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## EXPLANATORY NOTES ON THE CONTRACT BILL, 1994

1. The provisions of the Bill are primarily based on the Indian Contract Act 1882, as amended. They are often cast in broad terms with scope for interpretation by the Courts in the development of the law.

The Indian Act (which is also more or less the same Act as the Contract Act of Pakistan) uses illustrations to elucidate the provisions of Act. In an Act of this nature that seems to be a most useful device. That method has, therefore, been adopted in this Bill, with the illustrations being distinguished from the substantive provisions by the fact that they are in italics. If, however, it is desired that the illustrations be de-emphasised by their removal from the main part of the legislation, they could continue to perform the same useful function if they were to be put in a Memorandum attached to the Act.

2. In s.3, the equivalent provision in the Indian Contract Act has the word "or" between the words "revocation" and "has the effect of" in the last clause. But it has been suggested by commentators that the word "or" is a mistake and should be "and", because no legal result is produced by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, unless such act or omission has the effect of communicating it as well; mere intention is not enough. In this Bill the word "and" has been substituted for "or" in the Indian Act.
3. With regard to the modes of revocation of the offer under s.6, as the requirement under subsection (a) that the communication of the revocation must be by *notice of revocation* by the proposer to the other party, the English decision in Dickinson v. Dodds (1876) 2 Ch.D.463 would not apply. In that case, on 10th June, Dodds made Dickinson an offer to sell him a dwelling house for £800. "The offer to be left open until Friday, 9 A.m., 12 June." On 11th June Dodds entered into a contract to sell the house to A. One B informed Dickinson of the sale to A, but he was not acting under the authority of Dodds. Dickinson handed Dodds an acceptance of the offer at a few minutes to 9 a.m. on the 12th. Dodds said "You are too late. I have sold the property." On Dickinson suing for specific performance it was held by the English Court of Appeal that there was no contract. The Court seems to have relied upon Dickinson's knowledge of the sale to the third party which was communicated to him by B. The correctness of this decision has been doubted by *Anson*. It would not be authority under the new Bill since the subsection makes it clear that revocation of a proposal can be made by notice of the revocation by the *proposer* to the other party and so knowledge of the proposer's intention to revoke coming to the offeree from whatever source other than the proposer would not be good notice of revocation. Notice of revocation must come from the proposer or his agent duly appointed.
4. It is one of the requisites of a contract that the parties to it must be such as are regarded by law as competent to contract. A person is not competent to contract under this Bill

if at the time of the agreement, he is (a) a minor; (b) of unsound mind; or (c) disqualified from contracting by any law to which he is subject. Under s.11, a minor is a person who has not attained the age of majority according to the personal law to which he is subject. English law holds that a minor may properly enter into a contract, his contract being voidable at his option and not void. The position taken here is that prevailing in India and Pakistan, which follows the Privy Council decision in Mohori Bibee v. Dharmodas Ghose (1903) 30 Cal.539, which held that under the Indian Contract Act it was essential that all contracting parties should be "competent to contract" and expressly provided that a person who by reason of infancy was not competent to contract could not make a contract within the meaning of the Act.

5. S.20 is based on s.19.A of the Indian Contract Act as inserted by the Indian Contract Act, 1899, s.3. Originally, "undue influence" had been dealt with under s.19 of the Indian Act, the parallel of which is s.19 of this Bill, but that was deleted by the 1899 Act.
6. Illustration (a) under s.21 deals with the situation in Couturier v. Hastie (1856) 5 H.L.C.673, where a contract was made for the sale of a cargo of wheat which the parties supposed to be on a voyage from London to Bombay, but which had in fact (before the date of the sale) been lost, and the mistake was held to be essential and the agreement avoided. In Scott v. Coulson (1903) 2 Ch.249, a contract for the assignment of a life policy made upon the basis that the assured was alive, when as a matter of fact he was dead, was held to be unenforceable. In order to bring this section into operation it is necessary -
  - (a) that *both the parties* (and not one party alone, s.23) must have been under a mistake;
  - (b) that the mistake must be *as to some fact* (and not as to any matter of law, s.22);
  - (c) that the fact must be *essential* to the agreement.
7. S.25 of this Bill - when a contract contains several distinct promises, or a promise to do several acts of which some are legal and others illegal, the Court will enforce those parts which are legal, provided they are severable. But if any part of the consideration for any distinct promise is illegal, that promise will not be enforced, though the other parts of the consideration are legal. This section may be read with ss.67 and 68.
8. S.25 of the Indian Contract Act permits three exceptions to the rule that a contract which is unsupported by consideration is void. These are reproduced in paragraphs (a), (b) and (c) of s.26 of this Bill. Apart from these exceptions, paragraphs (d) and (e) which derive inspiration from the Ghana Contract Act are situations where it is considered that the requirement of consideration for the validity of contracts makes the law for the establishment of contracts too rigid or harsh (see Ghana Contract Act, 1960, s.8).

Paragraph (f) is an omnibus provision to enable further exceptions to be made in future, if necessary. For example, it takes in the provision in s. 152 of this Bill that no consideration is necessary for the creation of an agency.

9. Ss. 27 and 28 of the Bill are derived from the Ghana Contract Act, ss.9 and 10. Indeed, with regard to s.27, reference may be made to the position arising in connection with bills of exchange. S.27 of the UK Bills of Exchange Act, 1882, provides that valuable consideration (i.e. value) may be constituted by an antecedent debt or liability. Hence if B already owed C 1,000 dalasis and gave him a cheque in payment, the cheque would be regarded as having been given for value even though B was already obliged to repay C. That has been the situation operating in The Gambia with cheques since The Gambia applied the UK Act, and is a position which has been recommended for continuation under the draft Negotiable Instruments Bill. But if that is so, then the need to insist that the same type of situation in other agreements should lead to contracts in those cases being void for want of consideration becomes quite unreal.
10. With regard to s.28, mention may be made of the fact that The Contracts (Privity) Act 1982 of New Zealand also takes this position of principle. It provides in ss.4 and 8 the following -
  - "4. *Deeds or contracts for the benefit of third parties* Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description or reference or class, who is not a party to the deed or contract (whether or not the person is in existence at the time the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:  
  
Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.
  8. *Enforcement by beneficiary* The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer."
11. Ss.34, 35 and 36 are reproductions of ss. 30A, 30B and 30C the Pakistan Contract Act which were inserted by s.2 of the Contract Act (Amendment) Ordinance, 1960.
12. The rules laid down in sections 48 to 51 are based on the Indian Act, ss.42 to 45, and materially vary the rules of English Common Law as to the devolution of the benefit of

and liability in respect of joint contracts. What in England figures as an exception has been adopted on the Indian sub-continent as the rule; instead of throwing the whole liability on the surviving joint debtor, the Indian Act by these provisions makes the representative of a deceased person, so far as the assets go, liable equally with the survivor. This is in accordance with modern mercantile usage. (see Kendal v. Hamilton (1879 ) 4 A.C.504).

13. S.49, as already pointed out, is one of the series of sections (ss.48 to 51) materially altering the rules of English Common Law as to devolution of the benefit of and liability in respect of joint contracts. The English rule that joint contractors must be sued jointly for a breach of contract, is departed from in this section which lays down that the promisee can compel any one of the joint promisors to perform the promise. The section will apply to joint promisors such as mortgagors, joint-tenants, partners, persons jointly passing a promissory note and others. It is not incumbent on the promisee in such cases to make all the joint promisors party defendants to the suit.
14. The rule in s.62(3) on refund in the case of impossibility, which is based on the Indian Act, is different from the English Common Law position. In England, if, by no default of either party and through circumstances which were not in the contemplation of the parties when the contract was made, a contract becomes impossible of performance, no further obligation exists; but everything done or paid up to the moment when impossibility supervenes and everything which, by the contract, should have been done or paid before the event, continues to hold good. The liabilities under the contract are, as it were, broken off short and the parties discharged from further performance (see the cases on postponement of the coronation processions in 1902: Krell v. Henry (1903) 2 K.B.740; Hobson v.Peteaden (1903) 2 K.B.760).
15. Ss.63 to 66 deal with the question of the adjustment of the rights and liabilities of the discharged parties in a frustrated contract. The provisions are based on the provisions of the Ghana Contracts Act, ss.1 to 4. They are substantially the same as s.3 of the Frustrated Contracts Act, 1944 of New Zealand.
16. S.67 is supplemental to s.25. If parties have treated the two parts (legal and illegal) as an integral whole, the whole would be void. The question is - are the parts severable?
17. S.72 deals with novation. This occurs where the parties to a contract agree to substitute a new contract for the existing contract. It takes place when - there being a contract in existence - some new contract is substituted either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.
18. The provision on the restoration of benefit received in s.74 does not apply to the case of a benefit received under an agreement made by a minor or one incompetent to contract. (see s. 11).

19. Ss.78 to 80 deal with third party rights, and are derived from the Ghana Contracts Act. Ss.78 and 79 are consequential to and consistent with the provision that consideration need not move from the promisee (see s.28). S.80 deals with assignment of rights.
20. S.81 applies to quasi-contracts, i.e. implied contracts by which one person is bound to pay money in consideration of something done or suffered by another person. Quasi-contracts are not founded on actual promises, but arise when one person has so conducted himself that he must be deemed bound as if he had made a promise although in fact he had not. Though no contract has been made by the parties, the law makes out a contract for them, and such a contract is said to be a contract implied in law. The section also applies to agreements made by or with minors and persons of unsound mind. From the decision of the Privy Council in Mohori Bibee's Case (see note 4 above) a minor or person of unsound mind is not "competent to contract", or in the words of s.11 is "a person who is incapable of entering into a contract." In order to render an agreement by or with a minor for necessaries enforceable, the plaintiff must prove (i) that the agreement was for goods reasonably necessary for supporting a person in his position; and (ii) that the minor (or person of unsound mind) had not already a sufficient supply of these necessaries (see Nash v. Inman (1908) 2 K.B.1.) The obligation is to pay a reasonable, and not the agreed, price for the goods.
21. In s.82 the provision requires that the person who pays and becomes entitled to a refund must have an interest in the payment being made. The rule so laid down is somewhat wider than that under English law, where to be entitled to requirement, it is necessary that a person must have been compelled to pay the debt or discharge the liability of another.
22. The Indian Act does not include in the equivalent of s.83 the words, "understanding that there is an obligation to pay therefor". This has been inserted in the Bill because the Privy Council held that it was not in every case that an obligation to compensate arises. In Ram Tuhul v. Biseswar Lall (1875) L.R.2 I.A.131 at 143, which is said to be the leading case on the point the Privy Council stated that, "It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises.... To support such a suit there must be an obligation, express or implied, to repay." The insertion is made to clarify matters. The section goes beyond English Law. The terms of the section are wide, but applied with circumspection and discretion, enable the Court to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract.
23. The principle regarding the measure of damages stated in section 86 is the same as that which is acted upon by the Courts in England. The leading case on the subject is Hadley v. Baxendale (1859) 9 Ex.341 which lays down that "when two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach should be either such as may fairly be considered as 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 the contract was entered into as a probable result of the breach."

24. The difference between a contract of guarantee and that of indemnity as provided for in ss.90 and 92 is that in the case of a contract of guarantee there are three parties, whereas a contract of indemnity has two; the one is generally for security of a creditor, the other for the reimbursement of loss. A contract of guarantee presupposes a principal debtor, for there must be an engagement to answer for the debt or default of another; a contract of indemnity is an original and direct engagement and may be made independently of the existence of a third party, e.g., when a person promises to save another from any loss caused by him by the conduct of the promisor himself. Another point of difference is found in English Law. In England, the Statute of Frauds requires a guarantee to be in writing, though a contract of indemnity need not be. There is no requirement for writing in this Bill.
25. Ss.136 and 137 deal with the bailee's lien. This may be general or particular. A bailee who has a particular lien can detain only the goods in respect of which service involving the exercise of labour or skill is rendered in accordance with the purpose of the bailment. He can detain the goods until he receives due remuneration for services rendered in respect of the goods. This is a principle of Common Law (see Bevan v. Watery 3 Car. & P.520). The goods can be detained only for the charges of the bailee in respect of the service rendered to them, and not for a general balance of account or other claims, which the bailee may have against the bailor. It is only persons having a general lien who can retain the goods bailed to them as a security for general balance. S.136 applies only if the service rendered by a bailee is one involving the exercise of labour and skill in respect of the goods bailed.
26. S.144 is based on s.178 of the Indian Contract Act which was repealed and replaced by the Indian Contract (Amendment) Act 1930.
27. In s.182, the qualification at the end of the section, i.e., "or that the dealings of the agent have been disadvantageous to him", is not supported by any English authorities, but is found in s.215 of the Indian Contract Act.
28. S.206 provides that the rules of Common Law will continue to apply to and supplement the rules laid down in this Bill. This is because it is difficult to cover comprehensively all the possibilities on Contract law. The Indian Act has so far as it goes been stated by the Privy Council in Bibee v. Dharmodas (1903) to be exhaustive and imperative. But it is impossible to aver that every possible point has been covered by it. In order not to leave any possible position uncovered in this Bill, the saving provision is inserted to give a general backdrop in case a position is inadvertently uncovered.

Where a case is covered by any section of the Bill, the rule of interpretation is that the Court must in the first instance examine the language of the section and ask what is its

natural meaning, uninfluenced by any considerations derived from the previous state of the law (Bank of England v. Vagliano (1891) A.C.107, at page 144). It has been repeatedly laid down by the Privy Council that in interpreting the provisions of an Act the Court should examine the language of the Act uninfluenced by any consideration derived from the English Law upon which it was founded. (see the West African case of Wallace Johnson v. R(1939) 5 W.A.C.A.56 and the Indian cases of Ramanandjikuier v.Kalawati (1928) 7 pat.221, 227 (P.C.); Chunna Mal v. Mool Chanh (1928) 9 Lah.510,518 (P.C.)).

Cases which have to take into account foreign elements have to be decided by the canons of Private International Law.

The section also repeals the statutes of general application made applicable to The Gambia by the Constitution and the Law of England (Application) Act [Cap:5].

# **THE DRAFT CONTRACT BILL**

## **Report on the Library Based Research and Field Study**

### **A. Introduction**

The Field Study for the drafting of a Contract Bill for The Gambia was undertaken at the same time as the study for several other pieces of legislation. These were the proposed legislation on Bills of Exchange, Bills of Lading, Hire Purchase, Equipment Leasing and a review of the Sale of Goods Act. The Field Study was undertaken during August and September 1993, and consisted primarily of interviews of a number of people in the legal, banking, accountancy, business and governmental sectors of The Gambia who were expected to have experience of, and contributions to make on, the pieces of legislation under consideration. The Field Study was preceded by Library Based Research, also undertaken in August.

The following are the findings emerging from the research and study. The draft legislation has been drafted with the knowledge acquired from the research, and such views as were expressed during the study, in mind.

### **B. The Present Situation**

The law of Contract applied in The Gambia is basically the English Common Law as illustrated by judicial precedents in England going back for centuries, and by any cases on the subject that have been decided by the Courts of The Gambia. As pointed out in our other Reports, the legislative backing for this application of the English law by The Gambia can be found in the Constitution and the Law of England (Application) Act. It will be recalled that statutes of general application in England on November 1, 1886 were made applicable to The Gambia by virtue of section 119 of the Constitution of the Republic of The Gambia (1970), section 2 of which continues existing laws, and section 2 of the Law of England (Application) Act [Cap.5], which renders applicable to The Gambia "the common law, the doctrines of equity, the statutes of general application in force in England on the first day of November, 1888". As in the case of the Field Study for the draft Bill on Bills of Exchange (now described as the Negotiable Instruments Bill in order to match the title to the scope of its contents) we found that not much discussion or comment was offered by those interviewed on the manner in which they expected a Bill on Contract should be fashioned.

A legal system based on the doctrine of binding judicial precedent as the English Common Law is, has some theoretical advantage in flexibility and the development of legal principles to match the changing conditions of a society. This advantage is here described as theoretical, because the hierarchy of the Courts and aspect of the doctrine of precedent which requires that Courts of lower rank must follow the decisions of higher Courts, whatever the opinion of the lower Court of the merits of the higher Court decisions, has introduced some rigidity into the application of the doctrine. Courts in newly independent countries of the Commonwealth, like The Gambia,

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long used to the automatic application of decisions of the Courts in England, whether these decisions emanate from the English High Court, Court of Appeal, or House of Lords, find it difficult to detach themselves from such practice, and to examine afresh situations and relations arising in their own countries in order to determine for themselves whether principles laid down by the English Courts are applicable to conditions in their own countries at the time that these principles are being considered for application in the independent country.

The final appellate Court for The Gambia under the Constitution is the Judicial Committee of the Privy Council. For that purpose, the Committee, although it sits regularly in London and is most often composed of members of the UK House of Lords, is strictly not an English Court. Courts in The Gambia are obliged, by the doctrine of judicial precedent to apply the decisions of the Privy Council. It is not unknown for the Privy Council to disagree with decisions of the English Courts. At times, even the English Courts adopt reasoning first enunciated in the Privy Council. An example of this is the Privy Council decision in Nakkuda Ali v. Javaratne (1951) A.C.66, which led the judicial defection from the majority judgment of the House of Lords in Liversidge v. Anderson (1942) A.C.206 as the true test for consideration in personal freedom cases, at least in peace time. The point being made is that though the Courts of The Gambia are bound to follow the decisions of the Privy Council, especially in Gambian cases, they are not so bound to follow rigidly the decisions of any other Court in England, although those decisions may be of high persuasive force. Yet the history and traditions of the Courts may force Courts in The Gambia to apply English decisions, even where the circumstances of The Gambia do not justify such application. If The Gambia has its own rules of Contract laid down by legislation, the Courts may be encouraged to act on the decision of the Privy Council in Wallace Johnson v. R (1939) 5 W.A.C.A 56 that the statutes of each Commonwealth country should be "construed ... free from any glosses or interpolations derived from any expositions however authoritative of the law of England ..." In having to look first and at their own legislation and interpret it as it is, one purpose which Gambian legislation will serve will be to inspire initiative and independence in its judges.

One other problem has to be recognised with an area of law which is almost entirely regulated by judicial precedent, as the Common law of Contract is. Often there are conflicting judicial decisions of equal authority which are difficult to reconcile. This problem is to a considerable extent reduced, if not entirely removed, by legislation on the subject, as in the last resort, the provisions of the legislation are the authority for the rules. The judicial function is thus limited to interpretation of these provisions.

We have stated in connection with our recommendations for a Mortgages Act, and we think that statement will bear repeating, that "It is important, ... that The Gambia should have its own legislation on as many subjects on which it needs regulation as soon as it possibly can." The law of Contract is the basis of all commercial relations in the society. It is the foundation for a number of specialised laws, such as mortgages, leases, conveyances, partnerships, sale of goods, hire-purchase, agency, bailment etc., which govern business and personal relationships. Some of these specialised laws have already been enacted by the Gambian Parliament; others are being drafted at the moment. It is important, considering even the ordinary course of things, that the

mother of all these offspring should herself be dealt with. The significance of the law of Contract, in our view, makes it essential that in a scheme to provide necessary legal infrastructure for the financial and commercial system of the country, it should be one of the primary subjects that should be brought home, by The Gambia having its own legislation on it.

Indeed, although there was not so much comment from those interviewed during the Field Study on the parts of the Contract law as applicable today which ought to be changed or reformed, the view was unanimous that The Gambia should have its own legislation on the subject. As we have said before, it is necessary that the laws of The Gambia should be readily accessible to Gambians, and that foreigners who require advice on what the prevailing Gambian regulation on any subject is should be directed to the relevant law in The Gambia and not be told to consult the laws of some foreign country.

### **C. Report on the Field Research**

In the Report attached to the Negotiable Instruments Bill, we pointed out that "It was noticeable, that although Bills of Lading, Hire Purchase and Equipment Leasing, evoked quite a lot of comment at the interviews we conducted, comment on Bills of Exchange, as indeed on Contract, were few." This, we thought, might indicate either that the laws and practices followed in The Gambia on Bills of Exchange and Contract were either generally satisfactory to users, or too specialised for the uninitiated, to warrant much comment.

The consensus from all who made comment on Contract during the Field Study was that The Gambia should have its own statute, which should be based on the English law, but with modifications where necessary. There was no desire to depart from the Common Law tradition. In our discussions during the Study, we asked certain questions arising from the English Common Law, which had been disclosed during our Research, which we thought might need consideration in a statute on Contract in The Gambia -

- one such question was on the subject of consideration and its formalities: i.e., whether consideration was necessary in all cases to turn a promise into a legal contract; whether the consideration must always be provided by the person to benefit from the contract and who should bring legal action on his own to enforce it; whether the performance of an act or promise to perform such an act which is already enjoined by legal duty should be regarded as consideration. With regard to the last point, the UK Bills of Exchange Act of 1882 had removed such requirement from bills of exchange, in that s.27(1)(b) provides that "Valuable consideration for a bill may be constituted by an antecedent debt or liability." The question then was if this is accepted in the case of bills of exchange, why should it not be accepted in all cases? In the other questions raised in connection with the doctrine of consideration, some countries had adopted different solutions to the problems which were worth examining;

- another question was whether the Common Law doctrine that where a contract was frustrated, the loss should lie where it falls, should be applied, whether in its unmitigated form or at all, to The Gambia.

A further question which was raised by one of the persons we interviewed was whether the provisions of the Statute of Frauds, a UK Act passed in 1677 passed to minimize frauds involved in contracts at the time when the law of evidence was undeveloped and the parties to a litigation were not competent witnesses, should continue to apply to The Gambia. The 1677 Statute required certain conveyances of interests in land, wills of real estate, declarations or assignments of trusts, and certain classes of contracts, to be evidenced by writing. The reason why the question was raised was whether a society like The Gambia with so much illiteracy, should make writing a mandatory requirement for the validity of contracts. A number of specialised statutes on some of the transactions dealt with by the Statute of Frauds have, however, been enacted in The Gambia with the requirement for writing. The writing requirements with respect to land transactions, for example, are expected to be complied with by the society. Perhaps writing should only continue to be made a requirement in these specialised enactments, where the need for it has been considered on a case by case basis. The draft Bill in itself does not make writing necessary for the formation or enforcement of a contract.

We were aware that the English Common Law had been modified in particular aspects by legislation dealing with those aspects. But we sought advice from Professor Patrick Atiyah, perhaps the foremost exponent of the English Common Law of Contract, on which countries had a comprehensive legislation on the subject. He thought this was rare within the Commonwealth, but his advice lead us to the Indian Contract Act.

The Bill which we have drafted is based on the Indian Contract Act of 1872, which has continued, with relatively few amendments, to be used in India. The Contract Act of Pakistan is based on the same provisions. The nineteenth century codification of the rules of contract for the Indian sub-continent was based on the principles of the English Common Law. There have been some departures, but they have been consciously made in those parts where it was considered that the Common Law provisions were out of date or did not provide a acceptable solution to the problems of the sub-continent. These Acts are the major comprehensive Acts on the law of Contract in the Commonwealth. Like the English Common Law, the Contract Law of most of the Commonwealth countries is dependent on judicial precedent, with specific areas being reformed from time to time by legislation.

Apart from the Indian Contract Act, ideas from the Ghana Contract Act, 1960 and provisions in particular areas of Contract Law from New Zealand legislation have been imported into the draft Bill where considered appropriate.

The Indian Act dealt not only with the general principles of Contract, but also treated several specialised types of contractual relations: Sale of Goods, Indemnity and Guarantee, Bailment, Agency and Partnership. The Gambia already has a Sale of Goods Act [Cap.89:01] which is under review, and a draft Partnership Bill for consideration and submission to Parliament. These

have been omitted from the draft Bill. Indeed, those very parts of the Indian Act had been repealed and replaced by specialised Acts in India, with the Indian Sale of Goods Act replacing the provisions of the Contract Act in 1930 and the Indian Partnership Act replacing the relevant provisions in their Contract Act in 1932.

**D. International Convention and Other Instruments on Contract**

On the international scene, attention is drawn to the following Conventions and instruments as relevant to the subject-matter of this Bill -

- The Hague Convention on the Law Applicable to Agency;
- The International Chamber of Commerce (ICC) Adaptation of Contracts;
- The ICC Uniform Rules for Contract Guarantees.

# THE CONTRACT BILL, 1994

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# **CONTRACT BILL, 1994**

## **A BILL ENTITLED**

An Act to declare the Law of Contract and to make provision for matters connected therewith.

Enacted by the Parliament of The Gambia.

### **Short title**

1. This Act may be cited as the Contract Act, 1994, and it shall come into force on such day as the Minister by Order published in the Gazette appoint.

## **PRELIMINARY**

### **Interpretation**

2. In this Act, unless the context otherwise requires:
- (a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a "proposal";
  - (b) when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be "accepted". A proposal when accepted becomes a "promise";
  - (c) the person making the proposal is called the "promisor," and the person accepting the proposal is called the "promisee";
  - (d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a "consideration" for the promise;
  - (e) every promise and every set of promises, forming the consideration for each other, is an "agreement";

- (f) promises which form the consideration or part of the consideration for each other are called "reciprocal promises"
- (g) an agreement not enforceable by law is said to be "void";
- (h) an agreement enforceable by law is a "contract" :
- (i) an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a "voidable contract";
- (j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

## **CHAPTER I**

### **COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS.**

#### **Communication, acceptance and revocation of proposals**

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, and which has the effect of communicating it.

#### **Communication, when complete**

4. (1) The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
- (2) The communication of an acceptance is complete -
- (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;
  - (b) as against the acceptor, when it comes to the knowledge of the proposer.
- (3) The communication of a revocation is complete,-
- (a) 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;

- (b) as against the person to whom it is made, when it comes to his knowledge.

#### *Illustrations*

(a) *A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter.*

(b) *B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete -*

(i) *as against A, when the letter is posted;*

(ii) *as against B, when the letter is received by A.*

(c) *A revokes his proposal by telegram.*

(i) *the revocation is complete as against A when the telegram is despatched;*

(ii) *it is complete as against B when B receives it.*

*B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and against A when it reaches him.*

#### **Revocation of proposal and acceptance**

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the acceptor, but not afterwards. An acceptance may be revoked at any time before its communication is complete as against the proposer, but not afterwards.

#### *Illustrations*

*A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post.*

*A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.*

*B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.*

#### **Revocation how made**

6. A proposal is revoked -

- (a) by the communication of notice of revocation by the proposer to the other party;
- (b) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
- (c) by the failure of the acceptor to fulfil a condition precedent to the acceptance; or
- (d) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

**Acceptance must be absolute**

7. In order to convert a proposal into a promise, the acceptance must be -

- (a) absolute and unqualified;
- (b) expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise; but if he fails to do so, he accepts the acceptance.

**Acceptance by performing conditions, or receiving consideration**

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

**Promises, express and implied**

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

## CHAPTER II

### VOIDABLE CONTRACTS AND VOID AGREEMENTS

#### **What agreements are contracts**

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

#### **Who are competent to contract**

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

#### **What is a sound mind for the purposes of contracting**

12. (1) A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests.

(2) A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind but occasionally of unsound mind, may not make a contract when he is of unsound mind.

#### *Illustration*

*Under subsection (2), a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals. A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgement as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.*

#### **"Consent" defined**

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

### **"Free consent" defined**

14. Consent is said to be free when it is not caused by -
- (a) coercion, as defined in section 15; or
  - (b) undue influence, as defined in section 16; or
  - (c) fraud, as defined in section 17; or
  - (d) misrepresentation, as defined in section 18; or
  - (e) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

### **"Coercion" defined**

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Criminal Code, or any other law, or the unlawful detaining, or threatening to detain, any person or property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

For the purposes of this definition, it is immaterial whether the Criminal Code is or is not in force in the place where the coercion is employed.

#### *Illustration*

*A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to intimidation under the Criminal Code. A afterwards sues B for breach of contract at Banjul. A has employed coercion, although his act is not an offence by the law of England, and although section 243 of the Criminal Code was not in force at the time when or place where the act was done.*

### **"Undue influence" defined**

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) Without prejudice to the generality of the principle stated in subsection (1), a person is deemed to be in a position to dominate the will of another -

- (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

#### *Illustrations*

(a) *A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.*

(b) *A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.*

(c) *A, being in debt to B, the money-lender of the village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.*

(d) *A applies to a banker for a loan at a time when there is stringency in the money-market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.*

#### **"Fraud" defined**

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract -

- (a) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (b) the active concealment of a fact by one having knowledge or belief of the fact;
- (c) a promise made without any intention of performing it;

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- (d) any other act intended to deceive;
- (e) any such act or omission as the law specially declares to be fraudulent.

It is hereby declared that mere silence as to the 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, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

#### *Illustrations*

- (a) *A sells, by auction to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.*
- (b) *B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.*
- (c) *B says to A - "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.*
- (d) *A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.*

#### **"Misrepresentation" defined**

18. "Misrepresentation" means and includes -

- (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (b) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him;
- (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the substance of the agreement.

#### **Voidability of agreements without free consent**

19. (1) When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the

position in which he would have been if the representations made had been true. However, if such consent was caused by misrepresentation or by silence fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

(3) A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

#### *Illustrations*

(a) *A, intending to deceive B, falsely represents that five thousand pounds weight of indigo are made annually at A's factory, and thereby induces B to buy the factory. B does not have the means of finding out the truth. The contract is voidable at the option of B.*

(b) *A, by a misrepresentation, leads B erroneously to believe that five thousand pounds weight of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four thousand pounds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.*

(c) *A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.*

(d) *B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The sale is voidable at the option of A.*

(e) *A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.*

#### **Power to set aside contract induced by undue influence**

20. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as may seem just to the Court.

#### *Illustrations*

(a) *A's son has forged B's name to a promissory note. B, by virtue of a threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.*

*(b) A, a money-lender, advances 500 dalasis to B, an agriculturist, and, by undue influence, induces B to execute a bond for 1,000 dalasis with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the 500 dalasis with such interest as may seem just.*

### **Agreement void where both parties are under mistake as to a matter of fact**

21. (1) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

It is hereby declared that an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

#### *Illustrations*

*(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Banjul. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.*

*(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.*

*(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.*

### **Effect of mistake as to law**

22. A contract is not voidable because it was caused by a mistake as to any law in force in The Gambia; but a mistake as to a law not in force in The Gambia has the same effect as a mistake of fact.

#### *Illustrations*

*(a) A and B make a contract grounded on the erroneous belief that a particular debt is barred by The Gambia Law on limitation of actions: the contract is not voidable.*

*(b) A, a widow, is entitled to certain occupancy rights. A remarries and believing that she has lost her occupancy rights by reason of her second marriage agrees to take land from B, on an increased rate of rent. Both A and B honestly believe that A has lost her occupancy rights. The agreement is not voidable.*

### **Contract caused by mistake of one party as to matter of fact**

23. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

## **What considerations and objects are lawful and what not**

24. The consideration or object of an agreement is lawful, unless -
- (a) it is forbidden by law; or
  - (b) it is of such a nature that, if permitted, it would defeat the provisions of any law; or
  - (c) it is fraudulent; or
  - (d) it involves or implies injury to the person or property of another; or
  - (e) the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

### *Illustrations*

- (a) *A agrees to sell his house to B for 10,000 dalasis. Here B's promise to pay the sum of 10,000 dalasis is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 dalasis. These are lawful considerations.*
- (b) *A promises to pay B 1,000 dalasis at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.*
- (c) *A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment and B's payment is the consideration for A's promise and these are lawful considerations.*
- (d) *A promises to maintain B's child and B promises to pay A 1,000 dalasis yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.*
- (e) *A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void as its object is unlawful.*
- (f) *A promises to obtain for B an employment in the public service, and B promises to pay 1,000 dalasis to A. The agreement is void, as the consideration for it is unlawful*

(g) *A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.*

(h) *A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.*

(i) *A's estate is sold for arrears of revenue under the provisions of an enactment, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.*

(j) *A, who is B's guardian, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 dalasis to A. The agreement is void, because it is immoral.*

(k) *A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under The Gambia Criminal Code.*

#### *Void Agreements*

#### **Agreements void, if consideration or object unlawful in part**

25. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

#### *Illustration*

*A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 dalasis a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.*

#### **Agreement without consideration void, unless permitted**

26. (1) An agreement made without consideration is void, unless -

- (a) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or

- (b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or
- (c) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of actions; or
- (d) it is a promise to keep an offer open for acceptance for a specified time; or
- (e) it is a promise by the creditor or person to whom the obligation is owed, to waive the payment of a debt or part of a debt or the performance of some other contractual or legal obligation; or
- (f) it is otherwise permitted by this Act or any other enactment.

In any of these cases, such an agreement is a contract.

(2) Nothing in this section shall affect the validity, as between the donor and the donee, of any gift actually made.

(3) An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

#### *Illustrations*

(a) *A promises, for no consideration, to give B 1,000 dalasis. This is a void agreement, unless the agreement comes within any of the exceptions in the section.*

(b) *A, for natural love and affection, promises to give his son, B, 1,000 dalasis. A puts his promise to B into writing and registers it. This is a contract.*

(c) *A finds B's purse and gives it to him. B promises to give A 50 dalasis. This is a contract.*

(d) *A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.*

(e) *A owes B 1,000 dalasis, but the debt is barred by the limitation Act. A signs a written promise to pay B 500 dalasis on account of the debt. This is a contract.*



(f) *A agrees to sell a horse worth 1,000 dalasis for 10 dalasis. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.*

(g) *A agrees to sell a horse worth 1,000 dalasis for 10 dalasis. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.*

### **Promise of act already enjoined by legal duty as consideration**

27. The performance of an act or the promise to perform an act may be sufficient consideration for another promise notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not.

