that only parties to a contract can sue on it. A contract is primarily a matter between the contracting parties who have provided consideration.

403. In *Price v. Easton*,[620] a man was indebted to Price for the sum of GBP 13. He offered to work for Easton who would in return discharge his debt to Price. The debtor fully worked as agreed, but Easton did not clear the debt to Price, who then sued Easton. Lord Denman held that the plaintiff had to show 'consideration for the promise moving from him to the defendant'.

404. In *Tweddle v. Atkinson*,[621] the plaintiff's father and prospective father-in-law agreed with each other that they would pay the plaintiff GBP 100 and GBP 200 respectively in consideration of the plaintiff's intended marriage and confirmed that agreement in writing after the marriage. The father-in-law died before he paid his GBP 200, and the plaintiff sued the executors to recover the money. Wightman J held that the plaintiff's action would fail since he had not furnished any consideration. That as a stranger to the contract, he could not take advantage of it, even though it was made for his benefit.[622]

405. In *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge,*[623] Dunlop sold tyres to Dew & Co. The contract contained a term that the tyres were not to be sold below a certain price. Dew & Co. agreed to demand a similar undertaking from trade customers who bought the tyres from them. Selfridge bought the tyres from Dew & Co. and agreed to abide by the minimum price condition. In fact, they underpriced them, and Dunlop sued. In dismissing their claim, the court held that Dew & Co. could sue Selfridge but not Dunlop who were not party to that particular contract. Lord Haldane stated:

> My Lords, in the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it … A second principle is that if a person with whom a contract not under seal has been made is

620. (1833) 4 B. & Ad. 433.
621. (1861) 1 B. & S. 393.
622. On privity doctrine, *see also National Social Security Fund v. Alcon International* S.C.C.A. No. 15 of 2009; *ZTE v. Uganda Telecom* H.C.C.S. No. 169 of 2013; *Kiga Lane Hotel Ltd v. Uganda Electricity Distribution Co. Ltd* H.C.C.S. No. 557 of 2004; *Ecumenical Church Loan Fund v. John Bwiza & Others* H.C.C.S. No. 614 of 2004; *Francis Xavier Muhozi v. National Bank of Commerce (U) Ltd;* H.C.C.S. No. 303 of 2006.
623. [1915] A.C. 847.

to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request.[624]

406. The rule that in order for a person to successfully sue on a contract he or she should have provided consideration is harsh and may produce unfair results. For example, Ahmed buys a brand new motorcycle from DK Motors Ltd for his son, Ken, aged 20. Two days later, Ken discovers that the engine is faulty, and it cannot move. According to the privity rule, Ken cannot sue DK Motors Ltd, since he is a stranger to the contract between Ahmed and the company. Over the years, exceptions to the privity rule have been developed to enable deserving third parties to sue on the contract.

I. Third Parties and the Contract

407. 4The Contracts Act allows a third party to enforce a contractual term under certain circumstances. The Act provides that 'a person who is not a party to a contract may in his or her own right enforce a term of the contract'.[625] In order for the third party to succeed, two conditions must be met: the contract should expressly allow him or her to enforce the contractual term[626] and a term of the contract should confer a benefit on him or her.[627] However, a third party cannot claim that a contract conferred a benefit on him or her 'where on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by a third party'.[628]

408. A third party may derive a benefit under a trust. A trust may be defined as a relationship created at the direction of a person known as a settlor, in which another person called a trustee, holds the property subject to certain duties to use and protect it for the benefit of another person known as the beneficiary or *cestui que trust*. A third party may sue under the concept of trust. Thus, a trustee may, on behalf of the beneficiary, sue on a contract that was entered into by a settlor notwithstanding that he or she was not a party to it. A beneficiary may, in his or her own name, also sue on the contract entered into by the settlor although he or she was not a party to it.

409. In *Tarlok Singh v. Sterling General Insurance Co. Ltd*,[629] the court invoked the concept of trust and held that a beneficiary can sue under an insurance policy although he was not party to the contract between the insured and the insurer. In this case, A took out a motor vehicle insurance to cover himself and any authorized driver. The driver was injured and sued the insurance company. According to the

624. *Ibid.*, p. 849.
625. Section 65(1).
626. Section 65(1)(a).
627. Section 65(1)(b).
628. Section 65(2).
629. [1966] E.A. 144.

privity rule, the driver could not successfully sue the company because the premium – the consideration – had been paid by A. However, the court held that A was a trustee of the driver and as a beneficiary, the latter could sue the insurance company through the trustee, the insured, or direct if the trustee refused. Hence, where X enters a contract with Y for the benefit of Z, X can sue Y on the contract for the benefit of Z and recover all that Z could have recovered if the contract had been made with Z him/herself. Should X refuse to sue Y, then Z can directly sue Y. In this situation, X is regarded as a trustee under an implied or constructive trust. However, as Lord Wright observed in *Vandepitte v. Preferred Accident Insurance Corporation of New York*,[630] the intention to constitute a trust must be affirmatively proved, and cannot be merely inferred from general words in a contract.

410. A benefit may also be derived under third-party insurance. The law imposes an obligation on motor vehicle owners to have third-party insurance. The Motor Vehicle Insurance (Third Party Risks) Act[631] makes it unlawful 'for any person to use, or to cause or to permit any other person to use, a vehicle on a road unless there is in force … a policy of insurance in respect of third party risks'.[632] Under third-party insurance, a third party may sue on the contract between the insured and the insurance company.

411. In *Kayanja v. New India Assurance Co. Ltd*,[633] the appellant was injured in an accident by a vehicle owned and insured by H but driven at the time by B. The insurance policy stated that it covered any authorized driver. The appellant sued B and obtained judgment against him for damages. H had a policy of insurance with the respondent insurance company, under which the respondent was to indemnify against sums which H would become liable to pay to third parties for injuries arising from the motor vehicle. B was not named in the policy. However, by the terms of the policy, the respondent had agreed also to indemnify – subject to certain conditions – 'any authorized driver'. B was an authorized driver within the policy. The appellant brought an action against B. The court held that a stranger to a contract cannot sue upon the contract unless given a statutory right to do so. The appellant was awarded damages, which he claimed from the insurance company. The appeal was allowed on the basis that he could sue under third-party insurance in accordance with the Traffic Act.

412. A third party may also sue under the Bills of Exchange Act.[634] A holder of a negotiable instrument, for example a cheque, which is not crossed, may sue on it even though he or she did not provide consideration provided that a previous person provided some consideration.[635] The holder in due course may take action not

630. [1933] A.C. 70.
631. Cap. 214.
632. Section 2(1).
633. [1968] E.A. 295.
634. Cap. 68.
635. Sections 26 and 28.

only against the original drawer of the instrument if he or she fails to pay but also against any other parties who have endorsed the cheque or instrument.[636]

413. A third party may also sue under agency, which is a relationship between a principal and an agent. The Contracts Act defines an agent as 'a person employed by a principal to do any act for that principal or to represent the principal in dealing with a third person'.[637] The Act also defines a principal as 'a person who employs an agent to do any act for him or her or to represent him or her in dealing with a third person'.[638] It follows from these definitions that where an agent negotiates a contract between his or her principal and a third party, he is acting on behalf of the principal. This is derived from the Latin maxim, *qui facit per alium facit perse*, which means, 'he who acts through another acts him/herself'. Thus, a third party can successfully sue the principal on the contract entered into between him and the agent, provided the agent acted with authority, which may be express or implied.[639]

414. The doctrine of privity of contract may also be avoided by bringing the action in tort, especially under the law of negligence, rather than contract. For example, in *Donoghue v. Stevenson*,[640] it was held that the plaintiff who consumed adulterated ginger could take direct action against the manufacturer, although he had no contractual relationship with the latter. Lord Atkin pointed out that the manufacturer of the beer had a duty of care to the consumers, and since this duty was breached, the plaintiff was entitled to damages in tort.

II. Contract for the Benefit of a Third Party

415. Under the Ugandan legal system, the general rule is that only parties to the contract that have provided consideration may have benefits under the contract. However, where the contract is for the benefit of the third party, he or she may sue on it. For example, X purchases a packet of biscuits from Shoprite Shopping mall for his daughter, Y. The biscuits are expired. After eating part of the biscuits, Y falls sick. In such a situation, Y can sue the Mall albeit she is not party to the contract entered into by her father.

§2. Transfer of Contractual Rights

416. A party to a contract may transfer his or her contractual rights through a process known as assignment, which involves the transfer by an assignor of some or all his or her rights to receive performance under a contract to a non-party known as an assignee. In this case, the assignor no longer receives benefits of the assigned

636. *Ibid.*
637. Section 118.
638. *Ibid.*
639. Section 122(1). *See Kand (U) Limited v. The Registered Trustees of Arya Practinidihi Sabha Eastern Africa* H.C.C.S. No. 299 of 2011.
640. [1932] 1 A.C. 562.

rights, which are all transferred to the assignee. For example, X sells his car to Y at UGX 20 million. Can he assign to Z the right to receive the UGX 20 million? Can an assignee sue on his initiative against the debtor? Does an assignment bind both the debtor and the assignor? An assignment may be absolute or conditional. An absolute assignment is where the interest of the assignor is transferred unconditionally to the assignee and placed completely under his control.[641] A conditional assignment on the other hand is 'one which is to become operative or to cease to be operative, upon, the happening of an uncertain event'.[642]

417. In *Kiga Lane Hotel Ltd v. Uganda Electricity Distribution Ltd*,[643] the court held that although the rule is that only a party to a contract can sue on it, through assignment, the benefits under a contract can be transferred to a third party. Yorokamu Bamwine, J observed as follows:

> However, the law as I understand it is that an equitable assignee of a legal chose in action cannot enforce the right assigned by action unless the action is in the name of the assignor, or he is joined as a plaintiff if he consents, or if he does not, as a defendant.[644]

418. According to Furmston, '[a]n absolute assignment of an equitable chose in action entitles the assignee to bring an action in his own name against the debtor',[645] while the 'non-absolute assignment of an equitable chose in action does not entitle the assignee to bring an action in his own name, but requires him to join the assignor as a party'.[646] A chose in action is a right to property that is not in possession of the owner who has merely a right of action for their possession. Thus, a chose in action is an intangible property that is not in one's possession but is enforceable through legal or court action. Examples of choses in action include debts, goodwill, shares, negotiable instruments, insurance policies, bills of lading, patents and copyrights.

§3. The Special Case of a 'Subcontract', e.g., the (Nominated) Subcontractor in Building Contracts

419. A subcontract is an agreement to do part of a bigger piece of work that has been contracted by the main contractor. The subcontractor usually signs a subcontract with the contractor. Thus, a subcontractor is a person who is awarded a part of an existing contract between the employer and the prime or main contractor. In such situation, the subcontractor performs work under a contract with the main contractor, rather than the employer who hired the main contractor. This arrangement is

641. Furmston, *supra*, p. 637.
642. *Ibid.*
643. H.C.C.S. No. 557 of 2004.
644. *Ibid.*, p. 8.
645. Furmston, *supra*, p. 639.
646. *Ibid.*

common in large construction projects, which include a contractual chain comprising of an employer, the main contractor and the subcontractor(s). The question is whether a subcontractor can successfully sue the employer in case of a dispute with the main contractor. Because of the privity rule, the subcontractor cannot successfully sue the employer. The subcontractor is not party to the contract between the employer and the prime contractor. The subcontractor is said to be a stranger who has not provided consideration in support of that contract.

420. In *Lunco Constructors Ltd v. The Attorney General & Another*,[647] the first defendant through its Ministry of Water, Lands and Environment signed a contract to undertake Luwero Town Water Supply Project with the second defendant, M/S Combine Services Ltd. With the apparent knowledge and approval of the Ministry, the second defendant subcontracted the plaintiff to do the work on its behalf. In December 2000, the Ministry was advised to terminate the contract on account of shoddy work and the contract was accordingly terminated. The first defendant through the Ministry paid for the materials imported by the plaintiff but declined to pay for the works done because there was no contract between them and the plaintiff. The plaintiff sued for the recovery of UGX 264,904,018. The issue before the court was whether the plaintiff had a cause of action against the first defendant. The court cited the case of *Auto Garage & Others v. Motokov (No. 3)*,[648] where it was held that existence of a cause of action depends on whether the plaintiff enjoyed a right; the right was violated; and the defendant was liable for the violation. In dismissing the suit, the court held that there was no cause of action since the plaintiff did not enjoy any right: it was not privy to the contract between the first and second defendants.

421. Thus, under Ugandan law, the legal position is that a subcontractor cannot successfully sue the employer unless it can for example be shown that there was an express term to that effect, or there was a collateral contract, or equitable assignment of rights, or a statutory exception as illustrated above.

§4. *Actio Pauliana*

422. *Action pauliana* is a remedy where a person entitled to a debt arising under a contract requests that an act by which his or her debtor has transferred property or money to a third party be declared ineffective. However, this remedy, which is recognized in civil law jurisdictions, such as Burundi and Democratic Republic of Congo, is unknown in the law of contracts of Uganda.

647. HCT-00-CC-CS-0318 of 2004.
648. [1971] E.A. 514.

Chapter 5. Termination of the Contract

§1. Performance and Breach

I. Performance

423. The general rule in relation to performance is that it must be carried out strictly in accordance with the terms of the contract: the performance must be precise and exact.[649] The Act provides that '[t]he parties to a contract shall perform or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act or any other law'.[650] For example, if Mohamed contracts to sell to Kenneth 100 bags of white beans, and delivers 80 bags of white beans and 20 bags of brown beans, then Kenneth may allege that the contract has not been duly performed and reject the goods.

424. In *Re Moore & Co v. Landauer & Co*,[651] there was a contract for the sale of tins of canned fruit which were to be packed in cases of thirty tins. On delivery, it was discovered that a number of cases contained only twenty-four tins. The court held that the defendants had a right to reject the whole consignment albeit the total number of tins delivered was correct.

425. In *Arcos Ltd v. EA Ronaasen & Son*,[652] there was a contract for the supply of wooden staves to be used in barrel making, described in the contract as being half-an-inch thick. At the time of delivery, the price of timber had dropped, and this meant that it was in the interests of the purchaser to be able to reject the cargo, since he could renegotiate the contract at a lower price or go elsewhere for the timber. When the timber was measured, it was found that most of it was 9/16 of an inch thick. Although this difference would not have had any effect on the usefulness of the timber, the court held that the purchaser was entitled to reject the cargo.

426. The Sale of Goods and Supply of Services Act[653] also provides that where the seller delivers a wrong quantity of goods, the purchaser may reject the goods but if he or she accepts the quantity delivered, he or she must pay for the goods at the contract rate.[654]

427. The general rule that performance should be precise and exact is so strict that a party who has only partially performed his or her obligations cannot recover anything for the work he or she has done. The effect of this strict rule is unjustly to enrich the party who has taken advantage of the partial performance. In *Cutter v.*

649. *See, for example*, *Osman v. Mulangwa* [1995-1998] 2 E.A. 275.
650. Section 33(1).
651. [1921] 2 K.B. 519.
652. [1933] A.C. 470.
653. Cap. 82.
654. On delivery of wrong quantity or description, *see* s. 37(1)–(7).

Powell,[655] there was a contract by a seaman to serve on a ship sailing from Jamaica to Liverpool. He was to be paid 30 guineas if he did his duty up to Liverpool. However, he died at sea before reaching Liverpool. The defendants refused to pay for the work completed before his death and were sued by the deceased's widow for a portion of the agreed sum. It was held that her action would fail since the terms of the contract meant that he would be paid only if he sailed the ship to Liverpool.

428. It can be seen that strict performance rule is manifestly harsh and unjust especially when a party is prevented from performing his or her obligations by circumstances beyond his or her control. Consequently, over the years, the courts have developed several rules to mitigate the effects of the rule.

429. In the first instance, there is the substantial performance. The doctrine of substantial performance arises where a person performs his or her side of the bargain but there are minor defects in the performance of the contract. For example, Charles Co. Ltd, a company dealing in the business of real estate and construction, agreed to erect a two-storey house for Jennifer at UGX 500 million. Jennifer paid a deposit of UGX 300,000,000. The house was supposed to be completed one year from the date of the agreement. The company constructed the house and remained with only painting, which required about UGX 40,000,000 to complete. Nine months into the construction, the company experienced financial problems. When the managing director wrote to Jennifer requesting for the balance, she refused to pay, arguing that the company had breached the contract by failing to complete the house. Basing on the strict performance rule, Charles Co. Ltd would not be entitled to any payment. However, under the substantial performance rule, the company would be paid for the substantial work done on the project.

430. In *Hoenig v. Issacs*,[656] there was a contract by the plaintiff to decorate and furnish the defendant's flat for GBP 750. The defendant alleged that the workmanship was poor and defective but paid GBP 400. The plaintiff sued for the balance. The court found that there were defects in the work, but these could be cured for GBP 55. The court awarded the plaintiff the full amount of the contract less the cost of putting right the defects plus the amount already paid. In *Marshides Mehta & Co. Ltd v. Baron Verhegen*,[657] a builder erected a house, and the price was to be paid in instalments. On completion, the client withheld the balance on grounds that there were some structural defects. Relying on the cases of *Hoenig v. Isaacs* and *Darkin v. Lee*, the Court of Appeal allowed the builder's claim that he had substantially completed the contract.

431. Second, there is partial performance. Partial performance arises where a person only partially performs his or her side of the contract but the other party, rather than rejecting the work, decides to accept what has actually been done. In

655. (1795) 6 Term. Rep. 320.
656. [1952] 2 All ER 176. *See also Mondel v. Steel* (1841) 8 M. & W. 858; *Darkin v. Lee* [1916] 1 K.B. 566.
657. 21 E.A.C.A. 153.

such case, if the promisee accepts the partial work done, he or she will be obliged to pay for the work on a *quantum meruit* basis. The Latin principle of *quantum meruit*, means 'as much as deserved' or 'what one has earned'. In contracts law, it is aimed at preventing unjust enrichment, and loosely translated, means payment for actual or reasonable services rendered. However, the promisee has complete discretion as to whether to accept the partial performance or not.

432. In *Sumpter v. Hedges*,[658] the plaintiff, who had agreed to erect upon the defendant's land two houses and stables for GBP 565, did part of the work worth GBP 333 and then abandoned the contract. The defendant himself completed the buildings. The court held that the plaintiff could not recover for the value of the work done.

433. Third, where there is a divisible contract. The general rule that performance must be precise and exact does not apply to divisible contracts. Richards defines a divisible contract as 'a contract in which partial performance attracts an obligation to provide payment of part of the consideration'.[659] For example, X agrees to supply 100 tonnes of maize to Y in ten instalments of 10 tonnes each. It is agreed that X would be paid for each tonne delivered. X delivers only two instalments but becomes broke. Under the notion of indivisible contract, Y will be obliged to pay X the moneys owed under the contract, that is, for the two instalments.

434. In *Richie v. Atkinson*,[660] a ship owner had agreed to transport a cargo at a given price per ton. Although he carried less than agreed, it was held that he was entitled to claim for what he had carried, at the agreed rate per ton, subject to the other party's right to sue him for not carrying the overall amount agreed upon.

435. Fourth, prevention of completion by one party. This arises where a party to a contract performs part of the work that he or she has undertaken and is prevented from completing the work by the fault or refusal of the other party. The Contracts Act provides that '[w]hen a contract contains reciprocal promises and one party to the contract prevents the other party from performing his or her promise, the contract shall become voidable at the option of the party who is prevented from performing his or her promise'.[661] The Contracts Act further provides that the aggrieved party 'is entitled to compensation from the other party for any loss which he or she sustains'.[662] Thus, the innocent party can sue for damages for breach of contract or may claim on a *quantum meruit* basis.[663] The innocent party may also not be liable where the other party neglects or refuses him or her reasonable facilities to perform.[664]

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658. [1898] 1 Q.B. 673. *See also Godom Builders and Contractors Ltd v. Departed Asian Property Custodian Board* H.C.C.S. No. 681 of 1994.
659. P. Richards, *Law of Contract* 291 (Pearson Education Ltd 2002).
660. (1808) 10 East 295.
661. Section 45(1).
662. Section 45(2).
663. *See Apple v. Myers* (1867) L.R. 2 C.P. 651; *Planche v. Colburn* (1831) 1 Q.B. 673.
664. Section 56.

436. Fifth, there is tender of performance. This is an offer by a person who has bound him or herself to fulfil a contract to carry out his or her obligations. To offer a tender for performance may in certain circumstances be regarded as equivalent to actual performance. It is certainly wrong for the promisee to avoid a contract for non-performance where he or she has refused to accept performance. The Contracts Act provides that '[w]here a party to a contract refuses or disables himself or herself from performing a promise in its entirety, the promisee may put an end to the contract unless he or she signifies by words or conduct, to its continuance'.[665] Thus, where a party is willing to perform and tries to tender performance, but the other party does not accept the performance, then the party seeking to tender performance is discharged from the contract and the non-accepting party is liable in damages for non-acceptance.[666]

437. The Sale of Goods and Supply of Services Act, 2017, also provides that '[i]t is the duty of the seller to deliver the goods, and for the buyer to accept and pay for them, in accordance with the terms of the contract of sale'.[667] Thus, if the seller has promised to deliver goods to the buyer and fulfilled the promise, but the buyer refused to accept delivery, the seller may sue for breach of contract. However, the seller's tender of performance must conform to the rules of delivery,[668] especially the requirement that 'tender of delivery may be treated as ineffectual unless made at a reasonable hour'[669] and '[w]hat is a reasonable hour is a question of fact'.[670] The buyer must also have a reasonable opportunity to see that what is delivered is what the seller was bound to deliver in terms of quality, description, fitness for purpose, and quantity.[671]

438. The subject of performance raises a question: what is the time and place of performance? At common law, time was regarded as being of the essence of a contract, unless agreed otherwise by the parties. Equity, on the other hand, did not regard time as of the essence and would apply equitable remedies to the contract even where there was failure to comply with the time fixed for completion in the contract. However, equity regarded time to be the essence of the contract where the parties expressly stipulated that conditions as to time had to be complied with or the nature of the subject matter of the contract or the surrounding circumstances showed that time should be considered to be the essence.[672] Where time is of the essence of the contract, any delay will amount to repudiation or avoidance of the contract.[673]

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665. Section 35.
666. *Startup v. Macdonald* (1843) 6 Mann & G. 593.
667. Section 34(1).
668. Section 36.
669. Section 36(6).
670. *Ibid.*
671. Sections 14, 15 and 37.
672. *Halsbury's Laws of England* para. 481 (94th ed.).
673. *See Union Eagle Ltd v. Golden Achievement Ltd* [1997] 2 All ER 215.

439. In *Osman v. Haji Haruna Mulangwa*,[674] the Supreme Court held that performance must be completed in accordance with the date agreed upon in the contract.

440. In *Aida Nunes v. John Mbiyo Njonjo & Another*,[675] it was held that when time has not been made the essence of the contract, it is clear that in contracts for the sale of land and the grant of leases, one of the parties cannot avoid the contract on the ground of unreasonable delay by the other until notice has been served making time of the essence.

441. Under the Sale of Goods and Supply of Services Act, time is not deemed to be the essence of the contract of sale of supply of services, unless a different intention appears in the contract.[676] According to this Act, '[w]hether any other stipulation as to time is of the essence of the contract depends on the terms of the contract'.[677]

442. The Contracts Act also does not regard time as the essence of the contract unless the parties agreed that time shall be of essence. According to the Act, 'the performance of a promise may be made in any manner and at any time which a promise prescribes or sanctions'[678] and determination of what is a proper time or place is a question of fact.[679] Where time is not specified, the promise shall be performed within a reasonable time.[680] The promise may be performed during hours of business of the agreed day at the agreed place.[681] Where time is of essence and a party does not perform within the agreed time, the other party may avoid or repudiate the contract and or claim damages.[682] However, the party may extend the time of performance of the contract.[683]

II. Breach

443. A contract may also be terminated by breach. Where a party fails to perform his or her side of the contract, he or she is said to be in breach of contract.[684] In *Uganda Building Services v. Yafesi Muzira t/a Quickest Builders*,[685] it was held that a breach of contract occurs when a party fails to fulfil the obligations imposed by the terms of the contract. The innocent party is entitled to a remedy which will

674. S.C.C.A. No. 38 of 1995; [1995-1998] 2 E.A. 275.
675. [1962] E.A. 88.
676. Section 11(1).
677. Section 11(2).
678. Section 42(5).
679. Section 42(6).
680. Section 42(1).
681. Section 42(2)–(4).
682. Section 47(1) and (2).
683. Section 52(b).
684. *See Kwalnet Technology Ltd v. Plessy Uganda Ltd* H.C.C.S. No. 634 of 2013.
685. H.C.C.S. No. 154 of 2005.

depend on the type of breach the other party has committed. However, a breach of contract will always give rise to a claim for damages regardless of the nature of the breach.

444. Termination of the contract by breach may take two forms: repudiation and fundamental breach. According to Furmston, repudiation 'occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due in future'.[686] Repudiation may be express or implied. An example of express repudiation is *Hochster v. De La Tour*,[687] where the defendant entered into a contract in April to employ the plaintiff in June as a courier. In May, he wrote stating that he no longer required the plaintiff's services. The plaintiff sued for damages before 1 June and succeeded. The court held that he was entitled to choose to treat the contract as discharged immediately and sue for damages even though the date of performance had not arisen. An example of implied repudiation is *Frost v. Knight*,[688] where the defendant agreed to marry the plaintiff upon the death of his father but broke off the engagement during the latter's life time. The plaintiff sued for damages and succeeded.

445. In *Sihra Singh Santokh v. Faulu Uganda Ltd*,[689] the plaintiff and the defendant executed a tenancy agreement in respect of a portion of the plaintiff's property on 31 March 2000. The tenancy agreement was for a period of seven years commencing on 1 May 2000. In 2003, the plaintiff commenced construction works on a piece of land adjacent to the suit premises. Despite a verbal complaint from the defendant about noise and dust emanating from the construction site, the work continued. On 30 December 2003, the defendant gave two months' notice to the plaintiff that it intended to terminate the tenancy agreement and subsequently left the premises. The plaintiff contended that in doing so, the defendant breached key terms of the tenancy agreement, that is, six months' notice, payment of rental arrears due till end of the said notice period and returning the premises in an appropriate state of repair. The defendant averred that by the time it left the premises, the tenancy agreement stood breached in so far as the plaintiff had reneged on his obligation to give the defendant quiet possession of the premises. The issue before the court was whether there was a breach of the tenancy agreement, and if so by who and what remedies were available. It was held that the plaintiff had breached the tenancy agreement. Monica Mugenyi J stated:

> The question is whether the breach complained of was sufficiently serious to justify rescission of the tenancy agreement, or, stated differently, whether it constituted breach of a condition not a mere warranty. Breach of condition would entitle the wronged party to rescind [repudiate] the contract, as well as claim damages for any loss s/he has suffered, whereas a breach of warranty would only entitle him or her to damages. The determination as to whether a

686. Furmston, *supra*, p. 568.
687. (1853) 2 E. & B. 678.
688. (1872) L.R. 7 Exch. 111.
689. H.C.C.S. No. 517 of 2004.

> contractual term is a condition or warranty depends on the intention of the parties as deduced from the construction of the contract. Where the contract contains no indication on its face on the status of the terms, the trial court must review the contract within the context of its extrinsic circumstances in order to determine the intention of the parties. Important factors to be taken into consideration include the extent to which the performance of the term under scrutiny would be likely to affect the substance and purpose that the contract is intended to carry out.[690]

446. In *Prabhulal v. Sayani Investments Ltd*,[691] the appellant agreed to lease from the respondent certain shops which were in the course of construction, and paid three months' advance rent. The shops were not completed. The appellant withdrew from the agreement and demanded a refund of the advance rent. The respondent argued that the appellant was in breach of the agreement. The court rejected this argument and held that on withdrawal from a wholly executory contract, the appellant was entitled to a refund of the advance rent.

447. Repudiation of obligations that are not yet ripe for performance is called an anticipatory breach.[692] The doctrine of anticipatory breach was first clearly laid down in *Hochster v. De La Tour*,[693] where a traveling courier sued his employer who wrote before the time for performance arrived that he would not require his services. The courier sued for damages. It was held that a party to an executory agreement may, before the time of executing it, break the agreement either by disabling himself from fulfilling it or by renouncing the contract, and that an action will lie for such breach before the time for fulfilling of the agreement.

448. The innocent party must prove that the other party has made his or her intention clear that he or she no longer intends to perform his or her side of the bargain.[694] The intention can be discerned from the nature of the contract, the circumstances of the case and the motives that prompted the breach. In *Khatijabai Jiwa Hasham v. Zeab d/o Chandu Nansi*,[695] the appellant agreed to sell certain premises to the respondent. The contract provided for completion of the transaction six months after the date of the contract. However, the appellant repudiated the contract before the contract had expired. It was held that the repudiation of the contract by one party, before the time of performance has arrived, may not be an actual breach of contract but the other party may, if he thinks fit, treat it as an immediate breach of the contract giving him the right to bring an action for damages. Further, it was held that where the injured party sues for damages, he must treat the contract as having been brought to an end.

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690. *Ibid.*
691. [1975] E.A. 205.
692. *See Khatijabai Jiwa Hasham v. Zeab d/o Chandu Nansi* [1957] E.A. 38.
693. (1853) 2 E. & B. 678.
694. *See Freeth v. Barr* (1874) L.R. 9 C.P. 208; *Mersey Steel and Iron Co. v. Naylor Benzon & Co* (1884) 9 App. Cas. 434.
695. [1957] E.A. 38.

449. The second form of breach of contract by which a party may be discharged from further liability is where the other party commits a fundamental breach. A fundamental breach is a breach of the primary obligation of the contract: it goes to the root of the contract. Whether the term breached is fundamental depends on the construction of the contract in question. The court looks at the intention of the parties and asks: Did the parties, at the time of the contract, regard the term as major or minor?[696]

450. The question is: What is the legal effect of breach? The innocent party may decide to affirm the contract, that is, treat it as if it is still in force. He or she, with full knowledge of the facts constituting the breach, makes it clear by words or conduct that he or she refuses to accept the breach as a discharge of the contract, and therefore the contract remains in force. Thus, where under a contract of sale of goods, the seller of goods refuses to treat a breach of a fundamental term as discharging the contract, he or she remains liable to deliver the goods in accordance with the contract, while the buyer remains liable to accept delivery and pay for the goods. Both parties retain their rights to sue for damages for past and future breaches.[697] What amounts to affirmation of the contract depends on the type of contract in question and the ground on which repudiation or termination is sought.

451. The innocent party may accept the repudiation as discharging the contract. In such a situation, all the obligations of the parties under the contract come to an end, except that the guilty party has to pay damages as a matter of law.[698] The innocent party who decides to accept the repudiation is entitled to recover for the loss of the benefit that the performance of the contract would have brought.

452. The decision to repudiate and treat the contract as discharged should not be taken lightly. In order to treat the contract as discharged, there should be a breach of a fundamental term. For example, in *Media Airtime Ltd v. Uganda Broadcasting Corporation (UBC)*,[699] the plaintiff entered into a sales marketing and public relations agreement with the defendant in 2006 in respect of the FIFA World Cup. The plaintiff contended that under the agreement, it was to work exclusively for the defendant with regard to all commercial activities and by terminating the agreement before the three-year agreed period had lapsed, the defendant committed a breach of contract. The plaintiff alleged that the defendant had breached an auxiliary written and oral agreement between the parties regarding broadcast rights and marketing and production obligations related to the World Cup. The defendant denied the claim and argued that since the plaintiff had failed to perform its obligations under the contract, it had a right to terminate the contract without notice.

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696. *See Media Airtime Ltd v. Uganda Broadcasting Corporation (UBC),* H.C.C.S. No. 752 of 2008; *Bunge Corporation v. Tradax Export SA* [1981] 2 All ER 523.
697. *See Denmark Productions Ltd v. Boscobel Productions Ltd* [1969] 1 Q.B. 699; *Harbutt's Palasticine Co. Ltd v. Wayne Tank and Pump Co. Ltd* [1970] 1 Q.B. 447; *Fercometal SARL v. Mediterranean Shipping Co. SA, The Simona* [1989] A.C. 788; *Avery v. Bowden* (1855) 5 E. & B. 714.
698. Section 61(1). *See also Moschi v. Lep Air Services Ltd* [1973] A.C. 331.
699. H.C.C.S. No. 752 of 2008.

453. The court held in favour of the defendant and stated that there are two alternative tests for determining what amounts to a fundamental breach. First, the court looked at the importance the parties seem to have attached to the term which has been broken or to the seriousness of the consequences that have resulted from the breach. The court asked: did the parties regard the promise which has been breached of major or minor importance? Second, the court may look at the seriousness of the consequences that have resulted from the breach. The court found that, in view of the terms of the contract, accounting for the sales proceeds and commission by the plaintiff as well as paying over the balance to the defendant were the most important terms in the entire contract. It was held that by failing to account and pay over the proceeds for the World Cup season as agreed in the final contract, the plaintiff had breached a fundamental term of the contract and the defendant was entitled to treat the contract as discharged by breach and terminate without notice.

§2. Impossibility, Frustration and Hardship: 'The Unforeseen'

I. Impossibility

454. A contract should be capable of performance since the law does not compel a person to do an impossible act. The Contracts Act provides that '[a]n agreement to do an act which is impossible to perform is void'.[700] The Act further provides that '[a] contract becomes void, where the contract is to do an act which, after the contract is made, becomes impossible or unlawful or which by reason of an event which the promisor could not prevent, becomes impossible or unlawful'.[701] An act is impossible of performance 'if in law or the course of nature, no person can do or perform it'.[702]

455. The above provisions are similar to those of the 1872 Indian Contract Act,[703] which gives a number of illustrations of impossible acts. For example, where A contracts with B to discover treasure by magic, such an agreement is void. Another example is where A contracts to take in cargo for B at a foreign port. A's government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared. Another example is where A contracts to act at a theatre for six months in a consideration of a sum paid in advance by B. On several occasions, A is too ill to act. The contract to act on these occasions becomes void. Another illustration is where A agrees to marry B, being already married to C and being forbidden by the law to which he is subject to practice polygamy. Such an agreement is void and A must compensate B for the loss caused to her by the non-performance of the promise.

700. Section 25(1).
701. Section 25(2).
702. Section 25(4).
703. Section 56.

456. According to the Contracts Act, a party who receives an advantage under a void contract must restore it or pay compensation for it to the party from whom he or she received the advantage.[704] However, under certain circumstances, the other party may be allowed to retain the whole or any part of the advantage received by him or her,[705] or discharge him or her from making any compensation for any expenses incurred.

II. Frustration and Hardship

457. A party may fail to perform a contract due to frustration. The general principle is that parties must strictly comply with the terms of the contract. However, a party may be prevented from completing his or her side of the bargain due to some unforeseen circumstance, event or hardship that is beyond his or her control. In such a situation, the law enables the promisor to plead frustration, which basically means that the contract, though entered into by the parties, has subsequently become impossible to perform.

458. Frustration should be distinguished from common mistake. Whereas in common mistake, there is an initial impossibility to perform, with frustration, the impossibility to perform is subsequent. For example, Jovia agrees to sell a car to Tom at UGX 10 million. Unknown to both Jovia and Tom, the car was destroyed by fire a day earlier. In such a scenario, there is a common mistake: performance is impossible from the beginning since the subject matter – the car – was non-existent at the time of entering into the contract. However, assuming the car was destroyed a day after entering into the contract, there is frustration and performance has subsequently become impossible.

459. In *Monday Eliab v. Attorney General*,[706] it was held that the burden of proving frustration is on the party alleging it.

460. In *D.S.S Motors Ltd v. Afri Tours and Travel Ltd & Another*,[707] the plaintiff's claim against the defendant was for damages for breach of contract and negligence and costs of the suit. The parties entered into a hire purchase agreement on 26 July 2002 where the defendant hired the plaintiff's vehicle on a self-drive basis at UGX 100,000 per day for three days. It was not returned within the hire period. The vehicle was involved in an accident under the control of a third party as it was being returned to the plaintiff. The defendant pleaded frustration. It was held that under the doctrine of frustration, a contract may be discharged if, after its formation, events occurred making its performance impossible, illegal or radically different from that which was contemplated at the time it was entered into. However, not all supervening events will operate to discharge a contract. That in order to frustrate

704. Section 54(1).
705. Section 54(2)(a).
706. S.C.C.A. No. 16 of 2010. *See also Howard & Co. Africa Ltd v. Barton* [1964] E.A. 540.
707. [2006] 1 U.L.R. 556.

a contract, there must be something more than inconvenience or hardship. Where one party has failed to exercise reasonable care in implementing a contract, he or she cannot plead frustration.

461. During the nineteenth century in England, when the principles of freedom of contract and equal bargaining power held sway, the position was that once the parties had agreed to their various obligations and the contract was valid, the courts were reluctant to intervene in the contract. For example, in *Paradine v. Jane*,[708] the defendant had leased a farm from the plaintiff but was unable to pay rent, because the farm had been invaded and occupied by a 'hostile army' making it difficult for him to make profits. The court held that supervening events that were beyond the control of either party had no effect on the obligations of the parties to perform their side of the contract. That since the defendant had agreed to pay and had not provided against such eventualities in the agreement, then he should bear the loss. However, once the courts realized that failure to intervene would produce serious consequences, they began to imply terms in the contract under certain circumstances thus allowing frustration of the contract as illustrated below.

462. One of the circumstances in which the doctrine of frustration applies is where the subject matter of the contract is destroyed. In *Taylor v. Caldwell*,[709] the defendant agreed to let out a music hall to the plaintiff. After the contract was made, but before the day of the concert, a fire broke out, completely destroying the music hall. The plaintiffs had made extensive arrangements with regard to the productions they intended to perform. The loss of the music hall meant that their concerts had to be cancelled, resulting in substantial financial loss to the plaintiffs. The contract contained no express provisions dealing with this eventuality. The plaintiffs sued for non-performance of the contract in order to recover their losses. The defendants pleaded the destruction of the music hall through no fault of their own as a defence. The court held that the contract was frustrated.

463. The case of *Taylor v. Caldwell* above was applied in *James Mundele Sunday v. Pearl of Africa Tours and Travel*,[710] where the plaintiff, the owner of a motor vehicle, hired it to the defendant on self-drive arrangement at UGX 100,000 per day. The plaintiff alleged that due to the negligence of the defendant's agents or servants, the vehicle broke down on its return from Murchison Falls National Park. Justice Madrama held that the contract was frustrated and stated:

> It was in contemplation of the parties that the vehicle hired by the defendant would be capable of doing its work of being driven from place to place. The essence of the contract was that the vehicle would be used by the defendant to convey persons in it. When the vehicle broke down, the defendant could not use it for the purpose for which it had been hired. In absence of negligence on the part of the defendant's servants in handling the vehicle and in the absence

708. (1647) Aleyn 26.
709. (1863) 3 B. & S. 826.
710. H.C.C.S. No. 089 of 2011.

> of evidence that the vehicle was inherently defective at the time it was hired, the only hard fact is that the vehicle broke down and the defendant managed to have it conveyed back to a garage in Kampala. The vehicle became a liability and not an asset. There is no evidence that the mechanical problem of the magnitude of the vehicle incurred was supposed to be rectified by the defendant under the hire arrangement. Simply put, the purpose for which the vehicle had been hired was frustrated when it broke down. The vehicle was no longer of any use to the defendant and the contract of hire was frustrated.[711]

464. Regarding the effect of destruction of goods on the contract, the Sale of Goods and Supply of Services Act provides that '[w]here there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is void'.[712]

465. Death of an individual on whom the performance of the contract depends would also frustrate the contract.

466. Another circumstance that may lead to frustration of the contract is unavailability of the subject matter. Where the subject matter, though not destroyed, ceases to be available for the purposes of the contract, the doctrine of frustration may apply. A good example is a contract requiring personal performance. For instance, Bebe Cool, a popular musician in Kampala, agreed to perform at Hotel Africana every Thursday. A week before the actual performance, he became ill and was unavailable to perform. Was the contract frustrated? This depends, to a large extent, on the duration of the illness. If the illness is for a short time, for example, a week, the court may hold that the contract still subsists. However, if the illness persists for several weeks, the contract may be frustrated due to impossibility to perform.[713]

467. The courts construe the contract in light of its nature and circumstances before determining the question of frustration. In *Condor v. The Barron Knights Ltd*,[714] a member of a pop group agreed to work each night of the week, should the work be available. He fell ill and was advised by his doctor to work only four nights a week. He ignored this advice since he considered himself sufficiently well to perform the contract, and he did so. He was dismissed and was replaced by another musician. He brought a claim for wrongful dismissal. The court held that his action would fail because his medical condition made it impossible for him to perform his contractual obligations and the contract was frustrated.

468. Government intervention or supervening illegality may also frustrate a contract. Once a contract has been entered into, a party may be prevented from performing his or her obligations by government rules, regulations or enactments. The performance of such a contract is rendered illegal. For example, Musa agreed to

711. *Ibid.*, p. 10.
712. Section 8.
713. *See* s. 25(2) of the Act.
714. [1966] 1 W.L.R. 87.

supply coffee to Kamau in Nairobi, Kenya. However, before the coffee was delivered, the Kenyan government passes a law banning the importation of coffee because of the outbreak of coffee wilt disease in Uganda. In such a scenario, the contract becomes frustrated because of the Kenyan government's intervention, which had subsequently made performance of the contract illegal.[715] The contract is terminated as to the future if supervening legislation prohibits the importation of such goods.[716] In any case, a court of law cannot compel a person to perform an illegal act.

469. In *Metropolitan Water Board v. Dick Ken & Co Ltd*,[717] the respondents agreed with the appellants to construct a reservoir to be completed within six months. But by a notice issued under the Defence of the Realm Act, the respondents were required to lease work on their contract, and they stopped the work accordingly. They claimed that the effect of the notice was to put an end to the contract. The House of Lords held that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off and that the contract was completely discharged.

470. Whether a contract is frustrated due to government intervention depends on the facts of each case. For example, in *Bank of Uganda v. Banco Arabe Espanol*,[718] in November 1987, the Uganda Government borrowed USD 1,000,000 from the respondent, a Spanish Bank, according to the terms and conditions set out in the loan agreement. The appellant, Bank of Uganda, guaranteed repayment of the loan, and a representative of the Bank signed the agreement. The Uganda Government defaulted on repayment of the loan whereupon the respondent made demands to the appellant to pay the loan as guarantor. When no payment was forthcoming, the respondent sued the appellant as guarantor. The appellant denied liability and argued that the loan agreement was unenforceable against it as it was not executed under seal and that the contract had been frustrated by Uganda Government's policy of liberalization of coffee trade and dealing in foreign currency resulting in failure to pay the loan. The trial judge rejected the defence of frustration and held that the appellant was liable for the debt under the agreement as guarantor. The appellant appealed to the Court of Appeal which upheld the decision of the High Court. The appellant subsequently appealed to the Supreme Court, which upheld the decision of the lower courts and dismissed the appeal with costs.

471. Another example may be where the government interferes in the activities of one or both parties in time of war. The activities contemplated under the contract may be prohibited for an indefinite duration or the goods or materials necessary for performance of the contract may be stopped from entering the country or a building

715. *See Davis and Keating v. Jesse Bhaloo* (1868-1918) Z.L.R. 517; *Watson & Co. v. Kanji Shah* 23 E.A.C.A. 366.
716. *See Denny, Mott and Dickson Ltd v. James B. Fraser & Co. Ltd* [1944] A.C. 265.
717. [1918] A.C. 119.
718. S.C.C.A. No. 8 of 1998.

in which the contract is to be performed may be seized by the government. As pointed out above, whether government intervention amounts to frustration depends upon the actual circumstances of the case.

472. In *Shah v. Attorney General*,[719] the plaintiff, under an agreement dated 29 December 1965 made between him and the Kabaka's Government, undertook to introduce a financier to enter into a contract with the Buganda Government to finance development projects to the limit of GBP 300,000. The plaintiff was to be paid a fee of GBP 6,750 in two instalments. The plaintiff duly introduced the financiers in form of a company in which he was a shareholder. The first instalment was paid, and the agreement was duly signed on 20 January 1966. The second instalment was not paid. The agreement between the financier was never implemented because of the events of May 1966, which led to the abolition of the Kingdom of Buganda. The plaintiff sued the defendant for payment of the second instalment of the agreed fee. The defendants argued that the contract had been frustrated by the events of leading to the disappearance of the Kingdom of Buganda, and the fact that the projects referred to in the agreement were suited only to the needs of the defunct kingdom and that the defendant, the Government of Uganda had not succeeded to any liability on the contract. It was held that the agreement between the financier and the government may have been frustrated, but it did not follow that the plaintiff's agreement was also frustrated.

473. In *Kaira & Co. Ltd v. Dhanani*,[720] the buyers in Kenya contracted on 1 December 1966 to buy 50 tons of Uganda mixed beans from the sellers F.O.R. (free on rail) Kampala, delivered to be between February and March 1967. At the time of contracting, the export of beans from Uganda was prohibited except on issuance of a licence from the Minister of Commerce and Industry. On 2 March 1967, before delivery of the beans, the Ministry by letter cancelled all licences held by the sellers for the export of beans. The sellers on 10 March wrote to the buyers informing them that, due to the cancellation of the licence, they could not rail the contracted 50 tons of mixed beans and stated in the circumstances, they regarded the contract as cancelled. The buyers then cabled to the sellers asking them to deliver the contract goods to M/s Garden Fresh, Kampala, to whom the buyers stated they had sold the goods. The sellers refused to deliver the goods as requested, and the buyers sued for damages for breach of contract. The trial judge held that there was no frustration of the contract as the licence had not been legally cancelled and found in favour of the buyers. On appeal, it was held that the letter from the Ministry, although not signed by the Minister, validly cancelled the licence. That the sellers had not done everything they could to obtain a setting aside of the cancellation of the licence and had therefore failed to prove that the contract had been frustrated. That the cancellation of the contract by the sellers by letter of 10 March was a repudiation of performance of the contract and entitled the buyers, at that stage, to sue for damages for breach.

719. [1969] E.A. 261.
720. [1969] E.A. 392.

474. In *Tsakiroglou & Co. Ltd v. Noblee & Another*,[721] the appellants agreed to sell to the respondents 300 tons of Sudan groundnuts c.i.f. Hamburg. The usual and normal route at the date of the contract was via the Suez Canal. Shipment was to be in November/December 1956, but on 2 November the canal was closed to traffic due to the invasion of Egypt by Israel, and it was not reopened until the following April. The appellants refused to ship the goods via the Cape of Good Hope, since the obvious route would have been through the Suez Canal. The question to be decided by the court was whether shipment via the Cape of Good Hope would constitute a fundamental alteration in the contractual obligations of the sellers. In other words, would this mode of performance be radically different from what they had agreed to perform and thus frustrate the contract? The court held that the appellants were bound to ship the groundnuts by a reasonable and practical route. Though they might be put to greater expense and hardship by shipping the goods via the Cape of Good Hope, that did not render the contract fundamentally or radically different and thus there was no frustration of the contract. The contract had only become more expensive, but not impossible to perform.

475. In yet another case of *Victoria Industries Ltd v. Ramanbhai & Brothers Ltd*,[722] the appellant which carried on business in Mwanza, Tanzania (then Tanganyika) agreed to buy from the respondent, which carried on business in Uganda, 200 ton of Mengo maize. The contract provided that the price was 'F.O.R. Kampala or Jinja station'. The obvious route for transport of the maize was by rail to Port Bell, Uganda, and thereafter by steamer to Mwanza. The respondent company commenced loading maize at Jinja, but was obliged to unload as the railway stopped accepting maize from Tanganyika via Lake Victoria. During the stoppage, a little maize was transported by lake steamer to Mwanza on a quota basis. However, the Government of Uganda prohibited the export of maize to Tanganyika. The respondent company accordingly informed the appellant of the position and offered delivery at Jinja or alternately suggested that the contract be cancelled. After some correspondence, the respondent purported to cancel the contract and the appellant sued for damages for breach of contract.

476. The trial judge dismissed the suit on ground that the railway's refusal to accept the maize made it impossible for the respondent to book it 'F.O.R. Kampala or Jinja', and thus the contract was frustrated. On appeal, the appellant argued that the respondent could have purchased the documents of title to the maize in transit and thus would have been able to perform the contract. In any case, impossibility of performance had not been proved, since there were alternative routes. The court held that there were no practicable alternative routes for the transport of the maize to Mwanza and the contract was frustrated.

477. In another case of *Twentsche Overseas Trading Co. Ltd v. Uganda Sugar Factory Ltd*,[723] there was a contract for the supply of 'Krupp's' steel rails. The

721. [1962] A.C. 93. *See also Victoria Industries v. Ramanbhai Bros* [1961] E.A. 11.
722. [1961] E.A. 11.
723. 12 E.A.C.A. 1.

appellants claimed that the rails specified under the contract were to be manufactured by a German firm only and based on this to argue that they should not be blamed for failure to deliver the goods since to do so would have meant dealing with alien enemies due to the outbreak of the World War II. They argued that the performance of the contract became impossible and illegal. It was held that it was not open to the supplier to invoke the doctrine of frustration since there was nothing in the contract that required that the rails should be obtained only from Germany and that the reference to 'Krupps' did not indicate a source of supply but merely a specification of the rails. Given that there were many other sources of supply, the contract left the appellants with a free hand in the matter and having failed to deliver, they could not plead frustration.

478. In yet another case of *Cricklewood Property and Investment Trust Ltd v. Leighton's Investment Trust Ltd*,[724] a plot of land was let in 1936 to the lessees for ninety-nine years in order that they could build shops on the property. Before the lessees could begin construction, the war broke out and the government subsequently passed regulations restricting such development. The effect was that the lessees could not build the shops as they had agreed to do, and they thus claimed that the lease was frustrated. The House of Lords held that the doctrine of frustration did not apply.

479. The question is: Does *Cricklewood Property* case above imply that the doctrine of frustration does not apply to leases? Although Lords Simon and Wright stated that the doctrine could apply in a rare circumstance, for example, where the land is engulfed by sea, Lords Russell and Goddard were of the view that frustration could never apply. However, in *National Carriers Ltd v. Panalpina (Northern) Ltd*,[725] the House of Lords held that frustration could apply to leases especially where the object or purpose has become impossible because of events beyond the control of the parties. In this case, there was a ten-year lease over a warehouse. The local authority closed the only road leading to the warehouse for twenty months. This meant that the warehouse was useless to the tenants during that time. The tenants invoked the doctrine of frustration and argued that the closure of the road and its effect on the contemporary use of the property justified the application of the doctrine.

480. Another circumstance of frustration is the non-occurrence of an event, which is regarded as the basis of the contract. Does the non-occurrence render the object or purpose of the contract defeated and thus frustrated? Another important question is whether the specified event amounts to the object of the contract or it merely amounts to the motive for entering into the contract. The doctrine of frustration is applicable if the object which is the foundation of the contract is not obtainable. However, the motive of the parties does not give rise to frustration. Two

724. [1945] A.C. 221.
725. [1981] A.C. 675.

English cases of *Krell v. Henry*[726] and *Herne Bay Steamboat Co. v. Hutton*,[727] with almost similar facts, illustrate how the courts have inquired into these questions.

481. In *Krell v. Henry*, the plaintiff let a flat to the defendant for 26 and 27 June 1902 to use it in order to watch and celebrate the coronation procession of King Edward VII which would pass by the flat. This purpose was not mentioned in the contract. The defendant made a pre-payment of one-third of the rent. Due to the sudden illness of the King, the coronation procession was cancelled. The defendant refused to pay the balance of the rent owing. The court held that the plaintiff could not recover the balance since the contract had been frustrated by the cancellation of the procession. The court observed that the procession and the position of the flat formed the objective of the contract which was thus frustrated.

482. In *Herne Bay Steamboat* case, the defendant hired a motor launch for 28 and 29 June 1902 for the purpose of watching the coronation review of the fleet at Spithead and allowing the passengers themselves the opportunity of touring the fleet. Like in *Krell v. Henry*, the review was cancelled because of the King's illness, although the fleet remained at Spithead. The court held that the defendant was bound by the contract which had not been frustrated by the cancellation of the review. It was held that the review was not the object of the contract but merely the motive for the hiring of the motor launch on the specified dates. The decision of the court was based on two grounds. First, it was still possible for the tour of the fleet to take place. Second, since the defendant intended to charge the passengers for the trip, it was his venture and therefore he had to bear the risks of the venture.

III. Self-Induced Frustration

483. Self-induced frustration is not permitted by law. The courts will not readily infer frustration. A party seeking to invoke the doctrine must affirmatively prove the occurrence of the supervening event, which was unforeseen and beyond the control of the parties. Thus, if the event arises out of the actions of a party to the contract – that is, where it is self-induced – the doctrine cannot be relied upon.

484. In *Maritime National Fish Ltd. v. Ocean Trawlers Ltd*,[728] the appellants chartered a trawler from the respondents. The trawler was fitted with a type of net called an 'otter trawl' whose use, without a licence from the Canadian government, was illegal and both parties were aware of this fact. The appellants had four other trawlers all fitted with the same type of net. They applied for five licences but in fact were only awarded three. They had to indicate to which trawlers the licences applied. The appellants nominated three of their own trawlers, and then claimed that the charter of the trawler belonging to the respondents was discharged by frustration on the basis that no licence was forthcoming for that vessel. The court held that

726. [1903] 2 K.B. 740.
727. [1903] 2 K.B. 683.
728. [1935] A.C. 524. *See also Howard & Co. (Africa) Ltd. v. Burton* [1964] E.A. 540.

their claim would fail since they could have nominated the vessel in question to have one of the licences but had declined to do so. In rejecting their claim, the court observed that since the appellants had control of the supervening event, frustration could not be relied upon as discharging the contract.

IV. Where Frustration Is Explicitly Provided for in the Contract

485. There are instances where frustration is expressly provided for in the contract. Parties may explicitly provide for what is to happen should a particular supervening contingency or event occur in what are known as force majeure clauses. Force majeure refers to an event beyond the control of a party to a contract, which prevents him or her from complying with any of the obligations under the contract. Where the clause deals with the event that has occurred, then the courts will hold that the doctrine of frustration does not apply. However, the clause must be capable of dealing with any form of contingency that a party alleges to have prevented him or her from carrying out the obligation in question. Thus, whether a party can successfully invoke a force majeure clause is a question of construction. The court would ask: does the clause take account of the contingency or event that had occurred?[729]

V. Effect of Frustration

486. The effect of frustration at common law was that from the date of the supervening event, the parties were released from all future contractual obligations. But any obligations that had already arisen under the contract had to be performed. In *Chandler v. Webster*,[730] the defendant agreed to let a room to the plaintiff for GBP 141 for the purpose of viewing a coronation procession. The cost of hire was payable immediately but in fact the plaintiff only paid GBP 100 in advance. Before he paid the balance, the procession was cancelled, and the contract was frustrated as a result. It was held that the plaintiff could not recover the GBP 100, since there was no total failure of consideration. He had to pay the balance since the obligation to pay had already accrued prior to the supervening event.

