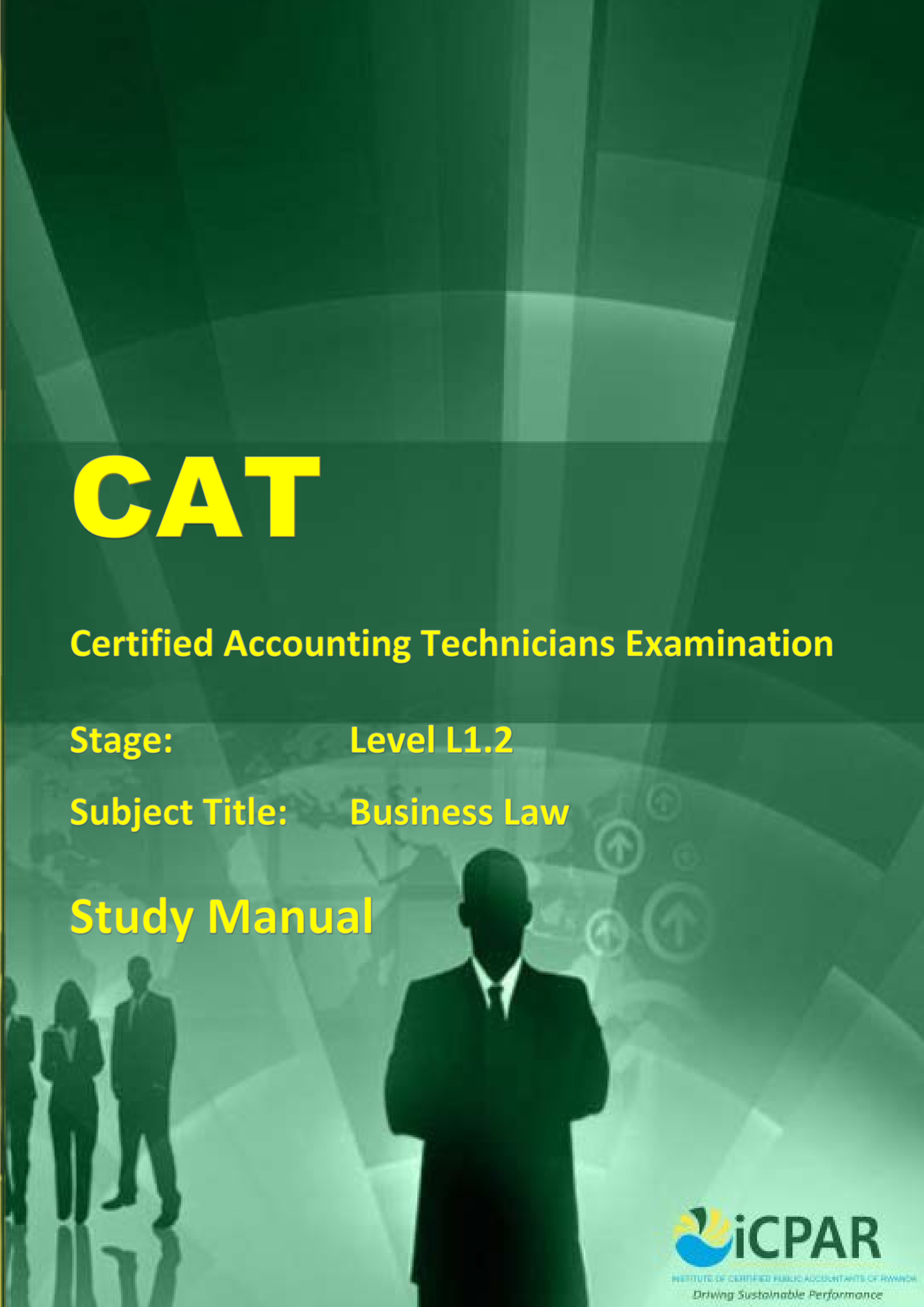
CAT

Certified Accounting Technicians Examination

Stage: Level L1.2

Subject Title: Business Law

Study Manual



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INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF RWANDA

Level 1

L1.2 Business Law

First Edition 2012

This study manual has been fully revised and updated

in accordance with the current syllabus.

It has been developed in consultation with experienced lecturers.

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Stage: Level 1
Subject Title: L1.2 Business Law

Aim

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

Learning Outcomes

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

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

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CHAPTER I. GENERAL INTRODUCTION TO LAW

Section 1. MEANING OF THE LAW AND OTHER KEY CONCEPTS

A. Definition of Law

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

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

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

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

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

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

Natural law is a body of ideal rules of human conduct considered as superior to those of positive law and compulsory even to the legislator. Natural laws are usually used to justify the legal rule (positive law) this is because every single law is related to a pure moral law, which is to say that a legal rule is a result of a moral law. An example is that the legal rule (positive law) against murder originated from the natural law of 'don't kill' which has been in existence since time immemorial.

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

B. Purpose of the law

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

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

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

C. Law and morality

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

D. Law and Ethics

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

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

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

Section 2. CLASSIFICATION OF LAW

A. Substantive and procedural law

Substantive law sets out the rights and duties governing people as they act in the society and specifies remedies to back up those rights. Duties tend to take the form of a command. ''Do this'' or 'Do that' or 'Do not do that'. For example, the Rwanda labour code tells employers that they must not discriminate amongst people in hiring and employment on the basis of race, colour, religion, sex, etc. substantive law also establishes rights and privileges, e.g. freedom of speech, the right to self-defence.
Procedural law establishes the rules by which substantive law is enforced. It does not define rights or duties, but merely implements them. Rules as to what cases a court can decide how, a judgment of a court is to be enforced are part of procedural law.

B. Criminal and civil law

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

violators. If a person is found guilty of the crime such as theft, the person will be punished by imprisonment and or a fine. When a fine is paid, the money goes to the side of the government, not to victim of the crime.

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

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

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

C. Main divisions of law

Broadly, law can be divided into two broad categories

1. International law

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

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

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

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

The two traditional branches of the field are:

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

2. National law

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

a) Public law

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

b) Private law

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

- **Law of persons** (including family law): This branch of law deals with the legal status of natural persons, such as minors and insane persons, and involves factors influencing capacity, such as age, marriage and nationality. Family law deals with the law of domestic relations and the legal rules for family relationships, such as marriage, divorce, guardians.

- **Law of "things".** This branch is divided into categories:
  - ✓ **Law of property:** this is a branch of law that is concerned with real rights and deals with ownership and possession, and various real rights in a thing belonging to another, such as servitudes, mortgages, pledges and liens.
  - ✓ **Law of succession:** This deals with what happens to a person's estate upon death. In testamentary succession, the deceased leaves a valid will. In intestate succession, there is no will at all, or part of the estate of the deceased was not disposed of by will.

- ✓ **Law of obligation:** This branch of law deals with personal rights, and is divided into two categories.
- ✓ **Law of contract:** a contract is defined as a binding agreement between two or more persons by which one or more of them agrees to give something, or to do something, or not to do something. It is therefore an agreement intended to create or extinguish personal rights between persons.
- ✓ **Civil liability**. This is a branch of general duty imposed by law which will ground an action for damages by any person to whom the duty was owed who has suffered harm in consequence of the breach. The duty is owed to persons generally and is imposed independently of the will of the parties.
- ✓ **Business law**: There is no simple categorization of laws that fall under business law, since much of this law also falls into other categories. However, business law may include laws relating to insurance, labour law, bankruptcy, and agency, sale of goods, taxation, negotiable instruments, company law, carriage, and law of banking.

- **Procedural law:** This branch of law deals with the rules that govern **how** actions may be brought under the law. There are two divisions:

  a) Civil procedure: This sets out the rules of how persons can bring action against others in a civil court.
  b) Criminal procedure: This sets out procedure on how a criminal court operates, the powers of judges in criminal matters, and how persons can be brought before a criminal court.

- **Law of evidence:** This sets out the rules of how evidence may be introduced and proved in a civil or criminal court.

- **Conflict of laws:** This branch of law prescribes rules for settling an issue before a Rwandan court if the events at issue are so connected to a foreign country that the foreign country's system of law has to be considered in resolving the matter.

Section 3. CHARACTERISTICS OF A LEGAL RULE

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

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

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

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

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

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

A legal rule generally regulates human conduct. This is why it is general and abstract (it is concerned with general ideas or principles rather than specific issues)
A legal rule normally means a general and abstract provision stipulating how beings should behave. The generalizing and impersonality of a legal rule are an important guarantee against arbitrariness (unfairness)

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

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

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

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

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

Section 4. SANCTIONS OF A LEGAL RULE

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

- Criminal sanctions
- Civil sanction
- Disciplinary sanctions

A. CRIMINAL SANCTIONS

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

B. CIVIL SANCTIONS

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

C. DISCIPLINARY SANCTIONS

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

Section 5. MAJOR LEGAL SYSTEMS (FAMILIES) OF THE WORLD

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

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

b) Civil law system. Originating from continental Europe the civil law system has spread to the countries of Latin America, Francophone and Lusophone African countries, the countries of the near East, Japan and Indonesia. Colonization and voluntary reception contributed for this wide spread. French law stands out as the prototype of the civil law systems of laws. This is so because the Napoleonic codes have served as model codes for other countries. The main features of the civil law system are following. Firstly all civil law jurisdictions adopted the legal technique of condition. Secondly, the legal rule seeks to formulate a general rule of conduct as opposed to address the case in hand (cf Common Law).

c) Socialists legal system. Prior to 25th October 1917 (the October Revolution) Russian law could be said to belong to civil law family. Since then, law in Russia has taken a different path based on Marxism-Leninism. So that today, it is current to speak of socialist legal theory; a socialist law with its own distinctive structure and system of administering justice. The primary function of Soviet law is to organize the nation's economic forces and to transform the behaviour and attitude to an infringement on the interests of private persons or an insult to the code of morality. This position is bound to change when states previously subject to soviet law have adopted European Union market economic policies (capitalism).

d) Muslim legal system. Muslim law is not an independent branch of knowledge or leaning. It is only one of the facts of Islamic religion itself; Islam is first of all a religion, then a state, and finally a culture. The Islamic religion includes, firstly, theology which established dogma and states exactly what a Muslim must believe. Secondly It includes the 'sharia' ('the way to follow') which lays down rules of behaviour for believers. Since Muslim law is an integral part of the Islamic religion no authority in the world is qualified to change it.

Chapter 2. SOURCES OF LAW

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

SECTION 1. MATERIAL SOURCE OF LAW

A. Definition.

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

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

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

B. Various material sources

1. Social standards

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

2. The economic theory

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

3. Religions

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

[1] P ex. Per example or for example and is the same as e.g.

C. Value of the material sources

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

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

SECTION 2. FORMAL SOURCES

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

A. OBLIGATORY SOURCES OF LAW

These are the principal sources of law. In a narrow sense, laws are statutes enacted by the parliament and promulgated by the president of the Republic.
In a broader sense, the Law mean all legal rules of written law formulated in a general way by means of exercising legislative power or even executive power.
The laws have a general impact, emanating from public power and are obligatory for all individuals found in a given society.
Here, we have national laws at the country level, and international laws on the international level.
We will first examine national laws.

1. SOURCES OF NATIONAL LAWS

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

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

1.1. The constitution

At the national level, the constitution comes at the first position. The constitution is a set of rules which form the fundamental law of a state with which all other laws have to be in conformity. This means that when there is a conflict between constitutional provisions and any other law of the country, the former prevails.
For G. Burdeau, the constitution occupies a central place in a system of the rule of law. A certain philosopher M. Kamto wrote:
“A democracy should not be a government by peoples, but a government by the law”. This is what is called the rule of law. In this sense, it coincides with a “democratic state” on condition that “the law really expresses the general will of the public”.
Rwanda has only one constitution, which was adopted through the referendum of 26th May, 2003.

1.2. The organic laws

Besides the constitution, there are organic laws, which rank immediately below the constitution. Within the hierarchy of laws, organic laws come after the constitution.
An organic law is adopted with a view to specifying or completing the constitution and other laws. There are organic laws in Rwanda. This is the case of the organic law No 08/96 of 30/08/1996 on the organization of prosecutions of crimes constituting the crime of genocide or crimes against humanity committed between 1st October 1990 and 31/12/1994, the organic law on the organization and functioning of Gacaca jurisdictions, and so many others.
According to 93(6) of the Rwandan constitution, organic laws shall be passed by a majority vote of three fifths of the members present in each chamber of Parliament.

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

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

1.3. Ordinary laws

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

1.4. Decree Law

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

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

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

1.5.1. Presidential orders

The president of the republic exercises his functions as the head of the executive Power by way of Presidential Decrees.
According to article 112 of the constitution, the President of the Republic shall sign presidential orders approved by the cabinet, and the prime minister, ministers, and ministers of state and other members of government responsible for their implementation countersign these orders.

1.5.2. Orders of the Prime minister and others public authorities

The prime minister signs orders of the prime minister relating to the appointment and termination of senior public servants mentioned by article 118(10) of the constitution.
Ministers, ministers of state and other members of cabinet implement laws relating to matters for which they are responsible by way of orders (art.120 (i) const)

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

2. SOURCES OF INTERNATIONAL LAW

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

- International conventions, whether general or particular, establishing rules expressly recognized by contesting states;

- The general principles of law recognized by civilized nations;

- International customs, as evidence of a general practice accepted as law …. Judicial decisions and the teachings of most highly qualified practioners of law in various nations, as subsidiary means for the determination of rules of law.

B. AUXILIARY SOURCES OF LAW

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

1. Custom (as a source of law)

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

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

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

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

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

2. General principles of law.

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

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

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

3. Jurisprudence (Decided case law)

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

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

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

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

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

4. Doctrine

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

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

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

5. Equity

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

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

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

Section 3. SOURCES OF RWANDA BUSINESS LAW

A. International sources

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

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

Indirect implication of international conventions can be found in the adoption by Rwanda of the Vienna Convention on the International Sale of Goods (the United Nations Convention on Contracts for the International Sale of Goods) of April 1980, which deals primarily with external trade relations, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, etc.
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Below are some examples of international conventions related to international trade.
- 1995- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit;
- 1988- United Nations Convention on International Bills of Exchange and International Promissory Notes;
- 2001- United Nations Convention on the Assignment of Receivables in International Trade;
1991- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;
- 2005- United Nations Convention on the Use of Electronic Communications in International Contracts.

B. Domestic sources

Currently, there is no commercial law code in Rwanda. However, some disparate laws do exist:
- Decree of 2 August 1913 on traders and proof of commercial engagements;

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

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

Chapter 3. ADMINISTRATIVE LAW

Section 1. MEANING

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

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

Section 2. SEPARATION OF POWERS

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

- The Legislature
- The Executive
- The Judiciary

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

1. The Legislative branch: the Rwandan Parliament

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

- The chamber of Deputies, whose members shall have the title of 'Deputies'

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

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

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

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

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

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

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

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

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

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

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

2. The Executive branch

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

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

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

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

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

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

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

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

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

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

3. The Judiciary

A. Introduction

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

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

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

Judicial decisions are binding on all parties concerned, be they public authorities or individuals.

They shall not be challenged except through ways and procedures determined by law (Art. 140(3)

const.).

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

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

B. **Judicial organization and competence**

B.1. Ordinary courts
a) Lower instance courts

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

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

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

b) Higher instance courts

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

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

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

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

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

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

c) The Higher court

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

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

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

d) Supreme Court

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

The Supreme Court exercises ordinary and special jurisdiction. In the exercise of ordinary jurisdiction the court is the court of last resort for appeal for trials heard by the high court of the republic in the first degree and in the second degree provided inter alia, the award of damages equals or exceeds twenty million francs (20,000,000) or the subject matter in disputes equals or exceeds twenty million francs (20,000,000).
In the exercise of its special jurisdiction the supreme court has, inter alia, exclusive jurisdiction to try in the first and final degree, the president of the republic, the president of the senate, the president of the chamber of deputies, the president of the supreme court and the prime minister for offences committed during their terms of office, whether such offences relate to the exercise of their public duties or their private matters, regardless of whether they are still or have ceased to hold office.

B.2. Specialized courts
a) Military courts

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

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

The military high court exercises both original and appellate jurisdiction. In that exercise of its original jurisdiction, the military high court shall try all offences which constitute a threat to national security and murder committed by soldiers. However, if, during judgment, the court finds that the elements of the offences constitute manslaughter instead of murder, it shall nonetheless hear the case.
In its appellate jurisdiction the court hears appeals from cases tried by the military court. Cases heard in the first instance by the military high court may be reviewed by the same court or appealed to the Supreme Court. If the case was heard in the second instance by the military high court, the case will be appealed to Supreme Court provided the sentence passed by the military high court is equal to or exceeds ten (10) years of imprisonment.

b) **Commercial courts**

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

Chapter 4. THE BUSINESS DISPUTES RESOLUTION

Section 1: REVIEW OF KEY CONSTITUTIONAL PROVISIONS REGARDING THE COURT SYSTEM

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

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

Section 2. Rwandan Commercial justice system

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

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

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

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

Activities	Time
Creation of the Rwandan Law Reform Commission	May 2001
Law Reform Commission drafts new laws	July 2001-December 2003
Law Reform Commission presents new laws to the Cabinet	January 2004
Parliament adopts new law on courts, judges and civil and criminal procedure	April-July 2004
Cabinet admits failure of assessors in enhancing commercial litigation	End of 2004-Early 2005
Cabinet establishes Business Law Reform Cell	October 2005
Superior Council of the Judiciary selects 22 local judges for the commercial courts	July-December 2005
Draft law establishing commercial courts adopted	December 2007
Draft law establishing commercial courts goes through legislative process	December 2007-March 2008

Eight local judges leave for specialized course in South Africa	February 2008
Publication of law establishing commercial courts. Procedural rules law is published the same day	March1, 2008
Law dealing with arbitration and conciliation in commercial matters enters into force	March 6, 2008
Swearing in of 2 Mauritian judges as President of the Commercial Court and President of the commercial court of Nyarugenge	May 2, 2008
Commercial courts become fully operational	March 15, 2008

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

2.2. Organization structure of commercial courts

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

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

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

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

2.3. Jurisdiction of commercial Courts

Commercial courts have a limited jurisdiction. Such courts are competent to try commercial cases. In order to determine the jurisdictional scope of commercial courts, the Law provides a list of commercial matters. According to Article 3 of the Law establishing commercial courts, commercial matters refer to commercial, financial, fiscal and other matters closely related to them regarding:

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

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

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

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

2.4. Qualified judges for dealing with commercial litigation

Judges dealing with commercial litigation shall have sufficient experience in trade issues and the relevant laws of different business activities. For satisfactory and effective commercial litigation, it is important to train group of judges, lawyers and experts to deal with commercial litigations and legislations, and to set suitable training program for this end.