#### *Illustration*

*A already owes B 1,000 dalasis which A was liable to repay at any time B demands it. A promises to pay B the 1,000 dalasis immediately if B agrees to buy A a radio within the next two days. B agrees to do so. A's promise is sufficient consideration.*

### **Consideration need not move from the promisee**

28. No promise shall be invalid as a contract by reason only that the consideration therefor is supplied by someone other than the promisee.

### **Agreement in restraint of marriage void**

29. Every agreement in restraint of the marriage of any person, other than a minor, is void.

### **Agreement in restraint of trade void**

30. (1) Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

(2) A person who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein:

Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

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### **Agreements in restraint of legal proceedings void**

31. (1) Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is to that extent void.

(2) Subsection (1) shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, or that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. Nor shall the subsection render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

(3) When such a contract as is referred to in subsection (2) has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such a contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

### **Agreements void for uncertainty**

32. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

#### *Illustrations*

(a) *A agrees to sell to B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.*

(b) *A agrees to sell to B one hundred tons of oil of a specific description, known as an article of commerce. There is no uncertainty here to make the agreement void.*

(c) *A, who is a dealer in groundnut-oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of groundnut-oil.*

(d) *A agrees to sell B "all the rice in my warehouse at Brikama." There is no uncertainty here to make the agreement void.*

(e) *A agrees to sell to B "one thousand bags of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.*

*(f) A agrees to sell to B . . . y white horse for five hundred dalasis or one thousand dalasis". There is nothing to show which two of the prices was to be given. The agreement is void.*

**Agreements by way of wager void unless permitted**

33. (1) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

(2) This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred dalasis or upwards, to be awarded by a race club, gymkhana club or sports club recognised by Government.

(3) Nothing in this section shall be deemed to legalize any transaction which is made an offence by the provisions of sections 161 to 163 of the Criminal Code.

**Agreements collateral to wagering agreements void**

34. All agreements knowingly made to further or assist the entering into, effecting or carrying out, or to secure or guarantee the performance, of any agreement void under section 33, are void.

**No suit for recovery of money, commission etc., in respect of void agreements**

35. No suit or other proceeding shall lie for the recovery of -

- (a) any sum of money paid or payable in respect of any agreement void under section 33 or 34; or
- (b) any commission, brokerage, fee or reward in respect of knowingly effecting or carrying out, of any such agreement or of any sum of money otherwise claimed or claimable in respect thereof; or
- (c) any sum of money knowingly paid or payable on account of any person by way of commission, brokerage, fee, reward or other claim in respect of any such agreement.

**Payment by guardian, executor etc., in respect of void agreements not to be allowed credit**

36. No guardian, executor, administrator, heir or personal representative of any minor or deceased person, as the case may be, shall be entitled to or allowed any credit in his account for or in respect of any such agreement, or any such commission, brokerage, fee, reward or claim as is referred to in sections 33 to 35.

## CHAPTER III

### CONTINGENT CONTRACTS

#### **"Contingent contract" defined**

37. A "contingent contract" is a contract to do or not to do something, if the event, collateral to such contract, does or does not happen.

#### *Illustration*

*A contracts to pay B 10,000 dalasis if B's house is burnt. This is a contingent contract.*

#### **Enforcement of contracts contingent on an event happening**

38. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

#### *Illustrations*

*(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.*

*(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy the horse. The contract cannot be enforced by law unless and until C refuses to buy the horse.*

*(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.*

#### **Enforcement of contracts contingent on an event not happening**

39. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

#### *Illustration*

*A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.*

**When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person**

40. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

*Illustration*

*A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die or be divorced and that C may afterwards marry B.*

**When contingent contracts depending on happening of specified event within fixed time are void or enforceable**

41. (1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

(2) Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

*Illustrations*

(a) *A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.*

(b) *A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.*

**Agreement contingent on impossible event void**

42. A contingent agreement to do or not to do anything, if an impossible event happens, is void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

### *Illustrations*

(a) *A agrees to pay B 1,000 dalasis if two straight lines should enclose a space. The agreement is void.*

(b) *A agrees to pay B 1,000 dalasis if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.*

## **CHAPTER IV**

### **THE PERFORMANCE OF CONTRACTS**

#### *Contracts which must be performed*

#### **Obligation of parties to contracts**

43. (1) The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

(2) Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

#### *Illustrations*

(a) *A promises to deliver goods to B on a certain day on payment of 1,000 dalasis. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the 1,000 dalasis to A's representatives.*

(b) *A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.*

#### **Effect of refusal to accept offer of performance**

44. (1) Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

(2) Every such offer must fulfil the following conditions -

(a) it must be unconditional;

- (b) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
- (c) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

(3) An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

#### *Illustration*

*A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bags of rice of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the rice to B's warehouse on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is rice of the quality contracted for, and that there are 100 bags.*

#### **Effect of refusal of party to perform promise wholly**

45. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless the promisee has signified, by words or conduct, his acquiescence in its continuance.

#### *Illustrations*

(a) *A, a singer, enters into a contract with B, the manager of a hotel, to sing at his hotel two nights in every week during the next two months, and B engages to pay her 500 dalasis for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.*

(b) *A, a singer, enters into a contract with B, the manager of a hotel, to sing at his hotel two nights in every week during the next two months, and B engages to pay her at the rate of 500 dalasis for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damages sustained by him through A's failure to sing on the sixth night.*

## *By whom Contracts must be Performed*

### **Person by whom promise is to be performed**

46. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

### *Illustrations*

(a) *A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.*

(b) *A promises to paint a picture for B. A must perform this promise personally.*

### **Effect of accepting performance from third person**

47. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

### **Devolution of joint liabilities**

48. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

### **Joint promisors may be compelled to perform and may compel contribution**

49. (1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

(2) Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

(3) If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

(4) Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

#### *Illustrations*

(a) *A, B and C jointly promise to pay D 3,000 dalasis. D may compel either A or B or C to pay him 3,000 dalasis.*

(b) *A, B and C jointly promise to pay D the sum of 3,000 dalasis. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 dalasis from A's estate, and 1,250 dalasis from B.*

(c) *A, B and C are under a joint promise to pay D 3,000 dalasis. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 dalasis from B.*

(d) *A, B and C are under a joint promise to pay D 3,000 dalasis, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.*

#### **Effect of release of one joint promisor**

50. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors, neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.

#### **Devolution of joint rights**

51. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

#### *Illustration*

*A, in consideration of 5,000 dalasis lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.*

## *Time and Place for Performance*

### **Time for performance where no application is to be made and no time is specified**

52. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. The question "what is a reasonable time" is, in each particular case, a question of fact.

### **Time and place for performance where time is specified and no application to be made**

53. When promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

#### *Illustration*

*A promises to deliver goods at B's warehouse on 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.*

### **Application for performance on certain day to be at proper time and place**

54. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business. The question "what is a proper time and place" is, in each particular case, a question of fact.

### **Place for performance where no application to be made and no place fixed for performance**

55. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

#### *Illustration*

*A undertakes to deliver 100 bags of rice to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.*

### **Performance in manner or at time prescribed or sanctioned by promisee**

56. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

### *Illustrations*

(a) *B owes A 2,000 dalasis. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.*

(b) *A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.*

(c) *A owes B 2,000 dalasis. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.*

(d) *A desires B, who owes him 100 dalasis, to send him a note for 100 dalasis by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.*

### *Performance of Reciprocal Promises*

#### **Promisor not bound to perform, unless reciprocal promisee ready and willing to perform**

57. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

### *Illustrations*

(a) *A and B contract that A shall deliver goods to B to be paid for by B on delivery.*

*A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.*

*B need not pay for the goods, unless A is ready and willing to deliver them on payment.*

(b) *A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.*

*A need not deliver, unless B is ready and willing to pay the first instalment on delivery.*

*B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.*

### **Order of performance of reciprocal promises**

58 Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

#### *Illustrations*

(a) *A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.*

(b) *A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.*

### **Liability of party preventing event on which the contract is to take effect**

59. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

#### *Illustration*

*A and B contract that B shall execute certain work for A for a thousand dalasis. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.*

### **Effect of default as to promise which should be first performed, in contract consisting of reciprocal promises**

60. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

#### *Illustrations*

(a) *A hires B's ship to take in and convey, from Banjul to Lagos, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship.*

*A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.*

*(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.*

*(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.*

*(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.*

### **Effect of failure to perform in time**

61. (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.

### **Agreement to do impossible act**

62. (1) An agreement to do an impossible act is void.

(2) A contract to do an act which after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, becomes unlawful, shall be void when the act becomes impossible or unlawful.

(3) Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

#### *Illustrations*

(a) *A agrees with B to discover treasure by magic. The agreement is void.*

(b) *A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.*

(c) *A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.*

(d) *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 war is declared.*

(e) *A contracts to act at a theatre for six months in 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.*

#### **Adjustment of rights and liabilities of parties to frustrated contracts**

63. (1) Where a contract has become impossible of performance or otherwise frustrated and the parties thereto have for that reason been discharged from the further performance of the contract the provisions of this section shall, subject to sections 64 and 65, have effect in relation thereto.

(2) Subject to subsection (3), all sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged, herein referred to as "the time of discharge", shall, in the case of sums so paid, be recoverable from him, and in the case of sums so payable, cease to be payable.

(3) Where a party has incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may allow him to recover or to retain out of any sum received by him under the contract, such amount, if any, not exceeding the expenses so incurred or the total sum payable to him under the contract, as the Court may consider just having regard to all the circumstances of the case.

(4) In estimating, for the purposes of subsections (2) and (3), the amount of any expenses incurred by any party to the contract, the Court may, without prejudice to the generality

of those provisions, include such sums as appear to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by that party.

(5) In considering whether any sum ought to be recovered or retained under subsections (2), (3) and (4) by any party to the contract, the Court shall not take into account any sums which have, by reason of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the contract rendered impossible or otherwise frustrated or by or under any enactment.

#### **Severance of frustrated contract**

64. Where it appears to the court that a part of any contract to which section 63 otherwise applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the Court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat section 63 as only applicable to the remainder of that contract.

#### **Parties may contract out of sections 63 and 64**

65. Where any contract contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the Court shall give effect to that provision and shall only give effect to the provisions of section 63 or 64 to such extent, if any, as appear to the Court to be consistent with that provision.

#### **Application of sections 63 to 65**

66. (1) Sections 63, 64 and 65 apply to contracts made before or after the commencement of this Act, in respect of which the time of discharge is after the commencement of this Act.

(2) The provisions of sections 63, 64 and 65 do not apply -

(a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or

(b) to any contract of insurance.

#### **Reciprocal promise to do things legal, and also other things illegal**

67. Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

### *Illustration*

*A and B agree that A shall sell B a house for 10,000 dalasis, but that, if B uses it as a gambling house, he shall pay A 50,000 dalasis for it.*

*The first set of reciprocal promises, namely, to sell the house and to pay 10,000 dalasis for it, is a contract.*

*The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.*

### **Alternative promise, one alternative being illegal**

68. In the case of an alternative promise, one of which is legal and the other illegal, the legal alternative alone can be enforced.

### *Illustration*

*A and B agree that A shall pay B 1,000 dalasis for which B shall afterwards deliver to A either rice or smuggled opium. This is a valid contract to deliver rice, and a void agreement as to the opium.*

### *Appropriation of Payments*

#### **Application of payment where debt to be discharged is indicated**

69. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

### *Illustrations*

(a) *A owes B, among other debts, 1,000 dalasis upon a promissory note which falls due on the 1st June. He owes B no other debt of that amount. On 1st June A pays B 1,000 dalasis. The payment is to be applied to the discharge of the promissory note.*

(b) *A owes B, among other debts the sum of 567 dalasis. B writes to A and demands payment of this sum. A sends to B 567 dalasis. This payment is to be applied to the discharge of the debt of which B had demanded payment.*

#### **Application of payment, where debt to be discharged is not indicated**

70. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any

lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of actions.

### **Application of payment where neither party appropriates**

71. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of actions. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

### *Contracts which need not be performed*

### **Effect of novation, rescission and alteration of contract**

72. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

### *Illustrations*

(a) *A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.*

(b) *A owes B 10,000 dalasis. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 dalasis in place of the debt of 10,000 dalasis. This is a new contract and extinguishes the old.*

(c) *A owes B 1,000 dalasis under a contract. B owes C 1,000 dalasis. B orders A to credit C with 1,000 dalasis in his books, but C does not assent to the arrangement. B still owes C 1,000 dalasis, and no new contract has been entered into.*

### **Promisee may dispense with or remit performance of promise**

73. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

### *Illustrations*

(a) *A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.*

(b) *A owes B 5,000 dalasis. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 dalasis paid at the time and place at which the 5,000 dalasis were payable. The whole debt is discharged.*

(c) *A owes B 5,000 dalasis. C pays to B 1,000 dalasis, and B accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim.*

(d) *A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts the sum of 2,000 dalasis. This is a discharge of the whole debt, whatever may be its amount.*

(e) *A owes B 2,000 dalasis, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of fifty bututs in the dalasi upon their respective demands. Payment to B of 1,000 dalasis is a discharge of B's demand.*

### **Consequences of rescission of voidable contract**

74. When a person at whose option a contract is voidable, rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

### **Obligation of person who has received advantage under void agreement or contract that becomes void**

75. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

### *Illustrations*

(a) *A pays B 1,000 dalasis in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 dalasis.*

(b) *A contracts with B to deliver to him 250 bags of rice before 1st of May. A delivers 130 bags only before that day, and none after. B retains the 130 bags after the 1st of May. He is bound to pay A for them.*

(c) *A, a singer, contracts with B, the manager of a hotel, to sing at his hotel for two nights in every week during the next two months, and B engages to pay her five hundred dalasis for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.*

*(d) A contracts to sing for B at a concert for 1,000 dalasis, which is paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 dalasis paid in advance.*

### **Mode of communicating or revoking rescission of voidable contract**

76. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

### **Effect of neglect of promisee to afford promisor reasonable facilities for performance**

77. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

#### *Illustration*

*A contracts with B to repair B's house. B neglects or refuses to point out to A the places in which his house requires repair.*

*A is excused for the non-performance of the contract if it is caused by such neglect or refusal.*

## **CHAPTER V**

### **THIRD PARTY RIGHTS**

#### **Provision in contract for benefit of third party**

78. (1) Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Chapter, be enforceable or relied upon by that person as though he were a party to the contract.

(2) Subsection (1) does not apply to -

- (a) a provision in a contract designed for the purpose of resale price maintenance, that is to say, a provision whereby a party agrees to pay money or otherwise render some valuable consideration to a person who is not a party to the contract in the event of the first-mentioned party selling or otherwise disposing of any goods, the subject matter of the

contract, at prices lower than those determined by or under the contract;  
or

- (b) a provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto.

**Rights of third party not to be altered, etc., without his consent but subject to equities**

79. Where under the provisions of section 78 a person who is not a party to a contract is entitled to enforce or rely on a provision in the contract -

- (a) no variation or rescission of the contract shall prejudice that person's right to enforce or rely on the provision if he has acted to his prejudice in reliance thereon, unless he consents to the variation or rescission; and
- (b) subject to paragraph (a), any party against whom the provision is sought to be enforced or relied on shall be entitled to rely or plead by way of defence, set-off, counterclaim or otherwise any matter relating to the contract which he could have so relied on or pleaded if the provision were sought to be enforced or relied upon by the other party to the contract.

**Assignment of legal rights**

80. (1) Subject to any rule of law, and subject to any contrary intention appearing from any transaction giving rise to any legal rights, a person may, after the commencement of this Act, assign a legal right to another person as hereinafter specified.

(2) An assignment, whether given for consideration or not, of a vested legal right, transfers the full right and interest therein to the assignee and extinguishes the right and interest therein of the assignor if -

- (a) it is absolute and not by way of charge only; and
- (b) it is in writing and is signed by the assignor or his agent; and
- (c) written notice thereof is given to the debtor or other person against whom the right is enforceable.

(3) A purported assignment of a conditional right operates as a promise to assign if and when the condition occurs.

(4) An assignment, whether given for consideration or not, is valid notwithstanding that it does not comply with all or any of the requirements of subsection (2) but -

- (a) no right so assigned shall be enforced or relied upon against the debtor or other party against whom the right is enforceable unless the assignor is a party to any proceedings in which it is sought to be enforced or relied upon, or unless the Court is satisfied that it would be impossible or impracticable so to join the assignor; and
- (b) no such assignment shall prejudice the debtor or other person against whom the right is enforceable unless he has written notice thereof.

(5) Where there are two or more assignments in respect of the same debt or right, a later assignee shall have priority over an earlier assignee if the debtor or other person liable had not received written notice of the earlier assignment at the time when the later assignment was notified to him in writing.

(6) A debtor or other person against whom a right is enforceable is entitled as against any person to whom the debt or other right is assigned, to rely on or plead by way of defence, set-off, counterclaim or otherwise, any matter relating to the right which he could have so relied on or pleaded against the assignor at the time when he received written notice of the assignment.

## CHAPTER VI

### OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

#### **Claim for necessaries supplied to person incapable of contracting, or on his account**

81. If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

#### Illustrations

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

#### **Reimbursement of person paying money due by another in payment of which he is interested**

82. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

*Illustration*

*B holds land on a lease granted by A. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.*

**Obligation of person enjoying benefit of non-gratuitous act**

83. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person, understanding that there is an obligation to pay therefor, enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

*Illustrations*

(a) *A, a tradesman, leaves goods at B's house by mistake. B appreciating that the delivery has to be paid for, treats the goods as his own. He is bound to pay A for them.*

(b) *A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.*

**Responsibility of finder of goods**

84. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

**Liability of person to whom money is paid or thing delivered by mistake or under coercion**

85. A person to whom money has been paid or anything delivered by mistake or under coercion, must repay it or return it.

*Illustrations*

(a) *A and B jointly owe 100 dalasis to C. A alone pays the amount to C, and B, not knowing the fact, pays 100 dalasis over again to C. C is bound to repay the amount to B.*

(b) *A transport company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.*

## CHAPTER VII

### CONSEQUENCES OF BREACH OF CONTRACT

#### Compensation for loss or damage caused by breach of contract

86. (1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(2) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

(3) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

(4) If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract, the party entitled to that remedy shall, subject to the provisions of section 87, be entitled to enforce it upon the occurrence of the misrepresentation, repudiation or breach of contract.

#### *Illustrations*

(a) *A contracts to sell and deliver 50 bags of salt to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 bags of salt of like quality at the time when the salt ought to have been delivered.*

(b) *A hires B's ship to go to Banjul, and there take on board, on the 1st of January, a cargo which A is to provide and to bring it to Accra, the freight to be paid when earned. B's ship does not go to Banjul, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.*

(c) A contracts to buy of B, at a stated price, 50 bags of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 600,000 dalasis, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a vehicle, contracts with B to take a load of cement to Georgetown, for the sale at that place, starting on a specified day. The boat owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cement at Georgetown is delayed beyond the time when it would have arrived if the vehicle had started according to the contract. After that date, and before the arrival of the vehicle, the price of cement falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cement at Georgetown at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the 1st of January, for a certain price. Freight rises, and, on the 1st of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the 1st of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 600 dalasis a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 500 dalasis a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds

*the contract. C must pay to A 100,000 dalasis, being the profit which A would have made by the performance of his contract with B.*

*(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.*

*(l) A, a builder, contracts to erect and finish a house by the 1st of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the 1st of January, it falls down and has to be rebuilt by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.*

*(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.*

*(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.*

*(o) A contracts to deliver 50 bags of rice to B on the 1st of January, at a certain price. B afterwards, before the 1st of January, contracts to sell the rice to C at a price higher than the market price of the 1st of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the 1st of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.*

*(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.*

*(q) A contracts to sell and deliver to B, on the first of January, a certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that*

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*year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.*

*(r) A, an air-charter operator, contracts with B to convey him from Banjul to Lagos in A's plane, starting on the 1st of January, and B pays to A, by way of deposit, one-half of his passage-money. The plane does not fly on the 1st of January, and B, after being in consequence detained in Banjul for some time, and thereby put to some expense, proceeds to Lagos on another plane, and, in consequence, arriving too late in Lagos, loses a sum of money. A is liable to repay B his deposit, with interest, and the expense to which he is put by his detention in Banjul, and the excess, if any, of the passage-money paid for the second plane over that agreed upon for the 1st, but not the sum of money which B lost by arriving in Lagos too late.*

### **Compensation for breach of contract where penalty stipulated for**

87. (1) When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

(2) A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

(3) When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

(4) A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

### *Illustrations*

*(a) A contracts with B to pay B 1000 dalasis if A fails to pay B 500 dalasis on a given day. A fails to pay B 500 dalasis on that day. B is entitled to recover from A such compensation, not exceeding 1,000 dalasis, as the Court considers reasonable.*

*(b) A contracts with B that, if A practises as a surgeon within Banjul, he will pay B 50,000 dalasis. A practises as a surgeon in Banjul. B is entitled to such compensation, not exceeding 50,000 dalasis, as the Court considers reasonable.*

(c) *A gives a recognizance binding him in a penalty of 5000 dalasis to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.*

(d) *A gives B a bond for the repayment of 1000 dalasis with interest at 12 per cent at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.*

(e) *A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 bags of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 bags. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach*

(f) *A undertakes to repay B a loan of 1000 dalasis by five equal monthly instalments with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.*

(g) *A borrows 100 dalasis from B and gives him a bond for 200 dalasis payable by five yearly instalments of 40 dalasis, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.*

#### **Party rightfully rescinding contract entitled to compensation**

88. A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

#### *Illustration*

*A, a singer, contracts with B, the manager of a hotel, to sing at his hotel for two nights in every week during the next two months, and B engages to pay her 500 dalasis for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.*

#### **Alternative remedies in contract**

89. (1) A party who is entitled to damages for a breach of contract may, in the discretion of the Court, be granted any of the following remedies -

- (a) specific performance of the contract; or
- (b) an injunction.

(2) The Court may not grant the remedy of specific performance or injunction where damages are an adequate remedy for the breach complained of. Nor will the Court enforce specific performance of a contract which is not certain, fair or just.

(3) The Court may on the application of a party grant in appropriate circumstances a rescission of the contract or such other remedy, and on such terms, as the Court deems fit.

## CHAPTER VIII

### OF INDEMNITY AND GUARANTEE

#### **"Contract of indemnity" defined**

90. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

#### *Illustration*

*A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 dalasis. This is a contract of indemnity.*

#### **Rights of indemnity-holder when sued**

91. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor -

- (a) all damages which he may be compelled to pay in any action in respect of any matter to which the promise to indemnify applies;
- (b) all costs which he may be compelled to pay in any such action if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the action;
- (c) all sums which he may have paid under the terms of any compromise of any such action, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the action.

## **"Contract of guarantee", "surety", "principal debtor" and "creditor"**

92. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor"; and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

### **Consideration for guarantee**

93. Anything done, or any promise made, for the benefit of the principal debtor may be sufficient consideration to the surety for giving the guarantee.

#### *Illustrations*

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

### **Surety's liability.**

94. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

#### *Illustration*

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

### **"Continuing guarantee"**

95. A guarantee which extends to a series of transactions is called a "continuing guarantee".

### *Illustrations*

(a) *A, in consideration that B will employ C in collecting the rent of B's tenants, promises B to be responsible, to the amount of 5,000 dalasis, for the due collection and payment by C of those rents. This is a continuing guarantee.*

(b) *A guarantees payment to B, a trader, to the amount of £100, for any goods he may from time to time supply to C. B supplies C with goods to above the value of £100, and C pays B for it. Afterwards B supplies C with goods to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.*

(c) *A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.*

### **Revocation of continuing guarantee**

96. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

### *Illustrations*

(a) *A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 dalasis. B discounts bills for C to the extent of 2,000 dalasis. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 dalasis, on default of C.*

(b) *A guarantees to B, to the extent of 10,000 dalasis, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.*

### **Revocation of continuing guarantee by surety's death**

97. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

### **Liability of two persons primarily liable, not affected by arrangement between them that one shall be surety on other's default**

98. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third

person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

#### *Illustration*

*A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.*

#### **Discharge of surety by variance in terms of contract**

99. Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

#### *Illustrations*

(a) *A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.*

(b) *A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.*

(c) *C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming a surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.*

(d) *A gives to C a continuing guarantee to the extent of 3,000 dalasis for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.*

(e) *C contracts to lend B 5,000 dalasis on 1st March. A guarantees repayment. C pays the 5,000 dalasis to B on 1st January. A is discharged from his liability, as the contract has been varied inasmuch as C might sue B for the money before 1st March.*

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### **Discharge of surety by release or discharge of principal debtor**

100. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

#### *Illustration*

(a) *A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors, including C, to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.*

(b) *A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.*

(c) *A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.*

### **Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor**

101. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety unless the surety assents to such contract.

### **Surety not discharged when agreement made with third person to give time to principal debtor**

102. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

#### *Illustration*

*C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.*

### **Creditor's forbearance to sue does not discharge surety**

103. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

#### *Illustration*

*B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.*

### **Release of one co-surety does not discharge others**

104. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

### **Discharge of surety by creditor's act or omission impairing surety's eventual remedy**

105. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

#### *Illustrations*

(a) *B contracts to build a boat for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.*

(b) *C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.*

(c) *A arranges for M to be an apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash accounts. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.*

### **Rights of surety on payment or performance**

106. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

### **Surety's right to benefit of creditor's securities**

107. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

#### *Illustrations*

(a) C advances to B, his tenant, 2,000 dalasis on the guarantee of A. C has also, a further security for the 2,000 dalasis by a pledge of B's furniture. C cancels the pledge. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

### **Guarantee obtained by misrepresentation invalid**

108. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

### **Guarantee obtained by concealment invalid**

109. Any guarantee which the creditor has obtained by means of keeping silent as to material circumstances is invalid.

#### *Illustrations*

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by C to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five dalasis per ton beyond the market price,

*such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.*

### **Guarantee on contract that creditor shall not act until co-surety joins**

110. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

### **Implied promise to indemnify surety**

111. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

#### *Illustrations*

(a) *B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.*

(b) *C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.*

(c) *A guarantees to C, to the extent of 2,000 dalasis, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 dalasis, but obtains from A payment of the sum of 2,000 dalasis in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.*

### **Co-sureties liable to contribute equally**

112. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

### *Illustrations*

(a) *A, B and C are sureties to D for the sum of 3,000 dalasis lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 dalasis each.*

(b) *A, B and C are sureties to D for the sum of 1,000 dalasis lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter. B to the extent of one-quarter and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 dalasis, B 250 dalasis, and C 500 dalasis.*

### **Liability of co-sureties bound in different sums**

113. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

### *Illustrations*

(a) *A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 dalasis, B in that of 20,000 dalasis, C in that of 40,000 dalasis, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 dalasis. A, B and C are each liable to pay 10,000 dalasis.*

(b) *A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 dalasis, B in that of 20,000 dalasis, C in that of 40,000 dalasis, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 dalasis. A is liable to pay 10,000 dalasis, and B and C 15,000 dalasis each.*

(c) *A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 dalasis, B in that of 20,000 dalasis, C in that of 40,000 dalasis, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 dalasis. A, B and C have each to pay the full penalty of his bond.*

## **CHAPTER IX**

### **BAILMENT**

#### **"Bailment," "bailor," and "bailee" defined**

114. (1) A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise

disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

(2) If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

### **Delivery to bailee how made**

115. The delivery to the 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 them on his behalf.

### **Bailor's duty to disclose faults in goods bailed**

116. (1) The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if the bailor does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

(2) If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

### *Illustrations*

(a) *A lends a horse, which he knows to be vicious, to B. A does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.*

(b) *A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.*

### **Care to be taken by bailee**

117. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

### **Bailee when not liable for loss, etc., of thing bailed**

118. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 117.

### **Termination of bailment by bailee's act inconsistent with conditions**

119. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

#### *Illustration*

*A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.*

### **Liability of bailee making unauthorised use of goods bailed**

120. If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

#### *Illustrations*

*(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.*

*(b) A hires a horse in Banjul from B expressly to ride to Serakunda. A rides with due care, but the ride is to Brikama instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.*

### **Effect of mixture, with bailor's consent, of his goods with bailee's**

121. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

### **Effect of mixture, without bailor's consent, when the goods can be separated**

122. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

#### *Illustration*

*A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100*

*bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.*

### **Effect of mixture, without bailor's consent, when goods cannot be separated**

123. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

#### *Illustration*

*A bails a bag of special flour worth 50 dalasis to B. B, without A's consent, mixes the flour with country flour of his own, worth only 25 a bag. B must compensate A for the loss of his flour.*

### **Repayment by bailor of necessary expenses**

124. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

### **Restoration of goods lent gratuitously**

125. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit derived.

### **Return of goods bailed on expiration of time or accomplishment of purpose**

126. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

### **Bailee's responsibility when goods are not duly returned**

127. If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

### **Termination of gratuitous bailment by death**

128. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

### **Bailor entitled to increase or profit from goods bailed**

129. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to the directions of the bailor, any increase or profit which may have accrued from the goods bailed.

#### *Illustration*

*A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.*

### **Bailor's responsibility to bailee**

130. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

### **Bailment by several joint owners**

131. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

### **Bailee not responsible on re-delivery to bailor without title**

132. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

### **Right of third person claiming goods bailed**

133. If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

### **Right of finder of goods; may sue for specific reward offered**

134. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has

offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

#### **When finder of thing commonly on sale may sell it**

135. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it -

- (a) when the thing is in danger of perishing or of losing the greater part of its value;  
or
- (b) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

#### **Bailee's particular lien**

136. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

#### *Illustrations*

- (a) *A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.*
- (b) *A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.*

#### **General lien of bankers, factors, wharfingers, legal practitioners and policy-brokers**

137. Bankers, factors, wharfingers, legal practitioners and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

## *Bailment of Pledges*

### **"Pledge", "pawnor" and "pawnee" defined**

138. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

### **Pawnee's right of retainer**

139. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

### **Pawnee not to retain for debt or promise other than that for which goods pledged - Presumption in case of subsequent advances**

140. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

### **Pawnee's right as to extraordinary expenses incurred**

141. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

### **Pawnee's right where pawnor makes default**

142. (1) If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring an action against the pawnor upon the debt or promise and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

(2) If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

### **Defaulting pawnor's right to redeem**

143. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time

before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

#### **Pledge by mercantile agent**

144. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has no authority to pledge.

#### **Pledge by person in possession under voidable contract**

145. When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 20, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a right to retain to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

#### **Pledge where pawnor has only a limited interest**

146. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

#### *Suits by Bailees or Bailors against Wrong-doers*

#### **Suit by bailor or bailee against wrong-doer**

147. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any damage, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring an action against a third person for such deprivation or damage.

#### **Apportionment of relief or compensation obtained by such actions**

148. Whatever is obtained by way of relief or compensation in any such action shall, as between the bailor and the bailee, be dealt with according to their respective interests.

## CHAPTER X

### AGENCY

#### *Appointment and Authority of Agents*

#### **"Agent" and "principal" defined**

149. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

#### **Who may employ agent**

150. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

#### **Who may be an agent**

151. As between the principal and the third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

#### **Consideration not necessary**

152. No consideration is necessary to create an agency.

#### **Agent's authority may be express or implied**

153. The authority of an agent may be express or implied.

#### **Definition of express and implied authority**

154. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be taken as circumstances of the case.

#### *Illustration*

*A owns a shop in Serakunda, living himself in Brikama, and visiting the shop occasionally. The shop is managed by B, who is in the habit of ordering goods from C in the name of A for the*

*purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.*

### **Extent of agent's authority**

155. (1) An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act; and an agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

#### *Illustrations*

(a) *A is employed by B, residing in London, to recover at Banjul a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.*

(b) *A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.*

### **Agent's authority in an emergency**

156. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss, as would be done by a person of ordinary prudence in his own case under similar circumstances.

#### *Illustrations*

(a) *An agent for the sale of goods may have such goods repaired if it be necessary.*

(b) *A consigns provisions to B in Banjul, with directions to send them immediately to C at Bansang. B may sell the provisions in Banjul, if they will not bear the journey to Bansang without being spoiled.*

#### *Sub-Agents*

### **When agent cannot delegate**

157. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

### **"Sub-agent" defined**

158. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

### **Representation of principal by sub-agent properly appointed and responsibilities of agent and sub-agent**

159. (1) Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for the sub-agent's acts, as if the sub-agent were an agent originally appointed by the principal.

(2) The agent is responsible to the principal for the acts of the sub-agent.

(3) The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

### **Agent's responsibility for sub-agent appointed without authority**

160. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons, and the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

### **Relation between principal and person duly appointed by agent to act in business of agency**

161. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

#### *Illustrations*

(a) *A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.*

(b) *A authorizes B, a merchant in Banjul, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.*

### **Agent's duty in naming such person**

162. In selecting such person to act for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the person so selected.

#### *Illustrations*

(a) *A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.*

(b) *A consigns goods to B, a merchant, for sale. B in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.*

#### *Ratification*

### **Right of person as to acts done for him without his authority; effect of ratification**

163. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

### **Ratification may be express or implied**

164. Ratification may be express or may be implied in the conduct of the person on whose behalf the acts are done.

#### *Illustrations*

(a) *A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.*

(b) *A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.*

### **Knowledge requisite for valid ratification**

165. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

### **Effect of ratifying unauthorized act forming part of a transaction**

166. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

### **Ratification of unauthorized act not to injure third person**

167. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

#### *Illustrations*

(a) *A, not being authorized thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.*

(b) *A holds a lease from B, terminable on three month's notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.*

#### *Revocation of Authority*

### **Termination of agency**

168. An agency is terminated by -

- (a) the principal revoking his authority; or
- (b) the agent renouncing the business of the agency; or
- (c) the business of the agency being completed; or
- (d) either the principal or agent dying or becoming of unsound mind; or
- (e) the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

### **Termination of agency where agent has an interest in subject-matter**

169. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

### *Illustrations*

(a) *A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.*

(b) *A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.*

### **When principal may revoke agent's authority**

170. The principal may, save as is otherwise provided by section 164, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

### **Revocation where authority has been partly exercised**

171. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

### *Illustrations*

(a) *A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.*

(b) *A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.*

### **Compensation for revocation by principal or renunciation by agent**

172. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

### **Notice of revocation or renunciation**

173. Reasonable notice must be given of such revocation or renunciation: otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

## **Revocation and renunciation may be express or implied**

174. Revocation and renunciation may be express or may be implied in the conduct of the principal or agent respectively.

### *Illustration*

*A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.*

## **When termination of agent's authority takes effect as to agent, and as to third persons**

175. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

### *Illustrations*

(a) *A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 1,000 dalasis. The sale is binding on A, and B is entitled to fifty dalasis as his commission.*

(b) *A, at Brikama, by letter, directs B to sell for him some cotton lying in a warehouse in Banjul, and afterwards, by letter, revokes his authority to sell, and directs B to send his cotton to Brikama. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.*

(c) *A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.*

## **Agent's duty on termination of agency by principal's death or insanity**

176. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

## **Termination of sub-agent's authority**

177. The termination of the authority of an agent causes the termination, subject to the rules herein contained regarding the termination of an agent's authority, of the authority of all sub-agents appointed by him.