487. The harsh consequences of the rule in *Chandler* were partially tackled by the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*,[731] where the appellants ordered machinery from the respondents for delivery to their factory in Poland and paid GBP 1,000 in advance by virtue of the terms of the contract. In 1939, Germany invaded Poland, and the contract became frustrated. The London agent for the appellants asked for the return of their GBP 1,000, but the respondent refused on grounds that a substantial amount of time had already

729. *See Jackson v. Union Marine Insurance Co. Ltd.* (1874) L.R. 10 C.P. 125.
730. [1904] 1 K.B. 493.
731. [1943] A.C. 32.

been expended on the order. The House of Lords overruled the decision in *Chandler* and held that there was a total failure of consideration: the appellants had not received anything under the contract they had bargained for and could thus recover the money they had paid. Where there is a total failure of consideration, the plaintiff can recover money had and received and nothing more.[732]

488. The *Fibrosa* case did not satisfactorily handle the burden of the effects of frustration, because it only addressed situations where there is a total failure of consideration. What about cases that involve partial failure of consideration? The continued unsatisfactory nature led to the enactment of the UK Law Reform (Frustrated Contracts) Act, 1943, which deals with the consequences of frustration and allows recovery of money paid[733] and financial readjustment where a valuable benefit is conferred.[734] Before the repeal of the Contracts Act,[735] the above 1943 Act was applicable in Uganda.

489. The Contracts Act provides that '[w]here a contract becomes impossible to perform or is frustrated and where a party cannot show that the other party assumed the risk of impossibility, the parties to the contract shall be discharged from the further performance of the contract'.[736] Thus, frustration discharges the parties from their obligations except where the other party assumed the risk of impossibility by, for example, expressly providing for it in the agreement under a force majeure clause.

490. The Contracts Act adopts the position of the UK Law Reform (Frustrated Contracts) Act, 1943[737] and provides that any sum of money paid shall be recoverable from the party as money received for his or her use,[738] and any sum payable shall cease to be payable.[739] A party may be allowed by the court to retain or recover expenses incurred before the time of discharge or for the purposes of the performance of the contract.[740] In estimating the amount of any expenses, the court shall have regard to all the circumstances of the case.[741] The expenses allowed by the court may include reasonable overhead expenses and those expenses 'in respect of any work or services performed personally by that party'.[742]

491. In determining the sums to be retained or recovered, the court will not take into account any sums that are payable to a party under a contract of insurance, unless there was an obligation to insure under the frustrated contract or by or under

732. *Ibid.*
733. Section 1(2).
734. Section 1(3).
735. Formerly Cap. 75 and later Cap. 73 following the realignment of laws of Uganda in 2000 and repealed by the Contracts Act, No. 7 of 2010 (s. 172).
736. Section 66(1).
737. Section 1(2).
738. Section 66(2).
739. *Ibid.*
740. Section 66(3).
741. *Ibid.*
742. Section 66(5).

any law.[743] The Contracts Act also adopts the position of the UK Law Reform (Frustrated Contracts) Act 1943 on obligations other than to pay money, that is, financial adjustment where a valuable benefit is conferred.[744] The relevant section of the Act provides as follows:

> Where a party to a contract has by reason of anything done by any other party to the contract or for the purpose of the performance of the contract, obtained a valuable benefit, other than a payment of money to which subsection (3) applies, before the time of discharge, the other party shall recover from the party a sum, if any, not exceeding the value of the benefit to the party obtaining it, as the court may consider just, having regard to all the circumstances of the case and in particular: (a) the amount of any expenses incurred before the time of discharge by the party who benefited for the purpose of the performance of the contract, including any sums payable by that party to any other party under the contract and retained or recoverable by that party under subsection (3); and (b) in relation to that benefit, the effect of the circumstances giving rise to the frustration of the contract.[745]

492. In *BP Exploration Co. (Libya) Ltd v. Hunt (No. 2)*,[746] Robert Goff J stated that section 1(3) of the Law Reform (Frustrated Contracts) Act, 1943, must be applied in two distinct stages: first, identification and valuation of the benefit and second, assessment of what sum – not exceeding the value of the benefit – it considers just to award to the party by whom the benefit has been conferred. In this case, there was a contract between BP and Hunt for the exploration and exploitation of an oil concession in Libya that was held by Hunt. Under the contract, BP was to get half share in the concession, but had to finance and conduct the exploration work. BP's expenses would be recoverable at a rate of three-eighths of Hunt's share should oil be found until 125% of their expenses had been recouped. A large oil field was discovered, and in 1967 it came on stream. In 1971, Libya expropriated Hunt's concession with the result that the contract between BP and Hunt became frustrated. By this time, BP had recovered only a proportion of their expenses and thus brought an action based on section 1(3) of the 1943 Act.

493. It was held that the sum assessed should not exceed that valuation placed on the valuable benefit, which should not be assessed based on what had been paid out by BP in the exploration work but on the benefit received by Hunt. Hunt's benefit amounted to the value by which his concession had been enhanced, but this had to be reduced by the diminution to the value of the concession caused by the expropriation. Thus, the valuable benefit obtained by Hunt amounted to the value of the oil he had received, plus the amount of compensation awarded to him by the Libyan Government for the expropriation. Given that half of this benefit was attributable to BP's efforts, the valuable benefit obtained by Hunt amounted to USD 85 million. In

743. Section 66(6).
744. Section 1(3).
745. Section 66(4).
746. [1983] 2 A.C. 352.

assessing what would be a just sum, Lord Goff decided that this should be calculated on the basis of what BP had actually spent on developing the concession, namely, USD 87 million, plus any sums paid to Hunt, that is, USD 10 million, less expenses actually recovered amounting to USD 62 million. Thus, the just sum was USD 35 million, which was recoverable in full, since it did not exceed the figure for the assessment of the valuable benefit.

§3. Discharge by Agreement

494. The general rule is expressed in the Latin maxim *eodem modo quo oritur, eodem modo dissolvitur*, which literally means that 'since contracts are created by agreement, they may be extinguished or dissolved by agreement'. Thus, a contract may be discharged by subsequent agreement when both parties agree to bring the contract to an end and release each other from their contractual obligations.

495. Discharge by agreement may be unilateral or bilateral. Unilateral discharge arises where one party has fully performed his or her obligations under the contract and the other is yet to do so. In such a situation, the first party agrees to release the other from any obligation that he or she has yet to perform. Bilateral discharge arises where both parties are yet to carry out their obligations, and this may be through accord and satisfaction, waiver and novation as explained hereunder.

496. For a contract to be discharged by agreement, there should be accord and satisfaction. Accord is the agreement: each party must agree to end the contract and the agreement must be freely given. The satisfaction is the consideration. Thus, both parties must provide consideration. In *British Russian Gazette Ltd v. Associated Newspapers Ltd*,[747] the court stated:

> Accord and satisfaction is the purchase of a release from an obligation, whether arising under a contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.[748]

497. If both parties have continuing obligations, then generally the consideration will be simply each of them giving up their rights under the contract. As illustrated in *Pinnel's* case and *Foakes v. Beer* above, the 'satisfaction' supplied by the parties must not be something less than what was required under the original contract and must amount to sufficient consideration. The party that has not performed his or her original obligation must offer new consideration to be released from the

747. [1933] 2 K.B. 616.
748. *Ibid.*, p. 620.

original contract and the other party accepts the new consideration. In *D & C Builders Ltd v. Rees*,[749] it was held that accord and satisfaction would defeat the principle in *Pinnel's* case. Lord Denning stated:

> In applying this principle [in *Pinnel's* case], however, we must note the qualification that the creditor is only barred from his legal rights when it would be inequitable for him to insist upon them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction and the debtor acts on that accord by paying the lesser sum and the creditor accepts, there it is inequitable for the creditor afterwards to insist on the balance, but he is not barred unless there has been truly an accord between them.[750]

498. In *E.A. Plans Ltd v. Bickford-Smith*,[751] costs of a civil suit were agreed between the plaintiff and the defendant at UGX 12,000. On the defendant's failure to pay, a notice was issued against him, which by error stated that the amount due was UGX 1,200. The defendants paid in full settlement of costs, and thereafter, refused to pay the difference. It was held that there had been no accord and satisfaction, since the error would be corrected. Nyamuchoncho J stated:

> It would be inequitable to allow the defendant to retain the balance since he fully understood that he was paying the full costs. His hands are not clean and cannot therefore seek an equitable remedy. In my opinion, there is no reason law or equity why the applicant cannot enforce the full amount due to him.[752]

499. In *Petro Uganda Ltd v. Mwesigwa*,[753] it was also held that the legal position as when a payment of a lower sum can suffice for the extinction of a higher debt can only be achieved by a process known as accord and satisfaction. That estoppel as an equitable remedy cannot discharge a party by allowing him or her to pay a lesser amount for a higher debt. There must be a fresh agreement discharging the old agreement called 'accord' and the performance of that agreement through fresh consideration is called 'satisfaction'.

500. Discharge by waiver arises where one party is prepared to waive or vary the terms of the original agreement. According to the Contracts Act, a right, duty or obligation that would arise under the contract may be varied by the express agreement of the parties.[754] In *Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory & Another*,[755] Kiryabwire J pointed out that 'waiver' in contract is

749. [1966] 2 K.B. 617.
750. *Ibid.*, p. 265.
751. [1974] E.A. 462.
752. *E.A. Plans Ltd* case, *supra*, p. 464.
753. [2009] 1 E.A. 374.
754. Section 67.
755. H.C.C.S. No. 819 of 2004. *See also Joel Kateregga & Another v. Uganda Post Ltd & Another* H.C.C.S. No. 20 of 2010; *Andes (ESA) Ltd v. Akong Wat Mulik Systems Ltd* H.C.C.S. No. 184 of 2008.

mostly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived.

501. In *Hard Fibres v. Tanganyika Electric Supply Co. Ltd*,[756] the defendant was licensed under the Electricity Ordinance to supply electricity. The supply was then cut off. The company was put into receivership, and the receiver on behalf of the company entered into a new agreement with the defendant for the supply of electricity, the cost of which was paid regularly. As the previous bill was not paid, the defendant threatened to cut off the supply again. The plaintiff applied for an injunction to refrain the defendant from so doing. In dismissing the suit, the court held that the defendant had not waived his rights by signing a new agreement with the receiver.

502. In *Charles Rickards Ltd v. Oppenheim*,[757] a chassis for a Rolls-Royce was ordered from the plaintiffs, who later also agreed to build a body for it in six to seven months. At the end of this period, it was still not ready. The defendant gave notice that if the car was not ready within four months, he would cancel the order. At the end of this period, the body was still not ready, and the order was cancelled. The court held that he was entitled to cancel the order since, even though he waived the stipulation as to the time of delivery, he had given reasonable notice of his intention to make time of the essence.

503. A contract may also be discharged by agreement through novation. Novation occurs where two contracting parties agree to substitute an existing party with a new one. The original party who is substituted by the new party gives up his rights against the other original party to the contract. However, both original contracting parties must agree to the novation. In this vein, the Contracts Act provides that where the parties to a contract agree to substitute the original contract with a new contract, the original contract need not be performed.[758]

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756. [1969] E.A. 619.
757. [1950] 1 All ER 420.
758. Section 51.

Chapter 6. Remedies

§1. General Provisions

504. Where there is a breach of contract, the aggrieved party may move court for a number of remedies, including damages, specific performance, injunction or restitution. These remedies are considered in detail below.

§2. Specific Performance and Injunctions Astreinte

I. Specific Performance

505. Damages may be adequate, for example, where the contract is for sale of goods which are easily procurable elsewhere. However, there are instances where damages may not be a suitable remedy for the plaintiff. For example, A agrees to sell to B the only vacant plot in Kololo, Kampala where B intends to erect a twenty-floor hotel. B pays 50% of the purchase price, but A refuses to transfer the land to B. B has asked various estate agents who have confirmed that no such land can be found in the most prime areas of Kampala. B insists that he does not want compensation, but A should transfer the land to him. In such a situation, the court may grant the equitable remedy of specific performance that would compel A to transfer the land to B.

506. Specific performance is an order of the court that compels a defendant to carry out his or her obligations in accordance with terms set out in the contract. Being an equitable remedy, specific performance is awarded at the discretion of the court. It cannot be granted if the plaintiff can be atoned in damages.[759]

507. Although a party to a contract of sale of goods usually claims damages for breach, specific performance may be awarded where the goods in question are unique. In respect of breach of contract of sale of specific goods, which are 'goods identified and agreed upon at the time a contract of sale is made',[760] the Sale of Goods and Supply of Services Act provides as follows:

> In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.[761]

759. *Kibona Enterprises v. Departed Asians Property Custodian Board & Another* H.C.C.S. No. 663 of 1996.
760. Section 1(1).
761. Section 63(1).

508. The judgment or decree as to specific performance may be unconditional or upon such terms as the court may consider just.[762] The application for specific performance may be made at any time before the delivery of judgment or decree. Although damages are an appropriate remedy in contracts to pay money, specific performance may be granted where the money is to be paid to a third party.[763]

509. Specific performance will not be awarded where its effect is to cause hardship amounting to injustice to either party or an interested third party.[764]

510. The plaintiff should apply for the remedy of specific performance within a reasonable time, that is, the delay should not be inordinate.[765]

II. Injunction

511. Another way in which a contract may be enforced is by use of an injunction, which may be prohibitory or mandatory in its application. A prohibitory injunction is an order to the defendant not to do something. In the law of contract, a prohibitory injunction is used to restrain a breach of a negative undertaking.[766] For example, the plaintiff may seek an injunction prohibiting the defendant from selling goods that he or she has agreed to buy. A mandatory injunction, which is uncommon, is restorative in nature, and directs the defendant to do a positive act, for example the demolition of a building.

512. In common law jurisdictions like Uganda, when court grants an injunction to an applicant and the respondent refuses to comply, the court may, issue an order of contempt of court. However, in most civil jurisdictions, courts do have contempt power. In civil law jurisdictions, such as Burundi and Democratic Republic of Congo, the court may issue an *astreinte*, which is a pecuniary penalty that accrues every day of non-compliance. For example, court may order X to do something or restrain from doing something under a penalty of UGX 200,000 of non-compliance. The *astreinte* is thus like a contempt power supposed to put pressure on the defendant to comply with court directions.

513. Like specific performance, an injunction is available at the discretion of the court. Being an equitable remedy, an injunction may not be granted where damages are an adequate remedy. The remedy cannot be granted if its effect is to cause hardship to the defendant. The plaintiff must also go to court with ‘clean hands’, that is, his or her claim must not be tainted with such factors as illegality or fraud or duress.

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762. Section 63(2).
763. *See, for example*, *Beswick v. Beswick* [1968] A.C. 58.
764. *See, for example*, *Patel v. Ali* [1984] Ch. 283.
765. *See Mzee bin Ali v. Allibhoy Nurbhoy* 1 K.L.R. 58.
766. *See, for example*, *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] A.C. 535.

514. In *Giella v. Cassman Brown & Co. Ltd*,[767] the court held that the court's discretion to grant an injunction will not be interfered unless it has not been exercised judiciously. An applicant must show a prima facie case with a probability of success and an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be atoned by damages. The court explained that a prima facie case includes, but is not limited to a 'genuine and arguable' case. That is, a case which, in the material facts presented, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. When the court is doubt, it will decide the application on a balance of probabilities.

§3. Termination

515. Termination or cancellation occurs where the contract is brought to an end. This may be through an action by the parties to the contract or through an act of law. Termination or cancellation ends the contract by destroying its force, validity or effectiveness. One of the ways of terminating the contract is through rescission, which is an equitable remedy that allows a party to terminate or cancel a contract. Rescission is basically a declaration of an intention by a party to a voidable contract that it is exercising the right to rescind or terminate the contract.

516. In *Nkemba Elizabeth v. Kabahenda*,[768] where the plaintiff informed the defendant that he would sell the suit land and refund her deposit from the time he sold the land, it was held that he had communicated his intention to rescind the contract.

517. In *Sihra Singh Santokh v. Faulu Uganda Ltd*,[769] it was held that where an aggrieved party elects to rescind the contract following a breach by the other party, all the obligations of the parties under the contract which have not yet been performed are terminated. Rescission requires that all parties give back any benefits they have received while the contract was in force and be returned to their original position as if the contract had never been formed.

518. Rescission may be initiated by one party or by mutual consent or ordered by the court. It may be awarded by the court in cases of mistake, fraud, misrepresentation, duress or coercion or undue influence.

519. Being an equitable remedy, rescission is discretionary. Rescission will not be exercised if it is not possible to restore both parties to their original position, or where one party has affirmed the contract, or where a third party has acquired rights

767. [1973] E.A. 358. *See also Commercial Properties Ltd & Another* [2009] 1 E.A. 106.
768. HCT-01-LD-CA-0024 of 2017.
769. H.C.C.S. No. 517 of 2004.

under the contract. A party seeking to exercise rescission must do so within a reasonable time.[770] In *Leaf v. International Galleries*,[771] Lord Denning held that the plaintiff had lost the right of rescission because of lapse of too much time between the making of the contract and the decision to rescind it.

§4. *Exceptio Non Adimpleti Contractus* (The Defence of Non-performance by the Other Party)

520. The *exceptio non adimpleti contractus* is a remedy or defence that may be raised in the case of a reciprocal contract. It allows a party to withhold performance of a reciprocal obligation if the other party did not make or tender performance.[772] In order for the remedy to be available, two essential requirements are critical. First, the two performances must be reciprocal to one another. Second, the other party must be obliged to perform first.[773] In respect of this remedy, the Contracts Act provides that, '[w]hen a contract contains reciprocal promises and one party to the contract prevents the other party from performing his or her promise, the contract shall become voidable at the option of the other party who is prevented from performing his or her promise'.[774] According to the Act, a party who sustains a loss as a result of non-performance of a reciprocal promise 'is entitled to compensation from the other party for any loss which he or she sustains'.[775]

§5. Faulty Behaviour of the Debtor

521. A debtor in Uganda can be held liable under contracts law for failure to pay a debt. However, the concept of 'faulty behaviour of the debtor' is unknown in Uganda's contracts law. It may be relevant under insolvency, which is governed by the Insolvency Act, 2011.

§6. Limitation of Actions

522. Technically, this is not a remedy but may be relied upon as a defence against the plaintiff's claim. Limitation of actions in Uganda is governed by the

770. *Francis Paul v. Namwandu Muteranwa*, Civil Appeal No. 20 of 2014 (arising from Civil Suit No. 71 of 2010).
771. [1950] 2 K.B. 86.
772. N. Tjakie, *The Principle of Reciprocity in Continuous Contracts Like Lease: What Is and Should Be the Role of the Exception Non Adimpleti Contractus (Defence of the Unfulfilled Contract*), 27(2) Stellenbosch L. Rev. 323–353, https://open.uct.ac.za/handle/11427/25073 (accessed 4 Jun. 2020).
773. D. Hutchinson & C.J. Pretorius, *The Law of Contract in South Africa* (2d ed. Oxford University Press 2012).
774. Section 45(1).
775. Section 45(2).

Limitation Act[776] and the Civil Procedure (Miscellaneous Provisions) Act.[777] According to the Limitation Act, no contractual claim can be brought after the expiry of six years,[778] except where the plaintiff can plead a disability.[779] The Civil Procedure and Limitation (Miscellaneous Provisions) Act provides that, '[n]o action founded on contract shall be brought against the government or local authority or scheduled corporation after the expiration of three years from the date on which the cause of action arose'.[780]

523. In *Miramago v. Attorney General*,[781] it was held that time begins to run as against the plaintiff from the time when the cause of action arose up the time when the suit is filed. When the defendant successfully pleads limitation of a contractual claim, the suit may be dismissed with costs.

§7. Damages and Exemption Clauses

I. Damages

524. The Contracts Act provides that '[w]here there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her'.[782] Thus, the purpose of an award of damages is to compensate the injured party for breach of contract. In *Robinson v. Harman*,[783] it was held that the basis of an award of damages is to place the injured party in the same position he or she would have been in had the contract been carried out, insofar as money is able to do this.

525. In *Gullabhai Ushillingi v. Kampala Pharmaceutical Ltd*,[784] the court stated that according to the principle of *restitutio integrum*, damages are intended to restore the wronged party into the position he would have been in if there had been no breach of contract. In *Ahmed Ibrahim v. Car and General Ltd*,[785] the court also stated that damages are aimed at compensation of the plaintiff in money terms for a loss or injury he or she has sustained at the instance of the defendant.

526. The court may award nominal damages or general and or special damages for breach of contract. Nominal damages, which are rare in contract law, are typically small amounts of money awarded to the plaintiff. Why should court award

776. Cap. 80.
777. Cap. 72.
778. Section 3(1)(a).
779. Section 21.
780. Section 3(2).
781. [1979] H.C.B. 24.
782. Section 61(1).
783. (1848) 1 Ex. 855. *See also Uganda Telecom Ltd. v. Tanzanite Corporation* C.A.C.A. No. 17 of 2004.
784. S.C.C.A. No. 6 of 1999.
785. S.C.C.A. No. 12 of 2002.

such damages? The court recognizes that the plaintiff did not suffer any real financial loss, or the economic harm cannot be calculated. Since damages cannot compensate him or her, nominal damages are awarded to show that he or she was right in the lawsuit. In *Waiglobe (U) Ltd v. Sai Beverages Ltd*,[786] Mubiru J stated that the function of nominal damages is to mark the vindication, where no real damage has been suffered, of a right which is held to be so important that its infringement attracts a remedy.

527. General and special damages reflect the financial loss, which should flow directly or naturally from the breach of contract. In *Musisi Edward v. Babihuga*,[787] it was held that for a party to be eligible for general damages, he or she should have suffered loss or inconvenience. General damages are awarded after due assessment and are compensatory in nature so that they should afford some satisfaction to the injured plaintiff.[788] In *Ronald Kasibante v. Shell Uganda Ltd*,[789] the plaintiff claimed special and general damages arising from the defendant's alleged breach of contract upon suspension and termination of the plaintiff's licence to operate a petrol station. The defendant did not deny termination of the plaintiff's contract but argued that it was lawfully done. The court observed that breach of contract is the breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. The court held that special damages must be pleaded and strictly proved by the party claiming them. That general damages consist of items of normal loss which are presumed by law to arise naturally in the normal course of things.

528. The court may also award aggravated damages, which like general damages, are compensatory in nature but are enhanced because of the aggravated conduct of the defendant. They reflect the exceptional harm done to the plaintiff by reason of the defendant's actions or omissions.[790] Special damages, which may be recovered by a party to a contract, including a seller and/or buyer of goods,[791] must be specifically and strictly proved to the satisfaction of the court.[792] In *Haji Ajumani Mutekanga v. Equator Growers (U) Ltd*,[793] it was held that in breach of contract, special damages must be specifically pleaded and strictly proved irrespective of whether there is a defence to the claim or not. That proof of special damages consists of evidence of particular losses.

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786. H.C.C.S No. 0016 of 2017, https://ulii.org/ug/judgment/hc-civil-division-uganda/2017/172 (accessed 8 Aug. 2020).
787. [2007] H.C.B. 83.
788. *See Stroms v. Hutchinson* [1905] A.C. 515.
789. [2008] U.L.R. 690.
790. *See Uganda Revenue Authority v. Wanume David Kitamirike* S.C.C.A. No. 43 of 2010.
791. Section 66 of the Sale of Goods and Supply of Services Act, 2017.
792. *See Kyambadde v. Mpigi District Administration* [1983] H.C.B. 44; *Sylvan Kakugu v. Tropical Africa Bank* H.C.C.S. No. 1 of 2001; *Alex Owor v. Registered Trustees of Arua Catholic Archdiocese* H.C.C.S. No. 692 of 1994; *Christopher Kiggundu & Another v. Uganda Transport Co.* (1975) Ltd S.C.C.A. No. 7 of 1993; *John Nagenda v. Sabena Belgian World Line* H.C.C.S. No. 1148 of 1998.
793. S.C.C.A. No. 7 of 1995.

529. The court may, using its discretion, award interest on the amount of damages awarded to the wronged party. According to the Sale of Goods and Supply of Services Act, 2017, the buyer or seller has the right to recover interest.[794] However, the appellate court may interfere with that discretion. For example, in *B.M. Technical Services Ltd v. Crescent Transporters Ltd*,[795] the Court of Appeal awarded interest at 22% from the date of judgment till full payment. The Supreme Court found this interest too high and reduced it to 10%. In *Mohanlal Kakubhai Radia v. Warid Telecom*,[796] it was observed that in awarding interest, court should take into account inflation and depression of the currency and the fact that the money awarded may not be promptly paid when it falls due.

530. Although exemplary or punitive damages are rarely granted by the courts in cases of breach of contract,[797] there are instances where the court may award them.[798] These damages are awarded to punish and deter the defendant and may also be awarded to prevent unjust enrichment.[799] In *Ahmed Ibrahim Bholm v. Car and General Ltd*,[800] the respondent, contrary to the terms of the contract, had terminated the appellant's employment due to irreconcilable differences between the appellant and the respondent. The appellant was to be paid one-month salary in lieu of notice. The contract was for two years and had no provision for termination. The trial judge found that the exact reason for the appellant's dismissal was that the respondent wanted to replace him with another person. The appellant was denied his privileges. The Supreme Court upheld the award of punitive damages for harassment, humiliation and embarrassment that the respondent meted out on the appellant albeit it reduced them from UGX 50 million to UGX 30 million.

531. The court may also award damages for substantial physical inconvenience or some discomfort caused by a breach of contract.[801] The damages claimed must be commensurate with the loss suffered. In *Waiglobe (U) Ltd v. Sai Beverages Ltd*,[802] Mubiru J, citing section 61(1) of the Contracts Act, stated that for a loss arising from a breach of contract to be recoverable, it must be such as the party should have reasonably contemplated as not unlikely to result. The burden is on the plaintiff to prove to the satisfaction of the court the damage suffered. The court may also award interest on the basis that the defendant has kept the plaintiff out of his or her money and ought accordingly to compensate him or her.[803]

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794. Section 66.
795. S.C.C.A. No. 8 of 2002.
796. H.C.C.S. No. 234 of 2011. *See also Kinyera v. The Management Committee of Laroo Boarding Primary School* H.C.C.S. No. 099 of 2013.
797. *See Esso Standard (U) Ltd v. Semu Amanu Opio* S.C.C.A. No. 3 of 1993.
798. *See, for example*, *Obongo v. Kisumu Municipal Council* [1971] E.A. 91.
799. *See Rookes v. Barnard* [1964] A.C. 1129; *Casell Co. Ltd v. Broome* [1972] 1 All ER 367.
800. S.C.C.A. No. 12 of 2002.
801. *See Robbialac Paints (U) Ltd v. KB Construction Ltd* [1976] H.C.B. 45; *Ntabgoba v. Editor of the New Vision & Another* [2004] 2 E.A. 234; *Frederick Zabwe v. Orient Bank & Others* S.C.C.A. No. 4 of 2006.
802. H.C.C.S. No. 0016 of 2017. *See also Ssemate v. Seninde* H.C.C.S. No. 409 of 2014.
803. *Pica Printery and Stationery Ltd. v. Pallisa District Local Government* H.C.C.S. No. 456 of 2006.

532. The law is that damages claimed must not be too remote. They should be reasonably foreseeable. In this vein, the Contracts Act provides that compensation for breach of contract 'is not to be given for any remote and indirect loss or damage sustained by reason of the breach'.[804] Thus, in order to claim damages, the plaintiff must show that there is a direct link between the losses sustained and the breach of contract. The defendant will be liable only for losses arising out of the breach and which are in contemplation of the parties at the time of the breach.

533. In *Hadley v. Baxendale*,[805] the plaintiffs' mill had ceased working because of a broken crankshaft. Since there was no spare shaft, the broken one had to be sent to the manufacturer for use as a pattern for a new one. The plaintiffs engaged the defendant carriers to transport the shaft to the manufacturers. The defendants were told that the item was a broken shaft from a particular mill, which belonged to the plaintiffs. The defendants were negligent in their delivery of the shaft, and their negligence resulted in the operation of the mill being shut down for longer than would have been ordinarily necessary had there been no delay in delivery of the shaft. The plaintiffs sued for increased loss of profits caused by the delay. The court held that the loss of profits could not be regarded as a normal loss, since such loss was not an inevitable consequence of the delay. The mill owners should have had a spare shaft which would have prevented any loss from occurring. Alderson B stated:

> Where two parties have made a contract which one has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[806]

534. The court further held that the plaintiffs could not claim 'special loss', since this type of loss required actual knowledge on the part of the carriers that their delay would result in such losses being incurred. Given that the carriers were not given actual knowledge of this potential consequence by the plaintiffs, they could not be held liable for this remote consequence.

535. The rule in *Hadley v. Baxendale* was followed in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd*,[807] where the plaintiffs ordered a new boiler from the defendants. At the time of contracting, the boiler had not yet been dismantled. In the course of dismantling the boiler, the defendants damaged it. Consequently, it was delivered to the plaintiffs, twenty-two weeks late. As a result of the delay, the plaintiffs failed to reap the extra profits the boiler would have produced. The profits

804. Section 61(2).
805. (1854) 9 Exch. 341.
806. *Ibid*.
807. [1949] 2 K.B. 528. *See also Koufos v. Czarnikow Ltd., The Heron II* [1969] 1 A.C. 350; *H Parsons (Livestock) Ltd v. Uttley Ingham* [1978] 1 All ER 525; *Balfour Beatty Construction (Scotland) Ltd v. Scottish Power PLC* (1995) 71 B.L.R. 20; *Woodruff v. Dupont* [1964] E.A. 404.

were assessed at GBP 16 per week. The plaintiffs also lost a dyeing contract with the Ministry of Supply, and the damages for loss of profits amounted to GBP 262 per week. The plaintiffs sued for breach of contract. It was held that the plaintiffs could recover GBP 16 per week since the loss of profits were normal losses, which the defendants should have known, at the time of entering into the contract, that the plaintiffs would suffer by their failure to deliver the boiler on time. However, the court held that the claim in respect of GBP 262 would fail, since this was a unique or abnormal loss for which the defendants would be liable only if they had actual knowledge of the possibility that such loss might occur at the time of entering into the contract. Given that the plaintiffs had not informed the defendants of the dyeing contract, the defendants had no actual knowledge of such potential loss and were thus not liable.

536. The principles in *Hadley* and *Victoria Laundry* have been applied in Uganda in a number of cases. For example, in *Justine Olijo v. Attorney General*,[808] the plaintiff supplied to the Ministry of Justice and Constitutional Affairs spare parts and consumables for the ministry's photocopy machines, worth UGX 6,950,000. The Ministry paid UGX 2,250,000 and failed to pay the balance. The defendant was sued for breach of contract for the payment of the price and general damages for loss of profit and interest on borrowed money. Katutsi J restated the applicable principles in *Hadley v. Baxendale* as follows: the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights have been observed; the aggrieved party is entitled to recover only as such part of the loss actually resulting as was at the time of contract reasonably foreseeable as liable to result from breach; what is reasonably foreseeable depends on knowledge possessed by the parties; knowledge may be imputed or actual; it is not necessary that the contract-breaker should actually have asked himself what loss is liable to result from the breach; and if on the given state of knowledge of the contract-breaker, a reasonable man could foresee that a loss was on the cards, the contract-breaker is liable to that extent.

537. The judge further restated the following instances as laid down in *Victoria Laundry* where recovery of loss of profits as a head of damages might be tenable: where there had been non-delivery or delayed delivery of what is on the face of it obviously a profit-earning event; where ordinary mercantile goods have been sold to a merchant with knowledge by the vendor that the purchaser wanted them for resale; at all events where there was no market in which the purchaser could buy similar goods against the contract on the seller's default; and where the defendant is not a vendor of the goods but a carrier.

538. Based on the above principles, the court failed to find certain special circumstances which could lead it to hold that damages arising out of such circumstances were recoverable. It was held that general damages for non-payment of the contract price are only recoverable where the alleged loss must have been within the reasonable contemplation of the parties at the making of the agreement, and the

808. [1995] VI K.A.L.R. 42. *See also Kabaseke Store Co. Ltd v. AG* H.C.C.S. No. 675 of 1989.

alleged loss must be the direct result of the breach of contract by non-payment of the price. Also, that in the present case, loss of profit and interest on borrowed money was not recoverable; only the unpaid price was recoverable.

539. The onus of proving the losses or damage suffered lies on the plaintiff and the damages claimed must not be remote. When assessing damages for breach of contract, any damages awarded should compensate the innocent party for the loss of its contractual bargain. In other words, the party should be put in the same position that it would have enjoyed had the contract been performed.[809]

540. According to the Sale of Goods and Supply of Services Act, 2017, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue for damages for non-acceptance.[810] It provides that '[t]he measure of damages is the difference between the contract price and the market or current price at the time when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of refusal to accept'.[811] Where the foregoing damages are not adequate to compensate the seller, the Act provides that the measure of damages 'is the profit, including reasonable overhead, which the seller would have made from full performance by the buyer, together with any incidental damages, due allowance incurred [expenses] and due credit being given for payments or proceeds of resale'.[812] According to the Act, incidental damages resulting from the buyer's breach, include commercially reasonable charges, expenses or commission incurred in stopping delivery, in the transportation, or care and custody of the goods.[813]

541. There is no precise meaning of 'market'. However, in *Shearson Lehman Hutton Inc. v. Maclaine Watson & Co. Ltd (No. 2)*,[814] the court stated that in the case of a breach by the buyer, a market arises where the seller actually offers the goods for sale, and there is a buyer who offers a fair price on that day. Thus, the seller must take reasonable steps to mitigate his or her loss by going into the market place, should a market be available. If he or she sells the goods at the same or a higher price, then he or she can recover damages from the first buyer.[815]

542. Where the seller or supplier wrongfully neglects or refuses to deliver the goods to the buyer, the latter may claim damages for non-delivery of the goods or failure to supply services.[816] The measure of damages is the difference between the contract price and the market or current price at the time when the goods ought to

809. *See Gullabhai Ushillingi v. Kampala Pharmaceuticals Ltd* S.C.C.A. No. 6 of 1999; *Flame SA v. Glory Wealth Shipping Ltd* [2013] E.W.H.C. 3153 (Comm.).
810. Section 61(1).
811. Section 61(2).
812. Section 61(3).
813. Section 65(a) and (b).
814. [1990] 3 All ER 723.
815. *See, for example*, *Lazenby Garages Ltd v. Wright* [1976] 1 W.L.R. 459.
816. Section 62(1).

have been delivered or services supplied.[817] Where no time is fixed, then the measure of damages is at the time of refusal to deliver or supply.[818]

543. The buyer should mitigate his or her loss by going into the marketplace and 'make any reasonable purchase of goods of a similar nature'.[819] What is reasonable is a question of fact dependent on the market price at the time of purchase and the circumstances of each case. He or she may recover damages from the seller – the difference between the new purchase (market) price and the contract price plus any expenses incurred.[820] In such a situation, the damage is the difference between the contract price and the market price.[821] Should he or she buy the goods at the price offered by the seller, he or she may only be paid nominal damages. The seller should also try to mitigate his or her loss by selling the goods on the open market.[822]

544. The buyer may also recover incidental and consequential damages from the seller or the supplier. Incidental damages include: expenses reasonably incurred during inspection, receipt, transportation and care and custody of goods rightfully rejected; any commercially reasonably charges; expenses or commissions in connection with effecting insurance cover; and any other reasonable expenses incidental to the delay or other breach.[823] Consequential damages include losses which the seller at the time of contacting had reason to know and could not reasonably be prevented by insurance or otherwise and injury to person or property proximately resulting from any breach of warranty.[824]

545. In case of a breach of warranty by the seller under a contract of sale of goods, the buyer may sue for damages[825] and the measure of damages 'is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty'.[826] The seller or buyer may also claim special damages for breach of contract.[827]

546. In *Iron Steel Wares Ltd v. C.W. Matyr*,[828] it was held that where there has been an implied condition by the seller, but the buyer has lost his right to reject the goods, he may still be awarded damages for breach of contract. That the measure of damages for breach of contract is prima facie, the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had conformed to the condition of the contract which has been broken. The

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817. Section 62(2).
818. *Ibid.*
819. Section 62(3)(a).
820. Section 63(3)(b).
821. *See Patrick v. Russo-British Grain Export Co.* [1927] 2 K.B. 535; *Wertheim v. Chlcoutimi Pulp Co. Ltd.* [1911] A.C. 301.
822. *See Musa Hassan v. Hunt & Another* [1964] E.A. 490.
823. Section 65(20)(a)–(d).
824. Section 65(3).
825. Section 64(1)(b).
826. Section 64(3)(a) and (b).
827. Section 53.
828. [1952-1957] U.L.R. 146.

court stressed the point that the buyer must mitigate his loss and mitigation includes accepting replacement of parts which did not meet the condition when offered by the seller. The court also held that where mitigation of damages would have prevented any loss of profits, the buyer is still entitled to damages for business inconvenience and for any period of credit which he lost.

547. Although it is the defendant that is in breach of his or her obligations, the plaintiff is not released from all other duties. The plaintiff must make an effort to mitigate or minimize his or her losses. The plaintiff will not be able to successfully claim for losses which he or she could have avoided by taking reasonable steps to reduce those losses once he or she decided to treat the contract as at an end. For example, an employee who is seeking damages for wrongful dismissal should also try to seek alternative employment as a reasonable person.[829]

548. In *British Westinghouse and Manufacturing Co. v. Underground Electric Railways Co. of London Ltd*,[830] the judge stated:

> I think that there are certain broad principles, which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps.[831]

549. Whether a plaintiff has taken reasonable steps to mitigate his or her loss is a question of fact, which revolves around whether he or she has done everything a reasonable person should have been expected to do in the ordinary course of business. The burden lies on the defendant to prove that the plaintiff has not taken reasonable steps to mitigate his or her loss.[832]

II. Exemption Clauses

550. An exemption clause in a contract either limits or excludes a party's liability for breach of contract. Thus, a party to a contract may raise a defence that he or she is not liable to the other party by virtue of the exemption clause, which is a term that forms part of the contract between the parties.

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829. *See Southern Highlands Tobacco Ltd v. David McQueen* [1960] E.A. 490; *Brace v. Calder* [1895] 2 Q.B. 253.
830. [1912] A.C. 673.
831. *Ibid.*, p. 701.
832. *See Payzu Ltd v. Saunders* [1919] 2 K.B. 129.

§8. Restitution

551. The equitable remedy of restitution is aimed at restoring the aggrieved party to the position occupied before the contract was created. The defendant is ordered by the court to give back any money or property received from the plaintiff under the contract. For example, if a person lacking capacity to contract such as a minor obtains goods by fraud and remains in possession of them, court may order restitution. However, restitution is not used to compensate the plaintiff for loss of profits or other financial losses caused by breach of contract.

Part II. Specific Contracts

Chapter 1. Agency

§1. Nature of Agency

552. The privity rule provides that only parties to a contract can have rights and liabilities conferred and imposed on them respectively. However, under agency, an agent may act on behalf of a principal and create a contractual relationship between the principal and a third party. A contract made by an agent on behalf of the principal is the contract of the principal and not an agent. Thus, if X contracts with Y on behalf of Z, the contract that results is between Y and Z.

553. According to the Contracts Act, an agent is 'a person employed by a principal to do any act for that principal or to represent the principal in dealing with a third person'.[833] The Act defines a principal as 'a person who employs an agent to do any act for him or her or to represent him or her in dealing with a third person'.[834] Fridman[835] defines agency as:

> [T]he relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by making of contracts or the disposition of property. [836]

554. Thus, agency may be taken as a situation where a person called a principal appoints another known as an agent to deal with a third party on his or her behalf. This is expressed in the Latin maxim, *quic facit per alium facit perse*, which means that he who acts through another does the act himself.

555. Agency may be of various types. There are auctioneers who are agents for the seller but may also be agents of the buyer for certain purposes. There are also directors, who are agents of the company; partners, who are agents of the firm and their other partners; and advocates/lawyers, who are agents of their clients. Other types of agents include estate agents, who have powers to make representations

833. Section 118.
834. *Ibid.*
835. G.H.L. Fridman, *The Law of Agency* (6th ed. Butterworth 1985).
836. *Ibid.*, p. 9.

about property but have no power to make any contract unless they are specifically authorized to do so. Estate agents work for a commission: the principal is bound to pay the commission only when the agent has brought the intended result.[837] Whether a commission is payable to an agent is a question of construction to be ascertained from the actual words used.

556. Another category of agents include: factors who may be given possession or control of goods to be sold for their principals; brokers, who are negotiators and make contracts between buyers and sellers of goods; *del credere* agents, who in return for an extra commission, undertake to indemnify their principals should the latter suffer losses as a result of the failure of a customer, introduced by the agent, to pay for the price of the goods when the price is ascertained and due; and confirming houses, which usually acts for overseas buyers.

§2. Creation of Agency

557. An agency may be created in a number of ways. Any person who has the legal capacity to perform an act may be a principal and empower an agent to carry out that act. According to the Contracts Act, a person may appoint an agent to act on his or her behalf provided that both are eighteen years or above; of sound mind; and each of them is not disqualified from acting in that capacity by any law to which he or she is subject.[838] It is important to point out that consideration is not necessary to create an agency.[839] Thus, although the general law of contract requires consideration for the existence of a valid contract, an agency may be gratuitous.

558. An agency may be created through actual authority of the principal. In this case, an agency arises out of an agreement between the principal and the agent whereby actual authority may be conferred on the agent. Actual authority may be express or implied.[840] According to the Contracts Act, '[a]uthority is express where it is given by spoken or written words and implied where it is to be inferred from the circumstances of the case'.[841] In *Direct Domestic Appliances Ltd v. Nile Breweries Ltd*,[842] it was held that to establish an agency requires consent of the principal and agent and such consent may be express or implied. Thus, in determining whether an agency exists, the court may take into account words spoken or written, in the ordinary course of a dealing, depending on the circumstances of each case.[843] In *Ireland v. Livingston*,[844] the defendant wrote to the plaintiff asking him to ship 500 tons of sugar. The letter continued: 'Fifty tons more or less of no moment, if it

837. *See Luxir (Eastbourne) Ltd v. Cooper* [1941] A.C. 108.
838. Sections 119–120.
839. Section 121.
840. Section 122(1). *See also Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480.
841. Section 122(2).
842. [2008] 1 E.A. 88.
843. Section 122(3).
844. (1872) L.R.H.L. 395.

enables you to get a suitable price.' Ireland shipped 400 tons in one vessel, presumably intending to ship the rest in another vessel. Livingston refused to accept the 400 tons and wrote to Ireland to cancel any further shipment. The House of Lords held that Livingston was bound to accept the sugar.

559. Where the authority of an agent is given by an instruction in a document such as the letter in *Ireland v. Livingston* above, the usual strict rules of construction apply: the authority will be limited to the purpose for which it was given.[845] Where the authority of an agent has been given orally, it is construed liberally, with regard to the purpose of the agency and to the usages of trade or business.[846]

560. In certain transactions such as the sale of land, it may be more prudent to appoint an agent expressly in writing by giving him or her a power of attorney. The latter is a document giving the agent the power to act for the principal. Under the power of attorney, the agent may be given broad legal authority, for example 'to sell a house and any other act necessary for carrying out the transaction'. In such a situation, the agent may, for example, on behalf of the principal, effect repairs on the house and the principal would be bound. The agent may have limited authority, for example, 'to sell the house as it is and no more'. In such a situation, he may not carry out the repairs and bind the principal.

561. Whether the implied agency exists or not is subject to an objective test. The implied authority usually arises out of an express authority because an agent's authority is not necessarily confined to only those matters expressly referred to by the principal. The agent has implied authority to carry out those matters that are incidental to the performance of his or her duties under the express authority. For example, in *Mullens v. Miller*,[847] it was held that an estate agent has implied authority to make representations relating to a property when conducting negotiations with a prospective buyer. An agent with authority, whether express or implied can do any lawful act and can undertake any business and do anything which is necessary for the carrying-on of the business.[848]

562. An agency may also be created through apparent authority. This type of authority, which is sometime referred to as ostensible authority, arises where a person acts in such a way as to lead others to believe that a certain person is his or her appointed agent. In such a situation, the court may not allow him or her to deny that that person is his or her agent.

563. Apparent authority forms an extension of the doctrine of estoppel.[849] The authority arises where a principal, by words or conduct, creates an impression that the agent is entitled to act on his or her behalf, when in fact no such authority exists.

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845. *See Midland Bank Ltd v. Reckett* [1961] A.C. 336.
846. *See Ashford Shire Council v. Dependable Motors Property Ltd* [1961] A.C. 336.
847. (1882) 22 Ch. D. 194.
848. Section 123(1) and (2).
849. *See Rama Corpn Ltd v. Proved Tin and General Investments Ltd* [1952] 2 Q.B. 147.

Notwithstanding that the agent who acts within this apparent authority has no actual authority as such, he or she will bind the principal to a third party.[850] In *Pole v. Leask*,[851] Lord Cranworth stated:

> No one can become an agent of another person except by the will of that person. His will may be manifested in writing, or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him. … This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that belief, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed.[852]

564. In order to establish apparent authority, the key requirements of estoppel must be met: there should be an express or implied representation, which is relied on by the third party leading to an alteration of his position.[853] In *Freeman and Lockyer v. Buckhurst Park Properties Ltd*,[854] which was cited with approval by Kiryabwire J in *Dosh Hardware (U) Ltd v. Alam Construction Ltd*,[855] the Articles of Association of a company granted it powers to appoint a managing director. Y with the knowledge and approval of the board of directors, acted as a managing director, although his appointment was never confirmed. Y entered into a contract on behalf of the company with a firm of architects. The company argued that it was not liable since Y had no authority to enter into the contract on behalf of the company. It was held that the company was liable as it had represented that Y was its managing director and third parties relied upon the representation. The company was estopped from denying his apparent authority and was thus bound by the contract.

565. Lord Diplock held that the following requirements should be satisfied by the contractor in order to enforce a contract against the company entered by an agent without actual authority to do so. First, there should be a representation by the company made to the contractor that the agent had authority to enter on their behalf into a contract of the kind sought to be enforced. Second, that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract

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850. *See, for example*, *Spiro v. Lintern* [1973] 1 W.L.R. 1002.
851. (1863) 33 L.J. Ch. 155.
852. *Pole v. Leask*, *supra*, 161–162.
853. *See Coffee Marketing Board v. Kigezi District Growers Co-Operative Union* [1995] II K.A.L.R. 21; *Edmund Shutter & Co. (Uganda) Ltd v. Patel* [1969] E.A. 259; *Vallabhadas Hirji Kapdia v. Thakersey Laxmidas* [1964] E.A. 378; *Rama Corporation v. Proved Tin and General Investments Ltd* [1952] 2 Q.B. 147; *Attorney General for Ceylon v. Silva* [1953] A.C. 461; *Armahas Ltd. v. Mudogas SA, The Ocean Frost* [1986] 2 All ER 385; *Overbrooke Estates Ltd. v. Glencombe Properties Ltd* [1974] 1 W.L.R. 1335.
854. [1964] 2 Q.B. 480. *See also Hely-Hutchinson v. Brayhead Ltd* [1968] 1 Q.B. 549; *Waugh v. HB Clifford & Sons Ltd* [1982] Ch. 374.
855. HCT-00-CC-CS-425-2003.

relates. Third, that he was persuaded or induced by such representation to enter into the contract and in fact relied upon it. Fourth, under its Memorandum or Articles of Association, the company was deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

566. An agency may also be created through usual authority. This is authority that binds the principal to a contract entered into by his agent where the latter has no express, implied or apparent authority to act. In *Watteau v. Fenwick*,[856] F owned a hotel and appointed H a manager. H was expressly forbidden from buying any goods other than mineral water and bottles of beer. H had previously owned the hotel and his name remained above the door as the licensee. H ordered cigars from W, who believed he was the owner of the hotel. F was held to be liable for the price of the cigars since a principal whether disclosed or not, was liable for the acts of an agent acting within his authority. However, this decision is problematic: why should a principal be liable in circumstances where he has not conferred authority and has even expressly restricted an agent's authority in respect of purchasing the cigars?

567. The limits of *Watteau v. Fenwick* are clear: it will not apply if the agent acts for himself or herself and not for his or her principal; or the third party knows, or ought reasonably to know, of the restriction of the agent's authority.

568. The case of *Watteau v. Fenwick* was relied on by Bamwine J in *NIS Protection (U) Ltd v. Nkumba University*[857] to hold that the defendant was liable for the acts of the employee who was its agent. In this case, the plaintiff, a limited liability company registered in Uganda and engaged in the business of providing guard services, claimed against the defendant general and special damages for breach of contract, interest and costs. The dispute arose out of an agreement between the plaintiff and the defendant dated 24 April 2003 for provision of guard services. The agreement was signed on behalf of the defendant by its security officer and on behalf of the plaintiff by its managing director. The plaintiff began mobilizing staff for performance of the contract. However, the defendant stopped it from deploying guards on the ground that the security officer had acted without authority. The court cited the cases of *Bigger Staff v. Rowatt's Whare Ltd*[858] and *Watteau v. Fenwick* and held that the defendant company was liable for its employee's acts which he carried out within his usual authority.

569. An agency may also be created by necessity or emergency. A principal may be bound by a contract made by an agent on his or her behalf but without authority in case of urgent necessity or an emergency. Agency of necessity arises where a person is faced with an emergency in which the property or interest of another, which are his responsibility, are in imminent danger and it becomes necessary, in order to preserve the property or interest to act for that person without authority.

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856. (1893) 1 Q.B. 346.
857. H.C.C.S. No. 604 of 2004.
858. (1896) 2 Ch. 102.

570. The Contracts Act provides that in situations of emergency, 'an agent has authority to do any act for the purpose of protecting a principal from loss, as would be done by a person of ordinary prudence, under certain circumstances'.[859]

571. In *The Argos*,[860] it was held that the master of a ship is entitled, in case of accident and emergency, to enter into a contract which will bind the owners of the cargo, notwithstanding that it is out of the scope of his or her authority. A land carrier may also dispose of perishable goods without authority in case of an accident or emergency.[861] The acts of the master of the ship or land carrier should have been done bona fide in the interest of the owners of the cargo or goods.[862]

572. An agency may also be created through presumed agency. This is a kind of implied agency that arises out of cohabitation of husband and wife. Although not explicitly provided for under the Act, the wife's authority, maybe covered by the phrase 'where it [the authority] is inferred from the circumstances of a case'.[863] While in cohabitation, a wife is entitled to pledge her husband's credit for necessaries which are suitable for their station in life. In *Debenham v. Mellon*,[864] the court explained the scope of this authority as follows:

> There is a presumption that she has such authority in the sense that a tradesman, supplying her with necessaries upon her husband's credit and suing him, makes out a prima facie case against him, upon proof of that fact and of cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage and to pledge their husband's credit in respect of matters coming within those departments.[865]

573. The question is: what are 'necessaries' for this type of authority? In *Phillipson v. Hayter*,[866] necessaries were defined as 'things that are necessary and suitable to the style in which the husband chooses to live, in so far as the articles fell fairly within the domestic department which is ordinarily confided to the management of the wife'.[867] The goods must be suitable both in kind and quantity. Thus, the presumption may be rebutted by the husband by proving that the goods supplied were not necessaries and therefore the wife is liable in her own right.

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859. Section 124.
860. (1873) L.R. 5 P.C. 134. *See also China-Pacific SA v. Food Corpn of India, The Winson* [1982] A.C. 939.
861. *See, for example*, *Sachs v. Miklos* [1948] 2 K.B. 23.
862. *Ibid.*
863. Section 122(2).
864. (1880) 5 Q.B.D. 394. *See also Nanyuki General Trading Stores v. Peterson* 15 E.A.C.A. 28.
865. *Debenham v. Mellon*, *supra*, p. 402.
866. (1870) L.R. 6 CP 38.
867. *Ibid.*

574. An agency may also be created by ratification. If a person (agent) acts without authority, or exceeds his or her authority, his or her actions cannot bind the person (the principal) on whose behalf he or she purports to act. However, the principal may decide to ratify or adopt the contract so that he or she will be bound by it.

575. The Contracts Act provides that '[w]here an act is done by one person on behalf of another but without the knowledge or authority of that other person, the person on whose behalf the act is done may ratify or disown the act'.[868] It follows that where the principal disowns the act, he or she is not bound by it. Where he ratifies the act, he or she is bound by it.[869] Ratification may be express or implied from the unequivocal conduct of the principal.[870] The principal can only ratify acts which the agent purported to do on the principal's behalf.[871]

576. Ratification is governed by a number of rules. First, the agent must contract as an agent. He or she must disclose the existence of the principal since an undisclosed principal cannot ratify the act of an agent.[872] Second, in order for ratification to take place, the principal must be in existence. In *NEC & 2 Others v. Nile Bank Ltd*,[873] it was held that if a person contracts with a non-existent principal, that person may be found personally liable on the contract. Third, the principal must be competent, that is, he or she must have capacity to enter into the contract at the time the agent did so on his or her behalf.[874] Fourth, the actions of the agent must be capable of being ratified. Thus, contracts that are void *ab initio* for example due to illegality are incapable of being ratified.[875] Fifth, the actions of an agent are capable of being ratified only if the principal is aware or has knowledge of the facts of the particular case.[876] Sixth, '[w]here a person ratifies an unauthorized act done on behalf of that person, the whole of the transaction of which the act forms a part is accordingly ratified'.[877] Thus, the principal cannot choose to ratify some parts of the contract entered into on his or her behalf and not others: he or she must ratify the whole contract. However, he or she cannot ratify an unauthorized contract that is prohibited by statute.[878] Lastly, ratification should not subject a third party to damages or terminate his or her right or interest.[879]

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868. Section 130(1).
869. Section 130(2). *See Alex Olwor v. Registered Trustees of Arua Catholic Archdiocese* H.C.C.S. No. 692 of 1994.
870. Section 131. *See Marsh v. Joseph* [1897] 1 Ch. 213.
871. *See Keighley, Maxsted & Co v. Durant* [1910] A.C. 240.
872. *Ibid*.
873. S.C.C.A. 17/94; [1995] I K.A.L.R. 138.
874. *See Boston Deep Sea Fishing and Ice Co. Ltd v. Farnham (Inspector of Taxes)* [1957] 1 W.L.R. 1051; *Dibbins v. Dibbins* [1896] 2 Ch. 348; *Grover & Grover Ltd v. Matthews* [1910] 2 K.B. 401.
875. *See Brook v. Hook* (1871) L.R. 6 Exch. 89.
876. Section 132.
877. Section 133.
878. *See, for example*, *Bedford Insurance Co Ltd v. Instituto de Resseguros do Brasil* [1985] Q.B. 966.
879. Section 134.