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

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

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

2.5. Proceedings relating to commercial cases

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

A. Initiation of a case

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

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

The Plaint shall:

1° specify in form of conclusions the remedies sought;

2° identify the names of the parties to the suit or other persons connected to it;

3° contain a summary of the nature of the claim in form of short numbered

paragraphs and indicating the grounds on which it is premised;

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

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

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

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

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

B. Preliminary hearing

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

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

C. Rules on adjournments

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

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

D. Substantive hearing

At the substantive hearing of the merits, the parties present their evidence. The trial judge may during this hearing, after examining the evidence of witnesses or their opinions, make an order whether such evidence is sufficient. He may also encourage skilled people on the subject matter to seek dialogue with the parties with the view of making them settle the matter or appoint an expert to examine on behalf of court any report of skilled persons or other evidence presented to court and to report to court on a date fixed by the trial Judge. Upon request by the parties, the trial judge may pass judgment based on the written submissions or written submissions or any other evidence without a hearing.

E. Increased Efficiency of Commercial Courts

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

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

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

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

Section 3. Arbitration

1 Introduction

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

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

Arbitration refers to a process in terms of which the parties to a dispute voluntarily and jointly ask a third party, the arbitrator, to hear both sides of their dispute and make an award that they undertake in advance will be final and binding. The fact that the arbitrator settles the dispute by making a legally binding award distinguishes arbitration from mediation and negotiation. For this reason, arbitration is more similar to litigation, as both are command processes where a decision is imposed on the parties, in contrast to negotiation, which is consensual in nature. But, in contrast to litigation, the arbitrator`s award arises from the consent of parties to accept the award, not from the power of the court imposing an order.

2. Significant features of arbitration

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

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

3. The agreement to arbitrate

An agreement by parties to submit to arbitration any dispute or difference between them is the starting point of the process in both national and international arbitration. If there is to be a valid arbitration, there must first be a valid agreement to arbitrate. Arbitration is a contractual process in the fact that it is based on an agreement between the parties, by opposition to some cases where arbitration is imposed in statute, such as provided for in Switzerland by article 89 of the Statute on health care insurance for disputes between doctors and health insurers, or as provided in France by Article 761-5 of the labour law code for certain disputes in the field of journalism.
The Rwandan law on arbitration defines the arbitration agreement. The long Article 9 of the above-mentioned law provides:

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

4. The choice of arbitrators

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

5. The decision of the arbitral tribunal

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

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

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

6. The enforcement of the award

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

The registration or deposit of award is a *sine qua non* requirement for an award to be recognized an enforced in Rwanda. However, no fee is paid for that registration or deposit for recognition of arbitral awards sought in Rwanda.
According to article 395 of the law establishing Commercial, civil, social and administrative procedure code, the party seeking recognition shall deposit the duly authenticated original award or duly certified copy thereof; and the original agreement or duly certified copy thereof award at the president of the higher instance court`s office and request the executory stamp on the deposited award. Article 396 of the same law, states that the President has 8 days to make a decision concerning that recognition.

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

The New York convention provides for a simpler and effective method of enforcement of obtaining recognition and enforcement of foreign awards. It is mainly due to the provisions of the New York convention that arbitration has become a very attractive alternative to traditional

litigation. It is one of the widest accepted international conventions. It has significantly simplified the enforcement of foreign awards and harmonized the national rules for the enforcement of foreign awards.

7. Matters excluded from arbitration

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

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

Arbitration is not permissible in following matters:

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

8. Difference between arbitration and litigation

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

<u>Cost and Expeditiousness</u>

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

Although litigation has been described as 'a machine in which you enter as a pig and come out as a sausage'. one would not be far from right by defining some international arbitration procedures in the same way. Moreover, it is not uncommon for lawyers to take control of the proceedings in complex international commercial arbitrations. This may come about as a result of the arbitrators' efforts to instil trust in the arbitration process. Arbitrators give both parties the opportunity to fully present their case. Unlike in litigation where a case could summarily be dismissed, arbitration does not have the remedies found in judicial systems that are created to limit the development of frivolous cases. Consequently, there are no measures such as motions

to dismiss or motions for summary judgment. The non-existence of such measures is an advantage for the claimant but a rather costly disadvantage for a defendant confronted with an unwarranted claim.

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

Additionally, there is usually a great amount of difficulty in arranging a timetable that will accommodate the schedule of the members of the arbitral tribunal, the legal representatives or witnesses, if the situation warrants it.
Moreover the panel of arbitrators for complex international commercial contracts is usually three; each of whom has to be well paid hence increasing the cost of arbitrations. This cannot be compared to the minimal court fees one encounters in litigation.

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

Confidentiality

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

Flexibility

The arbitration process is hailed for its inherent procedural flexibility. Unlike court proceedings which are rigid, arbitral proceedings offer greater flexibility in international commercial transactions. Parties get to choose their own arbitrators, in addition to having the independence to customize the arbitration proceedings to suit their wishes. Although parties may choose an already established arbitral institution with its own set of rules of procedure, the parties have a choice to decide on whether or not they want a totally different procedure that better serves their needs. If both parties cooperate and decide that they both want a speedy arbitration, the flexibility of arbitration can be used to their advantage to achieve that goal. Moreover, parties may even choose to have ‘fast track’ arbitration – an option that is offered by institutions such as the International Chamber of Commerce and the London Court of International Arbitration.

Another reason for the preference of arbitration over litigation by business parties is that many legal problems arise due to the possibility of several legal systems clashing hence complicating matters even more. It may be hard for the parties to find the most ideal place to file their suit. This may lead to a party embarking on a venture in search of a jurisdiction that may be more

sympathetic to its interests. 'Forum-shopping' as this venture is often called, may be based on the search for a jurisdiction that is likely to be biased in favour of the party choosing that jurisdiction (for instance the anticipation of large amounts in damage awards).

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

Impartiality

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

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

Chapter 5. LAW OF PERSONS

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

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

These associations are governed:

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

Natural persons and moral persons are vested with juridical personality.

§1. Juridical or legal personality

A. *Principle*

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

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

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

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

Legal personality has a beginning and an end.

B. The beginning of legal personality: birth of a natural person

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

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

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

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

C. The end of legal personality: death

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

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

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

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

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

3. Determination of the moment of death. It is always important and obligatory to determine the moment of death. This is for practical reasons: for example, succession falls open at the time of death. The date of death can be certain or presumed. The presumption is applied to cases of co-deceased persons (Art. 18 FC) and "declaration of death".

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

§2. Legal identification of physical persons

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

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

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

A. Gender, age and ethnicity

1. Gender and age

There are legal effects related to gender and age :

Examples :

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

2. Ethnicity

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

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

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

B. Name and Given names (Art.58-72 FC)

1. **Notion and principle**

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

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

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

2. Surname and given name

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

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

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

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

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

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

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

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

Clergymen and religious personnel also retain their surnames and given names on official documents.
Surnames and given names must not be against morality and good morals.

3. Nickname

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

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

4. Pseudonym

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

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

5. Legal characteristics of a name

The name is characterised by the following three elements:

- Immutability;
- Imprescriptibility;
- Unavailability.

(1) Immutability

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

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

(2) Imprescriptibility
The person's name is not subject to extinguishing or acquisitive prescription.

(3) Unavailability

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

6. Protection of the right to a name

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

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

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

C. Domicile and residence

1. Notions

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

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

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

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

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

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

The terms "domicile and residence" in their current usage, or in their official usage or juridical usage, are very often confused. For example, in the field of criminal law, when we talk of 'violation of domicile", it can be taken to mean violation of domicile, as well as residence, housing or lodging of a person, even for a single night.

2. Practical importance of domicile and residence

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

(1) Importance in the law of procedure

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

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

(2) Importance in the civil law

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

The succession falls open at the deceased's domicile.

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

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

3. Legal characteristics of domicile and its determination

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

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

D. Civil status

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

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

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

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

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

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

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

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

Chapter 6. LAW OF TORT

Section 1. The Liability for personal acts

1.1. The wrongful act or fault

1.1.1. Culpability

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

A. Fault, violation of a rule

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

B. Without a violation of a legal text

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

C. abuse of authority

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

1.1.2. Imputability

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

1. 2. The damage

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

1. 2.1. Various kinds of damages

A. Material damage

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

B. Moral damage

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

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

1. 2.2. Characteristics of the reparable damage;

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

A. The damage must be actual and certain

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

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

B. The damage must consist of the violation of a legitimate interest (legally protected interest)

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

C. The damage must be direct

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

D. The damage must be personal.

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

1.3. The causal relationship

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

Section 2. Liability for acts committed by others

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

2.1.1. Principle

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

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

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

- The damage must be caused by the child

- The child must be residing with the parent (article 260(2))

- The damage must be caused by the personal act of the child

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

2. 2. 1. Principle

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

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

- Relationship of subordination

- The fault of the domestic or agent (worker)

[2] Civil Code Book iii

- The damage is supposed to be caused to a third party**,** that is to say, any other person other than the master/*commettant*

- A relationship between the act of the domestic or agent and the functions which they do

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

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

A. Principle

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

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

B. Conditions for there to be this civil liability

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

- the act which caused the damage must be the fault of the student or apprentice

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

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

- the damage for which teachers and craftsmen are liable are those caused by the students and apprentices against third parties or those committed between themselves.

- There must be a relationship of artisan and apprentice. This is usually by way of contract of apprenticeship.

2.1.4. Liability of the damage caused by things.

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

A. Liability for the damage caused by animals

1. Principle

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

2. Conditions of application of this liability

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

2.1. The concerned animal and its behaviour

Here, the concerned animal is one that is domestic or even wild if the latter was caught and made domestic.
These animals may be dangerous or harmless. We therefore consider all animals without distinction of their zoological nature: domestic animals or others (dog, goat, pig, cat, monkey, rabbit, bees in hives, etc.)
- The behaviour of the animal is also important, and it must be a positive one. The animal must do a positive act.

2.2. The liable person

According to article 261 CC III the liable person is the owner of the animal which caused the damage or its keeper while it is being used by him.
In general, the owner of the animal (this is why the law firstly cites him or her) or its keeper. The keeper can be "an independent keeper" or "a professional keeper"

1° an independent keeper

This is the owner or the hirer of the animal. When the owner of the animal hires it out, it means that he has transferred all the care and duty towards the animal to another person. Then if the animal causes damage to someone, the hirer is liable and must indemnify the victim.
Another situation is when the owner of the animal loses its custody, for example when it has been stolen. Then the thief becomes the keeper of the animal and the liable person. But someone who abandons the animal cannot be considered as the one who loses its custody and will therefore be liable for its damage.

2° the professional keeper

Someone who takes care of an animal on a professional level is considered to be its keeper and will therefore be liable under article 261 CC III. An example could be a veterinarian who treats the animal and is liable for the damage which it causes during the time when the animal is under his care.
Also, someone in a circus who trains animals while exercising, dancing, running, etc., is liable for the damage caused by these animals while they are under his care.

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

2.1.1. The principle

According to article 262 CC III, the owner of the building is liable for the damage caused by its ruins when the ruins were caused by a result of default of maintenance or a construction defect.
Here, the owner of the building is liable, contrary to the case of the animal (article 261CC III) where the owner and others may be liable for the damage caused by the animal.

A. Necessary condition

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

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

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

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

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

B. Defences

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

b) ***The exclusive fault of the victim***

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

C. Legal actions of the owner

The owner can have legal actions against:

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

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

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

Chapter 7. LAW OF CONTRACT

Section 1. General overview on Contract

1.1. The scope of the law governing contract

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

1.2. Interpretation principle

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

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

1° "contract": a promise or a set of promises the performance of which the Law recognizes as obligation and the breach of which the Law provides a remedy; …

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

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

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

1.3. Requirements of a contract

The four basic requirements of a valid contract are as follows: Mutual assent, capacity, legality of purpose and consideration. The new law governing contracts enumerates the basic

requirements in its article 2 but without any comprehensive definition. They are developed in the chapter on formation of contracts.

1.3.1 Mutual assent

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

1.3.2 Capacity

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

1.3.3 Legality of Purpose

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

1.3.4 Consideration

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

1.4. Classification of contracts

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

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

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

1.4.1 Bilateral and unilateral contracts

A bilateral contract results from the exchange of a promise for a return promise whereas a unilateral contract results from the exchange of a promise either for performing an act or for refraining from doing an act. The interpretation section gives the following definition: A bilateral contract is a contract in which the parties have reciprocal obligations and unilateral contract as a contract in which obligees do not have obligations.

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

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

1.4.2 Express and implied contract

Parties to a contract may indicate their assent by conduct implying such willingness. Such a contract formed by conduct is an implied contract or more precisely, an implied in fact contract. In contrast, a contract in which the parties manifest assent in words is an express contract.
Both are contracts, equally enforceable. The difference is merely the manner in which the parties manifest their assent.

1.4.3 Valid, void, voidable, and unenforceable contracts

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

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

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

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

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

1.4.4 Unenforceable contract

A contract that is neither void nor voidable may nonetheless be unenforceable. An enforceable contract is one for the breach of which the law provides no remedy. For example, in the application of the law of limitations or prescription, after the statutory time period has passed, a contract is referred to as an unenforceable contract, rather that void or voidable.

1.4.5 Formal contracts

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

1.4.6 Gratuitous contracts

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

1.4.7 Quasi contracts

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

1.4.8 Promissory Estoppel

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

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

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

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

Section 2. Contract formation

2.1. Requirements regarding parties

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

2.2. Requirements relating to the capacity to contract

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

2.2.1 Minors

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

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

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

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

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

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

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

2.2.2 Person under guardianship

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

2.2.3 Mental defect

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

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

2.2.4 Intoxicated persons

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

2.3. Mutual assent; an offer followed by an acceptance

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

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

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

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

2.3.1 Offer

Definition and essentials of an Offer

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

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

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

In case of doubt, an offer is to be interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.
To be effective however, it must be communicated, manifest intent to enter into a contract and sufficiently certain and definite.

Invitation to Treat

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

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

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

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

Communication of an Offer

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

Intent to enter into a contract

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

It is important to distinguish language that constitutes an offer from that which merely invites offers.
If a communication creates in the mind of a reasonable person in the position of the offeree an expectation that his acceptance will conclude a contract, then the communication is an offer. If it does not, then the communication is a preliminary negotiation.

Definiteness and certainty of an offer

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

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

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

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

Duration of an offer

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

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

(1) *Lapse of time*: "The offeree's power of acceptance is terminated at the time specified in the offer, or if no time is specified, at the end of a reasonable time". The offeror may specify the time within which the offer is to be accepted. Unless otherwise terminated, the offer remains open for the specific time. Upon the expiration of that time, the offer no longer exists and cannot be accepted and any purported acceptance of an expired offer will serve only as an offer.

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

The provisional draft stated that unless otherwise indicated by the language or circumstances, an offer sent by email is reasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received - referring to the restatement, section 41 and the Uniform Commercial Code 1-303 but this provision was removed during the legislative

process as a detail that would be not really applicable in a Rwandan context. For the same reason, article 48 of the provisional draft has been removed:
"If a communication of an offer to the offeree is delayed, the period within which a contract can be created by acceptance is not thereby extended if the offeree knows or has reason to know of the offer, even though the delay is due to the fault of the offeror ; but if the delay is due to the fault of the offeror or to the means of transmission adopted by him, and the offeree neither knows nor has reason to know that there has been delay, a contract can be created by acceptance within the period of delay which would had been permissible if the offer had been dispatched at the time that its arrival seems to indicate".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.2 Acceptance of an offer

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

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

Modes of acceptance

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

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

Notification of acceptance

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

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

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

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

Acceptance by silence

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

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

Silence may also operate as an acceptance where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept.
But care must be taken. Simply putting into the offer a term such as "If I do not hear from you I shall assume you have accepted the offer" may not be, in common law, the same as a silent acceptance.

Time when acceptance takes effect

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

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

"*Unless the offer provides otherwise:*

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

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

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

Reasonableness of medium of acceptance

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

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

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

2.4. Consideration

2.4.1 Consideration and cause

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

A performance or a promise by the promisee is a consideration if it is established as such by the promisor and is given by the promise in exchange for that promise.
The consideration exchanged for the promise may be an act, forbearance to act, or a promise to do either of these.

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

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

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

2.4.2 Adequacy of consideration or mutuality of obligation

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

The provisional draft was clear on the issue of adequacy of consideration contemplated in article 35 of the voted law:
"If the requirement of consideration is met, there is no additional requirement of
(1) a gain ,advantage, or benefit to the promisor or a loss, disadvantage or detriment to the promisee,
(2) equivalence in the values exchanged ; or
(3) mutuality of obligation."

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

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

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

Re McArdle (1951)Ch 669 Court of Appeal (in UK)
Mr McArdle died leaving a house to his wife for her lifetime and then to his children. While Mrs. McArdle was still alive, one of the children moved into the house. The wife made improvements to the house costing £ 488. After the work had been completed, all the children signed a document in which they promised to reimburse the wife when their father's estate was finally distributed. The court of appeal held that this was a case of past consideration. The promise to pay £ 488 to the wife was made after the improvements had been completed and was, therefore, not binding. The rule about past consideration is not strictly followed. If, for

example, a person is asked to perform a service, which he duly carries out, and later a promise to pay is made, the promise will be binding.

