PN ABX-049

MONOGRAPHS ON
BUSINESS TRANSACTIONS LEGISLATION

Prepared by
Albert Fiadjoe
Austin Amissah

EDITORS' NOTE

These Monographs are preliminary in many senses. Firstly, they have been put together before the draft Bills have received the assent of Parliament contrary to our original recommendation. Secondly, when we first recommended the creation of these Monographs, we envisaged a thoroughly comprehensive exercise, indicating what the Monographs covered, and the departures, if any, made from the common law or previous existing legislation in the area for The Gambia. The justification for our recommendation was that because of the general inaccessibility of requisite textbooks on a subject, such Monographs would prove to be necessary and desirable for serious users of the law. Regrettably, it was not possible to produce Monographs of the coverage, standard and quality which these Bill or their serious users in or outside The Gambia, deserve, in the time allowed us.

We hope therefore that some enterprising persons will now take the opportunity offered by these Bills and accompanying Library and Field Study Reports and Explanatory Notes as a basis for writing suitably comprehensive Monographs on these laws.

A.K. Fiadjoe

A.N.E. Amissah

December 1994

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REPUBLIC OF THE GAMBIA

MONOGRAPHS

ON

BUSINESS TRANSACTIONS LEGISLATION

Prepared for:

USAID/THE GAMBIA

Prepared by:

ALBERT FIADJOE

AUSTIN AMISSAH

Submitted by:

HERON LTD.
KANIFING INDUSTRIAL AREA
SERREKUNDA
THE GAMBIA

DECEMBER 1994

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REPUBLIC OF THE GAMBIA

MONOGRAPH

ON

THE CARRIAGE OF GOODS BY SEA BILL, 1994

Prepared for:

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MONOGRAPH ON THE CARRIAGE OF GOODS BY SEA BILL

INTRODUCTION

The Carriage of Goods By Sea Bill, 1994 starts off from the basic premise that the existing Carriage of Goods By Sea Act (Cap. 67:01) is no longer adequate for the needs and demands of modern contractual arrangements governing such regime. Indeed, the latter is nothing more than a replica of the English Carriage of Goods By Sea Act of 1924, which was itself repealed by the U.K. Carriage of Goods By Sea Act of 1971. Quite apart from that, a number of serious deficiencies identified in the Gambian legislation made it inevitable that a new and modern regime should be recommended for The Gambia to replace the old statute. Part of the justification for change is contained in the Field Report which was submitted earlier on in this exercise.

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 has been to take cognisance of the new developments in international trade relating to the carriage of goods as elicited in the relevant international Conventions on the subject. This is certainly an area of the law where uniformity in the application of international rules of trade is considered desirable in order to ensure smooth co-relationships in the industry of business transactions.

Therefore, the Bill is designed to create a well-defined ground 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 generally deal with the detailed operation of the prescriptions governing the carriage of goods by sea.

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 accepts any liabilities in respect of the goods. This therefore clearly identifies the consigne '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 in the form of a deeming provision. 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 had 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.

CONCLUSION

For those interested in pursuing further research into the Bills of Lading, we hereby recommend the text by Alan Mitchelhill, Chapman & Hall , (2nd ed.), *Bills of Lading: Laws and Practice.*

We think that we should make a statement on faxed bills of lading, especially since we have not introduced it specifically in the legislation.

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. Accordingly, we have not recommended their introduction at this stage.

REPUBLIC OF THE GAMBIA

MONOGRAPH

ON

THE CONTRACT BILL, 1994

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CONTRACT ACT, 1994

A MONOGRAPH

A. Introduction

A.1 The Contract Act, 1994.

The Contract Act, 1994 was promoted by the Attorney General's Chambers and the Ministry of Justice (the Ministry) with the support of United States Agency for International Development (USAID), which, through its Office in The Gambia, sponsored and executed a consultancy to review the existing law on the subject and to make recommendations for its modernisation. The review was part of the cooperation arrangement between the Ministry and USAID to improve and modernise the laws to support and strengthen the financial sector of The Gambia.

The consultants undertook the required review and drafted the legislation they thought appropriate to meet the requirements of today. This review was undertaken concurrently with a review of the laws on negotiable instruments, sale of goods, bills of lading, hire purchase and finance leasing. These were the laws dealt with in the project to produce laws for The Gambia on Business Transactions.

Up to the enactment of the Contract Act, the law of contract in The Gambia had been governed by the common law. The law applied in The Gambia was basically the English common law as illustrated by judicial precedents in England going back for centuries, and by any cases on the subject that had been decided by the courts of The Gambia. As pointed out in other monographs on the legislation enacted in support of the financial sector, the legislative backing for this application of the English law

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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 preceding the enactment of the Negotiable Instruments Act not much was offered by way of discussion or comment by those interviewed as to the manner in which a possible Contract Act was to be written.

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 society. This advantage is described as theoretical, because the hierarchy of the courts and the 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 on the merits of the higher courts' decisions, has introduced some rigidity into the application of the doctrine. Courts in newly independent countries of the Commonwealth, like The Gambia, long used to the automatic application of decisions of the courts in England, whether these decisions emanated from the English High Court, Court of Appeal, or House of Lords, find it difficult to detach themselves from this 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 United Kingdom 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. Jayaratne (1951) A.C.66, which led to 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 at their own legislation and to interpret it as it is, one purpose which a Gambian legislation serves is 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 the interpretation of these provisions.

As stated in connection with the 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." 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 agreements between two or more persons in business or in personal relationships. Some of these specialised laws have already been enacted by the Gambian Parliament. It was important, considering even the ordinary

course of things, that the mother of all those 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 which part of the contract law as applicable before the Act ought to be changed or reformed, the view was unanimous that The Gambia should have its own legislation on the subject. As advocated 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.

The new Act was drafted bearing these considerations in mind. Subsequent to the review and drafting of the bill, a workshop was held in The Gambia which encompassed all the outstanding draft bills produced as part of the project on legislation in support of or to strengthen the financial sector. The workshop, subject to a few proposed amendments, endorsed the new draft statute.

B. The 1994 Act

B.1 The basis of the Act

The consensus from all who made comment on the subject of

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contract during the field study preceding the Act 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 discussions during the study, certain questions arising from the English common law were asked, the answers to which 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 United Kingdom 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

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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 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 Act in itself does not make writing necessary for the formation or enforcement of a contract.

It was also realised that the English common law had been modified in particular aspects by legislation. Advice was sought by the draftsmen of the Act from Professor Patrick Atiyah,

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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 led to the identification of the Indian Contract Act as a comprehensive statement of the law on the subject.

The Act was 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 enactment. The nineteenth century codification of the rules of contract for the Indian sub-continent was in turn based on the principles of the English common law. There had been some departures, but they had been consciously made in those parts where it was considered that the common law provisions were out of date or did not provide an 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 were 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 Partnership

Act was enacted simultaneously with the Contract Act. These areas were therefore omitted from the Contract Act. 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.

B.2 The general arrangement of the Act

The Act has a Preliminary part which deals with the short title and the interpretation provisions. Of the 206 sections of the Act, only 2 are devoted to this part. Subsequently, the Act is divided into eleven substantive chapters. Seven of these chapters, i.e. Chapters I to VII, are devoted to a statement of the general law of contract. The other three, i.e. Chapters VIII to X, deal with the specialised contracts of indemnity and guarantee, bailment and agency. The last chapter deals with a subject entitled miscellaneous.

To elaborate further, Chapter I deals in 9 sections with offers and their communication, acceptance and revocation. Chapter II deals with voidable contracts and void agreements in 15 sections. Chapter III deals with contingent contracts. This is covered in 6 sections. Chapter IV covers the performance of contracts in 35 sections. Those sections are in turn arranged in 6 sub-titles on contracts which must be performed, persons by whom contracts must be performed, time and place for performance, performance of reciprocal promises appropriation of payments and contracts which need not be performed. Chapter V deals with third party rights in 3 sections; Chapter VI with certain

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relations resembling those created by contracts, such as claims for necessaries supplied to persons incapable of contracting. Chapter VII deals with the consequences of breach of contract in 4 sections.

Chapter VIII takes 24 sections in explaining the contracts of indemnity and guarantee. Bailment is dealt with in Chapter IX in 34 sections. That chapter deals not only with bailment generally, but has sub-divisions dealing with the bailment of pledges and suits by bailees or bailors against wrong-doers. Chapter X deals with the contract of agency in 58 sections, subdivided into parts on appointment and authority of agents, sub-agents, ratification, revocation of authority, agent's duty to the principal, principal's duty to the agent, and the effect of agency on contracts with third persons. By itself, it is the single longest Chapter of the Act.