577. Ratification operates retrospectively: the principal's authority 'relates back' to the time when the agent did the unauthorized act. In other words, ratification validates the agent's actions from the time those actions took place.[880] However, ratification must take place within a reasonable time after acceptance of the offer by the unauthorized person. What is a reasonable time will depend on the facts of each case. Furthermore, the restorative effect of ratification will not be allowed to deprive a stranger to the contract of any property rights which had vested in him or her before ratification.[881]

§3. Duties of the Agent to the Principal

578. An agent has a duty to conduct business according to the principal's directions and render true accounts According to the Contracts Act, an agent is obliged to conduct the business of a principal according to the directions given by the principal.[882] The agent must also keep accurate accounts of all transactions entered into on behalf of his or her principal and render proper accounts on demand.[883] The agent must keep the money and property of his principal separate from his or her own. The agent must also pay to the principal all sums received, less his or her remuneration.[884] Where there are no directions from the principal, the agent should act in accordance with the usage and customs that prevail at the material time.[885]

579. Where the agent acts contrary to the principal's directions, he or she has to make good the loss and account for any profits that may accrue.[886] For example, in *Turpin v. Bilton*,[887] an agent agreed to insure his principal's ship. He failed to do so, which meant that when the ship was lost, the principal was uninsured. It was held that the agent was liable for breach of contract. However, the agent is not obliged to do something that is illegal, or which at common law or statute, is null and void.[888] The principal may also repudiate the transaction where any material fact was concealed from him or her.[889] The principal may also claim any benefit that may have accrued to the agent from the transaction.[890]

580. An agent is in a fiduciary relationship with the principal. This is largely because the agent has power to affect the legal relations of his or her principal who normally places trust and confidence in the agent with regard to the exercise of that

880. *See, for example*, *Koenigsblatt v. Sweet* [1923] 2 Ch. 314; *Bolton Partners v. Lambert* (1889) 41 Ch. D. 295.
881. *See Bird v. Brown* (1850) 4 Exch. 786.
882. Section 145(1).
883. Section 147.
884. Section 152.
885. *Ibid.*
886. Section 145(2).
887. (1843) 5 Man. & G. 455.
888. *See Cohen v. Kittell* (1889) 22 Q.B.D. 680; *Fraser v. BN Furman (Productions) Ltd* [1967] 1 W.L.R. 898.
889. Section 149.
890. Section 150.

power. The agent has a duty not to put himself or herself in a position where his or her duties conflict with his or her own interests, or the interests of another principal. For example, in *Armstrong v. Jackson*,[891] the plaintiff instructed the defendant, a stockbroker, to buy shares in a certain company for him. Although the defendant pretended to purchase the shares on the open market, he actually sold his own shares in the company to the plaintiff. On discovering the truth some years later, the plaintiff claimed to have the transaction set aside. The court upheld the claim and ordered the defendant to repay all sums paid by the plaintiff for the shares. In *Aberdeen Rly Co. v. Blaikie Bros*,[892] Lord Cranworth stated:

> It is a rule of universal application that no one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect.[893]

581. It can be deduced from the above, that the agent must act in good faith and not permit his personal interests to override those of the principal. However, there will be no breach of duty if the agent makes full disclosure of all material facts to the principal and obtains the principal's consent before placing himself or herself in a position where his or her interests and duty conflict.[894] The no conflict rule may also be excluded by the terms of any contract between the principal and the agent.[895]

582. Unless he or she makes full disclosure to his or her principal and obtains his or her consent, the agent must not make a secret profit out of his or her relationship with the principal and must account for any profits made by virtue of confidential information that comes his or her way because of his or her position as an agent.[896]

583. The agent must also account for any commission paid to him or her without the knowledge of the principal.[897] In *Boston Deep Sea Shipping and Ice Co v. Ansell*,[898] the defendant was employed as a managing director of the plaintiff company. Acting on behalf of the company, the defendant contracted for the construction of certain fishing smacks, but, unknown to the company, he took a commission from the shipbuilders. He also accepted bonuses from two other companies, in which he held shares, with which he had placed orders on behalf of the principal

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891. [1917] 2 K.B. 822.
892. (1854) 1 Macq. 461.
893. *Ibid.*, p. 471.
894. *See North and South Trust Co. v. Berkley* [1971] 1 W.L.R. 470.
895. *See Kelly v. Cooper* [1993] A.C. 205; *New Zealand Netherlands Society v. Kuys* [1973] 1 W.L.R. 1126.
896. *See, for example*, *Boardman v. Phipps* [1967] 2 A.C. 46; *Lamb v. Evans* [1893] 1 Ch. 218; *Hippisley v. Knee Bros* [1905] 1 K.B. 1; *Industrial Development Consultants Ltd v. Cooley* [1972] 1 W.L.R. 443.
897. *See Boston Deep Sea Fishing and Ice Co. Ltd v. Ansell* (1888) 39 Ch. D. 339; *Ramzanali Ebrahim v. Astrid Prodger* 25 K.L.R. 29; *Hippisley v. Knee Bros* [1905] 1 K.B. 1.
898. (1888) 39 Ch. D. 339.

company. The plaintiff company dismissed the defendant from office and later brought an action against him for an account of the secret commission and bonuses he had received. The court held that the receipt of the commission was a good ground for dismissal and ordered the defendant to account for his secret commission and bonuses. Bowen LJ stated:

> [T]here can be no question that an agent employed by a principal or master to do business with another, who unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does a wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.[899]

584. An agent must exercise reasonable care, skill and diligence in the performance of his or her undertaking.[900] According to the Contracts Act, '[a]n agent shall act with reasonable diligence and conduct the business of agency with as much skill as is generally possessed by a person engaged in similar business, unless the principal has notice of the lack of skill by the agent'.[901]

585. The standard of care depends on the facts of a particular case. For example, in *Chaudhry v. Prabhakar*,[902] Chaudhry (C) had just passed her driving test. She asked Prabhakar (P), a close friend, to find a second-hand car, which had not been involved in an accident, for her to buy. P agreed to do so for no payment. C knew nothing about cars but P, albeit not a qualified mechanic, knew something about them. P found a car offered for sale by someone who was a car sprayer and panelbeater. P noticed that the bonnet of the car had been repaired but he made no inquiries as to whether the car had been involved in an accident. C bought the car. When C later discovered that the car had been involved in an accident and was not roadworthy, she sued P for breach of a duty of care. The trial judge gave judgment for C. P appealed but the appeal was dismissed. Stuart-Smith LJ stated:

> I have no doubt that one of the relevant circumstances is whether or not the agent is paid. If he is, the relationship is a contractual one and there may be express terms upon which the parties can rely. Moreover, if a paid agent exercised any trade, profession or calling, he is required to exercise the degree of skill and diligence reasonably expected of a person exercising such trade, profession or calling, irrespective of the degree of skill he may possess. Where the

899. *Ibid.*, p. 349.
900. *See Marianne Wither v. Arbon Langrish and Southern Ltd* [1966] E.A. 292.
901. Section 146(1).
902. [1989] 1 W.L.R. 29.

> agent is unpaid, any duty of care arises in tort. Relevant circumstances would be the actual skill and experience that the agent had, though, if he has represented such skill and experience to be greater than it in fact is and the principal has relied on such representation, it seems to me to be reasonable to expect him to show that standard of skill and experience which he claims he possesses. Moreover, the fact that [the] principal and agent are friends does not in my judgment affect the existence of the duty of care, though conceivably it may be a relevant circumstance in considering the degree of standard of care.[903]

586. An agent has a duty to act personally. The Contracts Act provides that '[a]n agent shall not employ another to perform an act which the agent expressly or impliedly undertook to perform personally'.[904] Thus, it is the duty of the agent not to sub-delegate his or her authority to another person. This rule is expressed in the Latin maxim, *delegatus non potest delegare*, that is, a delegate cannot delegate.

587. An agent is only allowed to sub-delegate where the authority to do so is expressly conferred by the instrument of appointment, or can be implied from the ordinary custom of a trade or the nature of an agency.[905] The agent shall be responsible for the acts of the sub-agent[906] and the latter shall be responsible for his or her acts to an agent except for fraud.

588. In *De Bussche v. Alt*,[907] a ship owner (De Bussche) employed an agent to sell a ship in India, China or Japan at a certain price. The agent was unable to sell the ship himself but, with the ship owner's consent, he employed a sub-agent (Alt) in Japan to do so. The sub-agent purchased the ship for himself and then resold it to a third party at a profit. The court held the sub-agent liable to account to the ship owner for his profit. Thesiger LJ summarized the rationale behind non-delegation of the agent's authority and the circumstances under which it may be done as follows:

> As a general rule, no doubt, the maxim '*delegatus non potest delegare*' applies so as to prevent an agent from establishing the relationship between principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfill; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose … [The authority to sub delegate] may and should be implied

903. *Ibid.*, p. 34.
904. Section 125(1).
905. Section 125(2) and (3).
906. Section 126(1) and (2).
907. (1878) 8 Ch. D. 286.

> where from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute [sub delegate]; and that when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself.[908]

589. The existence of privity of contract revolves on whether the agent was clearly authorized to create it, or whether his or her act of doing so was ratified by the principal. Nevertheless, whether there is privity or not, the acts of an authorized sub-agent bind the principal.

§4. Rights of the Agent

590. An agent has a right to be remunerated by his or her principal. A principal has a duty to remunerate the agent for the services rendered. According to the Contracts Act, consideration is not necessary to create an agency.[909] Thus, a person may be a gratuitous agent and no remuneration will be expected or demanded. However, an agent will be entitled to remuneration from his or her principal for the services rendered where the agency is contractual and there is an express or implied term to that effect. Where there is an agreement to pay remuneration, then the principal has a duty to meet his or her side of the bargain. This duty arises where the principal has expressly or impliedly agreed to pay the agent for his or her services.

591. In *Oriental Insurance Brokers Ltd v. Transocean Uganda Ltd*,[910] the appellant sued the respondent in the High Court for UGX 46,126,635. The appellant was contracted by the respondent to procure insurance covers for the respondent in respect of fire, burglary and customs bonds. The respondent obtained the necessary insurance covers and customs bonds. Subsequently, the respondent unilaterally terminated the contract. At the time of termination of the contract, the respondent owed National Insurance Corporation UGX 37,679,104 in respect of unpaid premiums for insurance covers and customs bonds arranged by the appellant for the respondent. Although the respondent promised to pay the appellant the outstanding insurance premiums at the time of termination of the contract, it never did so. The appellant had also brokered insurance covers from Universal Insurance Co. Ltd for the respondent. For this, the respondent owed the appellant the sum of UGX 8,372,541

908. *Ibid*, p. 300.
909. Section 121.
910. S.C.C.A. No. 55 of 1995.

for unpaid premiums and UGX 75,000 as stamp duty on customs bond arranged by the appellant for the respondent. All these totalled to UGX 46,126,635. The respondent denied it owed the sums claimed.

592. The court held that an insurance broker or agent is entitled to sue the insured for premiums not paid to the broker and for commissions due from the insured in respect of insurance policies or covers procured by the broker or agent. That this is the only way by which the broker can recover his commission on outstanding premiums, and pass the premiums so recovered to the insurer. The court observed that generally, the principles of the law of agency apply to the relationship between the broker and the insurer on the one hand and between the broker and the insured on the other. Where the insurer holds out the broker as his agent, the broker has ostensible authority to bind his insurer as his principal.

593. Where there is no express agreement as to the payment of remuneration, the agent may be paid on *quantum meruit* basis. In *Way v. Latilla*,[911] the defendant agreed with the principal to send to the latter information concerning gold mines and concessions in West Africa. Although the principal led the agent to believe that he would receive an interest in any concession obtained, no terms as to remuneration were expressly agreed between the parties. The House of Lords held that the agent was entitled to a reasonable remuneration on an implied contract to pay him a *quantum meruit*. Whether a term is to be implied into the agency contract will depend on the normal rules as to the implication of terms into contracts. Thus, a term as to payment of remuneration may be implied by trade usage, on grounds of business efficacy, or to give effect to the intention of the parties. In case of a professional person who is employed as an agent and there is no express term to that effect, there is a strong presumption that he or she is to receive remuneration for his or her services.[912] What is reasonable may depend on the trade profession or business in which the professional is employed. Any implied term must not be inconsistent with an express term in the agency contract.

594. According to the Contracts Act, unless there is a special contract between the principal and the agent, the entitlement to remuneration only arises where the agent has completed the act in accordance with his or her agreement with the principal.[913] However, an agent who acts outside the scope of his or her authority or is guilty of misconduct or commits a serious breach of his or her duties as an agent is not entitled to remuneration.[914] Unless there is a special contract to that effect, an agent is not entitled to a commission on transactions that take place after termination of the agency contract.[915]

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911. [1937] 3 All ER 759.
912. *See Miller v. Beale* (1879) 27 W.R. 403.
913. Section 153.
914. Section 154. *See also Mason v. Clifton* (1863) 3 F. & F. 899; *Boston Deep Sea Fishing and Ice Co. Ltd v. Ansell* (1888) 39 Ch. D. 339; *Hippisley v. Knee Brothers* [1905] 1 K.B. 1.
915. *See Crocker Horlock Ltd v. B Lang & Co Ltd* [1949] 1 All ER 526.

595. In order to claim remuneration, the agent must show that he or she caused the transaction. In *Alfa Insurance Consultants Ltd v. Empire Insurance Group*,[916] the appellants (an insurance broker) sued the respondent (an insurance company) for a sum of UGX 15,049,344 as balance on their commission for brokerage work, which they did for the respondent. It was held that the appellant could only be entitled to what was a reasonable rate of the commission in the circumstances of the case. The court cited the case of *McNeil v. Law Union & Rock Insurance Co. Ltd*,[917] where Justice Branson pointed out that the principle is that where an agent or, in this case a broker, is claiming a commission upon a certain transaction, he must show that he was an efficient cause of the transaction. To be a complete cause, the agent or broker need not necessarily complete or take part in all the negotiations. That it is not enough for him to prove that he introduced the parties to each other. The agent has a right to retain part of the moneys received on account of the principal as remuneration.[918]

596. The principal also has a duty to indemnify the agent. Indemnity arises where a person under a contract takes on the obligation to pay for any loss or damage that has been or might be incurred by another individual. According to the Contracts Act, the principal is under a duty to indemnify the agent for any loss or liability arising from all lawful acts done in good faith.[919] The right to indemnity arises as an express or implied term of the contract.[920] However, the right may be excluded by the parties or by a term implied through the custom of the trade. The principal is not liable to indemnify an agent for criminal acts.[921]

597. An agent has a right of lien over the goods bailed. A lien is the right of an agent to retain goods or other property until he or she is paid the remuneration. The Contracts Act allows an agent to retain the principal's goods until the amount owed to him for services rendered is paid unless there is a contract to the contrary.[922] The right of lien is only a possessory right that gives the agent no right to sell the goods to settle the debt. The agent can only exercise a lien over his or her principal's goods if he or she lawfully acquired possession of them in the course of the agency.[923] He or she should obtain a court order unless there is a contract allowing him or her to sell without resort to court. Since a lien is possessory, the agent loses the right when he or she parts with the goods in question.

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916. S.C.C.A. No. 9 of 1994.
917. (1925) Lloyd's List L.R. 341.
918. Section 151.
919. Section 156. *See Isaac Gundle v. Mohanlal Sunderji* 18 K.L.R. 137.
920. *See Rhodes v. Fielder & Others* (1919) 89 L.J.K.B. 15.
921. Section 157.
922. Section 155.
923. *See Taylor v. Robinson* (1818) 2 Moore C.P. 730.

§5. Termination of Agency

598. Authority of an agent may come to an end (be terminated) by an act of either party or by operation of law. The Contracts Act outlines the following circumstances under which an agency may be terminated: (a) a principal revokes his or her authority; (b) an agent renounces the business of the agency; (c) the business of the agency is completed; (d) a principal or an agent dies;[924] (e) a principal or an agent becomes of unsound mind;[925] (f) a principal is adjudicated an insolvent under the law;[926] (g) a principal and agent agree to terminate; or (h) the purpose of the agency is frustrated.[927]

599. In terminating the agency, special attention should be paid to the agent's interest in the affected property.[928]

600. Revocation can only take place before the authority to bind the principal is partly or wholly exercised.[929] Revocation or renunciation must be based on a reasonable cause, failure of which the other party shall be compensated.[930] Revocation or renunciation may be express or implied from the conduct of the principal or agent, respectively[931] and a party who revokes or renounces must give reasonable notice to the other party and make good on damage suffered.[932]

601. In order to take effect, termination of the authority of an agent must be made known to the agent and the third party.[933] Where the principal dies or becomes of unsound mind, the agent shall take all reasonable steps to protect and preserve the interests entrusted to him or her.[934] It should also be noted that termination of an agency is prospective and not retrospective.

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924. *See Campanari v. Woodburn* (1854) 15 C.B. 400.
925. *See Drew v. Nunn* (1879) 4 Q.B.D. 661; *Yonge v. Toynbee* [1990] 1 K.B. 215.
926. *See Elliot v. Turquand* (1881) App. Cas. 79.
927. Section 135. *See Marshall v. Glanvill* [1917] 2 K.B. 87.
928. Section 136.
929. Sections 137 and 138. On revocation, *see Frith v. Frith* [1906] A.C. 254; *Carmichael's Case* [1896] 2 Ch. 643.
930. Section 139.
931. Section 141.
932. Section 140.
933. Section 142.
934. Section 143.

Chapter 2. Bailment

§1. Nature of Bailment

602. Bailment comes from the French word, 'bailor', which means to deliver. The Act defines a bailment as 'the delivery of goods by one person to another for some purpose, upon a contract that the goods shall when the purpose is accomplished, be returned or disposed of according to the direction of the person who delivered them'.[935] The Act defines a bailor as 'a person who delivers the goods' and a bailee as 'a person to whom goods are delivered'.[936] A bailment occurs where a person takes possession of property that was formerly in the possession of someone else for a special purpose and for a limited period of time. There must be a transfer of possession of personal property from the bailor to the bailee and the eventual return or expectation of return of the property bailed. A bailment is a contractual relationship since the bailor and the bailee, either expressly or impliedly, bind themselves to act according to particular terms.

603. Unlike a contract of sale where there is intentional transfer of ownership of the property in exchange of something for value, a contract of bailment involves only a transfer of possession: the bailee receives only possession but the ownership interests are with the bailor. Only movable goods can be bailed. Thus, a deposit of money in the bank is not a bailment since money is not goods. Similarly, a waiter's custody of the hotel's plates does not make him a bailee. From the foregoing, it can be seen that there are three main characteristics of a bailment: (1) delivery of possession by one person to another; (2) delivery should be for some purpose; and (3) delivery must be upon a contract that when the purpose is accomplished, the goods should be returned to the bailor.

604. There are two main types of bailment: mutual benefit bailment and gratuitous bailment. A bailment for mutual benefit is created where there is an exchange of performance between the bailor and bailee. In this type of bailment, the bailee has to be paid for the services rendered and to have the bailed property returned to the bailor in good condition when the bailment ends. For example, a bailment for the repair of a motor vehicle is a bailment for mutual benefit when the bailee receives a fee in exchange for his or her work. A gratuitous bailment is one which is for the sole benefit of the bailee, and there is no charge for services rendered.

605. In *Coggs v. Bernard*,[937] the defendant agreed to carry various brands of brandy belonging to the plaintiff from a certain market. The defendant's undertaking was gratuitous since he was not offered any compensation for the work. As the brandy was being unloaded, a barrel was staved and 150 gallons were lost. It was held that where the bailment is found to be for the benefit of the bailee, a higher duty of care is expected and even slight negligence is actionable.

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935. Section 88.
936. *Ibid.*
937. (1703) 2 Ld. Raym. 909, 92 E.R. 107.

606. Whether a transaction is a bailment or not depends on the facts of each particular case. In *Chhatrisha & Co. v. Puranchand & Sons*,[938] the appellants had arranged to store in the respondents' go down a quantity of metal sheets. The representative signed a letter containing the conditions upon which the sheets were to be stored, one of which exempted the respondents for liability for loss of the sheets. The respondents were not warehousemen in the ordinary course of business. The appellants' representative had unrestricted access to the go down and was able to take away such consignments as he wished without signing a receipt in favour of the respondents. Subsequently, it was found that there was a shortage of sheets on the basis of quantities delivered and dispatched only part of which was accounted for by removal of sheets by the respondents with the knowledge and consent of the appellant's representative. The appellants sued for the value of the lost sheets alleging that the respondents were bailees and that they had not accounted for the shortage. The trial judge held that there was no contract of bailment between the parties and that the appellants simply had a licence to store the sheets in the respondent's go down at their own risk. On appeal, it was held that the letter drawn by the respondents and signed by the appellants' representative containing the terms upon which the sheets were to be stored imported a bailment.

607. Delivery of possession of goods is essential for a valid bailment. There must be transfer of possession of the bailed goods from the bailor to the bailee. Possession means control over goods and an intention to exclude others from exercising control over the same goods. The bailee should have actual physical control of the property.

608. According to the Contracts Act, '[t]he delivery of goods to a bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold the goods on behalf of the bailee'.[939] Thus, delivery may be actual or constructive. The delivery is actual where the bailor hands over the physical possession of the goods to the bailee. For example, where X takes his car to Moon Garage for repair, he will have given actual possession to the garage owner. The law treats constructive delivery as equivalent to actual possession.

§2. Duties of the Bailee

609. A bailee has a number of duties to the bailor. The bailee has a duty to take reasonable care of the bailor's goods. According to the Contracts Act, '[a] bailee shall take as much care of the goods bailed to him or her as a person of ordinary prudence would under similar circumstances take of his or her own goods of the same bulk, quantity and value, as the bailed goods'.[940] Thus, the bailee has a duty

938. [1959] E.A. 746.
939. Section 90.
940. Section 92.

to take reasonable care of the goods entrusted to him or her.[941] Even a gratuitous bailee must use such skill as he or she possesses or may be reasonably expected to possess. Omission to exercise that skill may be regarded as negligence on his or her part. The standard of care is that of a person of ordinary or common prudence and capable of managing or taking care of his or her own affairs or concerns, including property.

610. The bailee's duty to take reasonable care of the goods deposited with him or her has been considered in a number of cases. In *Petro v. Daniel S. Kato*,[942] the appellant's mechanic was sued for 'misappropriation' of a car delivered to him for repair. It was badly damaged; the chassis frame was broken. At first, it was intended to obtain another chassis frame and fit it in, but this was not forthcoming. There was a discussion of having the frame welded but this was not done and it was not clear whether the appellant ever understood to do it. However, in September 1950, ten months after the car had been brought to the appellant, he wrote to the respondent stating that he was unable to repair it and calling upon him to take it away.

611. It was held that a demand on the owner to take his vehicle away does not absolve a bailee from his duty to take reasonable care of the goods while they remain in his possession. That in deciding damages for loss of goods while in the hands of the bailee, depreciation up to the time of their deposit must be deducted from the purchase price, and if there is no evidence, the court will estimate the depreciation. The court ordered the appellant to return the automobile in substantially the same condition in which he received it or pay UGX 300. In estimating the price of the car, the court cited the case of *Singh v. Kumbhar*,[943] where a vehicle had been negligently allowed to deteriorate in the custody of a repairer and the then East African Court of Appeal reduced damages on the ground that the vehicle must be presumed to have deteriorated in value.

612. Another case in which the duty to take reasonable care of bailed goods was considered is *Mbale Exporters and Importers Ltd v. Ibero (U) Ltd*,[944] where the plaintiff was a company based in Mbale engaged in the business of buying coffee from farmers and supplying it to exporters. The defendant was based in Kampala and involved in buying, part-processing and exporting coffee from Uganda. On 19 December 1999, the plaintiff's trailer turned up at the defendant's premises in Kampala to deliver coffee. The plaintiff's driver convinced the defendant's security guards who allowed him to park the trailer in the defendant's yard pending opening of the defendant's business the following day. That night, the trailer was stolen from the defendant's yard. The plaintiff claimed that the trailer was carrying 650 bags of various grades of coffee, which was supplied and delivered to the defendant under the two contracts. In the alternative, the plaintiff pleaded that the defendant was a bailee and it breached its duty of care as a bailee and was thus liable for the loss.

941. *See Coggs v. Bernard* (1703) 2 Ld. Raym. 909, 92 E.R. 107.
942. [1952-1957] U.L.R. 3.
943. [1948] E.A.C.A. 21.
944. Civil Appeal No. 84 of 2005.

The defendant argued that since it never received any coffee, it was not liable as a bailee or otherwise to pay for the coffee in question.

613. The Court of Appeal held that bailment can take place without consideration; it may be gratuitous. That once the respondent/defendant accepted the coffee, he assumed the duty to ensure that nothing happened to the goods till they were sampled, weighed or dealt with in any other way stipulated by the contract or until they were returned to the owner if they did not satisfy the terms of the contract. Consequently, the respondent became a bailee and owed a duty to take care of the goods.

614. In *United Garments Industry Ltd*,[945] it was also held that a bailee owed a duty to the bailor to take reasonable care of the goods while they were in his custody so that they were not lost or damaged.

615. In *Giband v. Great Eastern Railway*,[946] the defendant railway company contracted with the plaintiff to keep his goods in a cloakroom but it kept them elsewhere in the station and as result they were stolen. It was held that since the contract was to keep the goods in the cloakroom, and the defendant did otherwise, it was liable.

616. It should be pointed out that a bailee's duty does not end when the goods are lost or stolen. The bailee should take reasonable steps to recover the goods. If he or she fails to do so, the burden of proof is on him or her to show that even if reasonable steps had been taken, the goods would not have been recovered.[947]

617. In *Martin v. London County Council*,[948] the plaintiff sued the defendant hospital for their negligence in taking care of the plaintiff's belongings because the jewellery of the plaintiff had been stolen from the custody of the hospital authority. The court held that where a hospital takes possession of the patient's belongings upon his admission to the hospital, it would be considered as bailee and would be liable for negligence. However, where a bailee takes the amount of care required by law, he or she is not liable for loss, destruction or deterioration of the bailed goods, unless there is a special contract to that effect.[949]

618. The bailee must use the goods of the bailor in accordance with the contract. The Contracts Act provides that '[w]here a bailee makes use of the bailed goods contrary to the conditions of the bailment, the bailee is liable to compensate the bailor for any damage to the goods arising from or during that use'.[950] Thus, the bailee must act in accordance with the terms of the bailment and use the goods in

945. H.C.C.S. No. 1520 of 1975.
946. [1921] 2 K.B. 426.
947. *See Morris v. CW Martin & Sons Ltd* [1966] 2 K.B. 426; *Coldman v. Hill* [1918-1919] All ER 434.
948. [1947] 1 All ER 783.
949. Section 93.
950. Section 95.

accordance with the directions of the bailor. Should he or she use the goods without the authority of the bailor, then he or she will be liable for any damage caused to the goods.

619. The bailee should not mix the goods bailed to him or her with other goods except with the consent of the bailor. Where the goods are mixed with consent of the bailor, both the bailor and the bailee shall have an interest in the mixed goods in proportion to their respective shares.[951] Where the bailee mixes the goods without the consent of the bailor, he or she will bear the expenses of separation of the goods and shall compensate the bailor for any damage or loss of the goods.[952]

620. The bailee must return the goods to the bailor in accordance with the bailor's instructions. The Contracts Act obliges the bailee to 'return or deliver without demand from a bailor, according to the directions of the bailor, the bailed goods, as soon as the time for which the purposes for which the goods were bailed expires'.[953] Thus, subject to the bailee's lien, the bailee must return the goods when the bailment comes to an end. The bailee shall also not deny or change the title of the bailor about the ownership of the goods. Where the bailee does not return the goods as agreed, he or she will be responsible to the bailor for any loss, destruction or deterioration of the goods from the time of failure to return or deliver the goods.[954]

621. In *Sylvan Kakugu v. Trans Sahara International General*,[955] the plaintiff sought recovery of a motor vehicle worth USD 2,200 or its equivalent in Uganda shillings and a refund of the value of goods worth USD 1,150 that went missing in the vehicle, general damages, interest and costs of the suit. The vehicle was delivered to the defendant who was responsible for shipping it from United Arab Emirates to Mombasa. It was held that as a bailee, the defendant was liable for the loss of the motor vehicle.

622. In yet another case of *Mohanlal Mathuradas and Brothers v. East African Navigators Ltd*,[956] the plaintiffs contracted with the defendants for the carriage of goods by sea from Dar es Salaam to a purchaser from the plaintiffs at Rufiji. The goods were shipped on the defendant's schooner subject to the terms and conditions of the Carriage by Sea Ordinance. On the voyage, the schooner's engine broke down beyond repair on a deserted stretch of the coast of Mafia island. The crew deserted the boat. No effective attempts to salvage or protect the goods were made by the defendants. When a police party reached the ship wreck, some people were found looting it. The goods were lost and the plaintiffs sued for damages. The defendants argued that the property in the goods had passed to the purchaser from the plaintiffs

951. Section 96(1) and (2).
952. Section 96(3) and (4).
953. Section 98.
954. Section 99.
955. H.C.C.S. No. 95 of 2005.
956. [1968] E.A. 186.

and the goods were lost through an unexpected peril. The court held that the appellants were bailees for reward and were under a duty to deliver the goods safely to their destination. That the goods were lost because they were abandoned, and the defendant had not discharged the onus on them of showing that the loss was not due to any fault or neglect on their part.

623. In *B.A.T Kenya Ltd & Another v. Express Transport Co. Ltd*,[957] it was held that a common carrier is responsible for the safety of the goods in all events except if the loss or injury arose solely from an act of God or hostilities involving the state or from the fault of the consignor or inherent vice of the goods themselves.

624. A person holding goods under another contract, for example of sale of goods may be treated as a bailee with the attendant obligation to return the goods. According to the Act, '[w]here a person in possession of goods under another contract holds the goods as bailee, that person becomes a bailee under the existing contract and the owner becomes the bailor of goods although the goods may not have been delivered by way of bailment'.[958] For example, in *HSGS Impex Uganda Ltd v. Bakama Enterprises Ltd*,[959] the plaintiff supplied to the defendant 910 cartons of panasonic batteries on credit. The first defendant issued cheques to the plaintiff. Subsequently, a written agreement was executed between the plaintiff and the first defendant for the return of the batteries. The cheques were presented for payment and were returned unpaid (bounced). The plaintiff recovered some of the batteries but failed to return the 705 cartons worth UGX 89,535,000. The court found that although initially there was a contract for sale of goods, subsequently there was another contract whose effect was to impose obligations of a bailee upon the first defendant to *inter alia*, return the batteries to the plaintiff.

625. The bailee has a duty to return any profit that has accrued in the course of the bailment. Unless there is a contract to the contrary, the bailee shall deliver to the bailor any increase or profit that may have accrued from the bailed goods.[960]

§3. Rights of the Bailee

626. The Contracts Act outline a number of rights of the bailee. The bailee may recover compensation for losses from the bailor where the latter was not entitled to make the bailment or to receive back the goods or to give directions.[961]

957. [1968] E.A. 171.
958. Section 89.
959. H.C.C.S. No. 787 of 2014.
960. Section 101.
961. Section 102.

627. The bailee is also entitled to expenses. Where the bailee is to receive no remuneration for keeping or carrying the goods or doing work on them, he or she is entitled to claim the necessary expenses incurred by him or her for the purpose of the bailment.[962]

628. The bailee also has a right to remuneration and a lien over the goods bailed to him or her. A bailee has a right to be remunerated for the services rendered or work done. He or she has a lien over the goods bailed to him or her. A lien is a right to retain goods until payment for services rendered is made or other liability is discharged. A lien may be particular or general. A particular lien is available against the particular property in respect of which the bailee has spent labour and skill. For example, a mechanic may retain a car until he or she is paid the charges for repair. Regarding a particular lien, the Contracts Act provides as follows:

> Where a bailee, in accordance with the purpose of the bailment, renders any service involving the exercise of labour or skill in respect of the bailed goods, the bailee may, in the absence of a contract to the contrary, retain the goods until he or she receives the remuneration due, for the services rendered in respect of the goods.[963]

629. A particular lien is possessory in nature. Thus, if the possession is lost, the lien is also lost. The bailee can exercise the lien only when he or she has spent his or her labour and skill on the goods bailed. Thus, mere custody of goods does not give a rise to a lien. For example, X parks her car in Y's garage for safe custody and X fails to pay the rent. Y cannot retain the car. However, if Y repairs the car on instructions of X, and the latter does not pay the repair charges, Y can retain the car until payment is made. The right of lien can also be exercised when the service or work has been rendered or done in time.

630. A lien can only be exercised when payment is due. In *Rahima Naggita & Others v. Richard Bukenya & Others*,[964] a carrier (the second defendant) who had not been paid freight charges amounting to USD 8554.30 held onto the shipped container until the freight was fully paid for by the shipper or the consignee. The court held that as a carrier, the second defendant had a lien on the goods. The court cited the English case of *Tappenden v. Artus & Another*,[965] where the plaintiff contracted with Artus to purchase a van under an installation contract. The plaintiff allowed Artus to take possession of the van before he paid the full purchase price. At that time, the car broke down, and Artus scheduled the van's repair with the defendant who was not aware that Artus was the owner of the van. The defendant claimed a repairer's lien and refused to return the van until receipt of payment for the repairs. The trial court held for the plaintiff and ordered the defendant to return the van. On

962. Section 97.
963. Section 108.
964. Civil Suit No. 389 of 2010.
965. [1963] 3 All ER 213.

appeal, it was held that a mechanic can assert a lien against a car owner where a car's lessee authorizes the mechanic to repair the vehicle but is not paid.

631. A general lien on the other hand is the right of one person to retain goods which are in his possession belonging to another person until the promise or liability is discharged. In this regard, the Contracts Act provides:

> A banker, a broker, a warehouse keeper, an advocate, an insurance broker or any other person authorized by law may, in the absence of a contract to the contrary, retain as security for a general balance of account, any goods bailed to him or her.[966]

632. The Act is clear: the general lien is available only to bankers, brokers, warehouse keepers, advocates and insurance brokers. Thus, any other person can exercise a general lien only under an express contract to that effect.[967] This lien also does not apply to properties deposited for safe custody or for a specific purpose.

633. The bailee may also institute a claim against a third party. Where a third party wrongfully deprives a bailee of the use of bailed goods, the bailee may sue for deprivation or damage.[968] When the bailee obtains compensation, it has to be handled in accordance with the interests of the bailor and bailee.[969]

§4. Termination of Bailment

634. A bailment may come to an end 'where the bailee does any act with regard to the bailed goods, which is inconsistent with the conditions of the bailment'.[970] A gratuitous bailment may terminate where the goods bailed are returned, where the time of bailment expires, by agreement of the parties, where the subject matter of the bailment is destroyed or upon the death of the bailor or bailee.[971]

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966. Section 109(1). On the exercise of a general lien by these persons as a matter of usage, *see Stevenson v. Blakelock* (1813) 1 M. & S. 535; *Baring v. Corrie* (1818) 2 B. & Ald. 137; *Re London & Globe Finance Corpn* [1902] 2 Ch. 416; *Hewison v. Guthrie* (1836) 2 Bing. N.C. 755.
967. Section 109(2). *See Rushforth v. Hadfield* (1805) 6 East 519.
968. Section 117(1).
969. Section 117(3) and (4).
970. Section 94.
971. Section 100(a)–(e).

635–640

Chapter 3. Gaming and Wagering

635. According to the Lotteries and Gaming Act, 2016, which provides for gaming, betting, wagering and lottery, 'betting' is defined as 'making or accepting a bet on: the outcome of a race, competition or other event or other process; the likelihood of anything occurring or not occurring; or whether anything is or is not true'.[972]

636. 'Gaming' means the 'the playing of a game for winnings in money or money's worth and for the avoidance of doubt includes gambling'.[973]

637. 'Wager' means a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain'.[974] According to the Contracts Act, '[a]n agreement made by way of an unlicensed wager is void'.[975] For the purposes of the Act, 'wager means a promise to pay money or other consideration on the occurrence of an uncertain event'.[976]

638. The Lotteries and Gaming Act, 2016, establishes the National Lotteries and Gaming Board (the Board)[977] whose objectives, include 'to supervise and regulate the establishment, management and operation of lotteries, gaming, betting and casinos in Uganda, and to protect the citizens from the adverse effects of gaming and betting'.[978]

639. According to the Lotteries and Gaming Act, '[a] person shall not establish or operate a casino or provide a gaming or betting machine without a license issued under this Act'.[979] The Board has powers to issue casino, gaming or gambling or betting licences.[980]

640. The Board may, by statutory order, approve the games that may be made available in a casino and the rules applying to those games.[981] The Act states that, '[a] casino operator shall make a copy of the rules applicable to a game available to a patron, upon request for inspection'.[982] The rules 'shall be kept or exhibited in a conspicuous place at a casino'.[983]

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972. Section 1.
973. *Ibid.*
974. *Ibid.*
975. Section 24(1).
976. Section 24(2).
977. Section 2.
978. Section 3. On the functions of the Board, *see* s. 4.
979. Section 26.
980. Section 27.
981. Section 32(1).
982. Section 32(3).
983. Section 32(4).

641. The licence granted by the Board may include specific conditions 'regarding the number or categories of gaming or betting machines that may be made available for use in accordance with the license'.[984] The licence may also state that 'a specified gaming or betting machine may not be made available for use unless the use of the machine is approved by the Board'.[985] The Act also provides that '[e]very gaming or betting machine or device shall be registered with the Board'.[986]

642. The Lotteries and Gaming (Licensing) Regulations, 2017, prohibit misleading betting advertisements. The Regulations state:

> any advertisement of a gambling and betting machine or device, a gambling or betting activity, licensed premises or website at which gambling or betting activities are available shall include a statement against the dangers of addictive and compulsive gambling or betting in the following words: 'Betting is addictive and can be psychologically harmful'.[987]

643. The Regulations further provide that, 'where betting advertisement is carried in a language other than English, the statement in sub regulation (2) shall be translated into that language and added to the advertisement'.[988]

644. The Regulations restrict access to betting or gambling by minors. A minor is defined by the Lotteries and Gaming Act, 2016, as 'a person below the age of twenty-five years'.[989] The Regulations state:

> a person licensed to provide betting or a gaming or betting machine, shall require every person accessing betting premises or facilities to produce a National Identification Card or passport in case of foreigners, before obtaining access to the premises of a betting facility or permitting that person to participating in any betting activities.[990]

984. Section 34(a).
985. Section 34(b).
986. Section 35.
987. Regulation 3(2).
988. Regulation 3(3). *See also* Regulation 3(4)(a)–(c) on the form of betting advertisement.
989. Section 1.
990. Regulation 5(1).

Chapter 4. Sale of Goods

§1. Nature of a Contract of Sale of Goods

645. The Sale of Goods and Supply of Services Act, 2017, defines a contract of sale as '[a] contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price'.[991] The contract of sale may also be absolute or conditional.[992] A number of elements can be discerned from the above: seller, buyer, property, goods and price.

646. According to the Act, a seller 'means a person who sells or agrees to buy goods'[993] while a buyer 'means a person who buys or agrees to buy goods or who procures or agrees to procure services'.[994] Thus, in a contract of sale of goods, there should be a seller and buyer. However, a person can validly buy his or her own goods if, for example, he or she buys from a bailiff who has seized them under a court order. According to the Act, there may also be a contract of sale between one-part owner and another.[995]

647. The Act defines property as 'the general property in goods, and not merely a special property'.[996] In the context of sale of goods, property in goods means ownership.[997] Thus, there must be an agreement transferring ownership of the goods from the seller to the buyer.

648. According to the Act, goods include:

(a) all things and personal chattels, including specially manufactured goods, which are movable at the time of identification to the contract of sale other than the money representing the price, investment securities and things in action;
(b) emblements, growing crops, unborn young of animals and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;
(c) computer software; and
(d) undivided share in goods held in common.[998]

649. It can be seen from the above definition that goods include all chattels or movable property except money or personal rights in property or choses in action such as stocks and shares, negotiable instruments, intellectual property rights such as trademarks, copyright and geographical indications.

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991. Section 2(1).
992. Section 2(3).
993. Section 1.
994. *Ibid.*
995. Section 2(2).
996. Section 1.
997. Robert Lowe, *Commercial Law* (5th ed. Sweet & Maxwell 1976).
998. Section 1.

650. Goods may be classified into three main types: existing, future and contingent goods. According to the Sale of Goods and Supply of Services Act, 2017, goods which form the subject matter of a contract of sale may be existing goods owned or possessed by the seller. Future goods are those goods to be manufactured or acquired by the seller after making of the contract of sale.[999] Thus, future goods are those goods which the seller does not own or possess at the time of the formation of the contract. For example, John enters into a contract with Joan to sell her all the millet that will be grown in his two acres next year.

651. A contract of sale of goods may be made where, the acquisition of such goods by the seller depends upon a contingency which may or may not happen. Contingent goods are a type of future goods, the acquisition of which by the seller is dependent on a contingency which may or may not happen. For example, J agrees to sell to Y a trailer if it is shipped to Mombasa within six months. Where the seller in a contract of sale of goods purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

652. Existing goods are goods that physically exist and belong to the seller at the time of the contract of sale. They are owned and possessed by the seller and may either be ascertained or specific or unascertained. According to the Act, ascertained goods are 'goods which have become identified subsequent to the formation of the contract'[1000] while specific goods are 'goods and percentages of goods identified and agreed upon by the parties at the time a contract of sale is made and includes undivided shares in specific goods held in common'.[1001] The Act defines unascertained goods as those 'goods not identified and agreed upon at the time the contract is made'.[1002]

653. The price is the consideration given by the buyer to seller for the property in the goods. In order to distinguish a contract of sale from a contract of exchange, the expression 'money consideration' is used. If a buyer fails to get the property, he or she can recover the price, since the consideration for it has totally failed.[1003] However, the price under the contract of sale of goods need not wholly be in money terms. In *Aldridge v. Johnson*,[1004] there was a contract for the sale of 52 bullocks valued at GBP 6 each against 100 quarters of barley, the difference to be paid in cash. The court held that the transaction was a contract of sale.

654. A sale should be distinguished from an agreement to sell. According to the Sale of Goods and Supply of Services Act, 2017, a sale 'includes a bargain and sale as well as a sale and delivery'.[1005] The Act further provides that '[w]here, under a contract of sale, the property in the goods is transferred from the seller to the buyer,

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999. *Ibid*.
1000. *Ibid*.
1001. *Ibid*.
1002. *Ibid*.
1003. *See Rowland v. Divall* [1923] 2 K.B. 500.
1004. (1857) 7 E. & Bl. 885.
1005. Section 1.

the contract is called a sale'.[1006] It is an agreement to sell '[w]here, the transfer of the property in the goods is to take place at a future time or subject to conditions to be fulfilled after the making of the contract'.[1007] The Act also provides that '[a]n agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be to transferred'.[1008]

655. A sale is an executed contract where transfer of property takes place immediately while an agreement to sell is an executory contract where property passes at a future date. In a sale, the buyer becomes an immediate owner of the goods, while in an agreement to sell, the seller remains the owner although the buyer may be in possession of the goods. In an agreement to sell, the buyer acquires merely personal rights.

§2. Formation of a Contract of Sale of Goods

656. The Sale of Goods and Supply of Services Act, 2017, provides that 'a contract of sale may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or in the form of data message, or may be implied from the conduct of the parties'.[1009] However, the Act clearly stipulates that this provision 'shall not affect a contract entered into under any other law requiring a contract to be made in a specific manner'.[1010]

657. The Sale of Goods and Supply of Services Act, 2017, does not contain specific provisions relating to offer and acceptance. Thus, the rules of offer and acceptance under the general law of contract are applicable to the contract of sale of goods. On auction sales, section 70(1) of the Act provides as follows:

(a) where goods are put up for sale by auction in lots, each lot is prima facie taken to be the subject of a contract of sale;
(b) a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in any other customary manner, and until that announcement is made, any bidder may retract his or her bid;
(c) where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it is lawful for the seller to bid himself or herself or to employ any person to bid at that sale, or for the auctioneer knowingly to take any bid from the seller or any such person, and any sale that contravenes that rule may be treated as fraudulent by the buyer; and
(d) a sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

1006. Section 2(4).
1007. Section 2(5).
1008. Section 2(6).
1009. Section 5(1).
1010. Section 5(2).

658. The auctioneer has a lien over the goods and as against the seller for his or her commission and other expenses and has a right to sue the buyer for the price. However, the auctioneer does not warrant the principal's title.

659. The bids in an action are simply offers, which the auctioneer may accept or reject. A sale by auction is complete at the fall of a hammer. However, in most cases, goods sold at an auction are expressed to be 'subject to reserve'. Thus, the auctioneer has no right to knock the goods down to the buyer until the seller's reserve price has been reached.[1011] The Act is silent about auction sales advertised without reserve. If the auctioneer withdraws goods from the sale because the reserve has not been reached, the auctioneer may be held liable for breach of an implied promise to sell to the highest bidder.[1012]

660. Like under the general law of contract, 'a person has capacity to buy and sell goods if he or she is: eighteen years and above; of sound mind; and not disqualified from contracting by any law'.[1013] Where necessaries are supplied to a minor, or 'a person who, by reason of mental incapacity or drunkenness is incompetent to enter into a contract',[1014] that person 'must pay a reasonable price for the necessaries'.[1015] According to the Act, necessaries mean 'goods or services suitable to the condition of a person under eighteen or other person, and to his or her actual requirements at the time of the sale and delivery'.[1016] The burden of proving that the goods supplied are necessaries is on the person seeking to enforce the contract, which is usually the seller.

661. One of the essential ingredients of a contract of sale is 'money consideration, called the price'.[1017] How may the price in a contract of sale of goods be ascertained? According to the Act, the price 'may be fixed by the contract, or may be left to be determined in a manner agreed by the contract, or may be determined by the course of dealing between the parties'.[1018]

662. In *May & Butcher v. The King*,[1019] the House of Lords held that an agreement for the sale of goods at a price to be later fixed by the parties was not, in the circumstances of the case, a concluded contract. However, in *Foley v. Classique Coaches Ltd,*[1020] the Court of Appeal held that an agreement to supply petrol 'at a price to be agreed upon by the parties was a binding contract as the parties had clearly evinced an intention to be bound and the contract contained an arbitration clause where a reasonable price would be fixed in case of disagreement'.

1011. *See McManus v. Fortescue* [1907] 2 K.B. 1.
1012. *See Warlow v. Harrison* (1859) 1 E. & E. 309.
1013. Section 4(1).
1014. Section 4(3).
1015. Section 4(3).
1016. Section 4(4).
1017. Section 2(1).
1018. Section 9(1).
1019. [1934] 2 K.B. 17.
1020. [1934] 2 K.B. 1.

663. In *Courtney & Fairburn Ltd v. Tolaini Bros (Hotels) Ltd*,[1021] the court refused to recognize a contract because the price was 'to be agreed'. This may be understandable given that the law does not recognize agreements 'to agree' or 'subject to contract'.

664. In case the price is not determined in the manner aforesaid, 'the buyer shall pay a reasonable price'.[1022] According to the Act, what is a reasonable price 'is a question of fact dependent on the circumstances of each case and may include a consideration of the prevailing market price'.[1023] The price may also be fixed through valuation. In this vein, section 10(1) of the Act provides:

> Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and the third party cannot or does not make the valuation, the agreement is voidable except that if the goods or any part of them have been delivered to and appropriated by the buyer he or she shall pay a reasonable price for the appropriated goods.

665. Thus, the parties may agree that the price for the goods may be fixed through valuation and the amount arrived at by the valuer would, in case of a dispute, be upheld by the court. In *Campbell v. Edwards*,[1024] Lord Denning, MR stated:

> It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly, they are bound by it. If there were fraud or collusion, of course, it would be different.[1025]

666. However, there is a challenge with section 10(1) above. The section talks of 'an agreement to sell'. What is the position in case of a sale where the price is to be fixed through valuation?

§3. Terms of the Contract of Sale of Goods

667. Terms of a contract of sale of goods may be either express or implied. The terms are conditions or warranties. The Sale of Goods and Supply of Services Act defines a condition as 'an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such a contract, the breach of which gives rise to a right to reject the goods and treat the contract as repudiated'.[1026] A warranty means 'an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of that contract, the

1021. [1975] 1 All ER 453.
1022. Section 9(2).
1023. Section 9(3).
1024. [1976] 1 W.L.R. 403.
1025. *Ibid.*, p. 407.
1026. Section 1.

breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated'.[1027]

668. Whether the term breached is a condition or warranty depends on the construction of the contract. In this vein, section 12(2) of the Act provides:

> Whether a stipulation in a contract of sale or supply of services is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or as a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods or services and treat the contract as repudiated, depends in each case on the construction of the contract.

669. Section 12(2) above explains the terms condition and warranty by reference to their legal effect, that is, giving rise to repudiation of the contract and a claim for damages respectively. Regarding the breach of condition, Atiyah has correctly observed that:

> a condition is a term which, without being the fundamental obligation imposed by the contract, is still of such vital importance that it goes to the root of the transaction. The importance of a condition in contracts for the sale of goods is that its breach, if committed by the seller, may give the buyer the right to reject the goods completely and decline to pay the price, or if he has already paid it, to recover it.[1028]

670. In *Kampala General Agency (1942) Ltd v. Mody's (EA) Ltd*,[1029] the appellant sold to the respondents certain goods intended for use in the respondent's cotton ginnery. The price specified in the contract was F.O.R. Mombasa, according to which delivery was to be made by 'railing Mombasa' and the goods were to be delivered in instalments. The first two instalments of goods were consigned to Atura port, which was the agreed destination. The third instalment was consigned to Soroti station on the written instructions of the respondents. When the appellants consigned the last instalment to the respondents at Aloi station, which was nearer to the ginnery, the respondents refused to accept the goods. The appellants sued for damages for breach of contract. The respondents argued that the appellants had breached the contract by consigning the goods to a place other than the agreed destination under the contract and that this entitled the respondents to reject the goods. On appeal, it was held that the respondents' action in consigning the goods to Aloi station instead of Soroti station, as instructed by the respondents, was a breach of warranty and not a breach of condition. Thus, the respondents were not entitled to reject the goods but were only entitled to damages. Newbold J.A. defined a condition in a contract of sale as, 'an obligation the performance of which is so essential to the

1027. *Ibid*.
1028. P.S. Atiyah, *The Sale of Goods* 56 (9th ed. Pitman Publishers 1995).
1029. [1963] E.A. 549.

contract that if it is not performed, the other party may fairly consider that there has been a substantial failure to perform the contract'.[1030]

671. In *Norman v. Overseas Motor Transport (Tanganyika) Ltd*,[1031] pursuant to a written agreement with the respondent, the appellant took delivery of a Morris Isis saloon car in England. The agreement had a warranty that the supplier's liability ended with the arrival of the motor vehicle in a roadworthy condition at the place of delivery. During the first three days after delivery, the appellant had trouble with the gear box and rust appeared on the bumper. The defects were worked on. The respondent wrote to the applicant that certain modifications had been carried out and that subject to final road tests, the car was perfectly fit for use. The trial judge found that the defects had been cured and awarded him damages. It was held that the appellant must be taken to have treated any breach of condition arising from the defects as a breach of warranty and since the defects were all remedied and he continued to use the car, he could not now rely on them to repudiate the contract.

672. It can be concluded from the above that the difference between a condition and warranty largely lies in the effect of breach of either term. Whereas a breach of condition gives rise to repudiation and rejection of goods, a breach of warranty entitles the buyer to a claim for damages. The buyer may choose to treat the breach of condition as a breach of warranty and sue for damages.[1032]

§4. Implied Terms as to Title

673. According to the Sale of Goods and Supply of Services Act, in a contract of sale of goods, there is:

> an implied condition on the part of the seller that in the case of a sale he or she has a right to sell the goods, and that in the case of an agreement to sell he or she will have such right at the time when the property is to pass.[1033]

674. In *Rowland v. Divall*,[1034] a buyer of a motor vehicle discovered that it had in fact been stolen and as a result he had to return it to the true owner. He sued on the implied condition as to title. The seller contended that in assessing the damages payable, the period for which the buyer had benefitted from the vehicle before it was forfeited to the true owner should be taken into account. It was held that the buyer was entitled to recover the whole of the purchase price he had paid for the vehicle because what he had purchased was title (ownership), not simply use of the vehicle, and yet the seller had no title to pass to the buyer.

1030. *Ibid.*, p. 551.
1031. [1959] E.A. 131.
1032. Section 12(1).
1033. Section 13(1).
1034. [1923] 2 K.B. 500. *See also Ali Kassam Virani Ltd v. The United Africa Co. (Tanganyika) Ltd* [1958] E.A. 204; *Lakhamshi Bros Ltd v. R. Raja & Sons* 1966 (1) A.L.R. Comm. 245.

675. In *Butterworths v. Kingsway Motors*,[1035] a car which was owned by a finance company and let on hire-purchase was wrongfully sold by the hirer and passed through several hands before being bought by the plaintiff, who used it for almost a whole year before it was reclaimed by the finance company. It was held that basing on the rule in *Rowland v. Divall*, the plaintiff could recover all his purchase price from his immediate seller because of breach of section 12(1) (equivalent of section 13(1)), even though he had used the car for nearly a year.

676. In a contract of sale of goods, there are also the following implied terms related to title of the goods: freedom from encumbrances and quiet possession of the goods sold. The Act provides that in a contract of sale of goods, there is an implied term that 'the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made'.[1036] There is also an implied term that 'the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known to the buyer'.[1037]

677. In *Lakhamshi Bros Ltd v. R. Raja & Sons*,[1038] the appellant purchased from the respondents forty-four cases of boot polish of which they sold twelve. The remainder was seized by the police on suspicion that they were stolen property. Police produced a court order that the goods be returned to the true owner. The respondents refused to refund the purchase price. The appellant sued for the price of the goods and damages either for breach of implied condition as to title under section 14 of the Sale of Goods Act (equivalent to section 13(1) of the Sale of Goods and Supply of Services Act, 2017) that the respondents had a right to sell the goods or in the alternative for breach of warranty that the appellant company should have and enjoy quiet possession of the goods (equivalent of section 13(2)(b) of the Act). The trial court held that the appellant had failed to prove either the breach of condition or warranty. On appeal, it was held that the appellant, having alleged theft of the goods and having failed to prove it, could not succeed on a claim based on a breach of condition as to title. It was further held that proof that the applicant's possession had been disturbed by the police together with evidence of the respondent's knowledge that their title was liable to challenge established prima facie a breach of warranty for quiet possession of the goods, which the respondent had failed to rebut.

§5. Implied Condition as to Description

678. The Sale of Goods and Supply of Services Act, 2017, provides:

1035. [1954] 1 W.L.R. 1286.
1036. Section 13(2)(a).
1037. Section 13(2)(b).
1038. [1966] E.A. 178.

> Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.[1039] Where the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.[1040]

679. In a number of cases, the courts have emphasized the point that in a contract of sale of goods by description, there is an implied condition that the goods sold shall correspond with the description. For example, in *Beale v. Taylor*,[1041] a private motorist advertised his car for sale as a 'Herald convertible, white, 1961, twin carbs'. The buyer, another private motorist, later discovered that the car was in fact a composite of two cars and that only the rear half corresponded with the description given by the seller, who was unaware of the true situation. The court held that even though the buyer had inspected the car, he had nevertheless at least partly relied on the description, and that it was a sale by description and the seller was liable.

680. In *Varley v. Whipp*,[1042] the term 'sale by description' was interpreted as including the reference to the article being sold as 'a second-hand reaping machine'.