Re Casey's Patents, Stewart v. Casey (1892)
Casey agreed to promote certain patents which had been granted to Stewart and another. (A patent gives the holder exclusive right to profit from an invention) Two years later Stewart wrote to Casey promising him a one–third share of the patents in consideration of Casey's efforts. It was held that Stewart's original request raised an implication that Casey's work would be paid for the later letter merely fixed the amount of the payment.
Consideration must move from the promisee: An action for breach of contract can only be brought by someone who has himself given consideration. A stranger to the consideration cannot take advantage of the contract, even though it may have been made for his benefit.

Tweddle V Atkinson (1861)
John Tweddle and William Guy agreed that they would pay a sum of money to Twaddle's William, who had married Guy's daughter. William Guy died without paying his share and William sued his late father – in- law's executor (Atkinson). His claim failed because he had not provided any consideration for the promise to pay.

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

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

Thomas v Thomas (1842)
After the death of her husband Mrs. Thomas agreed to pay rent of £1 a year in order to continue living in the same house. It was held that the payment of £ 1 was valid consideration.

A person who promises to carry out a duty which he is already obliged to perform is in reality offering nothing of value. The consideration will be insufficient. However, if a person does more than he is bound to do, there may be sufficient consideration. The promise may involve a public duty imposed by law.

Hartly v Ponsonby (1857)
When almost half of the crew of a ship deserted, the captain offered those remaining £40 to complete the voyage. In this case, the ship was so seriously undermanned that the rest of the journey had become extremely hazardous. It was held that this fact discharged the sailors from their existing contract and left them free to enter into a new contract for rest of the voyage.

2.4.3 Contracts without consideration

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

Promises to perform prior unenforceable obligations

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

Promise for benefit received

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

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

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

Promise modifying existing contract

A promise modifying a duty under a contract not yet fully performed is binding;
(1) If the modification is fair and equitable in view of circumstances not anticipated when the contract was made;
(2) If it is provided by specific law;
(3) In case of material change which results into the change of obligations for both parties.

Contracts under seal

Under the common law, when a person desired to bind himself by deed or solemn promise, he executed his promise under seal. No consideration for his promise was necessary.
Article 41 of Itegeko No. 45/2011 Ryo Kuwa 25/11/2011 Ringengo Amasezerano
(Law No. 45/2011 of 25/11/2011 Governing Contracts refers to this practice in the followings terms:

Article 41: Validity requirements for contracts without consideration
A promise without consideration is binding if:
1° it is in a written form and signed;

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

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

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

2.5. A mandatory writing form for some contracts

2.5.1 Contracts within the statute of frauds

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

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

In most Common Law jurisdictions, the contracts called "within the statute of frauds" are as follows:
(1) Promises to answer for a duty of another;
(2) Promises of an executor or administrator to answer personally for a duty of the decedent whose funds he is administering;
(3) Agreements upon consideration of marriage;
(4) Agreements for transfer of an interest in land;
(5) Agreements not to be performed within one year;
A sixth type of contract within the original English statute of frauds applied to contracts for sale of goods.

Article 42 refers to the practice and enumerates contracts under risk of frauds that should be evidenced in writing:
(1) Contract the duration of which exceeds one year
(2) Contract for the sale of an interest in land;
(3) Contract to act as a surety.
(4) Contract for the sale of goods for the price of 50,000Rwf or more;
(5) Contract for the sale of securities.

2.5.2 Requirement

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

The provisional draft had details on compliance with the requirement removed in the final voted bill, specifying that the note or Memorandum must
(i)Specify the parties to the contract
(ii)Specify with reasonable certainty the subject matter of the contract and the essential terms of the unperformed promise and,

(iii)be signed by the party to be charged or by his/her agent.

3. Vitiation and illegality

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

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

3.1 Mistake

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

3.1.1 Various kinds of mistakes

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

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

Mistake of one party or unilateral mistake: A unilateral mistake occurs when only one of the parties is mistaken. "Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake if:

(1) The effect of the mistake is such that enforcement of the contract would be unconscionable; or

(2) the other party had reason to know of the mistake or his fault caused the mistake".

3.1.2 Assumption of risk of mistake

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

"A party bears the risk of a mistake when:

(1) the risk is allocated to him by agreement of the parties; or

(2) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient".

3.1.3 Effect of the mistake

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

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

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

3.2. Misrepresentation

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

A misrepresentation may be:
(1) a misleading conduct or an assertion that is not in accord with the facts;
(2) an action intended, or known to be likely, to prevent another from learning a fact;
(3) a person's non-disclosure of a fact known to him/her, where he/she knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

3.2.1 Types of misrepresentation

There are two distinct types of misrepresentation:
(1) fraudulent or material misrepresentation; and
(2) misrepresentation as an inducing cause.

Fraudulent or material misrepresentation: A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker:
(1) knows or believes that the assertion is not in accord with the facts; or
(2) does not have the confidence that he states or implies as to the truth of the assertion; or
(3) Knows that he does not have the basis that he states or implies for making the assertion.

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

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

3.2.2 Prevention from formation of a contract due to misrepresentation

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

3.2.3 Effect of misrepresentation

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

3.3 Duress

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

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

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

3.3.1 Types of duress

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

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

conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent".

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

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

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

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

3.3.2 Assumption of strength and intelligence

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

3.3.3 Effect of duress

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

3.4 Undue Influence

Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that the person will not act in a manner inconsistent with the welfare of the party being persuaded.

3.4.1 Cases of undue influence

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

3.4.2 Effect of undue influence

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

3.5 Illegality

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

3.5.1 Unenforceability of contracts contrary to the law

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

3.5.2 Unenforceability on grounds of public policy

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

Weighing a public policy against enforcement of a term: In weighing a public policy against enforcement of a term, account is taken of:
(1) the strength of that policy as manifested by legislation or judicial decisions;
(2) the seriousness of any misconduct involved and the extent to which it was deliberate; and
(3) the directness of the connection between that misconduct and the term.

Bases of public policies against enforcement: A public policy against the enforcement of promises or other terms may be derived by the court from:
(1) legislation relevant to such a policy; or
(2) the need to protect some aspect of the public welfare such as a restraint of trade*;* an impairment of family relations*;* and an interference with other protected interests;
(3) failure to comply with a licensing, registration or similar requirement.

3.5.3 Exceptions to unenforceability

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

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

Performance if intended use is improper: If the promisee has substantially performed, enforcement of a promise is not precluded on grounds of public policy because of some improper use that the promisor intends to make of what he obtains unless the promisee:
(1) acted for the purpose of furthering the improper use; or
(2) knew of the use and the use involves grave social harm.

Section 3. END OF CONTRACTUAL OBLIGATIONS

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

1. Condition

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

It may also be a subsequent condition when a condition will terminate the contract. Subsequent condition occurs, despite the fact that the contract will have been formed; the occurrence of the subsequent condition renders the contracts without effect. In that case, the risk shall remain with the debtor. The law says if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or duty to pay damages for breach, that duty is extinguished if the event occurs, unless the occurrence of the event is the result of a breach by the obligor or the occurrence does not subject the obligor to a materially increased burden.

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

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

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

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

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

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

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

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

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

2. Discharge by Performance

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

2.1 Date and time of performance

Contractual obligations must be performed in the time stipulated whether expressly or by implication. When a specific date or a specified time is mentioned, then it is said that "time is

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

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

2.2 Substantial Performance

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

This is illustrated by this example. **X** built a bungalow For **Y** the price to be paid by installments. On completion **Y** withheld the balance due on the basis that there were some structural defects. The Court may allow the builder's claim that he had substantially completed the contract. In determining whether a failure to render, or to offer, performance is material, the following circumstances are significant:
(1) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
(2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
(3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
(4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
(5) the extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

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

2.3 Divisible performance

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

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

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

2.4 Prevention of performance by one party

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

It may be that one party is willing to release the other from completing the contract as originally agreed. If such can be assumed from the circumstances of the case, then the party that has performed part of his obligations is entitled to claim on a quantum merit. The other party must, however, be in a position freely to decide to accept partial performance. If it is forced upon him by the behaviour of the other party then no claim will be allowed. In some case, the innocent party can sue for damages for breach of claim on a quantum merit.

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

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

3. Discharge by agreement

After the formation of contract, but prior to complete performance, parties may wish to bring their contractual rights and obligations to an end. Often this will be due to a change in

circumstances of one or both parties and may also be used as part of a dispute resolution mechanism between parties.

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

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

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

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

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

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

4. Frustration or impossibility

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

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

The case *Paradine v. Jane ([1947] EWHC KB J5 is an English contract law case)* illustrates this situation. The defendant had leased a farm from the plaintiff. He was unable to pay the rent because a German Prince had " invaded the realm with a hostile army", occupied the farm and thus prevented him from making any profits from which he would have paid the rent. The court allowed the plaintiff's action arguing that the defendant had agreed to pay and as he had not provided against such eventualities in the agreement, then he should bear the loss. It is not sufficient merely to show that conditions have changed so that one party is released. That party must prove the existence of the frustration and its effects on the contract. Here the court decided that the parties did not contract one the footing that the goods were to come from Germany.

In the nineteenth century in England the courts began to adopt a more lenient approach to the problem. There is a difference of opinion as to the reasoning behind what has been termed the Doctrine of Frustration. The two commonly accepted approaches are either that there is an implied term in every contract that should the performance become impossible then the parties should be relieved from their obligations ,or that the event that occurs so fundamentally alters the courts to release the parties from the bargain. Perhaps the most useful course to adopt is to review the judgments in an effort to gauge when the courts will invoke the doctrine.

4.1 Events that may frustrate

There are number of events that the courts have recognized which have rendered a contract radically different from that which was contemplated. When determining whether the doctrine of frustration operates in any particular case, consideration should be given to the terms of the

contract, the nature of the event that has occurred and the type of contract involved; then an assessment may be made of whether or not the operation of the contract following the event is radically different from that originally contemplated.

(1) Destruction of something essential

If the continuing existence of a thing or a person is assumed by both parties as the foundation of the contract, the destruction of that thing or a person may invoke the doctrine of frustration. In one of the earliest cases on frustration, in *Taylor v. Caldwell***,** the defendants let a certain music hall to the plaintiffs. Before the dates of the proposed concerts, the hall was accidentally destroyed by fire. The court held that the contract was frustrated.

(2) Non- occurrence of an essential event

If the occurrence of an essential event is assumed by both parties as the basis of their contract relationship, the non occurrence of that event may invoke the doctrine of frustration.

(3) Impossibility of performance

If, as a result of a supervising event, a contract becomes impossible to perform, either physically or commercially, the doctrine of frustration may operate to discharge the contract. An interesting question of precedent arises out of the East African Court of Appeal decision in *Victoria Industries v. Ramanbhai Bros (1961 E.A. 11).* A Ugandan company had agreed to ship maize via Lake Victoria to Mwanza. While part of the shipment was being loaded E.A .Railways refused to accept the shipment. The court held that the railway's behaviour frustrated the contract as there was no alternative or feasible route.

(4) Events causing delay or making performance more expensive

Events which merely delay performance or render it more expensive than contemplated will not frustrate a contract. However, where delay or increased expenses is such that the contract becomes one that is radically different from that contemplated by the parties the doctrine of frustration may operate. However, sometimes as we said earlier, courts have to assess and decide to consider or to disregard this theory. This illustrates clearly the situation. The facts were that groundnuts were sold and were to be shipped from the Sudan to Germany. Obviously, the route would have been through the Suez Canal. Owing to the invasion of Egypt by Israel the Canal was blocked and the sellers argued that the contract was now frustrated. This argument was not accepted. The court refused to imply a term that the voyage must be via Suez. They considered that the contract could still be performed by going round the Cape of Good Hope. The extra expense was not to be regarded as a frustrating event. In this decision they seem to have forgotten that whenever the performance of the contract can be more expensive the doctrine of frustration may operate.

(5) Changes in the law or government intervention

A subsequent change in the law may frustrate a contract, even if it does not render performance of the contract illegal, provided it substantially affects the parties so that the contract becomes different in nature from that contemplated by the parties. This may be, for example, an interdiction from selling some kind of commodities in a given area or time.

If government rules, regulations or enactments prevent one party from fulfilling his obligations the contract is frustrated. The article 95 (of the Law 45/2011 Governing Contracts) says that if the performance of a duty is made impracticable by having to comply with a new domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

(6) Death in contracts involving personal performance (*intuitu personae)*
If the contract can be regarded as one that requires the personal service of one party and that party dies or it becomes physically impossible or illegal for him to complete his obligations, then it is regarded as a frustrating event. The law says that if the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.

For instance, if a law graduate had signed a contract to work for a firm of advocates and the Government then decided that all such graduates must spend one year at the Institute of Legal Practice Development before starting their carrier, then the original contract of employment would be frustrated because of the incapacity of that graduate.

4.2 Situation preventing the frustration

There cannot be a frustration when parties have contemplated a supervening event and made provision for it in their contract. There is also no frustration when the event was caused by one of the parties to the contract. If there is an event that has destroyed the basic on which the contract was made the party seeking to rely on frustration must prove affirmatively the occurrence of that the event. Once done, it is then for the other party to show that the event was due to the neglect or negligence of the party claiming frustration.

Two East African Appeal cases illustrate the workings of the rule. In *Howard and Co.(Africa) Ltd. V. Burton*, the plaintiffs had agreed to supply the defendants with mid-day meals for their labourers. The labourers however objected to the meals and the fact that deductions were made from their wages to cover part of the cost. The defendants allowed the men to choose and the result was that the number of meals required dropped from 2,500 to almost nil. The plaintiff sued for breach of contract and the defendants pleaded frustration. The court allowed the plaintiffs action, arguing that it was the defendants positive act of allowing their labourers to choose that led to the decline in numbers and the subsequent failure on their part to take delivery of the agreed quantities.

4.3 Consequences of frustration

The effect of frustration is to terminate a contract automatically. Consequently, there is no need for either party to elect to terminate. Where a contract is terminated in future that the accrued rights and obligations remain. Thus, money paid under a frustrated contract for services to occur in the future could not be recovered, nor could recompense be obtained for services rendered where payment only fell due after the frustrating event. However, if one part has gained an advantage under the contract before the frustrating event, for instance by way of part

performance of the contractual obligations, then the court may order payment to be made by the party benefited on the basis of the undue enrichment.

5. Discharge by breach

A breach of a contract may bring it to an end; in other words, may discharge, or terminate the contract. When one party fails to perform his obligations or performs them in a way that does not correspond with the agreement, the innocent party is entitled to a remedy. What form the remedy will take depends on what type of breach the guilty party has committed. In all cases the innocent party is entitled to claim damages, but only in two situations can the contract be regarded as discharged and thus freeing him from performing his own obligations.

5.1 Fundamental breach

In deciding whether there has been a fundamental breach of the contract it is necessary to ask whether it is a condition or a warranty that has been broken. We can examine if that condition is a major term of the contract and breach of such a term allows discharge of the contract, and that a warranty is a minor term that attracts only an award of damages. If the breach goes to the root of the contract and affects its commercial viability, it is said to discharge the contract.

This can be illustrated by this Court decision in *Mohamed Anwar v. Marjaria and Others*. The plaintiff had purchased eleven second hand tractors and spares from the respondents. He signed a document that stated that the tractors were "seen and fully inspected on the description … no other liability is taken whatsoever by the seller." When the plaintiff went to collect the tractors two were missing and others had been stripped of their spare parts. Nevertheless he removed the tractors on an undertaking that what was missing would be replaced. This was not done and the appellant stopped payment and when sued for the price he alleged that he had repudiated the contract and, in addition, that the consideration had totally failed.

Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated. The seller agreed to deliver milk daily for a period of one year. After eight days the buyer refused to accept more deliveries on the grounds that the milk had not passed through a refrigerator cooler. The buyer obtained the backing of the Public Health Inspector that the milk was not fit for human consumption and then sued for breach of contract.

5.2 Repudiation

A repudiatory breach is any form of conduct by a party that evinces an intention not to be bound by the contract. Examples include expressly refusing to perform part or all of a contract, or insisting that the other party perform the contract in a manner that it does not require or sanction. It may also take the form of a continued failure to perform the contract. This occurs when one party either expressly or impliedly intimates that he will not honour his side of the

bargain. Obviously this can happen at the moment performance is due or before that time, when prior warning is given that the obligations will not be performed it is called anticipatory breach. The law says "Repudiation shall be made by:

(1) a statement by the obligor to the obligee indicating that the obligor will commit a breach.
(2) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach".

The repudiation may be anticipatory. The anticipatory breach occurs when the guilty party repudiates the contract before the date on which they were due to perform their obligations and the innocent party elects to discharge the contract as a result. Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed ex- change until he receives such assurance.

Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach. Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance. In such a situation the innocent party can sue at once, or wait until the time of performance is due and sue then. If he decides on the last course of action, it is possible for the guilty party to "reform" and complete his part of the contract. It may even be that something occurs to prevent the original innocent party from completing his own obligations.

Similarly the innocent party, if he decides not to act on the anticipatory breach but wait until the date the performance was due, must show that he was able and willing to perform his part of the agreement. If the innocent party decides to treat the other party's behaviour as anticipatory breach, he may be allowed to ask the court for a decree of specific performance so that the court may compel the guilty party to perform. It is no defence to argue that the cause of action does not arise until the final date for performance is due. The obligor's failure to provide within a reasonable time such assurance of due performance may be treated as a repudiation.

5.3. Effects of breach

As was said earlier, the effects of breach of contract vary depending on the seriousness of the breach and also on how the innocent party decides to react towards the breach. The remedies available are discussed in the next Chapter. A breach by non-performance gives rise to a claim for damages for total breach only if it discharges the injured party's remaining duties to render such performance.

6. Rescission

Parties to a contract can file an action requesting for its nullity or rescission if there was error, fraud or violence. An agreement of rescission is an agreement under which each party agrees to discharge all of the other party's remaining duties of performance under an existing contract. An agreement of rescission discharges all remaining duties of performance of both parties. It is

a question of interpretation whether the parties also agree to make restitution with respect to performance that has been rendered.