## *Agent's Duty to Principal*

### **Agent's duty in conducting principal's business**

178. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

#### *Illustrations*

(a) *A, an agent engaged in carrying on for B a business in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.*

(b) *B, a broker, in whose business it is not the custom to sell on credit, sells the goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.*

### **Skill and diligence required from agent**

179. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

#### *Illustrations*

(a) *A, a merchant in Banjul, has an agent, B, in London: to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate of exchange, and for any further direct loss - as e.g., by variation of the rate of exchange - but not further.*

(b) *A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.*

(c) *A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.*

(d) *A, a merchant in England, directs B, his agent at Banjul, who accepts the agency, to send him 1,000 bags of groundnuts by a certain ship. B, having it in his power to send the groundnuts, omits to do so. The ship arrives safely in England. Soon after her arrival the price of groundnuts rises. B is bound to make good to A the profit which he might have made by the 1,000 bags of groundnuts at the time the ship arrived, but not any profit he might have made by the subsequent rise.*

### **Agent's accounts**

180. An agent is bound to render proper accounts to his principal on demand.

### **Agent's duty to communicate with principal**

181. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

### **Right of principal when agent deals, on his own account, in business of agency without principal's consent**

182. If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

### *Illustrations*

(a) *A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.*

(b) *A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.*

### **Principal's right to benefit gained by agent dealing on his own account in business of agency**

183. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

#### *Illustration*

*A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.*

### **Agent's right of retainer out of the sums received on principal's account**

184. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

### **Agent's duty to pay sums received for principal**

185. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

### **When agent's remuneration becomes due**

186. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

### **Agent not entitled to remuneration for business misconducted**

187. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

#### *Illustrations*

(a) *A employs B to recover 100,000 dalasis from C, and to lay it out on good security. B recovers the 100,000 dalasis and lays out 90,000 dalasis on good security, but lays out 10,000 dalasis on security which he ought to have known to be bad, whereby A loses 2,000 dalasis. B is entitled to remuneration for recovering the 100,000 dalasis and for investing the 90,000*

*dalasis. He is not entitled to any remuneration for investing the 10,000 dalasis, and he must make good the 2,000 dalasis to B.*

*(b) A employs B to recover 1,000 dalasis from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.*

### **Agent's lien on principal's property**

188. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

#### *Principal's Duty to Agent*

### **Agent to be indemnified against consequences of lawful acts**

189. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

#### *Illustrations*

*(a) B, in Freetown, under instructions from A in Banjul, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the action, and A authorizes him to defend the action. B defends the action, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.*

*(b) B, a broker in Banjul, by the orders of A, a merchant there contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.*

### **Agent to be indemnified against consequences of acts done in good faith**

190. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

#### *Illustrations*

*(a) A, a decree-holder entitled to execution of B's goods, requires the Bailiff to seize certain goods, representing them to be the goods of B. The Bailiff seizes the goods, and is sued by C,*

*the true owner of the goods. A is liable to indemnify the Bailiff for the sum which he is compelled to pay to C, in consequence of obeying A's directions*

*(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and the costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.*

### **Non-liability of employer of agent to do a criminal act**

191. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

#### *Illustrations*

*(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.*

*(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.*

### **Compensation to agent for injury caused by principal's neglect**

192. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

#### *Illustration*

*A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.*

### *Effect of Agency on Contract with Third Persons*

### **Enforcement and consequences of agent's contracts**

193. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

### *Illustrations*

(a) *A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.*

(b) *A, being B's agent with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.*

### **How far principal bound when agent exceeds authority**

194. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

### *Illustration*

*A, being the owner of a ship and cargo, authorizes B to procure an insurance for 4,000 dalasis on the ship. B procures a policy for 4,000 dalasis on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.*

### **Principal not bound when excess of agent's authority is not separable**

195. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

### *Illustration*

*A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 dalasis. A may repudiate the whole transaction.*

### **Consequences of notice given to agent**

196. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

### *Illustrations*

(a) *A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.*

(b) *A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.*

### **Agent cannot personally enforce, nor be bound by, contracts on behalf of principal, and presumptions of agreement to contrary**

197. (1) In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

(2) Such a contract shall be presumed to exist in the following cases -

- (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; or
- (b) where the agent does not disclose the name of his principal; or
- (c) where the principal, though disclosed, cannot be sued.

### **Rights of parties to a contract made by agent not disclosed**

198. (1) If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

(2) If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

### **Performance of contract with agent supposed to be principal**

199. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

#### *Illustration*

*A, who owes 500 dalasis to B, sells 1,000 dalasis' worth of rice to B. A is acting as agent for C in this transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.*

### **Right of person dealing with agent personally liable**

200. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

#### *Illustration*

*A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.*

### **Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable**

201. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal, as the case may be, on the contract.

### **Liability of pretended agent**

202. A person who falsely represents himself to be the authorized agent of another, and thereby induces a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the third person in respect of any loss or damage which that person incurs by so dealing with him.

### **Person falsely contracting as agent not entitled to performance**

203. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

### **Liability of principal inducing belief that agent's unauthorized acts were authorized**

204. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

#### *Illustrations*

(a) *A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.*

(b) *A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.*

### **Effect on agreement of misrepresentation or fraud by agent**

205. A misrepresentation made, or fraud committed, by an agent acting in the course of his business for his principal, has the same effect on an agreement made by such agent as if such misrepresentation or fraud had been made or committed by the principal; but a misrepresentation made, or fraud committed, by an agent, in a matter which does not fall within his authority, does not affect his principal.

#### *Illustrations*

(a) *A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.*

(b) *A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.*

## **CHAPTER XI**

### **MISCELLANEOUS**

#### **Saving of the rules of Common Law and the repeal of statutes of general application relating to contract**

206. (1) The rules of common law, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to, and supplement the rules herein provided on, contracts.

(2) Enactments of the United Kingdom Parliament, and in particular the statutes of general application regulating or relating to the principles of simple contract in force in England which were adopted by The Gambia by virtue of section 119 of the Constitution and section 2 of the Law of England (Application) Act [Cap:5] are hereby repealed.

**EXPLANATORY NOTES ON THE SALE OF GOODS  
(AMENDMENT) BILL, 1994**

**A. The Existing Legal Regulatory Regime**

The Sale of Goods Act (Cap. 89:01) is nearing forty years of operation since it was enacted in 1955. Although its provisions have not been adequately tested, that is to say, the worth of the Act has not been reflected through Gambian case law, or within the context of a marginal commercial transaction trend, our research has shown that generally the Act is sound. However, some of its provisions have been overtaken by developments in the business transaction industry which, as a result, necessitates a revision of some of those provisions to accommodate such developments.

Sales law, it should be noted, is merely a specialised aspect of the law of contract. Thus if the basic contract rules fail to keep abreast of changing needs in the commercial arena, the quality of the sales law will also be affected. Therefore the enactment of the proposed contract legislation should be viewed as a complement to this sphere of business transactions.

As most of the provisions of Cap. 89:01 are still germane to the law of sale of goods but there is the need to modernise and update the Act in certain respects, the question arises as to the most suitable form to adopt in this regard. There would appear to be two major alternatives:

- (1) to retain the essential structure and conceptual framework of the Sale of Goods Act and to amend the Act where necessary; or
- (2) to revise the Sale of Goods Act by drafting an entirely new Act.

So far as the first approach is concerned, amendment of the existing Act might facilitate continuing uniformity of the sales law of the Commonwealth countries and, further, might enable The Gambia to retain the benefit of the substantial body of jurisprudence that has accumulated to date. The uniformity of purpose in this respect would accord well with the adoption of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

Adopting the second approach might give the impression of major substantial changes in the Act, which in fact would not be the case. A complete revision would have the advantage of providing a single piece of legislation embodied in one document without any of the technicalities which abound an amendment legislation. However, we consider such an approach to be desirable in the case of a short simple piece of legislation; the size of the Sale of Goods Act militates against this approach. Hence our preference is for the first approach to assure the business community of continuity in this area of the law.

## **B. The Provisions of the Sale of Goods (Amendment) Bill, 1994**

**Clause 1** deals with the citation of the Act.

**Clause 2** - This clause amends section 9 of Cap. 89:01 in order to introduce certainty and clarity into the law as regards the price. The much argued provision which allows the fixing of the price "in manner hereby agreed" has been deleted and a new provision introduced in subsection (2) enabling the parties to enter into a contract of sale despite the absence of a settlement as to the price. This is more in keeping with the realities of modern business. Subsections (3) and (4) merely provide an answer where the parties fail to determine the price. Subsection (5) provides that where the parties have no intention to be bound before the price is fixed, then there is no contract. The provision further defines the relationship between the parties where goods have been delivered.

**Clause 3** - This clause amends section 11 of Cap. 89:01 by providing that time is of the essence in a contract of sale. The parties are, however, free to provide otherwise in their contract agreement. The provision thus achieves greater harmony with section 28.

**Clause 4** - This clause amends section 15 of Cap. 89:01 in several respects. The expression "quality of goods" is defined in section 2 as including their state or condition. However, this definition throws little light on the meaning of the term "merchantable". The meaning of merchantability was subjected to close scrutiny by the House of Lords in *Henry Kendall & Sons v. William Lillico & Sons Ltd.* [1969] 2 A.C. 31 (HL), and a majority of the Law Lords supported, with or without modification, a test put forward by Dixon, J., in *Australian Knitting Mills Ltd. v. Grant* (1933) 5 C.L.R. 387 (HC). The test was to the following effect:

"The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects existed, and not being limited to their apparent condition would buy them without abatement of the price ... and without special terms".

The English and Scottish Law Commissions adopted an amplified version of Dixon, J.'s test which they subsequently abandoned in favour of the definition of merchantable quality that now appears in section 62(1A) of the UK Sale of Goods Act in the following terms:

"62.(1A) Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other

relevant circumstances; and any reference in this Act to merchantable goods shall be construed accordingly."

Thus we are of the opinion that the Bill should adopt a definition of "merchantable quality" based on section 62(1A) of the UK Act, with the additional reference to the quality and condition of the goods. Such addition makes it clear that merchantable quality is not restricted to the functional or use value of the goods.

The amendment of section 15 further provides that the implied warranty of merchantability applies to used, as well as to new, goods. This does not, of course, mean that a buyer of used goods from a businessman is entitled to expect goods in as merchantable a condition as new goods of the same type could be expected to be; how much he can reasonably expect will depend on "all ... relevant circumstances".

Further provision as to merchantability is made relating to fungible goods, the quality and quantity of goods, the adequate containing, packaging and labelling of goods, the conforming of goods to representations or promises made and the fact that the goods will remain fit or perform satisfactorily for a reasonable length of time. Included in the definition of "merchantable quality" is a new warranty of spare parts and repair facilities. The reason for this provision is that, given the fact that complex durable products require spare parts and repairs during their lifetime, the availability of spare parts and repair facilities does seem to us to come within the expanded concept of a modern warranty of merchantability. However, the seller will be free to modify, or even to disclaim entirely, this aspect of merchantability. Moreover, as with all other aspects of merchantability, the implication is only a relative one, and it may be rebutted by the surrounding circumstances as demonstrated by the phrase "unless the circumstances indicate otherwise".

It should be noted, however, that certain exceptions exist to the implied warranty of merchantable quality and these are provided in section 15(3) as amended.

In effect, the amendment of section 15 incorporates the following changes:

- (1) The condition of fitness is no longer confined to sales where the goods are "of a description that it is in the course of the seller's business to supply". It is sufficient that the goods are sold in the course of a seller's business.
- (2) The proviso involving the sale of goods under a patent or trade name has been deleted since it is not in tune with the expanded scope of modern sales law.
- (3) It is no longer necessary for the buyer to show that he relied on the seller's skill and judgment. Instead, the condition of fitness will be implied unless the circumstances are such as to show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.

- (4) The revised section brings the statutory language into alignment with the case law [*Grant v. Australian Knitting Mills Ltd.* [1936] A.C. 85 (P.C.)], and makes it clear that the "particular purpose" covers a normal or usual purpose as well as a special or unusual purpose.

**Clause 5** - This clause amends section 22 of Cap. 89:01 to ensure that the owner of goods does not deny the authority of a person (not being owner thereof) to sell those goods if the owner fails to exercise reasonable care in entrusting the goods, and where the buyer, in exercising reasonable care, buys the goods in good faith and for value without notice of any defect in the title. This is aimed at preventing the owner from benefitting from his own carelessness or lack of exercise of reasonable care in entrusting his goods.

**Clause 6** - This clause amends section 23 of Cap. 89:01. It should be noted that the essence of section 23 is comprised in subsection (1) of the amendment. Subsection (2) of the amendment is new and it outlines the circumstances of voidable title.

**Clause 7** - This clause amends section 26 of Cap. 89:01 by repealing subsection (2) thereof, since that is a matter covered in the Interpretation Act (Cap. 4) in the same terms.

**Clause 8** - This clause amends section 43 of Cap. 89:01 by extending the rights of the seller who has parted with the possession of goods to resume possession while the goods are in course of transit. Thus the position now is not restricted to the buyer's insolvency; it also covers a situation where the buyer repudiates the contract or fails to effect a payment due before delivery or where the seller has, for any reason, a right to withhold or reclaim the goods.

**Clause 9** - This clause amends and expands the scope of section 57 of Cap. 89:01 by dealing with such issues as relate to the notification of an auction as being subject to a reserve or upset price, the position of the seller in a sale by auction and the buyer's rights. These provisions are a feature of modern sales law and are reflected in most Commonwealth legislation.

**Clause 10** - This clause, by amending section 58 of Cap. 89:01, applies to The Gambia the international instruments relative to the sale of goods. Thus while only the United Nations Convention on Contracts for the International Sale of Goods, 1980 is adopted in the Schedule, the Minister is empowered under subsection (5) of the amendment to amend the Schedule and add thereto any international instrument germane to the sale of goods. It should, however, be noted that the Schedule applies only to international contracts of sale as provided in Article 1 thereof; all other contracts of sale would still be governed by the other provisions of the Act. In order to attain the requisite uniformity in the application of international rules of trade, subsection (4) of the amendment is considered relevant to give precedence to the Schedule in matters of international contracts of sale.

**Clause 11** - This clause amends section 59 of Cap. 89:01 by repealing subsections (1) and (2) thereof and replacing them with new subsections which broaden the scope of application of the rules of law and equity.

**Clause 12** - This clause amends the Schedule to Cap. 89:01 by repealing it and replacing it with a new Schedule which applies the United Nations Convention on Contracts for the International Sale of Goods (1980).

## SALE OF GOODS ACT (CAP. 89:01)

### 1. The Existing Regime

The Sale of Goods Act (Cap. 89:01) was enacted as Act No. 4 of 1955 and came into force on May 31, 1955. It has thus been on the statute books for some 38 years. It may be aptly described as a replica of the English Sale of Goods Act, 1893. In respect of the common law of contract, the English Sale of Goods legislation provides that unless inconsistent with the express provisions thereof, the rules of the common law (including the law merchant) and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, mistake or other invalidating cause, apply to contracts for the sale of goods. This English position is reflected verbatim in Section 59(1) of Cap. 89:01 and is apparent in the Schedule of Cap 89:01 read with Section 58 thereof.

The Schedule states as follows:

This Schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee. Enactments repealed-

<i>Session and Chapter...</i>	<i>Title of Act and Extent of Repeal.</i>
1 Jac. 1 c. 21.....	An Act against brokers. The whole Act.
29 Cha. 2 c. 3.....	An Act for the prevention of frauds and perjuries. In part: that is to say, sections fifteen and sixteen (Commonly cited as sections sixteen and seventeen)
9 Geo. 4 c. 14.....	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part: that is to say, section seven.
19 & 20 Vict. c. 97.....	The Mercantile Law Amendment Act, 1856. In part: that is to say, sections one and two.

What this means is that certain provisions of the enactments not repealed in the Schedule are still applicable to the law relating to the sale of goods in The Gambia!

The Act itself is basically divided into six Parts. It is described in the long title as an Act which declares the law relating to the sale of goods. Part I of the Act addresses the formation of the contract by defining a contract of sale of goods (noting also that Section 2 defines "contract of sale") and outlining the capacity of parties to make a contract of sale of goods. It also deals with

the formalities of the contract (how the contract of sale is made), the subject-matter of the contract (existing or future goods, goods that perish at the time of concluding the contract, and those that perish before sale but after conclusion of the agreement to sell), ascertaining the price on a contract, selling goods at a valuation, and conditions and warranties (stipulations as to time and when a condition may be treated as a warranty). Furthermore, Part I lists down the implied undertakings in a contract of sale (condition that seller has right to sell goods, warranty that buyer shall have and enjoy quiet possession of goods and warranty that goods will be free from encumbrance). Related to this subject, it also deals with the implied conditions in a sale of description, as regards the fitness of the goods for the particular purpose intended for the goods, and the contract for sale by sample.

Part II of the Act deals with the effect of the contract on property in unascertained and specific goods including rules for ascertaining the intention of parties as to time when property in goods passes to a buyer, reservation of right of disposal in a contract for the sale of specific goods, transfer of risk in property, sale of goods by person not entitled thereto and sale under a voidable title, re-vesting of property in stolen goods, retaining goods sold and the effect of writ of execution against goods.

Part III of the Act deals with the performance of the contract. The provisions thereunder essentially relate to the duties of the parties to a contract of sale, i.e. conditions relating to the delivery of goods and payment of the price and the rules which appertain thereto, consequences of delivery of wrong quantity or descriptions of goods, installment delivery of goods, delivery of goods to carrier, risk where goods are delivered at a distant place, buyer's right of examining the goods, when the buyer is considered to accept goods, and the lack of liability of the buyer to return goods rejected by him, and the liability of the buyer for neglecting or refusing to take delivery of goods.

Part IV of the Act defines an unpaid seller and his rights and lien on goods, the termination of the lien, when he may resume possession of goods in transit and the manner he can effect a stoppage in respect to those goods, and the effect of sub-sale or pledge by buyer *vis-a-vis* unpaid seller's right of lien or stoppage in respect of goods in transit.

Part V of the Act outlines the remedies available to the seller in a contract of sale of goods (action for price of the goods and damages for non-acceptance of goods by buyer) as well as the remedies available to the buyer (damages for non-delivery, specific performance, remedy for breach of warranty and right to interest and special damages).

Part VI of the Act deals with supplementary provisions relating to evidence, and repeal and savings, with respect to enactments and the common law rules respectively.

## **2. Library-based Research**

From our study of representative Sale of Goods Acts in the Commonwealth, it is fair to say that most deal broadly with

- (i) the nature and function of the contract;
- (ii) the duties of the seller; including undertakings as to title, quality, quantity and delivery of the goods;
- (iii) the duties of the buyer;
- (iv) transfer of property and title;
- (v) remedies of the buyer.

To that extent, the Sale of Goods Act of The Gambia is very much in character. It may be pertinent at this stage to examine some provisions of the Act in greater detail.

**PART I** - This Part of Cap. 89:01 deals essentially with the formation of the contract. Section 3 of the Act is still relevant and in fact the English Sale of Goods Act, 1979 (ESGA) has a provision in almost exactly the same terms, defining the nature of a contract of sale of goods and agreement to sell as between the seller and the buyer.

Sections 4 and 5 are standard provisions with which we are in general agreement. Section 6 deals with the subject-matter of the contract and touches on existing or future goods.

Sections 7 and 8 are considered to be in order.

Section 9 is almost in the same terms as Section 8 of the ESGA. The purport of the provisions is indeed the same. However, Section 9 is fraught with problems. In the first instance, the Section assumes that a contract has been concluded by the parties and then deals with the method by which the price can be ascertained. It is important to ascertain first whether a contract of sale has in fact been concluded by the parties. Any absence of an agreement regarding the price or its mode of payment could only be evidence of an inconclusive contract. In the second instance, it is a difficult question whether the parties can enter into a binding contract which stipulates the fixing of the price at a future date. Would the law recognise an agreement to agree in the absence of an arbitration clause designed to resolve any disagreement thereto subsequently? When Section 9 provides that the price can be "left to be fixed in manner hereby agreed", does this exclude the possibility that the "manner" may simply require the parties to agree on the price? One view is that the parties simply cannot make a binding contract for the sale of goods at prices "to be agreed", and that Section 9 does not apply to such a case, because under that Section the buyer would have to pay a reasonable price - that is to say, a price fixed by a judge (or arbitrator) which is not the same thing as a price agreed between the parties. The case of *May & Butcher v. The King* [1934] 2 KB 17 lends support to this view. The House of Lords held in this case 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, a contrary view is held in *Foley v. Classique Coaches Ltd.* [1934] 2 KB 1, where the Court of Appeal stated that an agreement to supply petrol "at a price to be agreed 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 under which a reasonable price could be fixed in the event of a disagreement.

According to P.S. Atiyah in his book *The Sale of Goods*, 8th Ed., a number of recent court decisions have reiterated the old (but not strictly accurate) learning that the law does not recognise 'an agreement to agree' as a binding contract. Thus the courts have refused recognition of a contract at a price "to be agreed" or on terms "to be negotiated", at any rate if there is no arbitration clause. See *King's Motors v. Lax (Oxford) Ltd.* [1970] 1 WLR 426 and *Courtney & Fairburn Ltd. v. Tolaini Bros (Hotels) Ltd.* [1975] 1 WLR 297.

Considering the uncertainty of case law in this regard, we are convinced that where parties demonstrate an intention to be bound by a contract concluded between themselves, legitimacy ought to be accorded to such intention, the non-stipulation of the price notwithstanding. The idea is to enable parties to freely conclude a contract rather than condition them to fix or agree on a price, for invariably the continuation of the price may depend on various commercial factors which may make it unrealistic to stipulate a price at the time of concluding the contract.

A reasonable price is certainly not the same as the price. In any case, if the present law is going to continue to allow parties to conclude a contract of sale even though the price is not settled, at what point in time would the price be determined? Would the "reasonable price" be a reasonable price at the time of concluding the contract or would the reference be at the time of delivery? Again, what is the yardstick by which the reasonable price would be determined - would it be the current market value or some other standard? Furthermore, who determines the reasonable price that the buyer must pay - the seller or the buyer himself?

We think that where the parties do not intend to be bound unless the price is fixed or agreed upon, then there should be no contract and that this should be specifically stated. If, however, the goods have been delivered from seller to buyer, then the buyer must return the same or, if he is unable to do so, pay their reasonable value at the time of delivery, and the seller must return any monies already paid to him by the buyer.

Section 10 should be treated within the context of the issues raised in respect to Section 9.

Section 11, it is argued, appears to have been overtaken by developments in case law, for the courts' attitude is that "in ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery" (*Hartley v. Hymans* [1920] 3 K.B. 475, 484; *Byrne Corpn. v. Tradex SA* [1981] 1 WLR 711; *Gill & Duffus SA v. Societe Pour L'Exportation des Sucres* 1 Lloyd's Rep. 322). Thus this Section (which is the same as Section 10 of the ESGA) is said to be at 'serious odds' with Sections 27 and 28 of the Act. However, P.S. Atiyah questions this argument thus:

"Although it is obviously the duty of the buyer to pay the price agreed at the appointed time, the effect of sect. 10 is to create a presumption that this duty is not a condition. In other words, a

buyer who fails to pay the price on the day fixed is guilty of a breach of contract for which the seller may be able to recover damages if he has in fact suffered any, but he is not entitled to treat the contract as repudiated and resell the goods elsewhere. Although this rule has been criticized on the ground that the seller can of course decline to deliver the goods until the buyer pays, and there seems no reason why the seller should be entitled to repudiate the contract merely because the buyer is late in paying the price, perhaps by only a day or two. Indeed, even repeated failure by the buyer to pay on time (for example, in an installment contract) may not justify repudiation by the seller, at least where there is no serious fear that the buyer will not pay at all. It can make little difference to the seller in the usual way whether he is paid one day earlier or later, and if it does make a difference he should stipulate for a right of immediate termination, or of resale on default in payment by the buyer. Moreover, damages may be obtained for the late payment where additional costs have been imposed on the seller..."

Thus, even though failure to pay the price at the appointed time is not *per se* a breach of condition, the belief was at one time held that if the delay was of inordinate length, it might be possible to infer an intention to abandon the contract, so that the seller could thus be justified in reselling even without notice [*Pearl Mill Co. Ltd. v. Ivy Tannery Co. Ltd.* [1919] 1 K.B.]. However, the case of *Allied Marine Transport Ltd. v. Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 2 All E.R. 796, 806-7, appears to have now established that such avenue is not a permissible result unless there is some ground on which the court can find that the buyer has repudiated the contract, and that the seller has accepted that repudiation.

The above arguments elicit at least two situations: In the first place, Section 28 of Cap. 89:01 makes "delivery of the goods and payment of the price" concurrent conditions of a contract of sale. The only exception to this rule is where the parties agree otherwise. In effect, if the seller delivers the goods at the time, place, and manner agreed, the buyer is obliged to pay the price at the same time. Thus payment of the price becomes a condition. The effect of Section 11(1) is to water down this condition by creating a presumption that the duty to pay the price at the time of delivery is not a condition. Hence the seeming conflict or inconsistency.

Secondly, Section 11(1) appears to provide the buyer the opportunity to obtain goods by credit, even if for a short period, in the sense that since the time of payment does not form a condition of the contract of sale he could elect to effect payment at his convenience. This could place the seller at a considerable disadvantage, despite his right "to bring an action for damages".

We see three possible ways out of the quagmire: Firstly, we could affirm Section 11 as it is relying on the arguments advanced thereto by P.S. Atiyah; or secondly, we could seek greater harmony between Section 11 and Sections 27 and 28 and thus remove the seeming conflict or

inconsistency therewith by providing that a stipulation as to time of payment is of the essence of a contract of sale, unless a different intention appears from the terms of the contract; or thirdly, we could provide that, subject to Section 28, the question as to whether or not a stipulation as to time of payment is of the essence of a contract of sale depends on the terms of the contract. Such a provision would leave it to the parties to adopt their own rule with respect to the importance of punctual delivery and payment for the purposes of their contract.

The second and third options remove the controversy surrounding the relationship between Section 11 and Section 27. We, however, recommend the adoption of the second option since it is more in line with the current jurisprudence and the fact that in The Gambia it would provide the innocent farmer/producer adequate security in realizing his price without resorting to litigation to that effect.

Section 11(2) should be repealed since it is a matter addressed in the Interpretation Act (Cap. 4).

Sections 12-14 are considered relevant and should be retained.

In our view, Section 15 needs complete revision as it is quite limited in scope. Paragraph (a) thereof is comprehensively dealt with in Section 14(3) of the ESGA which has been adopted in Australia. Paragraph (8) needs to be expanded by providing a definition for "merchantable quality". Such definition should take into account that goods, whether new or used, should be fit for the purpose for which such goods are commonly bought or used and the quality must correspond thereto. This may even extend to suggest that the goods should be such as would pass without objection in the trade, and should be properly contained, packaged, and labelled as the nature of the goods require and that they will remain fit, perform satisfactorily, and continue to be of such quality and condition as is reasonable. Furthermore, in the case of future goods these should be of fair average quality and where new goods are concerned then the spare parts necessary with respect to such goods should be available for a reasonable period of time. Provisions along these lines will address the anomalies created by the absence of consumer legislation in The Gambia and protect the average businessman against unfair trading.

Section 16 is in order.

**PART II** - This Part deals essentially with the effects of a contract of sale of goods. In our view, Sections 17 and 20 appear to be in order.

Sections 21 and 33 must be considered against the background of the absence of Frustrated Contracts legislation in The Gambia. While these provisions appear to be too restrictive in scope they are nevertheless couched in very broad terms. The risk element should be considered against the risk of ordinary deterioration, shrinkage, and the like with respect to goods in the course of transportation.

While Section 22 is acceptable, we would, however, suggest that the provision be expanded to preclude an owner from denying the authority to sell of the person in possession of the goods

where it can be evidenced that the owner failed to exercise reasonable care in entrusting his goods to such person and that the buyer has exercised reasonable care in buying the goods for value without notice of the defect in the title of the transferor or his lack of authority to sell.

Although the Act makes provision enabling either party to a sale of goods contract to avoid title which is voidable, we have extended the scope of Section 23 respecting a voidable title to include situations where the person transferring was deceived as to the identity of the buyer, or where the goods were delivered in exchange for a cheque that is later dishonored, or where the transfer was procured by fraud or entered into under a mistake.

In our view Sections 24-26 seem to be in order, except that in Section 26(2) the provision should either be repealed or brought into line with the provisions of the Sheriff's and Civil Process Act, 1972. We recommend a repeal of Section 26(2).

**PART III** - This Part generally deals with the performance of the contract for the sale of goods.

Section 27 introduces an ambiguous concept by reference to the "duty of the seller to delivery the goods". Generally it is not the duty of the seller to "deliver" the goods in the popular sense, but the duty of the buyer to take them. The duty cast on the seller under this Section could be that requiring him to deliver to the buyer goods in which the property has already passed, or to procure and supply to the buyer goods within the terms of the contract (without reference to any particular goods in respect of which the delivery attaches), or to place the seller under a personal duty to deliver specific goods even though the property there has not yet passed to the buyer. In effect these three possibilities are not mutually exclusive, but may be considered as three stages in the performance of the contract. Thus the duty to deliver may start by being unattached to any particular goods; it may then become so attached; and, finally, the property may pass. On the other hand, these three stages may be merged into one, as in the sale of specific goods, or two of them may be so merged, as where goods are appropriated to a contract fixing the duty to deliver and passing the property at the same time. However, considering the provisions of Section 29, the ambiguous concept introduced in Section 27 may be considered as being merely semantic and creates no uncertainty as such; the provision is merely descriptive of the transaction of goods between the seller and buyer. Section 28 is in order. Although Section 29 does not deal with the situation where the seller has two or more places of business or two or more places of residence, or alternatively where the seller has no place of business, but has two or more residences, we are of the view that delivery at any one of such places would satisfy the requirements of the Section.

Sections 30 to 47 are considered relevant and therefore should be retained.

**PART IV** - This Part addresses the rights of the unpaid seller against goods and is considered to be in order, and the reference to an "insolvent" would now fall to be defined within the context of the Insolvency Act, 1992.

Section 43 appears to us to be rather limited. As it is, it deals with only three situations which could warrant a seller to exercise his right of stoppage: Firstly, the seller must be an unpaid seller; secondly the buyer must be insolvent; and thirdly, the goods must be in course of transit. Consideration may be given to cases for the seller to exercise his right of stoppage where the buyer fails to make a payment due before delivery or repudiates the contract, or if for any other reason the seller has a right to withhold or reclaim the goods.

**PART V** - This Part deals with the actions for breach of contract for the sale of goods and the remedies available to both the seller and buyer. We are of the view that the whole of Part V is in order and should therefore be retained.

**PART VI** - This Part deals with supplementary provisions which we consider relevant. However, we will suggest that Section 57 (relating to auction sales) should be expanded to include reserve bids and the fact that a right to bid may be reserved by or on behalf of the seller. The ESGA makes provision to that effect.

We consider the Schedule archaic in form and outmoded in substance and it should therefore be repealed. Hence there will not be any need for Section 58.

The use or adoption of the "rules of the common law" raises certain difficulties of certainty. Does this mean that the equitable doctrines which affect contract would continue to be applied to buttress or supplement the provisions of Cap 89:01 so long as they are not inconsistent with the Act? Or does the specific reference to the "rules of the common law" exclude equitable doctrines? The "rules of the common law" could be viewed as a reference to the rules administered by the common law courts in England prior to the fusion of law and equity in England in 1873. An alternative view is that the expression could refer to the non-statutory rules, both legal and equitable, governing contracts. This issue, according to *Benjamin's Sale of Goods*, 2nd Edn., para. 7, has never been authoritatively determined in England. In order to remove any uncertainty in this respect, we recommend the amendment of Section 59 to accommodate the rules of equity in respect of sale of goods.

### **3. Report of Field Research**

In the case of the Field Research, the Sale of Goods Act did not feature prominently in discussions. There was general concern that the Sale of Goods Act needed to be modernized. We found no decided case through the courts which had tested the provisions of the Sale of Goods Act. However, certain deficiencies stood out glaringly. The English statute from which it essentially derived its ideas has undergone revolutionary reform to accommodate developments in the modern business industry.

### **4. Need for Legislative Reform**

Considering the fact that the Sale of Goods Act runs into 59 Sections and that most of its provisions are still germane to the law of sale of goods, we consider that an amendment to the

Act should suffice to satisfy the issues, comments, and concerns raised and we so recommend. This approach may be justified by the fact that the amendments required are minimal, thus providing an advantage through continuity of the present law as generally understood and applied, save for the minor amendments designed to keep the law abreast of modern developments in the sphere of sale of goods.