681. In *Re Moore & Co and Landauer & Co.*,[1043] the plaintiff contracted to sell to the defendant 3,100 cases of Australian canned fruits, described as being parked in cases containing thirty cans each. When the ship containing the goods arrived in London, it was found that only half of the consignment was packed in cases of 30, the rest being in cases of 24. The buyers rejected the goods without giving any reason. The court held that the buyers were entitled to reject the goods since they did not correspond with the description.

682. In *Allibhai Panju & Sons (Tanganyika) Ltd v. Sunderji Nanji*,[1044] by a contract note dated 29 October 1946, executed through a broker, the respondents agreed to purchase from the appellant 30 tons of 'mtama' of the 1946 crops from the Belgian Congo for delivery at Dar es Salaam at UGX 500 per ton. The respondents refused to accept part of the consignment on the ground that it consisted of red and not white 'mtama'. It was held that the 'mtama' tendered by the appellants was not of the description for which the bargain was struck, which was the sale of white 'mtama'.

1039. Section 14(1).
1040. Section 14(2).
1041. [1967] 1 W.L.R. 1193.
1042. [1900] 1 Q.B. 513. *See also Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85.
1043. [1921] 2 K.B. 519. *See also Arcos Ltd v. EA Ronaasen & Son* [1933] A.C. 470; *Harlington & Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564.
1044. (1949) 16 E.A.C.A. 72.

683. Before a seller can be held liable, the buyer should have relied on description of the goods. In *Harlingdon & Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd*,[1045] Slade LJ stated:

> [W]here a question arises whether a sale of goods was one by description, the presence or absence of reliance on the description may be very relevant in so far as it throws light on the intention of the parties at the time of the contract. If there was no such reliance by the purchaser, this may be powerful evidence that the parties did not contemplate that the authenticity of the description should constitute a term of the contract; in other words that they contemplated that the purchaser would be buying the goods as they were. If on the other hand, there was such reliance … this may be equally powerful evidence that it was contemplated by both parties that the correctness of the description would be a term of the contract.[1046]

684. As pointed out above, where the sale is by sample as well as by description, the goods should correspond with both the sample and the description. In *Burongo Construction Co. v. The Attorney General*,[1047] the plaintiffs entered into an agreement with Uganda Virus Research Institute (UVRI), a government agency, to supply them single core PVC cables. The plaintiffs supplied the sample of the cable, which was accepted and approved by UVRI. The cables were supplied and delivered. One of the issues before the court was whether the goods supplied conformed with the description given by the defendant to the plaintiffs. It was held that although in accordance with section 14 of the Act, the goods conformed with the description, they did not correspond with the sample, and the buyers were entitled to reject them.[1048] The Act also makes it clear that section 14 applies to sales by both consumers and non-consumers.

685. In another case of *Pan African Trading Agencies v. Chande Brothers Ltd*,[1049] the appellants offered the respondents a quantity of beans as per sample supplied at a specified price. Their offer was not accepted and after selling some elsewhere in March, they made a further offer to the respondents of the remainder of the beans which were described as 'mixed coloured beans of fair average quality (f.a.q)' of Congo origin. The respondents did not accept this second offer but made a counter-offer referring to the prior second offer and omitted to describe them as f.a.q. The appellants accepted the counter-offer. Payment was made but while the beans were being weighed, about half of the beans were found to be damp and mouldy and not of f.a.q. The respondents accepted the good quality beans and rejected the rest. They sold the accepted beans at a profit. The respondents alleged that it was a condition of a contract of sale that the goods should be of f.a.q., and

1045. [1990] 1 All ER 737.
1046. *Ibid*.
1047. HCT-00-CC-CS-0253-2004.
1048. *See also Nurmohamed Nurjii & Others v. Hussenali Gulamhussein Dattu* 22 E.A.C.A. 294.
1049. (1952) 9 E.A.C.A. 141.

by delivering the mixed goods, the appellants had committed a breach of the contract. They claimed a refund of the price of the rejected beans and damaged for loss of profit that they would have made on a resale. The trial court found for them and ordered the appellants to pay the contract price for the rejected beans. On appeal, it was held that the term f.a.q. was an implied term of the contract and the question whether the goods were of 'inferior quality' and did not correspond with the description was a question of fact. Since the beans rejected were not of f.a.q., the respondents were right in accepting some and rejecting the reminder. Having failed to prove the existence of a market, the respondents were entitled only to nominal damages.

686. In yet another case of *H.B. Shah & 3 Others v. Rambhai Kashibhai Patel*,[1050] the appellants had contracted to sell to the respondent a quantity of sunglasses and the material terms of the contract were: (1) Description: 'Sun-glasses made in Hong Kong as per sample shown to and approved by you'; (2) Time and mode of delivery: 'Delivery to be effected after the arrival in Dar es Salaam of S.S. Tjibadak'. The Court of Appeal agreed with the trial judge that the contract was a sale by sample and description. In *Ali Kassam Virani Ltd v. The United Africa Company (Tanganyika) Ltd*,[1051] the appellants, dealers in coffee and other produce, sold the respondents six tons of 'Tanganika' coffee (Morogoro District) by sample. The court held that the contract was a sale by description as well as sample.

§6. Implied Condition as to Quality or Fitness for Purpose

687. The Sale of Goods and Supply of Services Act, 2017, expressly provides for the doctrine of *caveat emptor*. It provides that 'there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale'.[1052] However, 'where the seller sells goods of a description which it is in the course of the seller's business to supply',[1053] and 'where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's judgment',[1054] there is an implied condition that the goods shall be reasonably fit for the purpose.

688. In *Ibrahim Karimbu v. Dalgety and Co. Ltd*,[1055] there was a contract for the sale of 181 bags of 'maize meal' of first-class quality. It was held that the contract being for sale by description of 'maize meal', there was an implied condition that the meal should be of merchantable quality.

1050. (1956) 23 E.A.C.A. 329.
1051. [1958] E.A. 204.
1052. Section 15(1).
1053. Section 15(2)(b).
1054. Section 15(a).
1055. (1934) 1 E.A.C.A. 121.

689. In *Doola Singh and Son v. The Uganda Foundry and Machinery Works*,[1056] by a contract in writing, the respondents agreed to supply a complete saw-bench to the appellants. Subsequently, the appellants agreed to receive from the respondents certain specified parts and to construct a saw-bench from them. The saw-bench when completed failed to function owing to some of the parts supplied by the respondents being unserviceable and useless. There was evidence that the supply of saw-benches was part of the usual business of the respondents. It was held that there was an implied warranty that the parts manufactured should be fit for the purpose, that is, they should be, such as would, if fitted together and made into a saw-bench, be reasonably fit to constitute a machine capable of doing the work usually done by a saw-bench. Manning J stated:

> I regard the contract as not severable. It was clearly one to manufacture and deliver all the parts as specified in the memorandum, i.e. all the parts necessary for the construction of the saw-bench. If one or more parts were not delivered, the rest would be of no use to the plaintiffs … Here, in the circumstances, there was no performance at all. The only way in which the respondent could perform his contract was by delivery of all the parts specified in a serviceable condition.[1057]

690. In *Godley v. Perry*,[1058] the defendant sold a plastic catapult to the plaintiff, a boy aged six years. When the boy used the catapult, it broke, blinding him in the left eye. The court held that the defendant was liable since the catapult was not fit for the purpose for which it was sold. However, where the goods are of a description that is normally sold in the seller's business, then even if the buyer has not expressly indicated the purpose for which he wants the particular goods, there will be an implied condition that the goods sold are reasonably fit for the usual purpose for which the goods the seller deals in are sought.

691. In *Mable Bakeine v. Yuasa Investments Ltd*,[1059] the plaintiff filed an action for a refund of UGX 50 million as a deposit on the purchase price for a motor vehicle, leaving a balance of UGX 18 million. The car engine had knocked. The vehicle could not function properly in spite of expert service and repair. She returned the vehicle to the defendant and sued for recovery of the price, special and general damages. The issue was whether there was a breach of contract of sale of motor vehicle by the defendant. The court agreed with the plaintiff that the vehicle sold was in poor mechanical condition and not fit for the purpose for which it was required and thus the defendant was in breach of contract.

1056. (1946) 12 E.A.C.A. 33.
1057. *Ibid.*, p. 36.
1058. [1960] 1 W.L.R. 9. *See Aswan Engineering Establishment Co v. Lupdine Ltd* [1987] 1 W.L.R. 1.
1059. H.C.C.S. No. 136 of 2013.

692. In *Omer Saleh Audalih v. A. Besse & Co. Ltd*,[1060] it was held that the mere fact that the truck in question was not fit for up-country conditions did not mean it was not of the description specified in the agreement or was not saleable under that description.

693. In another case of *Goustar Enterprises Ltd v. John Kakas Oumo*,[1061] defective tractors were delivered. One tractor failed to work as it was overheating and the second had a hydraulic problem. The Supreme Court held that in order to succeed, the buyer had to prove that he had relied on the seller's skill and judgment to supply goods fit for the purpose for which the buyer bought them, since there was evidence to show that the seller in this case was a supplier of tractors for use by farmers. That where goods were delivered to a buyer who had not previously examined them, he or she was not deemed to have accepted them to ascertain that they were in conformity with the contract. That the respondent had not accepted the tractors because he had not had the opportunity to ascertain that they were fit for the purpose for which he bought them and simply relied on these seller's skill and judgment.

694. In yet another case of *Kinyanjui v. D.T, Doble & Co. Ltd*,[1062] the appellant bought from the respondent a modified lorry for use on the Mombasa to Zambia route. After the vehicle had given trouble to the appellant, he sued the respondent for breach of the implied term of fitness for purpose. The trial court held that the appellant had made known the express purpose for which the lorry was required, but that he did not rely on the respondent's skill and judgment. On appeal, it was held that the communication by the buyer to the seller of the purpose for which he required the goods is sufficient to show that he relied on the seller's skill and judgment. The trial judge's finding that the vehicle was reasonably fit for the purpose required was supported by evidence.

695. The seller may also not disclose the purpose if it is obvious.[1063] For example, in *Hon. Mable Bakeine v. Yuasa Investments Ltd*,[1064] where the car sold was found to be defective, it was held that the purpose for which the car was bought was obvious.

696. The Act also provides that '[w]here the seller sells goods in the course of business, there is an implied term that the goods supplied under the contract are of satisfactory quality'.[1065] However, this subsection does not apply to any matter that makes the quality of goods unsatisfactory if 'it is specifically brought to the attention of the buyer before a contract is made'.[1066] The provision does not apply where

1060. [1960] E.A. 907.
1061. S.C.C.A. No. 8 of 2003.
1062. [1975] E.A. 176.
1063. *See, for example*, *Henry Kendall & Sons v. William Lillico & Sons Ltd* [1969] A.C. 31.
1064. H.C.C.S. No. 136 of 2013.
1065. Section 15(3). In the repealed Sale of Goods Act, Cap. 82, the words 'merchantable quality' were used instead of 'satisfactory quality'.
1066. Section 15(4)(a).

'the buyer has examined the goods before the contract is made, which that examination ought to reveal'.[1067] It is also not applicable, in case of a sale by sample, where the matter 'would have been apparent on a reasonable examination of the sample'.[1068] In *The Universal Cold Storage Ltd v. Sabena Belgian World Airlines*,[1069] where the defendants had inspected and failed to reject the meat delivered, it was held that they could not be heard to complain about the quality of the meat.

697. Whether the goods are of satisfactory quality or not depends largely upon the circumstances of each case. The Act provides guidance that the quality of goods includes: their state, condition, appearance and finish; their fitness for all the purposes for which goods of the kind in question are commonly supplied safety and durability.[1070] The price and description of the goods may be significant in determining whether the goods are of satisfactory quality or not. Consequently, a second-hand car may be held to be of satisfactory quality even if it is not in perfect condition, regard being had to its price. For example, X purchases a used Toyota Premio car from Chata Motors in Ntinda industrial area at UGX 28 million and the sales man emphasizes to X that the car is not brand new. On delivery, X discovers that the tyres are won out and need replacement since the car was driven from Mombasa to Kampala. Such car may be held to be of merchantable quality. However, a new one, which has some defects may not pass the 'satisfactory' test.

698. In *Rogers v. Parish (Scarborough) Ltd*,[1071] the plaintiff bought a new Range Rover that had a number of defects such as a misfiring engine, an oil leak, scratches to the paintwork, and a noisy gearbox. It was held that the vehicle was not of merchantable quality even though the defects were capable of being repaired.

699. In *Doola Singh & Sons v. The Uganda Foundry & Machinery Works*,[1072] the defendants sold a saw-bench to the plaintiffs. After it had been installed and had worked for about five minutes, it stopped. It was found that it had been carelessly assembled by the seller who used wrong components. It was held that the defendants were liable since they knew the particular purpose for which the saw-bench was sold. The defendants were under an obligation to ensure that the bench was of merchantable quality and fit for the particular purpose for which it was sold.

700. In *Iron Steel Wares Ltd v. C.W. Matyr & Co*,[1073] it was held that where forks of bicycles did not fit the frames, there was a breach of condition that the goods shall be of merchantable quality.

1067. Section 15(4)(b).
1068. Section 15(4)(c).
1069. [1965] E.A. 418.
1070. Section 15(6).
1071. [1987] 2 All ER 232. *See also Shine v. General Guarantee Corporation* [1988] 1 All ER 911; *Bernstein v. Pamsons Motors (Golders Green) Ltd* [1987] 2 All ER 220.
1072. 12 E.A.C.A. 33.
1073. [1952-1957] U.L.R. 146.

701. In another case of *Direct Domestic Appliances Ltd v. Nile Breweries Ltd*,[1074] the plaintiff bought beer from the defendant through its local agent, M/s Ome Traders Ltd. A fundamental term of the contract was that the beer would have a shelf life of at least one year. However, the plaintiff later discovered that some of the Nile Special beer had a shelf life of only six months and they were unable to sell it in the United Kingdom and as it was about to expire, it was destroyed. The defendant however stated that they got an order from M/s Ome Traders Ltd and not the plaintiff and that they had an opportunity to check whether the beer conformed with its requirements and thus should not be heard to complain. It was held that the defendant's officials gave the plaintiff assurances on all their requirements including the shelf life of the beer and they relied on it. This amounted to a material representation which was broken with respect to the Nile Special brand. That the implied conditions of quality and fitness for purpose normally go together and the beer was not fit for export to United Kingdom and was not of merchantable quality.

702. The question of whether goods are fit for the purpose for which they were bought was also considered in the case of *Mugenyi v. Ssekubwa*,[1075] where the appellant supplied a second-hand Mercedes Benz car to the respondent. Although the gearbox developed problems after a short while, it was not repaired to the respondent's satisfaction. The respondent sued and the court ruled in his favour. On appeal, it was held that the appellant has a duty to ensure that both his workmanship and the gearbox he fixed were of good quality. That second-hand goods must be fit for the purpose they were intended for and that a gear box that did not work properly within days of being fitted in the appellant's car was not fit for the purpose which it was made for.

703. In *Juthalal Velji v. Gulmhussein Remtulia Jiuraj*,[1076] the respondent sued the appellant for breach of two contracts, which were in the form of brokers' notes, relating to the sale of new tyres and tubes. The tyres had been purchased from Government Disposals Board and were ex-military tyres, part of the stock at the end of the war. The issue was whether the respondent supplied new tyres within the meaning of the contract. There was evidence that the respondent had inspected the tyres and found them 'new' with the word 'military' stamped on them. It was held that the tyres that were tendered were new tyres of the only kind that would suit the appellant's purpose.

704. According to the Act, a 'warranty or condition as to quality or fitness for purpose may be implied in a contract by the usage of trade or custom'.[1077] The Act also provides that where materials are used in a contract for the supply of services, 'there is an implied term that the materials will be sound and reasonably fit for the purpose for which they are required'.[1078]

1074. [2008] 1 E.A. 88.
1075. [2008] 1 E.A. 249.
1076. (1949) 16 E.A.C.A. 75.
1077. Section 15(7).
1078. Section 16.

705. The Act also provides that terms as to care and skill may be implied in a supply of services contract. In this respect, the Act provides as follows: 'In a contract for the supply of services where the supplier is acting in the course of business, there is an implied term that the supplier will carry out the services with reasonable care and skill.'[1079]

§7. Implied Condition as to Sample

706. According to the Sale of Goods and Supply of Services Act, 'a contract is one for sale by sample, where there is a term in the contract, express or implied, to that effect'.[1080] Three conditions are implied into this type of contract. First, the bulk must, with regard to quality, correspond with the sample as was held in *Burongo* case above. Second, the buyer must have a reasonable opportunity of comparing the bulk with the sample. Third, the goods must be free of any defect rendering their quality unsatisfactory, which a reasonable examination of the sample would not reveal.

707. In *Jafferali Abdulla v. Janmohamed's Ltd*,[1081] the appellant bought from the respondents at an auction sale 264 dozens of plates packed in twenty-two cases. It was subsequently discovered that a large number of the plates were broken. At the time of the sale, the auctioneer held up a plate and said, 'This is a sample of the plates'. The handbill of the sale also contained the expression, 'The undermentioned goods are for account and risk of the parties concerned' and 'sample of the goods can be inspected in our Auction Room'. It was held that the sale was a sale by sample, and there was no opportunity offered for an intending bidder to inspect the goods which were in the bond. That there was a breach of the implied condition that the bulk must correspond with the sample in quality. The court further held that the seller knew that some of the plates were broken but the purchaser had no reason to suppose that this was the case. The words on the handbill would not protect a seller who knew that many of the plates were damaged but made no mention of the fact.

§8. Passing of Property Between the Seller and the Buyer

708. The main object of a contract of sale is the transfer of property, that is, ownership, from the seller to the buyer. The passing of property is an important aspect to help determine the rights and liabilities of the buyer and seller. Atiyah has summarized the practical consequences of passing of property as follows: If the property in the goods has passed to the buyer, he will generally have a good title to them if the seller becomes insolvent while the goods remain in the seller's possession; if the goods are delivered subject to a reservation of title (property) by the seller, the

1079. Section 18.
1080. Section 17(1).
1081. (1951) 18 E.A.C.A. 21.

seller may have a good title to the goods should the buyer become insolvent; the right to sue a third party for damage to, or loss of, the goods may depend on who has the property; the risk passes prima facie when property passes; and generally speaking, the seller can only sue for the price if the property has passed.[1082]

709. The exact moment when property passes depends on whether the goods are specific or unascertained. In respect of passing of property in specific or ascertained goods, the Sale of Goods and Supply of Services Act provides that, '[w]here there is a contract for the sale of specific or ascertained goods, the property in the goods passes to the buyer at such time as the parties to the contract intend it to pass'.[1083] How is the intention of the parties determined?

710. The Act provides that '[f]or the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case'.[1084] Regarding unascertained goods, the Act provides that, '[w]here there is a contract for the sale of unascertained goods, property in the goods shall not pass to the buyer until the goods are ascertained'.[1085]

711. In *Jane Bwiza v. John Nathan Osapil*,[1086] the seller of a vehicle retained the logbook, insurance certificate and road licence until payment of the full price by the buyer. The Supreme Court held that the general rules as to the passing of property can be modified by the intention of the parties to the sale. It was further held that the fact that the buyer allowed the respondent to retain critical documents of title such as the log book shows that the intention of the parties was that the property in the vehicle would not pass at the signing of the sale agreement. By retaining the documents of title, they were meant to act as security for the payment of the balance of the purchase price and property had passed according to the intention of the parties.

712. Where a contract contains an express provision regarding when the property is to pass, there is no controversy. However, in the majority of cases, the contract is silent on the matter. In this vein, the Act lays down rules for ascertaining the intention as to the time when property passes. The relevant provision opens with the following words: 'Unless a contrary intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.'[1087]

713. Thus, all the rules as to passing of property apply only if there is no different intention. This is critical in sale agreements, which are usually drafted in such

1082. P.S. Atiyah, *The Sale of Goods* 269 (9th ed. Pitman Publishing 1995).
1083. Section 25(2).
1084. *Ibid*.
1085. Section 22.
1086. S.C.C.A. No. 5 of 2012.
1087. Section 26.

a way that the property is not to pass until all the payments have been completed. However, in order to be effective, the contrary intention should be shown at or before the making of the contract.

714. In *Dennant v. Skinner & Another*,[1088] X, a swindler bid for a car at an auction, and it was knocked down to him. He gave a false name and address and was allowed to take the car away in return for a cheque, on signing a document that no property in the car would pass until the cheque was met. He then sold the car, which was resold to the defendant. When the cheque was dishonoured, the original owners sought to recover the car. Hallet J held that the intention of the parties as expressed in the document was too late to prevent the property from passing as it had already done so on the fall of the hammer. The document that was signed had no legal effect and accordingly the defendant had acquired a good title to the car and was entitled to retain it.

715. Rule 1 as to passing property, provides: 'Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or of delivery or both are postponed.'[1089] For example, Kenneth goes to a shop selling shoes and buys a pair of Clarks shoes. He pays and asks the shopkeeper to deliver the shoes to his office. The shopkeeper agrees. The shoes immediately become the property of Kenneth.

716. In *Osapil v. Kaddu*,[1090] pursuant to a written sale agreement dated 20 December 1995, the appellant sold a motor vehicle to the first respondent for UGX 12,500,000. The agreement provided that the first respondent was to pay UGX 7,200,000 immediately and the balance on 20 December 1996. The appellant handed over possession of the vehicle to the first respondent plus a photocopy of its logbook. That same day, the first respondent, sold the vehicle to the second respondent for UGX 12,800,000. Following failure by the first respondent to pay him, the appellant caused the motor vehicle to be impounded by the police. The appellant sued the respondent seeking payment for the balance of the purchase price by the first respondent and damages against the second respondent. The court distinguished the case of *Matayo Musoke v. Alibhai Garage*,[1091] from the one at hand, and held that a registration card or log book was prima facie evidence of title to a motor vehicle and the person in whose name the vehicle was registered was presumed to be the owner unless proved otherwise. Consequently, being a contract for the sale of a specific motor vehicle, and not being subject to a condition as to when the property in the vehicle was to pass, the property passed from the appellant to the first respondent when the sale agreement was executed and the appellant's prima facie title to the vehicle was thereby rebutted. However, after the appellant established ownership of the vehicle, it was released to her.

1088. [1948] 2 K.B. 164.
1089. Section 26(a).
1090. [2001] 1 E.A. 193.
1091. [1960] E.A. 31.

717. In *Anwar v. Kenya Bearing Co.*,[1092] the appellant bought many tractors from the respondent and when he came to collect them, he alleged that some of them were missing. He failed to meet the cheques and promissory notes given for the purchase price, alleging a total failure of consideration. The trial judge held that the contract was for the sale of specific goods in a deliverable state. That property had passed to the appellant and there was no total failure of consideration. In dismissing the appeal, the court held that the contract had not been repudiated. That the transaction was for specific goods in a deliverable state and property had passed to the appellant. That since the appellant had taken a substantial part of the goods, there was no total failure of consideration.

718. A question that arises from the above discussion is: What is an unconditional contract? Is there any contract without conditions? In *Varley v. Whipp*,[1093] it was held that the sale of a reaping machine was not an unconditional sale although it was not clearly subject to any condition precedent.

719. The goods should be in a deliverable state. In *Underwood Ltd v. Burgh Castle Brick and Cement Syndicate*,[1094] the sellers sold a 30-ton condensing engine 'free on rail London'. At the time of the sale, it was embedded in the floor of a factory. The sellers dismantled it and proceeded to load it on a truck, but in doing so, part of the machine was accidentally broken. The Court of Appeal held that the buyers could reject the engine because, at the time of the contract, the machine was not in a deliverable state and the parties intended that no property would pass until the engine was safely on rail.

720. Rule 2, as to passing property, provides: 'Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property shall not pass until that thing is done, and the buyer has notice of it.'[1095] For example, Jacob sells a second-hand car to Emily and agrees that he will respray it and exchange the tyres. The property does not pass until Emily has notice that this work has been done.

721. Rule 3, as to passing property, provides: 'Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of ascertaining the price, the property does not pass until that act or thing is done, and the buyer has notice of it.'[1096] Like Rule 2 above, the seller has to do something to the goods.

722. In *Turley v. Bates*,[1097] S sold B a heap of clay at a certain price per ton and it was agreed that the buyer would load the clay and weigh it to ascertain the price. It was held that the property passed to the buyer when the contract was made. In

1092. [1975] E.A. 352.
1093. [1900] 1 Q.B. 513.
1094. [1922] 1 K.B. 343.
1095. Section 26(b).
1096. Section 26(c).
1097. (1832) 2 H. & C. 200.

both Rules 2 and 3, the seller is bound to do something in reference to the goods. However, while in Rule 2 the seller is bound to put the goods in a deliverable state, in Rule 3, the purpose of doing something – weighing, measuring, testing or doing some other thing – is to ascertain the price.

723. Rule 4 as to passing property, provides: 'Where goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property in the goods shall pass to the buyer under the following conditions: (i) when he or she signifies his or her approval or acceptance to the seller or does any other act adopting the transaction; or (ii) if he or she does not signify his or her approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and if no time has been fixed, on the expiration of a reasonable time.'[1098] For example, Jenkins sells a motorcycle to Jamina on approval within one week and the car is accidentally damaged during this period. Can Jamina return the care to Jenkins without any compensation? In *Kirkham v. Attenborough*,[1099] Lopes, LJ stated:

> The position of a person who has received goods on sale or return is that he has the option of becoming the purchaser of them, and may become so in three different ways. He may pay the price, or he may retain the goods beyond a reasonable time for their return, or he may do an act inconsistent with his being other than a purchaser.[1100]

724. In *Poole v. Smith's Car Sales (Balham) Ltd*,[1101] a car was sent by the plaintiff to the defendants who were both car dealers for storage. It was agreed that the defendants could sell the car, provided that the plaintiff received GBP 325 for it. The car remained unsold for three months. When the plaintiff demanded the return of the car, it was tendered in a damaged condition, whereupon the plaintiff refused to accept it and sued for the price. The Court of Appeal held that since both parties had treated the contract as one of sale or return it must be regarded as such. That the defendants had retained the car beyond a reasonable time and accordingly the property had passed to them and they were liable to pay the price.

725. Rule 5 as to passing of property, provides:

> Where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods passes to the buyer and any such assent may be express or implied and may be given before or after the appropriation is made.[1102]

1098. Section 26(d).
1099. [1897] 1 Q.B. 201.
1100. *Ibid.*, p. 204.
1101. [1962] 1 W.L.R. 744.
1102. Section 26(e).

> Where, under the contract, the seller delivers the goods to the buyer or to a carrier or other bailee whether named by the buyer or not, for the purpose of transmission to the buyer, and does not reserve the right of disposal, he or she is taken to have unconditionally appropriated the goods to the contract.[1103]

726. In *Livio Carli v. Geom R. Zompicchiati*,[1104] the respondent ordered from the appellant a quantity of titles for the purposes of a building contract in Aden. He had paid the full price of the tiles ordered, but on delivery, a proportion of the tiles were found to be broken. The respondent rejected the broken tiles but subsequently bought them for TZS 2,308. He used them and then sued for a refund of a proportionate part of the price. He was awarded TZS 15,002 as the proportion of the price for the broken tiles. In dismissing the appeal, it was held that the contract was for the sale of unascertained goods and as the place of delivery was Aden, the property in the goods did not pass until delivery. Thus, the property in the goods did not pass until delivery and the appellant was liable to refund a proportionate part of the price.

727. For the passing of property in unascertained goods, there must be unconditional appropriation. Appropriation means attaching goods to the contract. How do unascertained goods become unconditionally appropriated to the contract? Some act or thing must be done so that the goods are irrevocably attached or earmarked for the particular contract in question. In *Carlos Federspiel & Co. S.A. v. Twigg (Charles) Ltd*,[1105] Pearson J stated:

> A mere setting part or selection by the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract, the parties must have had or be reasonably supposed to have had an intention to attach the contract irrevocably to those goods so that those goods and no others are the subject of the sale and become the [property of the buyer.[1106]

728. In *Devshi Samat Shah v. Budhram*,[1107] by an oral contract, the respondent sold physic nuts at TZS 675 per ton. The respondent delivered about 13 tons in two instalments and had a balance of nuts awaiting acceptance by the applicant when the market for nuts collapsed. The respondent elected to treat the contract as repudiated and to sue for damages. It was held that the contract was one for the sale of future goods by description. That in such a case, before the property can pass to the buyer, there must be an unconditional appropriation to the contract of goods of that description in a deliverable state, either by the seller with the assent of the buyer or

1103. Section 26(f).
1104. [1961] E.A. 101.
1105. [1957] Lloyd's Rep. 240.
1106. *Ibid.*, p. 255.
1107. (1951) 18 E.A.C.A. 21.

by the buyer with the assent of the seller. There was no evidence of any such appropriation to the balance of nuts due on the contract. The court further held that there had been acceptance of the bags of nuts delivered and thus the property in them had passed to the appellant and he is bound to pay the seller the contract price for the goods.

729. There are many ways in which appropriation may take place. One example is where the goods are delivered to their destination. Another example is where the goods are delivered to the 'buyer or carrier or other bailee'.[1108] However, where the seller delivers goods mixed with other goods, no property passes, because the goods are still unascertained.[1109] Yet another example is where a seller agrees to sell twenty mattresses out of his present stock to be selected by the buyer. The selection by the buyer will amount to appropriation.[1110]

730. There must be assent to the appropriation, which may be express or implied. The assent may come before or after the appropriation. In *Pignatoro v. Gilroy*,[1111] a seller of bags of rice to be delivered at the seller's place of business informed the buyer that the bags were ready. On receipt of this information, the buyer did nothing further for over three weeks, during which time the bags were stolen. It was held that the buyer had by his conduct assented to the seller's appropriation and accordingly the property and risk had passed to the buyer.

731. The delivery to a carrier will only amount to appropriation and thus pass the property in unascertained goods to the buyer where the seller 'does not reserve the right of disposal'.[1112] On reservation of the right of disposal, the Act provides as follows:

(1) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled.
(2) Where the seller reserves the right of disposal of the goods under subsection (1), then, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purposes of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his or her agent, the seller is prima facie taken to reserve the right of disposal.

1108. Section 26(f).
1109. *See Healy v. Howlett & Sons* [1917] 1 K.B. 337.
1110. *See, for example*, the case of *Wardar's (Import & Export) Ltd v. W. Norwood & Sons Ltd* [1968] 2 Q.B. 663.
1111. [1919] 1 K.B. 459.
1112. Section 26(f).

(4) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange:
   (a) the buyer is bound to return the bill of lading if he or she does not honour the bill of exchange; and
   (b) where the buyer wrongfully retains the bill of lading, the property in the goods does not pass to him or her.[1113]

732. Thus, a seller may reserve the right to disposal to the goods until certain conditions are fulfilled. For example, if under the terms of the contract, the buyer is to make payment of the price of goods before delivery, then the seller has reserved the right of disposal to the goods. In such a case, property shall not pass until the condition of payment for the goods have been fulfilled. The position is the same even if the goods were delivered to the carrier or bailee for transmission to the buyer. The property does not pass to the buyer where he or she wrongfully retains the bill of lading. The Act defines a bill of lading as 'a receipt of goods delivered to and received by a ship, evidencing the terms of the contract under which the goods are delivered and received, and signed by the person who has contracted to carry them, or his or her agent'.[1114]

733. Where the seller consigns goods to a buyer through a carrier, what is the nature of the relationship between the seller and carrier? This question was considered in *East African Navigators Ltd v. Mohanlal Mathuradas & Bros*,[1115] where the Rufiji Cooperative Society ordered goods from the respondents, a firm of general merchants in Dar es Salaam. There had been similar dealings between these parties before. The usual practice was that the society would only pay for goods on delivery. The respondents delivered the goods to the appellants for transportation by sea to Ndundu, on the terms of a document issued by the appellants to the respondents. The respondents insured the goods and paid the freight, adding the cost of transport to the price of the goods. Due to the negligence of the appellants, the goods were lost on the way. The respondents sued the appellants for the value of the goods. At the trial, there was only one issue: whether the respondents had a right to sue on the contract.

734. The court held that the relationship between the respondents and the society was that of seller and buyer and that the property in the goods passed to the society at the latest when they were shipped. But that this was immaterial since the respondents entered into the contract of carriage with the appellants as principals and not as agents of the society. Consequently, it was held that there was a contract between the respondents and the appellants upon which the respondents could sue, albeit the property had passed to the buyer. On the relationship between the seller and carrier, Sir Charles Newbold stated:

1113. Section 28.
1114. Section 1.
1115. [1968] E.A. 535.

> [T]he seller in consigning, normally acts purely and simply as the agent of the buyer and therefore there is no contract between the seller, as consignor, and the carrier. As there is no contract between them, there is no right in the seller to sue the carrier for breach of contract. For the seller to have any right of action in contract against the carrier, either the seller, as consignor, must enter into a contract of carriage as a principal or, if he enters into the main contract as an agent of the buyer, there must also be a subsidiary contract, or circumstances from which a subsidiary contract can be inferred, to which he is a party as principal.[1116]

735. The Sale of Goods and Supply of Services Act has also introduced the doctrine of ascertainment by exhaustion. The Act provides as follows:

> Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified in the contract or by subsequent agreement between the parties and the bulk is reduced to, less than that quantity, if that buyer under that contract is the only buyer to whom goods are due out of the bulk, the remaining goods shall be taken as appropriated to that contract at the time when the bulk is reduced and the property in those goods shall pass to the buyer.[1117]

736. The above provision deals with sales out of bulk, which would enable property in an undivided share in the bulk to pass before ascertainment of goods relating to specific sales contracts. In *Wait & James v. Midland Bank*,[1118] Mustill J observed that ascertainment can be achieved by a method other than that in Rule 5(1) (equivalent to section 26(e)) of the Act.

737. Section 26(g) of the Act introduces the doctrine of 'ascertainment by exhaustion', which refers to a situation where stock from which goods are to be drawn is depleted successfully by withdrawals until all that is left will satisfy the contract in question. All that is necessary is that the goods should be ascertained and the parties intend property to pass. Thus, where there is a sale of part of a ship's cargo, the goods can be ascertained where the cargo is reduced by prior deliveries to the amount for which the buyer contracted, or where a single buyer purchases the whole cargo in different lots, and the parties intend property to pass. Ben agrees to buy from Ken 200 tons of maize, which is part of a cargo of 500 tons on board *MV Kalangala*. The rest of the cargo is bought by other purchasers. The ship delivers 300 tons to those other buyers. At that point Ben acquires property in the remaining 200 tons, which are the subject matter of the contract, assuming there is no contrary intention expressed in their contract.

738. According to the Act, the doctrine of 'ascertainment by exhaustion' in section 26(g) also applies, 'with necessary modifications where a bulk is reduced to, or

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1116. *Ibid.*, p. 540.
1117. Section 26(g).
1118. [1926] 31 Com. Cas. 172.

to less than the total of the quantities due to a single buyer under separate contracts relating to that single buyer and he or she is the only one to whom goods are then due out of bulk'.[1119]

§9. Transfer of Risk

739. Goods are said to be at a person's risk where he or she is bound to bear their accidental loss or damage. Who bears the risk or loss where for example the goods perish or deteriorate? The general rule is that risk prima facie passes with property.[1120] The Act provides as follows:

(1) Unless otherwise agreed, the goods remain at the seller's risk until the property in the goods is transferred to the buyer.
(2) Where property in the goods is transferred to the buyer under subsection (1), the goods are at the buyer's risk whether delivery has been made or not.
(3) Notwithstanding subsection (1), the risk of loss shall not pass from the seller to the buyer unless the actions of the seller conform with all the conditions imposed upon the seller under the contract. [1121]

740. The risk of accidental loss or damage to the goods falls on the seller, who is the owner of the goods. The risk falls on the buyer only where property has passed over to him or her. For the risk to pass to the buyer, the seller must have complied with all his obligations under the contract of sale. However, the expression 'unless otherwise agreed' means that because of freedom of contract, the provisions of the Act may be varied by the agreement of the parties or by trade custom. The parties may expressly agree that the risk passes with property. What is critical is the intention of the parties.

741. In *Sterns Ltd v. Vickers Ltd*,[1122] the seller agreed to sell 120,000 gallons of spirit out of 200,000 in a tank on the premises of a third party. A delivery warrant was issued to the buyer, but was not acted upon for some months during which time the spirit deteriorated. It was held that although no property had passed as no appropriation had occurred, the parties must have intended the risk to pass when the delivery warrant was delivered, and thus the buyer remained liable to pay the price. The acceptance of the delivery warrant was regarded as a crucial factor since it gave the buyer an immediate right of possession.

742. The Act is only concerned with accidental destruction or deterioration but does not cover damage to the goods caused by the fault of either party. Consequently, section 27 of the Act provides as follows:

1119. Section 26(h).
1120. Section 27.
1121. Section 27(1)–(3).
1122. [1923] 1 K.B. 78.

(4) Where a delivery has been delayed through the fault of the buyer or the seller, the goods are at the risk of the party at fault as regards any loss, which might not have occurred, but for that fault.
(5) This section shall not affect the duties or liabilities of the seller or the buyer as a bailee of the goods of the other party.

743. In *Demby Hamilton & Co. Ltd v. Barden*,[1123] the seller contracted to sell 30 tons of apple juice, to be collected at the rate of one truckload per week by third parties to whom the juice had been sub-sold. The seller crushed the apples and put the juice in casks pending delivery. The buyer delayed to take delivery and some of the juice went bad. Applying the equivalent of section 27(5) of the Act, the court held that the buyer was liable since the loss would not occur but for the buyer's fault. However, the mere fact that a buyer is at fault does not absolve the seller of the responsibility to take reasonable care of the goods. The Act also provides that '[w]here an aggrieved party in case of breach of contract, is in control of goods and those goods are not covered by his or her insurance, the party in breach is liable for any loss or damage as a result of the breach caused to the aggrieved party'.[1124]

§10. Perishing of Goods

744. Parties may enter into a contract of sale where the seller is under the mistaken belief that the goods exist. Like any other contract, a contract of sale of goods may also be frustrated due to destruction of the subject matter. Related to the question of risk is perishing goods. Goods may be said to perish when they physically or commercially cease to exist. Who bears the risk or loss when the goods perish?

745. The Sale of Goods and Supply of Services Act provides two instances where goods may perish: before or after the contract. In respect of goods perishing before the contract, the Act provides as follows:

> Where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller have perished at the time when the contract is entered into, the contract is void.[1125]

746. The goods should have perished before or at the time of entering into the contract of sale of specific goods. The seller should not, at the time of entering of the contract, have known that the goods had perished. Where the goods perish, without the knowledge of the seller, the contract is void. However, in a situation where some of the goods had already been delivered, the buyer must pay for them. In *Barrow, Lane and Ballard v. Phillip Phillips & Co.*,[1126] the sellers sold 700 specific bags of Chinese nuts. Subsequently it was discovered that at the time of the contract, 109

1123. [1949] 1 All ER 435.
1124. Section 27(6).
1125. Section 7.
1126. [1929] 1 K.B. 574.

bags had been fraudulently removed. It was held that section 6 (equivalent of section 7 of the Act) applied, because the contract was an indivisible one for 700 bags. Thus, the buyers were not bound to pay the price, although they were bound to pay for goods actually delivered.

747. In situations where goods perish after the contract, the Act provides as follows:

> Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.[1127]

748. Section 8 of the Act above incorporated the doctrine of frustration, which is an aspect of risk, which is basically that prima facie, if the goods perish before the property passes, the seller must bear the loss and cannot claim the price. Both parties are discharged from their obligations: the seller does not deliver the goods and the buyer does not pay the price. The provision applies to a contract for the sale of specific goods in which neither the property nor risk has passed to the buyer.

§11. Transfer of Title

749. The sale of goods usually takes place between the buyer and either the owner of goods or his or her authorized agent. However, there are instances in which a seller may purport to sell goods which he or she does not have any right to sell. In such a situation, the buyer does not acquire a title to the goods. The general rule on transfer of title is expressed in the Latin maxim, *nemo dat quod non habet (nemo dat* rule), that is, no person can pass a better title than he or she possesses.

750. Over the years, exceptions have developed to make rule more suitable to a dynamic economy. The gist of the general rule and its exceptions were summarized by Lord Denning in *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd*[1128] who stated:

> In the development of our law, two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our times.[1129]

1127. Section 8.
1128. [1959] 1 K.B. 322.
1129. *Ibid.*, 336–337.

751. Part of the *nemo dat* rule is expressed in the Sale of Goods and Supply of Services Act as follows:

> Subject to this Act, where goods are sold by a person who is not the owner of the goods, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of goods is by his or her conduct precluded from denying the seller's authority to sell. [1130]

752. Because of the apparent harshness of the *nemo dat* rule, several exceptions to it were developed at common law and have been expanded by statute. However, all the exceptions will apply only in favour of a person who has bought the goods in good faith without notice of the rights of the original owner.

753. The first exception is estoppel. The Act provides that the *nemo dat* rule shall not apply where the owner is precluded by his or her conduct from denying the seller's authority to sell.[1131] The word 'precluded' is equivalent to the word 'estopped'. There should be a representation to a buyer or to the world at large that a person is for example the owner's agent to sell the goods. It could also be a representation from the seller that he or she is the owner of the goods.

754. Estoppel operates to preclude (prevent) a person from denying the truth of a fact which he or she has represented and has been acted or relied upon. Such representation may be made by words[1132] or by conduct.[1133] Estoppel may also arise by negligence, where the owner of goods has, by his or her negligence, allowed a third party to represent him/herself as owner or having the owner's authority to sell. However, in *Wilson & Meeson v. Pickering*,[1134] the court observed that the doctrine of estoppel by negligence only applied to negotiable instruments. In *Mercantile Credit Co. Ltd v. Hamblin*,[1135] it was held that the negligent signature of a document can only give rise to an estoppel if the signer owed a duty of care; the signer breached that duty; and the negligence was the proximate cause of the loss.

755. The second exception is sale by agent. A sale by an agent will bind the principal if the former had actual, apparent or usual authority. The Act provides that if the goods are sold without the authority or consent of the owner, the buyer acquires

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1130. Section 29(1).
1131. *Ibid*.
1132. *See Henderson & Co. v. Williams* [1895] 1 Q.B. 521; *Show v. Commissioner of Metropolitan Police* [1987] 1 W.L.R. 1332.
1133. *See Farquharson Bros v. J King & Co. Ltd* [1902] A.C. 325; *Central Newbury Car Auctions Ltd v. Unity Finance Ltd* [1957] 1 Q.B. 371; *Eastern Distributors Ltd v. Goldring* [1957] 2 Q.B. 600.
1134. [1946] K.B. 422.
1135. [1965] 2 Q.B. 242.

no title.[1136] The agent should be in possession of the goods with the owner's consent. However, consent of the owner (principal) is presumed in the absence of evidence to the contrary. In any case, the owner of the goods who has appointed an agent is estopped from denying the agent's authority to sell.[1137]

756. The third exception is sale under special common law or statutory power, or order of court. The Act provides that the Act shall affect 'any enactment enabling the apparent owner of goods to dispose them as if he or she were the true owner of goods'[1138] and 'the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction'.[1139] At common law, a pledgee can pass a good title if the pledgor defaults and so can a mortgagee. Persons having statutory powers include landlords, bailees and unpaid sellers.

757. The court has power to order the sale goods if for example they are perishable or are liable to attachment and sale. The Act provides that '[a] warrant of attachment or other warrant of execution against goods shall bind the property in the goods of the execution debtor as from the time when the warrant is delivered to the bailiff to be executed'.[1140]

758. The fourth exception is sale under voidable title. The Act provides that, '[w]hen the seller of goods has a voidable title to the goods, but his or her title has been avoided at the time of the sale, the buyer acquires a good title to the goods, if he or she buys them in good faith and without notice of the seller's defect in title'.[1141] The seller should have a voidable title to the goods. This means that the seller should sell the goods under a voidable contract. A person cannot avoid a voidable contract to the prejudice of third-party rights, which are acquired in good faith for value. However, the third party is only protected if he or she buys before the original contract has been avoided. The seller should take the necessary steps to rescind the contract by for example informing the police.[1142]

759. The fifth exception is sale by seller in possession. The Sale of Goods and Supply of Services Act provides as follows:

> Where a person who has sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him or her, of the goods or documents of title under any sale, pledge, or other disposition of the goods, to any person receiving them in good faith without notice of the previous sale, shall have the same

1136. Section 29(1).
1137. *Ibid*.
1138. Section 29(2)(a).
1139. *Ibid*.
1140. Section 33(1).
1141. Section 30.
1142. *See Car & Universal Finance Ltd v. Caldwell* [1965] 1 Q.B. 525.

> effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery of transfer.[1143]

760. Although in *Eastern Distributors v. Goldring*,[1144] the court held that the seller must remain in possession as 'seller', in *Pacific Motor Auctions v. Motor Credits Ltd*,[1145] the Privy Council was of the view that Goldring's case was wrongly decided and held that the defendants acquired good title. That the words 'continues … in possession' were intended to refer to physical possession, irrespective of the private transaction between the seller and the first buyer. The section operates where the original seller, having retained possession, delivers or transfers the goods or documents of title to the goods under the second contract. The Act defines document of title to goods as:

> any bill of lading, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods represented by it.[1146]

761. Thus, the goods or documents of title should be delivered or transferred to the second buyer if he is to obtain a title binding on the first buyer. There should not be a mere transfer of possession. To constitute disposition, there must be a transfer of an interest in the goods by the owner.[1147] The second buyer is only protected if he or she acts in good faith and without notice of the previous sale.

762. The sixth exception is sale by buyer in possession. The Sale of Goods and Supply of Services Act provides as follows:

> Where a person who has bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him or her, of the goods or documents of title, under any sale, pledge, or other disposition of them, to any person receiving them in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were an agent in possession of the goods or documents of title with the consent of the owner.[1148]

763. The provision above applies where a person 'has bought or agreed to buy goods'. In *Lee v. Butler*,[1149] the Court of Appeal held that the equivalent of the provision applied where the buyer was in possession of the goods under an agreement

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1143. Section 32(1).
1144. (1957) 2 Q.B. 600.
1145. [1965] A.C. 867.
1146. Section 1.
1147. *See Worcester Works Finance Ltd v. Cooden Engineering Co. Ltd* [1972] 1 Q.B. 210.
1148. Section 32(2).
1149. (1893) 2 Q.B. 318.

to buy the goods and pay for them in instalments. However, in *Helby v. Matthews*,[1150] it was held that a person in possession of goods under a hire purchase agreement had not 'bought or agreed to buy' them within the meaning of section 25(1) of the Sale of Goods Act (equivalent to section 32(2) of the Act).

764. The third party acquires a good title if the goods were in possession of the buyer with the consent of the seller. It is not enough that the first buyer has agreed to buy the goods. He or she must have actually obtained possession of the goods or documents of title to the goods. There must be a delivery or transfer of the goods under the second contract. The sale by a 'buyer in possession' shall have the same effect as if it has been carried out by an agent with authority. In this context, an agent means, 'a person having, in the ordinary course of his or her business as such agent, authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods'.[1151]

§12. Duties of the Seller

765. The implied terms under sections 13–17 could as well be translated into duties of the seller, namely to pass a good title; to deliver goods that correspond with the description; the duty to deliver goods that are fit for the purpose and of satisfactory quality; and the duty to ensure that the bulk of the goods corresponds with the sample. In addition to these duties, there are those that specifically fall under part IV of the Act – performance of the contract.

766. The Sale of Goods and Supply of Services Act provides that it is the duty of the seller to deliver the goods in accordance with the terms of the contracts of sale.[1152] According to the Act, delivery is 'the voluntary transfer of possession from one person to another and includes an appropriation of goods to the contract that results in property in the goods being transferred to the buyer'.[1153]

767. There are three forms of delivery. First, there is actual, or physical delivery, which means the handing over the goods, whether to a buyer, carrier, agent or other person. Second, there is symbolic delivery, which means handing something which symbolizes the goods, for example a document of title such as a bill of lading relating to the goods or keys to a vehicle carrying the goods or the warehouse where the goods are stored. Third, there is constructive delivery, which refers to a transfer of the right to possession of goods that are in the physical custody of a third party, through a process called attornment. In this respect, one of the rules of delivery is that, '[w]here the goods at the time of sale are in the possession of a third

1150. [1895] A.C. 471.
1151. Section 32(3).
1152. Section 34(1).
1153. Section 1.

party, there is no delivery by the seller to the buyer until the third party acknowledges to the buyer that he or she holds the goods on behalf of the buyer'.[1154] For example if Chris sells to Jamida a car stored at a warehouse belonging to Chaka, the property may pass as soon as the contract is made, but delivery will not take place until Chaka 'attorns' to Jamida, that is, acknowledges that he holds the goods on behalf of Jamida. The acknowledgment may be inferred from conduct.

768. Parties may agree on how the goods shall be delivered. However, in absence of an agreement to that effect, the rules of delivery outlined in the Act[1155] shall apply. First, delivery and payment are concurrent conditions. In short, delivery and payment should be given in exchange of each other. The Act provides as follows:

> Unless otherwise agreed, delivery of goods and payment of the price are concurrent conditions, namely, that, the seller must be ready and willing to give possession of the goods to the buyer in exchange of the price and the buyer must be willing and ready to pay the price in exchange of possession of the goods.[1156]

769. This provision applies to sales by instalments in accordance with the agreement of the parties. Second, '[w]hether it is the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties'.[1157] Third, unless there is an express or implied contract regarding the place of delivery, 'the place of delivery is the seller's place of business, if the seller has one, and if not, the seller's residence'.[1158] Fourth, '[w]here the contract is for the sale of specific goods which, to the knowledge of the parties when the contract is made, are in some other place, then that place shall be the place of delivery'.[1159] Thus, unless there is a contrary intention, the seller's sole duty is to have the goods available at his or her place of business or residence and he or she is not bound to send them to the buyer. However, in practice, parties vary this position in many sale agreements, whereby the seller is required to send the goods to the buyer.

770. Regarding time of delivery, the Act provides that, '[w]here under the contract of sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time'.[1160] The Act also provides that '[d]emand or tender of delivery may be treated as ineffectual unless made at a reasonable hour, and what is a reasonable hour is a question of fact'.[1161]

1154. Section 36(5).
1155. Section 36(1)–(7).
1156. Section 35(1).
1157. Section 36(1).
1158. Section 36(2).
1159. Section 36(3).
1160. Section 36(4).
1161. Section 36(6).

771. Albeit the Act provides that 'stipulations as to time of payment are not taken to be of the essence of a contract of sale',[1162] it adds that '[w]hether any other stipulation as to time is of the essence of the contract depends on the terms of the contract'.[1163] Indeed, in most commercial contracts, time for delivery is usually construed as being of the essence of the contract. For example, in *Bowes v. Shand*,[1164] where rice which was to be shipped during the months of March and or April and was in fact loaded in February, it was held that the buyer was entitled to reject.

772. Other rules about delivery concern expenses; delivery of wrong quantity or description; delivery in instalments; and delivery to a carrier. According to the Act, '[u]nless otherwise agreed the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller'.[1165] Where the seller delivers a lesser quantity of goods than he or she contracted to sell, the buyer may reject them but if he or she accepts them, he or she must pay for them at a contract rate.[1166] Where the seller delivers a larger quantity than agreed, the buyer may accept the goods included in the contract and reject the rest may reject the whole.[1167] However, where the seller accepts the whole of the goods delivered, he or she must pay for them at the contract rate.[1168] Where the seller delivers the agreed upon goods mixed with those of a different description, the buyer may accept the goods, which are in accordance with the contract and reject the rest, or he or she may reject the whole.[1169]

773. In spite of the rules above concerning delivery of wrong quantity of goods, the Act provides that a buyer who is not a consumer of goods may not reject a lesser or larger quantity than what was contracted for 'if the shortfall or, as the case may be, the excess, is so minor that it would be unreasonable for the buyer to do so'.[1170] According to the Act, the seller has to prove that the shortfall or excess is minor.[1171] The whole of section 37 'is subject to any usage of trade, special agreement or course of dealing between the parties'.[1172]

774. In a contract of sale, parties may agree that goods shall be delivered in instalments, or payment of the price or both, shall be made in instalments. For example, A may sell 100 tons of maize to be delivered in 10 tons per month for 10 consecutive months. The failure by the seller to deliver one instalment may entitle the buyer to reject the goods. The Act provides that, '[u]nless otherwise agreed, the buyer of goods is not bound to accept delivery of the goods by instalments'.[1173]

1162. Section 11(1).
1163. Section 11(2).
1164. (1877) 2 App. Cas. 455.
1165. Section 36(7).
1166. Section 37(1).
1167. Section 37(2).
1168. *Ibid*.
1169. Section 37(3).
1170. Section 37(4)(a)–(b).
1171. Section 37(5).
1172. Section 37(7).
1173. Section 39(1).

775. In *Behrend & Co. v. Produce Brokers' Co*,[1174] it was held that where the seller delivers goods by instalments instead of indivisible parcel, the buyer can either reject the whole of the goods, including those actually delivered, in which case he can recover the whole of his money. Alternatively, the buyer may keep the goods actually delivered and reject the rest, in which case he must pay for the goods kept at the contract price, and he can recover the price paid for the undelivered portion.

776. Regarding breach in respect of one or more instalments, the Act provides as follows:

> Where there is a contract for the sale of goods to be delivered by stated instalments and to be separately paid and the seller makes defective deliveries in respect of one or more of instalments or the buyer neglects or refuses to take delivery of 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 the contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not a right to treat the whole contract as repudiated.[1175]

777. An instalment contract may provide for delivery by instalments at a single lump sum price or for deliveries which are to be separately paid for. Section 39(2) above applies only where instalments are to be separately paid for. Such a contract is severable and the acceptance of one or more instalments does not prevent rejection of future instalments. A breach in respect of one or more instalments cannot automatically be regarded as a breach of the entire contract giving rise to repudiation. It depends on the terms of the contract and the circumstances of the case.[1176]

778. In *Maple Flock Co. v. Universal Furniture Products (Wembley) Ltd*,[1177] the plaintiffs contracted to sell the defendant 100 tons of rag flock 'to be delivered three loads per week as required'. The weekly deliveries were to be separately paid for. The first fifteen loads were satisfactory, but a sample from the sixteenth load was defective. The defendants had taken delivery of four more loads that were satisfactory. It was held that this was a single severable breach that did not justify termination of the contract as a whole. That any breach, however serious, in respect of one instalment should not have consequences extending beyond the particular instalment. However, in *Munro (Robert A) and Co. Ltd. v. Meyer*,[1178] where under a contract of sale of 1,500 tons of meat and bone meal, the sellers delivered 611 tons that were seriously adulterated, it was held that the magnitude of the breach and the likelihood that further deliveries could also be defective entitled the buyers to treat the contract as repudiated and refuse to accept further deliveries. Wright

1174. [1920] 3 K.B. 530.
1175. Section 39(2).
1176. *Ibid*.
1177. [1934] 1 K.B. 148.
1178. [1930] 2 K.B. 312.

observed that 'where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated'.[1179]

779. Delivery to a carrier is prima facie deemed to be delivery to the buyer. In this vein, the Act provides that, '[w]here, under a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is prima facie taken to be a delivery of the goods to the buyer'.[1180] However, the presumption of delivery may be rebutted by evidence to the effect that in sending goods, the seller made a bill of lading to himself or to his agent.