Rescission of the contract extinguishes not only the rights of the parties therein but also those of their successors in title. The rule is "*resoluto jure dantis resolvitur jus accipientis"*, but to a certain extent third parties are protected. When a lease has been granted by an owner whose right of ownership is afterwards rescinded in the case of the sale of an immovable object, the seller cannot get the sale rescinded against an onerous purchaser whose right is transcribed unless the seller has preserved his privilege by transcribing it.

In principle the rescission works '*ex tunc*', i.e. it returns matters to the state of the moment of the conclusion of the contract or, sometimes, of a later date in the case of non-retrospective effect the rescission works '*ex tunc'*, i.e. the day of the issue of the writ, or, sometimes, the day of the judgment or even the day of the enforcement of the judgment. *Ex tunc is the Latin for "from the outset"*

The impossibility of restitution in successive contracts, is due to the nature of the property (e.g. the enjoyment of the premises) or the use which was made of it (e.g. a pipe-line delivers oil over several months, but the oil is stocked in huge reservoirs; or fertilizer is spread in the fields). The criterion proposed by Marcel Fontaine in order to define the exceptions to the principle of the retrospective effect of the rescission is the divisibility of the contract. The rescission has a retrospective effect to the moment of the conclusion of the contract each time that the non-performance affects the whole of the contract; the rescission will be limited up until the date of the serious no-performance which does not overturn the reciprocal utility of what was performed earlier to the common satisfaction of both parties. If this criterion is accepted, the starting point of the non-retrospective rescission will not be the same in all cases. It is the date on which a party judged that the contract ceased to fulfil its function.

Chapter 8. SALE OF GOODS

Section 1. Definition

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price in the form of money.

A contract of sale may be absolute or conditional. In an absolute sale the property in the goods passes from the seller to the buyer immediately and nothing remains to be done by the seller. Sale at a counter in the shop is an absolute sale. In a conditional contract of sale the property in the goods does not pass to the buyer absolutely until a certain condition is fulfilled.

The term contract of sale comprises two things:
- Sale, and
- Agreement to sell

Where the seller transfers the property in the goods immediately to the buyer there is a sale. But where the transfer of the property in the goods is to take place at a future time or subject to some condition(s) thereafter to be fulfilled, the contract is called an agreement for sale.

An agreement for sale becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. Every sale originates in an agreement to sell. It is an agreement to sell which gives birth to a sale. On a sale, the agreement of sale is completely exhausted and ceases to exist.

Section 2. Essentials of contract of sale
- A contract
- Between two parties
- To transfer or agree to transfer the property/title in goods
- For a price, that is money consideration.

2.1. A contract

The word contract means an agreement enforceable at law. It presumes free consent on the part of the parties who should be competent to contract. A compulsory transfer of goods under any Nationalization Act is not a sale. The agreement must be made for a lawful consideration and with a lawful object. In other words all the essential elements of a valid contract must also be present in a contract of sale.

2.2. Two Parties

To constitute a contract of sale, there must be a transfer or agreement to transfer the property in the goods by the seller to the buyer. It means that there must be two persons one the seller and the other the buyer. The buyer and the seller must be two different persons, for a man cannot purchase his own goods. The parties must be competent to contract.
Example: A partnership firm was dissolved and the surplus assets including some goods were divided among the partners. The Tax Officer wanted to tax this as a sale.

The court held that this was not a sale as partners were themselves joint owners of the goods and they could not therefore be both sellers and buyers. Moreover there was no money consideration.
There are certain exceptions to the rule that the same person cannot be a purchaser and a seller. These are:

- Where person's goods are sold in execution of a decree, he may himself buy them.
- A part owner can sell his share to the other part owner so as to make the other part owner the sole owner of the goods.
- Where a Pawnee sells the goods pledged with him on non-payment of bill money, the pawnor may himself buy such goods

2.3.Transfer of property

In a contract of sale there should be a transfer or an agreement to transfer the absolute or general property in the goods sold. It contemplates the transfer of ownership in the goods. Though passing the title in the goods is an essential ingredient of sale, physical delivery of goods is not essential. The sale of goods contemplates the transfer of the general property or title in the goods from the seller to the buyer.

2.4. Goods

The subject matter of the contract of sale of goods must be the goods, the property in which is to be transferred from the seller to the buyer. Goods of any kind except immovable goods may be transferred. It does not include money and other actionable claims. The seller must be the owner of the goods the ownership of which is sought to be transferred.

2.5. Price

To constitute a valid contract of sale, consideration for transfer must be money paid or promised. Where there is no money consideration the transaction is not a contract of sale as for instance goods given in exchange for goods as remuneration for work or labour. However, an existing debt due from the seller to the buyer is sufficient. Further there is nothing to prevent the consideration from being partly in money and partly in goods or some other articles of value. For example when an old car is returned to the dealer for a new one and the difference is paid in cash that would also be a sale.

It may be noted no particular form is necessary to constitute a contract of sale. A contract of sale may be made in writing or by words of mouth or may be implied from the conduct of the parties.

Section 3. Distinction between a sale and an agreement for sale

The distinction between sale and an agreement for sale is very necessary to determine the rights and liabilities of the parties to a contract. The main points of distinction are:

1. **Transfer of property**

In a sale the property in the goods passes from the seller to the buyer at the time the contract is made. But in an agreement for sale the transfer of property takes place at some future time or until some condition is fulfilled.

In other words in a sale the buyer becomes the owner of the goods immediately at the time of making the contract. In an agreement for sale the seller continues to be the owner until the agreement for sale becomes a sale.

2. **Nature of the contract**

An agreement to sell as an executory contract, is a contract pure and simple and no property passes, whereas a sale is an executed contract plus a conveyance.

3. **Risk of loss**

In a sale the buyer immediately becomes the owner of the goods and the risk as a rule passes to the buyer; under an agreement to sell, the seller remains the owner and the risk is with him. Thus under a sale if the goods are destroyed the loss falls to the buyer even though the goods are in the possession of the seller. But under an agreement to sell, the loss will fall on the seller even though the goods are in the possession of the buyer.

4. **Consequences of the breach**

On breach of an agreement to sell by the seller, the buyer has only a personal remedy against the seller. But if after a sale, the buyer breaks the contract (e.g. resells the goods) the buyer may sue him for delivery of the goods or damages.

In an agreement to sell, if the buyer fails to accept the goods the seller may sue for damages only and not for the price. On a sale if the buyer does not pay the price, the seller may sue him for the price.

5. **Insolvency of the buyer**

In a sale if the buyer is adjudged an insolvent, the seller in absence of lien over the goods is bound to deliver the goods to the official receiver or any government appointee for that purpose. The seller will however, be entitled to a rateable dividend for the price of the goods. In an agreement to sell, when the buyer becomes insolvent before he pays for the goods, the seller need not part with the goods.

6. **Insolvency of the seller**

In a sale if the seller becomes insolvent the buyer is entitled to recover the goods from the official receiver or any government appointee for that purpose as the property of the goods is with the buyer. In an agreement to sell, if the buyer has already paid the price and the seller becomes insolvent, the buyer can claim only a rateable dividend and not the goods.

7. General and particular property

An agreement to sell creates a right "*in personam*" while a sale creates a right *"in rem"*. In case of an agreement to sell the buyer and the seller get remedy against each other in case of a breach of an agreement. The agreement for sale creates a right with which only the contracting parties are concerned and not the whole world, whereas in case of a sale the buyer gets an absolute right of ownership and this right of the buyer is recognized by the entire world.

8. Right of resale

In an agreement for sale, the property in the goods remains with the seller and he can dispose of the goods as he likes, although he may thereby commit a breach of his contract. In a sale, the property is with the buyer and as such the seller cannot resell the goods. If he does so, the buyer can recover the goods sometimes even from third parties.

Chapter 9. AGENCY

Modern business is becoming more complex day by day. As such it is not possible for an individual to carry out business singly. He must necessarily depend on others for the efficient running of the business.

He must delegate some of the powers to another. The person who acts on behalf of another or who has been delegated the authority is called an agent. The person who authorizes another to act is called the principal. The contract which creates the relationship of principal and agent is called 'agency". The law of agency is based on the principle, "what a person does by another, he does by himself".

Section 1. Agency: Definition and key features

Agency is a relationship between two parties created by agreement express or implied. The relationship of agency arises wherever one person called the agent has authority to act on behalf of another called the principal. The concept of agency emphasizes that one person brings two other persons into a legal relationship. It is this power of creation of a relationship between the principal and the third parties that the essential importance of agency lays. It may be noted that an agent is not a mere connecting link between the principal and the third parties. He has the power to make the principal answerable to the third parties for his conduct.

The relationship of agency is based upon a contract. The contract may be either express or implied. The essentials of agency are as follows:

1. There should be the appointment by the principal of an agent
2. The principal should confer authority on the agent to act for him
3. The authority conferred must be such as will make the principle answerable to third parties.
4. The object of the appointment must be to establish relationship between principal and third parties.
5. The relationship of agency, being based on confidence between the principal and the agent, deems that no consideration is necessary.

Section 2. Agent

2.1. Definition

Every person who acts for another is not an agent. A person does not become an agent on behalf of another merely because he gives him advice. A person can be an agent when he is authorized to act for the principal. To be an agent "the person employed must be authorized to do any act for another or to represent in dealings with third parties." The person for whom such act is done or who is so represented is called the principal.

2.2. Who may be an agent?

Any person can be an agent. In other words even a minor can be employed as agent and the principal shall be bound by the acts of such an agent. But no person who is not of the age of

majority and of sound mind can become an agent so as to be responsible to his principal. Thus, if an agent is to be held reliable to the principal he must be a major and of sound mind.

2.2. Who may be a principal?

A person who is a major and who is of sound mind can employ another person as an agent. A person who is of the age of majority and is of sound mind can become a principal. Thus a minor cannot become a principal

2.3. Types of agents

The term agent applies to anyone who by authority performs an act of another, and includes a great many classes of persons to who distinctive names are given. There may be various types. The important one are classified as under:

1. Express or implied agents

An express agent is one who is appointed verbally or by writing. An implied agent is one whose appointment is to be inferred from the conduct of the parties.

2. General, special or universal agents

A general agent is one who is employed to transact generally all the business of the principal in regard to which he is employed. A special agent has only authority to do some particular act or represent his principal in some particular transaction. A universal agent is one who is authorized to transact all the business of his principal of whatever kind and to do all the acts which the principal can lawfully do and can delegate.

3 Agent or Sub –Agent

An agent derives his authority directly from the principal .A sub–agent derives his authority from the agent who has been appointed to do the act.

One broad classification of agents is Mercantile or commercial agents and non-Mercantile or non-Commercial agents.

Mercantile Agents: the following are some of the important types of mercantile agents-:

1. Factor; A factor is a mercantile agent to whom possession of goods is given for sale. Generally speaking he is a person to whom the goods are consigned for sale by a merchant residing abroad, or at a distance from the point of sale. He usually sells the goods in his own name. He cannot barter or pledge the goods. He has a general lien for the balance of account as between himself and the principal.
2. Auctioneer: An auctioneer is an agent who is appointed to sell goods at a public auction for remuneration. He may or may not be entrusted with the possession or control of the goods which he sells. He may be agent both for the seller and the buyer. The auctioneer can sue for the purchase price in his own name.
3. Broker: A broker is a mercantile agent who is employed to make contracts for the purchase and sale of goods for a commission called brokerage. A broker unlike a factor is not entrusted with the possession of the goods. Even the documents of title are not made over to him. His business is to find purchasers for those who wish to sell, and sellers for those who wish to buy. His duty is to bring parties together to bargain or to

bargain for them in various matters. He makes contracts in the name of his principal and not in his own name. He is a mere negotiator or, in a sense, a middleman.

4. Commission Agent: A commission agent is a mercantile agent who in consideration for a certain commission engages to purchase or sell goods for his principal. He sells and buys goods in the market on the best terms and in his own name. His only interest in the transaction is his commission. All profits and losses accrue to the principal
5. Del credere Agent: A Del credere agent is an agent who in consideration of an extra remuneration guarantees to his principal the performance of the contract by the other party. This Del credere commission is a higher reward than is usually given in the form of commission. He occupies the position of the guarantor as well as of an agent. But his liability is secondary and arises only on the insolvency or failure of the other party. A Del credere agent is appointed generally when the principal deals with persons about whom he knows nothing.
6. Banker: The relationship between a banker and the customer is either that of debtor and creditor or of an agent and principal. When the banker advances money to his customer as a loan, banker is the creditor and the customer is the debtor. But the banker acts as an agent of his customer when he buys or sells securities, collects cheques, dividends , bills etc. on behalf of his customer

1. **Non-Mercantile agents**

Non–Mercantile agents include counsel, solicitor, guardian, promoter, wife, receiver, insurance agent etc.

Section 3. Creation of agency

An agency may arise in different ways. It need not be created expressly and may be inferred from the circumstances and conduct of the parties. Any agency may be constituted in the following ways.

1. By express agreement,
2. By implication in law i.e., from the conduct of the parties or from the necessity of the case; and
3. By ratification

3.1. Agency by express agreement

A contract of agency may be created by an express agreement. When a principal appoints an agent either by words spoken or written to represent and act for him, an express agency is created. No particular form or set of words is required for appointing an agent. When a person gives the power of attorney to another person, an express agency is created.

3.2. Agency by implication

The relationship of principal and agent need not be expressly constituted and can arise by implication of law as well. Authority to act as an agent can be inferred from the nature of the business, the circumstances of the case, the conduct of the principal or the course of dealings between the parties. Thus if a person realizes rent and gives it to the landlord, he impliedly acts for the landlord as an agent.

Example: A owns a shop at Remera, living himself in Kabuga and visiting the shop occasionally. The shop is managed by B and he is in the habit of ordering goods from C in A's

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

Implied agency includes-:

(a) Agency by estoppel;
(b) Agency by holding out;
(c) Agency by necessity.

(a) Agency by estoppel: In many case an agency may be implied from the conduct of the parties though no express authority has been given. Thus where the principal knowingly permits to act in a certain business in his name or on his behalf, such a principal is estopped from denying the authority of the supposed agent to bind him.
(b) Agency by holding out: Where a person permits the other by a long course of conduct to pledge his credit for certain purposes, he is bound by the act of such person for pledging his credit for similar purposes, though in some cases without the previous permission of his master. This is a case of agency by "holding out ". Similarly where a husband holds out his wife has having his authority by words or conduct and a third party advances to the wife on the faith of such conduct; the husband is liable for the debts.
(c) Agency by necessity: Sometimes extraordinary circumstances require that a person who is not a really agent should act as an agent of another. In such a case although there might not have been an express or implied authority to do an act, the law implies such an authority in favour of that person in account the necessity that has arisen.

However before an agency of necessity can be inferred, the following conditions should be fulfilled-:

- There should be real and definite necessity for the creation of the agency.
- It should be impossible to obtain the principal's instructions.
- The person acting as an agent should act bona fide and in the interest of the parties concerned.

3.3. Agency by ratification

All acts of an agent done in the discharge of his duties and within the scope of his authority is binding upon the principal. Acts performed by an agent beyond the scope of his authority are not binding upon the principal. However the principal may in such case either adopt or reject the act of the agent. In case the principal adopts the acts of the agent done without his authority, he is said to have ratified that act. On ratification the act of the agent becomes the act of the principal and he becomes bound by the same whether be to his loss or advantage.

Chapter 10. INSURANCE

Section 1. DEFINITION OF THE CONTRACT OF INSURANCE AND INSURER

A contract of insurance is a contract whereby a person called insurer undertakes, against payment of a premium or more, to provide a person named insured or beneficiary a cash benefit in case of realization of a determined risk[3].

Another definition is not directly oriented to the contract of insurance but to "Insurance Business" which is a business of undertaking liability of loss, damage, compensation, disease, health as well as reinsurance business in accordance with laws and agreements[4].

Scholars say that the contract of insurance is any contract whereby one party assumes that risk of an uncertain event, which is not within his control, happening at a future time, in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs[5].

The last definition given by the doctrine is more complete because it is précising that the risk could be uncertain, not within the control of the insured and happening at a future time.

Now let us talk about the definition of the insurer as an active moral person involved into financial sector as a non bank financial institution.

An insurer is a party that accepts the risk of loss in return for a premium (payment of money) and agrees to compensate the insured against a specified loss[6].

Section 2. COMMON TYPES INSURANCE AND THEIR ROLE

Insurance can be divided into seven major categories. These categories are: life insurance[7], fire insurance, casualty insurance, social insurance, marine insurance, inland marine insurance, and fidelity and surety bonding insurance[8].

In Rwanda there are five following private insurers: SONARWA (Société Nouvelle d'Assurances du Rwanda), SORAS (Société Rwandaise d'Assurances), CORAR (Compagnie de Réassurance et d'Assurances Rwandaise), COGEAR (Compagnie Générale d'assurances et Réassurances Au Rwanda) and Phoenix of Rwanda Assurance Company S.A.

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[3] Art. 1al 1 of the order n0 20/75 on insurance in *J.O*. of 1975

[4] Art. 2 (1) 0f Law nº52/2008 of 10/09/2008 governing to the organization of insurance business in *O.G* n° special of 31 March 2009

[5] JOHN BIRDS; Birds' *modern insurance law*, ed. Sweet & Maxwell, London, 2007, p. 9

[6] GORDON W. BROWN (et al); *Business Law with UCC Applications*, 11th ed. McGraw-Hill, p.939

[7] Some say Assurance – refers to a Certain Event i.e. death, and only the time is uncertain. Life Insurance is for a specified time period and after that time, the policy expires.

[8] NORBERT J. MIETUS (et al); Applied Business Law, 12th ed. South- Western Publishing CO, 1982, p. 442

Insurance has been referred to as the handmaiden of industry. Leave alone reducing loss, damage and stress in community to more agreeable levels, the insurance companies of Rwanda have played an important role in mobilization of savings and investments in the social sector in the past 25 years.

The services offered by Insurance companies in Rwanda are evidencing remarkable growth in the range and nature of insurances provided by this dynamic industry.

The focus has been to stick to the traditional roles of insurance in community, which are to spread risk, and if the risk materializes, to spread the resulting loss but at the same time making diverse the range of products provided. Incidental to this task, but increasingly a significant subordinate task of insurance in itself, has been the management of risk and the prevention of loss.