This monograph will concentrate on the general principles of contract as laid down by the Act. Bailment and agency are specialised based on these general principles. It is not considered necessary to discuss their detailed rules here.

Chapter XI, on miscellaneous, on the other hand, has only one section.

B.3 General principles of contract under the 1994 Act

B.3.1 General

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

The Indian Act (which is also more or less the same Act as

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the Contract Act of Pakistan) uses illustrations to elucidate the provisions of Act. In an Act of this nature this seems to be a most useful device. That method has, therefore, been adopted in this Act, with the illustrations being distinguished from the substantive provisions by the fact that they are in italics type of print. The illustrations do not form part of the substantive legislation, and indeed, in section 2(2) of the Act, it is provided that:

> "(2) Illustrations assigned to sections of the Act do not form part of the substantive provisions of the section and are not intended to extend, cut down or in any way qualify the meaning of those provisions."

B.3.2 What is a contract?

The interpretation section serves not only the purpose of defining terminology like "offer", "promise", "promisor", "promisee", "consideration", "agreement", "contract", "void" and "voidable" contracts etc, but acts also as a means of identifying what a contract is. It states that:

> "2. (1) 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 "offer";
>
> (b) when the person to whom the offer is made signifies his assent thereto, the offer is said to be "accepted". An offer when accepted becomes a "promise";
>
> (c) the person making the offer is called the "promisor", and the person accepting the offer 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."

As far as the offer or acceptance is concerned, section 9 provides that insofar as the offer or acceptance of any promise is made in words, the promise is said to be express. However, insofar as such offer or acceptance is made otherwise than in words, the promise is said to be implied.

It will be noticed from section 2(1)(a) that the signification by a person to another of 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, is said to be an "offer". The Indian Act uses the expression "proposal" for "offer". But it was thought that as the common usage in The Gambia, and indeed in England, is to describe the proposal as an offer, that The Gambia should retain the term "offer" in its Act.

Section 3 of the Act deals with communication, acceptance and revocation of offers and is based on section 3 of the Indian Contract Act. There is, apart from the substitution of "offers" for "proposals" one other difference in the wording of the two provisions. The Indian Act section 3 reads as follows:

> "3. The communication of proposals, the acceptance of offers, 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 offer, acceptance or revocation, or which has the effect of communicating it."

The word between the words "revocation" and "which has the effect of" in the last clause is "or". 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 the Gambian Act, therefore, the word "and" has been substituted for "or" in the Indian Act.

According to section 4, the communication of an offer is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete as against the proposer or offeror, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and as against the acceptor, when it comes to the knowledge of the offeror. The communication of a revocation is complete, as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; and as against the person to whom it is made, when it comes to his knowledge. Thus, where

> *(a) A proposes, by letter, to sell a house to B at a certain price, the communication of the offer is complete when B receives the letter.*
> *(b) B accepts A's offer 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 offer 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.*
> *(d) 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.*

(e) B accepts A's offer by telex or facsimile transmission. The communication of acceptance is complete when the report of successful transmission is given to B by the transmitting machine.

An offer may, according to section 5, be revoked at any time before the communication of its acceptance is complete as against the acceptor, but not afterwards. Thus, where

A proposes, by a letter sent by post, to sell his house to B. B accepts the offer by a letter sent by post. A may revoke his offer at any time before or at the moment when B posts his letter of acceptance, but not afterwards. B, on the other hand, may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

According to section 6, an offer is revoked in one of four ways: either by the communication of notice of revocation by the proposer or offeror to the other party; or by the lapse of the time prescribed in the offer for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance; or by the failure of the acceptor to fulfil a condition precedent to the acceptance; or 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. The requirement that the communication of the revocation must be by notice of revocation by the offeror to the other party departs from the English law as laid down by the decision in Dickinson v. Dodds (1876) 2 Ch.D.463. In that case, on 10 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 11 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

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the 12. 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*, the text writer on contracts. It would not be authority under the new Act since the relevant part of the section 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 offeror would not be good notice of revocation. Notice of revocation must come from the offeror or his agent duly appointed.

Sections 7 and 8 provide that the manner in which an acceptance could be made in order to transform an offer into a promise. According to these provisions, in order to convert an offer into a promise, the acceptance must be absolute and unqualified; it must be expressed in some usual and reasonable manner, unless the offer prescribes the manner in which it is to be accepted. If the offer prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the offeror may, within a reasonable time after the acceptance is communicated to him, insist that his offer shall be accepted in the prescribed manner and not otherwise; but if he fails to do so, he accepts the acceptance. But performance of the conditions of an offer, or the acceptance of any consideration for a reciprocal promise which may be offered with an offer, is an

acceptance of the offer.

By section 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, they are intended to have legal consequences, and are not hereby expressly declared to be void. However, that statement does not affect any law in force 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, which is not expressly repealed by the Act.

B.3.3 Who are competent to contract

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 Act 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 section 11, a minor is a person who has not attained the age of majority, which is there given as 18 years. 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 incompetent to contract could not make a contract within the meaning of the Act. By section 11, therefore, every person is competent to contract

who is of the age of 18 years, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. An exception to this provision is, however, made in the case of agreements made under customary or religious laws and enforceable by a District Tribunal established under the District Tribunals Act [Cap.6:03].

The various points dealt with in sections 10 and 11 are further elaborated in sections 12 to 23.

B.3.3.1 What is a sound mind for the purposes of contracting

Section 12 explains that 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.

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. Thus,

> *Under, a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals. And 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.*

B.3.3.2 "Consent"

Consent is explained in section 13 as: two or more persons are said to consent when they agree upon the same thing in the same sense. And section 14 further explains "free consent: consent which is not caused by coercion; or undue influence; or fraud; or misrepresentation; or mistake. And 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.

B.3.3.3 "Coercion"

According to section 15, is 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. Thus,

> *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 Gambia Penal 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 Gambia Criminal Code was not in force at the time when or place where the act was done.*

B.3.3.4 "Undue influence"

Undue influence is defined by section 16. 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. Without prejudice to the generality of that stated principle, a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or 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. 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 lies upon the person in the position to dominate the will of the other. Thus, where

> *(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.*

B.3.3.5 "<u>Fraud</u>"

Fraud is defined by section 17 as including 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, namely

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

However, 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

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had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. Thus, where

> *(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.*

B.3.3.6 "Misrepresentation"

By section 18, "misrepresentation" is said to include -

(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.

B.3.3.7 Voidability of agreements without free consent

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement, according to section 19, is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract must be performed, and that he must 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, which is fraudulent within the meaning of section 17, the contract is, nevertheless, not voidable, if the party whose consent was so caused had the means of discovering the truth through the exercise of ordinary diligence. A fraud or misrepresentation which did not cause the consent to a contract of the person on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable. Thus, where

> *(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. 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.*

B.3.3.8 <u>Power to set aside contracts induced by undue influence</u>

Section 20 gives the right to set aside contracts induced by undue influence by saying that 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.

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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. Thus, where

> *(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.*

Section 20 is based on section 19.A of the Indian Contract Act as inserted by the Indian Contract Act, 1899, section 3. Originally, "undue influence" had been dealt with under section 19 of the Indian Act, the parallel of which is section 19 of this Act, but that was deleted by the 1899 Act.

B.3.3.9 <u>Agreement void where both parties are under mistake as to a matter of fact</u>

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is, according to section 21, void. An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, however, is not to be deemed a mistake as to a matter of fact. Thus, where

> *(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.

Example (a) above deals with the situation in the English case of 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 void. 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 section 21 into operation it is necessary -

(a) that *both the parties* (and not one party alone, see section 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 - see section 22);

(c) that the fact must be *essential* to the agreement.

B.3.3.10 Effect of mistake as to law

By section 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. Thus, where

(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.

B.3.3.11 Contract caused by mistake of one party as to matter of fact

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Section 23 provides that 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.

B.3.4 Consideration

It will be recalled that the meaning of consideration has been given in section 2(1). That provision says that 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. The doctrine of consideration has been one of the pillars of the English common law. Without consideration, an agreement which is not under seal is not a contract which is enforceable by the law. This doctrine is not accepted in all jurisdictions. But in England, an elaborate theory was built around the doctrine. Some aspects of the doctrine have been found too cumbersome or to result in injustice, and have been modified or abolished.