In some respects the modern law on the subject has advanced tremendously, thereby eliciting the shortcomings apparent in some of the provisions. The Gambia has no codified consumer legislation although certain matters relating to consumer law are scattered in various legislation. The trends in modern legislative change which discriminate between consumer and non-consumer transactions are yet to come to the fore of The Gambia commercial sector development. But there could be an increase of risk in commercial transactions without an established regulatory framework for adequate redress.

Any attempt at reform should be aimed at modernizing the law governing the sale of goods and at promoting fair dealing in commercial transactions. In a society like The Gambia it is important to focus attention on the need to embrace commercial practices through custom, usage, and the general agreement of parties engaged in day-to-day business with each other.

#### **5. Applicability of International Conventions**

It is important to note that commercial transactions have leaped beyond national boundaries and inter-state trade and trade at the international level are prevalent. In this respect reform should equally be geared towards achieving uniformity with the laws of other countries. This is particularly important in view of The Gambia's attempt at establishing a center for off-shore business in the country which will invariably mean an increase in the volume of trade in goods that will fall to be governed by the law of sale of goods.

To that end, we have considered the applicability of the main Conventions dealing with the Law of the Contracts of International Sale of Goods. These are:

1. ICC Incoterms 1980
2. United Nations Convention on the Limitation Period in the International Sale of Goods - New York, 14 June 1974
3. Protocol Amending the United Nations Convention on the Limitation Period in the International Sale of Goods - Vienna, 11 April 1980
4. United Nations Convention on Contracts for the International Sale of Goods (Vienna Sale Convention) - Vienna, 11 April 1980

5. UNCITRAL Liquidated Damages and Penalty Clauses - Uniform Rules on Contract Clauses for an Agreed Sum upon Failure of Performance - Vienna, 29 June 1983

We consider the United Nations Convention on contracts for the International Sale of Goods to be of paramount importance in the regime of international sale of goods. This Convention signed in Vienna on 11 April 1980, entered into force on January 1st, 1988 after the ratification of the United States of America. It brought to a terminal point a half-century of work preparing uniform law for the international sale of goods.

The Convention replaces the Hague Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1964 and The Hague Convention Relating to a Uniform Law on the International Sale of Goods which, because of defects, have not been widely accepted by the important trading States. The new Convention provides a balanced representation of all legal systems of the world.

The following States have signed, approved, ratified, or acceded to the Convention:

<i>State</i>	<i>Signature</i>	<i>Ratification Approved (A)</i>	<i>Accession</i>
Argentina			19 July 1983
Australia		17 March 1988	1 April 1989
Austria	11 April 1980		
Botswana		29 December 1987	
Chile	11 April 1980		
China	30 September 1981	11 December 1986 (A)	
Czechoslovakia	1 September 1981		
Denmark	26 May 1981		
Egypt			6 December 1982
Finland	26 May 1981	15 December 1987	
France	27 August 1981	6 August 1982	
German Democratic Republic	13 August 1981		
Germany, Federal Republic of	26 May 1981		
Ghana	11 April 1980		
Hungary	11 April 1980	16 June 1983	
Italy	30 September 1981	11 December 1986	
Lesotho	18 June 1981	18 June 1981	
Mexico			29 December 1987
Netherlands	29 May 1981		
Norway	26 May 1981		
Poland	28 September 1981		
Singapore	11 April 1980		
Sweden	26 May 1981	15 December 1987	
Syrian Arab Republic			19 October 1982
United States of America	31 August 1981	11 December 1986	
Venezuela	28 September 1981		
Yugoslavia	11 April 1980	27 March 1985	
Zambia			6 June 1986

The above list shows that The Gambia has not ratified nor acceded to the Convention. We recommend that The Gambia consider ratifying and acceding to this Convention, subject to what we say below about reservations to parts thereof.

Our researches show that the following States have deposited their declarations and reservations:

1. Upon signing the Convention the Governments of Denmark, Finland, Norway, and Sweden declared in accordance with Article 92(1) that they would not be bound by Part II of the Convention (Formation of the Contract).
2. Upon ratifying the Convention the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of Article 90 of the Convention.
3. Upon ratifying the Convention the Governments of Argentina and Hungary stated, in accordance with Articles 12 and 96 of the Convention, that any provision of Article 11, Article 29, or Part II of the Convention that allowed a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than writing, did not apply where any party had his place of business in their respective States.
4. Upon approving the Convention the Government of China declared that it did not consider itself bound by sub-paragraph (b) of Paragraph 1 of Article 1 and Article 11 as well as the provisions in the Convention relating to the content of Article 11.
5. Upon ratifying the Convention the United States of America declared that it would not be bound by sub-paragraph (1)(b) of Article 1.

The for reasons which we state below, we recommend that The Gambia might wish to consider entering reservations on Article 1 (1)(b) which states that the Convention applies to contracts of sale of goods between parties whose places of business are in different states "when the rules of private international law lead to the application of the law of a contracting state".

The principal impact of this provision on traders of a contracting state appears to be that the Convention would be applicable in a greater number of cases, but at the expense of the contracting state's domestic law. The provision also reintroduces the uncertainties of private international law (i.e. choice of law) which the CISG was designed to avoid.

This drawback seems to explain why some states have entered reservations against Article 1 (1)(b). Another reason which informs our recommendation is that under the Convention a reservation once entered may be withdrawn at a later date. However, if a state does not enter a reservation at the time of ratification, then it may not do so later.

We also wish to draw attention to Article 11 which states that "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other reservation as to form. It may be proved by any means, including witnesses". While some states have made reservations on this Article, we find it to be in perfect harmony with Section 5 of Cap. 89:01 which provides that "...a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties". We therefore see no need to advise reservation in respect to Article 11.

Part II of the Convention deals with formation of Contract. Since formation would have featured in the proposed Gambian Contracts Act, we recommend that The Gambia avoid the effect of Part II by invoking Article 92. Article 92 states:

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval, or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.
2. A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part III of this Convention is not to be considered a Contracting State within paragraph (1) of Article 1 of this Convention in respect of matters governed by the Part to which the declaration provides.

Alternatively, The Gambia could limit the effect of Part II to contracts of international sale of goods only.

Article 99 provides for the denunciations of the 1964 Hague Formation Convention and the 1964 Hague Sales Convention. Our researches do not establish that The Gambia ever acceded to those two Conventions. We need however to draw attention to Article 99 (2) which states:

When a State ratifies, accepts, approves, or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval, or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this Article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval, or accession.

In order to provide for the period of 12 months when the Convention shall not have become operational, we recommend that this Convention be annexed to the Sale of Goods Act as a Schedule thereto and that the Minister be empowered to bring that Schedule into force on a day appointed by him. In fixing that date, we expect that the Minister will have regard to the above Article.

Other Protocols:

There are 4 Protocols that we wish to draw attention to. Read side by side with the 1980 Convention, they provide a set of transnational customary rules of the new *lex mercatoria*. These are:

- i) 1980 ICC Incoterms
- ii) 1974 UN Convention on the Limitation Period in the International Sale of Goods, together with its 1980 Protocol,
- iii) 1980 Vienna Sale Convention, and
- iv) 1983 UNCITRAL Liquidated Damages and Penalty Clauses.

Between them, they constitute a substantial portion of the contractual rights and obligations in the process of international commercial transactions.

i) The 1980 ICC Incoterms

The terms represent a set of accepted unified interpretations of trade terms designed to eliminate friction in international trade as a result of uncertainties of varied interpretations. First published in 1936 after the approval by the Berlin Congress of the ICC in 1935, these notes have been amended on 4 occasions ending with the present set of terms.

ii) The 1974 UN Convention On The Limitation Period In The International Sale of Goods:

The Convention provides for a uniform limitation (prescription period) during which a party to an international sales transaction may exercise a claim arising out of that transaction.

The Convention entered into force on January 1st, 1988. The following States have signed, ratified, or acceded to the Convention:

<i>State</i>	<i>Signature</i>	<i>Ratification</i>	<i>Accession</i>
Argentina			9 October 1981
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Byelorussian SR	14 June 1974		
Costa Rica	30 August 1974		
Czechoslovakia	29 August 1975	26 May 1977	
Dominican Republic			23 December 1977
Egypt			6 December 1982
German Democratic Republic	14 June 1974		
Ghana	5 December 1974	7 October 1975	
Hungary	14 June 1974	16 June 1983	
Mexico		21 January 1988	
Mongolia	14 June 1974		
Nicaragua	13 May 1975		
Norway	11 December 1975	20 March 1980	
Poland	14 June 1974		
Ukrainian SSR	14 June 1974		
USSR	14 June 1974		
Yugoslavia			27 November 1978
Zambia			6 June 1986

iii) The 1980 Vienna Sale Convention:

The Protocol was adopted by the United Nations Conference on Contracts for the International Sale of Goods, in order to harmonize the Protocol with the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). The following States have acceded to the Protocol:

<i>State</i>	<i>Accession</i>	<i>Entry into force</i>
Argentina	19 July 1983	1 August 1988
Egypt	6 December 1982	1 August 1988
Hungary	16 June 1983	1 August 1988
Mexico	21 January 1988	1 August 1988
Zambia	6 June 1986	1 August 1988

In accordance with Article XI and XIV of the Protocol, the Contracting States to the Protocol are considered to be Contracting Parties to the Convention on the Limitation Periods in the International Sale of Goods as amended by the Protocol in relation to one another and Contracting Parties to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

iv) The UNCITRAL Liquidated Damages and Penalty Clauses:

These rules are supposed to apply to international contracts in which the parties have agreed that, upon a failure of performance by one party the other party is entitled to an agreed sum from the obligor, whether as a penalty or as compensation. While it is accepted that commercial contracts often contain clauses providing for the payment by a party of a specified sum of money as damages or as a penalty in the event of a failure of the party to perform its contractual obligations, the common law and civil law systems have very different approaches to the validity and application of these clauses.

UNCITRAL therefore adopted a text of uniform rules on this subject in 1983, with the title "Uniform Rules on Contract Clauses for an Agreed Sum Due Upon Failure of Performance". However, the UNCITRAL did not decide upon the form that the Uniform Rules should take, considering that, in view of the importance of this issue, such a decision might be taken by the Sixth Committee of the General Assembly.

Upon the recommendation of the Sixth Committee, the General Assembly recommended that States should give serious consideration to the Uniform Rules and, where appropriate, implement them in the form of either a model law or a convention. This action was taken by the General Assembly without prejudice to its making a further recommendation or taking further action with respect to the uniform rules if circumstances so warranted.

We recommend that the Minister be empowered to bring into force any or all of these Protocols when the Government of The Gambia deems that the time is ripe to do so.

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**SALE OF GOODS (AMENDMENT) BILL, 1994**

*Clause: Arrangement of Clauses*

1. Short title.
2. Section 9 amended.
3. Section 11 amended.
4. Section 15 amended.
5. Section 22 amended.
6. Section 23 amended.
7. Section 26 amended.
8. Section 43 amended.
9. Section 57 amended.
10. Section 58 amended.
11. Section 59 amended.
12. Schedule amended.

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**SALE OF GOODS (AMENDMENT) BILL, 1994**

**A BILL ENTITLED**

**An Act to amend the Sale of Goods Act (Cap. 89:01) and to make provision for matters connected therewith.**

**Enacted by the Parliament of The Gambia.**

Short title.

**1.** This Act may be cited as the Sale of Goods (Amendment) Act, 1994.

Section 9 amended.

**2.** The Sale of Goods Act (hereinafter referred to as "the Principal Act") is amended by repealing section 9 and replacing it with the following new section:

"Ascertainment of price.

**9.(1)** Where parties conclude a contract for the sale of goods, the price in the contract of sale may be fixed by the contract or determined by the course of dealing between the parties.

**(2)** If the parties so intend, they may conclude a contract of sale even though the price is not settled.

**(3)** Where the price is not determined in accordance with subsection (1), or where a contract is concluded in accordance with subsection (2), the buyer shall pay a reasonable price.

**(4)** The price under subsection (3) is a reasonable price, depending on the circumstances of each case, at the time of delivery if,

**(a)** nothing is said as to price; or

**(b)** the price is to be fixed in terms of some agreed market or other standard

as set or recorded by the parties themselves and it is not so set or recorded.

(5) Where the parties intend not to be bound unless the price is fixed or agreed upon and it is not fixed or agreed upon, there is no contract, and in such a case the buyer shall return any goods already received or, if he is unable so to do, he shall pay their reasonable value at the time of delivery and the seller shall return any part of the price paid on account."

Section 11 amended.

3. The principal Act is amended by repealing section 11 and replacing it with the following new section:

"Stipulation as to time.

11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are of the essence in a contract of sale."

Section 15 amended.

4. The Principal Act is amended by repealing section 15 and replacing it with the following new section:

"Implied warranty of merchantability and fitness.

15.(1) In this section, "merchantable quality" means,

(a) that the goods, whether new or used, are as fit for the one or more purposes for which goods of that kind are commonly bought and are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances;

(b) that the goods,

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- (i) are such as pass without objection in the trade under the contract description;
  - (ii) in the case of fungible goods, are of fair average quality within the description;
  - (iii) within the variations permitted by the agreement, are of even kind, quality and quantity within each unit and among all units involved;
  - (iv) are adequately contained, packaged and labelled as the nature of the goods or the agreement require;
  - (v) conform to the representations or promises made on the container or label or other material, if any, accompanying the goods; and
  - (vi) will remain fit or perform satisfactorily, as

the case may be,  
for a reasonable  
length of time  
having regard to  
a l l t h e  
circumstances;  
and

- (c) in the case of new goods, unless the circumstances indicate otherwise, that spare parts and repair facilities, if relevant, will be available for a reasonable period of time.

(2) Where the seller is a person who deals in goods of the kind supplied under the contract, there is an implied warranty that the goods are of merchantable quality.

(3) The implied warranty of merchantable quality does not apply,

- (a) as regards defects specifically drawn to the buyer's attention before the contract was made;
- (b) if the buyer examined the goods before the contract was made, with respect to any defect that such an examination ought to have revealed; or
- (c) in the case of a sale by sample or model, with respect to any defect that would have been apparent o n r e a s o n a b l e examination of the sample or model.

(4) Where the buyer, expressly or impliedly, makes known to the seller the particular purpose for which he is buying the goods and the seller deals in goods of that kind, there is an implied warranty that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are commonly supplied.

(5) The implied warranty mentioned in subsection (4) does not apply where the circumstances show that the buyer does not rely or that it is unreasonable for him to rely on the seller's skill or judgment."

Section 22  
amended.

5. The Principal Act is amended in section 22 by adding immediately after subsection (2) thereof the following new subsections:

"(3) Without limiting the generality of subsection (1) an owner is precluded from denying the authority to sell of the person in possession of the goods, where

- (a) he has failed to exercise reasonable care with respect to the entrustment of the goods; and
- (b) the buyer has exercised reasonable care in buying the goods and has received the goods in good faith, for value and without notice of the defect in the title of the transferor.

\*(4) If in an action between the owner and the buyer the court finds that both have failed to exercise reasonable care, the court may allocate the loss between them and make such other order with respect to the goods as is fair in the circumstances."

*\*[No recommendation is made concerning the enactment of this subsection. It is inserted here to draw attention to the issue and to stimulate discussion as to whether it is a necessary provision to be adopted in the draft Bill.]*

Section 23  
amended.

6. The Principal Act is amended by repealing section 23 and replacing it with the following new section:

"Effect of  
voidable title.

23.(1) A person with a voidable title has power to transfer a good title to a buyer who receives the goods in good faith, for value, and without notice of the defect in the title of the transferor.

(2) A person is deemed to have a voidable title even if:

- (a) the transferor was deceived as to the identity of the buyer;
- (b) the goods were delivered in exchange for a cheque that is later dishonoured;
- (c) it was agreed that the transaction was to be a cash sale;
- (d) the transfer of title was procured by fraud; or
- (e) the transaction was entered into under a mistake of such a character as to render the agreement void at common law."

Section 26  
amended.

7. The Principal Act is amended in section 26 by

- (a) deleting the figure (1) in parenthesis immediately after section 26; and
- (b) repealing subsection (2) thereof.

Section 43  
amended.

8. The Principal Act is amended by repealing section 43 and replacing it with the following new section:

"Right of stoppage  
*in transitu*.

43. Subject to the provisions of this Act,

(a) where the buyer of goods becomes insolvent or repudiates the contract or fails to make a payment due before delivery, or

(b) where, for any other reason, the seller has a right to withhold or reclaim the goods,

the seller who has parted with the possession of the goods has the right of stopping them *in transitu* by resuming possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price."

Section 57  
amended.

9. The Principal Act is amended in section 57 by deleting the words "In the case of a sale by auction" in the opening paragraph, and adding immediately after subsection (2) thereof the following new subsections:

"(3) A sale of auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved by or on behalf of the seller.

(4) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, the seller shall not bid or employ a person to bid at the sale, and the auctioneer shall not knowingly take a bid from the seller or any such person.

(5) A sale which contravenes subsection (4) may be treated as fraudulent by the buyer, and he may

(a) avoid the sale and recover damages;

(b) affirm the sale and recover damages;  
or

(c) claim an abatement in the price.

(6) Where, in respect of a sale by auction, a right to bid is expressly reserved (but not otherwise) the seller, or any one person on his behalf, may bid at the auction."

Section 58  
amended.

10. The Principal Act is amended by repealing section 58 and replacing it with the following new section:

"Application of  
international  
instruments.  
  
Schedule.

58.(1) Subject to subsection (2), the United Nations Convention on Contracts for the International Sale of Goods, 1980 contained in the Schedule shall apply to The Gambia in respect of contracts for sale of goods, on such day as the Minister may, by Order published in the *Gazette*, appoint, not being earlier than twelve months from the date of the coming into force of this Act.

(2) The provisions of the Schedule apply only to international contracts of sale in accordance with Article 1 thereof.

(3) The following provisions of the Schedule shall not apply to The Gambia:

(a) Article 1(1)(b); and

(b) the whole of Part II.

(4) Where a provision of the Schedule conflicts or is inconsistent with a provision of this Act, the provision of the Schedule takes precedence.

(5) The Minister may, by Order published in the *Gazette*, amend the Schedule by adding thereto any international Convention,

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Protocol or similar document which is relative to the sale of goods."

Section 59 amended.

**11.** The Principal Act is amended in section 59 by repealing subsections (1) and (2) thereof and replacing them with the following new subsections:

"(1) Unless inconsistent with this Act, the principles of law and equity, including the law merchant and the law of principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, insolvency, or other validating or invalidating cause, apply to contracts for the sale of goods.

(2) Nothing in this Act affects

Cap. 89:02.

(a) the provisions of the Bills of Sale Act;

(b) the rights of a holder in due course of a bill, note or cheque within the meaning of the Bills of Exchange Act, 1994; and

(c) an enactment relating to the sale of goods which is not expressly repealed by this Act."

Schedule amended.

**12.** The Principal Act is amended by repealing the Schedule and replacing it with the following new Schedule:

**SCHEDULE**

**United Nations Convention on Contracts for the International Sale of Goods (1980)**

**THE STATES PARTIES TO THIS CONVENTION,**

**BEARING IN MIND** the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

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CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

## PART I

### SPHERE OF APPLICATION AND GENERAL PROVISIONS

#### Chapter I

#### SPHERE OF APPLICATION

##### Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

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Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
  - (b) the effect which the contract may have on the property in the goods sold.
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Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Chapter II

GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices

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which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

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Article 13

For the purposes of this Convention "writing" includes telegram and telex.

PART II

FORMATION OF THE CONTRACT

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

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Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time

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of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Articles 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

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Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III

SALE OF GOODS

Chapter I

GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party

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in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II

OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

*Section I.*

*Delivery of the goods and handing over of documents*

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

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- (a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;
  - (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract, the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;
  - (c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hand the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;

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- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
  - (c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

*Section II.*

*Conformity of the goods and third party claims*

Article 35

- (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
- (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
  - (a) are fit for the purposes for which goods of the same description would ordinarily be used;
  - (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;
  - (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

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(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

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(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right to claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at

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the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### *Section III.*

#### *Remedies for breach of contract by the seller*

#### Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

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- (a) exercise the rights provided in articles 46 to 52;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

- (1) The buyer may require performance by the seller of his obligation unless the buyer has resorted to a remedy which is inconsistent with this requirement.
- (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
- (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

- (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
- (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

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Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

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- (b) in respect of any breach other than late delivery, within a reasonable time:
- (i) after he knew or ought to have known of the breach;
  - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
  - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

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(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter III

OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

*Section I.*

*Payment of the price*

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

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- (a) at the seller's place of business; or
  - (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

#### Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms where by the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

### *Section II.* *Taking delivery*

#### Article 60

The buyer's obligation to take delivery consists:

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- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
  - (b) in taking over the goods.

*Section III.*  
*Remedies for breach of contract by the buyer*

Article 61

- (1) If the buyer fails to perform any of his obligations under the contract or this Convention, the shelter may:
  - (a) exercise the rights provided in articles 62 to 65;
  - (b) claim damages as provided in articles 74 to 77.
- (2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
- (3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has restored to a remedy which is inconsistent with this requirement.

Article 63

- (1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.
- (2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

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Article 64

- (1) The seller may declare the contract avoided:
  - (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  - (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
  - (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
  - (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
    - (i) after the seller knew or ought to have known of the breach; or
    - (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

- (1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

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(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

#### Chapter IV

### PASSING OF RISK

#### Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

#### Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

#### Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at risk of the seller.

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Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller had committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter V

PROVISIONS COMMON TO THE OBLIGATIONS OF THE  
SELLER AND OF THE BUYER

*Section I.*

*Anticipatory breach and instalment contracts*

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

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(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

#### Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

#### Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good ground to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence,

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those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

*Section II.*  
*Damages*

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purpose of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

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Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

*Section III.*  
*Interest*

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

*Section IV.*  
*Exemptions*

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and
- (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

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(4) The party who fails to perform must give notice to the other party of the impediment and its effects on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

*Section V.*  
*Effects of avoidance*

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the

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condition in which the buyer received them is not due to his act or omission;

- (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
- (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

- (a) if he must make restitution of the goods or part of them; or
- (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

*Section VI.*  
*Preservation of the goods*

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made

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concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 must take reasonable

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measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### PART IV

#### FINAL PROVISIONS

##### Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

##### Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

##### Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

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Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale

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or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention.

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

#### Article 98

No reservations are permitted except those expressly authorized in this Convention.

#### Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of

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Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratification, acceptance, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciation as may be required on the part of those States in respect of the latter two Convention have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Convention, so as to ensure necessary co-ordination in this respect.

#### Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the

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Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect from the expiration of such longer period after the notification is received by the depositary.

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**EXPLANATORY NOTES ON**  
**THE NEGOTIABLE INSTRUMENTS BILL, 1994**

The Bill is based on the UK Bills of Exchange Act, 1882. The general approach has been to bring it up to date and modernise the language where possible. In these Notes a reference to the "UK Act" or the "1882 Act" without further identification, is a reference to the UK Bills of Exchange Act, 1882.

1. Minor changes have been introduced in the Interpretation section, e.g. "note" (i.e. promissory note) is not defined together with "bill" (i.e. bill of exchange) as in the UK Act, but by itself.
2. S.4 of the U.K. Act which draws the distinction between inland and foreign bills has been eliminated from this draft legislation. Bills of exchange are relatively little used in domestic trade, and most bills have a non-domestic element. Although the UK Act recognises a distinction between inland and foreign bills, the distinction even in the U.K. has been by and large of no significance. There is no such distinction drawn in the United States. Nor is there any in continental Europe. As a consequence of the elimination of this distinction from the provisions of this Bill, all provisions of the UK Act resulting from the distinction have also be eliminated.
3. Paragraphs (b) and (c) of s.9, now s.8 of this Bill, have been merged.
4. Some stylistic changes have been introduced in s.10 (s.11 of the UK Act). The wording is otherwise the same.
5. Some stylistic changes have been introduced in s.11 (s.12 of the UK Act), but the substance is the same.
6. The wording in s.13(a) which corresponds to s.14(1) of the UK Act was introduced by s.3 of the UK Banking and Financial Dealings Act, 1971. In the original Act the corresponding wording was:
  - "(a) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that -
  - (b) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast

or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day.

- (c) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a holiday, the bill is due and payable on the succeeding business day."

7. A stylistic change has been introduced in s.14 (s.15 of the UK Act), but the substance is the same.
8. Some stylistic and verbal changes have been introduced in s.15 (s.16 of the UK Act), but the substance is the same.
9. A stylistic change has been introduced in s.17 (s.18 of the UK Act), but the substance is the same.
10. A stylistic change has been introduced in s.18(2) (s.19(2) of the UK Act), but the substance is the same.
11. In s.29 the words "or other defect mentioned" have been added to cover the situations of "duress, or force and fear" which had been previously mentioned in the subsection but not again mentioned in the UK Act s.30. The U.K Act does not include the case of the defendant proving that the bill has been lost. According to Byles on *Bill of Exchange* (26th ed.1988) page 245 "it may be included under the general heading 'illegality', since the finder of a lost bill or note acquires no property therein" but then Byles continues "there does not appear to be any direct authority on the subject." To avoid possible uncertainty, the word "loss" has been inserted.
12. In s.43, pursuant to the removal of the distinction between an inland bill and a foreign bill, in every case where a bill has been accepted as to part it should be protested as to the balance.
13. The word "it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day" in s.50(3) were inserted by s.1 of the Bills of Exchange (Time of Noting) Act 1917, an Act which was passed by the UK Parliament after the cut-off date for the reception of Acts of general application in England in The Gambia.
14. S.52 takes the position which the UK Act provides for Scotland. That is different from the provision for England, in respect of which, the following is what section 53(1) of the UK Act says:

"A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument."

The difference is that whereas in England where the bill does not constitute an assignment of the sum payable to the holder, even if funds have been transferred to the drawee, he is not liable on the bill unless he has also assumed personal liability on it i.e. he has accepted it. It is otherwise in Scotland where in such a situation the holder is entitled to the money and can demand it from the drawee. The Scottish position is considered preferable and is adopted in this Bill.

15. S.57(2) of the UK Act which provided that -

"In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment."

was repealed by the *Administration of Justice Act 1977*, s.4 (1) and Schedule 5, Pt 1. It is accordingly omitted from s.56 which is the comparable section in this Bill.

16. In s.62(2) a verbal alteration of the equivalent provision in the UK Act has been made for the sake of clarity.
17. In section 71, the proviso to s.72(2) of the UK Act which deals with inland bills and which would otherwise have qualified paragraph (b) (the comparable provision in this draft Bill), has been deleted as a consequence of the abolition of the distinction between inland and foreign bills.
18. S.72(4) of the UK Act was repealed by the UK *Administration of Justice Act 1977* s.4(1) and Schedule 5, Part 1, as a result of the interpretation which it received from Mocatta J. in *Barclays Bank International Ltd. v. Levin Bros. (Bradford) Ltd.* [1977] Q.B.270, (see p.275), where after referring to the House of Lords' judgment in *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C.443, the learned judge said:

"the very restrictive wording of the subsection merely provided a formula to ascertain the amount of sterling which an acceptor should pay on the date of maturity in order to discharge his obligation under a bill of exchange, if he chose to pay the bill of exchange in sterling and not in the currency in which it is drawn. Accordingly, the function of the subsection ended with the day of payment and it had no statutory effect upon the sum

recoverable by the indorsee when no payment had been made on the date of maturity and the indorsee subsequently sued the acceptor."

Dr. F.A.Mann in *The Legal Aspects of Money* (5th ed. pp.322 and 323) points out that reference to the date of maturity requires revision, as the material date for the conversion is not when the money is due but when it is actually paid. Once judgment is given in a currency, the judgment debtor, if he wishes to pay in sterling, must take the risk of an alteration in the exchange, and the conversion will be at the date of payment however that may come about. The equivalent of the repealed UK subsection is, accordingly, omitted from this draft Bill.

19. S.82 of the UK Act gave protection to a collecting bank, which apparently incurred liability to a true owner. That section was repealed by the Cheques Act, 1957 s.6(3), and Schedule, and replaced by s.4 of the 1957 Act, which is incorporated in Section 81 of this Bill. S.82 of this Bill is a reproduction of s.1 of the UK Cheques Act, 1957.
20. S.83 of this Bill is a reproduction of s.2 of the UK Cheques Act, 1957. That section is an exception to s.31 of the UK Act of 1882, which is s.30 of this Bill, and is peculiar to banks alone. The concession will not enable a bank to take title through a thief since the section states clearly that the bank must receive the cheque from the holder and a thief cannot be a holder of an order cheque, since an indorsement in his favour must be forged. S.2 of the UK Cheques Act speaks only of cheques, but s.4(2) of that Act (see s.81(2) of this Bill) enables a collecting bank to collect a variety of instruments other than valid cheques and is unprejudiced by their lacking indorsement. There seems, therefore, to be an inconsistency between the two provisions. For the sake of consistency, s.83 of this Bill has been broadened to cover such other instruments.
21. S.84 of the Bill is a reproduction of s.3 of the UK Cheques Act, 1957.
22. S.85 of the Bill is a modification in appropriate form of s.5 of the UK Cheques Act, 1957.
23. S.83(4) of the UK Act which draws the distinction between inland and foreign notes has been omitted from s.86 of this Bill.
24. S.89(4) of the UK Act which makes the protest of a dishonoured foreign note unnecessary, is for reasons already given omitted from s.92 of this Bill.

# **THE DRAFT NEGOTIABLE INSTRUMENTS BILL**

## **Report on the Library Based Research and Field Study**

### **A. Introduction**

The request made of us was to draft a new Bills of Exchange legislation. Our recommended draft statute is entitled the "Negotiable Instruments Bill", which, if adopted would lead to the consequent enactment being called the "Negotiable Instruments Act". The reason for this variation of title is that although the legislation which has governed and continues to govern transactions in this field in The Gambia is the United Kingdom Bills of Exchange Act, 1882, that Act itself deals with three types of negotiable instruments: bills of exchange in the strict sense, cheques and promissory notes. All of them are negotiable instruments, but not all the rules which apply to bills of exchange in the strict sense apply to cheques or promissory notes. As a result, the rules which apply only to cheques and notes were put in separate parts of the UK Act. Further, it will be found that at least one amending piece of legislation to the UK Bills of Exchange Act is simply described as the Cheques Act 1957. By its provisions that Act substitutes a part of the 1882 Act with more detailed provisions regarding cheques alone. It should give some clarity to the subject matter of the proposed legislation if it were to be described by the title which comprehends the different types of instruments dealt with by it. For that reason, the title Negotiable Instruments Bill is proposed.

The Field Study for the drafting of a Bills of Exchange Bill for The Gambia was undertaken at the same time as the study for several other pieces of legislation. These were the proposed legislation on Contract, Bills of Lading, Hire Purchase, Equipment Leasing and a review of the Sale of Goods Act. The Field Study was undertaken during August and September 1993, and consisted primarily of interviews of a number of people in the legal, banking, accountancy, business and governmental sectors of The Gambia who were expected to have experience of, and contributions to make on, the pieces of legislation under consideration.

The Field Research was preceded by Library Based Research, also undertaken in August.

The following are the findings emerging from the research and study. The draft legislation has been drafted with the knowledge acquired from the research, and such views as were expressed during the study in mind.

### **B. The Present Situation**

The Gambia has always used the UK Bills of Exchange Act, 1882. It did so before independence, and it has continued to do so ever since. There was legislative backing for this in that the main UK Act was passed before the date of reception of English law by The Gambia. It will be recalled that statutes of general application in England on November 1 1888 were made applicable to The Gambia by virtue of section 119 of the Constitution of the Republic of The

Gambia (1970), subsection (2) of which allows for continuation of existing laws, and section 2 of the Law of England (Application) Act [Cap.5], which renders applicable to The Gambia "the common law, the doctrines of equity, the statutes of general application in force in England on the first day of November, 1888". The measure of success of this arrangement, involving continued reliance after independence on the UK Act, can, with respect to bills of exchange, be gauged by the fact that not much adverse comment was made by those interviewed on the operation of the Act. The question which arises then is why should that arrangement be disturbed now?

As we stated in connection with our recommendations for a Mortgages Act, "It is important, ... that The Gambia should have its own legislation on as many subjects on which it needs regulation as soon as it possibly can." Bills of Exchange, by virtue of the importance of the regulation of payments in the financial and economic system constitute, in our view, one such subject where The Gambia should have its own legislation. Indeed, those who had a view to express on the matter during our interviews were unanimously in favour of The Gambia having its own law on the subject. It is necessary that the laws of The Gambia should be readily accessible to Gambians, and that foreigners who require advice on what the prevailing Gambian regulation on any subject is should be directed to the relevant law in The Gambia and not be told to consult the laws of some foreign country.

Further, although the UK Bills of Exchange Act appears perennial, and is still highly praised, it has been amended from time to time. Among such amendments are the Bills of Exchange (Crossed Cheques) Act, 1906, the Bills of Exchange Act (1882) Amendment Act, 1932, and the Bills of Exchange (Time of Noting) Act, 1917 and the Cheques Act, 1957. The 1906 and 1932 Acts were superseded by the Cheques Act. It is questionable whether any of these amending Acts applies to The Gambia. Section 3 of the Law of England (Application) Act also provided for continuance in force of "All Acts of Parliament of the United Kingdom declared to extend or apply to The Gambia, which had effect as part of the law of The Gambia immediately before the eighteenth day of February 1965." Simple as this sounds, it is not easy to say whether any statutes on bills of exchange were so declared by the British Parliament to extend or apply to The Gambia. This strengthens the argument that The Gambia should have its own legislation on the subject, and that the legislation should be a consolidation and modernisation of the UK Act.