780. According to the Act, the sellers should make a contract of carriage 'on behalf of the buyer that is reasonable, having regard to the nature of the goods and the other circumstances of the case'.[1181] Where the seller does not make a reasonable contract with the carrier and the goods are lost or damaged in the course of transit, 'the buyer may decline to treat the delivery to the carrier as a delivery to himself or herself or may hold the seller responsible in damages'.[1182]

781. In *Thomas Young and Sons Ltd v. Hobson and Partners*,[1183] the sellers of electric engines agreed to send them to buyers by rail. They were sent at 'owner's risk', and were damaged during the journey because they were insufficiently secured. On arrival, the buyers refused to accept them. It was shown that the sellers could have consigned the goods at identical rates at 'company risk' in which case the railway authorities would have ensured that they were properly secured. It was held that the sellers had failed to make a reasonable contract of carriage and the buyers were entitled to reject.

782. The Act further provides that unless there is an agreement to the contrary, 'where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him or her to insure them during their sea transit'.[1184] Where the seller fails to give such notice to the buyer, 'the goods shall be deemed to be at his or her risk during the sea transit'.[1185]

783. The Act also provides that '[w]here a contract requires or authorises the seller to ship the goods by a carrier but the contract does not require the seller to deliver the goods at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier'.[1186] In case the contract requires the

1179. *Ibid.*, p. 331.
1180. Section 40(1).
1181. Section 40(2).
1182. Section 40(3).
1183. (1949) 65 T.L.R. 365.
1184. Section 40(4).
1185. Section 40(5).
1186. Section 41.

seller to deliver the goods at a particular destination, 'and the goods are duly tendered at that destination while in the possession of the carrier, the risk of loss passes to the buyer when the goods are duly tendered at that destination to enable the buyer to take delivery'.[1187] Where the seller agrees to deliver goods at his or her own risk 'at a place other than that where they are when sold, the seller shall, unless otherwise agreed, take any risk of deterioration in the goods necessarily incidental to the course of transit'.[1188]

§13. Examination and Acceptance

784. By accepting the goods, the buyer loses his or her right to reject them for breach of condition. The buyer shall not be deemed to have accepted the goods unless 'he or she has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract'.[1189] In absence of an agreement to the contrary, when the seller tenders delivery of goods to the buyer, he or she 'is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract'.[1190]

785. In the Kenyan case of *Basco Products Kenya Ltd v. Machakos County Government*,[1191] it was held that the buyer should have exercised the right to examine the goods for purposes of ascertaining whether they conform with the contract. That since there was no evidence of deficiency of the goods, the buyer was obliged to pay for them.

786. According to the Act, the buyer is taken to have accepted the goods, when he or she intimates to the seller that he or she has accepted them;[1192] when the goods have been delivered to him or her and he or she 'does any act in relation to the goods which is inconsistent with the ownership of the seller';[1193] or when after a lapse of a reasonable time, he or she 'retains the goods without intimating to the seller that he or she has rejected them'.[1194]

787. In *Hardy (E) and Co. v. Hillerns & Another*,[1195] X bought wheat from Y. It reached X on March 21. On the same day, X sold and delivered part of it to Z. Two days later, X discovered that the wheat did not conform with the contract and he purported to reject. The court found that at the time when he purported to reject, a

1187. Section 40(6).
1188. Section 41.
1189. Section 42(1).
1190. Section 42(2).
1191. Civil Suit No. 187 of 2015; [2018] Eklr.
1192. Section 42(1)(a).
1193. Section 42(1)(b).
1194. Section 42(1)(c).
1195. [1923] 2 K.B. 490. *See also E. & S Ruben v. Faire Bros. & Co.* [1949] 1 K.B. 254.

reasonable time for examination had not elapsed. It was held that the sale and delivery to Z was an act inconsistent with the ownership Y and thus X had accepted the wheat and could no longer reject it.

788. The buyer shall not be taken to have accepted the goods merely because he or she 'asks for or agrees to their repair by or under an arrangement with the seller or the goods are delivered to another person under a sub-sale or other disposition'.[1196]

789. The Act also provides that '[w]here the contract is for the sale of goods making one or more commercial units of sale, a buyer accepting any goods included in a unit is taken to have accepted all the goods making the unit'.[1197] A commercial unit 'means a unit, division of which would materially impair the value of the goods or the character of the unit'.[1198]

790. Where the buyer rightly refuses to accept the goods delivered to him or her, he or she 'is not bound to return them to the seller, and it is sufficient if the buyer intimates to the seller that he or she refuses to accept them'.[1199] Where the seller is ready and willing to deliver the goods and the buyer neglects or refuses to take delivery within a reasonable time, the buyer is liable for any incidental loss occasioned to the seller.[1200] The buyer is also liable for a reasonable charge for the care and custody of the goods.[1201] However, this shall not affect the rights of the seller where the neglect or refusal amounts to repudiation of the contract.[1202]

§14. Duties of the Buyer

791. The buyer has the duty to pay the price. The Act is clear: It is the duty of the seller to deliver the goods, and for the buyer to accept and pay for them.[1203] Thus, the buyer has a duty to pay the price of the goods he has bought or agreed to buy. In the absence of an agreement to the contrary, a buyer is not entitled to claim possession of the goods unless he or she is ready and willing to pay the price. Where no time for payment is fixed by the contract, payment is due at the conclusion of the contract if the seller is willing and able to deliver the goods.[1204]

792. The buyer also has a duty to take delivery of the goods. The rules of delivery have been discussed above, but suffice to emphasize that the buyer has a duty

1196. Section 43(3).
1197. Section 43(4).
1198. Section 43(5).
1199. Section 44.
1200. Section 45(1).
1201. *Ibid.*
1202. Section 45(2).
1203. Section 34(1).
1204. Section 35(1).

to accept and pay for the goods in exchange for delivery of the goods by the buyer.[1205] If the buyer wrongfully neglects or refuses to take delivery of the goods, he or she must compensate the seller.

§15. Remedies of the Unpaid Seller

793. In addition to the remedies under the general law of contract, the Sale of Goods and Supply of Services Act confers additional remedies on the seller who is unpaid. According to the Act, a seller is an unpaid seller within the meaning of the Act: when the whole of the price has not been paid or tendered; or when a bill of exchange is received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.[1206]

794. According to the Act, 'seller' under section 50 includes, 'an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself or herself paid, or is directly responsible for, the price'.[1207] The remedies of the unpaid seller are categorized into two: real and personal.

795. The Act sets out the real remedies of the unpaid seller: a lien on the goods or right to retain them for the price while he or she is in possession of them; in the case of the insolvency of the buyer, a right of stopping the goods in transit after he or she has parted with possession of them; and a right of resale as limited by the Act.[1208] The first two remedies – the lien and stoppage in transit are 'not affected by any sale or other disposition of the goods which the buyer has made, unless the seller has assented to it'.[1209] These remedies shall also be defeated where a document of title to the goods has been lawfully transferred to any person who by way of sale transfers the document to another person that takes the document in good faith and for valuable consideration.[1210]

796. The unpaid seller's lien is his or her right, if he or she is still in possession of the goods, to retain them until the price is paid or tendered. The lien is in a form of possessory security. According to the Act, the right of lien arises under the following circumstances: the goods have been sold without any stipulation as to credit; the goods have been sold on credit, but the term of credit has expired; or the buyer becomes insolvent.[1211] The unpaid seller may exercise this right even when he or she is in possession of the goods as an agent or bailee of the buyer.[1212] Where the

1205. Sections 34 and 35.
1206. Section 50.
1207. Section 50(2).
1208. Section 51(a)–(c).
1209. Section 58(1).
1210. Section 58(2).
1211. Section 52(1)(a)–(c). *See Valpy v. Gibson* (1847) 4 C.B. 837; *Mordaunt Bros v. British Oil and Cake Mills Ltd* [1920] 2 K.B. 502.
1212. Section 52(2).

buyer has made part delivery of the goods, the unpaid seller may retain the remainder, unless he or she has waived his or her lien.[1213]

797. The unpaid seller shall lose his or her lien under the following circumstances: when he or she delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods; when the buyer or his or her agent lawfully obtains possession of the goods; or by waiver.[1214] The unpaid seller shall lose his or her lien after the price is paid or tendered to him or her. However, the unpaid seller does not lose his or her lien 'by reason only that he or she has obtained a judgment or decree for the price of the goods'.[1215] The Act provides that the termination or loss of lien is 'subject to any usage of trade, special agreement or course of dealing between the parties'.[1216]

798. In *Karim Omoding v. Sulaiman Kabanda*,[1217] under a sale agreement, the respondent, the owner of a motor vehicle, sold a motor vehicle to the appellant at UGX 11,500,000. The appellant paid UGX 8,000,000 leaving a balance of UGX 3,500,000. The respondent handed over the motor vehicle to the appellant minus the logbook. The appellant put up the motor vehicle for sale before paying the balance. The respondent impounded the vehicle and kept it. The respondent filed a claim for payment of the balance of UGX 3,500,000, general damages, interest and costs of the suit. Wangutusi J found that the respondent was an unpaid seller who could exercise a lien if he was still in possession of the motor vehicle. However, the respondent lost his lien when he released the vehicle to the appellant on receipt of the first payment. His only remedy was to sue for the balance of the purchase price. The respondent was thus ordered to refund UGX 8 million that the appellant had paid.

799. In *Osapil v. Kaddu*,[1218] it was held that although an unpaid seller who was in possession of goods was entitled to a lien over the goods until he was paid, that lien was lost the moment the buyer lawfully obtained possession of the goods. Since the appellant had parted with possession of the motor vehicle to the respondent, he no longer had any right of lien over it.

800. In *John M. Magamboni v. Uganda Hire Purchase Co. Ltd*,[1219] the plaintiff obtained a loan for UGX 23,580 from the Treasury Department, Government of Uganda for purchase of a motor vehicle, whose market value was UGX 67,785. The loan was to be recovered by his Ministry from his salary in instalments but he had to pay the difference of UGX 42,000. The plaintiff issued a cheque of UGX 50,000 in satisfaction of the balance and the vehicle was transferred by the defendant into his names. The cheque was dishonoured. The defendant seized the car and later sold it to someone else. The plaintiff sued the defendant for the return of the car or its

1213. Section 53.
1214. Section 54(2)(a)–(b)
1215. Section 54(3).
1216. Section 54(1).
1217. Civil Appeal No. 35 of 2005.
1218. [2001] 1 E.A. 193.
1219. [1978] H.C.B. 54.

market value and damages. It was held that the property in the car was transferred to the plaintiff who became the owner. That the defendant became an unpaid seller and had a right to retain the car if it had been in its possession. The defendant lost its lien when it delivered possession of the car. The defendant had no legal authority to seize the car and seizure was thus wrongful. The remedy of the defendant as an unpaid seller was to bring an action for the price of the car.

801. The Act sets out the unpaid seller's right of stoppage in transit as follows:

> Subject to this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit and resuming possession of the goods as long as they are in the course of transit and may retain them until payment or tender of the price.[1220]

802. The Act outlines the rules defining duration of transit.[1221] According to the Act, goods are in transit 'from the time when they are delivered to a carrier by land, air or water, or other bailee for the purpose of transmission to the buyer, until the buyer or his agent for the purpose takes delivery of them from that carrier or other bailee'.[1222] When the buyer or his agent obtains delivery of the goods before their arrival at the appointed destination, the transit shall end.[1223] The Act further provides that the transit shall end where, 'after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his or her agent, that he or she holds the goods on his or her behalf and continues in possession of them as bailee for the buyer, or his or her agent, and it is immaterial that a further destination for the goods has been indicated by the buyer'.[1224] The transition shall also come to an end where the carrier or other bailee wrongfully neglects or refuses to deliver the goods to the buyer or agent.[1225]

803. The transit shall not be taken to be at an end 'if the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back'.[1226] Where the seller has made part delivery of the goods to the buyer or his or her agent, the seller may stop the remainder in transit.[1227] However, where circumstances indicate that the part delivery shows an agreement to give up possession of the goods, the seller loses his right to stop the remainder in transit.[1228]

1220. Section 55.
1221. Section 56.
1222. Section 56(1).
1223. Section 56(2).
1224. Section 56(3).
1225. Section 56(6).
1226. Section 56(4).
1227. Section 57(1).
1228. Section 57(1).

804. How may the right of stoppage in transit be exercised? The Act sets out the following modes of stopping goods in transit: by taking actual possession of the goods; or by giving notice of his or her claim to the carrier or other bailee who has possession of them.[1229] The notice shall be given to the person in actual possession of the goods or to his or her principal.[1230] Where notice is given to the principal, 'it must be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his or her servant or agent in time to prevent a delivery to the buyer'.[1231] Where notice is given to the carrier or bailee of the goods, he or she must re-deliver them to the seller or in accordance with the seller's directions.[1232] The seller shall meet all expenses of the re-delivery of the goods.[1233]

805. The right of resale is exercised by an unpaid seller who has retained or stopped goods in transit. He or she may re-sell them to a second buyer who acquires a good title to the goods against the original buyer.[1234] According to the Act, where goods are of a perishable nature, the unpaid seller may give notice to the buyer of his or her intention to resell.[1235] If the buyer does not pay or tender the price within a reasonable time, the seller 'may re-sell the goods and recover from the original buyer, damages for any loss occasioned by his or her breach of contract'.[1236] The seller may expressly reserve the right of resale if the buyer makes a default.[1237] In such case, where the buyer defaults, the seller may resell the goods and the original contract shall be rescinded without prejudice to the seller's right to claim damages.[1238]

806. The seller has two personal remedies: action for the price and action for damages for non-acceptance. In respect of action for the price, section 60 of the Act provides as follows:

(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may bring an action against the buyer for the price of the goods, together with any incidental damages.
(2) Where under a contract of sale, the price is payable on an agreed date irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may bring an action against the buyer for the price, together with any incidental damages, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

1229. *Ibid*.
1230. Section 57(2).
1231. Section 57(3).
1232. *Ibid*.
1233. Section 57(4).
1234. Section 59(2).
1235. Section 59(3).
1236. *Ibid*.
1237. Section 59(4).
1238. *Ibid*.

807. Under section 60(1) above, the seller can only claim the price if it is due and the buyer has wrongfully or refused to pay for the goods in accordance with the terms of the contract. In addition, the seller may claim incidental damages. Thus, the seller cannot claim the price when a credit period agreed with the buyer has not yet lapsed, or where the buyer has rejected the goods due to a breach of a condition. The property in the goods should have passed to the buyer. Under section 60(2), where the price is payable on an agreed date, and the buyer wrongfully neglects or refuses to pay, the seller may sue for the price and incidental damages albeit the property has not passed.

808. Assuming X sells a car to Y at UGX 20 million and Y pays UGX 15 million but fails to pay the balance and X repossesses the vehicle. Can X successfully sue for the balance? This scenario was considered by the Court of Appeal in the case of *Mubarak Batesaki v. Mubarak Magala*,[1239] where by a written agreement dated 3 January 1996, the respondent sold his motor vehicle to the appellant at UGX 3,800,000 of which UGX 2,500,000 was paid at the execution of the agreement. The appellant took possession of the vehicle but without a logbook. It was agreed that the balance would be paid in two equal instalments of UGX 650,000 on 30 March 1996 and 15 April 1996 respectively. The respondent would then receive the logbook after full payment. When the appellant failed to pay the instalments as agreed, the respondent repossessed the vehicle on 15 June 1996, two months after the last date of payment. The respondent filed a claim for recovery of the unpaid balance. Counsel for the appellant relied on the English case of *Dies v. British International Mining Corporation*,[1240] where the court distinguished part payment of the purchase price and deposit were distinguished. That a deposit is forfeitable on the purchaser's default while a part payment is refundable. Thus, counsel argued that the respondent was not entitled to both the vehicle and UGX 2,500,000. Mpagi-Bahigeine JA cited the English case of *Stickloser v. Johnson*,[1241] where Lord Denning stated:

> It seems to me that the cases show the law to be this: When there is no forfeiture clause, if money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so longer as the seller keeps the contract open and available for performance, the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross claim by the seller for damages.[1242]

809. The learned judge held that in absence of a forfeiture clause in the sale agreement, the UGX 2,500,000, which was a substantial percentage of the purchase

1239. Civil Appeal No. 29 of 2012.
1240. [1939] 1 K.B. 724.
1241. (1954) 1 All ER 630.
1242. *Ibid.*, 637.

price, was not a deposit but part payment of the price and thus had to be refunded to the buyer. Thus, X above cannot successfully sue for the balance. He can only sue for damages for breach of contract.

810. Where the buyer wrongfully neglects or refuses to pay for the goods, the seller may sue for damages for non-acceptance.[1243] The seller suing for the price must have delivered or willing and able to deliver in accordance with the terms of the contract. The measure of damages is the difference between the contract price and the market or current price. The assessment of damages is governed by the rules under the general law of contract, including the case of *Hadley v. Baxendale*.[1244] The seller may also claim interest or special damages.

§16. Remedies of the Buyer

811. The buyer has a right to reject the goods. Where there is a breach of condition to be performed by the seller, the buyer may repudiate the contract and reject the goods. In *Colourprint Ltd v. Pre-press Production*,[1245] the plaintiff sued the defendant for recovery of 523,034.50 Kenyan shillings being the price of goods sold and delivered to the defendant by the plaintiff. The defendant denied being liable to pay allegedly because the plaintiff had supplied substandard goods and of a quality inferior to the sample submitted in respect of the contract. It was held that the buyer had to intimate to the seller rejection of the goods otherwise he would be deemed to have accepted them. That a period of two months was more than reasonable for the defendant to intimate rejection to the plaintiff.

812. The buyer may also sue the seller for breach of warranty. Where the buyer elects or is compelled to treat a breach of condition as a breach of warranty, he or she may 'set up against the seller the breach of warranty in diminution or extinction of the price'[1246] or sue for damages for breach of warranty.[1247] In addition to setting up the breach of warranty in diminution or extinction of the price, the buyer may maintain an action for the same breach of warranty if he or she has suffered further damage.[1248] Where there is a breach of warranty, the measure of damages is 'the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty'.[1249] However, section 64 'is subject to any usage of trade, special agreement or course of dealing between the parties'.[1250]

1243. *See* s. 61(1)–(4).
1244. (1854) 9 Exch. 341.
1245. [2003] 1 E.A. 45.
1246. Section 64(1)(a).
1247. Section 64(1)(2).
1248. Section 64(5).
1249. Section 64(3).
1250. Section 64(2).

813. The buyer may also sue the seller for damages for wrongful neglect or refusal to deliver the goods in accordance with the terms of the contract.[1251] The measure of damages is the difference between the contract price and the market or current price at the time when the goods ought to have been delivered,[1252] or if no time is fixed, then at the time of refusal to deliver the goods.[1253] Where there is unreasonable delay, the buyer may purchase goods in substitution of those due from the seller.[1254] The buyer may recover from the seller damages, which shall be 'the difference between the cost of the new purchase price and the contract price'.[1255]

814. In *Fidahussein & Co. v. Mohamedally & Co*.,[1256] the appellants agreed to sell 6 tons of cloves to the respondents at GBP 875 a ton and the consignment was due to be shipped on 8 February 1969. On 22 February 1969, the appellants wrote repudiating the contract. The respondents refused to accept the repudiation and extended their letter of credit to 31 March 1969. On 10 March 1969, the respondents reiterated their repudiation, and on 1 April 1969, the respondents had to buy in Singapore at GBP 1,600 per ton. The trial judge awarded the respondents the difference between the contract price and the purchase price. It was held that the buyer of goods may show the damage directly resulting from the breach and this was the difference between the purchase price and resale price. Law, J stated:

> In any event, s. 51(3) of the Sale of Goods Act only provides a prima facie or rebuttable method for the assessment of damages in cases where there is an available market. It does not purport to provide the exclusive method, and it is open to the plaintiff to rely, if he prefers, on subsection 1(2) and prove the loss which directly and naturally resulted from the breach.[1257]

815. In addition, the buyer may claim 'any incidental or consequential damages, but less the expenses saved in consequence of the seller's breach'.[1258] The buyer may also claim interest or special damages.[1259]

816. The buyer may apply to court for an order of specific performance. There should be a breach of contract to deliver specific or ascertained goods.[1260] The court may direct the seller to specifically perform the contract without giving 'the option of retaining the goods on payment of damages'.[1261] The court may impose terms and conditions as to damages and payment of the price as it may deem just.[1262]

1251. Section 62(1).
1252. Section 63(2).
1253. *Ibid*.
1254. Section 62(3)(a).
1255. Section 62(3)(b).
1256. [1973] E.A. 1.
1257. *Ibid.*, 4.
1258. Section 62(3)(b).
1259. Section 66.
1260. Section 63(1).
1261. *Ibid*.
1262. Section 63(2).

Chapter 5. Building Contracts, Hire of Work and Skills

§1. Nature of a Building Contract

817. According to Uff,[1263] a building contract is a form of a construction contract. It is a contract where the contractor agrees to supply work, skills and materials for the erection of a defined building or works for the benefit of the employer. The detailed design of the building or works to be carried out is usually supplied by or on behalf of the employer, but may also be supplied in whole or in part by the contractor. In *Modern Engineering (Bristol) Ltd v. Gilbert-Ash Northern*,[1264] Lord Diplock defined a building contract as:

> An entire contract for the sale of goods and work and labour for a lumpsum price payable by instalments as the goods are delivered and the work is done. Decisions have to be made from time to time about such essential matters as making variation orders, the expenditure of provisional sums and prime cost sums and extension of time for carrying out of the work under the contract.[1265]

818. Thus, a building contract may be defined as an agreement with a person for carrying out building works or operations and providing labour and in some instances, goods and materials. It is a legally binding agreement within which the structure, details and identification of both commitments and parties involved in the building process are illustrated. Usually, a building contract is executed between the owner of the project (client or employer) and the contractor and contains several clauses defining the scope, terms and conditions of such agreement.

819. The building contract provides the date, full name, address and signature of the parties; scope of work (outline and framework of the project). It contains a set of conditions that lay down procedures of general application to particular works. The conditions may include: general obligations to perform works; provision for instructions, including modifications or variations or rectification in the event that the expressed terms are not sufficiently met by either party involved in the construction process; valuation and payment; liabilities and insurance; promotion of quality and inspection; completion, delay and extension of time; role and powers of the certifier or project manager; method statement that specifies the intended method of construction; and dispute settlement.[1266] The contract may also contain a legislation clause that ensures that the contractor will adhere to any or all applicable legislation required by the local jurisdiction in which the works are taking place.

1263. John Uff, *Construction Law* 1 (6th ed. Sweet and Maxwell 1985).
1264. [1974] A.C. 689.
1265. *Ibid.*, p. 710.
1266. John Uff, *supra*, p. 230.

820. Like other construction contracts, building contracts often state the price for the work to be carried out subject to modification as work proceeds due to certain factors such as variations and price fluctuations. Where the price of the original contract work remains fixed, the contract may be called a lump sum contract. Where the original contract expressly provides that the work may be remeasured or bills are stated to be provisional or approximate, the contract may be called a remeasurement contract. In a situation where the contract makes no provision for payment, the contractor is entitled to a reasonable sum. It is however necessary to point out that some building contracts between the employer and contractor may be based on standard form contracts.

821. A building contract must conform with applicable laws such as the Building Control Act, 2013, the Public Health Act, Cap. 281, National Environment Act, 2019, and relevant regulations such as Public Health (Building) Rules.

§2. Parties to the Building Contract

822. The parties to the main or head building contract are the client, who is also called the owner or employer, and the contractor. The employer is the most essential person that commissions the work and may be a private individual, partnership, limited liability company, local or central government or any other incorporated or unincorporated body. The main contractor, who is also referred to as the builder or building contractor, carries out the building works. The contractor is responsible for the provision and completion of the works. The contractor may, subject to the provisions of the main or head contract, subcontract portions of the work to one or more subcontractors, usually called nominated subcontractors, except where the contract requires special skill or quality of the contractor. A subcontract creates no privity of contract between the subcontractor and the employer. A subcontractor can sue only the main contractor for the price of the subcontracted work.

823. The task of designing works and supervising their construction is carried out by a professional team, including architects and engineers. Albeit the architect or engineer may be named in the main building contract, he or she is neither party to the contract nor any subcontract. He or she is engaged under his or her own contract with the employer. An engineer or architect may perform functions as an agent of, or as an independent contractor engaged by the employer, or as an impartial certifier. A civil or structural engineer may be required to carry out part of the design work and may be directly engaged by the employer. A quantity surveyor may also be engaged by the employer or the architect to prepare bills of quantities from the drawings and other technical descriptions. Another important person in the building industry is the project manager, whose primary role is to ensure the achievement of cost, time and performance requirements and the monitoring progress of the works. There may also be other people involved in the building process such as the clerk of works and the foreman.

824. Where a contract nominates a contract administrator or project manager to administer the performance of a contract, the employer should not take over or encroach on the functions of the administrator, unless there is an express term in the contract to that effect. The encroachment on or arrogation of the contract administration duties by the employer is referred to as interference and has serious consequences for the employer.[1267] For example, in *Scheldebouw BV v. St. James Homes (Grosvenor Dock) Ltd*,[1268] the issue was whether or not the employer could appoint itself as a contract administrator (decision-maker). The court held that it was such an unusual state of affairs for the employer himself to be the certifier and decision-maker, which could only be achieved by an express term.

825. The court set out four general principles concerning the position of the contract administrator. First, the precise role and duties of the decision-maker will be determined by the terms of the contract under which he is required to act. Second, as a general rule, the decision-maker is not and cannot be regarded as independent of the employer. Third, when performing decision-making functions, the decision-maker is required to act in a manner that has variously been described as independent, impartial, fair and honest. Fourth, the fact that the decision-maker acts in conjunction with other professionals, when performing his decision-making functions, does not water down his legal duty.

§3. Formation of a Building Contract

826. Like any other contract, the applicable law to building contracts is the general law of contract, which is largely found in the Contracts Act, 2010, and the relevant principles of common law and equity. In *Modern Engineering (Bristol) Ltd v. Gilbert-Ash (Northern) Ltd*,[1269] Lord Reid stated:

> When parties enter into a detailed building contract, there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of a contract.[1270]

827. Thus, the usual elements of a contract – offer, acceptance, consideration, capacity to contract and intention to create legal relations should be present. However, there is need to pay particular attention to some of the peculiarities in the building industry, for example, how the offer and acceptance take place. An employer, especially a company, may send out a request for quotations or proposals to potential contractors or builders in order for them to submit bids. The actual bid submitted by the contractor or builder is the offer. Once the company has collected all the bids, it may accept a builder's bid by sending a purchase order to the best

1267. *See Halsbury's Laws of England*, *Building Contracts* Vol. 6, para. 336 (2011).
1268. [2006] B.L.R. 113 T.C.C.
1269. [1974] A.C. 689.
1270. *Ibid.*, p. 677.

bidder. An example of an offer could be bidding for a government contract, or a proposal to do work or provide supplies, or it can be an email statement such as 'I will renovate your house if you pay me 10 million shillings'. Once the bidder receives a response from the prospective employer, it is necessary to make the proper terms of acceptance in the proposal.

828. Letters of intent are widely used in the construction industry before a formal contract is executed. These letters may present difficulties for employers and contractors. The key question is whether or not letters of intent are legally binding. Parties should ensure that letters of intent are properly drafted so that they do not create binding obligations where they were actually not intended to do so.

829. In *British Steel Corporation v. Cleveland Bridge and Engineering Co. Ltd*,[1271] which was cited with approval in *Cafe Technical Services Ltd & Another v. J.W. Opolot Construction (U) Ltd*,[1272] a dispute arose concerning whether a contract arises from a letter of intent. It was held that whether a contract to manufacture cast-steel nodes had come into existence depends on the true construction of the relevant communications, which have passed between the parties and the effect, if any, of their action pursuant to those communications. That there is no hard and fast rule to answer the question of whether a letter of intent will give rise to a binding contract. It depends on the circumstances of a particular case. In *ACT Construction Ltd v. E. Clarke & Sons (Coaches) Ltd*,[1273] it was held that as long as there was an instruction to do work and an acceptance of that instruction, there was a contract.

830. The building contract may be oral or in writing or partly oral and partly in writing.[1274] However, given the complexity of the construction industry in general, it may be necessary for the parties to enter a formal contract. A well-drafted contract is a major component of a successful building project. The existence of a formal contract, carefully drafted to cover every possible aspect of the project, is thus imperative for both the contractor and the employer. The contract does not only set out the agreement between the parties but also states the legally enforceable obligations of each party and sets out the process for resolving any disputes. It is thus important to record exactly what has been agreed between the parties during contractual negotiations, and who the parties are.

831. In *Williams Tarr Construction Ltd v. Anthony Roylance Ltd*,[1275] contract works included designing a retaining wall, which was defective due to unexpected ground conditions and required urgent remedial works. No formal contract was prepared and the appointment was made simply through a number of emails. A dispute arose as to who the plaintiff had contracted with: Anthony Roylance in his capacity as an individual or Anthony Roylance Ltd, his company. Following a review of all

1271. [1984] 1 All ER 504.
1272. Civil Suit No. 0007 of 2013.
1273. [2002] E.W.C.A. Civ. 972.
1274. *See also* s. 10(2) of the Contracts Act, 2010.
1275. [2018] E.W.H.C. 2339 (T.C.C).

correspondence between the parties, the court held that the plaintiff had engaged Anthony Roylance in his capacity as an individual. That Anthony Roylance had not been required to warrant that the wall was fit for the purpose, but only to design a solution. The plaintiff was thus unsuccessful in claiming breach of contract and breach of warranty.

§4. Terms of the Building Contract

832. After a contractual relationship has been established, in case of a dispute, the courts have to extract the actual terms from the oral or written statements of the parties. The courts look at what the parties have agreed to undertake in the building contract. The rights and obligations of the parties to the contract are defined by its terms, which may be express or implied.

833. Express terms are those that have been explicitly agreed and specifically stated by both parties. They consist of direct promises made by either party to the other and are binding on them. Express terms may be obtained from oral or written statements made by the parties to one another during negotiations leading to a contract and by which they intend to be bound. Thus, express terms may be oral or in writing. For example, a building contract may explicitly impose a wide range of duties and responsibilities on the contractor, in relation to the quality, safety, accurateness, rectification of defects, maintenance and timely completion of the works that he has contracted to do. The contract may also explicitly impose obligations on the employer in respect to, for example, timely payment on completion of agreed works.

834. In certain circumstances, the courts may imply terms into a building contract provided such terms are necessary to give business efficacy to the agreement. Courts are generally reluctant to imply terms into a contract, particularly where there are detailed terms and conditions. Thus, a term will not be implied if it is inconsistent with the express terms of the contract. There is no implied term where a matter is covered by express provisions in the building contract. The courts may ask: Is the proposed implied term necessary to make the contract work? In other words, in the absence of the implied term, does the contract fail to deliver the bargain, which the parties had agreed?

835. In *North Midland Building Ltd v. Cyden Homes Ltd*,[1276] the plaintiff employed the defendant to design and build a large house under a design and construction contract. The parties agreed to an amendment clause, which stated that, in considering an Extension of Time (EOT), 'any delay caused by a relevant event which is concurrent with another delay for which the contractor is responsible shall not be taken into account'. The Court of Appeal upheld the decision of the Technology Construction Court (TCC) and decided that the express contractual term

1276. [2018] E.W.C.A. Civ. 1744.

allowing the defendant to levy liquidated damages for periods of concurrent delay took precedence over the prevention principle.

836. In another case of *Leander Construction Ltd v. Mulalley and Co. Ltd*,[1277] the court refused to imply a term in a contract in order to give business efficacy to the contract. The court cited the case of *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings*,[1278] where it was held that for a term to be implied, the following conditions, which may overlap, must be satisfied: it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be obvious so that 'it goes without saying'; it must be capable of clear expression; and it must not contradict any express term of the contract.

837. In yet another case of *Investors Compensation Scheme Ltd v. West Bromwich Building Society*,[1279] the court observed that the object of construction of terms of a contract is to ascertain the meaning or in other words, the common intention of the parties thereto. That such construction must be objective. The question is not what one or the other parties meant or understood by the words used. Rather, the question is what a reasonable person in the position of the parties would have understood the words to mean. In *Damondar Jihabhai & Co. Ltd v. Eustace Sisal Estates Ltd*,[1280] Sir Charles Newbold, P also stressed that the function of courts is to give effect to the intention of the parties in their agreement.

838. There are certain terms that are usually implied into building contracts. For example, the employer is required to give possession of the site within a reasonable time, and give instructions and information at reasonable times.[1281] The contractor should carry out work with proper skill and care or in a workman like manner. In the pre-contract stage, the architect or engineer has a duty to the employer to prepare skilful and economic designs of the works as an independent contractor. When works are in progress, he or she has a duty to supervise and administer the carrying out of the works in the best interests of the employer with reasonable care and skill.

839. In *Cafe Technical Services Ltd & Another v. J.W. Opolot Construction (U) Ltd*,[1282] Mubiru J cited the cases of *Duncan v. Blundell*,[1283] *Conquer v. Boot*,[1284] and *Purser and Co. (Hillingdon) Ltd v. Jackson & another*,[1285] and stated:

1277. [2011] E.W.H.C. 3449.
1278. [1978] 52 A.L.J.R. 20. *See also Philips Electronique Grand Public SA & Another v. BSkyB Ltd* [1995] E.M.L.R. 472.
1279. [1998] 1 W.L.R. 896; [1997] U.K.H.L. 28. *See also Attorney General of Belize & Others v. Belize Telecom Ltd & Another* [2009] 1 W.L.R. 1988; *Mediterranean Salvage and Towage Ltd v. Seamer Trading and Commerce Inc* [2009] E.W.C.A. Civ. 531.
1280. [1967] E.A. 153.
1281. *L.B. Merton v. Leach* (1985) 32 B.L.R. 51.
1282. Civil Suit No. 0007 of 2013.
1283. (1820) 171 E.R. 749.
1284. [1928] 2 K.B. 336.
1285. [1971] 1 Q.B. 166.

> It is an implied term in every construction contract that the contractor will carry out work in a good and workman like manner. This term imposed upon the plaintiffs an obligation, during the performance of their part of the contract, to employ that degree of skill, efficiency and knowledge which is possessed by those of ordinary skill, competence and standing in the particular trade or business for which they were employed, performed in a manner generally considered proficient by those capable of judging such work. The focus is not the result of the work, but the manner in which the work is performed.[1286]

§5. Standard of Skill and Care

840. A contractual obligation to carry out works with reasonable skill and care creates a performance obligation that is analogous to the standard of care in negligence. It is an implied duty to exercise the level of skill and care expected of another reasonably competent member of the profession. The standard of determining whether a particular conduct will incur liability for any resulting loss depends primarily upon established practice, that is whether the conduct falls within the range to be regarded as acceptable. The required standard is that in medical negligence, which was established in *Bolam v. Friern Hospital*,[1287] where it was stated:

> Where you get a situation, which involves the use of some special skill or competence, then the test as to whether there has been negligence is not the test of the man on top of the Claphan Omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act.[1288]

841. However, later cases seem to have treated the *Bolam* test with caution. For example, in *J.D. Williams and Co. Ltd v. Michael Hyde and Associates Ltd*,[1289] the court set out a number of qualifications to the *Bolam* test. First, the court observed that in a rare case, it may be demonstrated that the opinion alleged to be held by a respectable body of the profession cannot withstand logical analysis. On this point, the court cited the case of *Bolitho v. City and Hackney Health Authority*,[1290] where it was held that the practice relied upon had to be respectable, responsible and reasonable with logical basis. Also, where it involved comparative risks, it had to be shown that those advocating the practice had directed their minds to relevant matters and had reached a defensible position. Second, the court observed that in some cases, the evidence given may not establish that the view contended for is in fact

1286. *Purse and Co*., *supra*, p. 170.
1287. [1957] 1 W.L.R. 582.
1288. *Ibid*.
1289. [2000] E.W.C.A. Civ. 211.
1290. [1998] A.C. 232.

held by a responsible body of professional opinion, but may simply be the personal view of the expert as to what he might have done if faced with similar circumstances, and that this is not expert evidence at all, and the judge must discount it and form his view. Lastly, the court observed that where the advice at issue required no separate skill, then the *Bolam* test was simply irrelevant and should not apply.

842. Where the architect or engineer is employed by a contractor who is himself liable for the fitness of purpose of the works, the court may imply an additional duty. In *Greaves Contractors v. Baynham Meikle*,[1291] an engineer was employed to design the structure of a building known to be subject to vibrating loads because the floors were not sufficiently designed to resist vibrations. Albeit the court found that the engineer had failed to exercise reasonable skill and care, it held that there was a breach of an implied term that the building would be fit for the purpose.

843. In *SSE Generation v. Hochtief Solutions AG*,[1292] SSE contracted Hochtief to design, construct and commission a hydroelectric scheme. The contract contained both a fitness for purpose obligation on Hochtief that the tunnel would not collapse for seventy-five years and a limit on design liability to 'reasonable skill and care'. SSE took over the works from Hochtief in December 2008. In April 2009, the head-race tunnel which formed part of the scheme collapsed. Hochtief refused to carry out any remedial work, claiming that the works were carried out with reasonable skill and care. As a result, SSE engaged a third party to do the work, which cost around a GBP 107 million, then instituted proceedings against Hochtief. The trial court held that Hochtief was not liable because they had exercised reasonable skill and care in preparing the design, which 'placed an important brake on liability'. On appeal, the decision was reversed. It was held that there was a defect, which was not a result of the contractor's design works. Hochtief were liable, even though they had complied with their duty to use reasonable skill and care in design, because the defect was in the implementation of design, which had to meet the fitness for purpose obligation.

§6. Reasonable Skill and Care in Design

844. What constitutes reasonable skill and care in the design of work? This depends on the circumstances of each case. The architect or engineer should do the best available and warn the employer of any risks involved. This is especially so when a new or noble construction method is to be used.[1293] Where the engineer or architect delegates design works, there is no contract between the employer and the designer.

1291. [1975] 1 W.L.R. 1095.
1292. [2018] C.S.I.H. 26.
1293. *See Turner v. Garland & another* (1853) in Alfred Arthur, *Hudson's Building Contracts*, Vol. II, 1 (4th ed.) (Sweet & Maxwell, 2001).

845. The general rule is that the engineer or architect remains liable unless the employer approves delegation of the design work. In *Moresk Cleaners v. Hicks*,[1294] an architect delegated the design of a reinforced concrete structure to the contractor. The design proved to be defective. It was held that the architect was liable. However, in case of specialist processes, delegation may not be permissible. In *Merton LBS v. Lowe*,[1295] an architect was held liable for failing to take adequate steps to remedy the design defects of a plastering system for a swimming pool ceiling that had subsequently become apparent. However, he was found not to be in breach because he was entitled to rely on the specialist manufacturer's expertise, where details of the design were not revealed.

846. A situation may arise where a person agrees to complete design work started by another. In the Kenyan case of *Sand Dunes Ltd v. Raiya Construction Ltd*,[1296] the court observed that non-compliance with the drawings and specifications could not be justified as the trial judge tried to, by assigning blame to the previous contractors. When a person undertakes on terms to complete a design commenced by another, that person agrees that the result, however much of the design work is done before the process of completion commenced, will be prepared with reasonable skill and care.[1297] The respondent's duty to complete the works with reasonable skill and care also gave rise to an implied term on its part to inform the appellant of substantial defects, if any, it was aware of or believed to exist in the works carried out by the previous contractors.[1298] The court found that the trial judge erred by awarding the claimed sum without an agreement to that effect. The court held that the respondent breached the terms of the building contract by failing to complete the works thereunder.

§7. Supervision and Quality Assurance

847. The engineer or architect must provide reasonable supervision and quality assurance of the building project. The amount of supervision required depends on the nature of the works. As Lord Upjohn observed in *East Ham v. Bernard Sunley*,[1299] an architect was expected to make visits and inspections that are sufficient to check important items, including defects, which a reasonable examination may have disclosed. In *Jameson v. Simon*,[1300] the architect had made weekly visits to a house under construction but failed to inspect the bottoming of the floor, which was defective. The Scottish Court of Session held that the architect was liable to the employer on the ground that he had not sufficiently fulfilled the duty of supervision

1294. [1966] 2 Lloyd's Rep. 338.
1295. (1982) 18 B.L.R. 130.
1296. Civil Appeal No. 26 of 2017.
1297. *Ibid.*, para 43.
1298. Paragraph 44.
1299. [1966] A.C. 406.
1300. (1899) 1 F (Ct of Sess) 1211.

under the contract. In *Clay v. Crump*,[1301] an architect had failed to examine a dangerous wall and allowed it to remain in the belief that it was safe. He was held liable in negligence to a workman who was injured when the wall collapsed.

§8. Payment for Extra Works

848. In *Bottoms v. Mayor of York*,[1302] a contractor undertook to build sewerage works in unknown ground which turned out to be marshy. He abandoned the works when the engineer refused to authorize additional payment. It was held that there was no express warranty as to the nature of the site and the contractor was not entitled to additional payment. However, certain items may be taken as extras though not specifically included in the contract. In *Williams v. Fitzmaurice*,[1303] a contract was to build a house for a fixed sum. The specification did not mention the floor boards, and the contractor claimed that these boards were an extra. On construction of the contract, the court held that the flooring boards had to be taken into account.

849. In *Molly v. Leibe*,[1304] a building contract provided that no payment for extras would be made without a written order. It was held that there was an implied promise to pay for the works if they were extras. However, in *Thorn v. London Corporation*, [1305] it was held that there must be some limit as to what may be added to a contract. If work exceeding such limit is ordered, the contractor may be entitled to be paid on a *quantum meruit* basis.

§9. Liability for Default by Nominated Subcontractor

850. What is the extent of liability for the contractor in the event of default by a nominated subcontractor? What are the rights of the employer where the subcontractor's work, while complying with the express terms of the main and subcontract, is neither of good quality nor fit for the purpose? The general rule is that the main contractor will be responsible for the quality and for the fitness of the materials used.[1306] In *Gloucestershire County Council v. Richardson*,[1307] the main contractor discovered, during the course of construction works, defects in pre-cast concrete columns provided by a nominated supplier. It was held that the main contractor was not liable for the quality or fitness of the components and was thus not in breach of contract. In *Greater Nottingham Co-operative Society Ltd v. Piling and*

1301. [1964] 1 Q.B. 533.
1302. (1892) *Hudson's Building Contracts* Vol. 2, 208 (4th ed.). *See also Sharpe v. San Paulo Railway Co*. (1873) L.R. 8. Ch. App. 597.
1303. (1858) 3 H. & N. 844.
1304. (1910) 102 L.T. 616.
1305. (1876) 1 App. Cas. 120.
1306. *Young and Marten v. McManus Childs* [1969] 1 A.C. 454.
1307. [1969] 1 A.C. 480.

Foundations Ltd,[1308] it was held that because there was a direct contract between the employer and nominated subcontractor, there was no room for a separate duty of care in tort between the parties.

851. An employer may protect himself from liability by obtaining an express warranty from a nominated contractor before the subcontract is entered into. In *Shanklin Pier v. Detel Products*,[1309] a supplier stated to the employer that his paint had a life of seven to ten years. The particular paint was specified by the employer and duly used by the contractor. It was held that the statement made concerning the quality of the paint constituted a warranty and the employer was entitled to damages from the supplier's breach.

§10. Duty to Proceed Regularly and Diligently

852. In *GLC v. Cleveland Bridge and Engineering*,[1310] Parker LJ stated that what is due diligence and expedition depends on the object which is to be achieved. In *West Faulkner Associates v. London Borough of Newnham*,[1311] West Faulkner were architects who were found by the judge to have been in breach of their duty by failing to give the contractor a notice that he was failing to proceed regularly and diligently with the work. In the Court of Appeal, Simon Brown LJ stated:

> Taken together, the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the work steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work.[1312]

§11. Performance and Completion

853. Where the contract is to carry out and complete a specific item work, the general rule is that only complete performance can discharge the contractor's obligation. The purpose of signifying completion is not to release the contractor as such but to permit the employer to take possession of the works and to allow the contractor to leave the site. Completion is not affected by the existence of latent defects.[1313] In *Harrison & others v. Shepherd Homes Ltd*,[1314] the court stated:

1308. [1989] Q.B. 71.
1309. [1951] 2 K.B. 854.
1310. (1984) 34 B.L.R. 50.
1311. [1994] 71 B.L.R. 1.
1312. *West Faulkner*, *supra*, p. 5. On the obligation to act regularly and diligently, *see also Multiplex Construction v. Cleveland Bridge UK Ltd* [2006] 107 Con. L.R. I.
1313. *See Gilbert-Ash v. Modern Engineering* [1974] A.C. 689.
1314. [2011] E.W.H.C. 1811 (T.C.C.).

> It is the nature of construction projects that faults and defects caused by failures in design, workmanship or materials, may not become apparent or readily detectable (even with the exercise of reasonable care) until many years after completion of the project, long after the defects liability period. Such defects are known as latent defects as opposed to patent defects which are apparent.[1315]

854. The court held that after the end of the defects liability period, the building owner does not have a contractual right to insist that the contractor rectifies defects not notified during that period. The building owner must instead seek redress in an action for damages for breach of contract or for negligence, provided, of course, the claim is within the limitation period. Thus, where defects are discovered after apparent completion, the employer is entitled to sue for damages. Whether or not a contractor has substantially completed the work is a question of fact in each case.[1316]

855. A contractor is bound to do the work within the specified period. If the contractor fails to complete the work, he or she will be liable in damages subject to extension of time, which is usually provided for in the contract.

856. Ideally, a building contract stipulates the degree of completion of works required to bring it to an end. In the absence of an express provision, an implied term arises to that effect that the works will be substantially completed.[1317] Thus, no payment is due until the work is substantially or practically complete. In *Sumpter v. Hedges*,[1318] a builder entered into a contract to erect two houses and stables on the defendant's land for a lumpsum, but abandoned the contract part-completed. It was held that although the employer retained the benefit, in absence of entitlement under the contract, the builder was not entitled to further payment for the unfinished work. However, he succeeded in recovering payment for his materials which had been used by the employer. The contractor may recover if he or she can show that completion was prevented by the employer for example by failing or refusing to give possession of the site or that a fresh agreement to pay for the partially completed work may be implied.

857. In *Mears Ltd v. Costplan*,[1319] the issue was whether practical completion of two blocks of student accommodation had been achieved. Practical completion, which in some contracts is referred to as substantial completion, is where the project manager or contract administrator certifies that all the works described in the contract have been duly carried out. In this case, Mears Ltd ('Mears' or the 'employer') had engaged Plymouth (Notte Street) Ltd ('the developer') to design and build the two blocks. The parties had also entered into an Agreement for Lease (AFL), which

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1315. *Ibid.*, p. 1830.
1316. *Bolton v. Mahadeva* [1972] 2 All ER 1322.
1317. *Chitty on Contracts* paras 37–112 (31st ed., Vol. II).
1318. [1898] 1 Q.B. 673.
1319. [2019] E.W.C.A. Civ. 502.

required Mears to take a twenty-one-year lease of the property following completion. The AFL prohibited the developer from varying the works which 'materially' affected the size of the student rooms. Any reduction in size that was more than 3% was to be considered material. There were lengthy delays to the works. The employer claimed that fifty-six of the student rooms had been constructed with material deviations from the general specifications. The employer sought declarations in the TCC preventing the certification of practical completion. This would in effect allow Mears to terminate the AFL and discharge its obligations under the agreement.

858. The TCC refused to grant the declarations. The Court of Appeal held that the TCC correctly declined to grant the declarations since, on the proper construction of the contract, the question of practical completion was to be decided by the certifier. Thus, Mears could neither terminate the AFL nor discharge its obligations. The court observed that where patent defects exit and are more than trifling or *de minimis*, such defects shall be sufficient to prevent practical completion. The court cited the case of *Jarvis v. Westminster*[1320] where it was held that whether a patent defect is trifling is a matter of degree to be assessed against the purpose of allowing the employers to take possession of the works and to use them as intended. The court applied the approach in *Jarvis* case above and held that while some rooms were built 3% smaller than specified, this did not sufficiently detract from their intended purpose of providing student accommodation and the defects were thus merely trifling.

859. The court made a number of observations on practical completion. First, practical completion is easier to recognize than define and there are no hard and fast applicable rules. Second, the existence of latent defects cannot prevent practical completion as, self-evidently, their existence is unknown at the time when practical completion certification takes place. Third, in respect of patent defects, there is no difference between an item of work that is yet to be completed (i.e., an outstanding item) and an item of defective work, which requires remedying. Fourth, where patent defects exist and are more than trifling in nature, such defects will be sufficient to prevent practical completion. Fifth, the ability to use the works as intended may be considered a relevant factor when deciding whether a patent defect is trifling in nature. However, such ability alone will not necessarily mean that the works are practically complete. Lastly, the mere fact that a defect is irremediable does not mean that the works are not practically complete.

1320. [1969] 3 All ER 1025.

§12. Final Certificate as Evidence of Completion

860. A final certificate has been held to be conclusive evidence that the work has been properly carried out and the employer is obliged to pay the amount due. In the South African case of *Joob Joob Investments (Pty) Ltd*,[1321] the Supreme Court of South Africa stated:

> A final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed an acknowledgement of debt in favour of the contractor. The certificate thus embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract. It is regarded as the equivalent of cash.[1322]

861. A certificate should be properly made in order to have effect as provided in the contract. A person such as an architect or project manager who makes the certificate should exercise due care and skill and ensure that the certificate is in the correct form.[1323] In *Kaye v. Hosier & another*,[1324] an architect issued his final certificate. It was held that the final certificate shall be conclusive evidence that the work was properly executed. On the function of the architect as a certifier, Lord Pearson stated:

> The architect's function is not primarily or essentially an arbitral function. The works have to be carried out to his satisfaction, and accordingly he must give or withhold his expression of satisfaction. He may notify defects and require them to be made good. He has to issue certificates showing how much money is owing. Incidentally, his certificates and instructions may resolve some controversial points, and he has to act fairly, but he is not primarily or characteristically adjudicating on disputes. If in a contract such as this the parties agree that the architect's final certificate shall be conclusive evidence of certain matters, I do not think that there is an invasion of the court's jurisdiction or any affront to its dignity. The court's function in a civil case is to adjudicate between the parties, and if they have agreed that a certain certificate shall be conclusive evidence, the court can admit the evidence and treat it as conclusive.[1325]

862. In *Omega Construction Co. Ltd v. Kampala Capital City Authority*,[1326] the plaintiff brought a suit for recovery of the amount specified by the project manager under a contract for upgrading of the drainage black spots in Kampala between the defendant as employer and the plaintiff as contractor plus interest on the debt under

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1321. [2009] Z.A.S.C.A. 23.
1322. *Ibid.*, p. 30.
1323. *See, for example*, *Sutcliffe v. Thackrah* [1974] A.C. 727.
1324. [1972] 1 W.L.R. 146.
1325. *Ibid*.
1326. Civil Suit No. 780 of 2017.

the contract and general damages. The main contention in the suit concerned certificates of completion issued by the defendant. Two rival certificates of completion were issued and the main controversy between the parties was which certificate reflects the plaintiff's claim. The claim arising from the certificate relied upon by the plaintiff amounted to UGX 4,187,692,874 as the unpaid balance of the certified sum plus interest accrued thereon by 6 November 2015. The following was agreed upon as the main issue before the court: whether payment should be made in accordance with the original certificate as issued by the project manager/consultant or whether the payments should be made in accordance with the defendant's certificates issued out and amended by the defendant.

863. Counsel for the plaintiff cited Murdoch and Hughes, *Construction Contracts: Law and Management* and submitted that the final certificate can signify the contract administrator's satisfaction with the work, or the amount that is finally due to the contractor, or both of these things. He also cited *Alpha Gama Engineering Enterprises Ltd v. Attorney General*,[1327] where court considered whether a document was a final certificate by referring to the words of the project manager in part that 'I/we certify that final payment as shown is due from the employer to the contractor. … Value of the work executed as per final statement attached (including variations and price adjustment).' The court gave these words their natural meaning and held that they meant that the document was the last certificate signifying the final payment in respect of construction of the office block and in satisfaction of the contract between the plaintiff and the defendant. Basing on these authorities, counsel for the plaintiff submitted that the project manager issued a final certificate, which created a debt that was due for immediate payment to the plaintiff. Madrama J stated:

> The strong point to be made is that the verification of the payment request is made before certification. The certification under the contract is made by the project manager. The duty is therefore on the project manager to ensure that it is professionally done and where necessary in consultation with other stakeholders. There ought not to be two or more conflicting certificates in respect of the same work under the same contract. If information is subsequently received which requires deductions, the amount to be paid in the next certificate shall be adjusted accordingly either by an increase or decrease in the amount to be paid in the next certificate.[1328]

864. The court observed that the plaintiff is not concerned with any errant conduct of the project manager, which prejudices the employer because the project manager is an official or a servant of the defendant. The contractor forwards the proposed payment document giving the basis for the payment and this is crosschecked for execution of the work and quality thereof. The project manager is appointed by and paid by the defendant. The project manager makes the defendant liable for whatever he does, such as certification, which attracts liability. The plaintiff does not

1327. HCCT-00-CC-CS-438-2010.
1328. *Ibid.*, p. 23.

certify any work for himself. Such liability arises from a certificate of payment specifying the amount to be paid by the employer. The certificate is issued after the work has been completed and then verified by the project manager. In theory, a dispute as to whether work has been done or not can be established by the production of a certificate of payment and a request specifying the work that has been done. The process of verification and challenge to the award of the project manager is a contractual process. It is primarily the work of the project manager to determine the amount due upon request for payment being made by the contractor.

865. The court further observed that because the employer, who is the defendant, did not pay the sums certified by the contract manager, and particularly because the payment was not made within thirty days as envisaged in the contract, then prima facie that would amount to a breach of contract. It held that there was a breach of contract. That a certificate of payment can be the basis of a summary suit because the contract itself is couched in mandatory language and provides that payment shall be made within thirty days of the issuance of the certificate of payment. It was the duty of the project manager to ensure that the certificates were in accord with the contract and to ensure that no certificate is issued without verification. The defendant was estopped from raising the erroneous conduct of its project manager as a justification for its non-payment. The plaintiff was awarded damages for breach of contract with interest on the sums claimed at the commercial bank rate.

§13. Damages for Breach of the Building Contract

866. According to the Contracts Act, 2010, compensation or damages may be awarded to the plaintiff for breach of contract.[1329] In *Radford v. de Froberville*,[1330] the plaintiff owned a home adjacent to a garden and plot of land. The plaintiff sold the land to the defendant who planned to build on the plot for GBP 6,500. As part of the transaction, the defendant promised to build a wall to separate the plot from the remainder of the plaintiff's land. The defendant did not build the wall, which caused diminution of value of the plaintiff's property. The plaintiff sued the defendant for GBP 3,400, which represented the cost of building the wall that would separate the defendant's plot from the remainder of the plaintiff's land. It was held that the plaintiff was entitled to damages, which would be measured by the cost of the wall. The cost observed that generally, an injured party is entitled to compensation representing what he contracted for but did not receive.