B.3.4.1 <u>What considerations and objects are lawful and what not</u>

By section 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 the above 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. Thus, where

(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 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 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.

B.3.4.2 Agreements void, if consideration or object unlawful in part

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, under section 25, void. Accordingly,

> *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.*

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 sections 67 and 68.

B.3.4.3 Agreement without consideration void, unless permitted

By section 26, 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.

Section 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 section 26 of the Act (as itemised above). Apart from these exceptions, paragraphs (d) and (e) which are derived from the Ghana Contracts 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, section 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 section 152 of the Act that no consideration is necessary for the creation of an agency. An agreement in any of the cases mentioned above is a contract. Nothing in this section affects the validity, as between the donor and the donee, of any gift actually made.

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. Thus, where

(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

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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.

B.3.4.4 Promise of act already enjoined by legal duty as consideration

By section 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. Thus, where

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.

This section and section 28 of the Act are derived from the Ghana Contract Act (see sections 9 and 10 of that Act). Indeed, with regard to section 27, reference may be made to the position arising in connection with bills of exchange. Section 27 of the United Kingdom 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

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with cheques since The Gambia applied the United Kingdom Act, and is a position which continues under the Negotiable Instruments Act, 1994. But if that is so, then to insist that the same type of situation in other agreements should lead to the contracts in those cases being void for want of consideration becomes quite unreal.

B.3.4.5 Consideration need not move from the promisee

No promise shall, according to section 28, be invalid as a contract by reason only that the consideration for it is supplied by someone other than the promisee. This provision is a major departure from the ordinary rule of contract at common law.

With regard to this section, mention may be made of the fact that The Contracts (Privity) Act 1982 of New Zealand also takes the same position of principle as the Ghana Contracts Act. The New Zealand Act provides in sections 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."

B.3.5 Other void agreements

B.3.5.1 Agreement in restraint of marriage, or in restraint of

trade, or in restraint of legal proceedings, void

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

By section 30, every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. 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.

By section 31, every agreement by which any party to it 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. But this provision does 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 does 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.

When an contract which falls into any of the exceptions to

the rule rendering agreements in restraint of legal proceedings void is made, a suit may be brought for its specific performance. And if a suit, other than a suit 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 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.

B.3.5.2 Agreements void for uncertainty

Section 32 makes an agreement, the meaning of which is not certain, or capable of being made certain, void. Thus, where

> *(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 "my 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.*

B.3.5.3 Agreements by way of wager void unless permitted

Agreements by way of wager are void by section 33, which further provides that 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. But this ban does not 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. However, nothing in the section can be deemed to legalise any transaction which is made an offence by the provisions of sections 161 to 163 of the Criminal Code. Those sections of the Criminal Code provide criminal sanctions in respect of gaming houses, betting houses and lotteries.

As a collateral of section 33, section 34 provides that 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 made void by section 33, are in themselves void.

B.3.5.4 Consequences of void agreements

Under section 35, no suit or other proceeding lies for the recovery of -

(a) any sum of money paid or payable in respect of any agreement void under section 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.

And under section 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 34 and 35.

Sections 34, 35 and 36 are reproductions of sections 30A, 30B and 30C of the Pakistan Contract Act which were inserted by section 2 of their Contract Act (Amendment) Ordinance, 1960.

B.3.6 Contingent Contracts

B.3.6.1 Definition

Section 37 defines a "contingent contract" as a contract to do or not to do something, if the event, collateral to such contract, does or does not happen. The illustration of this definition is given

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

Section 38 makes contingent contracts to do or not to do something if an uncertain future event happens unenforceable by law unless and until that event happens. If the event becomes impossible, such contracts become void. Thus, where

> *(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.*

On the other hand, contingent contracts to do or not to do something if an uncertain future event does not happen can be enforced under section 39 only when the happening of that event

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becomes impossible, and not before. Thus, where

> *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.*

B.3.6.2 <u>When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person</u>

Section 40 provides that 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 must 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. Thus, where

> *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.*

B.3.6.3 <u>When contingent contracts depending on happening of specified event within fixed time are void or enforceable</u>

Contingent contracts to do or not to do something if a specified uncertain event happens within a fixed time become void according to section 41, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible. Contingent contracts to do or not to do something 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. Thus, where

> *(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.

B.3.6.4 Agreement contingent on impossible event void

By section 42, a contingent agreement to do or not to do something, 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. Thus, where

(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.

B.3.7 The Performance of Contracts

B.3.7.1 Contracts which must be performed

B.3.7.1.1 Obligation of parties to contracts 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. 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. This is the general statement made by section 43. It is illustrated by the following examples:

(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.

B.3.7.1.2 Effect of refusal to accept offer of performance

Under section 44 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. 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.

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

A contracts to deliver to B at his warehouse, on the 1 March, 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.

B.3.7.1.3 <u>Effect of refusal of party to perform promise wholly</u>

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

acquiescence in its continuance. Thus, where

> *(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.*

B.3.7.2 By whom Contracts must be Performed

B.3.7.2.1 Person by whom promise is to be performed By section 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. Thus, where

> *(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.*

B.3.7.2.2 Effect of accepting performance from third person When a promisee accepts performance of the promise from a third person, section 47 says that he cannot afterwards enforce it against the promisor.

B.3.7.2.3 Devolution of joint liabilities Section 48 provides that 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.

B.3.7.2.4 <u>Joint promisors may be compelled to perform and may compel contribution</u> When two or more persons make a joint promise, the promisee may, as provided by section 49, 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. On the other hand, 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. 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. But nothing in the section prevents 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. Therefore, where

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

B.3.7.2.5 Effect of release of one joint promisor According to section 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 promisor so released from responsibility to the other joint promisor or joint promisors.

B.3.7.2.6 Devolution of joint rights When a person has made a promise to two or more persons jointly, then, section 51 declares that 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, the right rests with the representative of the deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly. Thus, where

> *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.*

B.3.7.2.7 Sections 48 to 51 and the common law The rules laid down in sections 48 to 51 which have just been discussed are based on the Indian Act, sections 42 to 45, and materially alter the rules of English common law as to the devolution of the benefit and liability in respect of joint contracts. What in England figures as an exception had 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

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as the assets go, equally liable with the survivor. This is in accordance with modern mercantile usage. (see Kendal v. Hamilton (1879) 4 A.C.504).

Section 49, as already pointed out, is one of the series of sections (i.e., sections 48 to 51) materially altering the rules of English common law as to devolution of the benefit 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 defendants to the suit.

B.3.7.3 Time and Place for Performance

B.3.7.3.1 Time for performance where no application is to be made and no time is specified By section 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.

B.3.7.3.2 Time and place for performance where time is specified and no application to be made On the other hand, when a 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, according to section 53, 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. Thus, where

> *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.*

B.3.7.3.3 <u>Application for performance on certain day to be at proper time and place</u> 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, section 54 makes it 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.

B.3.7.3.4 <u>Place for performance where no application to be made and no place fixed for performance</u> When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, section 55 makes it 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. For example,

> *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.*

B.3.7.3.5 <u>Performance in manner or at time prescribed or sanctioned by promisee</u> According to section 56, the performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions. To illustrate this statement, the following examples are given

> *(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.

B.3.7.4 Performance of Reciprocal Promises

B.3.7.4.1 Promisor not bound to perform, unless reciprocal promisee ready and willing to perform According to section 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. Examples illustrating this rule are

(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.

B.3.7.4.2 Order of performance of reciprocal promises Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, section 58 prescribes that they must be performed in that order. However, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. Thus, where

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(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.

B.3.7.4.3 <u>Liability of party preventing event on which the contract is to take effect</u> When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, section 59 provides that the contract becomes voidable at the option of the party so prevented. He is also entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract. Thus, where

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.

B.3.7.4.4 <u>Effect of default as to promise which should be first performed, in contract consisting of reciprocal promises</u> According to section 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, that 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. The following examples illustrate the point.

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(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.

B.3.7.4.5 <u>Effect of failure to perform in time</u> 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, section 61 makes the contract, or so much of it as has not been performed, voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. But 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. The promisee, however, is entitled in the latter case to compensation from the promisor for any loss occasioned to him by such failure. 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.