The origins of the Bills of Exchange Act 1882 can be found in the Introduction to the Third Edition of *Chalmers on the Bills of Exchange*. The Introduction to the Third Edition of this book by the draftsman of the Act, Sir Mackenzie Chalmers, which was the first to be published after the 1882 Act was passed, but which has long ceased publication, can be found in *Byles on Bills of Exchange* (26th ed.) at pages 547 to 550. It is such an interesting and instructive historical account of how the Act came into being that its reading is recommended. Here it is sufficient to recite an excerpt of his reference to the case of *Goodwin v. Roberts* (1875) L.R.10 Ex. at pp.346-358, where he said:

"The origin and history of bills of exchange and other negotiable instruments are traced by Lord Cockburn C.J. in his judgment in *Goodwin v. Roberts*. He says:

'Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and the Venetians about the thirteenth century. The use of them gradually found its way in France, and still later but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled *Specimen of a Digest of the Law of Bills of Exchange*, that Richard Malynes, a London merchant, who published a work called the *Lex Mecatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute 3 Rich.2, c.3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that the use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin v. Boure* (Cro.Jac.6), in the time of James I. Up to this time, the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be payable to a man

and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica in 1607. Savary, cited by Mons.Nouguier, in his work *Des Lettres de Change*, had assigned to it a later date, namely, 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first, the use of bills of exchange seemed to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not.'

Chalmers then continues with the remark that "The law throughout has been based on the custom of merchants respecting them..." it must have been partially on this account, as on account of the fact that aspects of transactions with respect to bills of exchange etc. could be affected by the law of Contract, that s.97(2) of the UK Act of 1882 provided that:

"The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act shall continue to apply to bills of exchange, promissory notes, and cheques."

This section has been retained in the draft Bill (see s.99(b)). The passage from *Goodwin v. Roberts* also shows that the development of the law on bills of exchange has been heavily influenced by the practices of merchants of different countries involved in international payments in the course of trade.

### **C. Report on the Field Research**

It was noticeable, that although Bills of Lading, Hire Purchase and Equipment Leasing, evoked quite a lot of comment at the interviews we conducted, comment on Bills of Exchange, as indeed on Contract, were few. This may indicate either that the laws and practices followed in The Gambia on Bills of Exchange and Contract are either generally satisfactory to users, or too specialised for the uninitiated to warrant much comment.

All who made comment on Bills of Exchange during the Field Study stated that The Gambia should have its own statute, which should be a modernisation of the English law, with which no doubt, practitioners in the field felt comfortable. The main advice we got was that we should not, in the drafting of a bills of exchange law, attempt to invent the wheel. We should not, that is, go about inventing new or unfamiliar principles or provisions. That advice is easy to follow in the case of the UK Bills of Exchange Act, because, though enacted in the 19th century, all commentators on it remark that it has lasted so long because it was well drafted in simple language.

We have, accordingly, adapted the UK Act in our proposal for legislation, bringing it up to date, and making it conformable with the laws of The Gambia. Where we have made any change or an election on alternative provisions, that has been indicated in the Notes accompanying the draft Bill.

There was a suggestion that we should look at the criminal aspect of the issue of cheques. The suggestion was that at present the only offences which the criminal law dealt with in respect of cheques were obtaining by false pretences and forgery. Apparently, a number of serious cases of cheque frauds have come up in The Gambia within the past six months, and that has given rise to some anxiety over the adequacy of the law prohibiting such frauds. Upon consideration, we have come to the conclusion that without further study of the exact nature of the cases in which the laws governing fraud, obtaining by false pretences and forgery have proved inadequate, we should not take any hasty action in creating new offences. It may be that the need is to spell out clearly with respect to the definition of obtaining by false pretences in section 287 of the Criminal Code that a person who issues a cheque is making a representation either that he has sufficient funds in the bank to meet the cheque or that he has made an arrangement with the bank to meet the cheque in any case; and that if the representation made in this respect is false then it amounts to obtaining by false pretences. But to say so at this stage is merely to speculate. We expect this aspect to be debated and developed further at the proposed Workshop, which would be an appropriate forum to decide whether an amendment should be made to the Criminal Code, especially to Chapters XXX and XXXIV, or to some general statute dealing with criminal offences, rather than to a specialised statute on negotiable instruments alone. This point is of some importance because the UK Forgery and Counterfeiting Act 1981, for example, which replaced the Forgery Act 1913 with regard to falsification of instruments, included money, postal orders, cheques, travellers cheques, cheque and credit cards (see s.5), which is wider in scope than the instruments dealt with in the present draft Bill. If it is decided that offences be created in this statute, the required insertion as prescribed could, after their scope and nature has been determined, be made in the Bill without difficulty.

#### **D. The International Scene**

Our mandate also required that we should "review and make recommendations for accession to appropriate International Conventions." According to the compilation on *Basic Documents on International Trade Law* (2nd.revised ed.) edited by Chia-Jui Cheng:

"The law of international payment is regulated by two principal systems of law, i.e. the law of negotiable instruments represented by the 1930 and 1931 Geneva Conventions and the law of banker's commercial credits represented by the 1983 ICC Uniform Customs and Practices for Documentary Credits.

With respect to the system established by the Geneva Conventions, some important problems, such as provision, were not dealt with by the uniform laws forming the annex to those conventions, while the uniformity which those laws sought to establish had further been compromised by reservations. Similarly, divergencies did exist between the English and American acts and, consequently, in the laws of those countries which had modelled their legislation on one or the other of these acts.

It was generally considered that to create a negotiable instrument law on a world wide basis was most likely to produce tangible results in the UNCITRAL's (United Nations Commission on International Trade Law) endeavours to secure uniformity. After more than ten years of preparation, the UNCITRAL finally adopted a convention on International Bills of Exchange and International Promissory Notes, which was adopted by the General Assembly in 1988."

The list of Multilateral Conventions which The Gambia inherited from Britain kept by the Ministry of Justice does not include the 1930 or 1931 Geneva Conventions on negotiable instruments. That in itself may not be conclusive on the issue whether The Gambia is bound by them or not. The list may, in spite of its various addenda, not be comprehensive. But the citation above indicates the problems connected with the Geneva Conventions and shows that the efforts of the United Nations Commission on International Trade Law (UNCITRAL) to produce a uniform law on the subject has resulted in a convention which has been accepted by the UN. If The Gambia is to accede to any convention, it is this 1988 Convention which it ought to consider adopting.

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**NEGOTIABLE INSTRUMENTS BILL, 1994**

*Clause: Arrangement of Clauses*

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2. Interpretation.

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**SCHEDULE**

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**NEGOTIABLE INSTRUMENTS BILL, 1994**

**A BILL ENTITLED**

**An Act to declare the law regulating negotiable instruments and to make provision for matters connected therewith.**

**Enacted by the Parliament of The Gambia**

**PRELIMINARY**

Short title.

1. This Act may be cited as the Negotiable Instruments Act, 1994.

Interpretation.

2. In this Act, unless the context otherwise requires,

"acceptance" means an acceptance completed by delivery or notification;

"action" includes counter claim and set off;

"banker" includes a body of persons whether incorporated or not who carry on the business of banking;

"bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy;

"bearer" means the person in possession of a bill or note which is payable to bearer;

"bill" means bill of exchange;

"delivery" means transfer of possession, actual or constructive, from one person to another;

"holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof;

"indorsement" means an indorsement completed by delivery;

"issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder;

"note" means a promissory note;

"person" includes a body of persons whether incorporated or not.

## PART I - BILLS OF EXCHANGE

### CHAPTER I - NATURE AND REQUIREMENTS OF A BILL OF EXCHANGE

Bills of exchange defined.

3.(1) A bill of exchange is 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 certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section, but an unqualified order to pay is unconditional if it is

(a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount; or

(b) a statement of the transaction which gives rise to the bill.

(4) A bill is not invalid by reason

(a) that it is not dated;

(b) that it does not specify the value given, or that any value has been given therefor; or

(c) that it does not specify the place where it is drawn or the place where it is payable.

Effect where different parties to bill are the same person.

4.(1) A bill may be drawn payable to, or to the order of, the drawer, or it may be drawn payable to, or to the order of, the drawee.

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

Address to drawee.

5.(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

Certainty required as to payee.

6.(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

What bills are negotiable.

7.(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

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(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Sum payable.

8.(1) The sum payable by a bill is a sum certain within the meaning of this Act, even if it is required to be paid

- (a) with interest;
- (b) by stated instalments, whether or not coupled with a provision that upon default in payment of any instalment the whole shall become due; or
- (c) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

Bill payable on demand.

9.(1) A bill is payable on demand

- (a) which is expressed to be payable on demand, or at sight, or on presentation; or
- (b) in which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

Bills payable at a future time.

10.(1) A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable

- (a) at a fixed period after date of sight; or

- (b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

(2) An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

Omission of date in bill payable after date.

11.(1) Where a bill expressed to be payable at a fixed period after the date appearing on the bill is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

(2) Where a bill, mistakenly and in good faith wrongly dated, subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date in any case

- (a) where the holder in good faith and by mistake inserts a wrong date; or

- (b) where a wrong date is inserted.

Ante-dating and post-dating.

12.(1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

Computation of time of payment.

13. Where a bill is not payable on demand, the day on which it falls due is determined as follows:

- (a) the bill is due and payable in all cases on the last day of the time of payment as fixed by the bill or, if that is a non-business day, on the succeeding business day;

- (b) where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, time of payment is determined by excluding

the day from which the time is to begin to run and by including the day of payment; and

- (c) where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

Case of need.

**14.(1)** The drawer of a bill and any indorser may insert therein the name of a person, called the referee, to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment.

(2) It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

Optional stipulations by drawer or indorser.

**15.** The drawer of a bill, and any indorser, may insert therein an express stipulation

- (a) negating or limiting his own liability to the holder; or
- (b) waiving as regards himself some or all of the duties of the holder.

Definition and requisites of acceptance.

**16.(1)** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) An acceptance is invalid unless it complies with the following conditions:

- (a) it shall be written on the bill and be signed by the drawee and the mere signature of the drawee without additional words is sufficient; and
- (b) it shall not express that the drawee will perform his promise by any other means than the payment of money.

Time for acceptance.

**17.** A bill may be accepted

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- (a) before it has been signed by the drawer, or while otherwise incomplete;
  - (b) when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment; or
  - (c) when a bill payable after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

General and  
qualified  
acceptance.

**18.(1)** An acceptance is either general or qualified.

(2) A general acceptance assents without qualification to the order of the drawer.

(3) A qualified acceptance in express terms varies the effect of the bill as drawn and in particular, an acceptance is qualified which is

- (a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
- (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
- (c) local, that is to say, an acceptance to pay only at a particular specified place, and an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere;
- (d) qualified as to time; and
- (e) the acceptance of one or more of the drawees, but not of all.

Inchoate  
instruments.

**19.(1)** Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any

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amount the stamp will cover, using the signature of the drawer, or the acceptor, or an indorser and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given and reasonable time for this purpose is a question of fact.

(3) Where such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

Delivery.

20.(1) Subject to subsection (2), a contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

(2) Where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance becomes complete and irrevocable.

(3) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be;

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

(4) Where the bill is in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(5) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

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CHAPTER II - CAPACITY AND AUTHORITY OF PARTIES

Capacity of parties.

21.(1) Capacity to incur liability as a party to a bill is coextensive with capacity to contract.

(2) Nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to do so to do under the law for the time being in force relating to corporations.

(3) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Signature essential to liability.

22. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such, provided that,

(a) where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name;

(b) the signing of the name of a firm is equivalent to the signature by the person so signing of the names of the persons liable as partners in that firm.

Forged or unauthorised signature.

23.(1) Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

(2) Nothing in subsection(1) shall affect the ratification of an unauthorised signature not amounting to a forgery.

Procurator signatures.

24. A signature by procurator operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

Person signing as agent or in representative capacity.

25.(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon, but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

### CHAPTER III - THE CONSIDERATION FOR A BILL

Value and holder for value.

26.(1) Valuable consideration for a bill may be constituted by

- (a) any consideration sufficient to support a simple contract;
- (b) an antecedent debt or liability and such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3) Where the holder of a bill has a lien on the bill arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Accommodation bill or party.

27.(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value, and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Holder in due course.

28.(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions:

- (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;
- (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) The title of a person who negotiates a bill is defective within the meaning of this Act when he obtains the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumption of value and good faith.

**29.(1)** Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

(2) Every holder of a bill is prima facie deemed to be a holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, force and fear, loss, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud, illegality or other defect mentioned, value has in good faith been given for the bill.

#### CHAPTER IV - NEGOTIATION OF BILLS

Negotiation of bill.

**30.(1)** A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse a bill in such terms as to negate personal liability.

Requisite of a  
valid  
indorsement.

31. An indorsement in order to operate as a negotiation must comply with the following conditions:

- (a) it must be written on the bill itself and be signed by the indorser and the simple signature of the indorser on the bill, without additional words, is sufficient, and where an indorsement is written on an allonge or a 'copy' of a bill issued or negotiated in a country where 'copies' are recognised, it is deemed to be written on the bill itself;
- (b) it must be an indorsement of the entire bill, and a partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill;
- (c) where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others;
- (d) where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding, if he thinks fit, his proper signature;
- (e) where there are two or more indorsements on a bill, each indorsement is deemed to have been made in

the order in which it appears on the bill, until the contrary is proved; and

- (f) an indorsement may be made in blank or special and it may also contain terms making it restrictive.

Conditional indorsement.

**32.** Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

Indorsement in blank and special indorsement.

**33.(1)** An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

Restrictive indorsement.

**34.(1)** An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed

- 'Pay D only'; or
- 'Pay D for the account of X'; or
- 'Pay D or order for collection'.

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorises him to do so.

(3) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

Negotiation of  
overdue or  
dishonoured  
bills.

35.(1) Where a bill is negotiable in its origin it continues to be negotiable until it has been

- (a) restrictively indorsed; or
- (b) discharged by payment or otherwise.

(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time, and what is an unreasonable length of time for this purpose is a question of fact.

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is prima facie deemed to have been effected before the bill was overdue.

(5) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this subsection shall affect the rights of a holder in due course.

Negotiation of  
bill to party  
already liable  
thereon.

36. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

Rights of the  
holder.

37. The rights and powers of the holder of a bill are as follows:

- (a) he may sue on the bill in his own name;
- (b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill; and

- (c) where his title is defective
  - (i) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and
  - (ii) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

### CHAPTER V - GENERAL DUTIES OF THE HOLDER

When presentment for acceptance is necessary.

**38.(1)** Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

Time for presenting bill payable after sight.

**39.(1)** Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2) If he does not do so, the drawer and all indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

Rules as to  
presentment for  
acceptance and  
excuses for  
non-presentment.

40.(1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

- (a) the presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue;
- (b) where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only;
- (c) where the drawee is dead, presentment may be made to his personal representative;
- (d) where the drawee is bankrupt, presentment may be made to him or to his trustee; and
- (e) where authorised by agreement or usage, a presentment through the post office is sufficient.

(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance

- (a) where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill;
- (b) where, after the exercise of reasonable diligence, such presentment cannot be effected; or
- (c) where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Non-presentment.

41. When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance and if he does not, the holder shall lose his right of recourse against the drawer and indorsers.

Dishonour by non-acceptance and its consequences.

**42.(1)** A bill is dishonoured by non-acceptance

- (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or
- (b) when presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

Duties as to qualified acceptance.

**43.(1)** The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance he may treat the bill as dishonoured by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

(3) Subsection(2) does not apply to a partial acceptance, if due notice has been given and where a bill has been accepted as to part, it must be protested as to the balance.

(4) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

Rules as to presentment for payment.

**44.(1)** Subject to the provisions of this Act, a bill must be duly presented for payment and if it be not so presented the drawer and indorsers shall be discharged.

(2) A bill is duly presented for payment which is presented in accordance with the following rules:

- (a) where the bill is not payable on demand, presentment must be made on the day it falls due;
- (b) where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be

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made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after the indorsement, in order to render the indorser liable and in determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case;

- (c) presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found;
- (d) a bill is presented at the proper place
  - (i) where a place of payment is specified in the bill and the bill is there presented;
  - (ii) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;
  - (iii) where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary place of residence if known;
  - (iv) in any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence;
- (e) where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required;

- (f) where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all;
- (g) where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if there is one, and if he can be found, with the exercise of reasonable diligence;
- (h) where authorised by agreement or usage a presentment through the post office is sufficient.

Excuses for delay  
or non-  
presentment  
for payment.

**45.(1)** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence.

(2) When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(3) Presentment for payment is dispensed with

- (a) where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected and the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment;
- (b) where the drawee is a fictitious person;
- (c) as regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;
- (d) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented; or

(e) by waiver of presentment, express or implied.

Dishonour by non-payment.

46.(1) A bill is dishonoured by non-payment

(a) when it is duly presented for payment and payment is refused or cannot be obtained; or

(b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

Notice of dishonour and effect of non-notice.

47.(1) Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged;

(2) Where a bill is dishonoured by non-acceptance, and

(a) notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission; and

(b) due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

Rules as to notice of dishonour.

48. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:

(a) the notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill;

(b) notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not;

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- (c) where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given;
  - (d) where notice is given by or on behalf of an indorser entitled to give notice as provided in this Act, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given;
  - (e) the notice may be given in writing or by oral communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment;
  - (f) the return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour;
  - (g) a written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication and a misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby;
  - (h) where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf;
  - (i) where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if there is one, and if he can be found, with the exercise of reasonable diligence;
  - (j) where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee;
  - (k) where there are two or more drawers or indorsers who are not partners, notice must be given to each

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of them, unless one of them has authority to receive such notice for the others;

(l) the notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter and in the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless

(i) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill;

(ii) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there is a post at a convenient hour on that day, and if there is no such post on that day then by the next post thereafter;

(m) where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal, and if he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder;

(n) where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour;

(o) where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

Excuses for non-notice and delay.

49.(1) Delay in giving notice is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence.

(2) When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(3) Notice of dishonour is dispensed with

(a) when, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged;

(b) by waiver express or implied and notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice;

(c) as regards the drawer where

(i) the drawer and drawee are the same person;

(ii) the drawee is a fictitious person or a person not having capacity to contract;

(iii) the drawer is the person to whom the bill is presented for payment;

(iv) the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill;

(v) the drawer has countermanded payment;

(d) as regards the indorser where

(i) the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill;

Notice and protest of bill.

- (ii) the indorser is the person to whom the bill is presented for payment;
- (iii) the bill was accepted or made for his accommodation.

50.(1) Where a bill has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment, and if it is not so protested the drawer and indorsers are discharged.

(2) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(3) Subject to the provisions of this Act, when a bill is noted or protested, it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day, and when a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(4) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(5) A bill must be protested at the place where it is dishonoured provided that

- (a) when a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day; and
- (b) when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

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(6) A protest must contain a copy of the bill, and must be signed by the notary public making it, and must specify

(a) the person at whose request the bill is protested; and

(b) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(7) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(8) Protest is dispensed with by any circumstances which would dispense with notice of dishonour.

(9) Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence.

(10) When the cause of delay ceases to operate the bill must be noted and protested with reasonable diligence.

Duties of holder  
as regards drawee  
or acceptor.

51.(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

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CHAPTER VI - LIABILITIES OF PARTIES

Funds in hands  
of drawee.

**52.** Where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum, for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

Liability of  
acceptor.

**53.** The acceptor of a bill, by accepting it,

(a) engages that he will pay it according to the tenor of his acceptance; and

(b) is precluded from denying to a holder in due course,

(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(ii) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; and

(iii) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

Liability of  
drawer or  
indorser.

**54.(1)** The drawer of a bill by drawing it,

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken; and

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

**(2)** The indorser of a bill by indorsing it

- (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken;
- (b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; and
- (c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of its indorsement a valid and subsisting bill, and that he had then a good title thereto.

Stronger signing bill liable as indorser.

**55.** Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

Measure of damages against parties to dishonoured bill.

**56.** Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

- (a) the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser,
  - (i) the amount of the bill;
  - (ii) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;
  - (iii) the expenses of noting and of protest; and

- (b) where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

Transferor by delivery and transferee.

**57.(1)** Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a 'transferor by delivery'.

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

#### CHAPTER VII - DISCHARGE OF BILL

Payment in due course.

**58.(1)** A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

(2) "Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(3) Subject to the provisions of this Act, when a bill is paid by the drawer or an indorser it is not discharged, but

(a) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill; and

(b) where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(4) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

Banker paying demand draft on which indorsement is forged.

**59.** When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn, pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

Acceptor the holder at maturity.

**60.** When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

Express waiver.

**61.(1)** When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged provided that the renunciation is in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

Cancellation.

**62.(1)** Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of signature of that party by the holder or his agent and in such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative, but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

Alteration of bill.

**63.(1)** Subject to subsection(2), where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the

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bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

(2) Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

(3) In particular, the following alterations are material, namely, an alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

#### CHAPTER VIII - ACCEPTANCE AND PAYMENT FOR HONOUR

Acceptance for  
honour *supra*  
protest.

64.(1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3) An acceptance for honour *supra* protest in order to be valid must be

(a) written on the bill, and indicate that it is an acceptance for honour; and

(b) signed by the acceptor for honour.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

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Liability of acceptor for honour.

65.(1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

Presentment to acceptor for honour.

66.(1) Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it shall be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill shall be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill shall be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

Payment for honour *supra* protest.

67.(1) Where a bill has been protested for non-payment any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3) Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension to it.

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(4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest and if the holder does not on demand deliver them up he shall be liable to the payer for honour in damages.

(7) Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment.

#### CHAPTER IX - LOST INSTRUMENTS

Holder's right  
to duplicate  
of lost bill.

**68.**(1) Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons in case the bill alleged to have been lost is found again.

(2) If the drawer on request, as provided in subsection (1), refuses to give the duplicate bill, he may be compelled to do so by action in court.

Action on  
lost bill.

**69.** In any action or proceeding upon a bill, the court may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court against the claims of any other person upon the instrument in question.

Rules as to  
sets.

**70.**(1) Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable to every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill but this subsection shall not affect the rights of a person who in the course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, but it must be written on one part only.

(5) If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, the drawee is liable on every such part as if it were a separate bill.

(6) When the acceptor of a bill drawn in a set pays it without requiring the part bearing the acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(7) Subject to subsection (1) to (6), where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

## CHAPTER X - CONFLICT OF LAWS

Rules where  
laws conflict.

**71.** Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

- (a) the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made;

- (b) where a bill is issued out of The Gambia it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;
- (c) where a bill, issued out of The Gambia, conforms, as regards requisites in form, to the law of The Gambia, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in The Gambia,
- (d) subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made;
- (e) the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured;
- (f) where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

## PART II - CHEQUES

### CHAPTER I - CHEQUES ON A BANKER

Cheque defined.

72.(1) A cheque is a bill of exchange drawn on a banker payable on demand.

(2) Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

Presentment of cheque for payment

73. Subject to the provisions of this Act,

- (a) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such a cheque been paid;
- (b) in determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case;
- (c) the holder of a cheque referred to in paragraph (a) as to which the drawer or person is discharged shall be a creditor, in lieu of the drawer or person, of the banker to the extent of the discharge, and entitled to recover the amount from him.

Revocation of banker's authority.

74. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by

- (a) countermand of payment; or
- (b) notice of the customer's death.

#### CHAPTER II - CROSSED CHEQUES

General and special crossings defined.

75.(1) Where a cheque bears across its face an addition of

- (a) the words 'and company' or any abbreviation thereof between two parallel transverse lines either with or without the words 'not negotiable', or
- (b) the parallel transverse lines simply, either with or without the words 'not negotiable',

that addition constitutes a crossing and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable', that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

Crossings by  
drawer or after  
issue.

76.(1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable'.

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

Crossing a  
material part  
of cheque.

77.(1) A crossing authorised by this Act is a material part of the cheque and no person shall obliterate or, except as authorised by this Act, add to or alter the crossing.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding one thousand dalasis.

Duties of banker  
as to crossed  
cheques.

78.(1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection who is a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

(3) Where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which had been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

Protection to banker and drawer where cheques if crossed.

79. Where the banker, on whom a crossed cheque is drawn in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Effect of crossing on holder.

80. Where a person takes a crossed cheque which bears on it the words 'not negotiable', he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

### CHAPTER III - PROTECTION AND RIGHTS OF COLLECTING BANKS

Protection of bankers collecting payment of cheques.

- 81.(1) Where a banker, in good faith and without negligence,
- (a) receives payment for a customer of an instrument to which this section applies, or
  - (b) having credited a customer's account with the amount of such instrument, receives payment thereof for himself,

and the customer has no title or a defective title to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.

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- (2) This section applies to the following instruments:
- (a) cheques;
  - (b) a document issued by a customer of a banker which, though not a bill of exchange is intended to enable a person to obtain payment from that banker of the sum mentioned in the document;
  - (c) a document issued by a public officer which is intended to enable a person to obtain payment from Government of the sum mentioned in the document but is not a bill of exchange; and
  - (d) a draft payable on demand drawn by a banker upon himself, whether payable at the head office or some other office of his bank.

(3) A banker is not to be treated for the purposes of this section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of an instrument.

Protection of  
bankers paying  
unindorsed or  
irregularly  
indorsed  
cheques.

**82.**(1) Where a banker in good faith and in the ordinary course of business pays a cheque drawn on him which is not indorsed or is irregularly indorsed, he does not, in doing so, incur any liability by reason only of the absence of, or irregularity in, indorsement, and he is deemed to have paid it in due course.

(2) Where a banker in good faith and in the ordinary course of business pays

- (a) a document issued by a customer of his which, though not a bill of exchange, is intended to enable a person to obtain payment from him of the sum mentioned in the document, or
- (b) a draft payable on demand drawn by him upon himself, whether payable at the head office or some other office of his bank,

he does not, in doing so, incur any liability by reason only of the absence of, or irregularity in, indorsement, and the payment discharges the instrument.

Rights of bankers collecting cheques not indorsed by holders.

**83.** A banker who gives value for, or has a lien on, a cheque or other instrument referred to in section 81(2) payable to order which the holder delivers to him for collection without indorsing it, has such, if any, rights as he would have had if, upon delivery, the holder had indorsed it in blank.

Unindorsed cheques as evidence of payment.

**84.** An unindorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque.

Application of certain provisions of this Act to instruments not being bills of exchange.

**85.** The provisions of this Act relating to crossed cheques shall, so far as applicable, have effect in relation to instruments (other than cheques) to which section 81 applies as they have effect in relation to cheques.

### PART III - PROMISSORY NOTES

Promissory note defined.

**86.(1)** A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains a pledge of collateral security with authority to sell or dispose thereof.

Delivery necessary.

**87.** A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Joint and several notes.

**88.(1)** A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2) Where a note runs 'I promise to pay' and is signed by two or more persons it is deemed to be their joint and several note.

Note payable on demand.

**89.(1)** Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement and if it is not so presented the indorser is discharged.

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(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

Presentment of note for payment.

**90.**(1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable and in any other case, presentment for payment is not necessary in order to render the maker liable.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable, but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

Liability of maker.

**91.** The maker of a promissory note, by making it,

(a) engages that he will pay it according to its tenor; and

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Application of Part II to notes.

**92.**(1) Subject to the provisions in this Part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying the provisions of this Act relating to bills of exchange, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes:

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- (a) presentment for acceptance;
- (b) acceptance;
- (c) acceptance *supra* protest; and
- (d) bills in a set.

**PART IV - SUPPLEMENTARY PROVISIONS**

Good faith.

**93.** A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

Signature.

**94.(1)** Where, by this Act, any instrument or writing is required to be signed by a person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is sealed with the corporation seal.

(3) Nothing in subsection(2) shall be construed as requiring the bill or note of a corporation to be under seal.

Computation of time.

**95.(1)** Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

Cap. 31:01.

(2) "Non-business day" for the purposes of this Act means any day which is declared as such by section 5 of the Public Holidays Act.

When noting equivalent to protest.

**96.** For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding, and the formal protest may be extended at any time thereafter as of the date of the noting.

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Protest when  
notary public  
not accessible.

**97.(1)** Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary public cannot be obtained at the place where the bill is dishonoured, any householder, or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

Schedule.

(2) For the purposes of subsection(1), the form given in the Schedule may be used with such modifications as may be necessary.

Dividend  
warrants may  
be crossed.

**98.** The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

Repeal and  
savings.

**99.(1)** The Bills of Exchange Act, 1882, of the United Kingdom in so far as it applies to The Gambia, is hereby repealed.

(2) Notwithstanding subsection (1),

(a) the rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply notwithstanding anything contained in this Act; and

(b) the rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

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Schedule.

SCHEDULE

Section 97)

**Form of Protest which may be Used when the Services of a Notary Public cannot be obtained**

Know all men that I, A.B. [householder], of \_\_\_\_\_, in District [or Province] of \_\_\_\_\_, in The Gambia, at the request of C.D., there being no notary public available, did on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_, demand payment [or acceptance] of the bill of exchange hereunder written, from E.F., to which demand he made answer [state answer, if any] wherefore I now, in the presence of G.H. and J.K., do protest the said bill of exchange.

(signed) A.B.

G.H.  
Witnesses

J.K.

N.B. - The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

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## **EXPLANATORY NOTES ON THE HIRE-PURCHASE AND FINANCE LEASE BILL, 1994**

Considering that hire-purchase and finance leasing form two sides of the same coin, the subjects are treated in a single Bill with the title of "Hire-Purchase and Finance Lease Bill, 1994". The Bill is thus divided into two Parts - Part I and Part II - dealing with hire-purchase and finance lease respectively and each Part is further divided into Chapters.

The Preliminary provisions deal with the citation of the Act (clause 1) and the application of the Act (clause 2).

**Part 1** - This part generally deals with hire-purchase agreement and it is divided into five Chapters. Clause 3, which applies to the whole of Part I, deals with the interpretation of terms, expressions and references.

**Chapter I** - This Chapter outlines the requirements of a hire-purchase agreement. Thus in order for an owner or a seller to enforce a hire-purchase agreement he has to ensure that the agreement is in writing and accordingly signed and that the requirements of Sections 5 to 7 are complied with (clause 4). These provisions deal with the requirements for the seller or owner to state orally and in writing, the price of the goods to be purchased so that the buyer knows the cash price and the hire-purchase price or total purchase price of those goods; the content and form of each hire-purchase agreement with power being given to the court to dispense with the requirements thereunder provided the buyer or hirer is not prejudiced; and the avoidance of certain undesirable provisions in a hire-purchase agreement, which are designed essentially to provide adequate protection to the buyer or hirer.

**Chapter II** - This Chapter deals with the termination and completion of a hire-purchase agreement. Clause 8 empowers the buyer or hirer to terminate an agreement before effecting final payment thereunder. All that is required of him is that he should give a written notice of termination to the person entitled to receive payment under the agreement. In such circumstances, clause 9 outlines the liability of the buyer or hirer who has terminated the agreement so as to ensure that the owner or seller is not taken undue advantage of and is adequately compensated. Clause 10 gives the buyer or hirer the opportunity to complete payment of any outstanding balance on goods taken on hire-purchase on a specified day. Thus payment may be effected at any time while the agreement is subsisting or within a period of 28 days after the owner has taken possession of the goods. In the latter instance, the buyer or hirer must pay any costs that might have been incurred by the owner or are incidental thereto.

**Chapter III** - This Chapter essentially addresses the rights of the owner or seller and the buyer or hirer in relation to "protected goods" as defined in clause 11(4). This provision basically deals with restrictions on the rights of the owner or seller to recover possession of protected goods - the mode prescribed being by way of action in court. Sub-clause (2) provides for the termination

of a hire-purchase agreement in the event of repossession otherwise, and the release of the buyer or hirer from liability under the agreement.

Clause 12 outlines the powers of the court in a situation where an owner or seller brings action to recover possession of protected goods, without prejudice to the liability of the buyer or hirer to the owner or seller for any intentional or negligent harm caused to the goods.

Clause 13 outlines the circumstances in which specific delivery of goods to the owner or seller may be postponed and clause 14 deals with the effect of postponement of an order for specific delivery.

**Chapter IV** - This Chapter defines the scope of the terms and representations in respect of dealings relating to a hire-purchase agreement. Thus clause 15 provides that representations made to a buyer or hirer by a dealer or salesman of goods let under a hire-purchase agreement shall be deemed to have been made by the dealer or salesman as agent of the owner or seller. Clause 16 outlines the terms that will be implied in a hire-purchase agreement with respect to the buyer's or hirer's rights to the goods.

Clause 17 deals with the implied terms as to the merchantability of goods and together with clause 18 (which deals with further implied terms in special cases of sale by sample or description) has been harmonised with the new amendment in clause 4 of the Sale of Goods (Amendment) Bill, 1994.

**Chapter V** - Clause 19 of this Chapter deals with the rights and liabilities of third parties under a hire-purchase agreement and the transfer to the third party of the rights and obligations of the buyer or hirer. Clause 20 places limitations on the owner's or seller's rights to enforce against the buyer or hirer a provision in the hire-purchase agreement merely because of the latter's failure to execute an obligation under the agreement. Clause 21 places an obligation on the buyer or hirer to provide the owner or seller of goods with information relating to the whereabouts of the goods. A penalty of five hundred dalasis is provided for non-compliance.