867. Damages may be awarded for what is known as 'standing time'. In the South African case of *Inkunzi Civils CC v. Great Kokstad Municipality*,[1331] the plaintiff, a contractor, claimed damages in respect of the costs of labour and plant

1329. Section 61.
1330. [1977] 1 W.L.R. 1262; [1978] 1 All ER 33.
1331. [2012] Z.A.K.Z.H.P.C. 54.

standing time consequent upon the employer's breach of contract. The plaintiff tendered and was awarded a contract by the defendant for the construction and rehabilitation of certain roads. The plaintiff performed its obligations in accordance with the contract, but the defendant failed to make timely payment in respect of duly certified payment certificates by the contract engineer as a result of which the plaintiff cancelled the contract. Judgement was entered in favour of the plaintiff and Lopes J stated:

> The claim for standing time arises out of the defendant's breach of contract, the cancellation of the contract by the plaintiff and the fact that the defendant asked the plaintiff not to de-establish its site of after cancellation, pending payment by it of the amounts due. The damages for standing time arose as direct, natural and probable consequence of the defendant's breach of contract. They were clearly within the contemplation of the parties at the time they concluded the agreement. The equipment remaining onsite after cancellation, and the rates applied, were agreed between the parties and no issue arises in that regard.[1332]

868. Damages may also be awarded for loss of amenities. In *Ruxley Electronics v. Forsyth*,[1333] Ruxley agreed to build a swimming pool in Forsyth's garden. The contract provided that the pool would have a diving area seven feet, six inches deep. When constructed, the diving area was only six feet deep, which was still a safe depth of driving that did not affect the value of the pool. Forsyth brought a claim for breach of contract. The trial court rejected the claim for 'cost of care' damages on the ground that it was unreasonable in the circumstances, but awarded him loss of amenities damages amounting to GBP 2,500. The Court of Appeal reversed the award and held that Forsyth should be awarded damages that would place him in the same position as he would have been in had the contract been performed, which in the circumstances was the cost of rebuilding the pool. The House of Lords allowed the appeal and upheld the court's award of GBP 2,500 for loss of amenity.

869. What is the measure of damages for breach of a building contract? In the Australian case of *Bellgrove v. Eldridge*,[1334] a builder built a house with defective foundations, as a result of which the house was unstable. The building owner claimed in an action against the builder for the cost of reinstatement. It was held that the measure of damages recoverable by the building owner for the breach of a building contract was the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract.

870. In *Harrison & others v. Shepherd Homes Ltd*,[1335] the claimants owned houses on an estate which were built by the defendant, Shepherd Homes Ltd. The

1332. Paragraph 25.
1333. [1995] U.K.H.L. 8.
1334. [1954] 90 C.L.R. 613.
1335. [2011] E.W.H.C. 1811 (T.C.C.).

site was a former landfill site and the property was constructed on piled foundations, which had been negligently designed. Consequently, the properties showed varying degrees of damage. Some of the properties suffered only minimal damage. However, they proved virtually impossible to sell or re-mortgage. It was held that the foundations were defective and that the defendant was responsible for the defects as a consequence of its breach of both express and implied terms of the contract. That on proper construction of the contract, the defendant was obliged to carry out the design with proper skill and attention and ensure that the houses were fit for habitation. The court observed that although there is a general rule that a claimant cannot recover damages for injured feelings arising from a breach of contract, damages may be recovered where the object of the contract is to afford pleasure, relaxation or peace of mind.

Chapter 6. Lease, Commercial and Agricultural Leases

§1. Nature of a Lease

871. A lease may be defined as a contract whereby one party conveys land or other properties or assets such as a building, vehicle, piece of equipment or services, usually in return of consideration in form of rent or other charges, for an agreed period of time. In the Ugandan context, a lease may be in respect of land (real property), including mining leases, or a financial lease. Thus, though relevant under contracts law, commercial and agricultural leases are not covered under this chapter.

§2. Land Lease

872. There are two parties to a land lease: lessor and lessee. A lessee acquires an interest or ownership in the land for a specified period of time, unlike freehold or *mailo* land ownership, where ownership lasts forever. According to the Registration of Titles Act, Cap. 230, the registered proprietor of freehold or *mailo* land may create and register a lease for a period of three years and above.[1336]

873. A lessee may, with the consent of the lessor, create and register a sublease[1337] and a lease of land may take the form of a legal estate or equitable interest largely depending on the formality used to create it.[1338]

874. A lease may be for a fixed period of time, that is, for a number of years or some fractions of a year. There may be periodic leases, for example, yearly, monthly, weekly or quarterly. This is especially so in respect of tenancies where the parties are the landlord and tenant. Tenancies may be periodic, at will or sufferance. A periodic tenancy may be defined as a tenancy that continues for successive periods until either the landlord or the tenant issues notice of terminating the tenancy. A tenancy at will is usually where there is no contract or lease and can be terminated by the landlord or tenant without giving notice. A tenancy at sufferance is where a tenancy has expired, but the tenant continues to stay on the premises without the landlord's consent.

875. The Parliament recently passed the Landlord and Tenants Bill, 2018, which is awaiting Presidential assent and insertion into the Gazette. The Bill provides that a tenancy agreement, may be made in writing, or by word of mouth, or partly in writing and partly by word of mouth, or in the form of a data message, or may be

1336. Section 101.
1337. Section 109.
1338. On legal and equitable interests in land, *see Walsh v. Lonsdale* (1882) 21 Ch. D. 9; R.J. Smith, *The Running of Covenants in Equitable Leases and Equitable Assignments of Legal Leases*, 37(1) C.L.J. 98–121 (1978).

implied from the conduct of the parties'.[1339] However, a tenancy agreement of the value of twenty-five currency points[1340] or more shall be in writing or in form of a data message except where 'the party against whom enforcement is sought admits that the agreement was entered into'.[1341] The Bill implies the usual terms in a tenancy agreement such as fitness for human habitation,[1342] keeping premises in good repair except where the damage is caused by the defendant's negligence,[1343] landlord's responsibility for taxes and rates,[1344] not to use the premises for unlawful purposes,[1345] quiet enjoyment of the premises,[1346] payment of rent[1347] and termination of tenancy agreement.[1348]

876. It is crucial to distinguish a lease from a licence. A lessee who occupies a lease has more protection than a licensee who has possession of the land under a license. In *Street v. Montford*,[1349] the respondent, by a written agreement, granted a licence to the appellant to occupy two rooms at a weekly rent subject to fourteen days' notice of termination. The agreement was titled a 'licence agreement' and contained an explicit provision that it did not create a tenancy. The respondent sought a declaration from the court that the appellant had a mere licence and not a lease. The House of Lords held that whether the interest created is a lease or a licence depends on the nature of the rights created by the parties. Where the parties intended to confer exclusive possession, the court may construe the transaction as a lease albeit it was called a licence.

877. In *Kivumbi v. Kampala City Council*,[1350] the defendant received a loan from the World Bank to develop a market in Kampala (St. Balikuddembe market, formerly known as Owino market). Under the loan agreement, the World Bank would meet the cost of developing the infrastructure and main structures of the market. The market vendors, under the Market Development Steering Committee, were responsible for the construction of shops in areas specifically allocated to each of them for that purpose. Under that arrangement, the plaintiff constructed a storage shop at the market. However, upon completion, the defendant allegedly took over the ground floor of the shop and let it out to other vendors without any compensation to the plaintiff. The vendors on the ground floor continued to pay rent to the plaintiff. The issues before the court were: (1) whether the plaintiff acquired any proprietary interest in the market; (2) whether the defendant permitted the plaintiff to construct a shop in the market for his exclusive ownership and use; (3) whether

1339. Section 3(1).
1340. A currency point is equivalent to UGX 20,000. *See* Schedule I to the Bill.
1341. Section 4.
1342. Section 6.
1343. Section 7.
1344. Section 10.
1345. Section 14.
1346. Section 19.
1347. Section 22.
1348. Sections 38–46.
1349. [1985] A.C. 809.
1350. H.C.C.S. No. 1471 of 2014.

the defendant unlawfully deprived the plaintiff of the shop premises. Monica Mugenyi J held that the plaintiff had no proprietary interest in the suit premises or any land in the market and was a licensee. The court observed that the spirit and letter of the market project was to licence the vendor to utilize the shops they had constructed though the ownership of the land on which the shops were built would remain with the defendant, which was the controlling authority. The court further observed that a licence neither confers a right to exclusive possession of the land nor any estate or interest in the land, and that although the Land Act recognizes lawful and bona fide occupants of land as having a legitimate interest therein, under section 29(4), it expressly excludes licensees.

878. According to the Mortgage Act,[1351] a mortgagee may grant and execute leases in respect of mortgage land or accept a surrender of any lease, unless the mortgage instrument expressly provides to the contrary.[1352] However, before granting such a lease, the mortgagee 'shall serve notice on the mortgagor in the prescribed form and shall not proceed with the granting or execution of that lease until fifteen working days have lapsed from the service of the notice'.[1353] The lease granted by the mortgagee shall 'reserve the best rent that can reasonably be obtained, having regard to the circumstances of the case'[1354] and 'be for a term not exceeding fifteen years or the length of the term of the mortgage whichever is shorter'.[1355] The lease shall contain reasonable terms and conditions taking into account the interests of the mortgagor and any other persons having an interest in the mortgaged land.[1356]

§3. Mining Lease

879. According to the Constitution, the Government of Uganda has control of all minerals in, or under, any land or waters in Uganda on behalf of its people.[1357] In spite of the right to own property,[1358] where land is discovered to have minerals, it ceases to belong to the landowner, and is held and controlled by the Government on behalf of the people of Uganda.[1359] Thus, according to the Mining Act, 2003, the Government may grant mineral rights on the land to various persons in form of prospecting licence, exploration licence, retention licence, location licence or a mining lease.[1360] According to the Mining Act, a mining lease means a mining lease

1351. Act No. 8 of 2009.
1352. Section 23(1)(a).
1353. Section 23(2).
1354. Section 23(3)(a).
1355. Section 23(3)(b).
1356. Section 23(3)(c). On execution of mortgages, *see* the Mortgage Regulations, 2013, Statutory Instrument No. 2.
1357. Article 244(1) of the Constitution.
1358. Article 26 of the Constitution.
1359. Article 244(1) of the Constitution.
1360. Section 2.

acquired under provisions of Part III of this Act.[1361] Like other mineral rights, a mining lease can only be acquired by the citizens of Uganda, who are 18 years or above, or a company registered or incorporated in Uganda.[1362]

880. The transfer of a mineral right, including a mining lease, without the approval of the Commissioner of Geological Survey and Mines Department, is void and of no legal effect.[1363] Section 7 of the Mining Act provides for the form and content of a mineral right, which includes a mining lease. Thus, like other mineral rights, a mining lease shall specify, among other things, the name and address of the holder of the lease; the date and grant of the lease and the period for which it is granted; a description of the area over which it is granted; the mineral or minerals in respect of which it is granted; and the conditions on which it is granted.[1364] The lease shall also specify details of proposals for the employment and training of Ugandan citizens.[1365]

881. One of the mineral rights recognized under the Mining Act is a retention licence. According to the Act, a retention licence holder has an exclusive right to apply for a mining lease over the area in respect of which the retention licence has been granted.[1366] The Commissioner may, if satisfied that commercial mineral development of an area that is subject to a retention licence has become possible, require the retention licence holder to apply for a mining lease.[1367]

882. An application for a mining lease shall be made to the Commissioner in the prescribed form accompanied by the prescribed fee.[1368] The application shall indicate the financial and technical resources available to the applicant to carry out his or her obligations under the lease.[1369] It shall also be accompanied by a full feasibility study including a plan of the area in respect of which the lease is sought,[1370] the period for which the lease is sought[1371] and a statement giving details of mineral deposits in the area.[1372] The application shall also include a technological report on mining and processing techniques proposed to be used by the applicant.[1373] It

1361. *Ibid*.
1362. Section 5.
1363. Section 6.
1364. Section 7(a)–(e); s. 45(1)–(d).
1365. Section 45(1)(e).
1366. Section 39(1).
1367. Section 40.
1368. Section 41(1).
1369. Section 41(1)(b).
1370. Section 41(1)(c).
1371. Section 41(1)(d).
1372. Section 41(1)(e).
1373. Section 41(1)(f).

should also include a business plan that contains a detailed forecast of capital investment, operating costs and revenues, source of financing, financial plan and expenditure.[1374] Where the applicant meets the conditions for grant of a mining lease, he shall be granted the lease on such terms and conditions as the Commissioner may determine.[1375]

883. According to the Mining Act, the duration of the mining lease shall be specified in the lease and shall not exceed twenty-one years or the estimated life of the mineral ore proposed to be mined or whichever is shorter.[1376] A mining leaseholder may, at the expiry of the lease period, apply for renewal of the mining lease for a period not exceeding fifteen years.[1377]

884. The application of a mining lease shall be advertised in the Gazette and 'copies of the accompanying plan shall be displayed at the relevant district and subcounty headquarters and such other places as the Commissioner may specify'.[1378] The applicant must show a written form of agreement with the landowner in respect of the land he or she intends to mine. The mining leaseholder shall have an exclusive right to carry on exploration and mining in his or her mining area.[1379] The development and mining of the mineral deposits shall be in accordance with the approved plan and the terms and conditions of the lease.[1380]

§4. Financial Lease

885. A financial lease is an agreement that allows a party to use one's property, for example, a plant, equipment or a motor vehicle in exchange for consideration. The lease agreement involves at least two parties – the lessor and the lessee. The lessor, for example a bank, owns the property to be leased, while the lessee uses the property. The lessor is a creditor and is repaid through rental payments or proceeds from sale or resale of the property at the end of the term of the lease.

886. The UNIDROIT Model Law of Leasing defines a 'financial lease' as a lease with or without an option to purchase where: (a) the lessee specifies and selects the supplier; b) the lessee acquires the asset or the right to possession and use of the asset in connection with a lease and the supplier has knowledge of that fact; (c) the rentals or other funds payable under the leasing agreement take into account the amortization of the whole or a substantial part of the lessor's investment.

1374. Section 41(j).
1375. Section 42(1).
1376. Section 46.
1377. Section 47.
1378. Section 42(2).
1379. Section 49. In respect of exclusive rights for a holder of a location licence to enter a mining area to excavate for minerals, *see Welt Machine Engineering Ltd v. China Road and Bridge Corporation & Another*, Civil Suit No. 16 of 2014.
1380. Section 50(1).

887. The main objective of the Security Interest in Movable Property Act, 2019, which repealed the Chattels Securities Act, 2014, is 'to inter alia provide for the use of movable property as collateral for credit'. The Act defines 'collateral' as 'movable property that is subject to a security interest'.[1381] It defines 'financial lease' as a lease of a tangible asset where: the lessee automatically becomes the owner of the tangible interest; the lessee may become the owner of the tangible asset by payment of a nominal price at the end of the lease; or the tangible asset has not more than a nominal residual value.[1382]

888. According to Goode,[1383] there are two types of financial leases: operating lease and financial lease. The learned author presents the relationship as follows:

> An operating lease is typically one under which equipment is let out on lease to a series of different lessees in sequence, each taking the equipment for the period for which he needs it and paying a rent reflecting its use value. By contrast, a finance lease is, as its name implies, essentially a financial tool, in which the lessor's retention of ownership is little more than nominal. The characteristics of the finance lease are that the minimum period of the lease approximates to the estimated working life of the equipment, so that there is only one lessee. Responsibility for maintaining the equipment rests on the lessee and the rentals are calculated not on the use value of the equipment but on the basis of producing for the lessor a total amount which, taking account of the rental cash-flows and capital, allowances to which he is entitled, will recoup his capital expenditure in acquiring the equipment and give him the desired reform on capital.[1384]

889. Like other agreements, a financial lease is based on the doctrine of freedom of contract and thus parties are free to agree on the contents of the agreement. Thus, unless otherwise agreed by the parties, the lessor is not liable to the lessee or third party for death, personal injury or damage to property caused by use of the leased asset or property. The lessor has a lien over the property and any third party deals with the property subject to the lien. The risk of loss of the asset is borne by the lessee. Whereas the lessor's right under the lease may be transferred without the consent of the lessee, the lessee's rights can only be transferred with the consent of the lessor, which, however, may not be unreasonably withheld. The lessor grants the lessee a warranty of quiet possession, acceptability and fitness for purpose of the leased asset. In default of any obligation, the aggrieved party is normally entitled to damages in combination with other legal remedies.

890. At the end of the lease period, the lessor may have recovered the initial cost of the asset. The lessee may, after paying the final instalment, bargain with the lessor and opt to purchase the property and become the legal owner.

1381. Section 2.
1382. *Ibid*.
1383. Roy Goode, *Commercial Law* (2d ed.).
1384. Goode, *supra*, p. 776.

891. Where there is a breach of the lease agreement, the lessor may, subject to the terms and conditions of the lease, terminate the agreement and claim all arrears of rent and future rentals. In *Deluxe Enterprises Ltd v. Uganda Leasing Co. Ltd*,[1385] on 22 October 1998, the parties entered into a Master Lease Agreement for the lease of four motor vehicles for a term of four years commencing on 24 February 1999. The monthly rental for the vehicles was UGX 10,148,778 plus 17% VAT. The appellant provided a bank draft of UGX 34,375,000 and plots of land as securities. The appellant also deposited forty-eight post-dated cheques, each UGX 11,874,070 to be cashed as they became due. The appellant defaulted on the payment of the rental sums, and on 22 November 1999, the lease agreement was terminated by the respondent which repossessed the vehicles. The respondent sold the plots of land and obtained a sum of UGX 104,254,450. The vehicles were either leased to other companies or sold. The court held that non-payment of rental instalments within the prescribed time entitled the lessor to terminate the lease agreement. Although Uganda is not a party to the Convention on International Financial Leasing and the UNIDROIT Model Law of Leasing, 2008, the court relied on these instruments to hold that a lessor can recover the unpaid accrued rentals together with future rentals where the lease agreement explicitly states so. Given that Clause 10A(i) and (ii) of the lease agreement explicitly provided for such a recovery, and there was a breach of a fundamental term, the respondent was entitled to full rental payment.

892. A financial lease is different from a hire purchase agreement. In this vein, Goode states:

> In the eyes of English law, a lease of goods is a hire contract, by whatever name it is called. Its essential characteristic is that goods are bailed by one party, A, to another party, B, for B's use or enjoyment in exchange for payment of rent. It is distinguished from hire purchase and conditional sale in that B has neither the option or obligation to purchase the goods but is required to return them to A or deal with them as A directs, when the bailment comes to an end.[1386]

893. Indeed, the Hire Purchase Act[1387] defines 'hire purchase agreement' as 'an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the hirer'.[1388] Thus, whereas in most financial leases, there is no option to purchase, in a hire purchase agreement, the hirer has an option to purchase. In other words, the hirer becomes the owner of the asset or property immediately after completion of payment of the hire purchase price, which is defined as the 'total sum payable by the hirer under a

1385. Civil Appeal No. 13 of 2004.
1386. Goode, *supra*, 776–792.
1387. Act No. 3 of 2009.
1388. Section 3.

hire purchase agreement in order to complete the purchase of goods to which the agreement relates, including the cash price, interest, financial charges, and a deposit or other initial payment'.[1389]

1389. *Ibid*. On nature of hire purchase agreement, *see Monday Eliab v. Attorney General* S.C.C.A. No. 16 of 2010; *Cooper Motors Corporation (U) Ltd v. Genesis Transporters Ltd and 2 Others* H.C.C.S. No. 93 of 2008; *Vincent Mukasa v. Nile Safaris Ltd*, Civil Appeal No. 50 of 1997.

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Chapter 7. Compromise Settlement

894. Compromise settlement, which is recognized in civil law jurisdictions such as Democratic Republic of Congo and Burundi, is where parties reach a compromise before a contractual dispute is settled by a court or an arbitrator or arbitral tribunal. For purposes of clarity and finality, parties record the terms of the agreement in writing in a compromise or settlement agreement.

895. According to Richardson, '[i]n civil law jurisdictions, a compromise is an agreement by which parties end or prevent litigious obligations through reciprocal concessions'.[1390] A valid compromise should meet four essential requirements: existence of litigation; agreement between the parties; intention of ending or preventing the litigation; and reciprocal concessions made by the parties.[1391]

896. In Uganda, the law of contract recognizes an accord and satisfaction, which is used in the settlement of legal contractual claims before bringing them to court. According to Investopedia, an 'accord and satisfaction' is 'a legal contract whereby two parties agree to discharge a contract or other liability for an amount based on terms that differ from the original amount of the contract or claim'.[1392]

897. Accord and satisfaction in Ugandan contract law applies to the purchase of a release from a debt obligation. It is a form of compromise when the original terms of a contract cannot be met for whatever reason.[1393]

898. According to Richardson, a valid discharge of an existing claim or duty requires three essential requirements: existence of a claim or duty; offer and acceptance of a substitute performance in full settlement; and proper consideration.[1394]

1390. S.B. Richardson, *Civil Law Compromises, Common Law Accord and Satisfaction: Can the Two Doctrines Coexist in Louisiana?*, 69(1) Louisiana L. Rev. 176–215 at 180 (2008).
1391. *Ibid*.
1392. Investopedia, *Accord and Satisfaction*, http://www.investopedia.com/terms/a/accord-and-satisfaction.asp (accessed 4 Jun. 2020).
1393. *Ibid*.
1394. Richardson, *supra*, p. 183.

Chapter 8. Suretyship

899. Suretyship is 'an accessible agreement by which a person binds himself for another already bound, either in whole or in part, as for his debt, default or miscarriage'.[1395] In Uganda, the Contracts Act, 2010, does not explicitly mention suretyship but covers indemnity and guarantee. However, the terms 'suretyship' and 'guarantee' are used interchangeably by some jurists. A guarantor is also called a surety. Thus, this chapter is presented in the context of the law of indemnity and guarantee with close reference to the Contracts Act, 2010.

§1. Nature of a Guarantee

900. A 'contract of guarantee' is defined as 'a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written'.[1396] According to Goode, 'a guarantee is an undertaking to answer for another's default'.[1397] The contract has three parties: the creditor to whom a guarantee is given, the guarantor or surety who gives the guarantee and the principal debtor in respect of whose default a guarantee is given.[1398] The Mortgage Act, 2009, defines a surety as 'a person who offers security in the form of money or money's worth to ensure the payment of any monies secured, by a mortgage and includes a guarantor'.[1399]

901. There is a glaring contradiction in the law. Although the Contracts Act provides that the contract of guarantee *may* be oral or written,[1400] the same Act provides that '[a] contract of guarantee or indemnity *shall* be in writing'.[1401] However, in *Karangwa v. Kulanju*,[1402] Madrama J attempted to harmonize section 68 on the one hand with section 10(5), which requires that contracts that exceed 25 currency points shall be in writing, and section 10(6) that provides that a contract of guarantee shall be in writing. The learned judge observed that whereas the language in section 10(5) and (6) of the Contracts Act is mandatory, the language used in section 68 is permissive. Thus, a contract of guarantee, which exceeds 25 currency points shall be in writing while that which is less than 25 currency points may be oral.

902. Like any other contract, a contract of guarantee can be created after fulfilling the formal and essential requirements. There should be an agreement of the parties, that is, offer and acceptance; competence or capacity to contract; and valuable

1395. http://legal-dictionary.thefreedictionary.com.suretyship (accessed 4 Jun. 2020).
1396. Section 68 of the Contracts Act, 2010.
1397. R. Goode, *supra*, p. 821.
1398. *Ibid*. For the parties to a contract of guarantee, *see also* s. 78 of the Law of Contract Act, Cap. 345 (Tanzania).
1399. Section 2.
1400. Section 68.
1401. Section 10(6).
1402. Civil Appeal No. 03 of 2016.

consideration. On consideration, the Contracts Act provides that '[a]nything done or any promise made, for the benefit of a principal debtor, may be sufficient consideration to a guarantor to give a guarantee'.[1403]

§2. Guarantee and Indemnity Distinguished

903. It is important to make a distinction between a contract of indemnity and that of guarantee.[1404] 'Indemnity' means 'an undertaking by which a person agrees to reimburse another upon the occurrence of an anticipated loss'.[1405] A contract of indemnity is 'a contract by which one party promises to save the other party by the conduct of the person making the promise or by the conduct of any other person'.[1406] First, a contract of indemnity has two parties (indemnifier/promisor and indemnity holder/promise) while that of guarantee has three parties (guarantor/surety, creditor and principal debtor).

904. Second, in a contract of indemnity, one party (a promisor/indemnifier) makes a promise to the other (a promisee/indemnity holder) that he or she will compensate for any loss that may occur to the other party because of the action of the promisor or any other person. In a contract of guarantee, one party (the guarantor/surety) makes a promise to the other party (creditor) that he or she will perform the obligation or pay the liability, in case of default by the principal debtor.

905. Third, in a contract of indemnity, liability of the promisor is primary whereas in a guarantee, liability is secondary because the primary liability is of the principal debtor.[1407]

906. Fourth, the purpose of a contract of indemnity is to save the other party from suffering loss, while in a contract of guarantee, the purpose is to assure the creditor that either the contract will be performed or liability will be discharged.

907. Fifth, in a contract of indemnity, liability arises when the contingency occurs, while in a contract of guarantee, liability already exists. It should be pointed out that whether a contract is one of guarantee or indemnity is a question of construction. As a general rule, contracts of guarantee are strictly construed in favour of the guarantor/surety, and in cases of ambiguity, the courts will apply the *contra proferentem* rule. This is because, in most cases, the terms of guarantee will have been drafted by the creditor, usually relying on a standard form contract.

1403. Section 70.
1404. On the difference between guarantee and indemnity, *see Yeoman Credit Ltd v. Latter* [1961] 1 W.L.R. 828.
1405. Section 68.
1406. *Ibid*.
1407. The distinction between these types of obligations was explained in *Birkmyr v. Daniel* (1704) 1 Salk. 27.

§3. Liability of a Guarantor/Surety

908. According to the Act, '[t]he liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract'.[1408] In other words, the liability of the guarantor/surety is coextensive with that of the principal debtor unless there is a contrary provision in the contract of guarantee. Thus, the guarantor is liable for the liabilities of the principal debtor in accordance with the terms of the guarantee contract.[1409]

909. In *Paul Kasagga and another v. Barclays Bank (U) Ltd*,[1410] it was held that a guarantee is a contract whereby a person contracts with another to pay a debt of a third party who remains primarily liable, and the guarantor's liability for the non-performance of the principal debtor's obligation is coextensive with that obligation. If the principal debtor's obligation turns out not to exist or is void or diminished or discharged, so is the guarantor's obligation in respect of it. The court held further that a guarantor's obligation is to pay the outstanding debt upon default or demand by the creditor.

910. The Act also provides that 'the liability of a guarantor takes effect upon default by the principal debtor'.[1411] For example, a guarantor of a loan can only be liable under the guarantee contract if the principal debtor fails to clear it on demand.

911. In *DFCU Bank v. Manjit Kent & Another*,[1412] the plaintiff's claim against the defendant was for the recovery of UGX 23,616,698 being the money owing under a deed of guarantee plus interest and costs. The plaintiff's case was that, by a deed of guarantee and indemnity, the defendant guaranteed to indemnify the plaintiff on demand the debt owed by K. Pac Ltd, the principal debtor, a customer of the plaintiff, in the sum of UGX 100,000,000 plus charges and interest accruing after demand. The defendant denied that it had ever signed any guarantee or indemnity with the plaintiff, and contended further that if it ever did so it was for only UGX 20,000,000 and not the alleged sum. The issues before the court were whether the defendants guaranteed the overdraft facility; and if so, whether they were liable to pay the amounts owing and other reliefs sought.

912. The court found as a fact that the defendants had guaranteed the loan and held that the extent of liability of a guarantor is dependent on the contract between the parties and that the guarantor cannot be made liable for more than he has undertaken. The court cited *Halsbury's Laws of England* where it was stated:

> The extent of the liability undertaken by the guarantor will depend upon the terms of the contract of guarantee. … In order to ascertain the extent of the

1408. Section 71(1).
1409. On the nature and extent of liability of the guarantor, *see Moschi v. Lep Air Services Ltd* [1973] A.C. 331; *Dock and Wharf Co. Ltd* [1909] 2 Ch. 401; *Heyman v. Darwins* [1942] A.C. 356.
1410. H.C.M.A. 113 of 2000.
1411. Section 71(2).
1412. HCT-00-CC-CS-193-2000.

> guarantor's liability, if any, to the creditor, it is first necessary to determine the amount and the nature of the principal debtor's debt to the creditor and the circumstances in which it has arisen. This having been done, the contract of guarantee should then be construed strictly to see whether it covers the nature, extent and circumstances of the principal debt sought to be recovered from the guarantor.[1413]

913. The court awarded the sum of UGX 23,434,193 plus interest and charges as stated in the guarantee.

914. In *Moschi v. Lep Air Services*,[1414] it was held that on default of the principal debtor, apart from some special stipulation to the contrary, the guarantor/surety is immediately liable to the full extent of the obligation. In *Bank of Uganda v. Banco Arabe Espanol*,[1415] it was held that once a principal debtor defaults, the guarantor/surety has a duty to repay the loan.

915. Co-guarantors are liable among themselves to contribute equally in payment of the whole debt or part of the debt which remains unpaid by a principal debtor.[1416] Co-guarantors who are bound in different sums are also liable to pay equally as far as the limits of their respective obligations permit.[1417] For example, where A guarantees X's overdraft up to a limit of UGX 100,000,000 and B gives a guarantee without limit. In such a scenario, A and B must contribute to the common indebtedness in proportion to their respective liabilities, so that if the total claim is UGX 300,000,000, A's share of the guaranteed liability is one-third while that of B is two-thirds.

916. Where by his or her contract, the guarantor/surety limits the period of time for which he or she is willing to be responsible for the debt, it is clear he or she cannot be held liable or a longer period.

917. In respect of liability of two persons who are primarily liable, the Contracts Act states:

> Where two persons contract with another person to undertake a certain liability and also contract with each other that each of the shall be liable on the default of the other to that other person, the liability of the two persons to that other person under the first contract shall not be affected by the existence of the second contract, even where that other person is not aware of the existence of the second contract.[1418]

1413. *Halsbury's Laws of England* Vol. 20, para. 184 (4th ed.).
1414. [1973] A.C. 331.
1415. Civil Appeal No. 23 of 2000.
1416. Section 86. *See Stirling v. Burdett* [1911] 2 Ch. 418; *Re Ennis* [1893] 3 Ch. 238.
1417. Section 87. *See Ellesmere Brewery Co. v. Cooper* [1896] 1 Q.B. 75.
1418. Section 73.

§4. Discharge of the Guarantor/Surety

918. The general rule is that the guarantor has the right to be discharged or released.[1419] There are a number of circumstances that can result in the discharge or release of the guarantor/surety. First, since the guarantor's liability is limited to the principal indebtedness, it follows that if the guaranteed debt is paid, then he or she is discharged.[1420]

919. Second, a material variation of the principal contract between the principal debtor and the creditor without the consent of the guarantor discharges the guarantor. On this point, the Act states:

> Any variation made in the terms of a contract between the principal debtor and a creditor without the consent of a guarantor discharges the guarantor from any transaction which is subsequent to the variance.[1421]

920. Third, an absolute discharge or release of the principal debtor by the creditor or by his or her act or omission will release the guarantor. This may occur where there is a contract between a creditor and a principal debtor to that effect or where an act or omission discharges the principal debtor.[1422] For example, acceptance of a new debtor in place of the old, or the composition or compromise with the debtor may result in the release.[1423]

921. A guarantor is not discharged where a contract to give time to a principal debtor is made by the creditor with a third person and not with the principal debtor.[1424] Mere forbearance by a creditor to sue a principal debtor does not discharge the guarantor[1425] and the release of one co-guarantor by the creditor does not discharge the other guarantor.[1426]

922. A guarantor who discharges the debt he or she has guaranteed is entitled to what is known as subrogation, that is, to step into the shoes of the creditor, and take over all the creditor's rights against the debtor in respect of the debt and all the securities held by the creditor for payment of the debt.[1427] To this end, the Contracts Act provides that where the guarantor pays the guaranteed debt or performs according

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1419. *See Holme v. Brunskill* (1878) 3 Q.B.D. 495.
1420. *See Stacy v. Hill* [1901] 1 K.B. 660; *Commercial Bank of Tasmania v. Jones* [1893] A.C. 313.
1421. Section 74. *See also* s. 85 of the Law of Contract Act, Cap. 345 (Tanzania). On variation of terms of the guarantee contract, *see also Holme v. Brunskill* (1878) 3 Q.B.D. 495; *Mercantile Bank of Sydney v. Taylor* [1893] A.C. 317.
1422. Sections 75 and 80. *See Smith v. Wood* [1929] 1 Ch. 14; *Polak v. Everett* (1876) 1 Q.B.D. 669.
1423. Section 76.
1424. Section 77.
1425. Section 78.
1426. Section 79.
1427. *See Forbes v. Jackson* (1882) 19 Ch. D. 615.

to the contract of guarantee, he or she is invested with all the rights, which the creditor had against the principal debtor.[1428] Thus, the guarantor is entitled to the benefit of every security the creditor has against the principal debtor.[1429]

923. In *Re Lamplugh Iron Ore Co. Ltd*,[1430] it was held that a guarantor who paid a preferential debt acquired the same measure of priority as a creditor and becomes himself a preferential creditor. The right of subrogation is limited to the money actually paid in discharging his or her liability. Thus, any surplus obtained must be accounted for to the principal debtor.[1431]

924. Any guarantee obtained by the misrepresentation of the creditor or with his knowledge and assent concerning a material part of the transaction is void.[1432] Thus, where misrepresentation is proved, the guarantor will automatically be released.

§5. Guarantor's Right to be Indemnified

925. In every contract of guarantee, there is an implied promise by a principal debtor to indemnify the guarantor.[1433] The latter is entitled to recover from the principal debtor any sum he or she paid under the guarantee.[1434] The guarantor's right to be indemnified arises from an implied contract between the guarantor and the debtor. The guarantor has no right of claim against the principal debtor where he or she voluntarily assumed his or her obligations under the guarantee without the prior request of the principal debtor.[1435]

§6. Revocation of a Continuing Guarantee

926. According to the Act, a continuing guarantee is defined as 'a guarantee which extends to a series of transactions'.[1436] This type of guarantee is a standing offer, which is separately accepted each time the creditor makes an advance and thus can be withdrawn as to advances not yet made. It may, with regard to future transactions, be revoked by the guarantor at any time, by notice to a creditor.[1437]

1428. Section 81.
1429. Section 82.
1430. [1927] 1 Ch. 308.
1431. *See L. Luca Ltd v. Export Credits Guarantee Department* [1973] 2 All ER 984.
1432. Section 83.
1433. Section 85(1). *See Re a Debtor* [1937] Ch. 156; *Anson v. Anson* [1953] 1 Q.B. 636; *Wolmershausen v. Gullick* [1893] 2 Ch. 514.
1434. Section 85(2).
1435. *Owen v. Tate* [1976] Q.B. 402.
1436. Section 68.
1437. Section 72(1).

927. The Act also provides that the death of a guarantor operates as a revocation of any continuing guarantee to future transactions, unless there is a contract to the contrary.[1438]

1438. Section 72(2).

Chapter 9. Pledge

§1. Nature of a Pledge

928. The Contracts Act defines a 'pledge' as 'the bailment of goods as security for payment of a debt or performance of a promise'.[1439] There are two main parties to a pledge: a pledgor and a pledgee. A pledgor means 'a person who gives a pledge to another'[1440] and a pledgee is 'a person with whom a pledge is deposited'.[1441] Thus, a pledge is a bailment of goods.[1442] The bailment should be by or on behalf of the debtor (pledgor). It should be the intention of the parties that the goods serve as security for a debt or the performance of a promise.

929. A pledge may be in respect of goods, stocks, shares, documents of title to goods or any other movable property. There should be actual or constructive delivery of the goods from the pledgor to the pledge. There should be a contract of pledge between the parties, which may or may not be expressed in writing. The contract may be implied from the nature of the transaction or the circumstances of the case. However, it is advisable to have a contract in writing because it facilitates an understanding of the terms and conditions thereof, clearly indicating the intention of the parties. In any case, as pointed out in Chapter 1, a contract whose subject matter exceeds UGX 500,000 should be in writing.[1443]

930. Albeit a pledge is a bailment, not every bailment is a pledge. Thus, what is the difference between a bailment and a pledge? In a bailment, the goods are temporarily handed over from the bailor to a bailee for a specific purpose, while with a pledge, the goods are delivered to act as security against a debt owed by a pledgor to a pledgee. In a bailment, the bailee has no right to sell the goods, while with a pledge, the pledgee has the right to sell the goods if the pledgor fails to pay the debt. In a bailment, consideration may be present, while with a pledge it must exist. Another difference is that whereas in a bailment the bailee can use the goods for a specific purpose, with a pledge, the pledgee has no right to use the goods.

§2. Rights of a Pledgee

931. A pledgee has the right to retain the pledged goods for the payment of a debt or the performance of a promise, the interest on the debt and any necessary expenses incurred by him or her for the possession or preservation of the goods.[1444]

1439. Section 88.
1440. *Ibid.*
1441. *Ibid.*
1442. *See Coggs v. Bernard* (1703) 2 Ld. Raym. 909.
1443. *See* s. 10(5) of the Contracts Act, 2010.
1444. Section 110(a)–(c).

However, unless there is a contract to that effect, the pledgee shall not retain the pledged goods except for the purpose for which they are pledged.[1445]

932. The pledgee may bring a suit against the pledgor where the latter defaults on payment and retain the goods as collateral security.[1446]

933. The pledgee may sell the goods after giving the pledgor reasonable notice of the sale.[1447] The nature and duration of the required notice depends upon the nature of the pledge and the circumstances of each case. The notice must be clear and specific in its language, indicating the intention of the pledgee to dispose of the goods in question. If the pledgor does not receive reasonable notice, he or she has a right to claim damages that may accrue. Where the pledgee has exercised his or her right of sale of goods and the proceeds of the sale are less than the amount due in respect of the debt, the pledgor is not liable to pay the balance.[1448] However, where the proceeds are greater than the amount due, the pledgee shall pay the surplus to the pledgor.[1449]

§3. Pledge by a Mercantile Agent

934. The Contracts Act provides as follows:

> Where a mercantile agent is with the consent of an owner, in possession of goods or documents of title to goods or the documents of title to goods, any pledge made by the mercantile agent while acting in the ordinary course of business of a mercantile agent, shall be valid as if the mercantile agent was expressly authorized by the owner of goods to make the pledge.[1450]

935. A 'mercantile agent' is defined by the Act as 'a mercantile agent having, in the customary course of his or her business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods'.[1451] The Act defines documents of title to goods as including:

> [A]ny bill of lading, warehouse keeper's certificate, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of possession or control of goods or which authorizes or purports to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods represented by the document.[1452]

1445. Section 111(1).
1446. Section 131(1)(a).
1447. Section 113(1)(b).
1448. Section 113(2).
1449. *Ibid*.
1450. Section 115(1).
1451. Section 2. *See also* s. 32(3) of the Sale of Goods and Supply of Services Act, 2017.
1452. Section 2. *See also* s. 1 of the Sale of Goods and Supply of Services Act, 2017.

936. Thus, a mercantile agent has a right to pledge goods by transferring documents of title to another person. For the pledge to be effective, a number of conditions must be met. First, the pledgor must be a mercantile agent. Second, he or she must be in possession of the goods or of documents of title as defined above with the consent of the owner. Third, he or she must have made the pledge in the ordinary course of business of a mercantile agent. Fourth, the pledgee must have acted in good faith and had no notice at the time of the contract that the mercantile agent had no authority to pledge.[1453]

§4. Obligations of the Pledgee

937. The pledgee is obliged to take care of the goods pledged to him or her as a person of ordinary prudence would under similar circumstances does to his or her own goods of a similar nature. The pledgee should not make unauthorized use of goods pledged to him or her. He or she should return the goods pledged to the debtor when the debt is repaid or the promise is performed.

§5. Rights and Obligations of the Pledgor

938. The pledgor has the right to redeem the goods before they are sold by the pledgee. The right to redeem the collateral from the pledgee is firmly established by law. The Contracts Act provides as follows:

> Where time is stipulated for the payment of a debt or the performance of a promise, for which a pledge is made and a pledgor defaults in the payment or the performance at the stipulated time, the pledgor may redeem the pledged goods at any subsequent time, before the actual sale of goods.[1454]

939. Where the pledgor redeems the goods, he or she shall pay any expenses that may arise from his or her default to pay or perform at the agreed time.[1455] The pledgor is thus obliged to repay the debt regarding the pledge, including interest and other charges.

940. The pledgor is obliged to disclose to the pledgee any material faults or extraordinary risks involved in the goods to which the pledge might be exposed. Failure to do so, the pledgee may sue for damages. The pledgor is also responsible to the pledgee for any defect in the pledgor's title to the goods.

941. The pledgor may also sue for any accruals to the goods pledged. If any loss is caused to the goods because of mishandling or negligence on the part of the pledgee, the pledgor has a right to sue for damages.

1453. Section 115(2) and (4).
1454. Section 114(1).
1455. Section 114(2).

Chapter 10. Loans

§1. Nature of a Loan

942. A loan may be defined as a borrowed thing, especially a sum of money, that is usually expected to be paid with interest. A loan has also been defined as:

> money, property, or other material goods given to another party in exchange for future payment of the loan value or principal amount, along with interest or charge. A loan may be for a specific, one-time amount or can be available as an open-ended line of credit up to a specified limit or ceiling amount.[1456]

943. This chapter deals with situations where loans are advanced in form of money. In Uganda, these loans may be advanced by financial institutions, including banks, savings and credit societies (SACCOs), non-deposit taking microfinance institutions, money-lending companies, and individuals or companies lending to government in form of securities such as treasury bills and bonds.

§2. Loans by Financial Institutions

944. The Financial Institutions Act, 2004, defines a financial institution as:

> a company licenced to carry on or conduct financial institutions business in Uganda and includes a commercial bank, merchant bank, mortgage bank, post office savings bank, credit institution, a building society, an acceptance house, a discount house, a finance house, or any institution which by regulations is classified as a financial institution by the Central Bank.[1457]

945. According to the Financial Institutions Act, financial institution business means the business, of among others, acceptance of deposits, lending or extending credit, including consumer and mortgage credit, the financing of commercial transactions, the recovery by foreclosure or other means of amounts so lent, advanced or extended, financial leasing, and mortgage banking.[1458] The Act defines a bank as 'any company licenced to carry on financial institution business as its principal business'.[1459]

946. The Financial Institutions Act prohibits transactions of financial institution business without a licence issued by the Central Bank (Bank of Uganda).[1460] The Central Bank fixes minimum capital requirements for financial institutions, including banks.

1456. Investopedia, *Loan*, http://www.investopedia.com/terms/l/loan.asp (accessed 10 Oct. 2019).
1457. Section 3.
1458. *Ibid*.
1459. *Ibid*.
1460. Section 4.

947. According to the Financial Institutions Act, in order to carry on financial institutions business, a financial institution must have a minimum paid up capital of not less than two hundred thousand currency points invested initially in such liquid assets in Uganda as the Central Bank may approve.[1461]

948. The Financial Institutions Act imposes certain restrictions in respect of financial institutions business. For example, no financial institution shall not use the word 'bank' unless specifically licensed to carry out banking business by the Central Bank.[1462] The Act also establishes a bar on lending where liquid assets are insufficient. In this respect, the Act provides that, '[W]here a financial institution fails to maintain the minimum amount of liquid assets, it shall not grant any new or additional loan or credit accommodation to any person without the prior written approval of the Central Bank'.[1463]

949. A financial institution is also prohibited from lending against its own shares and other debt instruments.[1464] Insider lending is also prohibited.[1465] The Act specifically imposes restrictions on a mortgage bank. In this regard, the Act that, '[n]o mortgage bank shall advance more than five percent of all its loans for a purpose other than acquisition, construction, enlargement, repair, improvement and maintenance of urban and real estate or the substitution of mortgages taken out for that purpose'.[1466]

950. The Financial Institutions (Amendment) Act, 2016, introduced bancassurance, agent banking and Islamic banking. Bancassurance is the selling of insurance products and services by banking institutions. Agent banking means 'the conduct by a person of financial institution business on behalf of a financial institution as may be approved by the Central Bank'.[1467] Islamic banking, which is also known as non-interest banking, has been defined as:

> a banking system that is based on the principles of Islamic or Sharia law and guided by Islamic economics. Two fundamental principles of Islamic banking are the sharing of profit and loss, and the prohibition of the collection and payment of interest by lenders and investors.[1468]

951. According to Investopedia, Islamic banks make a profit through equity participation that requires a borrower to give the bank a share in their profits instead of paying interest.[1469]

1461. Section 26.
1462. Section 7.
1463. Section 29.
1464. Section 30.
1465. Section 34.
1466. Section 45.
1467. Section 1.
1468. Investopedia, *Islamic Banking*, https://www.investopedia.com/terms/i/islamicbanking.asp (accessed 20 Oct. 2019).
1469. *Ibid*.

952. Islamic financial business means the financial institution business which conforms to the Shari'ah and includes, 'the business of receiving property into profit sharing investment accounts or of managing such accounts';[1470] and 'any other business of a financial institution which involves or is intended to involve the entry into one or more contracts under Shari'ah or otherwise carried out or purported to be carried out in accordance with the Shari'ah'.[1471] Such business includes equity or partnership financing; lease based financing; sale based financing; currency exchange controls; fee based activity; the purchase of bills of exchange, certificates of Islamic deposit or other negotiable instruments; and the acceptance or guarantee of any liability, obligation or duty of any person.[1472] Islamic financial business also includes, 'the business of providing finance by all means including through the acquisition, disposal or leasing of assets or through the provision of services which have similar economic effect and are economically equivalent to any other financial institution business'.[1473]

953. Islamic financial business is carried out by Islamic financial institutions. An Islamic financial institution is defined as, 'a company licenced to carry on financial institution business in Uganda whose entire business comprises Islamic financial business and which has declared to the Central Bank that its entire operations are and will be conducted in accordance with the Shari'ah'.[1474]

954. Islamic contracts must comply with the Shari'ah and satisfy any conditions specified by the Central Bank for that purpose.[1475]

955. Before delving into other forms of lending, it may be necessary to briefly comment on the relationship between the banker and customer. This relationship arises from a contract. It is the relationship between a debtor and creditor whereby the respective positions are determined by the state of the account.[1476] When a customer deposits his or her money in the bank, the latter is the debtor while the customer is the creditor. The customer has the right to demand back his or her money whenever he or she wants it from the bank, and the latter must pay the balance on the account. However, in respect of loan accounts, the bank is the creditor because the customer owes money to the bank. The customer is the debtor. The bank may demand repayment of the loan on the due date and the customer has to repay the debt.

1470. Section 1.
1471. *Ibid*.
1472. *Ibid*.
1473. *Ibid*.
1474. *Ibid*.
1475. *Ibid*.
1476. On the relationship between a banker and customer, *see Foley v. Hill* (1848) 2 H.L.C. 28; *Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 100.

§3. Loans by SACCOs

956. Savings and credit societies (SACCOs) may borrow and lend money. According to the Tier 4 Microfinance Institutions and Money Lenders Act, 2016, which repealed the Money Lenders Act, Cap. 273, in order for a SACCO to carry on business of financial services, it must be registered and licensed by the Uganda Microfinance Regulatory Authority,[1477] which is responsible for regulating, licensing and supervising tier 4 microfinance institutions and moneylenders.[1478] Upon registration and attainment of a licence, the SACCO may provide loans to its members.[1479]

957. The Tier 4 Microfinance Institutions and Money Lenders Act imposes restrictions on borrowing on SACCOs. In this vein, the Act provides that a SACCO may borrow an amount to the maximum set by the members during its general meeting.[1480] However, a SACCO shall not borrow an amount which exceeds in aggregate the limit prescribed by the Authority.[1481] A SACCO is obliged to have a credit policy that includes the terms and conditions of repayment; the maximum amount that may be borrowed; and an acceptable form of security for a loan.[1482] A SACCO may only provide credit according to the terms and conditions prescribed in the credit policy.[1483]

958. The Act establishes the SACCO Stabilization Fund,[1484] whose main objectives are to provide financial assistance to SACCOs that may be insolvent or are likely to be insolvent; and to advance loans and grants to SACCOs that require financial assistance.[1485] The Act also establishes a SACCO Savings Protection Fund,[1486] which shall provide protection of savings of individual members[1487] but not savings of shareholders.[1488] The monies for the Savings Protection Fund shall include: monies appropriated by Parliament; and an annual contribution from SACCOs as determined by the Authority.[1489] These monies may be invested in Government securities; commercial paper; deposits in a financial institution and a microfinance deposit taking institution; and any other investment as may be approved by Parliament.[1490]

1477. Section 36(1).
1478. Section 8(1).
1479. Section 36(2).
1480. Section 50(1).
1481. Section 50(2).
1482. Section 51(1).
1483. Section 51(2).
1484. Section 54.
1485. Section 55(1).
1486. Section 57(1).
1487. Section 57(3).
1488. Section 57(4).
1489. Section 58.
1490. Section 59.

§4. Loans by Non-deposit Taking Microfinance Institutions

959. According to the Tier 4 Microfinance Institutions and Money Lenders Act, 2016, upon receipt of a licence from the Authority,[1491] a non-deposit taking microfinance institution may grant micro-loans,[1492] which shall be in Uganda shillings and may be granted with or without collateral.[1493] According to the Act, the microfinance institution shall be transparent in dealing with the public by furnishing the borrowers with accurate information on the procedure and conditions for microlending.[1494] It shall also 'inform borrowers, prior to the acquisition of a microloan of the financial costs associated with the procurement and servicing of that microloan to be met by the borrower'.[1495] It shall also ensure that information relating to borrowers remains confidential.[1496] It is obliged to inform borrowers of their rights and duties regarding acquisition of micro-loans.[1497]

960. The Act imposes on a non-deposit taking microfinance institution a number of obligations. The institution shall permit its clients to examine the procedures for loan application and approval; the micro-loan agreement; the amount of loan; the interest rate; the schedule of repayment; the performance of a micro-loan agreement; and the responsibilities of the parties in case of non-performance.[1498] The loan agreement form shall include: the names of the borrower; the amount of the loan; the purpose and drawdown period of the loan; the maturity date and repayment schedule of the loan; the total amount of interest to be paid; the penalties in case a borrower is unable to fulfil a loan obligation; the security or collateral, if any; and the procedures for settlement of disputes.[1499] The microfinance institution 'shall provide to the borrower full and accurate information on the procedure and conditions for microlending, including information on the borrower's financial costs associated with the acquisition and servicing of a micro-loan'.[1500]

§5. Loans by Money-Lending Companies

961. According to the Tier 4 Microfinance Institutions and Moneylenders Act, 2016, and the Tier 4 Microfinance Institutions and Money Lenders (Money Lenders) Regulations, 2018, only a company can engage in money-lending business,[1501] which shall be regulated and supervised by the Authority.[1502] However, the following shall not engage in money-lending business: a company carrying-on business of

1491. Section 62.
1492. Section 67(1).
1493. Section 67(2).
1494. Section 68(a).
1495. Section 68(b).
1496. Section 68(c).
1497. Section 68(d).
1498. Section 69(2).
1499. Section 70(2)(a)–(d).
1500. Section 72(1).
1501. Section 78(1).
1502. Section 77(1).

banking or insurance; a society registered under the Cooperative Societies Act, Cap. 112; or a body corporate, incorporated or empowered by an Act of Parliament to lend money in accordance with that Act.[1503]

962. An application for a money-lending licence shall be made in writing to the Authority and shall be accompanied by the certificate of incorporation of the company; a resolution of the particulars of the directors and secretary of the company; the postal and physical address of the company; and the prescribed fee.[1504] The Authority may or may not issue a money-lending licence applied for.[1505] The money-lending licence may be revoked by the Authority under certain circumstances.[1506]

963. The Act provides for the form of a money-lending contract. The contract shall be in writing, signed by the moneylender and the borrower and witnessed by a third party.[1507] The contract shall take the form of a note or memorandum which shall contain all the terms of the contract.[1508] In particular, the contract shall show, the date on which the loan is disbursed; the amount of the principal of the loan; the interest charged on the loan expressed in terms of a percentage per year; the nature of the security, if any; the duties and obligations of the borrower; the mode of repayment; the nature of guarantorship, if any; and the right of early repayment.[1509]

964. According to the Act, a money-lending contract is illegal and unenforceable if it directly or indirectly provides for the payment of compound interest; or the rate or amount of interest being increased by a reason of default in the payment of sums due under the contract.[1510] Where the borrower defaults on repayment of the loan, the lender is entitled to charge simple interest from the date of default until the sum is paid.[1511]

965. A moneylender must issue a receipt to a borrower for every repayment made on a loan.[1512] The receipt must be issued immediately after the payment is made.[1513] The moneylender must keep a record that shall contain the date on which the loan was disbursed; the amount of the principal; the rate of interest; and the sum repaid on the loan and the date on which the payment is made.[1514]

966. The Act provides for power of the court in respect of money-lending transactions between the moneylender and the borrower. In an action for recovery of

1503. Section 78(2)(a)–(c).
1504. Section 78(3).
1505. *See* ss 79 and 80.
1506. *See* s. 83.
1507. Section 85(1).
1508. Section 85(2).
1509. *Ibid*.
1510. Section 86(1).
1511. Section 86(2).
1512. Section 87(1).
1513. Section 87(2).
1514. Section 83(3).

money lent, the moneylender shall produce all material records.[1515] Where the court is satisfied that the borrower has defaulted, 'it may determine the contract and order the principal outstanding to be paid to the money lender, with such interest as the court may allow, up to the date of payment'.[1516]

967. The court may, on application by the borrower or the moneylender, reopen the transaction if it is satisfied that the interest charged in respect of the sum actually lent is excessive; the amount charged for expenses, inquiries, fines, bonus, premium, renewals or any other charges is excessive; the transaction is harsh and unconscionable; or the transaction is such that a court of equity would give relief.[1517] In reopening the transaction, the court shall take into account the money-lending agreement and may 'relieve the borrower from payment of a sum in excess of the sum adjudged by the court to be fairly due in respect of the principal, interest and charges, as the court having regard to the risk and all the circumstances, may adjudge to be reasonable'.[1518]

968. The court may also order the moneylender to repay the excess sum paid by the borrower,[1519] set aside, either wholly or in part, or revise, alter any security given or agreement made in respect of money lent.[1520] It may also order the moneylender to indemnify the borrower if the former has realized the security.[1521] However, the rights of a bona fide assignee or holder for value shall not be affected when the court reopens the transaction and issues the orders herein above.[1522] The Act grants the minister, in consultation with the Authority, to prescribe, by notice in the Gazette, a maximum interest rate a money mender shall charge.[1523]

969. There are instances where, pursuant to the repealed Money Lenders Act, the courts intervened in money-lending transactions. For example, in *Balintuma v. Dr. Handel Leslie*,[1524] the defendant argued that the plaintiff merely advanced a friendly loan to be repaid with interest. The plaintiff argued that with a promise for security and interest, the transaction ceased to be a friendly loan. It was held that since the plaintiff had no money-lending licence as required by the Money Lenders Act, the contract between him and the defendant was illegal and thus unenforceable.