B.3.7.5 Agreement to do impossible act or frustrated contracts

B.3.7.5.1 Statement of the rule By section 62, an agreement to do an impossible act is void. 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, will be void when the act becomes impossible or unlawful. 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.

This rule 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 and the parties discharged from further performance (see the cases on postponement of the coronation processions in 1902: Krell v.

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Henry (1903) 2 K.B.740; Hobson v.Peteaden (1903) 2 K.B.760).

Illustrations of the position adopted in section 62 of the Gambian Act are

> *(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.*

B.3.7.5.2 Adjustment of rights and liabilities of parties to frustrated contracts Section 63 provides that 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.

Subsection (2) provides that subject to the following subsection: 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. Subsection (3) then provides that: 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.

Subsection (4) provides that: 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. 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 by or under any enactment.

B.3.7.5.3 <u>Severance of frustrated contract</u> Section 64 provides that 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.

B.3.7.5.4 Parties may contract out of sections 63 and 64 Section 65 gives the right to the parties to contract out of the provisions of sections 63 and 64. It states that 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 ought to give effect to that provision and must only give effect to the provisions of sections 63 or 64 to such extent, if any, as appear to the court to be consistent with that provision.

B.3.7.5.5 Application of sections 63 to 65 Section 66 applies sections 63, 64 and 65 to contracts made before or after the commencement of the Act, in respect of which the time of discharge is after the commencement of the Act. The section excludes the following from the application of sections 63, 64 and 65 -

(a) 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) any contract of insurance.

B.3.7.5.6 Origin of section 63 to 66 These sections, as has been noticed, 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, sections 1 to 4. They are substantially the same as section 3 of the Frustrated Contracts Act, 1944 of New

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Zealand.

B.3.7.6 Reciprocal promise to do things legal, and also other things illegal

B.3.7.6.1 Severability Section 67 provides that 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. Thus, where

> *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.*

Section 67 is supplemental to section 25, dealing with void agreements in cases where the consideration or object is unlawful in part. 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?

B.3.7.6.2 Alternative promise, one alternative being illegal In the case of an alternative promise, one of which is legal and the other illegal, section 68 rules that the legal alternative alone can be enforced. Thus, where

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

B.3.7.7 Appropriation of Payments

B.3.7.7.1 Application of payment where debt to be discharged is indicated 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, under section 69, the payment, if accepted, must be applied accordingly. As the following illustrations show

> *(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.*

B.3.7.7.2 Application of payment, where debt to be discharged is not indicated By section 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.

B.3.7.7.3 Application of payment where neither party appropriates By section 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.

B.3.7.8 Contracts which need not be performed

B.3.7.8.1 Effect of novation, rescission and alteration of contract According to section 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. This section deals among other things 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. Illustration of the provision are, where

> *(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.*

B.3.7.8.2 <u>Promisee may dispense with or remit performance of promise</u> Under section 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. Thus, where

> *(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 its amount may be.*
> *(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.*

B.3.7.8.3 Consequences of rescission of voidable contract Section 74 lays down the rule that when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained of 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. The provision on the restoration of benefit received in this section does not apply to the case of a benefit received under an agreement made by a minor or by one who is otherwise incompetent to contract (see section 11).

B.3.7.8.4 Obligation of person who has received advantage under void agreement or contract that becomes void When an agreement is discovered to be void, or when a contract becomes void, under section 75, 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. Accordingly, where

> *(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 only 130 bags 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.

B.3.7.8.5 Mode of communicating or revoking rescission of voidable contract By section 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 an offer.

B.3.7.8.6 Effect of neglect of promisee to afford promisor reasonable facilities for performance By section 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.

Thus, where

> *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.*

B.3.8 Third Party Rights

B.3.8.1 General

Sections 78 to 80 deal with third party rights, and are derived from the Ghana Contracts Act. Sections 78 and 79 are consequential to and consistent with the provision that consideration need not move from the promisee (see section 28). Section 80 deals with assignment of rights.

B.3.8.2 Provision in contract for benefit of third party

By section 78, any provision in a contract made after the commencement of the 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 sections 78 to 80, be enforceable

or relied upon by that person as though he were a party to the contract. That rule, however, does not apply to a provision in a contract designed for the purpose of resale price maintenance. That is to say, it does not apply to a provision whereby a person who is a party to a contract agrees to pay money or otherwise to render some valuable consideration to another person who is not a party to the contract in the event of the person first mentioned selling or otherwise disposing of any goods, which are the subject matter of the contract, at prices lower than those determined by or under the contract. Neither does the rule apply to a provision in a contract purporting to exclude or restrict any liability of a person who is not a party to the contract.

B.3.8.3 Rights of third party not to be altered, etc., without his consent but subject to equities

By section 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, no variation or rescission of the contract can prejudice that person's right to enforce or rely on the provision if he has acted to his prejudice in reliance on it, unless he consents to the variation or rescission. Further, and subject to the protection just described, any party against whom the provision is sought to be enforced or relied on is entitled to rely or to 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.

B.3.8.4 Assignment of legal rights

Section 80, which deals with the assignment of legal rights provides that, 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 the Act, assign a legal right to another person as in the manner specified in the section. 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 it fulfils three requirements, namely, that

(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.

A purported assignment of a conditional right operates as a promise to assign if and when the condition occurs. An assignment, whether given for consideration or not, is valid notwithstanding that it does not comply with all or any of requirements (a) to (c) sated above but no right so assigned is enforceable or can be 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. Further, no such assignment can prejudice the debtor or other person against whom the right is enforceable unless he has

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written notice of it.

Where there are two or more assignments in respect of the same debt or right, a later assignee has 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 he was notified of the later assignment in writing. And 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.

B.3.9 Relations Resembling Those Created by Contract

B.3.9.1 General

The relations dealt with here are those arising from the supply of necessaries to persons who are incapable of contracting (see sections 11 and 12), the reimbursement of money paid for another from whom the money is due, the obligation of a person enjoying the benefit of a non-gratuitous act, the responsibility of a finder of goods, and the liability of a person to whom money is paid or a thing is delivered by mistake or under coercion.

B.3.9.2 Claim for necessaries supplied to person incapable of contracting, or on his account

Section 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 page 16 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. Thus, the section provides that 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 by the incapable person by the payment of a reasonable price for the said necessaries. As seen in sections 11 and 12, the person who is incapable of contracting may be an infant, i.e., below the age of 18 years, or may not be sound of mind. The amount payable for the supply of the necessaries is not necessarily the contract price, but an amount considered by the court to be reasonable. Therefore, where

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

B by payment of a reasonable price for the necessaries.
(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 by B by payment of a reasonable price for the necessaries.

B.3.9.3 Reimbursement of person paying money due by another in payment of which he is interested

According to section 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. Thus, where

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.

It should be noted that in section 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 reimbursement, it is necessary that a person must have been compelled to pay the debt or discharge the liability of another.

B.3.9.4 Obligation of person enjoying benefit of non-gratuitous act

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, section 83 binds the latter to make compensation to the former in respect of, or to restore, the thing so done or delivered. To illustrate the point

(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.

The Indian Act does not include in the equivalent of section 83 the words, "understanding that there is an obligation to pay therefor". This has been inserted in the Gambian Act 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, would 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.

B.3.9.5 Responsibility of finder of goods

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

B.3.9.6 Liability of person to whom money is paid or thing delivered by mistake or under coercion

Section 85 makes a person to whom money has been paid or anything delivered by mistake or under coercion liable to repay it or return it. Thus, where

(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.

B.3.10 Consequences of Breach of Contract

B.3.10.1 Compensation for loss or damage caused by breach of contract

By section 86, 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.

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.

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.

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.

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."

The illustrations of these principles are numerous. Examples are

> *(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, there take on board, on the 1st of January, a cargo which A is to provide and to bring 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 from 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*

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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 vehicle 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. Freights rise, 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

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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 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.

B.3.10.2 Compensation for breach of contract where penalty stipulated for

When a contract has been broken, section 87 provides that 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 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. And his entitlement to this compensation remains the same whether or not actual damage or loss is proved to have been caused by the breach.

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

When any person enters into any bail-bond, recognisance 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 is liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

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.

The following are illustrations of these principles:

(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.

B.3.10.3 <u>Party rightfully rescinding contract entitled to compensation</u>

By section 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. Thus, where

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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.

B.3.10. Alternative remedies in contract

Section 89 empowers the court in its discretion to grant any of the following remedies to a party who is entitled to damages for a breach of contract, that is -

(a) specific performance of the contract; or

(b) an injunction.