Clause 22(1) prohibits a buyer or hirer of goods from removing the goods from The Gambia without the written consent of the owner or seller thereof. Considering the value that may be attached to goods taken on hire-purchase and to ensure maximum compliance with sub-clause(1), a penalty of a ten thousand dalasis fine is provided in sub-clause(2). However, where the owner or seller is of the view that the goods have been, or are being, or are about to be, removed from The Gambia, he may apply to the court for the return of the goods. But in order to succeed in his application he must link the removal of the goods with an "intent to deprive him of his ownership or to defeat his rights to obtain a payment due to him". This caveat is merely to ensure that the buyer or hirer is not "prejudiced" by the misdeeds of a third party acting contrary to his instructions. The owner or seller would not lose his interest in the goods since the misdeeds of a third party will not discharge the buyer or hirer from his liability to the owner or seller under the hire-purchase agreement.

Clause 23 places an obligation on the owner or seller upon request to supply a copy of the hire-purchase agreement to the buyer or hirer at a fee of five dalasis. The fee is to enable the owner or seller to defray his costs which, in any case, should be minimal. Clause 24 provides for the application of clauses 11 to 14 to successive agreements.

Clause 25 empowers the Minister responsible for the administration of the Act to make Regulations providing for the regulation and control of the letting of goods under hire-purchase agreements.

Clause 26 enables parties to a hire-purchase agreement to vary their rights, duties and liabilities by express agreement, or by the course of dealing between them, or by custom, subject only to the provisions of the Bill. The power of variation by custom is considered relevant in The Gambian context to give continuity to existing customary practices in this field of trade.

**Part II** - This Part deals with finance lease agreement and it is divided into four Chapters. Clause 27, which applies to the whole of Part II, deals with the interpretation of terms, expressions and references.

**Chapter I** - This Chapter deals with the nature and requirements of a finance lease agreement, and clause 28 specifically outlines the formal requirements for a finance lease agreement while clause 29 specifies the matters which the agreement must contain.

Clause 30 outlines the rights and obligations of the lessee in a finance lease agreement and clause 31 outlines those of the lessor.

Clause 32 deals with the duties of a supplier of an asset to a lessor which are the same duties he owes to a lessor under a sale agreement. Clause 33 outlines the circumstances in which the lessor may recover accrued unpaid rents (together with interest and damages) and repossess assets, while clause 34 permits the assignment of a finance lease agreement by the lessor after informing the lessee of his intention in writing. However, the lessee's right to transfer his right to the use of an asset is limited by the fact that he has to have the consent of the lessor, and his exercise of the right is also subject to the rights of third parties.

**Chapter II** - This Chapter essentially deals with third party claims. Clause 35 places the lessor's claims under a finance lease agreement over and above that of a third party, and in the event of the lessee's bankruptcy, insolvency or otherwise, the lessor has the right to repossess the leased asset. Where a third party commences an action claiming a right to the asset, clause 36 requires him to institute such action against the lessor.

In the event of any damage caused to the leased asset by a third party, the responsibility falls on the lessee to repair such damage (clause 37) and he may subsequently take legal action against the third party to recover any expenses incurred as a result.

By virtue of clause 38, the lessee is obliged not to create a charge or any other encumbrance on the asset leased in favour of a third party and any charge or encumbrance created in contravention thereof will be void.

**Chapter III** - This Chapter deals with licensing and other administrative requirements. Thus under clause 39 a lessor is required to be a body corporate incorporated as a company under the Companies Act, 1994 and must be specifically licensed to engage in finance leasing upon payment of the prescribed fee. The Minister is empowered to prescribe the fees and guidelines for eligibility for a licence. In order to ensure a viable economic system which minimises the stresses of borrowing and lending, clause 40 empowers the Minister to regulate the credit system of The Gambia in finance leasing matters.

**Chapter IV** - Under this Chapter the lessee is required to furnish the lessor with information regarding the whereabouts of a leased asset, provided the lessee is under a duty to keep the asset in his possession or control under the finance lease agreement (clause 41). Failure to comply attracts the penalty of a fine not exceeding five hundred dalasis.

As in the case of a hire-purchase agreement, a lessee, under a finance lease agreement, is prohibited from removing a leased asset from The Gambia without the written consent of the lessor (clause 42). A penalty not exceeding a fine of one thousand dalasis or a term of imprisonment of six months or both is provided for non-compliance.

The parties to a finance lease agreement may, as between themselves, vary their rights, duties and liabilities under the agreement, subject only to the provisions of the Bill (clause 43).

Clause 44 and 45 provide for offences and penalties respectively.

The Schedule, which relates to clause 6(1)(d), provides the notice to be included in a hire-purchase agreement with respect to the hirer's or buyer's right to terminate the agreement.

# HIRE-PURCHASE AND LEASING LAW

## 1. The Existing Regime

The Gambia has no law governing hire-purchase and leasing of equipment on its statute book. Apart from the Sale of Goods Act (Cap. 89:01) passed in 1955 the law relating to sale transactions in general has consisted of the common law and English statutes of general application. Among such laws are the Factors Acts of 1823, 1825 and 1842 and the Mercantile Law (Amendment) Act of 1856.

Because of this, it is virtually impossible to ascertain with any degree of certainty what the current law is on the subject. Furthermore, since the common law is evolutionary, it means that it is in a state of constant change from precedent to precedent. Modern notions of fairness have cut into the traditional philosophy of freedom of contract, requiring some important legislative advances in favour of hirers which the evolutionary nature of the common law would take much longer to attain.

## 2. Library Based Research

### (i) Hire Purchase Agreements

Hire-purchase transaction is one form of instalment purchase whereby goods are delivered to a person who agrees to make periodical payments by way of hire, with the option of buying the goods after the stated hire installments have been paid. Until the option is exercised, there is no agreement to buy the goods. Of equal importance is the fact that the hirer may determine the agreement and return the goods at any time (See *Helby v. Matthews* [1895] 8 A.C. 471). Closely related to the hire-purchase are the credit sale, an agreement where the purchase price of goods is payable by five or more installments and the conditional sale, also an agreement for the sale of goods, but ownership of the goods does not pass until all the installments have been paid. These two, strictly speaking, fall outside the general ambit of this study, since they are essentially contracts for the sale of goods.

A bailment signifies or contemplates a return of the goods. A contract of sale, however, whether conditional or otherwise, binds the buyer to purchase the goods. He has no option to purchase the goods. While the tendency in some Commonwealth jurisdictions is to lump in one legislation, hire-purchase with credit sale and conditional sale, that philosophy has not been recommended for The Gambia. The fundamental reason for this is the necessity to introduce the legal regime for hire-purchase in as painless and simple a way as possible. We develop the argument further.

Before the passage of modern legislation on hire-purchase, some developing Commonwealth jurisdictions had in the past combined in one statute - usually the Sale of Goods Act - the law relating to sale transactions comprising contracts of outright sale, credit sale and conditional sale. While this approach had some advantages yet in many respects the inclusion of sale generated

problems of considerable importance. Ghana was one such jurisdiction that found that approach troublesome. As noted by one commentator while examining the Sale of Goods Act, 1962:

By including hire-purchase contracts in the definition of contracts of sale, the Act on the face of it appeared to be emphasising the "purchase" element in the transaction almost to the exclusion of the "hire" element. This, ... was an attempt on the part of the legislature to give effect to the real intention of the parties.

Contrary to this objective however, the actual provisions of the Act gave the unmistakable impression that the transaction was being treated as a mere hire rather than an eventual purchase at the end of a period of hire. For example, under the Act property (in the sense of title) did not vest automatically in the hirer on the payment of the full purchase price. The option to purchase was not automatic in hire-purchase agreements. Indeed, the law at that time did not require it; neither was it an essential part of the definition of a hire-purchase contract. It was, therefore, possible under the Act for the parties to enter into a perfectly valid hire-purchase contract without vesting the option to purchase in the hirer.

Even where the parties had made provision for this option the exercise of the option *per se* did not vest title in the hirer.

Apart from the foregoing difficulties, rather serious problems of definition were created by the provisions of Act 137. A hire-purchase contract was defined S. 81(1) of the Act as "a contract of sale of goods in which the price is to be paid in five or more installments."

This definition was defective in at least one important respect. If the essential nature of a hire-purchase contract is payment in five or more installments, then credit sales and conditional sales, for example, would also attract the regulatory provisions of Part VIII of Act 137 relating to hire-

purchase contracts since a credit sale and a conditional sale can both lawfully provide for payment of the price in five or more installments."

A study of a representative number of hire-purchase laws shows a preference for applying the law to every hire-purchase and conditional sale agreement, irrespective of the hire-purchase price, cash price or total purchase price of the goods.

For The Gambia, we propose that the new law should apply to every conditional sale and hire-purchase agreement, without limitation as to a minimum or maximum cash price. It is eminently desirable that the protections offered by the new law should cover all hire transactions in the interest of uniformity and fairness. There is no good reason for limiting the application of the law to the cost of the goods.

We find to be entirely satisfactory a definition of a hire purchase agreement as "an agreement for the bailment of goods under which the bailee may buy goods or under which the property in the goods will or may pass to the bailee". Thus put, the concept of bailment and the option to purchase the goods at the end of the period of bailment are thus made essential components of a hire-purchase agreement.

#### **Protection of the Hirer:**

At common law, the cornerstone of contract has been the freedom of the parties to enter into a legally binding agreement. The following passage from a commentator sets the scene quite well:

In the late eighteenth and nineteenth centuries the common law in England and America evolved the highly individualistic doctrine of freedom of contract under which contracts were enforced by the courts on the often mistaken assumption that the parties had equal bargaining power during the negotiations leading to the agreement. No matter how harsh the terms, the common law enforced contracts provided, of course, none of the recognized vitiating elements existed, e.g. duress, undue influence, misrepresentation or fraud.

This attitude of the courts is exemplified by the following extract from the judgment of Sir George Jessel, M.R. in *Printing and Numerical Registering Company v. Sampson* (1875) LR 19 Eq 462 at 465:-

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

In subsequent years, however, there have been attempts not only by the courts but also by the legislature at mitigating the rigours of the doctrine. The development of the principle of collective bargaining by trade unions, the creation of the doctrine of fundamental obligation to modify the harshness or draconic effects of exemption clauses, the statutory regulation of standard form contracts are but a few examples of these attempts. Despite these attempts, freedom of contract remains very much the general rule.

As was observed by Sutherland J. in the American case of *Adkins v. Children's Hospital* (1923) 261 US 525 at 545-6:-

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances ..."

Hire-purchase law recognises that hire-purchase agreements contain terms to which no hirer would agree if he had the freedom to bargain. And generally speaking, most consumers enter into such agreements because of the situation of economic necessity.

As M.R. Cohen puts it in his book, *Law and the Social Order*:

"Regulations, therefore ..., involving some restrictions on the freedom of contract are as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways."

Hire-purchase laws thus tend to mitigate the principle of freedom of contract by imposing prohibitions on certain types of transactions, while statutorily requiring the inclusion of others and the disclosure of certain facts. For example, it is quite customary to provide that within 14 days of the making of the agreement the seller must send or deliver to the hirer a copy of the agreement which contains the hire-purchase price, the cash price, the amount of each instalment, the date on which each instalment is payable (or the mode of determining such date), a list of the goods to which the agreement relates, and a notice in a prescribed form and as prominent as the rest of the agreement, setting out the hirer's right to terminate the agreement and also a restriction on the owner's right to recover the goods after 50 per cent of the hire-purchase price has been paid.

Another imposition is a duty on the seller to supply to the hirer within a stipulated period (usually 7 days) a copy of the agreement together with a statement of accounts.

Apart from the requirements relating to disclosures, it is also customary to provide for the prohibition of certain provisions. Examples are:

- (a) that the owner is entitled to enter any private land or premises in order to recover possession of the goods, the subject-matter of the agreement. Similarly, any provision is void if it relieves the seller from liability for such an entry;
- (b) that the hirer's right to terminate the agreement is restricted or excluded and that the liability of the hirer after notice of termination is extended or enlarged beyond certain requirements in the law;
- (c) that the hirer after the termination of the agreement by the seller is subject to a liability which exceeds the liability to which he would have been subject if he himself had terminated the agreement;
- (d) that any person acting on behalf of a seller is deemed to be an agent of the hirer; and
- (e) that a seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with a hire-purchase agreement.

These provisions of course, create the impression that the hirer is extremely protected in law. And, indeed, the provisions discussed above are, in theory, extremely protective of the hirer. The provisions on disclosures before the agreement is signed are intended to furnish the prospective

hirer with the kind of information which is crucial to his decision as to whether or not the deal is worth entering into. For this reason, it seems most desirable that the disclosure should be made to the hirer in as full a manner and in as plain a language as possible before the agreement is entered into.

### **Hirer's Right to Terminate and Complete the Agreement:**

The principle of *Pacta Sunt Servanda*, exemplified by such cases as *Paradine v. Jane* (1647) 89 ER 897 requires that agreements once entered into shall be observed. For that reason at common law, an agreement once made could only be rescinded or varied by a subsequent fresh agreement between the parties unless, of course, there was evidence of factors such as mistake, illegality, incapacity, fraud, impossibility of performance or frustration. In the absence of evidence of these vitiating factors, the law generally frowned on unilateral abrogation of contracts.

Thus a buyer who concludes a harsh bargain cannot resile from the agreement merely because he discovers that he was not as prudent as he should have been. But modern hire-purchase legislation tends to provide that the hirer may return the goods to the seller at any time before final payment under the agreement has been made. In order to maintain some balance between the interest of the hirer and that of the seller, the law further provides that if at the time of terminating the agreement the hirer has not paid 50 per cent of the purchase price he should make up the difference. In other words, the law ensures that a hirer who wishes to terminate pays at least 50 per cent of the hire-purchase price. Furthermore, a duty is imposed on such a hirer to return the goods at his own expense to the place from which they were originally supplied and makes him liable for damage to the goods which cannot be attributed to reasonable wear and tear.

The purpose of the hirer's right to terminate is to protect him against unscrupulous dealers and salesmen. The same objective was behind the provisions of the English Hire-Purchase Act, 1938. Professor Diamond describes the background to this Act in the following words:-

"A boom in hire-purchase led to the mushrooming of a large number of unscrupulous dealers. At a time when the 'never-never' was not yet respectable, most agreements were entered into by poorer and less well-educated people. Door-to-door salesmen, many of them paid by commission, inveigled customers, often the wife whilst the husband was out at work, into agreeing to take goods without explaining how much the installments totalled, and by how much the total exceeded the cash price of the goods. The unsuspecting customers signed agreements, copies of which were not supplied, which excluded all conditions and warranties and gave the owner the right to enter premises, by force if necessary, to recover possession of the goods on

default by the hirer. Even respectable companies used agreements with terms of this type ... Moreover, this right to recover the goods was sometimes enforced by certain 'snatch-back' firms immediately on the slightest delay in payment, even though most of the price had been paid and the default was unavoidable or the result of unfortunate circumstances such as sickness or unemployment. The purpose of the Hire-Purchase Act 1938 ... was thus to remove what Lord Maugham, L.C. described in the Lords debates as in the nature of a social menace in this country." [Diamond A.L.: *Introduction to Hire-Purchase Law*, 2nd ed., London, 1971 pp. 91-92].

Final observation may be made on the very important restriction on the right of the seller to recover his goods after a certain percentage of the purchase price has been paid, except by court action. By this provision, the right of self help in the seller is totally excluded. Contravention of this restriction usually carries severe consequences, such as the termination of the agreement and the relief of the hirer and his guarantors from all liability coupled with an entitlement to a refund of all installments thus far paid.

#### (ii) Equipment Leasing

In many ways, equipment leasing and hire-purchase are different sides of the same coin. Leasing involves the use of an asset by a party who does not own that asset. It is said that in the UK there is a distinct leasing industry which consists "namely of companies operating in the broad financial services sector of the economy, particularly within banking, who are the leasing or lessor companies and who acquire assets in order to lease them to lessee businesses spread across the whole spectrum of industry and commerce".

Leasing may be defined as the hire of capital assets for substantial periods to commercial users who do not require, or obtain, rule to those assets.

Since our remit limits us to a consideration of equipment leasing only, we do not discuss land and property leasing.

The Leasing Handbook, edited by Derek Supa, Robert K. Munro and Owen Cameron makes a fundamental point about leasing and taxation. They say:

"... it is above all the system of corporate taxation which sets the boundaries of the leasing industry. Where assets are leased by one company to another, without the opportunity for the latter to acquire

ownership, the tax system recognizes the lessor as owner of the assets, using them in its trade - i.e. the trade of leasing - and thus entitled to offset the cost of acquisition, by way of capital allowances, against its tax liability on the rental income from the lease. If, on the other hand, the user can acquire legal title to the assets at some point within a hiring agreement, the tax system regards that party as the owner.

If it is not clear at the outset whether ownership of the assets is to be transferred to the lessee or hirer, the consequent uncertainties in tax treatment could rule out any capital allowance entitlement for either party, thus rendering the cost of the transaction prohibitive. Commercial hiring arrangements, therefore, tend to divide clearly into two categories:

- (1) The leasing agreement, where the lessor claims capital allowances on the understanding that at no stage will title in the assets pass to the lessee.
- (2) The hire purchase agreement, which provides for the user - in this case known as the hirer rather than the lessee - to acquire title.

In the case of hire purchase the passing of title, giving ownership to the user, could well occur only at the end of the agreement, when the hirer has completed the instalment payments representing capital and interest. However, because there is only a nominal option fee for the passing of title itself, while the hirer is in any event committed to the substantive cost of capital and interest payments, the tax system recognizes at the outset that the structure involves a purchase rather than a lease. The hirer rather than the financier can, in this case, claim capital allowances at the commencement of the agreement under Section 45 of the Finance Act 1971, even though the hirer does not have legal title at this stage.

There may be no essential difference in the commercial structure of these two types of asset-based finance arrangements. For any given asset financed at a particular time, the pattern of instalment payments for capital and interest under the hire-purchase structure may match quite closely those of the rental payments under a lease. However, the tax system follows the legal principle in recognizing a critical distinction between the two - treating the financier or lessor as owner in the leasing case, and the hirer as owner in the case of hire purchase.

They go on to make this further point:

Because of the taxation factors described above, equipment leases are so structured that the lessee never acquires ownership of the assets even where that party wishes to have the use of them for an indefinite period. The agreement is for an initial or primary lease period, at the end of which the equipment will revert to the possession of the lessor if no other arrangements are made.

It is necessary to draw a distinction between a "finance lease" and an "operating lease". A finance lease tends to transfer to the lessee most of the risks and rewards of ownership of the asset, without making the lessee the legal owner. This means then that the lessor's aim is to recover the full capital cost of the asset from the primary lease rentals. For that reason the primary lease period tends to cover the expected useful life of the asset. The underlying principle then is the full recovery of the lessor's cost from the primary lease.

The operating lease, on the other hand, tends to cover a shorter period of the time than the expected useful life of the property leased. For that reason, the lessor takes a substantial interest in the residual value of the asset, especially its sale value after the lease period.

These activities must be distinguished from the leasing of real property, such as land and buildings which are life-long assets. As pointed out in the Leasing Handbook:

"It is largely commercial factors which mark out the distinction between longer term leases and short-time hiring, while legal and fiscal factors mark the difference between leasing and other forms of asset based finance. It is essentially the tax system which separates commercial leasing from other forms of

leasing or hiring to private individuals, while a mixture of taxation and commercial factors generally demarcate between plant and property leasing."

### **The Advantages of Leasing:**

Leasing has taken on an increasingly important role as a form of asset-based finance. For example, in the United Kingdom a very distinct leasing industry is discernible; largely made up of companies operating in the broad financial services sector of the economy. The marked growth of the leasing industry is due to the manifest advantages to be derived from the type of activity. To some of these advantages, we now turn.

For the lessors, the principal advantage is the ability to utilize capital allowances on leased assets against their own taxable profits. Additionally, far greater margins can be earned on leasing transactions than on traditional forms of lending. Another advantage of an asset is that ownership is preferable to a mortgage or charge, both of which may be difficult to enforce and both of which tend to attract high registration costs.

Since leasing is a form of asset-based finance, there is no high demand for additional security. The resultant reduction of administrative costs is also seen as an important advantage.

For the lessee some of the prominent advantages which accrue to him are:

- (i) the extension of the range of methods of financing the acquisition of capital equipment;
- (ii) the provision of additional source of finance with no initial outlay apart from the first rental;
- (iii) the flexibility in the financing of fixed assets;
- (iv) the certainty of access to credit where a lease is a medium-term facility;
- (v) tax advantages in that lease rentals may be fully deductible for tax purposes;
- (vi) the preservation of the lessee's debt capacity; and
- (vii) the attraction of price competitiveness when compared with alternative sources of finance.

### **3. Report on Field Study**

All persons whom we interviewed were enthusiastic in learning that a new law on hire-purchase and finance leasing was under contemplation. They welcome the idea enthusiastically.

We found that despite the absence of legislation, there was a fair amount of hire-purchase and leasing transactions in the market place. We were told by one commercial entity that they were poised to enter the field in a big way if only legislation was put in place setting out clearly the rights of the parties. That entity had commissioned a special study of the market and was eagerly awaiting the necessary legislation. Of special interest to this company was the tax relief provisions that would go along with the legislation.

One company told us that it dealt in hire-purchase of in-house appliances and vehicles even though it knew that there was no law governing that area of activity in The Gambia. The company had its own "home-made" agreement which the parties signed to govern their relationship. That agreement was based on a form used by a foreign company which did some hire-purchase business some twenty years ago in The Gambia. That company had now left The Gambia.

Our examination of that specimen agreement revealed that the form had many mistakes and was otherwise defective in that it contained several omissions and mistakes. But at base, it is an agreement between the company and a buyer who undertakes to buy an article for a certain amount over a certain period of time. The options available in such an agreement at the end of the rental period for the purchase of a car, for example, are:

- (a) For the buyer to continue rental of the car on conditions similar to those that applied during the period of agreement;
- (b) To return the car to the company in good order and condition;
- (c) To purchase the car at the price of one shilling (note the currency which appears on the form which will show you how out-dated the form is).

The whole form was a four page document including a schedule of specifications. The form was not complete because it did not authorise seizure. We were told that some customers oppose seizure because there is no law governing the situation. We were also advised that the companies engaged in such business do enter into hire-purchase arrangements with people they have known over a long period of time. If there was a finance house the hire-purchase could be done through that. But such a house would also have to be selective.

As we noted earlier, there was warm support for legislation to govern hire-purchase. According to those we interviewed, the law should mention the main rights and duties which should be contained in an agreement, and should include;

- (a) The right of the supplier to seize by presenting the agreement to the Police. (In view of our desire to exclude the police from such civil matters, such intervention should be avoided.);
- (b) The right to sell within a certain period after seizure;

(c) Comprehensive insurance in the names of both the buyer and the owner.

They thought that the law was defective in that while it gives a right to repossess there is no right to sell. This, they thought, was most disadvantageous to the owner. In the case of a vehicle, if there is an accident and the vehicle breaks down, the insurance companies take a very long time to pay up. What they would like to see is that in such a case, the vehicle would be deposited on the premises of the owner and the owner should be entitled to sell within three months, whether the insurance has compensated the hirer or not, at a price fixed by the owner.

We asked whether it was desirable or fair that the law should include a provision that after a certain amount of the purchase price has been paid, the article should not be liable to seizure. Many thought that this was fair, but that it would be difficult to fix such an amount. When the figure 75% was put to them at first, they thought it was acceptable but on reflection thought that it should be 80% to be on the safe side, as the company does not charge interest on default of payment. In holding the balance fairly between the owner and the hirer, and after consulting the legislation of several commonwealth countries, we recommend 50% as the minimum sum required to turn the goods into protected goods, and have framed the Act accordingly.

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**HIRE-PURCHASE AND FINANCE LEASE BILL, 1994**

*Clause: Arrangement of Clauses*

**PRELIMINARY**

1. Short title.
2. Application.

**PART I - HIRE-PURCHASE AGREEMENT**

3. Interpretation.

**CHAPTER I - REQUIREMENTS OF A HIRE-PURCHASE AGREEMENT**

4. Enforcement conditional on compliance with specified requirements.
5. Requirements before agreement.
6. Requirements as to content and form of agreement.
7. Avoidance of certain provisions.

**CHAPTER II - TERMINATION AND COMPLETION**

8. Right of hirer to terminate agreement.
9. Liability of hirer after termination of agreement.
10. Right of hirer to complete agreement.

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CHAPTER III - PROTECTED GOODS

11. Restriction on rights of seller to recover protected goods.
12. Action to recover protected goods.
13. Circumstances in which specific delivery may be postponed.
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CHAPTER IV - TERMS AND REPRESENTATIONS

15. Dealer to be treated as agent.
16. Terms implied by law.
17. Implied terms as to merchantability.
18. Further implied terms in special cases of sale by sample or description.

CHAPTER V - MISCELLANEOUS

19. Third parties.
20. Limitation on enforcement of agreement.
21. Hirer or buyer to give information to seller.
22. Removal of goods from The Gambia.
23. Duty to supply documents and information.
24. Successive agreements.
25. Regulations.
26. Variation of rights, duties and liabilities.

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**PART II - FINANCE LEASE AGREEMENT**

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**CHAPTER I - NATURE AND REQUIREMENTS OF FINANCE**

**LEASE AGREEMENT**

28. Requirements for lease agreement.

29. Contents of a finance lease agreement.

30. Rights and obligations of lessee.

31. Rights and obligations of lessor.

32. Duties of supplier.

33. Repossession of lessor.

34. Assignment of finance lease agreement.

**CHAPTER II - THIRD PARTY CLAIMS AND INSOLVENCY**

35. Priority of lessor's claim against third party and insolvency of lessee.

36. Claims by third parties.

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38. Lessee not to create charge.

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39. Licence for leasing activity.

40. Power of the Minister to regulate credit system.

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CHAPTER IV - MISCELLANEOUS

41. Lessee to give information.
42. Removal of asset from The Gambia.
43. Variation of rights, duties and liabilities of third parties.
44. Offences.
45. Penalty.

**HIRE-PURCHASE AND FINANCE LEASE BILL, 1994**

**A BILL ENTITLED**

**An Act to make provision for the regulation of hire-purchase, finance lease and other matters connected therewith.**

**Enacted by the Parliament of The Gambia**

PRELIMINARY

Short title.

1. This Act may be cited as the Hire-Purchase and Finance Lease Act, 1994.

Application.

2. This Act applies to

(a) every hire-purchase agreement, regardless of the hire-purchase price, cash price, or total purchase price of the goods; and

(b) a finance lease.

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**PART I - HIRE PURCHASE AGREEMENT**

Interpretation.

3. (1) In this Part, unless the context otherwise requires,

"action" includes every judicial proceeding instituted in a court in The Gambia;

"antecedent negotiations", in relation to a hire-purchase agreement, means any negotiations or arrangements with the hirer or buyer whereby he was induced to make the agreement or which otherwise promoted the transactions to which the agreement relates;

"court" means the Supreme Court;

"contract of guarantee" means a contract to guarantee the performance of the hirer's or buyer's obligations under a hire-purchase agreement, or to indemnify the owner or seller against any loss which he may incur in respect of that agreement;

"dealer" means a person in the business of buying or selling goods;

"guarantor" means a person who enters into a contract either to guarantee the performance of the hirer's or buyer's obligations under the hire-purchase or to indemnify the owner or seller against any loss which he may incur in respect of that agreement;

"hire-purchase agreement" means 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 bailee;

"hire-purchase price", subject to subsection (2), means the total sum payable by the hirer under a hire-purchase agreement in order to complete the purchase of the goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement;

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"hirer" or "buyer" means the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by the operation of law;

"Minister" means the Minister responsible for the administration of this Act;

"owner" or "seller" means the person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner's property in the goods or any of the owner's rights or liabilities under the agreement has passed by assignment or by the operation of law;

"postponed" means postponed in pursuance of section 12(1)(b)(ii);

"property" means the general property in the goods and not merely a special property;

"protected goods" has the meaning assigned to it in section 11(4);

"representations" has the meaning assigned to it in section 15(2);

"salesman" means a person whose occupation is to sell goods;

(2) For the purposes of this Act, any sum payable by the hirer under a hire-purchase agreement by way of a deposit or other initial payment, shall form part of the hire-purchase price.

(3) Reference in this Part

(a) to the person by whom any antecedent negotiations were conducted is a reference to the person by whom the negotiations or arrangements in question were conducted or made in the course of a business carried on by him; and

(b) to an order for the specific delivery of goods is a reference to an order for the delivery of those goods without giving the hirer or buyer an option to pay their value.

(4) For the purposes of this Part, any negotiation conducted, or arrangements or representations made by a servant or agent, if conducted or made by him in the course of his employment or agency, shall be treated as conducted or made by his employer or principal; and anything received by a servant or agent, if received by him in the course of his employment or agency, shall be treated as received by his employer or principal.

CHAPTER I

REQUIREMENTS OF A HIRE-PURCHASE AGREEMENT

Enforcement conditional on compliance with specified requirements.

4. (1) Where goods are let under a hire-purchase agreement the owner or seller shall not be entitled to enforce the agreement unless

- (a) the agreement is in writing and signed by the hirer or buyer and by or on behalf of all other parties to the agreement; and
- (b) the requirements of sections 5 to 7 are complied with.

(2) Where the owner or seller is not entitled to enforce an agreement,

- (a) he shall not be entitled to enforce any contract of guarantee relating to that agreement;
- (b) no security given by the hirer or buyer in respect of money payable under the agreement, or given by a guarantor in respect of money payable under a contract of guarantee relating to the agreement, shall be enforceable against the hirer or buyer, or against such guarantor by the holder of such a security; and
- (c) the owner or seller shall not be entitled to enforce any right to recover the goods from the hirer or buyer.

Requirements before agreement.

5.(1) Before a hire-purchase agreement is made the seller or owner shall state orally and in writing to the prospective buyer or hirer

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(otherwise than in the agreement referred to in section 4) the price at which the goods may be purchased by him for cash and the hire-purchase price or total purchase price.

(2) The price referred to in subsection(1) may be denoted in writing by placing a tag or similar form on the goods to be purchased.

Requirements as to content and form of agreement.

6. (1) Every hire-purchase agreement shall contain

- (a) a statement of the cash price and the hire-purchase price or total purchase price, as the case may be, of the goods;
- (b) the amount of each instalment by which the price is to be paid and the date or the mode of determining the date upon which each instalment is payable;
- (c) a description or list of the goods to which the agreement relates sufficient to identify them;
- (d) a notice, which is at least as prominent as the rest of the contents of the agreement, in the terms set out in the Schedule of this Act.

Schedule.

(2) A copy of the agreement shall be delivered or sent to the hirer or buyer within 14 days after the making of the agreement.

(3) If the court is satisfied in any action that a failure to comply with any of the requirements specified in subsection (1)(b) and (c) and subsection (2) has not prejudiced the buyer or hirer and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it thinks fit to impose, dispense with that requirement.

Avoidance of certain provisions.

7. A provision in a hire-purchase agreement shall be void to the extent that it provides that

- (a) an owner or seller or a person acting on his behalf is authorized to enter upon private land or premises for the purpose of taking possession of goods which have been let under a hire-purchase agreement or is relieved from liability for such an entry;

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- (b) the right conferred on a hirer by section 8 to terminate the hire-purchase agreement is excluded or restricted, or a liability beyond that stated in section 9 is imposed on a hirer by reason of the termination of the hire-purchase agreement by him or under that section;
- (c) a hirer, after the termination of the hire-purchase agreement or the bailment in any manner, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been terminated by him under this Act;
- (d) a person acting on behalf of an owner or seller in connection with a hire-purchase agreement is treated as or deemed to be the agent of the hirer or buyer; or
- (e) an owner or seller is relieved from liability for the acts or defaults of a person acting on his behalf in connection with a hire-purchase agreement.

## CHAPTER II

### TERMINATION AND COMPLETION

Right of hirer or buyer to terminate agreement.

**8.** Notwithstanding anything in a hire-purchase agreement between the parties, the hirer or buyer shall be entitled to terminate the agreement at any time before the final payment falls due by giving written notice of termination to any person entitled to receive payment under the agreement.

Liability of hirer after termination of agreement.

**9.(1)** Where the hirer or the buyer terminates a hire-purchase agreement under section 8, then, subject to the following provisions and without prejudice to any liability which has accrued before the termination, he shall

- (a) be liable to pay the difference between the total of the sums paid and one half of the hire-purchase or total purchase price, or if the agreement specifies a lesser amount, he shall be liable to pay the amount so specified;

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- (b) return the goods at his own expense to the premises from which they were originally supplied to him or to such other place as the owner or seller may direct, provided that the owner or seller shall at his own expense provide for any additional expense incurred in returning the goods to premises other than those from which they were originally supplied; and
- (c) be liable to compensate the owner or seller for any loss or damage caused by a failure to take reasonable care of the goods.

(2) Where a hire or buyer, having terminated a hire-purchase agreement under section 8, wrongfully retains possession of the goods, then, in an action brought by the owner or seller to recover possession of the goods the court may order the goods to be delivered to the owner or seller without giving the hirer or buyer an option to pay for the goods.

Right of hirer to complete agreement.

10.(1) The hirer or buyer may give notice in writing to the owner or seller of his intention to complete the purchase of the goods by paying or tendering to the owner or seller on a specified day the net balance due under the hire-purchase agreement, and having given such notice may complete the purchase accordingly on the day specified.

(2) For the purposes of subsection (1), the net balance due is the hire-purchase price originally payable under the agreement less any amounts paid or provided by the hirer.

(3) The rights conferred on the hirer or buyer by this section may be exercised by him

- (a) at any time during the continuance of the agreement; or
- (b) within twenty-eight days after the owner or seller has taken possession of the goods (during which period the owner shall not be entitled to dispose of the goods) upon paying or tendering to the owner in addition to the net balance due,

- (i) the reasonable costs incurred by the owner in and incidental to taking possession of the goods; and
- (ii) any amount properly expended by the owner on the storage, repair or maintenance of the goods.

### CHAPTER III

#### PROTECTED GOODS

Restriction on rights of seller to recover protected goods.