The Insurance companies offer various types of services ranging from life, retirement fund, medical fund, automobile, to property coverage[9].

The cost of retirement was so far covered by the Rwandan social security fund which is a public institution; but the draft law governing the organization of pension scheme foresees a voluntary pension scheme which will be covered by any insurer.

By providing contingent promises insurers offer a risk management tool enabling those who are least able to bear the risk to transfer, at a cost, those risks to those who are able to manage them. With the vulnerabilities to natural disasters in this region, people are exposed to their risks and consequent income fluctuations. Taking insurance cover can offset this.

As custodians of people's savings, banks are risk averse and not suited to take on general insurance risks. Life insurance companies mobilize savings from the household sector and channel them to the corporate and public sectors. The key difference between banks and life insurers is that the maturity of liabilities in banks is generally shorter than those of life insurance companies. This enables life insurers to play a large role in long-term financing. At the same time, life insurers' portfolios are typically more liquid than those of banks, making them less prone to liquidity crises.

For insurers, the risks that impact on their ability to pay can be classified into three main categories – technical risks, asset risks and other. Technical risks arise from the very nature of the insurance business hinging on the determination of liabilities. Insurance liabilities are estimated using actuarial or statistical techniques, based on probability using past experience and making assumptions about the future. If these calculations are incorrect, liabilities would be understated or premiums would be undercharged, both would distort the insurer's true financial position and lead to liquidity or even solvency problems. Under-pricing, unforeseen or inadequately understood events and insufficient reinsurance are all examples of technical risks. On the asset side, insurers face market risk, credit risk and to a lesser degree, liquidity risk. Other risks include legal and operational risks.

[9] *Insurance in Rwanda*, see http://www.guideafrica.com/rwanda/insurance-rwanda/insurance-in-rwanda.html

On top of all the risks, the heterogeneous nature of the insurance industry – with life and non-life insurers as well as reinsurers – and the wide range of risks even for insurers in the same country or market, all add to the difficulty in insurance supervision.

Section 3. CATEGORIES OF INSURANCE BUSINESS

Insurance business is divided into two categories; long term insurance business and short term insurance business[10].

Categories of insurance business provided by the Law governing the organization of insurance business comprise classes as specified under subparagraphs 2 and 3 of the article 2 of the regulation n°05/2009 of 29/07/2009 on licensing requirements and other requirements for carrying out insurance business**.**

According to this regulation Long-term insurance business refers to insurance business of all or any of the following classes, namely:
a) ordinary life insurance business,
b) industrial insurance business,
c) treasury bonds investment business,
d) any business carried on by the insurer as incidental to any class of business abovementioned.

Short-term insurance business refers to insurance business of any class not being long-term insurance business. This is the non exhaustive list:

- **a)** Motor insurance business comprising commercial Lines and personal lines
- **b)** Property insurance business comprising fire and natural forces, aviation – aircraft, and marine – ships
- **c)** Miscellaneous comprising damage to property, expropriation and confiscation of property, insurance contracts primarily designed to cover the interests of any natural person against loss or damage to immovable and movable property as well as specified property as a result of fire, explosion, storm, water and certain natural forces, (excluding the risks of riot, strike, war and nuclear energy, accidental incident or any other unforeseeable event), transportation insurance business, accident and health insurance, liability insurance, engineering insurance business, guarantee insurance business…

[10] Art. 4 0f Law nº52/2008 of 10/09/2008 governing to organization of insurance business in *O.G* n° special of 31 March 2009

Chapter 11. NEGOTIABLE INSTRUMENTS

Section 1: Definition and distinct characteristics of negotiable instruments

§1. Definition

The negotiable instrument refers to a promissory note, bill of exchange or cheque payable either to order or bearer. These three instruments are usually characterised as negotiable instruments.

Some writers have attempted to define a negotiable instrument as: " the property in which it is acquired by anyone who takes it bona fide, and for value" notwithstanding any defect of title in the person from whom he took it. Another useful definition is given by Thomas who states that " an instrument is negotiable when it is, by a legally recognised custom of trade or by law, transferable by delivery or by endorsement and delivery, without notice to the party liable, in such a way that a) the holder of it for the time being may sue upon it in his own name, and b) the property in it passes to a bona fide transferee for value free from any defect in the title of the person from whom he obtained it".

These definitions clearly reveal the true nature of negotiable instruments. A negotiable instrument is a transferable document either by the application of the law or by the custom of the trade concerned. The special feature of such an instrument is the privilege it confers on the person who receives it bona fide and for value. To possess good title thereto, even if the transferor had no title or had effective title to the instrument.

Negotiable instruments are a practical creation by merchants to facilitate transfer of funds and payment. They serve as a medium of payment more convenient than the traditional silver and gold coins. Today, negotiable instruments have become more sophisticated and modernized. The legal relationship created by negotiable instruments is similar to those of debtor and creditor. The issuer is a debtor, i.e. agrees to pay the particular sum of money, while the recipient is in turn a creditor, i.e. the negotiable instrument is a proof of his entitlement, against the issuer, of the particular sum specified in the negotiable instrument.
The creditor: holder of the bill: can negotiate the bill, i.e. exchange the value specified in the bill as a consideration for the conclusion of a contract, e.g. use of the bill to pay for a business transaction. The new holder of the bill acquires the same rights against the original issuer not so much different from the first holder. Such transactions have led the legislature to articulate detailed legal regimes to deal with the type of negotiable instruments as well as the rights and duties of their issuers, holders and guarantors.

§2. Different kinds of negotiable instruments

A. Bill of exchange

A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or, to the bearer of the instrument.

The essential requisites of bill of the exchange are:

1-It must be in writing;

2-It must be containing an “order to pay”;

3- The order to pay must be unconditional. The order is not conditional by the reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

4- It must be signed by the maker

5-The drawee must be certain. A person is certain although he is miss-pelt or designated by description only.

6-The sum payable must be certain. The sum payable may be certain although it includes future interest or is not payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instrument, the balance unpaid shall become due.

7-The order must be to pay money only

8-the payee must be certain

The following is an example of a bill of exchange:

Kigali 1-10-05

30.66.200
Rs. 10.500

On demand pay to M/s Mugenzi Enterprises Kigali, or order a sum of Rwandan Francs Ten Thousand Five Hundreds only for Value received.

To
M/s Gakire.
Mount Road,
Kigali.

Sd/-Ngirimana

B. Promissory note

A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

The essential requisites of a promissory note are:

1-It must be in writing

2-It must contain an undertaking to pay.

3-The undertaking to pay must be unconditional

4-It must be signed by the maker.

5-it must undertake to pay a certain sum

6-The undertaking must be to pay in money only.

7-the payee must be certain.

These are promissory notes:

1-I promise to pay B or order Rwf.500.

2-I acknowledge myself to be indebted to B in Rwf. 1,000 to be paid on demand for value received.

Specimen of promissory note:

Kigali 6-07-2009

RFrs.6.000

On demand I promise to pay Mr. Mugenzi or order a sum of Rwandan Francs Six Thousands only.

Ngirimana

Stamp

Sd/-

C. A cheque

A cheque is a bill of exchange drawn on a specified banker and expressed to be payable otherwise than on demand.

Specimen of cheque

Bank de Kigali

No. H/SB 362507

Date 25th march 2009

Kigali

RFs.500/-

Pay to Mr. Majaliwa ……or bearer Rwandan Francs Five Hundred only…….

L.F.

Account Nº.5628 Sd/-

a) Distinguishing features of cheque, bill of exchange and promissory note

Based on the above statutory definitions, the followings are the distinguishing features of the three negotiable instruments indicating the similarities and contrasts between them:

i) Instruments in writing

The law requires that a cheque, bill of exchange or promissory note must be an instrument in writing. It does not specify any particular material on which it is to be written. Though law does not prohibit a negotiable instrument written with a pencil, in practice the bankers do not accept such instruments because of risk involved. Alterations therein may be easily made which cannot be detected.

ii) Unconditional order/promise

A cheque and a bill of exchange contain order to the drawee whereas a promissory note contains a promise by the maker to his creditor. Thus the main difference between a cheque and a bill on the one hand and a promissory note on the other is that the cheque and the bill contain an order from the creditor to the debtor to pay a sum of money while the promissory

note contains an undertaking or promise made by the debtor to his creditor to pay the sum specified therein.

However, there is one common feature of a promissory note, cheque and a bill. The promise in the former and the order in the latter must be an unconditional one, i.e., the payment should not be made dependent upon the happening or occurrence of a particular event or on the fulfilment of any requirement. But if the time for payment of the amount (or any of its instalments) is expressed to be on the lapse of a certain period after the occurrence of a specified even, the promise or order to pay is not deemed 'conditional' provided the event is certain to happen according to ordinary expectation of mankind, although the time of its happening may be uncertain. Thus, a distinction may be made between an event, which is bound to take place according to human expectation, and the one, which may or may not at all take place. For example, the death of a particular person is an event which shall definitely take place; its timing may be uncertain. But the marriage of a person, or his departure to or return from a foreign country are events, which are uncertain to take place. The words in cheque or the bill must be in the nature of an order rather than a request, though it is not necessary that the word 'order' is specifically mentioned therein. Words of courtesy, if any, such as 'please' do not make the instrument invalid on this ground. The words in the promissory note should also amount to an unconditional promise to pay the specified amount; otherwise it will not be treated as a promissory note.

iii) The drawer of a cheque or bill

The main difference between a cheque and a bill is that the former is always drawn on and is payable by a banker specified therein, whereas a bill of exchange may be drawn on any person, firm or company. Thus only a customer of a bank having a current or a savings bank account is entitled to draw a cheque on his bank, i.e., the particular branch of a bank where he has opened his bank account. The name and address of the drawer bank are specifically printed on the cheque form. A seller generally draws a bill of exchange on his customer, or by a creditor on his debtor. Sometimes accommodation bills are also drawn to help a familiar party.

iv) The amount of the instrument must be certain

The order of the drawer of a cheque or a bill and the promise by the writer of a promissory note must be to pay a certain sum of money to be paid must be certain and specified both in words and figures. In most cases its stated that the sum must be certain although-

It includes future interest, or

It is payable at an indicated rate of exchange, or

It is according to the course of exchange,

The instrument provides that on default of payment of an instalment, the balance unpaid shall become due.

The amount may be mentioned in a foreign currency as well, provided the rate of conversion of the domestic currency into foreign currency is stated by the drawer or is left to be decided according to the market conditions.

v) The instalment must be payable either 'to order' or 'to bearer'

1º Payable to order

A promissory note, bill of exchange or cheque is payable to order if it is expressed to be so payable or if it is expressed to be payable to a particular person and does not contain words which prohibit its transfer or which indicate an intention that it shall not be transferable. For example, if a cheque is drawn as " pay to be transferable". For example, if a cheque is drawn to Madam Lal" its payment may be made to Madam Lal or any other person as per his order. The cheque can be endorsed, even if it does not contain the words " or order". But if the cheque is drawn as " pay to Madam Lal only" shows the intention of the drawer to restrict its further transfer. Such a cheque shall be payable to Madam Lal only.

If a negotiable instrument, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option. For example, if a bill of exchange is expressed as ' pay to the order of Ghanshyam or order', it is still payable to Ghanshyam or if he so chooses to the person specified by him.

2ºPayable to bearer

A promissory note, bill of exchange or cheque may be payable to bearer

If it is expressed to be so payable, or if the only or the last endorsement is an endorsement in blank. This means a cheque payable to 'to order' becomes a bearer cheque if it is endorsed in blank.

If the word 'bearer' printed on a cheque form is scored off, it does not make the cheque non-transferable or non-negotiable, nor does it render it payable only to the payee. Such a cheque remains payable to order and is negotiable as such.

vi) The payee must be a certain person

The person to whom payment of the instrument is to be made must be certain. The payee is considered as certain person for this purpose even if he is misnamed or designated by description only. The term 'person' includes, besides individuals, bodies corporate, local authorities, societies and associations of persons, etc., and cheques may be drawn payable to the Registrar, principal, director, secretary etc., of these institutions.

vii) The payee may be more than one person

A negotiable instrument may be made payable to two or more payees jointly or it may be made payable in the alternative to one of two or more or one of some of several payees. For example, a cheque may be payable to;

Ram and Hari

Or

Ram or Hari

In both these cases, it is payable to a certain person.

viii) The time of payment

A cheque is always payable on demand, though words to this effect are not mentioned therein. A bill may be payable at sight or after a period of time specified therein. A promissory note or a bill of exchange in which no time for payment is specified is payable on demand. If a bill is payable after a certain period it must be accepted by a drawee. But no such acceptance is necessary in case of a cheque. If a cheque is a post-dated cheque, it does not constitute an order to the banker till the date specified therein approaches. Banks do not make payment of such cheques before the date given in the cheque.

ix) Signature of the drawer or promissor

A negotiable instrument is valid only it if bears the signature of the drawer/promissor. In case of a cheque, the signature of the drawer must tally with his specimen signature given to the banker at the time of opening his account.

x) Delivery of the instrument is essential

A promissory note, bill of exchange and cheque is a negotiable instrument. The making, acceptance or endorsement of such an instrument is completed by delivery. This means that a negotiable instrument is deemed to have been drawn, when it is written by the person concerned and delivered to the other party to whom it is meant. Delivery may be either actual or constructive.

xi) Stamping of promissory notes and bills of exchange is necessary

Some systems require that the promissory note and the bills of exchange must be stamped. This is not required in case of a cheque. The value of stamp depends upon the value of the note or the bill and whether it is payable on demand or at a future date. A note or bill without stamp cannot be admitted in evidence. It may be stamped either before or at the time of its execution.

lº Transferability and negotiability

Transferability is a characteristic of any property. It also gives a right to the possessor of the property to transfer it to anyone with or without consideration, provided he can establish that he is a true owner and in that capacity he has exercised his right of transfer.
Negotiability is a characteristic of any property. It gives a right to the possessor of the property to transfer it to any body but for consideration. Here the negotiator is not required to establish his credentials. It is the negotiator who has to accept the property in good faith.

2º Differences between Transferability and negotiability

Transferability and negotiability are not the same. They convey different meanings. The followings are the differences between the two:

1 - Transferability is the part of negotiability. Negotiation without transfer either by simple delivery or by endorsement stands meaningless. Transferability, as a characteristic, is complete in itself. It is only exchange of hand, which is an act and which needs performance.

2 - Negotiation is an expression of faith and confidence. Transfer, on the other hand, is a process.

3 - Negotiation parts faith in other rights and thus even if the owner is not having a good title it does not affect the rights and title of the negotiation. Transfer is exchange of hands. Here possession is transferred. Transferability rights need a lawful and unchallengeable title.

4- 'Not Negotiable' marked documents lose all essential features of negotiability. 'Not transferable' marked documents can also be transferred to the person whose name is mentioned therein.

Section 2. Distinct characteristics of negotiable instruments

In most cases an instrument may be negotiable either by Statute or by usage.

Five characteristics are to be considered as necessary to constitute a negotiable instrument, instrument of payment or credit.

§1. Negotiability

It refers to the ability to transfer entitlements under the negotiable instrument from one person to another in such a manner to constitute from the transferor a holder of the negotiable instrument. Negotiability, therefore, allows for more simplified and easy circulation. It has the advantage of security in the sense that the rights of the holder are not dependent on the transferor once the instrument is negotiated. As we examine specific types of negotiable instruments, we will discover that the law distinguishes between various types of negotiability. For example, a bill of exchange payable to bearer is negotiated by mere delivery, whereas a bill of exchange payable to order is negotiated by endorsement of the holder of the bill and completed by delivery.

§2. Monetary value

Negotiable instruments contain a continued commitment by the issuer to pay the stipulated sum of money. A simple statement of an object of a specified monetary value is not enough to render a document a negotiable instrument.

§3. Commitment to pay

Negotiable instruments contain a continued commitment by the issuer to pay the stipulated sum of money. A simple transfer of credit payable to holder is not enough if the issuer does not guarantee payment.

§4. Short-term title

In order to facilitate a simple exchange of title, the credit stipulated in the negotiable instrument must cover an easily obtainable and transferable payment. Long-term titles seem to complicate such an easy transfer. There are however, no hard and fast rules as to what constitutes a short-term title. The fact that the bank sets dates within which a cheque is to be cashed, is not to be taken as a measurement criterion in this regard.

§5. Usage and collection of title in payment

One of the consequences of negotiability is that negotiable instruments can be used and explained in a similar to that of ordinary money. The title to some or most negotiable instruments include most of the foregoing requirements. The prime example is that of a bill of exchange *(lettre de change)* which may be defined as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, "requiring the person to whom it is addressed to pay on demand or at fixed or determinable future time a sum certain in money to or to the other of a specified person, or to bearer."

Another example of a negotiable instrument is that of a promissory note (*billet à ordre*) which is a written document by virtue of which the drawer undertakes the obligation (promises) to pay to the order of the beneficiary a sum of money at a prescribed date. The same qualifications can be found in a warrant which is a promissory note guaranteed by one person on the merchandises deposited with a store.

There are number of possibilities as to the types of financial documents which might qualify as negotiable instruments. To distinguish which is clearly part of these instruments, the three main characteristics, identified earlier, must be maintained: negotiability, a prescribed sum, and a commitment to pay.