970. In *MK Creditors Ltd v. Owora Patrick*,[1525] under a money-lending agreement, it was agreed that the loan was to be repaid at an interest of 3.5% per day.

1515. Section 88(1).
1516. Section 88(2).
1517. Section 89(1)(a)–(c).
1518. Section 89(2)(a).
1519. Section 89(2)(b).
1520. Section 89(2)(c).
1521. Section 89(2)(d).
1522. Section 89(5).
1523. Section 90(1).
1524. Civil Suit No. 193 of 2013.
1525. Civil Suit No. 533 of 2013.

The court observed that when this figure is computed and translated into a yearly percentage for interest which would be paid for the loan, then the total interest would amount to over 1,260% per year. That when the percentage was related to section 12 of the repealed Money Lenders Act, Cap. 273, which prohibited interest in excess of 24%, it would appear abnormally high, harsh and unconscionable and illegal and thus the transaction was unenforceable.

971. In yet another case of *Alice Akiror & Another v. Global Capital Save*,[1526] the court found that the interest charged at 12% per month (144% per annum) was harsh and unfair and awarded 25% per annum.

972. In *Charles Athembu v. Commercial Microfinance Ltd & Another*,[1527] the applicant signed a contract requiring him to pay a rate of interest of 2.5% per month, which translates into 53.46% per annum and a penalty of 2% per month of default. In finding the transaction harsh and unconscionable, Mubiru J stated:

> To establish that a contract is unconscionable, a party [should] have made an unconscientious use of its superior position or superior bargaining power to the detriment of someone suffering from some special disability or disadvantage. This weakness [should] have been exploited in some morally culpable manner leading to an oppressive transaction. There must be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself, but the former may often be inferred from the latter in absence of an innocent explanation. … The test is whether the conditions and terms of interest are so unconscionable as to shock the conscience of the court. … On the facts of this case, the applicant entered into a commercial transaction in a situation where the parties were of broadly dissimilar bargaining power. … [T]he transaction involved elements of deception or compulsion, or that the applicant as the grossly weaker party had no meaningful choice or real alternative, most especially since there was no evidence adduced during the trial that he obtained independent advice before entering into a transaction of terms tending to be usurious. [1528]

973. In a situation where the borrower wishes to repay the loan but the moneylender dodges him or her to the extent that it becomes impossible for the borrower to repay the monies borrowed, 'the borrower may deposit the loan monies with the Authority on behalf of the money lender and the repayment shall be deemed to have been paid by the money lender'.[1529] The Authority shall transmit the monies paid to the moneylender.[1530]

1526. Civil Suit No. 149 of 2010.
1527. Civil Suit No. 0001 of 2014.
1528. *Ibid.*, p. 10.
1529. Section 95(1).
1530. Section 95(2).

§6. Loans to Government

974. The Government may borrow through debentures or stocks. According to the Loans Act, Cap. 236:

> The minister may, with the prior approval of Parliament signified in that behalf by a resolution of Parliament, issue debentures or stock or both debentures and stock to an amount sufficient to produce a sum of two million pounds and such other sums as may be necessary to defray the expenses of the issue.[1531]

975. The minister may, by statutory instrument which shall be laid before Parliament, increase the amount to be borrowed.

976. Individuals, companies or other entities may lend money locally to the Government in the form of securities such as treasury bills and bonds. According to the Local Loans Act, Cap. 240, local loans may be raised by stock or bonds. The Act provides as follows:

> Wherever by or under any Act of Parliament, authority shall have been given or shall hereafter be given to raise any such sum of money for the purposes mentioned in the Act, the Treasury may, from time to time as it may deem expedient, raise any such sum either by the issue of stock (which shall be known as Uganda stock) or bonds or partly by stock and partly by bonds.[1532]

977. The Local Loans Act provides that the principal monies and interest represented by any stock or bonds are charged upon and shall be payable out of the Consolidate Fund.[1533] On expenses, the Act provides that, '[a]ll expenses of and incidental to the raising of loans and the issue or management of any stock or bonds shall be payable out of the Consolidated Fund or if the Treasury so directs, shall be payable out of the principal monies raised'.[1534]

978. Any stock or bonds shall be issued subject to such terms and conditions as the Treasury may determine from time to time.[1535] All stocks and bonds shall be registered, and the Treasury shall send to the person entitled a certificate showing that his or her title to the stock or bond has been entered on the register.[1536] Interest on the stock shall be paid half-yearly or on the surrender and cancellation of the stock.[1537]

1531. Section 1.
1532. Section 2.
1533. Section 3.
1534. Section 4.
1535. Section 5.
1536. Sections 6 and 7(1).
1537. Section 8.

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Chapter 11. Contracts with the Government and Other Public Administrations

§1. Government Contracts: Law Applicable

979. The Government is the largest contractor in most commercial transactions that take place in the Ugandan economy. The law governing contracts with the government and other public administrations, including local governments, is comprised of the Constitution of the Republic of Uganda, various legislations such as the Contracts Act, 2010, Public Procurement and Disposal of Public Assets Act, 2003 (as amended), Local Governments Act 1997 (as amended), case law, relevant regulations and procedures. The regulations include: the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014; the Public Procurement and Disposal of Public Assets Regulations, 2014; the Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014; and the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006.

§2. Public Procurement and Disposal

980. The public procurement and disposal process in Uganda is largely governed by the Public Procurement and Disposal of Public Assets Act, 2003 as amended and the regulations cited above. The public procurement and disposal shall be conducted in accordance with the principles of non-discrimination; transparency, accountability and fairness; maximization of competition and ensuring value for money; confidentiality; economy and efficiency; and promotion of ethics.[1538]

981. According to the Act, a procuring and disposing entity shall use open bidding as the preferred method of procurement and disposal.[1539] All methods for the selection of bidders shall allow for fair and equitable selection and ensure maximum competition.[1540] The entity may accept or reject any of the bids at any time before the award of the contract.[1541]

§3. Methods of Procurement and Disposal

982. One of the methods is open domestic bidding. Unless otherwise provided, a procuring and disposing entity shall use the open domestic bidding method.[1542]

1538. Section 43.
1539. Section 51.
1540. Section 63.
1541. Section 75.
1542. Section 80(1).

This method is open to participation on equal terms by all providers through advertisement[1543] and shall be used to obtain maximum possible competition and value for money.[1544] Foreign or international bidders may participate in open domestic bidding.[1545]

983. Another method is open international bidding. This type of bidding specifically seeks to attract foreign providers. It is used to obtain the maximum possible competition and value for money especially where national providers may not have the financial and technical capacity to bid for certain projects. [1546]

984. This also restricted domestic bidding. In order to obtain competition and value for money and the value or circumstances do not justify or permit the open bidding procedure, the procuring and disposing entity may obtain bids by direct invitation without open advertisement.[1547]

985. Bids may also be obtained through restricted international bidding. In order to obtain competition and value for money and the value or circumstances do not justify or permit the open bidding method, bids may be obtained by direct invitation without open advertisement and the invited bidders include foreign providers.[1548]

986. The quotation method may also be used to solicit bids. This is a simplified procurement method that compares quotations obtained from a number of providers. It shall be used to obtain value of money to the extent possible, where the value or circumstances do not justify or permit open or restricted bidding procedures.[1549] The method shall be used in works and supplies.[1550]

987. Direct procurement is a sole source procurement method that is used where exceptional circumstances prevent competition. It shall be used to achieve efficient and timely procurement, where the circumstances do not permit a competitive method.[1551]

988. Micro procurement may also be used. This method is used for very low value procurement requirements. Like direct procurement, this method shall be used to achieve efficient and timely procurement where the value does not justify a competitive procedure.

1543. Section 80(2).
1544. Section 80(3).
1545. Section 80(4).
1546. Section 81.
1547. Section 82.
1548. Section 83.
1549. Section 84.
1550. Section 84(3).
1551. Section 85.

§4. The Contracting Process

989. The Public Procurement and Disposal of Public Assets Act, 2003, defines a 'contract' as:

> any agreement between a procuring and disposing entity and a provider, resulting from the application of the appropriate and approved procurement or disposal procedures and proceedings as the case may be, concluded in pursuance of a bid award decision of a contracts committee or any other appropriate authority.[1552]

990. According to the Act, an award is not a contract.[1553] An award shall not be confirmed by a procuring and disposing entity until the period specified by regulations has lapsed; and funding has been committed in the full amount over the required period.[1554] After these conditions have been satisfied, an award shall be confirmed by a written contract signed by both the provider and the procuring and disposing entity.[1555]

991. According to the Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014, after evaluation and negotiation, the procurement and disposal unit shall submit to the contracts committee, a recommendation to award the contract.[1556] The contracts committee shall consider the recommendation and may decide to award the contract.[1557]

992. The Regulations outline the contents of the contract. It shall clearly identify the obligations of the parties.[1558] The contract shall also 'correlate all payments by a procuring and disposing entity with the corresponding input, obligations or deliverables by a provider, in a specific identifiable and measurable manner'.[1559] The contract shall also provide for effective supervisions, where required; provide adequate monitoring and control measures, where required; include adequate and clear delivery, acceptance and handover or commissioning arrangements, where required; and the procedure and right of the parties to terminate the contract.[1560]

993. The contract document shall be in accordance with the form of contract specified in the bidding document.[1561] A person signing the contract shall initial the

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1552. Section 3.
1553. Section 76(1).
1554. Section 76(2).
1555. Section 76(3).
1556. Regulation 3(1).
1557. Regulation 3(2).
1558. Regulation 10(a).
1559. Regulation 10(b).
1560. Regulation 10(c)–(f).
1561. Regulation 10(2).

pages of the contract.[1562] The Regulations also require the production of three originals of the contract.[1563] The procuring and disposing entity and the provider shall each get an original signed by both parties.[1564] In order to protect the procuring and disposing entity against non-performance of the contract, the provider shall provide a performance security, which shall be included in the bidding documents.[1565]

994. A contract shall become effective as specified in the contract.[1566] However, this depends upon the fulfilment of one or more conditions, including, procuring and disposing entity receiving a performance security, a payment guarantee or an acceptable letter of credit.[1567]

995. A contract may be terminated by the procuring and disposing entity where a provider fails or refuses to sign the contract without due cause; fails to provide the required performance security within the specified time; or fails to fulfil any other conditions in the contract.[1568] Where the contract is terminated, the procuring and disposing entity shall issue the award to the next best evaluated bidder.[1569]

996. In *Finishing Touches v. Attorney General*,[1570] the plaintiff brought an action for breach of contract, special damages, general damages, interest and costs of the suit. For a consideration of UGX 459,550,000, it was agreed that the plaintiff would decorate the Commonwealth Heads of Government meeting venues. The main issue was whether there was a legally binding contract for decorating services between the plaintiff and defendant. Counsel for the defendant argued that there was no valid and enforceable contract between the parties as the plaintiff's services were procured in violation of the mandatory provisions of the Public Procurement and Disposal of Assets Act, 2003. That the plaintiff's procurement did not comply with the Act and Regulations and was therefore illegal.

997. The learned judge summarized counsel for the defendant's submissions as follows. First, there was no written contract that had ever been executed between the parties as required by the Act and Regulations. Second, there was no definite offer and acceptance in terms of the Act and regulations. Third, that the purported actions and commitments taken by and made on behalf of the defendant/government were not taken or made by authorized persons as defined by the Act and Regulations. Fourth, that there was no award by the contracts committee as required by the Act and Regulations. Consequently, counsel for the defendant argued that there was no enforceable contract between the plaintiff and the government.

1562. Regulation 10(3).
1563. Regulation 10(4).
1564. *Ibid*.
1565. Regulation 12(1) and (2).
1566. Regulation 13(1).
1567. *Ibid*.
1568. Regulation 13(3).
1569. Regulation 13(4).
1570. Civil Suit No. 144 of 2010.

998. The court observed that there was no doubt that there was non-compliance with the Act and Regulations in the procurement of the decoration services. That there was no award of the contract or the formal signing of the contract. However, the court had to consider whether the procurement procedure used was generated by an emergency situation and whether in those circumstances the procedure used was a nullity or not. The court had to determine, whether in the circumstances, the use of the word 'shall' in the procurement law was mandatory or directory. Justice Madrama observed as follows:

> Where the legislature has used the mandatory words such as 'shall' for doing something and does not prescribe the consequences of failure to do as prescribed, it is the duty of the courts to examine the purpose of the enactment and the importance of the condition imposed in the section or rule. Secondly, the court considers whether there is any prejudice to private rights or injustice to those who have no control over those entrusted with compliance with the conditions in the rule or section. The court also considers the claims of public interest in the enactment. It is upon considering all the factors that the court would decide whether any particular condition imposed in the rule or section is mandatory or directory. Where it is mandatory, the action in disregard of the condition or directive is void and a nullity. On the other hand, if the court holds that the provision is directory, non-compliance would not render the acts done in disregard of the statutory provision void though the persons entrusted with the enforcement of the provision may be punished for non-compliance. Because no general rule may be laid, courts should treat the determination of whether a rule or section is mandatory or directory on the circumstances of the case and on a case by case basis.[1571]

999. The court held that the public duty placed on the government officers was directory. That the question of legality of the procurement was raised after the procuring and disposal entity had enjoyed the services of the plaintiff and there was satisfaction. That it would be unjust for the plaintiff not to be remunerated when the alleged acts of non-compliance were the acts of the defendant's servants.

1000. In *Galleria in Africa Ltd v. Uganda Electricity Distribution Ltd*,[1572] the respondent advertised for tenders in various newspapers of March and April 2007 for the supply of 2,500 drums of creosote oil. The appellants submitted a bid dated 17 May 2007 to supply goods at USD 734,902. By a letter dated 6 June 2007, the respondent issued a letter of bid acceptance to the appellant. By a letter dated 11 June 2007, the respondent confirmed receipt of the letter of bid acceptance and verified that it was proceeding with the requirement for the supply of creosote oil. By a letter dated 21 August 2007, the respondent cancelled the procurement on grounds among others that the bid had expired. The action in the High Court was for loss of profit as special damages and general damages for breach of contract.

1571. *Ibid.*, p. 15.
1572. Civil Appeal No. 08 of 2017.

1001. The trial court dismissed the suit with costs after finding that there was no contract between the parties. The appellant appealed to the Court of Appeal, which reversed the trial court's decision and found that there was a contract between the parties and allowed the appeal. The appellant was dissatisfied with the quantum of damages and appealed to the Supreme Court. The court distinguished this case from *Finishing Touches* case noting that in the latter case, the decoration services had already been rendered and there was a clear abuse of office by the various government officials at different levels. However, in the instant case (*Galleria in Africa Limited*), the appellant did not supply the creosote oil and was simply claiming for loss of profit on the basis of a letter of a bid of acceptance which does not amount to a contract. The judge held that the provisions of the Act are the life engine of its objectives and any breach of its provisions is not a mere irregularity since it goes to the core of the Act. Thus, it was held that non-compliance with the relevant provisions of the procurement law rendered any transaction entered into a nullity.

§5. Types of Contracts in Procurement and Disposal

1002. According to the Public Procurement and Disposal of Public Assets Act, a procuring and disposing entity shall in respect of a government procurement activity, use any of the following contracts or a combination of any of them. These include: a lumpsum contract; time-based contract; admeasurement contract; framework contract; percentage-based contract; cost-reimbursable contract; target-based contract; retainer contract; success fee contract; rental, tenancy or lease contracts; hire purchase contract; licence; and franchise.[1573]

1003. A lumpsum contract is where a single, lumpsum price is agreed before the construction works begin. The price is quoted for the entire project based on plans and specifications of the project. The contractor usually submits a total price instead of bidding on individual terms.[1574] According to the Act, a lumpsum contract 'shall be used where the content, duration and outputs of the procurement are well defined'.[1575]

1004. Time-based contract is where services are provided on the basis of fixed fee rates and payments are made on the basis of time actually spent.[1576] Time-based contracts are usually recommended for larger value, relatively complex assignments or when the scope of the services cannot be established with sufficient precision, or the duration and quantity of services depends on variables that are beyond

1573. *See* s. 88B–88L. In respect of procurement practices and contracts with local governments, *see* Parts V and VIII of the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006.
1574. *See* H. Daniel, *Construction Management*, (3d ed. Hoboken: NJ Wiley 2006).
1575. Section 88C.
1576. *Time-Based Contract*, https://www.lawinsider.com/dictionary/time-based-contract (accessed 18 Nov. 2019).

the control of the consultant.[1577] Consequently, the Act provides that a time-based contract 'shall be used where the scope and duration of the procurement requirement is difficult to define'.[1578]

1005. An admeasurement contract is a normal civil engineering contract where the whole of the work is remeasured and payment is made for the work actually done. According to the Act, an admeasurement contract may be used for works which are not well defined, which are likely to change in quantity or specifications, or where difficult or unforeseen site conditions, such as hidden foundation problems, are likely.[1579]

1006. A framework contract may be defined as an agreement with suppliers to establish terms governing contracts that may be awarded during the life of the agreement.[1580] It is a general term for agreements that set out terms and conditions for making specific purchases ('call offs'). Thus, a framework contract is merely an agreement about the terms and conditions that would apply to any order placed during its life. In such case, a contract is made only when the order is placed and each order is a separate contract. The Act defines a framework contract as a 'schedule of rates or an indefinite delivery contract'.[1581] The contracts shall be used 'where a requirement is needed "on call" but where the quantity and timing of the requirement cannot be defined in advance'; or 'to reduce procurement costs or lead times for a requirement which is needed repeatedly or continuously over a period of time by having them available on a "call off" basis'.[1582]

1007. A percentage-based contract is usually used in the construction industry to protect the interests of the client or contractor. The main type of a percentage-based contract is the cost-plus contract. It is a method of payment in which an additional amount of money, expressed as a percentage, is paid by the client and is designated to cover the contractor's overhead costs. When paid as a predetermined profit, the client will usually require a strict accounting of expenses.[1583] According to the Act, a percentage-based contract 'shall be used where it is appropriate to relate the fee paid directly to the estimated or actual cost of the subject of the contract'.[1584]

1008. Like a cost-plus contract, a cost-reimbursable contract is one in which the contractor is reimbursed the actual costs incurred in carrying out the works, plus an

1577. https://www.adb.org/sites/default/files/business-guide/527796/section6-timebasedcontract-delegated-ta-29aug08.doc (accessed 18 Nov. 2019).
1578. Section 88D.
1579. Section 83E.
1580. *See* https://constructingexcellence.org.uk/tools/frameworkingtoolkit/what-is-a-framework/ (accessed 7 Aug. 2020).
1581. Section 88F.
1582. *Ibid*.
1583. *See* http://www.businessdictionary.com/definition/cost-plus-percentage-contract.html (accessed 8 Aug. 2020).
1584. Section 88G.

additional fee. A cost-reimbursable contract may be used where the nature or scope of work carried out cannot be properly defined at the outset and the risks associated with the works are high, for example emergency work such as urgent alteration or repair work. In this vein, the Act provides that a cost-reimbursable contract shall be used 'for emergency work where there is insufficient time to calculate fully the costs involved'.[1585] It shall also be used 'for high risk works, where it is more economical for the procuring and disposing entity to bear the risk of price variations than to pay a provider to accept the risk or where the provider does not accept the risk'.[1586]

1009. Instead of a reimbursable contract, a procuring and disposing entity may use a target-based contract, 'where a target price can be agreed and cost savings may be achieved by offering an incentive payment to the provider for any cost savings below the target price'.[1587]

1010. A retainer agreement is a contract where a client pays a person, usually a professional, in advance for work to be carried out in future. The professional agrees to make him/herself available for an agreed time frame. In this regard, the Act provides that a retainer contract, 'shall be used to retain a provider to provide services over a period of time, without defining the level and actual amount of services required'.[1588] According to the Act, a success contract 'shall be used to link the fees of a provider to an achieved objective to provide an incentive to the successful completion of a particular task, event or action'.[1589]

§6. Variation and Amendment

1011. Variations and amendments are provided for under the Public Procurement and Disposal of Assets Regulation, 2003, which were considered in *Ambitious Construction Co. Ltd v. Uganda Broadcasting Corporation*.[1590] In this case, the defendant contracted the plaintiff to construct a TV complex at the defendant's premises. By virtue of the deed of variation made between the parties in December 2010, the defendant requested the plaintiff to carry out additional works worth UGX 350,031,602. The plaintiff completed the works under the variation deed. They were inspected by the project manager and UBC team and were found satisfactory. A final certificate for the said works of the value of UGX 349,997,760 was issued to the plaintiff. Under the contract, the defendant was obliged to pay the plaintiff for the works done by the plaintiff and certified by the project manager. However, the defendant refused to pay despite numerous demands from the plaintiff.

1585. Section 88H.
1586. *Ibid*.
1587. Section 88I.
1588. Section 88J.
1589. Section 88K.
1590. Civil Suit No. 335 of 2012.

1012. The court observed that variations to a contract are permissible under Regulation 261 of the Public Procurement and Disposal of Assets Regulation, 2003, which provides as follows:

(1) A contract variation or change order is a change to the price, completion date or statement of requirements of a contract, which is provided for in the contract to facilitate adaptations to unanticipated events or changes in requirements.
(2) A contract variation or change order may be issued with the approval of the contracts committee.
(3) Notwithstanding sub-Regulation (2), any additional funding required for a variation or change order shall first be committed.
(4) A contract may be varied in accordance with a compensation event or issue of a variation, change order or similar document, as provided in the contract.
(5) A variation or change order shall be in accordance with the terms and conditions of the contract and shall be authorized by a competent officer.
(6) A contract which provides for a variation or change order shall include a limit on a variation or change order which shall not be exceeded without a contract amendment.

1013. In respect to amendment of contracts, the court cited Regulation 262, which provides as follows:

(1) An amendment to a contract refers to a change in the terms of and conditions of an awarded contract.
(2) Where a contract is amended in order to change the original terms and conditions, the amendment to the contract shall be prepared by the procurement and disposal unit.
(3) A contract amendment shall not be issued to a provider prior to:
    (a) obtaining approval from a contracts committee;
    (b) commitment of the full amount of funding of the amended contract price over the required period of the revised contract; and
    (c) obtaining approval from other concerned bodies including the Attorney General, after obtaining the approval of the contracts committee.
(4) A contract amendment for additional quantities of the same items shall use the same or lower unit prices as the original contract.
(5) No individual contract amendment shall increase the total contract price by more than 15% of the original contract price.
(6) Where a contract is amended more than once, the cumulative value of all the contract amendment shall not increase the total contract price by more than 25% of the original contract price.

1014. The court observed that unlike a variation, which is 'a change to the price, completion date or statement of requirements of a contract' as per Regulation 261(1), an amendment deals with a change in the terms and conditions of the awarded contract. The court found that what happened in this case was a variation,

which proceeded from the contract that was approved by the Attorney General and was thus valid. Consequently, the court held that the plaintiff was not liable for breach of contract.

§7. Constitutional Role of the Attorney General in Government Contracts

1015. The Constitution of the Republic of Uganda, 1995 as amended, mandates the Attorney General to give legal advice in respect of all contracts or agreements to which the Government is a party. According to the Constitution, the functions of the Attorney General shall include giving legal advice and legal services to the Government on any subject.[1591]

1016. The Attorney General has the authority 'to draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has in interest'.[1592] No contract or agreement to which the Government is a party or has an interest 'shall be concluded without legal advice from the Attorney General, except in such cases subject to such conditions as parliament may by law prescribe'.[1593] However, the Attorney General may, by statutory instruments, 'exempt any particular category of contract none of the parties to which is a foreign government or its agency or an international organisation from the application of that clause (5)'.[1594]

1017. According to the Interpretation Act,[1595] the Solicitor General may, in any case where the Attorney General is unable to act owing to illness or absence or where the Attorney General has authorized him or her, give legal advice in respect of contracts in which the Government has an interest or is party to.[1596] Thus, any contract entered with the Government, including any ministry, department, agency or local government, without the legal advice or clearance by the Attorney General is void and not enforceable against the Government.[1597]

§8. Administrative Review

1018. Decisions taken by the procuring and disposing entity may be challenged through administrative review. This is the process of handling complaints arising from alleged breaches of the procurement law. An administrative review is initiated when a complaint from a bidder is made, claiming to have lost or is at the risk of losing a tender due to a breach of procurement law or as a result of errant actions

1591. Article 119(4)(a).
1592. Article 119(4)(b).
1593. Article 119(5).
1594. Article 119(6).
1595. Cap. 3.
1596. Section 29.
1597. *See Nsimbe Holdings Ltd v. Attorney and another*, Constitutional Petition No. 2 of 2005.

by a procuring and disposing entity or competitors. Thus, according to the Public Procurement and Disposal of Assets Act, a bidder may seek administrative review for omissions or breach of a procuring and disposing entity.[1598]

1019. The procuring and disposing entity shall provide the bidder with a summary of the evaluation process; a comparison of the tenders, proposals or quotation, including the evaluation criteria used; and the reasons for rejecting the concerned bids.[1599] Upon receipt of the complaint, 'the Authority shall promptly give notice of the complaint to the respective procurement and disposing entity'.[1600]

1020. The Authority may dismiss the complaint; or prohibit a procuring and disposing entity from taking any further action; or annul in whole or in part an unlawful act or decision made by the procuring and disposing entity.[1601] Before taking any decision on a complaint, the Authority shall notify all interested bidders of the complaint. It may take into account representations from the bidders and from the procuring and disposing entity.[1602] The Authority shall issue the decision within twenty-one working days after receiving the complaint, stating the reasons for its decision and remedies granted, if any.[1603] A bidder who is not satisfied with the decision of the Authority may appeal to the Public Procurement and Disposal of Public Assets Appeals Tribunal (hereinafter 'the Tribunal').

1021. According to the Act, a bidder who is aggrieved by a decision of the Authority may apply to the Tribunal for a review of the decision of the Authority.[1604] A bidder who alleges a conflict of interest in respect of a matter before the Authority, and who believes the matter cannot be handled impartially by the Authority, may apply to the Tribunal for determination of the allegation.[1605] The Tribunal may also review a decision of the Authority where an application is made to it by a procuring and disposing entity.[1606] Any person whose rights are adversely affected by a decision made by the Authority may also apply to the Tribunal for review of that decision.[1607] The Authority may on its own volition also refer a matter to the Tribunal.[1608]

1022. In hearing complaints or applications, the Authority and the Tribunal shall follow the principles of natural justice, including the right to a fair hearing. The Constitution provides that in the determination of civil rights and obligations, 'a person shall be entitled to a fair, speedy and public hearing before an independent and

1598. Section 89(1).
1599. Section 89(2).
1600. Section 69(1).
1601. Section 91(3).
1602. *Ibid.*
1603. Section 91(4).
1604. Section 91I(1).
1605. Section 91I(2).
1606. Section 91I(3).
1607. *Ibid.*
1608. Section 91J.

impartial court or tribunal established by law'.[1609] The right to a fair hearing is non-derogable.[1610] The Constitution guarantees the right to just and fair treatment and provides as follows:

> Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.[1611]

§9. Judicial Review

1023. The Act provides for appeals to the High Court against the decisions of the Tribunal. Thus, '[a] party to proceedings before the Tribunal who is aggrieved by the decision of the Tribunal, may within thirty days after being notified of the decision of the Tribunal or within such further time as the High Court may allow, lodge a notice of appeal with the registrar of the High Court'.[1612] A party who intends to appeal against a decision of the Tribunal shall serve a copy of the notice of appeal on the other party to the proceedings before the Tribunal.[1613] Indeed, a number of decisions of the Tribunal have been challenged in the High Court as illustrated below.

1024. In *Roko Construction Ltd v. Public Procurement and Disposal of Assets Authority & others*,[1614] the appellants appealed against the decision of the Tribunal in PPDA Appeals Tribunal Application No. 4 of 2017 dated 7 June 2017. The appellants argued that having found that there were deviations from the evaluation criteria in the bid solicitation document, the Tribunal erred when it did not set aside the procurement process and the awarded contract. They also argued that having found that the contract was signed during the administrative review period contrary to section 90(3) of the Act, the Tribunal erred when it failed to set aside the contract. The court held that awarding a contract to the second respondent through a process deviating from the solicitation of bid documents was an illegality. That setting aside the contract awarded was necessary to address the illegality that the Tribunal had rightly found. Thus, the illegal contract awarded to the second respondent was a nullity and was thus set aside. The Tribunal decision of 7 June 2017 was varied in order to halt the implementation of an illegal contract between National Drug Authority (NDA) and the second respondent. The appellant was the successful and best bidder and the contract must be awarded to it by NDA.

1609. Article 28(1).
1610. Article 44(c).
1611. Article 42.
1612. Section 91M(1).
1613. Section 91M(2).
1614. Civil Appeal No. 59 of 2017.

1025. In *Clear Channel Independent (U) Ltd v. Public Procurement and Disposal of Assets Authority*,[1615] there was an application for judicial review under section 38 of the Judicature Act. The applicant submitted a bid to the Civil Aviation Authority (CAA) for the tender of the management of advertisement of Entebbe International Airport following a request for bids by the CAA. The applicant argued that its bid was unjustly and unreasonably rejected by the CAA and the tender was awarded to M/S Alliance Media Limited. According to the applicant, upon CAA rejecting its tender bid, it (the applicant) applied to the respondent for administrative review of the said decision. The respondent, in its review process, found that the tender process had been marred by several irregularities and omissions. Despite the irregularities, the respondent allowed the tender process to continue. The court held that the award was made contrary to the law and was therefore illegal, void and a nullity. After noting that this was a sad day in the field of procurements, Justice Bamwine stated:

> Both parties are in agreement that the Public Procurement and Disposal of Assets Act applied to the impugned procurement. The basic public procurement and disposal principles appear in sections 43-54 of the Act. In short, all public procurement and disposal must be conducted in accordance with the Act. The reason is simple: because of entrenched corruption and institutionalized incompetence in most Government Departments, it is necessary that tenders be handled in an open manner to minimise complaints of unfairness. The procurement process therefore has well laid out guidelines for procurement and disposal of assets. For instance, there must be no discrimination in public procurements. The process must promote transparency, accountability and fairness or else every allocation of a government tender or contract will be challenged. The contract must be awarded to the bidder with the best evaluated offer ascertained on the basis of methodology and criteria in the bidding documents. The statute provides the means. Those means must be employed in the interests of fairness.[1616]

1026. In another case of *SGS Societe General De Surveillance SA*,[1617] the applicant sought an order of certiorari quashing the report in respect of the tender for the provision of motor vehicle inspection. The applicant alleged unethical conduct and interference in the bidding process. It was held that rules of natural justice had been flouted and the report had to be quashed.

1027. In yet another case of *Arua Municipal Council v. Arua United Transporters SACCO*,[1618] using the selective bidding method, the appellant invited bids for the management and collection of revenue from Arua Taxi park for the period running from July 2017 to June 2018 at a reserve price of UGX 18,767,900 per month and the other from the respondent at UGX 18,767,900. The appellant's evaluation

1615. Misc. Application No. 380 of 2008 (Arising from Misc. Cause No. 156 of 2008).
1616. *Ibid.*, p. 8.
1617. Misc. Application No. 43 of 2011.
1618. Civil Appeal No. 0025 of 2017.

committee considered the two bids and, in its report, dated 12 May 2017 disqualified the Transport Operators Society at the technical evaluation stage on account of its lack of the required experience. Only the Taxi Operators Society proceeded to the financial evaluation and was recommended for the award of the contract. Notice of the best-evaluated bidder was displayed on 12 June 2017 whereupon the contracts committee awarded the contract to the Taxi Operators Society at the price of UGX 18,767,900. The respondent applied to the Chief Administrative Officer (CAO) for administrative review pursuant to the Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006. The CAO concluded that there was no merit in the application and dismissed it. The respondent applied to the Authority for administrative review but it also dismissed the application. The respondent applied to the Tribunal for review of the Authority's decision. The Tribunal allowed the application and directed the appellant to refund the respondent's administrative fees and ordered a re-evaluation of the bids.

1028. The court set aside the Tribunal's findings, orders and decisions Justice Mubiru observed as follows:

> In appeals of this nature, it is not the court's role to embark on a re-evaluation or re-assessment exercise of the bids. The court's role instead is to review the decision of the procurement entity, the internal and external administrative review decisions subsequent thereto and determine whether: (a) the rules of public procurement have been applied; the facts relied upon by the procuring and disposing entity and the internal and external review bodies subsequent thereto are correct in relation to matters of judgment or assessment; and (c) a manifest error has occurred or not. … Whereas the court will consider whether a fair balance exists taking into account the circumstances of each case, the avoidance of arbitrariness, the possibility of other alternatives for achieving the aim in question, procurement entities should be able to exercise a certain measure of discretion. … Where a bidder seeks to challenge award of the contract on the basis that the tenders were evaluated incorrectly, then it needs to show that there was a manifest error on the part of the part of the procuring and disposing entity. The court must carry out its review with an appropriate degree of scrutiny to ensure that the principles for public procurement have been complied with, that the facts relied upon by the procuring and disposing entity are correct and that there is no manifest error of assessment or misuse of power.[1619]

§10. Enforcing Contracts Against Government

1029. Under common law, in theory, it was a general presumption that the Crown could do no wrong and no liability could ensue against it. Thus, legal proceedings, including for breach of contract, could not be instituted against his or her majesty's government, which was immune from liability. The theory that the King

1619. *Ibid*, p. 14.

or Queen could do wrong ignored the fact that he or she had both personal and political capacities. This position was unfortunately inherited by almost all British colonies, including Uganda, where the Constitution grants the President of the Republic, immunity from both civil and criminal proceedings while still in office. However, common law recognized limited legal liability against government. Any action could be instituted by way of a royal fiat or petition. Under this procedure, the prospective litigant against the Crown would first seek permission of the Crown itself before commencing proceedings.

1030. In relation to British colonies especially East Africa, it was realized that it was desirable in a modern democratic state, subject to certain safeguards, that the Government should be able to sue and be sued as if it were a private person of full capacity. Where state action resulted in individual damage to particular citizens, the state should make redress, whether or not there is fault committed by the public officers concerned. Consequently, the rule whereby government was not liable for breach of contract committed by its servants was discarded through the enactment of the Government Proceedings Act, Cap. 77, which was modelled on the English Crown Proceedings Act, 1947.

1031. Under the Government Proceedings Act, the government may be sued for breach of contract as if it was a private person.[1620] According to the Act, all civil proceedings by or against the Government in the High Court or magistrate's court shall be instituted and proceeded with in accordance with the rules of court.[1621] Civil proceedings by or against the Government shall be instituted by or against the Attorney General.[1622] The court shall 'have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such other relief as the case may require'.[1623]

1032. However, there are challenges of enforcing contracts against the Government. The court cannot grant an injunction or an order of specific performance against the Government.[1624] The court can only make an order declaratory of the rights of the parties.[1625] The Act further provides that the court shall not 'grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government'.[1626]

1033. Suffice to point out here that the Constitution provides some form of relief to litigants against the Government. The Constitution allows the modification of laws such as the Government Proceedings Act that existed before it came into force

1620. Section 2.
1621. Section 8(1) and (2).
1622. Section 10.
1623. Section 14(1).
1624. Section 14(1)(a).
1625. *Ibid*.
1626. Section 14(2).

in order to ensure that the provisions of those laws conform to the Constitution.[1627] In this vein, the Constitution provides that 'existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution'.[1628] According to the Constitution, 'existing law' means 'the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date'.[1629]

1034. In *Attorney General v. Osotraco Ltd*,[1630] the respondent claimed to be a registered proprietor of the suit property, at Plot 69 Mbuya Hill, Kampala having purchased the same from Uganda Times Newspapers Ltd in June 1985 and got duly registered. The property was however, at the material time occupied by employees of the Ministry of Information who refused to vacate, despite a request to do so. The respondent filed for, among others, an order of eviction from the suit premises and a permanent injunction. The trial court ruled that section 15(1)(b) of the Government Proceedings Act, which is now section 14(1)(b) of the 2000 revised edition of the Laws of Uganda, was in conformity with the 1995 Constitution and made an ancillary order of eviction against the appellant and its agents with costs. The order of eviction was to be complied with within thirty days of the date of judgment. The relevant section provides as follows:

> [I]n any proceedings against the Government for the recovery of land or other property, the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu of those orders make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession of the land or property.[1631]

1035. Counsel for the appellant argued that the trial judge erred in law and fact when he construed section 15(1)(b) of the Government Proceedings Act not be in conformity with the Constitution. He also argued that the trial judge erred in law by granting the respondent an order of vacant possession of the suit property and/or eviction against the appellant. The Court of Appeal agreed with the trial judge and dismissed the appeal with costs. Mpagi-Bahigeine JA observed as follows:

> Since the 1995 Constitution, the rights, powers and immunities of the state are not immutable anymore. Article 20(2) enjoins everybody including Government agencies to protect and respect individual fundamental human rights. The Constitution has primacy over all other laws and the historic common law doctrine restricting the liability of the state should not be allowed to stand in the way of constitutional protection of fundamental rights. Article 26 protects the

1627. Article 273.
1628. Article 273(1).
1629. Article 273(2).
1630. Civil Appeal No. 32 of 2002.
1631. Section 14(1)(b).

> respondent's rights to own property. The respondent having obtained judgment is clearly entitled to a meaningful form of redress under article 50 [on enforcement of fundamental rights and freedoms], as the judge put it. Since this is not a case of compulsory acquisition in the public interest, the respondent would be entitled to have his property back.

1036. It may be concluded from the above discussion that where actions for breach of contract raise issues of fundamental rights or freedoms, the courts are enjoined to construe the Government Proceedings Act with such modifications as are necessary to uphold rights of litigants. Thus, orders such as injunction, specific performance and eviction may be granted against the Government despite the Government Proceedings Act that provides the contrary. However, no execution or attachment is possible to force payment of any monies awarded by court against the Government, its departments of officers. In this regard, the Government Proceedings Act provides as follows:

> Except as provided in this section, no execution or attachment or process in the nature of an execution or attachment shall be issued out of any court for enforcing payment by the Government of any such money or costs as are referred to in this section, and no person shall be individually liable under any order for payment by the Government, and any Government department or any officer of the Government as such, of any such money or costs.[1632]

1037. The Treasury Officer of Accounts can be summoned to court to show cause why he or she should not be committed to civil prison for contempt of court upon failure to pay as directed in the Certificate of Order. In *Attorney General and Uganda Land Commission v. Namaiba Tea Estates Ltd*,[1633] counsel for the applicant argued that section 19 of the Government Proceedings Act expressly bars execution or attachment against Government. In reply, relying on *Osotraco* case above, counsel for the respondent argued that the law granting immunity to Government property against execution is outdated and obsolete. Justice Obura agreed with counsel for the applicant that execution cannot be levied against Government and stated:

In my considered view, the effect of section 15(1)(b) that was considered in *Osotraco Limited* is not comparable to the effect of section 19(4) of the Government Proceedings Act under consideration in this case. This is because unlike in that case where the aggrieved party had no other option for effective redress, in the instant case, there are options for the respondent to enforce the Certificate of Order. The respondent can apply for a writ of mandamus against the Secretary to the Treasury to compel him to perform his statutory duty and pay the sum stated the Certificate of Order.[1634]

1632. Section 19(4).
1633. Misc. Application No. 468 of 2012.
1634. *Ibid.*, p. 9.

1038. Indeed, in *Glory Ranchers Limited v. Attorney General and the Treasury officer of Accounts/Secretary to the Treasury*,[1635] an application was made under the Judicature Act for the order of mandamus to issue against the second respondent (Secretary to the Treasury) for payment of the decretal sum in Civil Suit No. 675 of 2012, amounting to UGX 4,294,017,315 plus interest at 10% per annum. Counsel for the second respondent argued that the second respondent was not a proper party to the suit since it did not have corporate personality. The court held that the second respondent was properly sued since prerogative orders like mandamus do not issue only against bodies that have corporate personality.

1039. The court observed that under section 37(1) of the Judicature Act, the High Court has discretion to grant an order of mandamus in all cases in which it appears to the court to be just and convenient to do so. That the applicant must establish the following circumstances in order to obtain a writ of mandamus, namely: a clear legal right and a corresponding duty in the respondent; that some specific act or thing that the law requires that particular officer to do has been omitted to be done; lack of any alternative remedy; and where the alternative remedy exists, it is inconvenient, less beneficial or less effective or totally ineffective. The court ordered that the writ of mandamus should issue to compel the respondent to pay the applicant the decretal sums owed plus interest.

1040. There are certain procedures that may affect government liability contained in the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap. 72. According to the Act, no suit shall lie or be instituted against the Government, a local authority or a scheduled corporation unless a notice of forty-five days has been issued prior to institution of the suit.[1636] However, whether the word 'shall' is mandatory or directory depends on the facts of each case.

1041. In *Kampala Capital City Authority v. Kabandize & 20 others*,[1637] where the services of the respondents/cross appellants were terminated and they filed a claim for payment of their benefits, the issue before the court was whether the statutory notice of intention to sue had been served on the defendant. The trial judge held that the statutory notice, a mandatory requirement under section 2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act had not been served on the appellant thus rendering the suit incompetent. The Court of Appeal, after evaluation of the evidence, agreed with the finding of the trial court that the statutory notice had not been served. However, it disagreed with the finding of the trial court that the requirement to serve the notice was a mandatory requirement, the non-compliance of which renders a suit subsequently filed incompetent. On appeal to the Supreme Court, it was held that failure to serve a statutory notice is not fatal. Mwangutsya J observed that failure to serve a statutory notice does not vitiate the proceedings. However, a party who decides to proceed without issuing the statutory

1635. Misc. Application No. 1409 of 2017 (Arising out of Civil Suit No. 675 of 2012 and Civil Application No. 778 of 2016).
1636. Section 2(1).
1637. Civil Appeal No. 013 of 2014.

notice risks being denied costs or causes delay to the trial if the statutory defendant was unable to file a defence because she required more time to investigate the matter.

1042. In a recent decision of *Historical Resources Conservation v. Attorney General*,[1638] the Court of Appeal, cited *Kabandize* case above with approval, and held that failure to serve a statutory notice on the Attorney General did not vitiate the proceedings since the Government was able to file its written statement of defence. In this case, the appellants had filed a suit against the Attorney General seeking a declaration that the proposed demolition of the Uganda Museum to give way to the erection of a sixty-storey East African Trade Centre was unlawful. They sought a permanent injunction against the Government to stop the demolition of the Uganda museum. They alleged that the demolition would lead to destruction of the cultural heritage of Uganda which is guaranteed by the Constitution. At the hearing, the Attorney General raised a preliminary point of law that the appellants had not served the Attorney General with a statutory notice in contravention of section 2 of the Civil Procedure (Miscellaneous) Provisions Act. The trial court held that the appellants had not served a statutory notice on the respondent and this rendered the plaint incompetent and thus ordered it to be struck out.

1043. The Act also provides that no action founded on a contract shall be brought against the Government or local authority after the expiration of three years from the date on which the cause of action arose.[1639] The plaintiff can plead liability in case he or she is caught up by the statutory period of limitation. However, the plaintiff should have instituted the action against the Government or local authority or scheduled corporation before the expiration of twelve months from the date when the person ceased to be under a disability.[1640]

1044. In *Magezi v. National Medical Stores & Others*,[1641] one of the issues was whether the suit or any part thereof was barred by limitation. Counsel for the defendant argued that the suit was barred by limitation because the defendant is a statutory corporation created under the National Medical Stores Act and as an agent of government, actions against it must be commenced within three years as per section 3 of the Act. In dismissing the suit, Justice Musota agreed with counsel for the defendant that the suit was barred by limitation and no exemption was pleaded in the plaint.

1045. In case of fraud or mistake, the period of limitation shall not run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.[1642] In *Kaddu & Others v. Segawa & Others*,[1643] one of the issues was

1638. Civil Appeal No. 57 of 2012.
1639. Section 3(2).
1640. Section 5.
1641. Civil Suit No. 638 of 2016.
1642. Section 6(1).
1643. Civil Suit No. 418 of 1988.

whether the suit was barred by limitation. The court found that the suit was premised on fraud and held that by the time the fraud came to the attention of the plaintiff, the limitation period had lapsed on account of the intricate fraudulent nature of the dealings among the defendants. Although this case involved private persons, it illustrates the point that a party can rely on fraud or mistake to defeat an objection that his or her suit is barred by limitation.

1046–1049

Chapter 12. Contract of Partnership

§1. Nature of a Partnership

1046. Partnerships in Uganda are governed by the Partnership Act, 2010, and principles of common law and equity, which are not inconsistent with the Act.[1644] A partnership is contractual in nature. It results from a contract or an agreement between two and more persons. It is a mutual, voluntary agreement or relationship between partners. Thus, according to the Act, 'a partnership is the relationship which subsists between or among persons, not exceeding twenty in number, who carry on a business in common with a view of making a profit'.[1645] The Act further provides that in case of a partnership that is formed for the purpose of carrying-on a profession, the number of professionals, which constitutes the partnership, shall not exceed fifty.[1646]

1047. For a partnership to exist, persons should 'carry on a business in common', which is largely a question of fact.[1647] The expression 'in common' means that the parties are involved directly or indirectly in the business. According to the Act, a business includes every trade, occupation or profession.[1648] In order to determine whether persons carry on business in common, there is a need to look at the relationship as a whole. The existence of a mere agreement to set up a partnership without further implementation does not give rise to a partnership. There has to be the carrying-on of some business activities by the persons involved. If the relationship has been reduced into writing, for example, in form of a deed, agreement or memorandum of understanding, there is a need to study the document carefully in order to determine whether the persons therein intended to carry on the business in common. If the relationship was not reduced into writing, it is necessary to scrutinize their conduct and circumstances surrounding the case.

1048. In the Australian case of *The Duke Ltd (In Liquidation) v. Pilmer*,[1649] it was held that the element 'in common' implied two requirements: an agency relationship in the sense that an alleged partner must stand in the relation of principal to the persons who carry on the business and the existence of mutual rights and obligations inherent in a partnership relationship.

1049. In *Hitchins v. Hitchins*,[1650] the plaintiff and her siblings entered into a hotel partnership with a number of other individuals. The hotel property and the business were jointly owned by all the hotel partners, and the joint share of the siblings in the hotel partnership was 18%. The business was running successfully. In

1644. Section 60.
1645. Section 2(1).
1646. Section 2(2).
1647. *See Smith v. Anderson* (1880) 15 Ch. D. 247.
1648. Section 1.
1649. (1999) 17 A.C.L.C. 1329.
1650. (1998) 47 N.S.W.L.R. 35.

spite of this, one of the partners (the plaintiff) wanted to bring an end to the investment and have the interest in the hotel and partnership sold. She wanted to have the amount payable to her from the drawings ascertained by selling the business of the partnership. The other parties refused to sell the business, since in their view, it was running successfully. The plaintiff brought a suit against the other parties who had interest in the business and argued that they shared a relationship of partners and the joint ownership of interest in the business was a partnership. Thus, she argued that, being one of the partners in the partnership business, she had a right to get the partnership sold. The issue before the court was whether the relationship among the parties with respect to the joint ownership of the interest in the hotel and partnership was itself a partnership.

1050. It was held that the relationship was not a partnership. Bryson J observed that mere investment in a share in the hotel partnership did not constitute carrying-on of a 'business in common'. According to the learned judge, this activity was simply an investment, since there were no elements of engaging in trade or a flow of transactions which amount to carrying-on of a business. That although the siblings were clearly partners in the hotel partnership, they were not partners in a separate partnership of which the business was the joint ownership of a share in the hotel partnership.

1051. According to the Partnership Act, there should be 'a relationship which subsists between or among persons'.[1651] The relationship should be of mutual trust and confidence of each partner in every other partner.[1652] There should also be some degree of continuity of the relationship. In *Smith v. Anderson*,[1653] it was held that a business is carried on in common if the activity is being repeated. However, in *Re Griffin, Ex Parte Board of Trade*,[1654] it was held that if there is no repetition, and the transaction is an isolated one, this does not necessarily mean that there is no partnership. It is however important to check if the persons have the intention to repeat the transaction.

1052. The business should be carried on 'with a view of making a profit', which means that the parties are planning to make financial gains from the business. The business does not need to actually make a profit as long as the intention to make a profit was there when the business was created. The purpose of the element, 'view of making profit', is to distinguish a partnership from charitable relationships or organizations. The Act also explicitly provides that relationships between or among members of a company registered under the Companies Act are not partnerships.[1655]

1651. Section 2(1).
1652. *See Agriculturalist Cattle Insurance Company, Baird's* case (1870) L.R. Ch. App. 725.
1653. (1880) 15 Ch. D. 247.
1654. (1890) 60 L.J.Q.B. 235.
1655. Section 2(3)(a) and (b).

§2. Partnership and Company

1053. A partnership is different from a company largely because while a company is separated from its owners and can own property and be sued in its own name, a partnership is not a legal entity. The firm's name is a mere expression that does not connote a legal entity.[1656] In *Sadler v. Whiteman*,[1657] the court observed that a firm has no separate existence and that partners carry on business as both principals and agents for each other within the scope of the partnership business. Partnership property is held exclusively for the purposes of the business. Unless the partners agree otherwise, when a partner dies, the partnership is dissolved, which is not the case with a company.

1054. There are two types of partnership: general partnership and limited liability partnership. A general partnership is a partnership with only general partners. Each general partner must actively participate in managing the business and must take personal responsibility for the liabilities of the business and the debts incurred by other partners. In case of a limited partnership, which consists of not more than twenty persons, only one of the partners is liable for the debts and obligations of the partnership.[1658] The rest of the partners are only liable to the extent of their capital contribution to the partnership. In many cases, there is one general partner who manages the business and a number of limited partners who do not participate in the day-to-day management of the partnership, and their liability is limited to the investment in the business. Usually, limited partners are merely investors who do not wish to participate in the day-to-day running of the business.

1055. According to the Act, in a limited liability partnership, in addition to general partners, there shall be 'one or more persons called limited liability partners who shall contribute a stated amount of capital to the firm, and shall not be liable for the debts or obligations of the firm beyond the amount of capital so contributed'.[1659] A body corporate may be a limited liability member.[1660] A limited liability partnership shall be registered with the Registrar of Business Names, failure of which, it will be a general partnership and all its members shall be general partners.[1661] After registration, a limited liability partnership shall add the letters 'LLP' at the end of its name.[1662]

1056. A limited liability partnership may be wound up: if it is dissolved or has ceased business, or is carrying-on business only for the purpose of winding-up its

1656. *See* the Kenyan case of *Nterekeya Bus Services v. Republic of Kenya* 1966 (1) A.L.R. Comm. 452.
1657. (1910) 79 L.J.K.B. 799. *See also Guaranty Co. of E. Africa Ltd v. Shah* [1959] E.A. 300; *Smith v. Anderson* (1880) 15 Ch. D. 247.
1658. Section 47(2).
1659. Section 47(3).
1660. Section 47(4).
1661. Section 48(1). On particulars of registration of a limited liability partnership, *see* s. 50.
1662. Section 48(2).

affairs; if it is unable to pay its debts; or the court is of the opinion that it is just and equitable that the partnership should be wound-up.[1663]

1057. A limited liability partnership may be converted into a general partnership by surrendering the certificate to the Registrar for cancellation.[1664] A general partnership may also be converted into a limited liability partnership by filing a statement of particulars of registration under section 51 of the Act.[1665]

§3. Capacity to Be a Partner

1058. According to the Partnership Act, a minor is a person who is under the age of 18 years.[1666] A minor may be a full-ledged partner and enjoy the benefits of the partnership, but cannot be made personally liable. However, his or her share in the property of the firm is liable for any obligation of the firm.[1667] In *Lovell v. Beauchamp*,[1668] it was held that the minor's immunity from liability covered the property of the minor partner but did not protect the whole of the partnership property from being available for payment of the partnership debts. When the minor attains majority, he or she shall be liable for obligations of the firm from the date of his or her admission 'unless he or she gives public notice within a reasonable time of his or her repudiation of the partnership'.[1669]

1059. In the Indian case of *Shivgouda Rajiv Patil v. Chandrakant Sedalge*,[1670] the issue before the court was whether the minor partner (Chandrakant) who had attained majority subsequent to commitment of acts of insolvency by the other partners could be personally liable for the debts of the firm. The Supreme Court held that he could not be held liable for the debts of the partnership that had already been dissolved before he attained majority.

§4. Determining Whether a Partnership Exists

1060. The Act provides that, in determining whether a partnership exists or not, regard shall be paid to a number of rules.[1671] First, 'joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a

1663. Section 53(a)–(c).
1664. Section 56(1).
1665. Section 50(4).
1666. Section 1.
1667. Section 10. *See* the Indian cases of *Mahori v. Bibi* (1903) 30 Indian Appeals 50; *Sanyasi Charan Mandal v. Krishnadhan* (1922) 24 B.O.M.L.R. 700.
1668. [1894] A.C. 607.
1669. Section 11.
1670. 1964 S.C.R. (8) 233.
1671. Section 3.

partnership'.[1672] In the Indian case of *Govind v. Maga*,[1673] two persons jointly purchased a tea shop. Each of them contributed half of the expenses incurred for purchase of pottery and utensils. They then leased out the shop and shared the rent equally. It was held that they were co-owners and not partners.

1061. Second, 'the sharing of gross returns does not of itself create a partnership, whether the persons sharing those returns have or do not have a joint or common right or interest in any property from which or from the use of which, the returns are derived'.[1674]

1062. In *Worbley and Farrell v. Campbell & others*,[1675] the question before the court was whether a partnership existed. In this case, the parties were preparing to set up a partnership but had not reached the point of doing so. Therefore, there was not carrying-on business in common and no partnership in the eyes of the law. On appeal, the court upheld the decision of the trial court and held that before a partnership could be found to exist, it had to be established that the parties had entered into a contractual relationship, but a consensus had never been reached as to the terms upon which the returns would be shared. However, in *Lewis v. Narayanasamy*,[1676] it was held that the sharing of returns from a business may indicate the possibility of a partnership depending on the intention of the parties and the evidence presented before the court.