**11.(1)** The owner or seller shall not enforce any right to recover possession of protected goods from the hirer or buyer otherwise than by action.

(2) If the owner or seller recovers possession of protected goods in contravention of subsection (1), the hire-purchase agreement, if not previously terminated, shall be terminated, and the hirer or buyer shall be released from all liability under the agreement, and shall be entitled to recover from the owner or seller, in an action for money had and received, all sums paid by him and any security given by him in respect thereof.

(3) Notwithstanding subsection (2), the court may, upon application by the hirer or buyer, make an order for the return of goods to the hirer or buyer and for the re-scheduling of payments due under the agreement.

(4) "Protected goods" are goods in relation to which the following conditions are fulfilled:

- (a) that the goods have been let under a hire-purchase agreement;
- (b) that one-half of the hire-purchase price has been paid (whether in pursuance of a judgment or otherwise) or tendered by or on behalf of the hirer or buyer;

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- (c) that the hirer or buyer has not terminated the hire-purchase agreement or the bailment, by virtue of any right vested in him.

Action to recover protected goods.

**12.(1)** Where an owner or seller brings an action to recover possession of protected goods, the following provisions shall apply:

- (a) pending the hearing of the action, the court may, upon its own motion or upon application, make such orders as it thinks just for the purpose of protecting the goods from damage or depreciation;
- (b) subject to sections 13 and 14, on the hearing of the action, the court may without prejudice to any other power,
  - (i) make an order for the specific delivery of all the goods to the owner or seller subject, if necessary, to the condition that the owner or seller refunds to the hirer or buyer such part of the sums paid as the court may direct;
  - (ii) make an order for the specific delivery of all the goods to the owner or seller and postpone the operation of the order on condition that the hirer or buyer pays the unpaid balance of the hire-purchase price at such times and in such amounts as the court, having regard to the means of the hirer or buyer, thinks just; or
  - (iii) make an order for the specific delivery of a part of the goods to the owner or seller and for the transfer to the hirer or buyer of the owner's or seller's title to the remainder of the goods.

(2) Nothing in this section affects the liability of the hirer or buyer to the owner or seller for harm done to the goods intentionally or negligently.

Circumstances in which specific delivery may be postponed.

13.(1) The operation of an order for the specific delivery of goods to the owner or seller shall not be postponed unless the hirer or buyer satisfies the court that the goods are not in his possession or control at the time when the order is made.

(2) If in an action to which section 12 applies, an offer as to conditions for the postponement of the operation of an order is made by the hirer or buyer, and accepted by the owner or seller, the court may thereupon make the order and postpone its operation, in accordance with the offer without hearing the evidence as to any of the matters mentioned in section 12(1)(b)(ii) and in subsection (1) of this section.

Effect of postponement of order for specific delivery.

14.(1) While the operation of an order for the specific delivery of goods to the owner or seller is postponed, the hirer or buyer shall, subject to this section, be deemed to be a bailee of the goods in accordance with the terms of the hire-purchase agreement.

(2) No further sum shall be or become payable by the hirer or buyer or a guarantor on account of the unpaid balance of the hire-purchase price, except in accordance with the terms of the order.

(3) The court may make such further modification of the hire-purchase agreement, and of any contract of guarantee relating thereto, as the court considers necessary having regard to the variation of the terms of payment.

(4) If while the operation of the order is postponed, the hirer or buyer or a guarantor fails to comply with a condition of postponement, or with a term of the hire-purchase agreement as varied by the court, or wrongfully disposes of the goods, the owner or seller shall not initiate an action in a court against the hirer or buyer or guarantor otherwise than by making an application to the court by which the order was made for a modification of the order or of its postponement.

(5) When the unpaid balance of the hire-purchase price has been paid in accordance with the terms of the order, the owner's or seller's title to the goods shall vest in the hirer or buyer.

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CHAPTER IV

TERMS AND REPRESENTATIONS

Dealer to be  
treated as agent.

15.(1) Notwithstanding anything in a hire-purchase agreement to the contrary, any representations made to a hirer or buyer by a dealer or salesman of goods let under the hire-purchase agreement shall be deemed to have been made by the dealer or salesman as agent of the owner or seller.

(2) "Representations" include any statement or undertaking, whether constituting a condition or a warranty or otherwise.

Terms implied by  
law.

16.(1) In every hire-purchase agreement there shall be implied a term that

- (a) the hirer or buyer shall have and enjoy quiet possession of the goods;
- (b) the goods shall be free from any charge or encumbrance in favour of a third party at the time when the property is to pass;
- (c) the owner or seller will have a right to sell the goods at the time when the property is to pass.

(2) Where the hirer or buyer, whether expressly or by necessary implication,

- (a) has made known to the owner or seller, or to a servant or agent of the owner or seller, the particular purpose for which the goods are required; or
- (b) in the course of any antecedent negotiations, has made known the particular purpose for which the goods are required, to a person by whom those negotiations were conducted, or to a servant or agent of such a person,

there shall, subject to the provisions of section 17, be implied a term that the goods will be reasonably fit for that purpose.

(3) A breach of a term specified in this section by the owner or seller shall give the hirer or buyer a right to damages in respect of such breach, or to such other remedy as the court may think appropriate.

Implied term as to  
merchantability.  
Cap. 89:01.

17.(1) The provisions of this section and section 18 apply notwithstanding anything to the contrary contained in the Sale of Goods Act.

(2) Subject to the provisions of this section, in every hire-purchase agreement there shall be implied a term that the goods will be of merchantable quality at the time of delivery.

(3) Where the hirer or buyer has examined the goods or a sample of them before delivery, the term referred to in subsection (2) shall not be implied in respect of defects which the examination ought to have revealed.

(4) Where the goods are let or sold as second-hand goods, and the hire-purchase agreement contains a statement to that effect and a provision that the term referred to in subsection (2) is excluded in relation to those goods, then subject to subsection (6) that term shall not be implied in relation to those goods.

(5) Where the goods are let or sold as being subject to any defect specified in the hire-purchase agreement (whether referred to in the agreement as a defect or by another description to the like effect), and the agreement contains a provision that the term referred to in subsection (2) is excluded in relation to those goods in respect of that defect, then subject to subsection (6) that term shall not be implied in respect of that defect.

(6) The owner or seller shall not be entitled to rely on a provision in a hire-purchase agreement excluding or modifying the term referred to in subsection (2) unless he proves that before the hire-purchase agreement was made,

(a) he had brought that provision to the notice of the hirer or buyer and made its effect clear to him; and

(b) where the exclusion or modification is in relation to any defect, he had brought that defect to the notice of the hirer or buyer.

(7) A breach of a provision of this section by the owner or seller shall give the hirer or buyer a right to rescind the agreement.

Further implied terms in special cases of sale by sample or description.

18.(1) Where goods are let under a hire-purchase agreement and the goods are so let by reference to a sample, there shall be implied a term

- (a) that the bulk will correspond exactly with the sample;
- (b) that the hirer or buyer will have a reasonable opportunity of comparing the bulk with the sample.

(2) Where goods are let under a hire-purchase agreement and are so let by description, there shall be implied in the agreement a term that the goods correspond exactly with the description.

(3) Where goods are let under a hire-purchase agreement by reference to a sample as well as by description, there shall be implied in the agreement a term that the goods will correspond both with the sample and the description.

(4) A breach of a term specified in this section by the owner or seller shall give the hirer or buyer the right to rescind the agreement.

## CHAPTER V

### MISCELLANEOUS

Third parties.

19.(1) Where a hirer or buyer under a hire-purchase agreement

- (a) resells, pledges or otherwise disposes of the goods for value to a third party under such circumstances that the sale, pledge or other disposition would not, but for this section, transfer any title to the goods to the third party, and
- (b) does anything which gives the owner or seller a right to terminate the agreement and recover the goods under sections 11 to 14,

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the third party may retain possession of the goods for the period of sixty days specified in subsection (6), or, if they have been repossessed by the owner or seller the third party shall be entitled to recover possession of the goods upon a request in writing to the owner or seller and may thereafter retain the goods for the period of sixty days specified in subsection (6).

(2) If within sixty days the third party pays or tenders to the owner or seller

(a) all amounts due and unpaid from the hirer or buyer to the owner or seller, or

(b) the total sum due under any three instalments owing from the hirer or buyer to the owner or seller,

whichever is less, the rights and obligations of the hirer or buyer shall be transferred to the third party who thereafter shall be treated as the hirer or buyer for the purposes of the agreement and this Act.

(3) Where the third party pays or tenders the total sum due under subsection (2)(b),

(a) the third party shall not be liable to the owner or seller for any amount then outstanding in excess of the said three instalments;

(b) the third party shall be entitled to recover from the hirer or buyer the amount of the three instalments which he has paid to the owner or seller;

(c) the owner or seller shall recover from the hirer or buyer all amounts then outstanding in excess of the three instalments;

(d) the contract between the third party and the hirer or buyer shall terminate except with regard to the payment of all amounts then outstanding.

(4) Where a third party has paid nothing to the hirer or buyer or is in arrears of payment to the hirer or buyer, he shall pay to the owner or seller not only the three instalments but also what he owes to the hirer or buyer.

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(5) The total amount payable by virtue of subsection (4) shall not exceed the total of all amounts due and unpaid from the hirer or buyer to the owner or seller, and the owner or seller shall credit to the third party in respect of immediate future payments payable to him by the third party all amounts so paid to him by the third party in excess of the three instalments.

(6) Nothing in this section

- (a) derogates from the rights of a hirer or buyer in whom the property in goods has vested;
- (b) affects the liability of the hirer or buyer for a wrongful sale, pledge or other disposition for value of the goods or documents of title; and
- (c) derogates from a liability of the hirer or buyer to a third party or to the owner or seller.

(7) For the purposes of this section, the sixty-day period shall commence

- (a) when the third party recovers possession of goods from the owner or seller, if the owner or seller has repossessed the goods; or
- (b) when the seller or owner notifies the third party in writing of his right to repossess the goods or of his right to bring an action to repossess the goods pursuant to sections 11 to 14.

(8) This section applies to goods which have been let under a hire-purchase agreement and which are subsequently transferred under any sale, pledge, or other disposition for value to any person receiving them in good faith and without notice of the hirer's lack of title, notwithstanding any other provision in this Act.

Limitation on enforcement of agreement.

**20.** An owner or seller shall not be entitled by reason of the hirer's or buyer's failure to carry out any obligation under a hire-purchase agreement to enforce a provision in the agreement for the payment of damages, or forfeiture or penalty, or for the acceleration of the payment of an instalment, or for termination of the agreement, or for repossession, unless he has made written demand to the hirer or buyer to carry out the

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obligation in question within a specified period of not less than fourteen days beginning with the date of service of the demand, and the hirer or buyer has failed to comply with the demand in the specific period.

Hirer or buyer to give information to seller.

21.(1) Where by virtue of a hire-purchase agreement a hirer or buyer is under a duty to keep the goods comprised in the agreement in his possession or control, the hirer or buyer shall, on receipt in writing of a request from the owner or seller, inform the owner or seller where the goods are at the time when the information is given, or, if the information is sent by post, at the time of posting.

(2) If a hirer or buyer fails without reasonable cause to give the information requested within fourteen days of the receipt of notice, he commits an offence and is liable on conviction to a fine not exceeding five hundred dalasis.

Removal of goods from The Gambia.

22.(1) The hirer or buyer of goods under a hire-purchase agreement shall not remove the goods from The Gambia without the written consent of the owner or seller.

(2) If the hirer or buyer contravenes subsection (1) he commits an offence and is liable on conviction to a fine not exceeding ten thousand dalasis or to imprisonment for a term not exceeding one year or to both, unless he satisfies the court that he did not intend to deprive the owner of his ownership or to defeat the rights of the owner to obtain any payment due to the owner.

(3) If the owner or seller believes that the goods have been removed or are being removed or are about to be removed from The Gambia without his written consent, and with intent to deprive him of his ownership or to defeat his rights to obtain a payment due to him under the agreement, he may apply to the court for the return of the goods.

(4) Before instituting an action under subsection (3), or while the action is pending, the owner may apply to the court for an order for the attachment of the goods.

(5) A court which makes an order for the attachment of goods under subsection (4) may require the applicant to give security for damages resulting from the order.

(6) An order for the attachment of goods under this section

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- (a) may be discharged or varied by the court for good cause shown by a person affected by the order and on such terms as to costs as the court thinks fit; and
- (b) shall be discharged upon the hirer or buyer giving security as the court may think proper taking into account the value of the goods, the amount due to the owner or seller under the agreement, and the costs of the owner or seller.

Duty to supply documents and information.

**23.(1)** At any time before the final payment has been made under a hire-purchase agreement, the owner or seller shall, within seven days after he has received a request in writing from the hirer or buyer and the hirer or buyer has tendered to him the sum of five dalasis for expenses, supply to the hirer or buyer a copy of the agreement, together with a statement signed by the seller or owner or his agent showing

- (a) the amount paid by or on behalf of the hirer or buyer;
- (b) the amount which is due under the contract but remains unpaid, and the date upon which each unpaid instalment became due and the amount of each such instalment; and
- (c) the amount which is payable under the agreement, and the date or the mode of determining the date upon which each future instalment is to become payable, and the amount of each such instalment.

**(2)** In the event of a failure without reasonable cause to comply with subsection (1), then, while the default continues

- (a) the owner or seller shall not be entitled to enforce the agreement against the buyer or hirer or to enforce a contract of guarantee relating to the contract, or to enforce a right to recover the goods from the buyer or hirer;
- (b) the security given by the buyer or hirer, in respect of money payable under the contract or given by a guarantor in respect of money payable under such a contract of guarantee shall not be enforceable

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against the buyer or hirer or the guarantor by any holder thereof; and,

- (c) if the default continues for a period of thirty days, the defaulter commits an offence under this section and is liable on conviction to a fine not exceeding five hundred dalasis.

Successive agreements.

**24.** Where goods have been let under a hire-purchase agreement and

- (a) a part of the hire-purchase or the total purchase price has been paid or tendered, and
- (b) the owner or seller makes a subsequent hire-purchase agreement or conditional sale agreement in respect of the same goods,

the provisions of sections 11 to 14 shall have effect in relation to any further agreement as from the time when one half of the hire-purchase price or total purchase price specified in the first agreement has been paid or tendered.

Regulations.

**25.(1)** The Minister may make regulations providing for the regulation and control of the letting of goods under hire-purchase agreements.

(2) Without prejudice to the generality of subsection (1), the regulations may provide for

- (a) the form of the agreement;
- (b) the limit of the rate of interest and other charges;
- (c) the minimum deposit to be paid by a buyer;
- (d) the maximum period of payment, and the amount and frequency of instalments or rentals;
- (e) the appropriation of payments as between two or more agreements between the seller or owner and the buyer or hirer;

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- (f) the information to be given in an advertisement or announcement published or made in a form or manner relating to goods to be disposed of by hire-purchase regarding the terms upon which the goods will be sold;
- (g) the inclusion in an advertisement or announcement of a statement of the price at which the goods will be sold for cash.

(3) Regulations under this section may also

- (a) provide that a person who lets or sells goods to which the regulations apply shall not be entitled to enforce any agreement for such sale or right to recover the goods unless the specified provisions of the regulations are complied with;
- (b) prescribe, whether for goods generally or for any class or description of goods, a minimum amount for the purposes of sections 11 to 14 in lieu of one half of the hire purchase price or total purchase price.

Variation of rights, duties and liabilities.

26. Subject to the provisions of this Act, the rights, duties and liabilities of the parties to a hire-purchase agreement as laid down in this Act may, as between the parties themselves, be varied by express agreement, or by the course of dealing between the parties, or by a custom (whether a rule of customary law or not) which the parties may be taken to have agreed to be applicable to the agreement.

**PART II - FINANCE LEASE AGREEMENT**

Interpretation.

27.(1) In this Part, unless the context otherwise requires,

"finance lease agreement" means, a written agreement between two parties where one of the parties (known as the lessor) undertakes to lease to the lessee for the latter's use only and against payment of mutually agreed lease rentals over a specified non-cancellable period

- (a) the lessor's own already acquired assets; or

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- (b) an asset that the lessor agrees to acquire from a third party, known as the supplier, chosen and specified by the lessee so that the lessor shall retain full title to the asset during the period of the lease

and, under which subject to agreement by the lessor, the lessee may exercise an option to purchase the asset outright after the period of the lease at a price to be agreed upon by the parties;

"fair value" means an amount for which an asset shall be exchanged between a buyer and a seller;

"lessor" means a person, who under a finance lease agreement, conveys to another person (the lessee) the right to use the asset in return for rent for an agreed period of time;

"lessee" means a person, who under a finance lease agreement, obtains from another person (the lessor) the right to use, in return for rent, an asset for an agreed period of time;

"leasable asset" means a movable asset which can be legally sold in or imported into The Gambia that becomes the subject matter of a finance lease agreement, whether or not the asset has become a fixture or incorporated in land;

"non-cancellable lease" means a lease that is cancellable only

(a) on the occurrence of some remote contingency;

(b) by mutual agreement; or

(c) by operation of law;

"residual value" means the value at the expiry of the lease term, estimated at the inception of a lease of the leased asset;

"supplier" means a person (other than the lessor or lessee) who is in the business of buying and selling goods; and

"total lease rental" means the total sum payable by the lessee under a finance lease agreement, exclusive of any sum payable as management fee, service charge or as a penalty or as compensation or damages for breach of the agreement.

(2) A reference in this Act to "lessor" or "lessee" includes his successors and assignees.

## CHAPTER I

### NATURE AND REQUIREMENTS OF FINANCE LEASE AGREEMENT

Requirement for  
lease agreement.

**28.(1)** An asset for leasing under this Act shall be made by a finance lease agreement between the lessor and the lessee in accordance with the provisions of this Part.

(2) Where an asset is to be acquired by the lessor before the finance lease agreement is finally made, the written agreement shall contain

- (a) a statement to the effect that the parties have agreed to enter into a finance lease agreement;
- (b) a description of the asset to be acquired under the lease, the estimated price of the asset and the total lease rentals payable by the prospective lessee;
- (c) a statement that the asset is being acquired by the prospective lessor in connection with the lease agreement which to the knowledge of the supplier is to be made between the prospective lessor and lessee; and
- (d) a statement as to whether or not the prospective lessee has selected the asset and selected the supplier without relying on the skill and judgment of the prospective lessor.

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Contents of a  
finance lease  
agreement.

**29.(1)** Every finance lease agreement shall contain

- (a) a statement of the price of the asset and the total lease rentals payable under the agreement;
- (b) the amount of each rental by which the total lease rental is to be paid and the date or the mode of determining the date on which each rental instalment is payable;
- (c) a description of the asset to which the agreement relates sufficient to identify it;
- (d) a clause that the lessee acknowledges, confirms and declares that he holds the asset as a mere bailee of the lessor and that he does not have any proprietary right, title or interest in the asset during the entire period of the lease;
- (e) a clause that the lessee confirms and acknowledges that the lessee shall pay to the lessor, lease rentals as mentioned in the agreement;
- (f) a clause that the lessee confirms and acknowledges that the agreement is a full pay-out non-cancellable agreement and that the lessee has no right to surrender the asset during the tenure of the agreement; and
- (g) a clause that upon determination of the agreement, unless a renewal is granted or the lessor agrees to sell the asset to the lessee, the lessee shall deliver to the lessor the asset in good order and condition, ordinary wear and tear excepted.

(2) A copy of the agreement shall be delivered or sent to the lessee within fourteen days after it is made.

Rights and  
obligations of  
lessee.

**30.(1)** The lessee shall have and enjoy quiet possession of the leased asset during the entire period of the lease as provided in the finance lease agreement.

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(2) The lessee shall use the asset according to the terms and conditions of the agreement.

(3) The lessee shall be responsible for proper maintenance and such adequate insurance cover of the asset as may be mutually agreed upon between the parties.

(4) The lessee shall take proper care of the asset, use it in a reasonable manner consistent with that of a normal user and keep it in the condition in which it was delivered, subject to fair wear and tear and to any modification of the asset agreed upon by the parties.

(5) The lessee shall pay the rentals as stipulated in the lease agreement, and unless otherwise stipulated in the agreement, the lessee shall not be liable for all payments set out in the agreement if the leased asset is fully or partly destroyed or damaged by accident not of the lessee's making or *force majeure*.

(6) As long as the lessee performs his obligations in accordance with the terms of the agreement, the agreement shall not be terminated unilaterally by the lessor, even if the lessor is declared bankrupt.

(7) Subject to subsection (4), the lessee shall, at the expiration of the agreement, return the asset to the lessor, unless the lease is further renewed with the consent of the lessor or the lessor agrees to its purchase by the lessee.

(8) Without prejudice to the lessor's rights as against those of the lessee or the supplier, the lessee shall have the right to take direct action against the supplier in order to hold the supplier to the satisfactory performance of the supplier's contractual obligations and to obtain from the supplier compensation for damages resulting from his default.

(9) The lessee shall have no other claim against the lessor for non-delivery, delay in delivery or delivery of a non-conforming asset except to the extent to which this results from the act or omission of the lessor.

Rights and obligations of lessor.

31.(1) Where the leased asset is not delivered to the lessee

(a) as a result of failure by the lessor to enter into a sales contract with the supplier on time;

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- (b) as a result of failure by the lessor to make payment to the supplier on time; or
- (c) for any other good reason,

the lessee's obligations under the finance lease agreement shall be suspended except that, subject to subsection (2), the lessee shall give the lessor reasonable extension of time during which the lessor may comply with his contractual obligations.

(2) The lessee may

- (a) request that the agreement be fulfilled in its entirety and that a penalty be paid, covering the actual losses that have resulted from the delay; or
- (b) demand that the agreement be terminated with the lessor paying any damage or losses incurred by the lessee as a result of the lessor's failure to comply with his contractual obligations.

(3) Where owing to default on the part of the lessee, the sales contract between the supplier and the lessor is subsequently terminated, the lessor retains the right to demand payments due from the lessee under the agreement so long as the lessor acted in good faith and payment was made by the lessor for purchase of the asset at the request of the lessee.

(4) Except in the cases covered by subsections (1), (2) or (3), the lessor shall not be liable to the lessee for damages except for wilful infringement or unlawful acts of the lessor which result

- (a) in damage to or defects in the leased asset; or
- (b) in curtailment of the lessee's rights in relation to a third party; or
- (c) in infringement of the lessee's peaceful and lawful use of the leased asset.

(5) Except as otherwise provided in this Act or in the agreement, the lessor shall not incur any liability in respect of defects in or fitness of the leased asset for any particular purpose unless the lessee has suffered loss as a result of his reliance on the lessor's skill and

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judgment and as a result of the lessor's intervention in the selection of the supplier or the specifications of the asset.

(6) The lessor shall not, in his capacity as lessor, be liable to third parties for death, personal injury or any damage to property caused by the use of the asset by the lessee.

Duties of  
supplier.

**32.**(1) For the purposes of this Act, the supplier of an asset to a lessor owes to the lessee the same duties as he owes to the lessor under the sale agreement, but the supplier shall not be liable to both the lessor and the lessee in respect of the same damage.

(2) Nothing in sub-section (1) shall be taken as permitting the lessee to terminate or rescind the sale agreement without the consent of the lessor.

Repossession by  
lessor.

**33.**(1) Where the lessee defaults in the payment of rentals in accordance with the finance lease agreement, the lessor may recover accrued unpaid rents together with interest and damages.

(2) Subject to subsection (3), where the lessee defaults in the payment of rentals, or commits another breach, the lessor may terminate the agreement and

(a) recover possession of the asset, subject to subsection (4); and

(b) recover such damages as will place the lessor in the position in which he would have been had the lessee performed the agreement in accordance with its terms.

(3) The lessor shall not be entitled to exercise his right of termination under subsection (2) when he has by notice given the lessee a reasonable opportunity of remedying the default so far as the default may be remedied.

(4) Where the lessor becomes entitled to repossess the asset leased through breach of agreement by the lessee or otherwise through operation of law, and the lessee does not deliver the asset after having been given due notice to surrender the asset to the lessor, the lessor may initiate legal proceedings in a court against the lessee for the recovery of the asset.

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(5) The right of the lessor to repossess shall in no way prejudice other remedies available to the lessor under any other law, including but not limited to the right to recover damages for losses caused by non-compliance with the terms of the agreement by the lessee.

(6) Where there is repossession under this section, the lessee shall, unless otherwise stipulated between the parties, be responsible for the immediate payment of all rents due for the remaining term of the lease agreement.

(7) The parties may, under a finance lease agreement, stipulate that the amount of future rents at a time of repossession shall be decreased by the fair value of the asset repossessed less any administrative costs of the lessor, including but not limited, to legal and transportation costs.

(8) The lessor shall not be entitled to recover damages to the extent that he has failed to take reasonable steps to mitigate his loss.

Assignment of  
finance lease  
agreement.

**34.(1)** Unless otherwise stipulated, a finance lease agreement may be assigned by the lessor after he has informed the lessee of his intention in writing.

(2) The lessor has the unilateral right to assign the lease agreement to third parties, but without infringement of the lessee's right to the quiet enjoyment of the asset leased.

(3) A subsequent holder of a finance leasing agreement has the same rights and obligations that are specified in the agreement or as provided by law in relation to the lessee as the original lessor, and accordingly, the lessee shall continue to have the right to quiet enjoyment of the asset provided the lessee performs his obligations under the agreement.

(4) The lessee may transfer the right to the use of the asset or any other rights under the agreement only with the consent of the lessor and subject to the rights of third parties.

CHAPTER II

THIRD PARTY CLAIMS AND INSOLVENCY

Priority of lessor's claim against third party and insolvency of lessee.

35.(1) The title of the lessor or his assigns in the asset leased under the finance lease agreement shall prevail at all times over claims by third parties including creditors of the lessee except as against a purchaser in good faith for value, of the asset.

(2) In the event of

- (a) death, bankruptcy or insolvency of the lessee,
- (b) liquidation or dissolution of the lessee where the lessee is a body corporate incorporated as a company under the Companies Act, 1994,
- (c) expiry of the finance lease agreement, or
- (d) breach of any of the terms of the finance lease agreement by the lessee, including default in one rental payment of any amount, not remedied within such period as may be stipulated in the agreement and in the absence of any such stipulation, within a period of thirty days,

the lessor, subject to section 33 has the right to repossess the leased asset which shall not be included in the assets of any receivership or pool of assets to be disposed of by the creditors of the lessee.

Claim by third parties.

36.(1) An action by a third party claiming a right to the asset shall be brought against the lessor.

(2) The lessee shall inform the lessor of any impediment or disturbances by third parties to his quiet enjoyment of the asset.

(3) In the event of the lessee's failure or delay to inform the lessor as provided under subsection (2) the lessee shall be responsible for any charges or damages incurred by the lessor.

(4) Where as a result of legal proceedings initiated by a third party against the lessor, the value of the asset is decreased, the lessee shall

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have the right to reduction of the rent or cancellation of the finance lease agreement.

Damage caused by third parties.

37.(1) The lessee shall be responsible for repairing damage caused by third parties during the time the asset is in his possession.

(2) The lessee has the right to take legal action against the third parties to recover any expenses incurred as a result of his obligations to restore the condition of the asset or to pay any damages to the lessor.

Lessee not to create charge.

38.(1) The lessee shall not create any charge or encumbrance on the asset leased in favour of a third party.

(2) In the event of creation of any charge or encumbrance, the charge or encumbrance shall be void and the creditors of the lessee shall not be entitled to enforce the charge or encumbrance on the asset leased.

### CHAPTER III

#### LICENSING AND ADMINISTRATION

Licence for leasing activity.

39.(1) A lessor in a finance lease agreement shall be a body corporate incorporated as a company under the Companies Act, 1994 and specifically licensed to engage in finance leasing upon payment of the prescribed fee.

(2) Notwithstanding anything contained in the Companies Act, 1994, the Minister may, by guidelines published in the *Gazette*, prescribe the fees to be paid and the requirements to be satisfied before a lessor becomes eligible for a licence to carry on the business of finance leasing.

(3) The guidelines shall, among other things, provide for

- (a) minimum paid-up capital of the lessor;
- (b) minimum requirements regarding management expertise and administrative controls; and
- (c) restrictions on accepting deposits from the public by lessors.

Power of the  
Minister to  
regulate credit  
system.

**40.(1)** For the purpose of regulating the credit system of The Gambia, in finance lease matters, the Minister may, by regulations,

- (a) require lessors to furnish him in such form, and at such intervals with statements and information or particulars relating to the business of the lessors as may be specified by the Minister;
- (b) give to lessors directions relating to the conduct of their business;
- (c) give to lessors directions regarding acceptance of deposits from the public; and
- (d) lay down suitable guidelines for proper supervision and control of the exercise of the power to accept deposits from the public.

(2) Without prejudice to the generality of the power vested in the Minister under subsection (1), the statements, information or particulars to be furnished by a lessor may relate to all or any of the following matters:

- (a) the paid-up capital;
- (b) reserves and other liabilities;
- (c) the share holding pattern;
- (d) the investments, if any; and
- (e) the persons to whom and the assets and periods for which leasing is provided and the terms and conditions on which it is provided.

(3) Every lessor shall furnish the statements, information or particulars called for and shall comply with any direction given by the Minister.

(4) A lessor who defaults in complying with subsection 3 commits an offence and is liable on conviction to a fine not exceeding one thousand dalasis.

(5) The Minister may, at any time, appoint any person to conduct an inspection or verify the correctness or completeness of a statement, information or particulars furnished to the Minister.

#### SECTION IV

#### MISCELLANEOUS

Lessee to give information.

41.(1) Where by virtue of a finance lease agreement, a lessee is under a duty to keep the asset in his possession or control, the lessee shall on receipt of a request in writing from the lessor, inform the lessor where the asset is at the time when the information is given or if the information is sent by post, at the time of posting.

(2) If a lessee fails without reasonable cause to give the information within fourteen days of receipt of the notice, he commits an offence and is liable on summary conviction, to a fine not exceeding five hundred dalasis.

Removal of asset from The Gambia.

42.(1) The lessee under a finance lease agreement shall not remove the asset from The Gambia without the written consent of the lessor.

(2) If the lessee contravenes subsection (1), unless he satisfies the court that he did not intend to deprive the lessor of his ownership or to defeat the rights of the lessor to obtain payment due to the lessor, he commits an offence and is liable on conviction to a fine not exceeding one thousand dalasis or to imprisonment for a term not exceeding six months or both.

(3) If the lessor believes that the asset has been removed or is being removed from The Gambia without his written consent, and with intent to deprive him of his ownership or to defeat his rights to obtain any payment due to him under the agreement, he may institute an action for the return of the asset.

(4) Before instituting an action under subsection (3) of this section, or while the action is pending, the lessor may apply to the court for an order for the attachment of the asset.

(5) The court may make an order for the attachment of the asset under subsection (4) and in doing so it may require the applicant to give security for damages resulting from the order.

- (6) An order for the attachment of the asset under this section
  - (a) may be discharged or varied by the court for good cause shown by a person affected by the order and on such terms as to costs as the court thinks fit; and
  - (b) shall be discharged upon the lessee giving security as the court may think proper taking into account the value of the asset, the amount due to the lessor and the costs of the lessor.

Variation of rights, duties and liabilities of the parties.

**43.** Subject to the provisions of this Act, the rights, duties and liabilities of the parties to a finance lease agreement as laid down in this Act may, as between the parties themselves, be varied by express agreement or by the course of dealing between the parties, or by a custom which the parties may be taken to have agreed to be applicable to the agreement.

Offences by bodies of persons.

**44.(1)** Where an offence is committed under this Act or under regulations made under it by a body of persons,

- (a) in the case of a body corporate, other than a partnership, every director or an officer of the body corporate shall be deemed to have committed the offence; and
- (b) in the case of a partnership, every partner or officer of the body corporate shall be deemed to have committed the offence.

(2) No person shall be convicted of an offence by virtue of subsection (1) if he proves that the offence was committed without his knowledge or connivance and that he exercised all due care and diligence to prevent the commission of the offence having regard to all the circumstances.

Penalty.

**45.(1)** A person convicted of an offence under this Act for which no penalty has been provided is liable, on first conviction, to a fine not exceeding one thousand dalasis or to imprisonment for a term not exceeding one year or to both.

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(2) On a second or subsequent conviction of a person for an offence under this Act, a court may impose a penalty which does not exceed double the penalty referred to in subsection (1).

## SCHEDULE

(section 6 (1)(d))

### NOTICE TO BE INCLUDED IN HIRE-PURCHASE AGREEMENT

#### NOTICE

#### RIGHT OF HIRER OR BUYER TO TERMINATE AGREEMENT

1. The hirer may put an end to this agreement either by giving notice of termination in writing to any person who is entitled to collect or receive the hire-rent or in accordance with the terms of the agreement where they are more favourable to him.

2. He shall then pay any instalments which are in arrears at the time when he gives notice. If, when he has paid those instalments, the total amount which he has paid under the agreement is less than (*here insert the minimum amount which the hirer is required to pay in accordance with section 9 of the Act*) he must also pay enough to make up that sum.

3. If the hirer fails to take reasonable care of the goods he may be liable to compensate the owner for any loss or damage caused by such failure.

#### RESTRICTION OF OWNER'S RIGHT TO RECOVER GOODS

4. \*[After (*here insert an amount calculated in accordance with the provisions of section 9 of this Act*) has been paid, then unless the hirer has himself put an end to the agreement, the owner of the goods shall not be entitled to take them back from the hirer without a court order or the consent of the hirer.

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5. If the owner applies to the court for an order to retrieve the goods, the court may, if it considers it just to do so, allow the hirer to keep

- (a) the goods, on condition that the hirer or buyer pays the balance of the price in the manner ordered by the court; or
- (b) a fair proportion of the goods having regard to what the hirer or buyer has already paid.