The cheque, not recognized as a negotiable instrument under Rwandan law, resembles a bill of exchange in a number of ways, as we will notice it in the following examination of the rule governing cheques. The main distinguishing characteristic of the cheque is that it is drawn on a bank and payable on order. The other distinction between the cheque and a bill of exchange relates to the type of law governing both. Unlike most jurisdictions, Rwandan legislature has opted for two separate laws to govern cheques and negotiable instruments. The doctrine, however, does not seem to maintain such a distinction

It's also important to note that the followings are presumptions related to negotiable instruments:

a) Consideration

Every negotiable instrument shall be presumed to have been made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred was accepted, endorsed or transferred for consideration. In *Shanmuga Rajeswara Sethupathi*

versus Chidamabaram Chettiar 1938 (India), it was held that where a promissory note had been given, consideration should be presumed and that the burden of proving that no consideration passed was upon the maker of the promissory note.

b) Date

Every negotiable instrument bearing a date is presumed to have been made or drawn on such date.

c) Time of acceptance

Every accepted bill of exchange is presumed to have been accepted within a reasonable time after its date and before its maturity.

d) Time of transfer

Every transfer of negotiable instrument is taken to have been made before its maturity.

e) Order of endorsement

The endorsements appearing upon a negotiable instrument are presumed to have been made in the order in which they appear thereon.

f) Stamp

It is presumed that a lost promissory note, bill of exchange or cheque was duly stamped.

g) Holder in due course

It is again presumed that a holder of a negotiable instrument is holder in due course. However, where the instrument has been obtained from its lawful owner or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

§6. Distinction between promissory note and bill of exchange

Promissory note differs from a bill of exchange in the following respects:

Bill of Exchange	Promissory Note	Cheque
There are three parties the drawer, the drawee and the payee- although only one and the same person may fill two of	There are only two parties the maker (debtor) and the payee (creditor)	Three parties (the drawer, the drawee which is a bank and the beneficiary)

these capacities.		
It contains an unconditional order to the drawee to pay according to the drawer's directions.	A note contains an unconditional promise by the maker to pay the payee.	Unconditional order to pay the beneficiary
The drawee or his agent must accept a bill payable after sight before it is presented for payment.	No prior acceptance is needed	Not only is Acceptance is not needed, but also the cheque is not entitled to days of grace
The liability of the drawer is secondary and conditional upon non-payment by the drawee.	The liability of the maker or drawer is primary and absolute.	The liability of the maker or drawer is primary and absolute.
Notice of dishonour must be given by the holder to the drawer and the immediate endorsers to hold them liable thereon.	No notice of dishonour need be given	Notice of dishonour is not necessary. The parties thereon remain liable, even if no notice of dishonour is given.
The maker or drawer does not stand in immediate relation with the acceptor or drawee.	The maker of the note stands in immediate relation with the payee	The maker or drawer does not always stand in immediate relation with the drawee.

A. Definition of a certified cheque

A cheque is a certified title by which a person called a drawer calls upon a banker (drawee) or any other institution authorized to carry out banking activities to pay to another person called a beneficiary (payee), a specified sum of money either to the beneficiary, to his order, or to bearer. Note that the cheque is always payable on demand or upon presentation.

A drawer is the person who draws/creates the cheque and is a creditor of the drawee. The drawee is the person on whom the cheque is drawn, i.e., the one supposed to effect payment. The payee is the person for whose benefit the cheque is drawn, that is why he is regarded as the beneficiary.

The relationship between the two is contractual in nature. It is a debtor and creditor relationship whereby the creditor who is the drawer (customer) is obliged to deposit money with his banker

(drawee) who has the duty to repay the money upon demand by virtue of cheques drawn by the customer. Therefore, the drawer must fulfil his obligation so as to make it obligatory for the drawee to pay when asked to do so.

B. Contents of the cheque

There are six requisites (important elements) to be present when one is creating a cheque. The cheque must contain the following: the word ″cheque in both text and title, an order to pay a specified sum of money, the person to be paid (payee) place of payment, date and place of drawing and lastly the signature of the drawer.

The fact that the word cheque must be evident in both text and title implies that if a bill contains all the requirements for a cheque but is not headed ″cheque″ then the bill is not a cheque and vice versa. Note that the title refers to the heading while the text refers to the content of the cheque.

Although one of the requisites of a cheque is that the payee must be mentioned, this is not always the case given that the same law recognizes bearer cheques.

The essence of date of drawing seems to be to assist in the computation of time within which the cheque must be presented for payment which is 60 days for cheques drawn in Rwanda and 120 days for cheques drawn abroad payable in Rwanda.

The drawer's signature is very important. A drawer becomes liable when he signs and delivers the cheques. However, the signature may be replaced by an authentic declaration certifying the willingness and capacity of the drawer. For a drawer to incur liability on the cheque, he must have the capacity to contract.

C. Requirements for creation of a cheque

There are two important requirements of with regards to requirements of substance.

-The first is the existence of disposable funds and the second is the existence of a drawee. Who disposes of the funds upon the drawers order.

Before drawing a cheque, the drawer must ensure that he has enough funds in his account except where there is an agreed overdraft. Rwandan law does not recognize post-dated cheques. As such, the moment a cheque is drawn, the payee has the right to present it for payment at any time provided the time period for presentation for payment has not elapsed.

-Second, the drawee is always a banker or an institution authorised to handle operations involving cheques and who must be designated on the cheque and his duty is to honour the customer's cheque up to the amount of his credit balance or agreed overdraft if any. Should the bank dishonour the cheque, the holder cannot sue the drawee (bank) on the cheque, since there is no privacy of contract (no contractual link) between them. However, he may sue the drawer or subsequent endorsers.

Note that a cheque drawn on an institution other than one authorized to carry out banking services is an invalid cheque.

D. Forms of cheques

Three types of cheques are recognized under Rwandan law. The determination of the form depends on how the beneficiary is indicated in the cheque. A drawn to named person with the clause ″to the order″, to a name.

a) A cheque payable to named person with or without clause ″to order″

This kind of cheque may take three different forms.

a) It may be ″pay x or order″, ″pay x″, or ″pay to the order of x″. This implies that x may negotiate the cheque to someone else by endorsement.

This type of cheque has advantages over the others. Compared to a cheque payable to a named person with clause″not to order" it can be transferred by simple endorsement and delivery, whereas the other one cannot be transferred. It is at the same time safer than the bearer cheque. Anyone in possession of a bearer cheque holds a good title and has the power to negotiate it. As regards the order cheque, only the named person has a good title and is the only one who can endorse it. Therefore, in case of loss or theft, the true holder of an order cheque holds a better title.

b) Cheque payable to a named person with clause "not to order"

This kind of cheque can only be presented for payment by the person whose name is indicated on the cheque. The holder of such a cheque cannot transfer it because it is non-negotiable in form. However this cheque may be endorsed by a drawee and this is only done in case the drawee owns several establishments such that he draws a cheque to one and endorses it to another.

The advantage of this cheque lies in the fact that whereas a cheque payable to a named person may be stolen since it is transferable, this kind of cheque cannot be of any use to someone who may steal it or one who may find it in case of loss because the drawee does not verify the signature but the identity of the holder.

c) Cheque drawn payable to Bearer

This kind of cheque is either drawn with an indication "payable to bearer" or it may be left blank. The holder of such a cheque may either cash it or negotiate it to someone else. Negotiation may be by simply transferring (simple delivery) the cheque to another person in which case it remains a bearer cheque or it may indicate the name of the person by endorsement, which changes the cheque to an order cheque.

E. Guarantor of payment

The drawer is the guarantor of payment. A guarantor is a person who promises to pay for something if the person who should pay does not. By virtue of drawing and issuing the cheque

the drawer becomes firstly liable as guarantor of payment. However, there are also secondary guarantors of payment who are endorsers.

F. Negotiable character of a cheque

Negotiation is the transfer of a negotiable instrument (cheque) in such a form that the transferee becomes a holder. A holder is a person in possession of a cheque that is properly endorsed to him, i.e., meets all the legal requirements for endorsement.

Note that only a cheque payable to order or to bearer is negotiable. While an order cheque may be negotiable by endorsement, a bearer cheque may be negotiated by simple delivery. Endorsement may designate the transferee. When it does not designate the transferee, it is referred to as endorsement in blank.

Endorsement may be made on the back of a cheque or on a separate sheet attached to the cheque (this is usually done where there are several endorsements on the back of the cheque and there is no space left for further endorsements.

The law provides that the cheque is payable upon presentation or demand. A cheque presented for payment before the date of issue is payable on the day of presentation. In other words, the date on which the cheque is presented is deemed to be the date of payment. It follows that from the date the cheque is issued it may be presented for payment immediately or at a future date regardless of whether it is post-dated, undated or antedated.

For a cheque issued and payable in Rwanda, presentation for payment should be done within 60 days while cheques issued abroad but payable in Rwanda should be presented within 120 days. After the expiry of this period, if the cheque is presented for payment and it is dishonoured, the bearer of the cheque may not have recourse against the drawer on the cheque, although he may sue him on the original debt.

The amount specified on the cheque must always be indicated in both letters and figures and in case of any discrepancy between the two, the amount in letters shall be presumed to be payable. In practice cheques with differing amounts in letters and figures are returned unpaid.

Furthermore, where there are several amounts denoted on the cheque, the lesser amount shall be the one payable. The rationale being to forestall alterations that may be made on the cheque before, if one is ever going to alter the amount specified on the cheque, he/she would have to put an amount that is greater than the original one. The provision is to protect the drawer.

It is the duty of the banker who pays an endorsed cheque to examine the regularity of the endorsement, but not to establish that the signatures are correct. The drawee is also required to verify the dates of payment to ascertain if the time allowed for presentation for payment has not expired, and if it has expired, if no revocation or opposition to payment has been made.

In case of a cheque drawn to bearer, without any endorsements, the drawee will examine the drawer's signature and the amount specified to confirm that there are no alterations or forgeries

done. With respect to a cheque payable to named person, the drawee will verify the identity of the payee in addition to what has been mentioned above.

Crossing is a special restriction on the payment of the cheque, which is usually effected by drawing two parallel lines across the cheque. The implication is that the cheque must not be paid across the counter.

This special restriction on payment takes two forms, i.e., there are two kinds of crossing: general crossing and special crossing. It is general crossing when two parallel lines are drawn across the cheque with nothing mentioned. General crossing implies the cheque in question can only be paid through a bank account and not across the counter. Special crossing is when a specific bank is named between the parallel lines. The implication is that the cheque must be paid to the banker named in the crossing.

General and special crossing give additional protection to the holder in case of theft, for the thief may not have a bank account and even if he has, the time involved in clearing the cheque enable the drawer to stop payment. In addition it is easier to trace the thief.

A general crossing may be transformed into a special crossing but the converse does not apply. It should be noted that if the banker fails to observe the crossing, the banker is liable to the drawer for any loss suffered by the drawer.

Default of payment may be defined as absence of payment implying the cheque is not paid upon presentation and yet it fulfils all the legal requirements and is presented within the period allowed by law. Usually there is default of payment when the drawer does not have sufficient funds on his account. Sometimes, there is wrongful dishonour and this is when the drawee by mistake refuses to pay a cheque drawn on him by his customer when the funds are available.

The effect of default of payment is that the holder may seek redress against the drawer and subsequent endorsers either jointly or severally. The holder's redress may be one of protest and attachment or seizure of moveable properties.

A protest is a formal statement in writing made at the request of a holder of a cheque, in which it is declared that the cheque was on a certain day presented for payment, and that such payment was refused, and stating the reasons, if any, given for such refusal. For this right (right of protest) to accrue to the bearer of an unpaid cheque, the bearer must have contested non payment in one of three ways: by notarial act (i.e. the statement in writing be made under the hand and seal of a notary (protest), Declaration by the drawee (banker) dated and written on the cheque indicating date of presentation, Declaration by a clearing-house (NBR) stating that the cheque was presented with the time allowed by law and that it was returned unpaid.

Note that a protest is made on the cheque itself or on a separate sheet attached to the cheque and must be delivered to the parties concerned. The rationale is to give either the drawer or drawee time to cure the mistake as the case may be.

The protest is required to be made within the time for presentation of the cheque for payment. However if presentation is made on the last day within this period, the time is extended to the next working day. However, if there is delay in making a protest, the time may be extended by the courts provided the plaintiff could establish exceptional circumstances.

As regards the place where the protest is to be made, the place shall be the location of the bank where the cheque is payable.

The holder of an unpaid cheque is required to give notice of default of payment to the drawer and/or subsequent endorsers within four working days from the date the protest or declaration was (re-)established. Similarly, the drawer or endorser who has been given notice is required to notify the rest or the next endorser or drawer within two working days from the date he was notified.

Conservatory attachment is the act or process of seizing a person's property by virtue of a judicial (court) order, and bringing the same into the custody of the court, for the purpose of securing a debt or claim of the creditor in the event where judgment is rendered. This act will prevent the owner from disposing of the property in anticipation of its judicial sale.

The unpaid bearer may attach the property (moveable) of the drawer and endorsers by obtaining an order of the court of first instance of the place where the property is located. Note that this remedy is available only to the bearer of an unpaid cheque who has protested default of payment. However, the property can be sold after a judgment in execution has been passed authoring the judicial sale of the property. The bearer of an unpaid cheque who seizes the property of the drawer or endorsers acquires a privilege over other creditors of the owner.

While the drawer and the endorsers are individually and collectively liable to the bearer of an unpaid cheque, the banker is liable to the drawer in case of wrongful dishonour.

The bearer may claim from the person he has sought redress: the amount specified in the cheque, interest from the date of presentation calculated at 6%, fees of protest or declaration and the expenses of giving notices and a commission of 1/3 of the original sum, in case it is justified, in the absence of any agreement to the contrary.

Opposition of payment implies stopping payment. It is usually done by the drawer of the cheque informing the drawee that the cheque in question should not be paid upon presentation. Opposition is required to be made by registered letter.

Opposition can be allowed if the cheque is lost, if its title is obtained fraudulently, or if the bearer has been declared bankrupt or incapacitated.

When a drawer bank does certify a cheque, it substitutes its undertaking to pay the cheque and becomes primarily liable for payment of the cheque. At the time a cheque is certified, the bank usually debits the customer's account for the amount of the bank. It also adds its signature to the cheque to show that it has accepted primary liability for paying it. The bank's signature must appear on the cheque.

The bearer of an unpaid cheque has a time of six (6) months in which to institute an action in court against the drawer and endorsers. Computation of time starts from the date of expiry of the time allowed for the presentation of the cheque for payment. Actions by persons obliged by the cheque against one another, that is, drawers and endorsers are also valid within six mouths.

Issuing cheque without sufficient funds to cover the cheque constitutes a crime punishable under Art. 435 PC by imprisonment of 3 months to 5 years and or a fine of up to 300.000 Frw.

Chapter 12. THE LAW OF PROPERTY

Property law or the law of property is the area of law concerned with the study of the legal relations between persons with respect to things. The things in question are, as economists convince us, scarce resources, for where things are in abundance there is no need for rules to regulate for their access and control. The law of property comprises the rules as to how persons can acquire, dispose of and lose rights to such things, various types of rights which may be acquired, the way in which such rights can be held, and how far the rights of access and control of a particular thing are against third parties.

Section 1. Definition of property

What is Property? How should we identify and describe the ownership of property? If someone owns property, what is the range of things he may do with it? Possess it? Use it?

Sell it? Destroy it? What limits does the law place upon a person's enjoyment of property in order to protect the public interest catered for by civil code Book II. How is this right (ownership) compared with other legal rights such as contract rights, civil rights to bring an action in tort-which are covered by Rwandan civil code Book III and others?

Consider, for example, a type of property important to most of us. Notice a car that Mr. Mugabo drives. If we describe him as the "owner', does that tell us everything we may want to know about his legal rights with respect to that car? Who else may have a claim to that car? Perhaps his parents loaned or gave it to him, or perhaps he bought it from an auto dealer. If a bank loaned Mr. Mugabo some money to finance his purchase of the car, does that bank own an interest in a car? If Mr Mugabo lends his car to his friend for a week while he is on vacation or on a mission outside the country, does his friend have a property right in the car? If Mugabo is married, does his wife have any legal right with respect to the car? To what extent may the state, on behalf of Mr. Mugabo's fellow citizens, regulate Mugabo's use of the car? Should we take it as an infringement on Mr. Mugabo's property rights? Such are the questions to be answered by this part of the course - Property law.

In the popular lay sense, the term "property" usually refers to tangible things. A person's property, we say, consists for example; his car, furniture, clothing, tools, and the like. Land ownership and intangible property, such as bank deposits, stocks, and bonds are also often imagined as ownership of things. In the study of law, the term "property" often is used in a legal sense different from the popular image as referring to a thing.

Different authors have attempted to define what the term "property" means, and among them, we note a few.

To begin with, the two French authors[11] in trying to figure out what the term "bien" means. Note that, the term has at least two meanings; the moral and legal meaning. From the moral point of view, the term refers to what is appreciated - good as opposed to bad. The second-legal meaning is **anything useful that satisfies the material needs of man or simply a good**.

[11] P. Malaurie et L. Aynès, Les Biens, 2e éd., Defrénois-Editions juridiques associées, Paris, 2005, p.1.

Sir William Blackstone, an eighteenth-century English barrister in his commentaries as a guide for laymen wrote; "The third absolute right, inherent in every English man, is that property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land… There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any individual in the universe."[12]

These words of Sir William Blackstone leads us to the Latin Maxims which shows the dismemberment of property rights into; *Usus* (use), *Fructus* (Enjoyment) and *Abusus* (disposal) which we shall talk about later in this course. He also brings a relationship to our article 14 of Rwandan Civil Code Book II, which states that: "ownership is the right to dispose of a thing in an absolute and exclusive manner, except for the restrictions that result from the law, or from the real rights belonging to others." This, we shall talk about later in this course.

The American Law Institute in 1936 in its Restatement of what property is, notes; "The word "property" is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations".[13]

The word "property" in this restatement is used to denote legal relations between persons with respect to a thing. The thing may be an object having a physical existence or it may be any kind of an intangible[14] nature such as a patent right or a debt that your debtor owes you. This definition brings us to something great in our course of property law - the legal relationship of this thing (property) with a person. This is the centre of our interest.

Nicole Hendebert-Bouvier, a French author of the book "*Droit Civil et Commercial*" defines "property" as a set of rights and obligations that a person has over a thing. These rights and obligations must be of Economic value. They consist of all the property which is represented at the same time by the things and rights that we have over those things.[15]

Property in its most technical legal sense is an intangible concept, signifying the rights, privileges, and powers that the law recognizes as vested in an individual in relation to things tangible or intangible, as distinguished from the things themselves. It includes every interest any one may have in anything that may be the subject of ownership, including the right to freely possess, use enjoy, and dispose of the same.[16] The sum of all these proprietary rights under English law for example is distinguished as "title' to property. In its popular usage, the term "property" refers to objects that may be the subject of ownership - both physical objects capable of being reduced to **possession** (infra) and such intangible items as **goodwill** (*the positive impression that people may be having in a business for example*).