1063. Third, 'the receipt by a person of a share of the profits of a business is prima facie evidence that he or she is a partner in the business, but the receipt of such a share, or a payment contingent on or varying with the profits of a business, does not itself make a person a partner in the business'.[1677] The sharing of profits is prima facie a strong evidence of partnership, but it is not a conclusive proof. Thus, if a person shares profits with another, it does not necessarily mean that he or she is a partner.[1678]

1064. In *Cox v. Hickman*,[1679] Mr Smith and his son were carrying-on partnership business as 'M/S Smith and Son'. Due to financial difficulties, they assigned the business to their creditors and executed an agreement to that effect. According to the agreement, the business was to be managed by five trustees representing the creditors under the name of 'Stanton Iron Co'. The trustees included Cox and Haywood. The net income/profit (after paying off the creditors) was to be distributed by

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1672. Section 3(a).
1673. (1948) 1 Madras 343.
1674. Section 3(b).
1675. [2016] C.S.O.H. 148. *See also Sutton & Co. v. Grey* [1894] 1 Q.B. 285; *Lyon v. Knowles* (1863) 3 B. & S. 556.
1676. [2017] E.W.H.C. Civ. 229.
1677. Section 3(c).
1678. The wording of s. 3(c) has been sharply criticized as ambiguous and confusing. *See, for example*, P.F.P. Higgins, *The Law of Partnership in Australia and New Zealand* 71 (2d ed. 1970); R. Burgess & G. Morse, *Partnership Law and Practice Law in England and Scotland* (Sweet & Maxwell 1980).
1679. (1860) 8 H.L.C. 268.

the trustees. After all the creditors had been paid off, the business had to be transferred to 'M/S Smith and Son'. The creditors were empowered to discontinue the business or to make rules for conducting the business. While the business was being managed by the trustees, Hickman supplied goods to the firm and drew a bill which was accepted by Haywood, who had undertaken to pay. Cox did not accept the trusteeship and did not take part in the transaction. Hickman sued the firm for payment treating Cox and Haywood as partners. It was held that there was no partnership, and Cox was not liable. The court observed that participation in profits is not the decisive test of a partnership. That the true test is whether there exist any mutual agency between or among the parties.

1065. According to the Act, 'the receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business, does not of itself make that person a partner in the business or liable'.[1680] In *Cox v. Hickman*,[1681] it was held that the creditors were not partners, as based on the facts there was no mutual agreement to trade as the debtor's agent.

1066. In *Younes v. Chrysanthov*,[1682] the court was asked to examine the relationship between two international businessmen, who had operated on a number of projects over the year on an ad hoc basis. One of them argued that a partnership had come into existence with the result that he was entitled to a share of the fee. It was held that there was no sufficient proof of a partnership. There was no documentary evidence pertinent to the matter and the oral evidence presented before the court by witnesses was not clear.

1067. The Act also provides that 'a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable'.[1683] In *Khan v. Khan*,[1684] Master Bowles found that the claimant was in fact a senior employee who had been remunerated for his services and was thus not a partner.

1068. A widow or child of a deceased partner may receive a portion of profits as annuity, but they cannot be said to be a partner of the firm on the grounds that they share the profits of the business.[1685]

1069. When a person has sold his or her business along with its goodwill and receives a portion of the profits in consideration of the sale, he will not be treated as a partner of the firm.[1686]

1680. Section 3(c)(i).
1681. (1860) 8 H.L. Cas. 268.
1682. [2016] E.W.H.C. 3269.
1683. Section 3(c)(ii).
1684. [2015] E.W.H.C. 2625. *See also Walker v. Hirsch* (1884) 27 Ch. D. 460.
1685. Section 3(c)(iii).
1686. Section 3(c)(v).

1070. On sharing of returns or profits of the business, the Act further provides that 'advance of money by way of a loan to a person engaged, or about to engage, in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner'.[1687] In *Badeley v. Consolidated Bank*,[1688] Badeley advanced money to Smith. Badeley was to get 10% of the profits. It was held that it was no longer appropriate to infer a partnership from merely sharing profits. Lindley L.J observed that in order to ascertain the intention of the parties as to the significance of sharing profits, it is necessary to examine the facts of the case, the terms and scope of the agreement between or among the partners.

1071. The Act outlines evidences that may be taken into account in determining the existence of a partnership.[1689] The evidences includes: whether the accounts are prepared for internal use or other purposes; any admissions by the members of the partnership; advertisements which include the alleged partners; agreements or other documents, formal or otherwise, which disclose the partnership relationship; the manner in which the bills of exchange have been drawn and accepted; and judgments of courts of law in which a partnership has been held to exist. The evidences also include: meetings which partners attended or were expected to attend; payment of money to courts of law for the liability of the partnership; letters and memoranda which relate to admission of a person in the partnership or which give a person a share in the profits as intended by the partners; any release executed by all the alleged partners; and recitals in the agreement in which the partners are partners.[1690] Thus, whether a partnership exists or not is largely a question of evidence.

1072. It may be necessary to scrutinize the intention of the persons involved in the relationship. For example, in *Cheema v. Jones*,[1691] the court found that a partnership existed between doctors since it would have been difficult to operate their medical practice without such a partnership.

1073. In *Nakatubu v. Sekitoleko*,[1692] the court considered whether the relationship between the parties constituted a partnership. In this case, the plaintiff sought to have the partnership between him and the defendant dissolved, and to have the defendant account for the contracts done and the amount due from such contracts to be shared accordingly. Counsel for the defendant raised a preliminary objection on a point of law that there was no cause of action, because no evidence showed that a partnership existed between him and the plaintiff. The plaintiff adduced evidence of partnership documents and particulars of registration of the partnership, which proved that there existed a partnership between the two parties. The court found that a partnership existed and dismissed the preliminary objection. The court held that

1687. Section 3(c)(iv).
1688. (1888) 38 Ch. D. 238.
1689. Section 3(d).
1690. Section 3(d)(i)–(xi).
1691. [2017] E.W.H.C. 1156.
1692. Civil Suit No. 4 of 1992.

whether a transaction or relationship constitutes a partnership or not is a question of fact and three elements have to be proved: the transaction amounted to a business; that the business was carried out in common; and the business was carried on with a view of profit.

1074. In yet another case of *Okello N. David v. Komakech Steven*,[1693] the plaintiff brought a suit for a declaration that a partnership subsists between himself and the defendant, a settlement of the partnership accounts, general damages, interest and costs. In 2002, the plaintiff and defendant contributed money and purchased an omnibus for business as a taxi. They opened an account where the revenue from the business would be banked. In the initial stages of the business, the defendant banked the monies from the business. but later, he failed or refused to render the plaintiff a true and full accurate account of the operations of the business. The defendant denied existence of any partnership between him and the plaintiff. Counsel for the defendant argued that the mere fact that the parties contributed money and jointly purchased a motor vehicle as their property do not in themselves create a partnership. The court held that the fact that there is no partnership agreement is irrelevant because a partnership can be formed informally or by the conduct of the parties. The court issued a declaration that a partnership existed between the plaintiff and the defendant. The defendant was ordered to render an account of how he used all the proceeds of the motor vehicle.

§5. Relations of Partners to Persons Dealing with Them

1075. Relations of partners to third parties (persons dealing with them) is governed by the law of agency. The business of the partnership can be carried on by all the partners or any of them acting for all. Thus, the general rule is that every partner 'is an agent of the firm and his or her other partners for the purpose of the business of the partnership'.[1694]

1076. In *Cox v. Hickman*,[1695] Lord Cranworth stated that the liability of one partner for the acts of his co-partners is in truth the liability of a partner for the acts of his agent. Consequently, all the partners are collectively liable for the acts or omissions of each other. A partner embraces the character of both the principal and the agent. If he or she acts for him or herself in his or her interest in the common concern of the firm, he or she is acting as a principal. However, if he or she acts for and in the interest of the partners, then he is acting as an agent. He or she is an agent only for the purpose of the business of the firm. If the partner does an act in the usual course of business of the firm, then his or her act binds the firm.

1693. HCT-02-CV-CS-0030.
1694. Section 5(1).
1695. (1860) 8 H.L. Cas. 268.

1077. In *Hirst v. Etherington & Another*,[1696] Etherington, a partner in a law firm, was acting for the borrower of money from a bank. He gave an undertaking to the bank guaranteeing the loan. The bank's solicitor requested and received confirmation from Etherington that the undertaking was given in the ordinary course of the business of the firm. When there was default of payment of the loan, the bank sued Etherington's partner since Etherington had been declared bankrupt. The Court of Appeal held that it was not within the ordinary course of business of a solicitor, without more, to give a guarantee to a third party regarding a debt incurred by a client. The Court held that Etherington's partner was not liable on the undertaking.

1078. As an agent, the partner can only bind the principal (the firm and co-partners) if he or she acts within the scope of his or her authority.[1697] In this vein, the Act provides that 'a partner who does any act for the purpose of carrying-on the ordinary course of business of the firm binds the firm and his or her partners, unless the partner so acting does not have authority to act for the firm in the particular matter'.[1698]

1079. The Act also provides that '[a]n act or instrument relating to the business of the firm and done or executed in the firm name, or in any other manner showing an intention to bind the firm by any person authorised to bind the firm, whether a partner or not, is binding on the firm and all the other partners'.[1699] However, this provision 'does not affect any general principles of law relating to the execution of deeds or negotiable instruments'.[1700]

1080. Clearly, there is liability if the partner had express or actual authority. This is where a partner has been expressly authorized to do an act in the course of the partnership business. There is also liability where the partner had implied or usual or ostensible authority. This type of authority is inferred where the partner's act is usually done in the course of the type of business carried on by the firm. If a partner does an act which he or she is not authorized to do and the person with whom the partner is dealing knows that the partner has no authority, then the firm and co-partners shall not be liable.[1701] However, if the third party is unaware of the restriction on the partner's authority, an act within the usual authority of the partner will be binding unless the third party 'does not know or believe him or her to be a partner'.[1702]

1696. [1999] T.L.R. 546.
1697. *See Mercantile Credit Co. Ltd v. Garrod* [1962] 3 All ER 1103.
1698. Section 5(2). *See also* Ernest H. Scammell & R. l'Anson Banks, *Lindley on Law of Partnership* 165 (14th ed. Sweet and Maxwell, 1979); *Lal Chand Sharma t/a Regal Provisions Stores v. Bush Mills* [1957] E.A. 404; *British Hoes Assurance Corporation v. Patterson* [1902] 2 Ch. 404.
1699. Section 6(1).
1700. Section 6(2).
1701. *Ibid*.
1702. *Ibid*.

1081. In *Dinesh Kotak v. Jagdish Kotak and Others*,[1703] the bank and two partners in a commercial property partnership disagreed on the scope of a bank's mandate signed by both parties. In determining whether an act of a partner constituted the carrying-on of a particular business in the usual way, the court examined whether the conduct in question was usual to the type of business carried on by the firm. The court observed that it was necessary to inquire into whether a rational, competent, reasonable counterparty to the transaction would regard the conduct of the business to be in the usual way. Since it was a daily action of such commercial property to operate on borrowed money, the acts of borrowing at issue here were clearly usual for the kind of business carried on by the partnership. The overseas partner had claimed that since the other partner had no authority to bind the firm to the relevant agreements, they were not valid. He argued that the agreements contained a section for the signature of both parties, which meant the partnership, by implication, was only bound if both partners had signed the agreements. The court observed that the acts of one partner in connection with the kind of business carried on by the partnership bind the partnership and each partner. However, there is an exception in relation to third parties who know the partner has no authority to carry out that action or does not know or believe he or she is a partner. The court held that the loan agreements were legally binding on the partnership and both partners.

1082. It can be seen from the above discussion that in order for the firm to be liable for the act of a partner, three conditions must be satisfied: the act must be done in relationship to the partnership business; it must be an act for carrying-on business in the usual way; and the act must be done by the partner acting as a partner and not in a private capacity. Thus, a firm is not liable 'where a partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business'[1704] unless that partner has been 'specially authorised by the other partners'.[1705] In *Lal Chand Sharma t/a Regal Provision Stores v. Bush Mill*,[1706] it was held that the action of the managing partner in pledging the credit of the firm for supply of provisions to the employees of the firm was in the usual course of business of the partnership.

1083. The partners may agree between or among themselves that any one or more of them shall not bind the firm. In such a case, 'an act done in contravention of the agreement is not binding on the firm with respect to persons having notice of that agreement'.[1707] Thus, whether an act is within a partnership business is a question of fact. Individual firms must be viewed differently since partnerships conduct business in their way and style.

1703. [2017] E.W.H.C. 1821.
1704. Section 7.
1705. *Ibid*.
1706. [1957] E.A. 404.
1707. Section 8.

1084. According to the Act, every partner is liable jointly with other partners for all debts and obligations of the firm while he or she was a partner.[1708] In *Kendall v. Hamilton*,[1709] there were two partners, X and Y. The plaintiff filed a suit against the firm but did not disclose one partner. Judgment was entered against X and Y, but it remained unsatisfied. After some time, the plaintiff found out that Z who had been insolvent had been a partner in the firm at the time when the loan was incurred. He instituted an action against Z in respect of the same loan. The court held that partners are jointly liable for partnership debts and obligations except in the case of a dead partner. However, where the court had already made the firm liable by an order against the named partners, even if the debt had not been fully paid, another action could not be sustained.

1085. After the death of the partner, his or her estate is also severally liable for such debts or obligations.[1710] In this regard, the Act provides that, '[w]here a partner dies, his or her estate is severally liable in due course of administration for the debts and obligations of the firm so far as they remain unsatisfied but subject to the prior payment of his or her separate debts'.[1711] However, the liability for the debts and obligations will only arise at the time when a partner is a member of the firm. In *Bagel v. Miller*,[1712] it was held that the estate of the deceased partner was not liable because the firm did not owe the price of the goods in his lifetime.

1086. Generally, a partner is liable for debts incurred while he or she was a member of the firm, and his or her retirement does not extinguish liability for such debts. However, he or she is not liable for debts incurred before he or she became a member or incurred after his or her retirement, unless he or she has agreed with the creditors to make him or herself liable. The Act provides that '[a] person who is admitted as a partner into an existing firm does not become liable to the creditors of the firm for anything done before he or she became a partner'.[1713] The Act also provides that '[a] partner who retires from a firm does not cease to be liable for partnership debts or obligations incurred before his or her retirement'.[1714] In *Seraf v. Jardine*,[1715] a partner retired from a partnership and a creditor continued to give advances to the firm with the belief that the said partner was still a partner in the firm. It was held that the both the firm and the retired partner were liable to repay the amount advanced by the creditor.

1087. A retiring partner may be discharged from any existing liability by an agreement with his or co-partners to that effect.[1716] This agreement 'may be either express or inferred from the course of dealing between the creditors and the firm as

1708. Section 9(1).
1709. (1879) App. Cas. 504.
1710. Section 9(2).
1711. *Ibid*.
1712. [1903] 2 K.B. 212.
1713. Section 19(1).
1714. Section 19(2).
1715. (1882) 7 A.C. 345.
1716. Section 19(3).

newly constituted'.[1717] The retiring partner may also execute an indemnity in writing with the members of the firm in which the members undertake to indemnify him or her of any existing liabilities.[1718]

1088. A partner who retires or withdraws from the partnership may need to give a notice to that effect. In *Rambhai and Co. (Uganda) Ltd v. Lalji Ratna & Another*,[1719] the plaintiff sued the defendants as partners in a firm for goods sold and delivered in 1967. The plaintiff produced its books of account, evidence of their correctness and dishonoured cheques given by the second defendant. The second defendant had retired from the partnership on 1 January 1967, but the notice of retirement was not gazetted. The Registrar of Business Names was also not notified for ten months thereafter. The second defendant contended that he was not sued as a partner and that the sale and delivery had not been proved and that he was not liable for debts incurred after he left the partnership. It was held that as the second defendant had been introduced to the plaintiff as a partner in the firm, express notice of his withdrawal was necessary and since this was not done, he was liable for the debts of the firm.

1089. The Act also provides that '[t]he estate of a partner who dies or who becomes bankrupt or of a partner, who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement respectively'.[1720] On the question of liability, the Act also provides that a firm is liable to make good the loss where a partner misappropriates or misapplies money or property of a third party received or in custody of the firm.[1721]

1090. Persons are liable by holding out as partners. Section 16 of the Act provides as follows:

(1) Any person who by words spoken, written or by conduct represents himself or herself, or who knowingly suffers himself or herself to be represented as a partner in a particular firm, is liable as a partner to anyone who has, on the faith of any such representation, given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.[1722]
(2) A firm shall not be liable for the acts of any person who falsely holds out himself or herself as a partner in a firm.
(3) Where, after a partner's death, the partnership business is continued in the firm name, the continued use of that name or of the deceased partner's name as part

1717. Section 19(4).
1718. Section 19(5).
1719. [1970] E.A. 106. *See also Nderitu & Another v. Wawewu* [1975] EA 308; *Owino Okeyo and Co. v. Fuelex Kenya Ltd* [2006] Ekl.
1720. Section 9(3).
1721. Section 14.
1722. Section 16(1).

> of the firm's name shall not of itself make his or her executors or administrators of the estate or effects liable for any partnership debts contracted after his or her death.

1091. Thus, a person who is not a partner may nevertheless be held liable as if he were one if his or her conduct has caused another person to believe him or her to be one. The moment there is a representation, express or implied that one is a partner, that person who has made the representation is called upon to meet claims of the third party or partner who acted on the belief that that person is a partner. In *Re Fraser, exp. Central Bank of London*,[1723] Lord Esther stated:

> If a man holds himself as a partner in a firm and thereby induces another person to act upon that representation, he is estopped as regards that person from saying that he is not a partner. The representation may be made either by acts or words; but estoppel can be relied upon only by the person to whom the representation has been made in either way and who has acted on the faith of it.[1724]

1092. In *Palter & others v. Zeller & others*,[1725] the plaintiffs instructed the first defendant (Zeller) as their solicitor as a result of their friendship with his wife (Lieberman). The husband and wife conducted themselves as partners in everything they did socially. In fact, Zeller had advertised this fact by an announcement to the effect that Lieberman had 'joined me in the practice of law'. However, there was no indication given in the firm's stationery or business cards that they were partners in this practice. The plaintiffs entrusted their savings to Zeller and signed blank documents in connection with the use of the funds. Zeller dissipated the plaintiffs' funds. The plaintiffs argued that Lieberman was jointly liable with Zeller for the loss of the funds on the grounds that either she was Zeller's partner or that she had allowed herself to be held out as his partner.

1093. The issues before the court were whether the wife was a partner in the legal practice and if she was liable as a partner by holding out as a partner with the first defendant. The court observed that although the plaintiffs presumed the defendants were partners, the mere fact that lawyers may be married and behave in an equal social and marital relationship does not in itself make them partners. Thus, there was no scintilla of evidence to support a finding of a partnership between Zeller and Lieberman. The court also found that the plaintiffs' belief that Zeller and Lieberman were partners was ill founded, since Zeller's social activities were not sufficient to constitute a holding-out by Lieberman of herself as a partner. The court held that Lieberman was Zeller's employee as a matter of law and not a partner. She was not liable as a partner by holding out. The court dismissed the claim against Lieberman and ordered that the case should proceed against Zeller alone.

1723. [1892] 2 Q.B. 633.
1724. *Re Fraser*, *supra*, p. 637.
1725. (1997) 30 O.R. (3d) 796.

§6. Relations of Partners to One Another

1094. There are two fundamental principles that govern the relationship of partners to one another. First, all the partners in a firm are free to enter into an agreement with regard to their mutual rights and duties. Second, the relationship of partners to one another is of the utmost good faith. The relation of partners is based on mutual trust and confidence.

1095. The terms of the partnership (rights and duties of partners) may be defined by agreement, for example, by a Partnership Deed or the Act. These terms may be varied in accordance with the consent of the partners. In this vein, the Act provides that '[t]he mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and that consent may be either express or implied from a course of dealing'.[1726]

1096. The Act also provides that the interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement, express or implied between the partners, by the rules outlined in section 26.

§7. Rights of Partners

1097. Partners have a right to share profits equally. The Act provides that, 'all partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm'.[1727]

1098. Partners have a right to be indemnified. The Act provides that 'the firm must indemnify every partner in respect of payments made and personal liabilities incurred by the partner: (i) in the ordinary and proper conduct of the business of the firm; or (ii) in or about anything necessarily done for the preservation of the business or property of the firm'.[1728]

1099. Each partner has a right to participate in the business of the partnership. Every partner has a right to take part in the conduct and management of the partnership business.[1729] However, under the Partnership Deed, partners may curtail this right to allow only some of them to participate in the running of the business. The Deed may also impose additional duties of management on a partner.[1730] Partners are not entitled to remuneration for participating in the partnership business.[1731]

1726. Section 21.
1727. Section 26(a).
1728. Section 26(b).
1729. Section 26(e).
1730. *See, for example*, *Peyton v. Mindham* [1971] 3 All ER 1215.
1731. Section 26(f).

1100. Every partner also has a right to express his or her opinions. He or she should be consulted and heard in all matters affecting the business of the partnership.

1101. Every partner has a right to access all records, books and accounts of the business and also to examine and copy them. In this regard, the Act provides that 'every partner may, at all reasonable times, have access to and inspect and copy any of the partnership books'.[1732] The books should be kept at the place of business of the partnership.[1733]

1102. Does a partner have a right to interest on capital and advances? Generally, partners are not entitled to an interest on the capital they contribute. In case they decide to take an interest, such payment should be made only out of profits. However, they can receive interest on advances made subsequently towards the business. In this vein, the Act provides as follows:

> A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he or she has agreed to subscribe is entitled to interest at the rate agreed by the partners, and, in the absence of any agreement, the ruling treasury bill rate shall apply; except that in determining the rate, due consideration shall be given to the period of repayment.[1734]

1103. The Act also provides that 'a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him or her'.[1735]

1104. A partner has a right to not be expelled from the partnership without just cause. Generally, expulsion is discouraged in law. A partner can only be expelled if the power of expulsion is available to the partners by an express agreement between or among the partners. In this regard, the Act provides that '[a] majority of the partners have no power to expel any partner unless a power to do so has been conferred by express agreement between or among the partners'. The power to expel a partner should be exercised in good faith, in the interest of the partnership and the partner's right to be heard and defend him or herself should be respected. The majority partners must act fairly and prudently in expelling any partner.[1736]

1732. Section 26(i).
1733. *Ibid*.
1734. Section 26(c).
1735. Section 26(d).
1736. *See, for example*, *Beasley v. Calwalade* No. CL-94-8646, 1996 W.L. 438777; *Bohatch v. Butler & another* 997 S.W. 2d. 543 (Tex. 1998). On scope of expulsion of a partner in a law firm, *see, for example*, Allan W. Vestal, *Law Partner Expulsion*, 55(4) Washington & Lee L. Rev. 1083–1146 (1998); Douglas R. Richmond, *Expelling Law Firm Partner*, 57 Cleveland St. L. Rev. 93–96 (2009).

1105. Every partner has a right to retire from the partnership. The Act provides that where no fixed term has been agreed upon for the duration of the partnership, a retiring partner shall give reasonable notice to the other partners of his or her intention to dissolve the partnership and obtain their consent.[1737] Where the partnership has originally been constituted by deed, a notice in writing signed by the partner giving the notice in accordance with the deed shall be deemed sufficient notice.[1738] Where the other partners decline to give their consent to the dissolution, that partner has the option of retiring from the partnership.[1739] According to the Act, 'the rights and duties of a retiring partner shall be as agreed between or among the partners'.[1740]

§8. Rights on Dissolution

1106. A partner has a right to issue a public notice regarding the dissolution of a partnership or retirement of a partner from the firm.[1741] On dissolution of a partnership, a partner has a right to have the partnership property applied in payment of debts and liabilities of the firm.[1742]

1107. Where a partnership is dissolved for fraud or misrepresentation, a partner, in addition to other rights, is entitled to: a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money he or she paid for the purchase of a share in the partnership and for any capital he or she contributed; to stand in the name of the creditors of the firm for any payments he or she made in respect of the partnership liabilities; and be indemnified by the person guilty of the fraud or misrepresentation against all the liabilities of the firm.[1743]

§9. Rights of Persons Dealing with the Firm Against Apparent Members of the Firm

1108. According to the Act, 'where a person deals with a firm after a change in the constitution of the partnership, he or she is entitled to treat all apparent members of the old firm as still being members of the firm until he or she has notice of the change'.[1744] The Act further provides that 'an advertisement in the Gazette by any partner shall be notice as to persons who had no dealings with the firm before the date of the dissolution or change so advertised'.[1745]

1737. Section 28(1)(a) and (b).
1738. Section 28(3).
1739. Section 28(2).
1740. Section 28(4).
1741. Section 39.
1742. Section 41.
1743. Section 43.
1744. Section 38(1).
1745. Section 38(2).

§10. General Duties of Partners

1109. Every partner has a duty to carry on business to the greatest common good, be just and faithful towards each other, render true accounts and provide full information of all things affecting the firm. In this vein, the Act provides that '[e]very partner is bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives'.[1746]

1110. In *Law v. Law*,[1747] W and X were partners in wooden manufacturer's business in Halifax, Yorkshire. W lived in London and took little part in running the business. X bought W's share for GBP 21,000. Later, W discovered that the business was worth considerably more and that various assets unknown to him had not been disclosed. The court held that if a partner is in possession of some extra information, he is bound to disclose it to the co-partners. If the partner enters into a contract with other co-partners without furnishing them the material details which are known to him but not his co-partners, such contract is voidable.

§11. Duty to Account for Private Profits

1111. A partnership is based on common shared goals. Thus, a partner should not make any secret or personal profit except with the consent of the other partners. He should disclose any personal profit made to the firm. The Act provides that '[e]very partner must account to the firm for any benefit derived by him or her without the consent of the other partners from any transaction concerning the partnership, or from any use by him or her of the partnership property, name or business connection'.[1748]

1112. In *Bentley v. Graven*,[1749] there was a partnership in a sugar refinery firm. One of the partners was skilled in buying and selling sugar. However, the partner sold the sugar from his own stock and earned profit. When the other partners discovered this fact, they brought an action to recover profits earned by the partner. The court held that the partner should not make secret profits, and therefore the firm was entitled to the profits earned by the partner.

1113. In *Regal (Hastings) v. Gulliver*,[1750] Lord Rusell stated:

> The rule of equity, which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit in no way depends on fraud, or absence of bonafides, or upon such questions or considerations as whether the profiteer was under a duty to obtain the source of the profit for the

1746. Section 30.
1747. (1905) 1 Ch. 140.
1748. Section 31.
1749. (1883) 18 Beav. 75.
1750. [1942] 1 All ER 378.

plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having in the stated circumstances, been made. The profiteer, however honest and well intentioned cannot escape the risk of being called upon to account.[1751]

§12. Duty Not to Compete with the Firm

1114. Allied to the duty to account for secret or private profits is the duty of the partner not to compete with the firm. The Act provides that '[w]here a partner, without the consent of the other partners, carries on any business of the same nature as, and competing with, that of the firm, the partner must account for and pay over to the firm all profits he or she made in that business'.[1752]

1115. In *Pullin Bihari Roy v. Mahendra Chandra Ghosal*,[1753] there was a partnership for buying and selling of salt. One of the partners, while buying salt for the firm, bought some quantity of salt for himself and earned a personal profit. The court held that what was done was in competition with the firm business, and he was thus liable to his co-partners for the profits earned.

§13. Duty to Indemnify the Firm and Co-partners

1116. Every partner has a duty to indemnify the firm for losses caused to it by his or her fraud in the conduct of the partnership business. Every partner must attend to his or her duties as diligently as possible. In case his wilful neglect causes loss to the firm, he or she must indemnify the firm and his co-partners.

§14. Duty to Use the Partnership Property Exclusively for Its Business

1117. The Act defines 'partnership property' as 'all property, rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm and in the course of the partnership business'.[1754] All partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with partnership agreement.[1755] However, the legal estate or interest in any land belonging to the firm shall dissolve in accordance with the applicable land tenure.[1756] Unless there is a

1751. *Ibid.*, p. 386.
1752. Section 32.
1753. A.I.R. 1921 Cal. 722. *See also Aas v. Benham* [1891] 2 Ch. 244.
1754. Section 22(1).
1755. Section 22(2).
1756. *Ibid*.

contrary intention, a partner who purchases property with money belonging to the firm shall be taken to have done so on account of the firm.[1757]

§15. Dissolution of Partnership

1118. Dissolution of a partnership is a process in which the relationship between the partners of a firm is dissolved or terminated. A partnership may be dissolved under the following circumstances.

I. Dissolution by Expiration or Notice

1119. The Act provides that subject to any agreement between or among the partners, a partnership is dissolved: if entered into for a fixed term, by the expiration of that term; if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;[1758] if entered into for an unidentified time, by the agreement of the partners to dissolve the partnership.[1759] In the latter case, the partnership is dissolved as from the date agreed by the parties for the dissolution to take effect.[1760]

1120. Although section 34 of the Partnership Act does not explain the circumstances under which a partnership may be dissolved by notice, in *Daule Mohamed v. Sheria Hussein*,[1761] it was held that a partnership at could be terminated at any moment by one party giving notice to the other.

II. Dissolution by Bankruptcy, Death or Charge

1121. The Act provides that subject to any agreement between or among the partners, a partnership may, at the option of the partners, be dissolved by the death or bankruptcy of any partner.[1762] The Act also provides that a partnership may be dissolved 'if any partner suffers his or her share of the partnership property to be charged under this Act for his or her separate debt'.[1763]

1757. Section 23.
1758. *See Zala v. Patel* H.C.C.S. No. 9 of 1969.
1759. Section 34.
1760. Section 34(2).
1761. 17 E.A.C.A. 1.
1762. Section 35(1).
1763. Section 35(2).

III. Dissolution by Illegality of Partnership

1122. According to the Act, a partnership is, in every case, dissolved by the happening of any event that makes it unlawful for the business of the firm to be carried on or for the partners to transact business.[1764]

IV. Dissolution by Court

1123. On the application of a partner, the court may order the dissolution of a partnership in the following circumstances: when a partner is shown to the satisfaction of the court to be permanently of unsound mind; when a partner becomes in any other way permanently incapable of performing his or her part of the partnership contract; when a partner is guilty of conduct that is calculated prejudicially to affect the carrying-on of the business; when a partner persistently commits a breach of the partnership agreement; when the business of a partnership can only be carried on at a loss; and whenever, in any case, circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.[1765]

1124. In *Re Yenidge Tobacco Co. Ltd*,[1766] there was a private limited company, which was in substance a quasi-partnership. The company consisted of two members who had quarrelled and disagreed too much that communication between them could only be made through the secretary. The court held that it was only just and equitable that the company be wound-up.

1764. Section 36. *See Dungate v. Lee* [1969] 1 Ch. 545; *Hudgell Yeates & Co. v. Watson* [1978] 2 W.L.R. 661; *Muhuri v. Kiru* [1969] E.A. 232.
1765. Section 37(a)–(f).
1766. [1916] 2 Ch. 426.

Chapter 13. Quasi-contracts

§1. The Nature and History of Quasi-contract

1125. According to Investopedia, a 'quasi-contract' is 'a retroactive arrangement between two parties who have no previous obligations to one another. It is created by a judge to correct a circumstance in which one party acquires something at the expense of the other'.[1767] The key principles of a quasi-contract are justice, equity and good conscience. The rights and obligations of the parties under a quasi-contract are not an outcome of an agreement, but they are imposed by law. The court helps the plaintiff to recover any losses at the hands of the defendant.

1126. Some of the earliest examples of liability to pay money imposed by law included actions for account and debt.[1768] In an action of account, persons such as bailiffs and receivers were called upon by court to account for money or other goods committed to their charge.[1769] The action of debt covered cases that were restitutionary in nature and was available to recover money paid in case of a contract that had not been performed.[1770] The action of debt covered a number of situations where there was no contract or agreement between the parties but simply an obligation imposed by law.

1127. Later, the notion of quasi-contract was developed. Quasi-contracts originated under a form of action known in Latin as *indebitatus assumpsit*, loosely meaning, being indebted or to have undertaken a debt. In *Slade's* case,[1771] the court held that an action of *indebitatus assumpsit* could be brought in circumstances in which debt was the proper action. The action of *assumpsit*, which was accepted as a normal remedy for breaches of contract was later extended to quasi-contracts, that is, relations similar to those created by contract.[1772] In an action of *assumpsit*, the court would make one party pay the other as if an agreement or contract already existed between them. The rationale of allowing a party to recover money in absence of a contract was that X should not be unjustly enriched at the expense of Y.

1128. In *Moses v. Macferlan*,[1773] Moses received from Jacob four promissory notes of 30s. each. He indorsed these notes to Macferlan who, by written agreement, contracted that he would not hold Moses liable on the indorsement. However, Macferlan sued Moses on the notes in a Court of Conscience. The Court refused to recognize the agreement, and Moses was forced to pay. Moses brought an action

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1767. *See* https://investopedia.com/terms/q/quasi-contract.asp (accessed 16 Dec. 2019).
1768. A.G. Guest, *Anson's Law of Contract* 572 (Clarendon Press 1984).
1769. *Ibid*.
1770. *Ibid*.
1771. (1602) 4 Co. Rep. 91.
1772. On the history of quasi-contract, *see* Guest, *supra*, pp. 572–576; Cheshire and Fifoot, *The Law of Contract* 631–636 (9th ed.).
1773. (1760) 2 Burr. 1005.

against Macferlan in the King's Bench for money had and received to his use. In explaining the juridical basis of the action for money had and received Lord Mansfield stated:

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund: It does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; … But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.[1774]

1129. Although Lord Mansfield based the obligations of quasi-contract upon the duty of restoring benefits unjustly obtained, he never asserted that in every such case an action would lie. In later years, Lord Mansfield's rationale of unjust benefit based on idealistic notions such as natural justice was challenged.

1130. In *Sinclair v. Brougham*,[1775] a building society, in addition to its ordinary business, had engaged in a banking business, which was ultra vires (outside its legal powers). It had accepted large sums of money from depositors on contracts of borrowing which were accordingly ultra vires and void. The society was being wound-up, and after the external creditors had been paid, the remaining assets were insufficient to pay both the shareholders and the depositors in full. Each of these classes claimed priority over the other. The depositors rested their claim to repayment on the ground, among others, that the deposits were recoverable as money had and received to their use. The court held that the power to borrow had to be for proper purposes. Given that the bank's actions were ultra vires, there was no possibility for the depositors to recover the money under quasi-contract. That the action, which was based on an implied contract or promise to pay, could not be maintained because allowing such claim would circumvent the point of saying that the deposit contracts were ultra vires and void and thus contrary to public policy. Lord Summer stated that the action of money had and received rests upon a promise to pay.

1131. It may be said that *Sinclair v. Brougham* case above established that liability in a quasi-contract is based on an implied contract and not liability imposed by law in absence of an agreement. However, the implied contract theory has been sharply criticized and perhaps rejected in favour of the notion of unjust enrichment,

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1774. *Moses v. Macferlan*, *supra*, p. 1012.
1775. [1914] A.C. 398.

which does not depend on the existence of a contract. Thus, *Sinclair* case has subsequently been overruled in a number of cases in favour of the remedy of restitution for unjust enrichment.[1776]

1132. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*,[1777] Lord Wright argued that the observations in *Sinclair* case in favour of an implied contract did not form part of the *ratio decidendi* of the case and that the case simply decided that an action for money had and received would not lie to recover money lent to a company on an ultra vires contract of borrowing. Lord Wright stated:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from, another which is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract and tort, and are now recognised to fall within the third category of the common law which has been called quasi-contract or restitution.[1778]

1133. Thus, the legal remedy for quasi-contracts is known as restitution that occurs in two forms: payment for services rendered and a return of items unpaid for. According to Guest, the court grants the remedy where:

> it becomes necessary to hold one person to be accountable to another, without any agreement, on the ground that otherwise he would be retaining money or some benefit which has come into his hands to which the law regards the other person as better entitled, or on the ground that without such accountability the other would suffer loss.[1779]

1134. Quasi-contracts are thus based on the principle of unjust benefit or unjust enrichment. According to Goff and Jones,[1780] this principle presupposes three things: first, that the defendant has been enriched by receipt of a benefit; second, that he or she has been so enriched at the plaintiff's expense; and third, that it would

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1776. However, some commentators question the change of position and argue that the decision in *Sinclair* case was just. *See, for example*, Struan Scott, *Sinclair v Brougham and Change of Position*, 14(2) Otago L. Rev. 313–327 (2016). For a discussion of the common law 'change of position defence', *see also* Graham Virgo, *The Principles of the Law of Restitution* (3d ed. Oxford University Press 2015); Elise Bant, *Change of Position: Outstanding Issues*, in *Defences in Unjust Enrichment* (Andrew Dyson & James Goudkamp and Frederick Wilmost-Smith (eds), Hart Publishing 2016).

1777. [1943] A.C. 32. *See also Westdeutsche Landesbank Girozentrace v. Islington LBC* [1996] U.K.H.L. 12; *Haugesund Kommune v. Depfa ACS Bank* [2010] E.W.C.A. Civ. 579.

1778. *Ibid.*

1779. A.G. Guest, *Anson's Law of Contract* 571 (Clarendon Press 1984). *See also* Cahn Sek Keong, *The Basis of Restitution*, 2(1) *University of Malaysia L. Rev.* 126–128 (1960).

1780. Goff and Jones, *The Law of Restitution* (Sweet and Maxwell 2004).

be unjust to allow him or her to retain the benefit.[1781] A claimant who satisfies these requirements is ordinarily entitled to recover the value of the enrichment received by the recipient defendant.[1782]

1135. According to Christine Davies,[1783] there are two situations that may give rise to restitutionary claims for services rendered: first, where the services in question have been freely accepted by the defendant; second, where the defendant has been incontrovertibly benefitted and the equities of the plaintiff are more compelling than the defence that the defendant had no opportunity to reject the services.

1136. Thus, quasi-contracts are not contracts as such, but the courts of equity may recognize and enforce them in order to preclude the defendant from unjustly enriching himself or herself or receiving a benefit at the plaintiff's expense. There is no real contract between the parties, but the law imposes contractual liability on the plaintiff due to the peculiar circumstances surrounding the 'relationship' of the parties. The court's decision is aimed at addressing an unfair situation concerning the payment for goods or services.

1137. In determining a quasi-contract, the court takes into account the conduct of both parties, their relationship and the potential for one to become unjustly enriched at the expense of the other. For example, in *McDonald v. Coys of Kensington (Sales) Ltd*,[1784] Mc Donald purchased a Mercedes Benz for GBP 20,290 but was mistakenly also given a personalized number plate worth GBP 15,000. By the time anyone realized, the number plate was registered in his name. The question before the court was whether Mc Donald was enriched by receipt of the number plate personalized for another. The court held that the benefit was an incontrovertible benefit, that is, a benefit that no reasonable person would deny. That Mc Donald's refusal to return the number plate indicated that he sufficiently valued the benefit, especially when it was easily returnable.

§2. Quasi-contract Obligations under the Contracts Act

1138. Under the Contracts Act, the principle of unjust enrichment is recognized in Part VI, sections 57–60. Though Part VI avoids the term quasi-contract, it proceeds on the basis that it would be unjust to retain a benefit at the expense of another person. Part VI outlines a number of quasi-contracts under the heading, 'relations similar to those created by contract', which are considered below.

1781. *See also Bank Financiere de la cite v. Parc (Battersea) Ltd* [1998] 1 All ER 737; [1998] 2 W.L.R. 475.
1782. *See, for example*, *Portman Building Society v. Hamlyn Taylor Neck (A Firm)* [1988] 4 All ER 202; *Patel v. Mirza* [2016] 3 W.L.R. 399.
1783. Christine Davies, *Unjust Enrichment and the Remedies of Constructive Trust and Quantum Meruit*, 15(2) *Alberta L. Rev.* 286–295 (1987).
1784. [2004] E.W.C.A. Civ. 47.

I. Claim for Necessaries

1139. The Act provides as follows:

> Where any person incapable of entering into a contract or anyone whom that person is legally bound to support, is supplied by another person with necessaries suited to the condition in life of that person or of anyone that person is legally bound to support, the person who furnishes the supplies is entitled to reimbursement from the property of the person who is incapable of entering into a contract.[1785]

1140. Under section 10(2) of the Contracts Act, one of the essential elements of a contract is capacity of the parties to enter into a contract. Strictly speaking, there is no valid and enforceable contract between the plaintiff and a defendant minor or person of unsound mind. The defendant is only liable to pay for necessaries under a quasi-contract. In *Re Rhodes, Rhodes v. Rhodes*,[1786] Cotton LJ stated:

> Whenever necessaries are supplied to a person, who, by reason of disability, cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property.[1787]

1141. In *Nash v. Inman*,[1788] the plaintiff, a tailor supplied to the defendant, an infant, who was an undergraduate student, over 10 years, fancy waistcoats. When the plaintiff sued for payment, the defendant pleaded lack of capacity. It was held that the contract was void as the goods supplied were not necessaries. Although Buckley LJ based liability of an infant upon contract, Fletcher Moulton was of the view that the liability of an infant or lunatic was quasi-contractual. He stated:

> An infant like a lunatic is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services so rendered and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied.[1789]

1142. Thus, where the minor or other person whom he or she is legally bound to support is supplied with goods or services, which are necessaries in law, the supplier is entitled to be paid a reasonable price, not necessarily a contract price, for

1785. Section 57.
1786. (1890) 44 Ch. D. 94.
1787. *Ibid.*, p. 105.
1788. [1908] 2 K.B. 1.
1789. *Ibid*., p. 12.

the necessaries. Where a minor has obtained goods by fraud and still remains in possession of them, restitution will be ordered by the court. Restitution may also be ordered where the minor has obtained goods by fraud but has sold or exchanged them.[1790]

II. Claim for Payment for Enjoying Benefit of a Non-gratuitous Act

1143. The Act provides as follows:

> Where a person lawfully does anything for another person or delivers anything to another person, not intending to do so gratuitously and the other person enjoys the benefit, the person who enjoys the benefit shall compensate the person who provides the benefit in respect of or restore, the thing done or delivered.[1791]

1144. Section 58(1) above is not founded on contract but embodies the equitable principle of unjust enrichment and restitution. However, for a plaintiff to successfully rely on this section, he or she must prove a number of things: first, that the goods are to be delivered lawfully or something has to be done for another person lawfully; second, the goods delivered or thing done must be delivered or done without the intention to do so gratuitously; third, the person to whom the goods are delivered enjoys the benefit thereof; fourth, the person to whom the goods were delivered or for whom the thing was done must have 'had the opportunity of accepting or rejecting the benefit'.[1792] Thus, the plaintiff's act must not be voluntary. This is because English law, which largely informs the law of contract in Uganda, does not favour *negotiorum gestor*, that is, the 'officious intervener', who pays money or assumes an obligation, without being requested to do so, on another's behalf.[1793]

1145. In *Macclesfield Corporation v. Great Central Railway*,[1794] the defendants were canal owners whose statutory duty was to repair a bridge carrying a highway over one of their canals. The bridge fell into disrepair, and the plaintiffs, the highway authority, called upon them to repair it. The defendants having failed to do so, the plaintiffs themselves undertook the repairs, although they had no legal liability to do the work. They sued the defendants for the work done. The action failed, since

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1790. *See, for example*, *Stocks v. Wilson* [1913] 2 K.B. 235.
1791. Section 58(1).
1792. Section 58(2).
1793. However, some writers have argued that English law, indeed recognizes some aspects of *negotiorum gestio*. *See, for example*, Duncan Sheehan, *Negotiorum Gestio: A Civilian Concept in the Common Law?*, 55(2) ICLQ 253–279 (2006). *See also* M.L. Marasinghe, *The Place of Negotiorum Gestio in English Law*, 8 Ottawa L. Rev. 573 (1976); P.B.H. Birks, *Negotiorum Gestio and the Common Law*, 24(1) Current Legal Problems 110–132 (1971); J.W. Lee Aitken, *Negotiorum Gestio and the Common Law*: *A Jurisdictional Approach*, 11 Sydney L. Rev. 556 (1976) https://www.classic.austlii.edu.au/journals/SydLawRw/1988/6.pdf 9accessed 19 December 2019).
1794. [1911] 2 K.B. 258.

they were merely volunteers and had no claim to an indemnity from the defendant. In *Falcke v. Scottish Imperial Insurance Co*,[1795] Lord Bowen stated:

> The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.[1796]

1146. A person who pays money or incurs liabilities at the request of another, whether express or implied, is entitled to be reimbursed by that other person in respect of the expenses or liabilities so incurred. In *Brewer Street Investments Ltd v. Barclays Woollen Co. Ltd*,[1797] during the course of negotiations for a lease, the defendants, the prospective tenants, requested the plaintiffs, the landlords, to make certain alterations to the premises before they entered into occupation, and agreed to accept responsibility for the work. The negotiations broke down before the work was completed, and the defendants refused to reimburse the landlords for the expenses incurred by them in relation to contractors engaged to carry out the work. The Court of Appeal held that landlords were entitled to recover the expenses. That albeit the claim could not be brought on the contract since the work specified in the contract had not been completed, the defendants' liability was for money paid by the plaintiffs for the work done.

1147. How much restitution the plaintiff receives for the benefit derived by the defendant depends on the principle of *quantum meruit*, that is, payment for what is deserved. In *Cafe Technical Services Ltd & Another v. J.W. Opolot Construction (U) Ltd*,[1798] the plaintiffs jointly sued the defendant for general and special damages for breach of contract. The plaintiffs averred that in 2012, they were respectively contracted by the defendant to offer services which included supervision of the construction of classroom blocks and a five-stance water borne toilet at Arua Public Secondary School. The agreed contract price for the supervision was UGX 25,000,000 while that of the construction of the stance water borne toilet was UGX 18,000,000. The contract price also involved the supply of 10,000 concrete blocks at UGX 30,000,000. Due to the defendant's breach of the head contract, the latter was terminated in 2013. By the time of termination of the head contract, the second defendant had made 7,000 blocks worth UGX 21,000,000 at the rate of UGX 3,000 each. After termination of the head contract, the defendant instructed the second plaintiff to level and remove the top soil at a cost of UGX 23,000,000. The defendant argued that the first plaintiff was supposed to be paid after completion of the

1795. (1885) 34 Ch. D. 234.
1796. *Ibid.*, p. 248.
1797. [1954] 1 Q.B. 428.
1798. Civil Suit No. 0007 of 2013.

works but failed to do so. The defendant also contended that the second plaintiff did not complete the making of blocks but instead levelled the ground, which was not part of the contract.

1148. The court found that there was breach of contract as the first plaintiff had not performed its part of the bargain in a good and workable manner. The court also found that when the head contract was terminated, the defendant assigned the second plaintiff additional work of levelling the site, which was not part of the work the second plaintiff had contracted for originally. Although the work done by the second plaintiff was not referable to the contract of 15 October 2012, it was nevertheless done at the request of the defendant. Mubiru J stated:

> Although the plaintiffs are not entirely blameless for the failure of the head contract and other respective sub-contracts, the circumstances are such that the law should, as a matter of justice, impose upon the defendant an obligation to make payment of an amount which the plaintiffs deserve to be paid, on a *quantum meruit* basis. The fundamental principle that equity is concerned to prevent unconscionable conduct applies to cases like this. The court will impose such an obligation where the defendant has received an incontrovertible benefit (e.g., an immediate financial gain or saving of expense) as a result of the plaintiff's services; or where the defendant has requested the plaintiff to provide services or accepted them (having the ability to refuse them) when offered, in the knowledge that the services were not intended to be given freely. The court regards it as just to impose such an obligation on the defendant who has received the benefit and has behaved unconsciously in declining to pay for it. The court is more inclined to impose an obligation to pay for a real benefit obtained by the defendant, since otherwise the circumstances will leave the defendant with a windfall and the plaintiffs out of pocket.[1799]

1149. The court held that the plaintiffs were entitled, on a *quantum meruit* basis, to payment of their services, whose value should represent the extent of the unjust enrichment obtained by the defendant. The plaintiff must prove that the defendant was unjustly enriched.

1150. In *Kensheka v. Uganda Development Bank*,[1800] the plaintiff claimed for a refund of UGX 84,000,000 from the defendant. In 2010, the defendant entered into a Trade Financing Agreement with M/S ABA Trade International Ltd under which trailer trucks and other accessories would be imported. The plaintiff sought to purchase a Mercedes Benz Actros truck plus accessories from ABA Trade International Ltd. Advised by a senior banking officer of the defendant to secure her position as a purchaser, the plaintiff paid UGX 84,000,000 on an account, details of which were availed by the officer. However, the Trade Financing Agreement between M/S ABA Trade International Ltd and the defendant bank failed as a result of which the right of possession of the consignment was taken over by the bank. The consignment

1799. *Ibid.*, p. 15.
1800. Civil Suit No. 469 of 2011.

arrived in Uganda, but the plaintiff was not informed by the defendant bank who subsequently sold the trucks to third parties. The defendant bank refused to refund UGX 84,000,000 despite several demands. It denied the claim and argued that under the facility, the defendant was only responsible for the financing while M/S ABA Trade International Ltd was responsible for the marketing, sale and delivery of the goods, as well as settlement of the credit facility. That the contractual relationship was between the plaintiff and M/S ABA Trade International Ltd in respect of the goods. That any further payment was effected by M/S ABA Trade International Ltd in fulfilment of its obligations under the trade finance facility. The defendant bank further contended that if the defendant had intended a contractual relationship, there would have been a commitment by the defendant in writing. In any case, the defendant argued that it is not in the business of dealing in vehicles of any kind and it never entered a transaction for the sale of trucks with the plaintiff.

1151. Counsel for the plaintiff submitted that this was a claim for money had and received given by the defendant as consideration for acquisition of a Mercedes Benz, which has wholly failed, and it would be unjust and inequitable that the defendant bank retains the sum claimed. That the remedy sought is an equitable one meant to prevent unjust enrichment by the defendant. Counsel for the plaintiff cited the case of *James Kashengyera Tumwine & Another v. Willie Magala & Another*,[1801] where it was held that a claim for money had and received is an equitable action that may be maintained to prevent unjust enrichment by the defendant when it obtained money which in equity and good conscience belongs to the plaintiff. In dismissing the case, the court held that there was no evidence that the defendant bank was unjustly enriched as the plaintiff had failed to demonstrate that the payment she made on the defendant bank's account fitted the test of unjust enrichment, namely, that the defendant has been enriched by the receipt of a benefit, that this enrichment is at the expense of the plaintiff and that the retention of the enrichment is unjust.

III. Responsibility of Finder of Goods

1152. The Contracts Act provides that a person who finds goods that belong to another and takes them into his or her custody shall be subject to the same responsibilities as a bailee, as provided in Part IX.[1802] Thus, liability of a finder of goods is the same as that of a bailee. Once a finder accepts the responsibility for the goods, he or she must take reasonable steps to locate the owner, take due care of the safety and preservation of goods and return them to the owner. The finder possesses a right of lien for the trouble and expenses incurred in preserving the goods and he or she can sue for a reward and in certain circumstances sell the goods.

1801. H.C.C.S. No. 576 of 2004.
1802. Section 59.

IV. Liability under Mistake

1153. The Act provides that '[a] person to whom money is paid by mistake or to whom anything is delivered by mistake shall repay or return the money or thing delivered'.[1803] The section does not make a distinction between mistake of law and mistake of fact. In *Kelly v. Solari*,[1804] the plaintiff was the director of an insurance company which had paid certain sums of money to the defendant, on a life insurance policy taken out on her husband's life. The policy had, in fact, lapsed by reason of the non-payment of the premiums by the assured. The company had known of this fact, but at the time the money was paid, the lapse had been overlooked. The plaintiff claimed to recover it from the defendant. The court held that he was entitled to do so. Parke B stated:

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specified fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it.[1805]

V. Recovering Money Paid under a Void or Invalid Contract

1154. Where a person pays money to another in pursuance of an agreement that is ineffective, or which subsequently becomes so, he or she may, in certain circumstances, recover from that other person the money which is paid. For example, the plaintiff may have paid money in pursuance of a transaction (e.g., involving a minor), which he or she thought to be a valid contract, but which in truth, through the operation of law, is null and void. If the strict letter of common law was adhered to, an adult plaintiff who deals with a minor would be left without a remedy. In order not to allow an infant to be enriched by his or her own fraud, equity developed the doctrine of restitution to allow the plaintiff certain remedies as illustrated above. Thus, a person may be liable where he or she has acquired benefits under an invalid contract. In *Lawford v. Billericay, R.D.C*,[1806] a plaintiff who had done work for a corporation under a contract that was not under seal, and thus invalid, was able to recover a reasonable remuneration for the work which he had done.

VI. Recovery of Money Paid under an Illegal Contract

1155. The general rule is that where a contract is made illegal, whether by statute or as offending public policy, a party may not successfully sue to recover his or her money. However, the plaintiff may recover the money if the parties are not in

1803. Section 60.
1804. (1841) 9 M. & W. 54.
1805. *Ibid.,* p. 60.
1806. [1903] 1 K.B. 772.

pari delicto (equally at fault), because an advantage may have been taken of the plaintiff's comparative innocence or defenceless position. The plaintiff may also recover where the illegal purpose has not yet been accomplished.

VII. Recovery of Money Where There Is a Total Failure of Consideration

1156. A plaintiff may recover any money paid by him to the defendant under the contract if the consideration for the payment has totally failed. In *Kwei Tek Chao v. British Traders and Shippers Ltd*,[1807] Devlin J stated:

> If goods have been properly rejected, and the price has already been paid in advance, the proper way of recovering the money back is an action for money paid on consideration which has wholly failed, i.e. money had and received.[1808]

1157. For the plaintiff to succeed in quasi-contract, the failure of consideration must be total. In *Hunt v. Silk*,[1809] it was held that where the contract had been part performed, no part of the consideration could be recovered. Where the plaintiff has received some part of the expected benefit, he or she can only sue for damages. In *Whincup v. Hughes*,[1810] the plaintiff apprenticed his son to a watchmaker and jeweler for a term of six years, paying a premium of GBP 25. The master instructed the apprentice for a year and then died. The plaintiff sued the master's executrix to recover the whole, or some part, of the premium on the ground of failure of consideration. It was held that the action could not succeed since the consideration had not totally failed. Brett J stated that '[w]here a sum of money has been paid for an entire consideration, and there is only a partial failure of consideration, neither the whole or any part of such sum can be recovered'.[1811]

1158. It is possible, under certain circumstances, to convert a partial failure of consideration into a total failure of consideration by the plaintiff returning such benefits that he has already acquired under the partial performance of the contract. For example, in *Rowland v. Divall*,[1812] the plaintiff bought a car and used it for four months. The plaintiff then discovered that the defendant was not the owner of the car and had no right or authority to sell it. The plaintiff sued to recover the price and succeeded. It was held that he was entitled to treat the contract as discharged, as there had been a total failure of consideration. In *Margolin v. Wright Pty Ltd*,[1813] subsequent to purchase of a car by the plaintiff, it was seized by Commonwealth

1807. [1959] 2 Q.B. 459.
1808. *Ibid.*, p. 475.
1809. (1804) East 449.
1810. (1804) 5 East 449.
1811. *Ibid.*, p. 85.
1812. [1923] 2 K.B. 500. For an analysis of this case, *see* S. Shamimul H. Azmi, *Failure of Consideration: An Appraisal of Rowland v Divall*, 26(3) J. Indian Law Institute 348–354 (1984).
1813. (1959) Arg. L.R. 988.

authorities for contravention of the Customs Act by a previous owner. The court held that the plaintiff was entitled to rescind the contract and recover the money paid.

1159. Where a contract is frustrated, money paid in pursuance of the contract before the time of discharge by one party to the other is recoverable subject to the provisions of section 66 of the Contracts Act.

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