**EXPLANATORY NOTES ON**  
**THE DRAFT CARRIAGE OF GOODS BY SEA BILL, 1994**

**A. The Existing Regulatory Regime**

The Carriage Of Goods By Sea Act (Cap. 67:01) may aptly be described as a replica of the English Carriage Of Goods By Sea Act, 1924. Whilst the latter English legislation was repealed by the Carriage Of Goods By Sea Act, 1971 to accommodate developments in this area of the law, the Gambian legislation remains static with certain obvious deficiencies. For instance, sections 502 and 503 of the English Merchant Shipping Act, 1894 which are saved under section 1(3) of Cap. 67:01 have since been repealed in the United Kingdom but continue to have the force of law in The Gambia.

It is also important to note that the rules relating to bills of lading (provided in the Schedule) as applied by section 2 of Cap. 67:01 relate to exports only and not imports. This defect is perhaps not entirely in accordance with the intentions of the drafters of the legislation and in this law has generally not been respected. Indeed many countries have followed the United Kingdom lead of applying the Rules on the basis of the port of shipment rather than the place of issue of the bill of lading. This contrasts with what holds in the United States where the Rules are applied to imports as well as exports by virtue of the Carriage Of Goods By Sea Act, 1936.

Furthermore, the reason for section 4 of Cap. 67:01 is that the Act will not be mandatory law in the court of a foreign country to which the ship may travel, so that the only way to ensure its application is by contractual incorporation. In any event, it may happen that the importing country will have overriding legislation in this respect. Thus the provision may be described as a "paper tiger" since there is no prescribed penalty for non-compliance, so that the section may be ignored with impunity, unlike in the United States, where non-compliance to a similar provision results in the shipowner being deprived of provisions placing limitations on his liability if brought before a U.S. court.

**B. The Philosophy and Aims of the Carriage of Goods by Sea Bill, 1994**

Essentially, the philosophy behind the draft Carriage Of Goods By Sea Bill, 1994 is to take cognisance of the new developments in international trade relating to the carriage of goods as recognised in the various international Conventions on the subject. This is certainly an area of the law where uniformity in the application of international rules of trade is desirable in order to ensure smooth relationships in international business transactions.

Therefore, the Bill is designed to create a well-defined regime relating to the rights and liabilities of the shipper and the carrier. It is also aimed at ensuring the easy identification of parties for purposes of legal proceedings in The Gambia. Finally, the Bill creates room for the application

of the Hamburg Rules which deal with the detailed operation of the international rules governing the carriage of goods by sea.

### **C. The Provisions of the Carriage of Goods by Sea Bill, 1994**

The draft Carriage Of Goods By Sea Bill, 1994 contains twelve clauses and a Schedule as follows:

**Clause 1:** Apart from the citation of the short title, this clause empowers the Minister to determine the day when the Schedule shall take effect. This empowering provision has been necessitated by Article 30(2) of the Schedule by which the Hamburg Rules would apply to The Gambia (upon accession) "on the first day of the month following the expiration of one year after the deposit of the appropriate instrument".

**Clause 2:** This clause merely excludes references to sea way bills and ships' delivery orders in so far as the provisions of the Bill are concerned.

**Clause 3:** This clause outlines the rights and liabilities of a consignee and endorsee such that a person who lawfully becomes entitled to goods as consignee or holder of a bill of lading acquires the rights of suit as well as being subject to any liabilities in respect of the goods. This therefore clearly identifies the consignee's right of suit and the fact that he may also be sued as if the contract contained in a bill of lading had been entered into with him personally.

**Clause 4:** This clause stipulates that the provisions of the draft Bill shall in no way prejudice or affect the rights of stoppage *in transitu* or a person's right to claim freight against the original shipper or owner of goods or any liability of the consignee or endorsee of goods for that matter. Thus where a right of stoppage in transit or a right of claim for freight or any liability of the consignee or endorsee arises, the provisions of the Bill shall not operate to affect such right or liability.

**Clause 5:** This clause deals with representations contained in a bill of lading relating to the shipment or receipt for shipment of goods. Where such a bill of lading is shown to have been signed by the master of the vessel or by a person who had the express, implied or apparent authority of the carrier to sign bills of lading then such bill of lading shall operate as conclusive evidence against the carrier of the fact of shipment of the goods or their receipt for shipment. Thus the carrier assumes responsibility for goods upon the execution of a bill of lading.

**Clauses 6 and 7:** The purport of clause 6 essentially is to ensure that the owner or charterer of a ship against whom legal proceedings are instituted in The Gambia does not evade participation in such proceedings merely because of his non-presence in The Gambia. Thus under such circumstances process issued in proceedings against the owner or charterer of the ship may be served on any person in The Gambia who is the recognised or ostensible agent of the owner or charterer or, in the absence of such agent, the master of the ship. In this respect

the proceedings are declared to be binding on the owner or charterer of the ship. Therefore any moneys in the hands of the agent or master to which the owner or charterer is entitled may be attached in accordance with the Rules of the Supreme Court (clause 7). The agent or master becomes a garnishee as a result under those Rules.

**Clause 8:** This clause is an attempt to cure the defect in section 2 of Cap. 67:01 by making the Rules contained in the Schedule applicable not only to exports but also to imports.

**Clause 9:** This clause is an improvement on section 4 of Cap. 67:01. While making it an obligation that a bill of lading or similar document of title issued in The Gambia shall contain an express statement that such bill of lading or similar document of title shall have effect subject to the Rules contained in the Schedule, the change goes further to ensure this requirement is deemed to have been fulfilled. That is to say, every bill of lading or similar document of title shall be deemed to have incorporated the requirement for the application of the Rules, notwithstanding the absence of the requisite express statement to that effect. In such case also it is irrelevant that the contract pursuant to which the bill of lading or similar document of title is issued is not governed by the laws of The Gambia. The essence of the provision therefore is to give prominence to and ensure the overall application of the Rules so that no person may circumvent, or contract out of, it.

**Clause 10:** The reason for this clause basically is to ensure that owners of sea-going vessels do not rely on the provisions of the Act (as contained in the Schedule) with respect to their liability or matters relating to the carriage of dangerous goods by sea as excluding the application of any other enactment on the subject.

**Clause 11:** This clause empowers the Minister to amend the Schedule and add thereto any international Convention on the carriage of goods.

**Clause 12:** This clause repeals the Carriage of Goods by Sea Act (Cap. 67:01).

**Schedule:** The Hamburg Rules provide that upon becoming a Contracting State a State which is party to the Hague Rules in their original or amended form must denounce the Convention when the UN Convention on the Carriage of Goods by Sea, 1978 enters into force in respect of that State (Article 31). The Gambia acceded to the Hague Rules and hence the importance of this provision.

The provisions of the Rules are applicable to all contracts of carriage by sea between two different States as provided in Article 2(1); they are not applicable to charter-parties. However, it should be noted that where a bill of lading is issued pursuant to a charter-party, the Rules apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

The Rules apply only to the carriage of goods. Thus where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper (Article 1(5)).

The responsibility of the carrier for the goods covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge (see Article 4 generally).

The basis of the carrier's liability is dealt with in Article 5 and the person who is entitled to make a claim for the loss of goods may treat them as lost if they have not been delivered within sixty consecutive days following the expiry of the time for delivery.

The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into (Article 9(2)).

The liabilities of the carrier and the actual carrier are dealt with in Article 10 and Part III generally deals with the liability of the shipper (which includes special rules on dangerous goods). Matters relating to the issue and contents of bills of lading as well as other documents other than bills of lading are covered under Part IV. Part V deals with claims and actions - limitation of action and limitation of liability. Part VI generally deals with supplementary provisions relating to contractual stipulations, general average, the application of other international conventions or national law relating to the limitation of liability of owners of seagoing vessels and the unit of account applicable under the Rules. The last Part (Part VII) deals with final clauses relating to procedural matters.

# CARRIAGE OF GOODS BY SEA

## 1. Existing Regime

The legal basis for the use of Bills of Lading in The Gambia is the Carriage of Goods By Sea Act (Cap. 67:01) which contains six sections only and includes the Hague Rules relating to Bills of Lading as a Schedule thereto. The Act became operational in May 1926 - nearly 70 years ago - and was based on the UK Bills of Lading Act 1855. While the UK has modernised its law into the Carriage of Goods By Sea Act 1971, Gambian law has remained static and, consequently, outmoded. To complicate matters, Cap. 67:01 contains references to sections 446 to 450, both inclusive, and 502 and 503 of the Merchant Shipping Act, 1894, of the Parliament of the United Kingdom "as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of sea-going vessels". That, with respect, represents a nightmare to the unsuspecting public and a snare to the legal profession.

As regards the need to incorporate into the draft Bill provisions of the Merchant Shipping Act (UK), 1894, it must be noted that sections 446-450 of the Merchant Shipping Act (UK) relate to Dangerous Goods. These rules are substantially reproduced in Article 13 (Special Rules on dangerous goods) of the United Nations Conventions on the Carriage of Goods by Sea, 1978, except that the latter has no forfeiture provision. It seems to us that it would be desirable to set out these clauses in an indigenous statute rather than to make statutory references to them. Sections 502 and 503 which formed part of Part VIII of the Merchant Shipping Act (UK) 1894, have since been repealed in the UK by the Merchant Shipping Act, 1979. But the subject matter of those provisions (i.e. the liability of the shipowners) is covered by article 10 (liability of the carrier) and Part III (liability of the shipper) of the 1978 United Nations Convention.

## 2. Library Based Research

### (i) Legal Historical Background

Of the historical origins of Bills of Lading, perhaps the most straightforward account is to be found in pages 1 and 2 of *Bills of Lading: Laws and Practice*<sup>1</sup> which we respectfully reproduce below:

It is not known when bills of lading were first used, although records of cargoes being placed on board ocean-crossing vessels have probably existed for well over a thousand years. Whereas no formal sea code has existed from Greek or Roman times, maritime law grew from the customs and practice of the early seafaring

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<sup>1</sup> By Alan Mitchelhill, (Chapman & Hall Ltd.), (2nd Ed.)

traders. The requirement that every master must take on board a clerk is mentioned in *The Ordonnance Maritime of Trani* (an Italian town) of 1063, and refers to the ship's book or register. This is one of the earliest references to the keeping of records of goods loaded on board ships. The French writer Desjardins in his *Droit Commercial Maritime* says that in a document of 1255, *Le Fuero Real*, it is said that the owners of ships should 'cause to be enrolled in the register all the articles put on board ships, giving their nature and quantity'.

When merchants travelled with their goods, these recorded details formed part of the ship's papers, and the development of a receipt from the master did not come until much later. In Paris a 14th-century manuscript called *Customs of the Sea* has been preserved which is believed to have been drawn up at Barcelona, in which the Register Book which had to be kept by the ship's clerk is mentioned. It further states that the merchants ought to make known to the ship's clerk as soon 'as the ship sets sail' any goods other than those entered in writing, as the owner would not be responsible for damage to goods other than those recorded. This writing, which according to *Customs of the Sea* also included an account of receipts and payments, seems undoubtedly to refer to the rudimentary bill of lading and seems to be in the nature of a document of title as well as the evidence of the merchant's right to the goods entered in his name at the end of the voyage.

These passages show a transitional period in the history of the bill of lading when it seems probable that oral evidence of shipment was replaced by the ship's register which led eventually to the private contract made between the individual merchant and the master. This period also saw a development away from merchants travelling with their goods. They simply dispatched them to a consignee and this necessitated a signed extract from the Register Book as a separate and distinct document of title. It became very difficult to prove title if this single document became lost, as the shippers were in all respects at the mercy of the master who possessed the sole proof of the contract.

In the latter half of the 16th century, the use of the bill of lading was widespread and was defined in *Le Guidon de la Mer* as 'the acknowledgement which the master of the ship makes of the number and quality of the goods on board' and goes on to carefully distinguish it from the Charter Party by saying that 'trois copies' of it must be drawn up. The words to the effect that 'one

of them being accomplished, the others shall be void' also appeared about this time. It is also interesting to note that in the case of *Chapman v Peers* (1534), it was expressly stated that it had long been the practice of merchants and the rule of law that no liability attached to the master or owner of the ship for goods not entered in the *Book of Lading*. The need to transfer the title in the goods before they arrived at their destination was brought about by the spread of commerce and the increasing complexity of business, hence the endorsement of the bill of lading to the buyer. The first reported case in which endorsement is actually mentioned in connection with the assignment of a bill of lading is that of *Snee v Prescott* (1793), thus the practice was well established by the 18th century and the negotiable bill of lading was in common use.

The earliest bill of lading qualifications used at that time were of general nature such as 'Act of God', 'dangers of the sea only expected' or 'inherent vice', by the 18th century judicial decisions caused shipowners to strengthen their bills of lading with provisions known as 'exoneration clauses' or 'negligence clauses'. These not only stipulated the old Common Law exceptions, but also served to protect the shipowners from liability for all perils of the sea and navigation. As this tendency was accentuated throughout the Maritime Nations, shipowners began to exempt themselves from practically every liability, even for their own negligence which led to disputes and complaints from merchants in international trade. As soon as an unfavorable court decision was given, the shipowner's legal advisers were instructed to draft a fresh set of clauses to nullify the result for the future.

The growing dissatisfaction of shippers, bankers and underwriters eventually forced the shipowners to negotiate and improve the situation which in turn led to the adoption, between 1890 and 1901, of model bills of lading mostly in the bulk grain, coal and timber trades. In fact a Conference Form bill of lading was adopted in 1882 at a meeting in Liverpool which was the first to recognize 'due diligence' and to fix a limit of liability of £100 sterling per package. This 'Conference' Form bill formed the basis for the Hamburg Rules adopted at Hamburg in 1885. The text of the 'Hamburg' bill of lading considerably reduced the number of exonerating clauses which had been numerous up to that time although it is understood that Italy was one of the last countries to resist the merchants' pressures for reform.

It was about this time that the problems between shipowners and cargo interests came to a head in the British Dominions and the United States and legislation was demanded to remove the chaotic state of affairs brought about by the shipowners' unlimited freedom of contract. Recommendations followed for the adoption of an international form for all bills of lading in order to highlight and prevent the casual manner in which alterations and additions were introduced without any consideration for the owners of the goods.

Ocean bills of lading were obviously in urgent need of reform because they had by this time acquired qualities other than that of a receipt. Merchants had discovered that by the use of banks and finance houses, it was possible to extend their trade by employing the same capital outlay and spreading the risk of loss by the payment of a simple premium or insurance. Thus in the event of disaster, not uncommon in those days, they were able to remain in business. It became possible for banks to advance cash against the security of bills of lading which in turn made it possible for business to be extended by the purchase and shipment of other consignments. The bank having made the advance was likewise secured as it held the title to documents against payment at the port of discharge.

England passed its Bills of Lading Act on August 14, 1855. Its main *raison-d'etre* was to overturn the common law rule that contracts at common law were not assignable. Until that time, when a bill of lading was passed by the shipper to his consignee in order to pass the title in the goods, it did not transfer the rights and liabilities under the contract of affreightment. The Act brought a revolutionary change to the law in that it provided *inter alia* that a consignee named in a bill of lading and every endorsee shall have transferred to him all rights of suit, and that the bill of lading shall be conclusive evidence of shipment.

It is instructive to note that the Bills of Lading Act 1855 did not seek to define "Bill of Lading". However, a definition of "Bill of Lading" is given in Article 1 of the "Hamburg Rules", adopted at the Diplomatic Conference held at Hamburg in March 1978, as follows:

'Bill of Lading' means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking.

In the United States of America the Act relating to bills of lading is known as the 'Pomerene' *Bills of Lading Act* 1916. It is much more comprehensive than the British Act and in its 44 sections is in itself a useful guide to the bill of lading procedure. The Pomerene Act relates to interstate and foreign commerce and applies to bills of lading issued in the United States and provides, *inter alia*, that a Carrier shall be liable to a bill of lading holder for non-delivery or delivery otherwise than in accordance with the description shown on the bill of lading.

## (ii) International Rules

It is beyond doubt that the bill of lading is now a principal internationally recognised document in overseas trade.

The first international rules governing the bill of lading were the Hague Rules, fashioned after the American *Harter Act* 1893 and drafted by the Maritime Law Committee of the International Law Association. These Rules were recommended for international adoption at the Hague in 1921. After amendment, they were eventually presented at the International Diplomatic Conference in Brussels in October 1922 and again in 1923, finally being approved at the International Convention held on 25th August 1924 and recommended for submission to the Governments of the major maritime nations for adoption and enactment into the law of their respective countries. The most important effect of these Rules, which provided a complete code for the carriage of goods by sea, was that the carrier could no longer contract out of certain defined responsibilities. The Rules thus established minimum obligations, maximum immunities and the limit of the carrier's liability.

These Rules were applied to most bills of lading issued in the United Kingdom by the *Carriage of Goods by Sea Act* 1924 and they were also adopted or given statutory effect by the then Dominions and Colonies as well as other countries throughout the world.

The Hague Rules were amended by the Brussels Protocol signed on 23 February 1968 and became known as the Hague-Visby Rules. Visby is an ancient port and the capital of Gotland Island in the Baltic Sea off the Coast of Sweden where the Hague-Visby Rules were signed in 1963. The reason for choosing this place was because in the 13th century it was the centre of a Maritime Association which monopolised the Baltic trade and gave its name to the *Laws of Visby*, a Maritime Legal Code generally known as the *Sea Laws*.

The Rules became operative after being ratified by ten states, namely Denmark (but not the Faroes) Ecuador, France, Lebanon, Norway, Singapore, Sweden, Switzerland, Syria and the UK. The Rules came into effect in the UK on 23 June, 1977 in the form of the *Carriage of Goods By Sea Act* 1971 which repealed the Act of 1924. This was considered appropriate in view of modern trading conditions under which existing laws were considered too favorable to the carrier, especially by developing countries.

Some contracting states apply these rules to both inward and outward voyages but the UK has applied the rules to two other classes of voyage not covered by the compulsory provisions of the

Protocol, namely, (a) all coastal voyages within the UK, and (b) all voyages, whether international or domestic where the contract evidenced by the bill of lading expressly provides that the Hague-Visby Rules govern the Contract of Carriage.

The "Hamburg Rules" evolved out of a United Nations Conference on the Carriage of Goods by Sea held in Hamburg in March 1978. The Conference was attended by 78 States. It was agreed that the new Rules would come into operation one year following the twentieth state to ratify or accede to it. These Rules contain the most up-to-date regime for carriage of goods by sea, including some innovative features. Among other things they restore some balance between the excessive protection of the carrier and that of the shipper. It defines for the first time a "bill of lading" and widens the application of the Rules to cover all contracts of carriage by sea whether contained in a bill of lading or some other document evidencing the contract of carriage. Also set out is the general principle that the liability of the carrier is based on presumed fault or neglect.

It is important to note that no reservations may be made to this Convention. Article 31 dealing with the denunciations of previous Conventions is quoted in full on page 13 hereunder.

Article 31 recognises the necessity to phase out the Hague and Hague-Visby Rules in preference for the Hamburg Rules. Provision is however made for a contracting State to defer denunciation of the Hague and Hague-Visby Rules for a maximum of five years from the entry into force of the 1978 Convention.

It is useful to make a reference to the United Nations Convention on International Multimodal Transport of Goods, 1980 which together with the Hamburg Rules are intended to govern the future regime of sea transport. In short, this Convention, formulated at the United Nations Conference on Trade and Development (UNCTAD) on 24th May, 1980 will come into force twelve months after it has been ratified by 30 states. The Convention seeks to impose an agreed system of liability over existing unimodal regimes in order to govern the contractual relation between a consignor and the multimodal transport operator (MTO) for the entire transport of the goods from the time the MTO takes them in charge until delivery, irrespective of the different modes of transport that will be involved.

At present, The Gambia is not a party to this Convention and understandably so. But we think that there is merit in vesting in the Minister the power to bring the Convention into effect whenever The Gambia decides to ratify it.

### **The Legal Nature of the Bill of Lading**

In sum then, a bill of lading remains a very important commercial instrument regulated by international trade and commerce. It has three crucial elements:-

- (a) evidence of the contract of affreightment;

- (b) *prima facie* evidence of the receipt by the carrier that the goods are shipped or received for shipment; and
- (c) a 'quasi negotiable' document which by endorsement or by contract in pursuance of which the endorsement is made, passes the title in the goods.

### **3. Report of Field Research**

What struck us most vividly during the field trip was that while the use of bills of lading was accepted as the norm, many could not tell us what the legal basis for their invocation was. In short, their legal basis was simply assumed. We were however exposed to some very useful information which has, of course, influenced our recommendations. All whom we interviewed were agreed that the Bill of Lading was a very important instrument which was in common use.

Documentation available to us as well as interviews conducted did not establish that The Gambia has ratified the 1978 Convention. We recommend that that should be done as a matter of urgency. Articles 28(4) and 30(2) and (3), which appear in the schedule to the proposed Carriage of Goods By Sea Bill, 1994, provide the mechanism for accession to the Convention. We recommend that the Minister consider bringing the Act into force on the same date as the Convention enters its force in Gambian law.

### **4. Caveats**

#### **(i) Other Shipping Documents**

Current trends recognise the inclusion of other shipping documents such as Sea Waybills and ship's delivery orders in one legislation with bills of lading. Our strict mandate limits us to Bills of Lading but we feel obligated to draw attention to this trend which is commendable.

#### **(ii) Charter-Parties**

The Draft Bill does not apply to charter-parties. This is in keeping with Article 2(3) of the 1978 UN Convention. However, a word or two must be said about bills of lading issued under a charter-party since our attention was drawn to them during the field trip in The Gambia. Such a bill of lading is different from the regular bill of lading in that it is a receipt for cargo loaded on board the vessel. The terms and conditions are in accordance with those incorporated in the charter-party and are normally governed by the rules of the Common Law. Whereas the Rules scheduled to the *Carriage of Goods by Sea Act* 1924 or 1971 do not apply to charter-parties, their provisions may be incorporated by a clause known as a Clause Paramount.

A bill of lading issued subject to the terms of the charter-party may be negotiated in the same way as a liner bill, the endorsee being deemed aware of the charter-party terms to the extent that they are incorporated by reference in the bill of lading. This is very important, because a

separate undertaking will emerge between the shipowner and the bill of lading holder if the third persons are unaware of the charter-party conditions.

The provisions of the United Nations Convention on the Carriage of Goods by Sea, 1978 do not apply to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

### **(iii) Faxed Bills of Lading**

In our field research, our attention was drawn to the fact that Banjul being the first port of call after Europe, Bills of Lading arrived there late. Some persons therefore expressed the wish that the proposed legislation should allow for faxed Bills of Lading. Attractive as the suggestion is, we advise against it since the dangers inherent in faxed bills far outweigh the advantages. For one, this would involve the danger of the original bill being misused as not all shippers are necessarily reputable. One interviewee gave us examples of such danger, for instance, where, after the release of the goods, the holder of the original document then comes to claim the goods or their value from the shipping agents. Another example might be when goods originating from China are shipped from Hong Kong with the shipper holding the original Bill of Lading; the goods first come to Hamburg and are from there consigned to Banjul. After the goods are released the shipper holding the original Bill of Lading raises a letter of credit either with the original consignors in China or from an institution in Hong Kong and the person who has given credit on the original Bill of Lading, but who holds the faxed copy, comes to the shipping agent in The Gambia and demands the goods or their value.

While it is possible that with the development of electronic technology, bills of lading as we now know them may be eventually replaced by transmitted documents, we feel persuaded that for now there are too many risks in introducing into The Gambia faxed bills of lading.

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**CARRIAGE OF GOODS BY SEA BILL, 1994**

**ARRANGEMENT OF CLAUSES**

**CLAUSE**

1. Short title and commence of Schedule
2. Intepretation
3. Rights and liabilities of consignee and endorsee
4. Act not to affect right to stop *in transitu*
5. Representations in bills of lading
6. Who to represent owner or charterer of ship in proceedings in Bill of lading
7. Moneys in hands of representatives may be attached
8. Application of the Hamburg Rules
9. Statements as to application of Rules to be included in bills of lading
10. Savings for dangerous goods and limitations of liability
11. Power to amend Schedule
12. Repeal

**SCHEDULE**

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**CARRIAGE OF GOODS BY SEA BILL, 1994**

**A BILL ENTITLED**

**An Act to amend and consolidate the law relating to Carriage of Goods By Sea, bills of lading and other matters connected therewith.**

**Enacted by the Parliament of The Gambia**

Short title and commencement of Schedule.

1. (1) This Act may be cited as the Carriage of Goods By Sea Act, 1994.

(2) The Schedule shall come into force on such day as the Minister may, by Order published in the *Gazette*, appoint, not being earlier than twelve months from the date of the coming into force of this Act.

Interpretation.

2. In this Act, unless the context otherwise requires, references to a bill of lading do not include references to a sea waybill or a ship's delivery order.

Rights and liabilities of consignee and endorsee.

3. A person who is a consignee of goods named in a bill of lading or becomes a lawful holder of a bill of lading shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Act not to affect right to stop *in transitu*.

4. Nothing in this Act shall prejudice or affect any right of stoppage *in transitu* or any right to claim freight against the original shipper or owner or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Representations in bills of lading.

5. A bill of lading which

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel, and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express,

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implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

Who to represent owner or charterer of ship in proceedings of bill of lading.

6. In any proceedings taken in The Gambia against the owner or charterer of any ship or other person in respect of any bill of lading, the recognised or ostensible agent in The Gambia of such owner or charterer or, if there be no such agent, the master of such ship, shall be deemed and taken to be the legally qualified agent of such owner or charterer on whom all process issued in proceedings taken against such owner or charterer shall be served, and such agent or master shall in all respect represent such owner or charterer in any such proceedings, and all such proceedings shall be binding on the owner and charterer.

Moneys in hands of representatives may be attached.

7. Moneys in the hands of or coming to such agent or master belonging or payable to such owner or charterer shall, for the purposes of this Act, be deemed to be a debt which may be attached in accordance with the Rules of the Supreme Court, and the agent or master shall for the purposes of those Rules be deemed to be garnishees within the meaning of those Rules.

Application of the Hamburg Rules.

Schedule.

8. Subject to this Act, the provisions contained in Articles 1 to 34 of the United Nations Convention on the Carriage of Goods By Sea, 1975 which are set out in the Schedule to the Act (hereinafter referred to as "the Rules") shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from or to any part in The Gambia.

Statements as to application of Rules to be included in bills of lading.

9. A bill of lading or similar document of title issued in The Gambia which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules, and the Rules shall be deemed to be incorporated in every such bill of lading or similar document of title notwithstanding

(a) that it does not contain the express statement required by this section; and

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- (b) the contract pursuant to which such bill of lading or similar document of title is issued is not governed by the law of The Gambia.

Savings for dangerous goods and limitations of liability.

10. Nothing in this Act shall affect the operation of any enactment for the time being in force relating to the liability of the owners of sea-going vessels or relating to the carriage of dangerous goods by sea.

Power to amend Schedule.

11. The Minister may by Order published in the *Gazette*, amend the Schedule and add thereto any international Convention relative to the carriage of goods.

Repeal.

12. The Carriage of Goods by Sea Act (Cap. 67:01) is hereby repealed.

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Section 8.

SCHEDULE

Articles 1 to 34 of the United Nations Convention on the Carriage of Goods By Sea (The Hamburg Rules) signed at Hamburg on march 30, 1978.

*Article 1 - Definitions*

In this Convention:

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

4. "Consignee" means the person entitled to take delivery of the goods.

5. "Goods" includes lives animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.

6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the

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goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

8. "Writing" includes, *inter alia*, telegram and telex.

*Article 2 - Scope of application*

1. The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if:

- (a) The port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
- (b) The port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or
- (c) One of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
- (d) The bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or
- (e) The bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

4. If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this

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Convention apply to each shipment. However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.

*Article 3 - Interpretation of the Convention*

In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.

PART II

LIABILITY OF THE CARRIER

*Article 4 - Period of responsibility*

1. The responsibility of the carrier for the goods under this Convention covers this period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

(a) From the time he has taken over the goods from:

- (i) The shipper, or a person acting on his behalf; or
- (ii) An authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;

(b) Until the time he has delivered the goods

- (i) By handing over the goods to the consignee; or
- (ii) In cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the

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particular trade, applicable at the port of discharge,  
or

- (iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

*Article 5 - Basis of liability*

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

4. (a) The carrier is liable

- (i) For loss or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
- (ii) For such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or

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agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

- (b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipment practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.

5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.

6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

*Article 6 - Limits of liability*

1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

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- (b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but no exceeding the total freight payable under the contract of carriage of goods by sea.
  - (c) In no case shall be aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply:

- (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, is issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.
- (b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

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*Article 7 - Application to non-contractual claims*

1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.

2. If such action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention.

*Article 8 - Loss of right to limit responsibility*

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

*Article 9 - Deck cargo*

1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.

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2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.

3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.

4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act of omission of the carrier within the meaning of article 8.

*Article 10 - Liability of the carrier and actual carrier*

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him

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expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

*Article 11 - Through carriage*

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

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PART III

LIABILITY OF THE SHIPPER

*Article 12 - General rule*

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

*Article 13 - Special rules on dangerous goods*

1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.

2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

(a) The shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

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PART IV

TRANSPORT DOCUMENTS

*Article 14 - Issue of bill of lading*

1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.

2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.

3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.

*Article 15 - Contents of bill of lading*

1. The bill of lading must include, *inter alia*, the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

(b) The apparent condition of the goods;

(c) The name and principal place of business of the carrier;

(d) The name of the shipper;

(e) The consignee if named by the shipper;

(f) The port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;

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- (g) The port of discharge under the contract of carriage by sea;
  - (h) The number of originals of the bill of lading, if more than one;
  - (i) The place of issuance of the bill of lading;
  - (j) The signature of the carrier or a person acting on his behalf;
  - (k) The freight to the extent payable by the consignee or other indication that freight is payable by him;
  - (l) The statement referred to in paragraph 3 of article 23;
  - (m) The statement, if applicable, that the goods shall or may be carried on deck;
  - (n) The date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and
  - (o) Any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.

2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars required under paragraph 1 of this article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.

3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.

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*Article 16 - Bills of lading: reservations and evidentiary effect*

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.

3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:

(a) The bill of lading is *prima facie* evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and

(b) Proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.

4. A bill of lading which does not, as provided in paragraph 1, subparagraph (h) of article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

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*Article 17 - Guarantees by the shipper*

1. The shipper is deemed to have guarantees to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.

2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of lading has been transferred.

3. Such letter of guarantee or agreement is valid against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.

4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.

*Article 18 - Documents other than bills of lading*

Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.

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PART V

CLAIMS AND ACTIONS

*Article 19 - Notice of loss, damage or delay*

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.

7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of article 4, whichever is later, the failure to give such notice is *prima facie* evidence that the carrier or the actual

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carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.

8. For the purpose of this article, notice given to a person acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively.

*Article 20 - Limitation of actions*

1. Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

2. The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

3. The day on which the limitation period commences is not included in the period.

4. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

5. An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

*Article 21 - Jurisdiction*

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated,

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is competent and within the jurisdiction of which is situated one of the following places:

- (a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or
- (b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
- (c) The port of loading or the port of discharge; or
- (d) Any additional place designated for that purpose in the contract of carriage by sea.

2.(a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4.(a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgment has been delivered by such a court, no new action may be started between the same parties on the same grounds

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unless the judgment of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.

- (b) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgment is not to be considered as the starting of a new action;
- (c) For the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.

*Article 22 - Arbitration*

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

- (a) A place in a State within whose territory is situated:
  - (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

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- (ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
  - (iii) The port of loading or the port of discharge; or
- (b) Any place designated for that purpose in the arbitration clause or agreement.
4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.
5. The provisions of paragraph 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.
6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

## PART VI

### SUPPLEMENTARY PROVISIONS

#### *Article 23 - Contractual stipulations*

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.
2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.

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3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provision of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The carrier must, in addition pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

*Article 24 - General average*

1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

*Article 25 - Other conventions*

1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

2. The provisions of articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said articles, provided that the dispute

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arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of article 22 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

- (a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or
- (b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. No liability that arise under the provisions of this Convention for any loss of or damage to or delay of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.

*Article 26 - Unit of account*

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation

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applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as:

12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion mentioned in paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

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PART VII

FINAL CLAUSES

*Article 27 - Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*Article 28 - Signature, ratification,  
acceptance, approval, accession*

1. This Convention is open for signature by all States until 30 April 1979 at the Headquarters of the United Nations, New York,
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. After 30 April 1979, this Convention will be open for accession by all States which are not signatory States.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*Article 29 - Reservations*

No reservations may be made to this Convention.

*Article 30 - Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.
2. For each State which becomes a Contracting State to this Convention after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

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3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect of that State.

*Article 31 - Denunciation of other conventions*

1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.

3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.

4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

*Article 32 - Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

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2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

*Article 33 - Revision of the limitation amounts and unit of account or monetary unit*

1. Notwithstanding the provisions of article 32, a conference only for the purpose of altering the amount specified in article 6 and paragraph 2 of article 26, or of substituting either or both of the units defined in paragraphs 1 and 3 of article 26 by other units is to be convened by the depositary in accordance with paragraph 2 of this article. An alteration of the amounts shall be made only because of a significant change in their real value.

2. A revision conference is to be convened by the depositary when not less than one-fourth of the Contracting States so request.

3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The amendment is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

4. Any amendment adopted enters into force on the first day of the month following one year after its acceptance by two-thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect, with the depositary.

5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention, is deemed to apply to the Convention as amended.

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*Article 34 - Denunciation*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

*Done* at Hamburg, this thirty-first day of March one thousand nine hundred and seventy-eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

*In witness whereof* the undersigned plenipotentiaries, being duly authorized by their respective governments, have signed the present Convention.