[12] J.C Smith et. al., Property-case and Materials, Aspen publishers, New York, 2004 Pg 2.

[13] Idem

[14] Tangible or intangible/corporeal or incorporeal property will be discussed later in this course.

[15] N.B. Huedebert, Droit civil et commercial, 5^{e} edit, Paris, Presse Universitaire de France, 2002, Pg.1113.

[16] Micheal. P. Litka , « Interests in real property », Business Law, (1970, Harcourt, Brace& World Inc.), p.640

Proprietary rights are exclusive rights[17] of the individual owner and are protected against infringement by others. In the last analysis, these rights represent a relationship between the owner and other individuals with respect to objects that are capable of being owned.

Third parties must be able to know what rights the owner or the usufructuary have on that property.

To summarize all the above definitions in a metaphoric manner, property today is often taken to be like a “bundle of rights” or, more vividly, a “bundle of sticks” with each stick representing some separable aspect of the total - which total is the property. This metaphor, drawing on sources like the Restatement and that of Sir William Blackstone, emphasizes that property is not an all-or-nothing proposition, but a number of different aspects of control which may be examined separately. Complete ownership of a property means that one person has all the sticks (rights) with respect to a thing. He may open the bundle and divide the sticks (rights), resulting in shared ownership with several people each having some sticks (rights).[18]

So, property is an aggregate of rights that a person has against a thing tangible or intangible, that are protected by the state through its laws. This thing upon which a person exercises these rights must be of economic value and subject to acquisition.

§1. Property and Patrimony

Whereas property has been exhaustively defined, at times it is confused with another interesting term - "Patrimony".

Patrimony is wider than Property. Property itself is a subset of Patrimony. From the moment a child is born, he/she owns the patrimony even though he/she owns no property. The patrimony owned by this child is based on the property in his/her being a person.

John Locke, an English philosopher in his writing on the two treatise of Government wrote" though the Earth and all inferior creatures be common to all men, yet every man has a property in his own person. This, nobody has any right to but himself".… Locke says that "every man has a property in his own person" , from which it immediately follows that " the labour of his body, and the work of his hands …….are properly his."

If it makes sense to say that one owns his/her body, then, on the embodiment theory of personhood, the body is quintessentially a personal property because it is literally constitutive of one’s personhood. If the body is property, then objectively, it is property for personhood. This line of thinking leads to a property theory for the tort used in common law of assault and battery. So the interference with my body is an interference with my personal property.

The idea of property in one’s body presents some interesting paradoxes. In some cases, bodily parts can become fungible commodities (to be talked about in details later), just as other

[17] Art. 1 of the Rwandan Civil code book 2.

personal property can become fungible with a change in its relationship with the owner : For example, Blood can be withdrawn and used in transfusion; hair can be cut off and used by wigmakers, body organs like the kidney can be transplanted.

On the other hand, bodily parts may be too "personal" to be property at all. We have an intuition that property necessarily refers to something in the outside world, separate from oneself. Though the general idea of property for personhood means that the boundary between person and thing cannot be a bright line, still the idea of property seems to require some perceptible boundary, at least in so far as property requires the notion of thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system.

Patrimony is composed of the present property (rights) and the future, something important to distinguish it from the definition of property. Article 1 of the decree law regarding hypothecs[19] in Rwanda provides that "All the property of a debtor, present and to come, constitute the common pledge of his creditors…"

This means that, the pledge is on his patrimony which is the present property and the property to be acquired later. On the other hand, article 1 of the civil Code Book II categorizes the property as " property or real rights are of three kinds: the rights to claim or obligation, the real rights and the intellectual rights".

To say that something is "property" only begins the analysis. The next question is which rights accompany ownership of this property. At one time, property was considered as a thing subject to the complete control of its owner. This pushes away the notion of personhood in the composition of property. More recently, property has been, as already given, defined as a bundle of sticks – a collection of individual rights which, in certain combinations, constitute property. But these rights are talked of in relation to a person. They are rights entitled to this person over a thing. Nonetheless, even before that thing to which this person is entitled some rights, this person has the patrimony.

To a lawyer, patrimony is quite distinct from property which forms part of the patrimony. Patrimony covers also the "property to be" that is, the property that will in future, belong to the person.

Hence, the patrimony, which is considered to be a combination of rights and obligations, is inseparably linked to the personality. This means that it forms part of the other two elements: pecuniary and the juridical universality. From this come some other outcomes. On one hand, the patrimony of a person, understood as a set, responding to the obligations upon this person, his creditors can even seize his property that was acquired after the birth of their claim (art. 1 of the decree law on hypothecs). On the other hand, the idea of universality functions in what we call "real subrogation". This means that the different property constituting the universality can change but, the universality remains.

The new property will replace the old one, and it will be subjected to the same legal regime as the one which it replaced. Thus the real subrogation guarantees the juridical stability situation. This is why the patrimony of a debtor constitutes the general pledge of his creditors. Since the

[19] In Roman and Scots law an Hypothec is a Mortgage; in other words, a legal right over a debtor's property that however remains in the debtor's possession

Civil Code does not explicitly give what the term patrimony is and what it entails, some authors (e.g. Aubrey and Rau both teachers of civil law) are used in a bid to show the link between the patrimony and a person.

They put forward four principles:

1. Only persons can have patrimony. You cannot think of patrimony without thinking of a person to whom this patrimony is attached.
2. Each person necessarily has patrimony, because he/she is able to have the rights and obligations.
3. The patrimony remains attached to the person as long as his personality is still valid. It cannot therefore be transferred (*intransmissible entre vifs*). A person can transfer some of the rights which he possesses over something e.g. his rights of ownership of an immovable, but the acquirer acquires the right transferred, not the patrimony.
4. A person cannot have more than one patrimony. Like the personality, patrimony cannot be divided. What is divided or transferred is the right(s).

§2. Property and things/ Things and Rights

What are things? This fundamental question is as old as the Earth. It was first put to light by the western philosophy through the Greeks in the 7th Century before Jesus Christ. Such a question of what a thing is has a multiple meaning. Things can be objects - a stone, a piece of wood, and others which are important in our daily lives. But what one notices is that all things cannot go as they wish. Some rules will have to be applied to their transfer and ownership. This is based on the economic principle of scarcity, and to some extent, in order to keep law and order/harmony in society.

Things have got a double meaning:

The restricted meaning of a thing is anything that can be acquired, which can be seen (visible), etc., which can be given or transferred from a hand to another. To the extended meaning of a thing, it means everything, transaction; all of which, that surrounds us, the acts, the events and happenings in this world are all things. It is this combination and wider meaning of a thing (often referred to as property) that interests a lawyer.

The law also cannot ignore these two meanings of the term "thing". For example art. 260 of our (Rwandan) civil code Book III stipulates that "we are not only liable for the prejudice caused by our own acts, but also to those which are caused by persons who are under our control, or things which are under our supervision…" Of course, a herdsman, just like the owner of a Cow will be responsible for the damages caused by this Cow. Here, this animal becomes a thing. So a thing is not restricted to be only objects. It can be a house, air, insect; in short a multiple of things as can be in the prairies during the summer season.

Property in Economic terms is something that can be used directly or indirectly for Economic gain for example, for the acquisition of money, or in exchange for another thing. Legally, the term property is a right itself over something. For example, a right over the bicycle that you own, the right you possess to acquire certain things. In short, it means patrimonial rights. However, legislators sometimes use the word “thing" to mean property (e.g. art 12 and 31 *bis*

CCB II) which draws a major confusion between the two terms (thing and a property) in our Civil Code.

Article 12 of the Civil Code Book II stipulates that “all "things" (which can also be replaced by property) without an owner belong to the state in respect of customary rights over them by the indigenous people, and subject of what will be said later on about the right of occupation". Here, the word “things " can as well be understood as property which does not have the owner (master). So in a word, ‘’ things ‘’ and ‘’ property’’ in our code are confused and are often used interchangeably.

§3. Patrimonial and Extra- Patrimonial rights

A person can have either patrimonial rights over a thing or an extra-patrimonial right over a given situation.

A. Patrimonial rights

A number of rights are considered to be patrimonial. These will include the right of ownership or the right to claim like the right of the landlord to claim his rent for the house he owns. Patrimonial rights are always of Economic value and always gauged in terms of money. They have an exchange value: they can be acquired by the new owner mainly through their exchange for other rights. They can be transmitted to inheritors and to the legatees of their owner (or holder): they can be seized by their creditors, they are stricken by prescription whether acquisitive or extinctive one.

Among the patrimonial rights, there are those which are more attached to the person (owner/ holder) than others. This is why, such rights cannot be exercised by the unpaid creditors of their holder when the former (the creditors), by way of protecting their general pledge over the property of their debtor, exercise what is termed as “oblique action”.

Art 64 of the Civil Code Book III stipulates that « Creditors can exercise all rights and actions of their debtor, save for those which are exclusively attached to his person». Here we should know that, although these rights are patrimonial in nature, they have either personal or family character that their exercise will call for other considerations of moral order to which only the debtor can know and appreciate their value.

Thus, the creditors cannot use the oblique action to exercise the suppression action or to attack the alimony (*pension alimentaire*) meant for the debtor, or stand in revocation for the donation between spouses.

Although the law is silent, an analogous question is put over the topic of the “Paulian action” which allows creditors to attack by themselves all the fraudulent acts accomplished by their debtor and which prejudice their rights. However, as a solution in such a case, the fraud is a behaviour worse off than a simple negligence to the extent that the moral and personal considerations that justify the exclusion of the oblique action disappears in favour of the need to sanction the act of fraud.

B. Extra- patrimonial rights

By considering the direct object of these rights, one can say that they are not of Economic value. For example, the right to acquire natural parenthood to a person, parents' rights over the "person "and property of their child (attributions of the parental authority), the right of an author of a book to decide to publish it or not: we call these extra-patrimonial rights as opposed to patrimonial ones whose direct object or reason is to ensure the protection of the pecuniary or monetary value and which have, within themselves, the monetary value.

Family rights (e.g. parental authority) are extra-patrimonial rights. In all legal systems, family life (rights) will ensure the satisfaction of sexual needs, to oversee the duty to procreate, the education of the children and to ensure that the life together as spouses flourishes. Each person in this family life enjoys and is a creditor to that right, but from which, no economic gain is waited for.

Contrarily to the patrimonial rights, extra- patrimonial rights are not seized and are not transmissible to the heirs or legatees of their holder, creditors can benefit from them and such rights are imprescriptible, whether acquisitive or extinctive prescription.

Section 2. Real rights

Property rights or real rights are exercised by an individual over a thing, movable or immovable. The bearer of a real right exercises it directly over a thing without interference of anybody on the thing on which he has custody. They are different from the Obligations or rights which are also referred to as personal rights. An obligation may be defined as a legal bond between two persons by which one is bound to the other to perform an act or to abstain from doing an act, or to create a right over something or to transfer its ownership. A personal right is thus the right that a person named a creditor has against another person named debtor by which the former (creditor) may compel the latter (debtor) to do, to refrain from doing or to give something. Among the real rights recognised by the Rwandan Civil Code Book 2, one can mention: Ownership, usufruct, servitudes, superficies, emphyteusis, etc.

§1. Ownership

A. Introduction and definition

Definition: « Ownership is the right of disposing of things in the absolute and exclusive manner, subject to any restriction of the law and the real rights belonging to other persons» (art.14 CCBII). The same article also provides that «Restrictions of the right of ownership resulting from the relationship between neighbours are established in the title concerning charges on Land».

The first paragraph of this article corresponds to art.544 of the French code which provides that «Ownership is the right to enjoy and dispose of things in an exclusive and absolute manner provided that it does not violate the established rules and regulation».

After the abolition of the Feudal privileges by the French Revolution of 1789 and after the consequent declaration of the human and citizens rights, ownership was acknowledged as an absolute inviolable and a sacred right. None can be deprived of this right save only when the public necessity legally constituted so requires, and subject to a condition of prior and fair indemnification or compensation.

Since then to date, the concept of the right of ownership is considered as a total and an exclusive right strictly reserved to the usage and enjoyment of individuals. Rwandan constitution recognizes the ownership right where it says «Every person has a right, to private property, whether personal or owned in association with others» (Art. 29 of Rwandan constitution, J.O No. special of 04/06/03).

The same article also insists on the inviolability of the right of ownership by saying «Private» property, whether individually or collectively owned, is inviolable.

The right to property may not be interfered with except in public interest, in circumstances and procedures determined by law and subject to fair and prior compensation» art.19 (2) and (3) respectively.

B. The history of the ownership right

Individual ownership has for centuries been the basis for the Economic systems and policies for all civilized peoples of the world. In the primitive societies however, only moveable objects meant for personal use such as clothing, arms, domestic utensils, ornaments, etc. were the ones reserved for individual ownership. Land belonged to the whole tribe, family or briefly, belonged to no-one in particular.

Such collective ownership of property is self-explanatory since, the only way of life was by hunting, fishing and collecting fruits from natural forests. This required no individual ownership of land or waters as it would as a consequence reduce your chances of extended hunting, fishing and fruit collecting. Families or tribes could however, restrict their hunting, fishing or fruis collecting but no individual in isolation from others could do it.

Even when life transformed into that of cultivating and rearing domestic animals, individual ownership was not so sudden. There was collective farming and collective rearing of animals in divisions of at least families. Little by little, constant cultivations by the same family on the same land naturally turned such a land to the family land and later, to be owned individually.

To the Romans, it started during the reign of king NUMA *(715-673 BCE)* who introduced the temporary sharing of land by individuals to cultivate it and enjoy the fruits from it, but as soon as the harvesting was over, the land turned to collective ownership and awaited for redistribution/sharing for the next season. Slowly by slowly, land which was given to an individual could be cultivated by the same individual season after season, and consequently built a house on the same land to facilitate his works on that land. From this, individual ownership of land was reached, for which the ***Pater familias*** was responsible. So the present day individual ownership of property descends directly from the ***dominium ex jure quiritium*** organized by law referred to as the ***12 tables***.

That dominium conferred to the one having this land, invested in him an exclusive, sovereign and perpetual right over that property with the three elements; ***jus utendi, fruendi,*** and ***ubutendi***.

C. Characteristics of the right of ownership

The right of ownership is an absolute right:

- It is exclusive in a sense that only the owner exercises his/her right over the property (thing) save for usufruct and servitudes
- It is individual or personal in that only the ownership has the right. However, there are some cases of collective ownership such as in successions or in co-ownerships (also matrimonial regime under common property, or community of acquired property after marriage).
- It is a right that gives freedom to the owner to use his/her property in any way he/she feels fitting. But in this case, case law has developed some limitations;
- The right of ownership is perpetual in that it lasts as long as the property upon which this right is exercised still exists. The right to ownership cannot be lost by the mere non use of the property. However, the owner who does not use his/her property may lose the ownership right to a third party who possesses it or who occupies it by the mere fact of acquisitive prescription (to be talked about later on possession).

D. *Abuse of the right*

The owner is not allowed to use his/her property with an intention of damaging or injuring the neighbours. Where this is established, the court will rule for the payment of damages to the neighbour equivalent to the prejudice caused, as well as the civil interests.

For example,1. Raising or erecting a wall of 3 metres high to hide the sight of the neighbour's house. 2. Letting the household discharges, e.g. foul water etc.,, into your neighbour's compound.

E. Prerogatives of the ownership right

Ownership right is the most complete real right one can talk about because it is the only one which accords to its owner all the three prerogatives; ie *Usus, Fructus* and *Abusus.* Art.1 of the civil code Book II makes an introduction of the concept of ownership and the related rights such as superficiary, emphyteusis, and servitude – *see below*

The same article (art.1CCBII) also mentions the dismemberment of this right of ownership where it talks of the right to use and habitation as well as the right to usufruct.

In principle, the full owner of a property must be having all the three mentioned sub rights which compose the ownership right (*Usus, Abusus* and *Fructus*).

1. *Usus* -The right to use

As already seen from above (as per the provisions of art.1 (2) the right to use is a real right. A person is free to use his property e.g. a house, by occupying it or a farm by cultivating it, or any kind of use of your property.

Negatively, in a sense, though, some authors have asserted that this right also includes the right of not using your property; the right not to occupy your house, the right not to consume the goods that you have, the right not to drive your car, and others.

Note: whether to use or not to use your property in the way that is convenient to you must go hand in hand with the observation of the limitations provided by the Law.

Such limitations to this prerogative include those established to meet the interests of good neighbourliness like the legal servitudes (e.g. a charge imposed on an immoveable by the law), limitations concerning the sight of your neighbours, the paths, the plantations, etc.

Other limitations include those which are there for the general interests as in

- urbanization - construction licences, land development plans,, protection of Memorials or historic sites;
- Hygiene and sanitation rules - stopping people from rearing animals in towns and cities, disposal of waste etc.);
- Agricultural policy of the Ministry of Agriculture and Animal Resources regarding how a given type of land will be used;
- Expropriation due to the public utility of your property (e.g. Land for the construction of a road or a public school or market).

Such limitations apply to or affect all the prerogatives of the right of ownership.

2. *Fructus*- **Right to enjoy fruits**

The right to enjoy fruits from your property or from the property on which you exercise the real right. *Here fruit is a general term and not solely agricultural produce, although the legal term grew from this base.*

This is the right of harvesting all the fruits that are given by that property. From this, a distinction should be made between fruits that are harvested or acquired periodically without changing the state or substance of the thing (property), and the products, the "harvesting" of which do transform the property such as in the case of mining stones from a quarry to be used in road construction or mining cassiterite to make tin where the property can be destroyed.