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.

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.

B.4 Indemnity and Guarantee

B.4.1 General

The difference between a contract of guarantee and that of indemnity as provided for in sections 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, the guarantee, is generally for security of a creditor; the other, the indemnity, is for the reimbursement of loss. A contract of guarantee pre-supposes 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 to 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. But there is no requirement for writing in the Gambian Act.

B.4.2 "Contract of indemnity" defined

By section 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". Thus, where

> *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.*

B.4.3 Rights of indemnity-holder when sued

The promisee in a contract of indemnity, acting within the scope of his authority, is by section 91, 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 authorised 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 authorised him to compromise the action.

B.4.4 "Contract of guarantee", "surety", "principal debtor" and "creditor"

By contrast, section 92 defines a "contract of guarantee" as 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.

B.4.5 Consideration for guarantee

Under section 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. Thus, where

> *(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.*

B.4.6 Surety's liability

Section 94 makes the liability of the surety co-extensive

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with that of the principal debtor, unless otherwise provided by the contract. For example, where

> *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.*

B.4.7 "Continuing guarantee"

By section 95, a guarantee which extends to a series of transactions is called a "continuing guarantee".

> *(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.*

B.4.8 Revocation of continuing guarantee

A continuing guarantee may at any time be revoked, as provided by section 95, by the surety, as to future transactions, by notice to the creditor. Thus, where

> *(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.*

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Section 97 provides that 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.

B.4.9 Liability of two persons primarily liable, not affected by arrangement between them that one shall be surety on other's default

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 that contract, section 97 declares that the liability of each of the two persons to the third person under the first contract is not affected by the existence of the second contract, although the third person may have been aware of its existence. Thus, where

> *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.*

B.4.10 Discharge of surety by variance in terms of contract

By section 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. By way of illustration, the following examples are given:

> *(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*

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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 in as much as C might sue B for the money before 1st March.

B.4.11 Discharge of surety by release or discharge of principal debtor

According to section 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.

(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.

B.4.12 Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor

By section 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.

B.4.13 Surety not discharged when agreement made with third person to give time to principal debtor

But 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, under section 102, the surety is not discharged. Thus, where

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.

B.4.14 Creditor's forbearance to sue does not discharge surety

Further, by section 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. Thus, where

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.

B.4.15 Release of one co-surety does not discharge others

And where there are co-sureties, section 104 provides that 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.

B.4.16 Discharge of surety by creditor's act or omission impairing surety's eventual remedy

By section 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. By way of illustration, the following examples are given:

> *(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 realised. 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.*

B.4.17 Rights of surety on payment or performance

Section 106 provides that 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.

B.4.18 Surety's right to benefit of creditor's securities

Section 107 states that 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

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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. As illustrated,

> *(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 in favour of 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.*

B.4.19 Guarantee obtained by misrepresentation or concealment invalid

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

Section 109 making the same point with respect to guarantees obtained by concealment states that any guarantee which the creditor has obtained by means of keeping silent as to material circumstances is invalid. Examples of guarantees obtained where material facts are concealed are, where

> *(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 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*

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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.

B.4.20 Guarantee on contract that creditor shall not act until co-surety joins

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, section 110 says that the guarantee is not valid if that other person does not join.

B.4.21 Implied promise to indemnify surety

According to section 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. Thus, in the cases where

(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.

B.4.21 Co-sureties liable to contribute equally

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, section 112 makes these co-sureties, in the absence of any contract to the contrary, 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. That is so, whether the co-sureties acquire their status as such under the same or different contracts, and whether with or without the knowledge of each other. Thus, where

(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.

B.4.22 Liability of co-sureties bound in different sums

Co-sureties who are bound in different sums are, according to section 113, liable to pay equally as far as the limits of their respective obligations permit. As illustrations of this principle, the following examples are given

(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,

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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.

B.5 Bailment

B.5.1 "Bailment", "bailor", and "bailee" defined

The definitions of these terms are given in section 114. A "bailment" is defined as 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".

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.

B.5.2 Care to be taken by bailee

Section 117 puts the bailee under an obligation in all cases of bailment 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. By section 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.

B.5.3 Return of goods bailed on expiration of time or accomplishment of purpose etc

Section 126 makes it the duty of the bailee to return, or

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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.

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

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

B.5.4 Bailor entitled to increase or profit from goods bailed

In the absence of any contract to the contrary, the bailee is bound, under section 129, 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. Thus, where

> *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.*

B.5.5 Bailor's responsibility to bailee

Section 130 states the responsibility of the bailor to the bailee. 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.

B.5.6 Bailee not responsible on re-delivery to bailor without title

Under section 132, if the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or

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according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Section 133 gives the right to a person, other than the bailor, who claims the goods bailed, to apply to the court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

B.5.7 Bailee's lien

Sections 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. Section 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. It provides that 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 granted by section 136 to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Accordingly, where

> *(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.*

B.5.8 General lien of bankers, factors, wharfingers, legal practitioners and policy-brokers

Further, section 137 grants bankers, factors, wharfingers, legal practitioners and policy-brokers, in the absence of a contract to the contrary, a right to retain, as a security for a general balance of account, any goods bailed to them. No other persons has a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

B.5.9 Other matters regulated by the Act

The Act deals with many other aspects of the relationships arising out of bailment, such as

delivery to bailee how it is made; the bailor's duty to disclose faults in goods bailed; termination of the bailment by the bailee's act which is inconsistent with conditions; the liability of a bailee making unauthorised use of goods bailed; the effect of mixture, with bailor's consent, of his goods with bailee's; the effect of mixture, without bailor's consent, when the goods can be separated and the effect of such mixture, when goods cannot be separated; the repayment by the bailor of necessary expenses incurred by the bailee; the restoration of goods lent gratuitously; bailment by several joint owners; the right of a finder of goods to sue for specific reward offered; when a finder

of thing commonly on sale may sell it; and the bailment of pledges.

It should be noted that section 144 of the Act which deals with pledge by a mercantile agent is based on section 178 of the Indian Contract Act which was repealed and replaced by the Indian Contract (Amendment) Act 1930.

B.6 Agency

B.6 1 Appointment and Authority of Agents

B.6.1.1 "Agent" and "principal" defined Section 149 defines an "agent" as 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".

B.6.1.2 Who may employ agent By section 150, any person who is over 18 years of age and who is of sound mind, may employ an agent.

B.6.1.3 Who may be an agent By section 151, as between the principal and third persons any person may become an agent, but no person who is not 18 years of the age 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.

B.6.1.4 Consideration not necessary By section 152, no consideration is necessary to create an agency.

B.6.1.5 Agent's authority may be express or implied By section 153, the authority of an agent may be express or implied. Section 154 defines the terms express and implied authority as, an authority is said to be express when it is given by words

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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. For example,

> *A owns a shop in Serekunda, 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.*

B.6.1.6 <u>Extent of agent's authority, ordinary and in an emergency</u> By section 155, 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. Thus, where

> *(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.*

Section 156, points out that 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. Thus, where

> *(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.*

B.6.1.7 <u>When agent cannot delegate</u> By section 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.

B.6.2 Other matters regulated by the Act

The Act then proceeds in the 47 other sections to regulate the various aspects of the relationship of principal and agent, their rights and duties *vis-a-vis* each other; the position of sub-agents and their relationship with the other parties to the agency agreement; and the rights and duties of these persons against third parties and *vice-versa*; ratification of acts of the agent; the revocation of the agent's authority; and termination of the agency, etc.

It should be noted that in section 182, which deals with the right of the principal when the agent deals, on his own account, in the business of the agency without the principal's consent, the qualification at the end of the section, "or that the dealings of the agent have been disadvantageous to him", is not supported by any English authorities, but is found in section 215 of the Indian Contract Act.

B.7 Miscellaneous

B.7.1 Saving of rules of common law

By section 206, the rules of common law, save in so far as they are inconsistent with the express provisions of the Act, continue to apply to, and supplement the rules provided in the Act on contracts. Enactments of the United Kingdom Parliament,

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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] cease to apply in The Gambia.

Section 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 Ghose (1903) 30 Cal.539 (see also page 16 above) to be exhaustive and imperative. But it is impossible to state positively that every possible point has been covered by it. In order not to leave any possible position uncovered by the Act, the saving provision is inserted to give a general backdrop in case a position is inadvertently left out.

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 Ramanandjikuer v. Kalawati (1928) 7 pat.221, 227 (P.C.); Chunna Mal v. Mool Chanh (1928) 9

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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.

December 1994 (nia-mon)

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REPUBLIC OF THE GAMBIA

MONOGRAPH

ON

THE HIRE-PURCHASE AND FINANCE LEASE BILL, 1994

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MONOGRAPH ON THE HIRE-PURCHASE AND FINANCE LEASE BILL, 1994

INTRODUCTION

This Bill covers the twin subjects of Hire-Purchase and Equipment Leasing. The justification for treating both subjects in one Bill is that in many ways equipment leasing and hire-purchase are different sides of the same coin. A 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 instalments 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 *Hezby* v. *Matthews* [(1895) A.C. 471).]

Leasing, on the other hand, involves the use of an asset by a party who does not own that asset. It is essentially the hire of capital assets for substantial periods to commercial users who do not wish to acquire or obtain title to those assets.

It is important to stress that this Bill does not cover land and property leasing. We need not stress the importance of equipment leasing to the generation of economic activity through tax concessions to the corporate world. For a review of this, reference may be made to *The Leasing Handbook*, edited by Derek Sopa, Robert K. Munro and Owen Cameron on the advantages of leasing.

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DETAILED PROVISIONS OF THE HIRE-PURCHASE AND FINANCE LEASE BILL, 1994

It has already been explained why the subjects of hire-purchase and finance lease have been treated in a single Bill. This accounts for the fact that 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 essentially 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 1 - 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 know 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.

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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 or 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) they have 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.

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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

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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 or 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 without 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).

Clauses 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.

OBSERVATIONS ON HIRE-PURCHASE

In this Bill, we have taken note of the evolution of the common law from a *laissez-faire* economy to that of a controlled economy with some active state participation in the regulatory regime.

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

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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 buyer'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:

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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 had not been 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-

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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 instalments 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].

A 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 instalments thus far paid.

OBSERVATIONS ON EQUIPMENT LEASING

Now that this form of activity has found reflection in legislative form, we hope that those who engage in it would find ready answers to their legitimate concerns within it. After all, what the law seeks to do is to strike a fair balance between the rights of the lessor and the lessee.

REPUBLIC OF THE GAMBIA

MONOGRAPH

ON

THE NEGOTIABLE INSTRUMENTS BILL, 1994

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MONOGRAPH ON THE NEGOTIABLE INSTRUMENTS BILL

INTRODUCTION

The Development of the Negotiable Instruments Act, 1994

The Negotiable Instruments Act, 1994 was promoted by the Attorney General's Chambers and the Ministry of Justice (the Ministry) with the support of United States Agency for International Development (USAID), which, through its office in The Gambia, sponsored and executed a consultancy to review the existing law on the subject and to make recommendations for its modernisation. The review was part of the cooperation arrangement between the Ministry and USAID to improve and modernise the laws to support and strengthen the financial sector of The Gambia.

The consultants undertook the required review and drafted the legislation they thought appropriate to meet the requirements of today. This review was undertaken concurrently with a review of the laws on contract, sale of goods, bills of lading, hire purchase and finance leasing. These were the laws dealt with in the project to produce laws for The Gambia on Business Transactions.

Unlike contract which had, until the enactment of the Contract Act, been governed by the Common Law, and finance leasing on which there was no governing statute, negotiable instruments were governed by the United Kingdom Bills of Exchange Act, 1882. That was because the 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

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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".

The Bills of Exchange Act, 1882 is an enactment which has received wide praise from users. The measure of its success in The Gambia long after independence can be gauged by the fact that no real adverse comment on its operation was made by those interviewed. All who made comment on bills of exchange during the Field Study leading to the drafting of the Bill which was subsequently enacted, stated that The Gambia should have its own statute, which should be a modernisation of the English law, with which without doubt, practitioners in the field felt comfortable. The main advice given to the draftsmen was that they should not, in the drafting of a bills of exchange law, attempt to invent the wheel. That is, they should not go about inventing new or unfamiliar principles or provisions. That advice was easy to accede to in the case of the United Kingdom 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. There was, therefore, no question of the enactment of a statute that was radically different from that which had been in operation, and been accepted over the years by the business community as satisfactory. The question which arises then is why should that arrangement be disturbed now? First of all, it could be said that it needed modernisation, both to include certain statutes which had been enacted amending aspects of it or covering areas which had not been covered by the 1882 Act; and to modernise its language for the use of a relatively new developing country like The Gambia.

With respect to the amendment of the United Kingdom Act, it is well known that although the 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, 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. Whether any of these amending Acts applies to The Gambia is questionable.

Further, the common thread found in all cases where The Gambia has no law of its own and has to rely on non-Gambian legislation, was the feeling that it was time that the Gambian law was given a domestic base and made more readily available to users in The Gambia. As indicated in the proposals for the enactment of the 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 is, in our view, one such subject where The Gambia should have its own legislation.

The new Act was drafted bearing these considerations in mind. Subsequent to the review and drafting of the bill, a workshop was held in The Gambia which encompassed all the outstanding draft bills produced as part of the project on legislation in support of or to strengthen the financial sector. The workshop, subject to a few proposed amendments, endorsed the new draft statute.

It will be noticed that a change in the title of the statute has been introduced. The new Act bears the title Negotiable Instruments Act, whereas the statute that had governed Gambian transactions on the subject for more than a hundred years was entitled Bills of

Exchange Act. The reason for this change is simple. the United Kingdom Act dealt not only with bills of exchange in the strict sense, even if the regulation of those bills formed the basic objective and the major part of the statute, but also with 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 of 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 was, in the circumstances considered advisable that a title which was more all-embracing, which would introduce some clarity to the subject matter of the legislation, and which would immediately direct the attention of the user to the fact that the statute dealt with other instruments than bills of exchange be adopted.

THE 1994 ACT

The basis of the Act

As indicated earlier, the Negotiable Instruments Act, 1994 was based on the United Kingdom Bills of Exchange Act, 1882. The history of the Gambian Act, therefore, starts with the history of the United Kingdom 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. *Robarts* (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. *Robarts*. 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 first James I. Up to this time, the practice of making these bills of 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

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> 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 well 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. 92(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. *Robarts* 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.

The general arrangement of the Act

The Act has a preliminary part which deals with the short title and the interpretation provisions. Of the 99 sections of the Act, only 2 are devoted to this part. Subsequently, the Act is divided into four substantive Parts. Part I regulates bills of exchange

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in the strict sense. This Part forms the bulk of the Act. It takes 69 sections, and contains the basic provisions which apply not only to bills of exchange but the other types of negotiable instruments. Part II regulates cheques, relying on the basic negotiable instruments provisions common to both bills of exchange and cheques, but also stating what applies only to cheques. There are 14 sections to this Part. Part III deals with promissory notes in the same way that Part II treats cheques. This is covered in 7 sections. Part IV, which also consists of 7 sections, gives the supplementary provisions.

The changes introduced in the coverage of the UK Bills of Exchange Act, 1994

The United Kingdom Bills of Exchange Act is so well known to those dealing with negotiable instruments, that it is not considered necessary to repeat each of its provisions in this monograph. These can be found in the standard expositions of that Act, such as *Byles on Bills of Exchange* (26th ed.). In this part, it is proposed to identify the main difference between the Gambian Act and the United Kingdom Act and to indicate the manner in which these difference have been effected in the Gambian Act. Those differences are set out in connection with the corresponding sections on each of the instruments.

It should be stated from the outset that some stylistic changes involving no change in the substance of the United Kingdom corresponding provisions have been made. Such changes, for example have been made in the following provisions of the Gambian Act, the corresponding provisions in the United Kingdom Act appear in brackets:

(a) in section 8 which deals with the sum payable on a bill of exchange, paragraphs (b) and (c) of section 9 of the United Act, have been merged;

(b) stylistic changes have been introduced in section 10 which deals with bills of exchange payable at a future time (section 11 of the United Kingdom Act);

(c) stylistic changes have been introduced in section 11 which deals with omission of the date in a bill payable after a date (section 12 of the United Kingdom Act);

(d) a stylistic change has been introduced in section 14 dealing with a case of need (section 15 of the United Kingdom Act);

(e) some stylistic and verbal changes have been introduced in section 15 dealing with optional stipulations by drawer or indorser (section 16 of the United Kingdom Act);

(f) a stylistic change has been introduced in section 17 dealing with time for acceptance (section 18 of the United Kingdom Act);

(g) a stylistic change has been introduced in section 18(2) dealing with a general as compared with a qualified acceptance (section 19(2) of the United Kingdom Act);

(h) in section 62(2) which deals with cancellation of a signature, a verbal alteration of the equivalent provision in the United Kingdom Act, section 63(2), has been made for the sake of clarity.

Preliminary

As stated earlier, the Preliminary part of the Act deals with the short title and the interpretation provisions. Minor changes have been introduced in the interpretation section e.g. "note" (i.e. promissory note) which in section 2 of the United Kingdom Act is defined together with "bill" (i.e. bill of exchange) as:

> "In this Act, unless the context otherwise requires - "Bill" means bill of exchange and "note" means promissory note."

In the Gambian Act the corresponding provisions are to be found in section 2 where it is provided that:

> "In this Act, unless the context otherwise requires, "
>
> "bill" means bill of exchange;
>
> "note" means a promissory note;"

The change may be more stylistic, but it is facilitative in the sense that a reader looking primarily for the meaning of "note" as used in the provisions of the Act may not immediately think of looking it up under "bill", and it may save him time spent in reading the whole interpretation provision in order to find out if and where "note" has been defined.

Further, the United Kingdom Act does not define negotiable instrument. That is because the Act does not use the expression in any part, and a definition of an expression which does not itself appear in the Act would have caused more problems than it solved. But considering that the common feature of the three instruments dealt with by the Act was that they were all negotiable, a strong sentiment felt in the Workshop considering the Bill in The Gambia was that the expression should be defined in the Gambian Act. The problem of definition of an expression which does not appear in the main body of an Act was overcome in The Gambia by

the expansion of section 98 of its Act which specifically mentions another instrument, the dividend warrant, to cover "other negotiable instruments" as well. This was supposed to blunt the opposition of purists to the definition of the term "negotiable instrument", which was then defined in section 2 as:

> "negotiable instrument" means a document or instrument in writing signed by the maker or drawer containing an unconditional promise or order to pay a specified sum of money on demand or at a definite time to the bearer or to order which is transferable merely by delivery or by indorsement and delivery, and includes a bill of exchange, cheque, promissory note, dividend warrant, banker's draft."

Bills of Exchange

A bill of exchange is defined by section 3 as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer. 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. If the order is not unconditional, then it cannot constitute a bill. Thus, an order to pay out of a particular fund is not unconditional within the meaning of this section. But an unqualified order to pay, coupled with 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, is unconditional. And the order will be unconditional if it is an unqualified order to pay to which is added a statement of the transaction which gives rise to the bill. The section also explains that a bill is not invalid by reason that it is not dated; that it does not specify the value given, or that any value has been given therefor; or that it does not specify the place

where it is drawn or the place where it is payable. All that is no different from the definition of a bill of exchange under the United Kingdom Act.

Section 4 of the United Kingdom Act which draws the distinction between inland and foreign bills has been eliminated from the Gambian Act. According to section 4(1) of that Act,

> "[a]n inland bill is a bill which is or on the fact of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill."

Bills of exchange are relatively little used in domestic trade, and most bills have a non-domestic element. Although the United Kingdom Act recognised a distinction between inland and foreign bills, the distinction even in the United Kingdom 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 United Kingdom Act resulting from the distinction have also be eliminated.

Section 13(a) of the Gambian Act provides that:

> "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."

This wording corresponds to section 14(1) of the United Kingdom Act which was introduced by section 3 of the United Kingdom Banking and Financial Dealings Act, 1971. In the original Act of 1882, the corresponding wording was:

> "(1) 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 -

(a) 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.

(b) 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."

Section 29 which deals with the presumption of value and good faith states that every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. Subsection (2) then says:

> "(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.

The words "or other defect mentioned" appearing in the penultimate line of the subsection have been added to cover the situations of "duress, or force and fear" which had been previously mentioned in section 30(2), the corresponding subsection of the United Kingdom Act, but not repeated in the latter part of the subsection. The United Kingdom 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

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"there does not appear to be any direct authority on the subject." To avoid possible uncertainty, the word "loss" has been inserted in the Gambian Act.

Section 43 of the Act deals with the duties attached to a qualified acceptance of a bill. The corresponding provision in the United Kingdom Act is section 44. Subsection (2) of the United Kingdom provision states that:

> "(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take qualified acceptance, or does not substantially assent thereto, such drawer or indorser is discharged from his liability on the bill.
>
> The provisions of this subsection do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance."

Pursuant to the removal of the distinction between an inland bill and a foreign bill, it is provided in the Gambian Act that in every case where a bill has been accepted as to part it should be protested as to the balance. Section 43(3) of the 1994 Act, therefore, provides that:

> "(3) Subsection (2) [equivalent to the main provision of section 44(2) of the United Kingdom Act[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."

There is therefore no difference in the position whether the bill is an inland bill or a foreign bill as is found in the United Kingdom Act.

Section 50 of the 1994 Act deals with notice or protest of a bill. The corresponding section of the United Kingdom Act is section 51. Subsection (3) of the Gambian provision states that:

> "(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

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duly noted, the protest may be subsequently extended as of the date of the noting."

It should be pointed out that the words "it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day" appearing in the subsection, now put in bold lettering for easy identification, were inserted into the United Kingdom Act by section 1 of the Bills of Exchange (Time of Noting) Act 1917, an Act which was passed by the United Kingdom Parliament after the cut-off date for the reception in The Gambia of Acts of general application in England.

Section 53 of the United Kingdom Act, which like section 52 of the Gambian Act, deals with funds in the hands of the drawee provides that:

> "53(1) 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. This subsection shall not extend to Scotland.
>
> (2) In Scotland, 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."

Section 52 of the Gambian Act takes the position which the United Kingdom Act provides for Scotland. That is different from the provision for England. 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 was considered preferable and was adopted in the Gambian Act.

Section 57 of the UK Act deals with the measure of damages against parties to a dishonoured bill. Subsection (2) of that section provided that -

> "(2) 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."

That subsection was repealed by the Administration of Justice Act 1977, section 491) and Schedule 5, Part 1. It was accordingly omitted from section 56, which is the comparable section in the Gambian Act.

In section 71 of the Gambian Act, the proviso to section 72(2) of the United Kingdom Act which deals with inland bills and which would otherwise have qualified paragraph (b) (the comparable provision in the Gambian Act), has been deleted as a consequence of the abolition of the distinction between inland and foreign bills.

Section 72(4) of the United Kingdom Act was repealed by the United Kingdom Administration of Justice Act 1977 section 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 required revision, as the material date for the conversion is not when the money is due but then 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 state of payment however that may come about. The equivalent of the repealed United Kingdom subsection is, accordingly, omitted from the Gambian Act.

Cheques

A cheque is defined in section 72 of the Act as a bill of exchange drawn on a banker payable on demand. That section also goes on to day that except as otherwise provided in that part of the Act dealing with cheques, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque. The provisions in the Gambian Act are reproduced from the United Kingdom Act as amended by subsequent enactments, especially the Cheques Act, 1957. The changes introduced in the Gambian Act are stated below.

Section 82 of the United Kingdom Act gave protection to a collecting bank, which apparently incurred liability to a true owner. That section was as follows:

> "82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally of specially to himself, and the customer has not title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received payment."

That section was first amended by the Bills of Exchange (Crossed Cheques) Act 1906, which provided that:

"1. A banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

This section was repealed by the Cheques Act, 1957 section 6(3), and Schedule, and replaced by section 4 of the 1957 Act, which is incorporated in this Bill. Section 81 of the Act is a reproduction of section 4 of the United Kingdom Cheques Act, 1957. It provides as follows:

"81. (10 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.

(2) This section applies to the following instruments, namely -

(a) cheques;

(b) any 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) any 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;

(d) any 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."

The new section appears much wider than the previous enactments on the point. *Byles on Bills of Exchange* (26th ed.) at page 314 says that:

> "This section has received little judicial consideration. There are marked differences between the former protective legislation. It covers uncrossed cheques and other orders to pay and the language in which it is couched differs in some respects from that of the earlier statutes. If the section presents any difficulty of interpretation, it lies in this change of language ..."

However, it was considered that in this respect, as otherwise in the Act generally, the Gambian provision should be more or less the same as the prevailing United Kingdom provision, and was so enacted.

Section 83 of the Act is a reproduction of section 2 of the United Kingdom Cheques Act, 1957:

> "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."

That section is an exception to section 31 of the United Kingdom Act of 1882, which is section 30 of the Gambian Act, and is peculiar to banks alone. The concession given to bankers by the section will not enable a bank to take title through a thief since the sections 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. Section 2 of the United Kingdom Cheques Act speaks only of cheques, but section 4(2) of that Act (see section 81(2) of the Gambian Act) 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. 82 of this Bill has been broadened to cover such other instruments.

Section 84 of the Gambian Act is a reproduction of section 3 of the United Kingdom Cheques Act, 1957.

Section 85 of the Gambian Act is a modification in appropriate form of section 5 of the United Kingdom Cheques Act, 1957.

There was a suggestion, strongly pressed at the Workshop, that the criminal aspects of the issue of cheques should be covered by this Act. The point made was that currently the only offences created by the criminal law which could be used in the fight against cheque frauds, namely, the offences of obtaining by false pretences and forgery, were inadequate. Apparently, a number of serious cases involving cheque frauds had come up in The Gambia in the recent past, where the accused person had been acquitted, and this had given rise to some anxiety over the efficacy of the law prohibiting such frauds. Against the argument that this Act regulating negotiable instruments was not the appropriate means for combatting criminal conduct, it was pointed out by the protagonists of the amendments that several of the enactments on the financial sector already on the statute book or now proposed created criminal offences. Such criminal offences, however, were of a nature which was intended to provide sanctions for the breaches of the regulatory measures introduced by the enactment, and thereby enforcing compliance with the enactment. The decision was eventually taken that this Act should not deal with the problem of cheque frauds; it should be left to the Criminal Code to continue to delimit the laws on fraud, and if there was any shortcoming in that enactment, the correction should be made there. 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 the representation made by a person who issues a cheque is 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 a false pretence. It may be that instead of an amendment of the Criminal Code, some special enactment to deal with this particular problem is what is needed. This last point is of some importance because it might be advisable to cover instruments other than cheques in the exercise. For example, the United Kingdom Forgery and Counterfeiting Act 1981 which replaced the Forgery Act 1913 with regard to falsification of instruments, covered money and postal orders, cheques, travellers cheques, and cheque and credit cards (see section 5). That coverage is of even wider scope that the specific instruments dealt with in the Gambian Act on negotiable instruments.

Promissory Notes

A promissory note is defined in section 86 of the Gambian Act as an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer. An instrument in the form of a note payable to maker's order is not a note within the meaning of the defining section unless and until it is indorsed by the maker.

The equivalent section in the United Kingdom Act is section 83. Subsection (4) of that section which draws the distinction between inland and foreign notes has been omitted from section 86 of the Gambian Act.

Section 89(4) of the United Kingdom Act which makes the protest of a dishonoured foreign note unnecessary, is for reasons already given omitted from section 92 of the Gambian Act.

Supplementary

As pointed out earlier, section 98, amended section 95 of the United Kingdom Act. The United Kingdom Act provision is:

> "95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend."

Thus it specifically equated dividend warrants to crossed cheques. There was nothing further said about possible development of new instruments and what law was to apply to them. The feeling in the Gambia was that this situation should be catered for. Accordingly, a general provision was added to the United Kingdom provision as subsection (1) of the Gambian section, the United Kingdom provision being made subsection (2). The Gambian section 98, therefore, reads as follows:

> "98. (1) The provisions of this Act as to bills of exchange shall apply *mutatis mutandis* to other instruments which according to the usage of merchants as recognised by the courts are negotiable instruments."
>
> (2) The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

Section 99(1) declares that the Bills of Exchange Act, 1882, of the United Kingdom in so far as it applies to The Gambia shall forthwith cease to apply in The Gambia.

The Schedule to the Act provides specimens of negotiable instruments.

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REPUBLIC OF THE GAMBIA

MONOGRAPH

ON

THE SALE OF GOODS (AMENDMENT) BILL, 1994

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MONOGRAPH ON THE SALE OF GOODS (AMENDMENT) BILL, 1994

INTRODUCTION

When the Sale of Goods Act (Cap. 89.01) was passed for The Gambia in 1955, the volume of inter-state trade was nowhere near the explosive dimensions to which such trade has grown in modern times. It means that any meaningful reform of the Sale of Goods Act had to recognise this significant development, while at the same time taking into account such developments in the business transaction industry as would necessitate a revision of some of those provisions in the existing law.

The law of the Sale of Goods is, of necessity, a specialised aspect of the law of contract. Accordingly, should the basic contract rules fail to keep abreast with changing needs in the commercial arena, that would necessarily impact adversely on the quality of sales law. The revision of the Sale of Goods Act should therefore be seen as a necessary adjunct to the enactment of the Contract Bill, 1994 for The Gambia.

In this revision, it has been thought prudent to retain the essential structure and conceptual framework of the Sale of Goods Act and to amend the Act where necessary. The principal justification for this is that the amendment of the existing Act, rather than its total re-draft, facilitates continuing uniformity of the sales law with that of Commonwealth countries generally and, further, enables The Gambia to retain the benefit of the substantial body of

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jurisprudence that has accommodated to date on the subject. This uniformity of purpose accords well with the recommendation to adopt the United Nations Convention on Contracts for the International Sale of Goods, 1980.

This Monograph, therefore, focuses on those provisions which have been overtaken by developments in the business transaction industry and which have necessitated a revision of some of the provisions of the Sale of Goods Act.

The Act itself is basically divided into six Parts. Part I of the Act addresses the formation of the contract by defining a contract of sale of goods 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 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, revesting of property in stolen goods, retianing 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 consideed 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 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.

THE PROVISIONS OF THE SALE OF GOODS (AMENDMENT) BILL

Clause 1 deals with the citation of the Act to reflect the fact that the Bill is an amendment to the existing Act.

Clause 2 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 theparties 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.

It is pertinent to point out that the original s.9 was fraught with problems. The section assumed that a contract had been concluded by the parties and then dealt with the method by which the price could 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. Furthermore, 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 desgined 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 sectionthe 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 aprice agreed between the parties. The case of *May & Butcher* v. *The King* [1934] 2 K.B. 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, ifhe 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.

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.

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; *Bryne Corpn.* v. *Tradex SA* [1981] 1 WLR 711; *Gill & Duffus SA* v. *Société 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 it extends compulsive credit to the buyer, 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 instalment 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, any 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 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 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 possibilities out of this 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 sectin 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

stipulations 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 28. 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 realising his price without resorting to litigation to that effect.

Section 11(2) has been repealed since it is a matter addressed in the Interpretation Act (Cap. 4).

Section 15 of the Act has also been amended in order to deal with the troublesome concept of "merchantable quality" of goods.

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 a consumer legislation in The Gambia and protect the average businessman against unfair trading.

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 requisite 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".

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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.

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 have suggested 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.

We have recommended a repeal of section 26(2).

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.

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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.

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).

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 deliver 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 mot 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 ambigious 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 has been retained in its original form. 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.

Part IV - This Part addresses the rights of the unpaid seller against goods and is considered to be in order. The reference to an "insolvent" has been defined to fall 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 transfer. Consideration may be given to cases for the seller to exercise his right of stoppage where a buyer fails to make a payment due before delivery or repudiates the contract, or it 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.

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

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to include reserve bids and the fact that a right to bid may be reserved by or on behalf of the seller. The English Sales of Goods Act makes provision to that effect.

We recommended the repeal of the Schedule because it was archaic in form and outmoded in substance. Hence there is no longer 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 have recommended the amendment of section 59 to accommodate the rules of equity in respect of sale of goods.

It is important also 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 centre 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 of 1964 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:

State	*Signature*	*Ratification Approved (A)*	*Accession*
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 considers 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

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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 in 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 Government of the United States of America declared that it would not be bound by sub-paragraph (1)(b) of Article 1.

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For the reasons which we state below, we recommend that The Gambia might wish to consider entering reservations on Article I (i)(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 roles 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 reservement 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 of Article 11.

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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 avoids 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 applies.

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

1) 1980 ICC Incoterms,
2) 1974 UN Convention on the Limitation Period in the International Sale of Goods, together with its 1980 Protocol,
3) 1980 Vienna Sale Convention, and
4) 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

These 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.

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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:

State	*Signature*	*Ratification*	*Accession*
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:

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State	*Accession*	*Entry into force*
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 Period 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 the 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 have recommended 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.