Fruits have been divided into; Natural fruits like those harvested from Natural trees or even timber from those trees: civil fruits such as rent from a real property e.g. a house or land, interest (income) from the money saved in a bank, etc.; and then, there are "industrial" fruits which are mostly from the works of man (man's labour) such as the agricultural produce or any other produce that is not of a regular basis and which diminishes totally **or periodically.**

3. ***Abusus*** **-** Right to dispose of your property

The right to dispose of your property can either be physical or legal. The physical disposition of property can be for example by deciding to destroy or demolish your house when you want to use the parcel on which it is built for another purpose. The legal disposition on the other hand, is where you decide for partial or full alienation of the right on your property for example by allowing other people to use your land or house through e.g. donation or through a sale contract.

It (Abusus) should not be confused with the usus - right to use. Abusus involves the transfer of right of ownership to another person whereas in usus, the ownership remains in the same hands even when someone else is using the property.

F. Extent of the Right of Ownership

Ownership of a thing whether moveable or immoveable means that the one with this right has the right to use and enjoy the fruits of his/her property - in short, the property and all that comes from it. The owner of Land for example has the right to use and enjoy all that is above and below this land unless the law provides otherwise. Under Rwandan law however, the owner of the Land does not have a inalienable right to control what is being done above or below the ground at such a height or such a depth in which he has no interest of "opposition" (art.16 (2)).

As a limitation to the rights of ownership, again, the same article provides that the owner of the soils (Land) has no rights over the water or the substance which could be subject of concessions under the laws relating to mines. In other words, you cannot claim ownership of a piece of Land which is rich in minerals and which can be turned to a mine or quarry.

Articles 261 and 262 of the civil code Book III also bring forward another kind of limitation on the right to use your property despite the freedoms we are entitled to through the ownership right. The two articles caution us to use our property -animals or objects - prudently and diligently. Where this is not observed, we, the owners of such property are answerable to the Law. So, the freedom of using our property the way we like is somewhat limited.

Laws, rules or instructions often limit peoples' freedom in the exercise of their ownership right to the new acquirer of the property. The right to alienation of your property can also be hampered by a contract already signed over it e.g. mortgage, etc.

As mentioned earlier, the ownership right stays as long as the property itself stays. The mere fact of alienation of the property does not extinguish the ownership right but rather, a transfer of ownership from one person to another. However, where this property has been abandoned (mainly moveable property), and someone else occupies it or takes possession, the new occupant/possessor may take the ownership right through the acquisitive prescription established by the law. In this case, it is not a transfer of ownership since the new possessor cannot tell who the former owner was, for example. before the property was abandoned.

G. *Acquisition of ownership through accession*

1. Definition and general concept of *accession*

Accession[20], in law, means a method of acquiring property (which itself was adopted from the Roman law), by which, in things that have a close connection with or dependence on one another, the property of the principle draws after it the property of the accessory, according to the principle, *"accessio cedet principali."*[21] The ownership of a thing, whether it be real or personal (English law), movable or immovable (French law), carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or by artificial means; this is called the right of accession.[22] Accession may take place either in a natural way, such as the growth of fruits or the pregnancy of animals, or in an artificial way as where a building has been constructed on a given piece of land.[23]

The French law[24] provides the same where it says that ownership of a thing, whether movable or immovable accords to its owner the right to whatever comes out of it, whether by natural or by artificial means. Such a right is recognized under French law as the right of accession.[25] According to art. 552 of the French civil code, ownership of land goes with the right on what is under and above it. Notwithstanding some exceptions, this would mean that whatever would be found under your piece of land, on your land, or above it would automatically belong to you - the owner of the land. In this case, land is the principle object and so, following the Latin maxim; *accession cedet…*, mentioned above, all that is accessory to it will belong to the owner of the principle.

But what about where no principle object can be identified from the accessories, for example when there is a mixture of two liquids to produce another, or where the two solids are mixed up to the extent that you cannot identify the new from the original property (commixtures)? If we could take Bridge's[26] definition of the term accession, there would necessarily be a dominant thing to which the other is attached or which 'swallows' the accessory, in which case, the application of the principle; *accession cedet…* would easily fit. Bridge defines Accession in the following words;

"accessio is the joining of a subordinate thing to a dominant one, so that the identity of the subordinate becomes submerged in the dominant."[27]

However, it should be noted that, accession takes different forms, some of which are too complicated to judge what the principle is. These forms include for example, movables to an

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[20] The word "Accession" etymologically comes from a Latin word, *accedo,ere*; which means, to go, or to approach , itself deriving from *cedo,ere*; go+ *ad*=towards.

[21] http://en.wikipedia.org/wiki/accession;

[22] http://www.lectlaw.com/def.htm.

[23] http://www.babylon.com/definition/Accession/English.

[24] Article 546 of the French Civil code

[25] MALAURIE, P., et AYNES, L., *Les biens* (2004), Paris, Defrenois, p.115.

[26] BRIDGE, M., Op. cit., note 1.

[27] Ibid., p.106

immovable (fixtures), movable to movables (specification), liquids to liquids or solids with other solids (confusion or commixture).[28]

2. Acquisition of ownership right by accession under Rwandan law

Under Rwandan law, accession can be seen in two aspects; the natural prolongation of your ownership right and the other, a mode of acquisition. What interests us here is the second aspect. According to art. 21CCBII, ownership of a thing whether moveable or immoveable gives the right to all its produces. The article continues to say that, the fruits of a thing, even if separated from it, continue to belong to the owner of a thing, unless the law provides otherwise. The following article (art.22 CCBII), stipulates that «ownership of a thing, whether moveable or immoveable, gives the right to whatever becomes united to or incorporated to, either in a natural or artificial manner. »

Contrary to the above, art.23 CCB II expressly puts it that the owner of land who made some construction on his land but used materials that did not belong to him, cannot claim any fruits from his property save only when he has made the reimbursement of the value that is equivalent to the material used in the development of his property, the materials which did not belong to him.

«The owner of the land who has made buildings, works or plantations with materials or vegetation which do not belong to him, must pay the value there of; he may also be condemned to pay damages, if there be any, but the proprietor of the materials or the vegetation has no right to take them away.»

Regarding animals, where the two i.e. a bull and a cow do not belong to the same owner, what will be produced from their mating will belong to the one who owns the female cow. The solution here will be given by art.22 CCBII. However, the owner of a bull can claim some amount of money from the owner of a cow for the bull's services to the cow but he cannot claim ownership of the calf to be produced.

3. Accession by incorporation

It should be reminded that, by the term accession, the legislators refer themselves to the Roman expression **«accession cedit principali».** The problem with accession is to solve a conflict of the real rights where two things, belonging to different owners, are united or incorporated into one.

The solution here is that the one who enjoys the principal or real rights will automatically enjoy the accessory rights.

Art.24 of CCBII clarifies this by adding that, the one who incorporated the constructions or other works to the land that is not his, but who did it in good faith and using his materials has to be reimbursed for the cost of his materials as well as his labour.

[28] Op. cit., note 7.

If the construction was done not in good faith (bad faith), then, the owner of land on which, for example the house was built (fixed), may ask him or her to remove his/her materials or construction. This depends on the choice of the owner of the land.

Alluvion: In short, this means the deposit of waters either of a lake or a river. Art.26 CCB II provides that, «the deposit of earth or left dry that may form on the bank of a lake or a stream navigable or floatable belongs to the state. The one that is formed on the bank of a lake or a stream that is not floatable or navigable belongs to the owner of the adjacent land. »

§2. Dismemberment of the right of ownership

Dismemberment is the act of transferring or dividing one's rights or some of them over a property to another person who is not the owner of that property. Usufruct, use, servitudes, superficiary and emphyteusis are some of the dismemberments of the right of ownership over a given property.

A. Usufruct

This right combines the two rights embedded in the right of ownership (i.e. usus and fructus). The usufructuary is a person who has and exercises the right to use and enjoy the fruits from a property that does not belong to him. The one who exercises this right is however bound by another obligation of preserving the property's substance for its owner. It should be noted that, where the owner did not give the usufruct for commercial purposes, it should be maintained because if the fruits from it are used for commercial gains, these gains will be for the real owner of the property. This is in line with the principle that, the usufructuary cannot gain more than the real owner gains.

B. Servitude

This is the right a person is entitled to on a property (Land) that is not his/hers due to the circumstances surrounding that property. These include the right of passage through another person's land so that he/she may reach his or her own Land, the right to water resources on another person's land, or the right to channel the running water through another person's land below your own. The right to another person's land which emanates from the nature of the terrain is provided for by the law or from mutual agreement between the concerned parties.

C. Superficies

The Rwandan civil code defines superficie as a right to enjoy an immoveable belonging to another person and to dispose of all buildings, wooded areas, trees and other types of plants joined to land. It can be created free of charge or by onerous title (art.76CCII).

On this right, one can be tempted to say that the superficiary behaves totally like the one having a full ownership of a given property but which is just limited to a given period of time (not exceeding 50 years).

Article 77CCII stipulates that, superficie can never be established for a term exceeding fifty years. And if a longer period had been stipulated, it has to be shortened to meet that provision (a term not exceeding 50 years).

The superficiary also has the right to enjoy and dispose of buildings, wooded areas, trees and other types of plants that existed on the same land to which he/she is a superficiary, at the time his/her right (superficie) began. So, the contract for the superficiary is not only for the benefit of what will be harvested in future but also the present accessories or immoveables which are incorporated in or destined to that land (art.79 CCII(3)).

However, as provided for by art.82 CCII, at the termination of his/her right, the superficiary cannot remove all that belonged to him/her which was either found there, or from the works of his hands but which are still joined in the land, or even to claim compensation for the property left on that land. But, as an exception to this, for the constructions he/she has constructed, though he/she cannot remove them, but at least can claim from the proprietor an indemnity fixed at three-quarters of their (constructions) actual value.

During this period of superficie, when there is any kind of use made of the property that affects the rights of the proprietor, the superficiary has a duty to inform the proprietor in timely manner. This is provided for in order to allow the proprietor to ensure his/her rights are not abused.

In principle, all superficies have to be registered but the superficies which do not exceed nine (9) years are not subject to registration (art.85 CCII).

D. Emphyteusis

Emphyteusis is a right just like the superficie which, for a certain period of time, grants to a person a full benefit and enjoyment of an immoveable property (Land) owned by another person, provided he/she does not endanger the existence of this immoveable and this carries with it a right or even an obligation to put constructions, works or plantations thereon and in due-course, durably, increases the land's value (art.62CCII).

It should be noted clear that, the duties mentioned above that go hand in hand with the acquisition of the Emphyteutic right does not in any way exonerate the Emphyteutic leasee from paying some rent to the real proprietor as agreed upon in their contractual provisions (normally paid annually).

An Emphyteusis cannot, according to Rwandan law, be established for a term exceeding ninety-nine years (99 yrs). Where a longer term has been stipulated, it must be shortened and brought down to meet the ninety-nine years. Within this period of emphyteusis, the Emphyteuta is free to use and enjoy the immoveable (land) in any way he likes just as any good owner. He/she can hunt, fish, extract rocks, clay or other similar materials from the immoveable and can cut down trees for the purposes of building or making improvements on the property. An Emphyteuta has the right to change the nature and purpose of an immoveable where he/she wants to increase its value (art.64(3) CCII). Though the Emphyteutic leasee is free to extract rocks, clay and the like, the law (art. 65 CC.BII) does not allow him/her to open mines, quarries, and peat bogs which were unopened at the time his/her emphyteusis was acquired.

As an Emphyteuta, he/she can dispose of his/her right, mortgage or hypothec in the immoveable or even impose servitudes on this immoveable for the duration of his enjoyment.

The civil code (art.71 CCBII) provides for the situations where the Emphyteuta can be deprived of his/her right over the property and instead pay some damages to the real proprietor. These situations include;

1) Where the Emphyteuta is in default of paying three consecutive annual rents, or even for any default of payment, if the emphyteuta became bankrupt or insolvent.

2) Where the emphyteuta showed grave negligence in executing his charge of maintenance and raising the value of the immoveable (Land) and lastly,

3) For any serious abuse of his right of enjoyment.

In as regards to what follows after the termination of the Emphyteutic period, the procedure and the rules are the same as those for the superficiary, even to what concerns the buildings and other constructions erected by the emphyteuta.

An Emphyteuta has to be given an emphyteutic title from the state, subject to the application of art.36 of civil code Book II. The registration of any transfer of property involving emphyteusis on state land is made by inscription of hypothecs (art.74 (2) CCII).

Section 3. OVERVIEW OF THE 2005 ORGANIC LAW ON LAND USE AND MANAGEMENT IN RWANDA

§1. Introduction

The land Use and Management Law seeks to address a number challenges to Rwanda's land regulations, including land insecurity, industrialization, and unsustainable plot size. It emphasizes commercial exploitation through large-scale farms that produce cash corps and announces a consolidation goal that will force famers with multiple, non adjacent small plot to merge their holdings with others. It also creates an apparatus for the systematic registration of all land and for issuing private titles, in a dramatic shift away from the previous system of state ownership. The 2005 Land Use and Management Law formally abolishes every form of customary tenure, but especially *Ubukonde* (article 86). The objective of the law is to ensure better land management while conferring security on the existing occupants of the land.

Drafters of the land Use and Management Law were urged to respond to some outstanding points. Here is a summary:

§2. *Land categorization in Rwanda*

Pursuant to the present law on the management and use of land in Rwanda, land is categorized in different ways; 1) Urban and Rural land which is defined as that land that is confined within the boundaries of towns and municipalities as established by the law. It should be reminded that, after the reform in the administrative structures of 2006, towns and municipalities exist no more. The law accords to the president a prerogative to issue a presidential order determining any additional area considered to be urban land and which is adjacent to the already established urban land.

2) Individual land is another category. Art.11 of the organic law considers the individual land to be that land that has been acquired through custom, written law (e.g. through contract or succession etc.) which excludes public land or that that belongs to any administrative entity.

3) State Land which includes that of public domain which consists of all the land that is meant to be used by the public or land that is reserved for organs of state services as well as national land reserved for environmental protection (arts.12 and 13) and that of private domain of the state which consists all other land that is excluded from that of public domain (arts. 14 and 15). Such land that falls within the private domain is that state owned land that is not included in state land that is reserved for public activities, infrastructures, and that land that does not belong to districts, City of Kigali or to individuals.[29] In addition to the different categories of land that are enlisted under art. 14 of this law, it also goes without mention that Escheat land[30] is also included under this category.

4) District land is that which is meant for the public activities of the District. It should be noted here that the District can have both the land that falls to the public domain as well as that of the private domain (arts.17 and 18 respectively).

§3. General Principles

A. Land is the common heritage of past, present and future generation (article 3 of the land law)

Land is the most important productive asset owned by most Rwandan households. For this precious heritage to be sustained, it requires two things in particular. First, everyone has rights and obligations regarding the land. Second, the State must act to guarantee this heritage for the benefit of present and future generations. Thus, there is both an individual and a State responsibility for ensuring that land is properly managed and used. Again this principle relies heavily on rational management and use of land in favour of the country's development.

The State is still recognised as having overall responsibility for the proper management of land, in order to implement its development strategy for the benefit of its people and ensure their food security. As part of the drive to obtain optimal benefit from this most significant of the country's resources, the law specifically requires landowners to cultivate or improve their property and contains provisions for the State to expropriate land where its owners fail to take advantage of it and leave it unused for an extended period of time.

B. Equal access to land

In article 4, the land law addresses gender imbalances in customary land tenure confirming that any form of discrimination in matters of land ownership, including gender discrimination, is prohibited. The first step in this direction has already been achieved in with the 1999 Law on Matrimonial Regimes and Succession which allowed women to inherit the property of their

[29] Art. 14 of the Organic law on the use and management of land.

[30] A piece of land without any person having particular rights over it; whether it was never owned or was abandoned by its owners for a longer period and it became vacant or it is impossible for an individual to own it. (art. 2 (9)). Escheats can also be, as the law on succession of December 1999 provides, that land that had been owned by someone who died intestate and did not have any kin, relatives, or anybody to claim over the land that is left by the deceased (decujus). Such land after the stipulated period of publicity will become escheat and owned by the state.

husbands where previously, it had traditionally passed to the husbands' heirs (article 70). Further in the text, the Land law reminds us that only legally married women and their children can inherit (article 36). More, however, is required – notably, education for the population as a whole, and the introduction of appropriate administrative procedures to ensure that these newly acquired rights are disseminated, implemented and respected.

It is nevertheless good to note that the present law opens ownership rights to nationals just as to foreigners, to physical as to moral persons. The procedure for the authentic acquisition of ownership (with authentic documents) as the present law suggests is determined by the Minister having land in his/her attributions.

C. Equal protection of the rights over the land acquired from custom and the rights acquired from written law

Even though the 2005 Land Law abolishes every form of customary tenure, it still recognises rights over land acquired from custom pending the registration thereof. Thus article 7 states that: 'This organic law protects equally the rights over the land acquired from custom and the rights acquired from written law. With regard to law, owners of land acquired from custom are all persons who inherited the land from their parents, those who acquired it from competent authorities or those who acquired it through any other means recognized by national custom whether purchase, gift, exchange and sharing'.

§4 . Innovative features of the 2005 land law

A. The creation land commissions and land bureau at each level of administration

In the process of the acquisition of land, the 2005 Land Law provides for the creation of national, provincial and district-level land commissions to conduct land regulation. Article 8 requires that at each level of administration, these authoritative bodies include women.

The law provides for the establishment of a land bureau at every district level (art.31) that is tasked with the land registration exercise. Such a bureau is headed by the Lands officer whose role can be equated to that of the *conservateur des titres foncier* in the previous law. Except for the general ones, other tasks and functioning of the land bureau are supposed to be determined by the order of the minister having land under his or her attributions, which order is not in place at the moment.

B. Universal Registration of land

The land law also states that the 'Registration of land a person owns is obligatory' (article 30). More specifically, Land Officers will be appointed to 'keep land registers and issue certificates approving ownership of land' (article 31). This is a significant shift away from the previous land tenureship practice, in which only a fraction of all land was titled. This universal registration will provide land users with more certain rights and thereby promote investment of labour and capital in increased productivity, and the sustainable development and management of land resources. In addition land registration could extend the tax base in rural areas.

Article 32 provides for the documents that will have to accompany the application for the registration of your land. These include those that provide the full identity of the applicant and expressly indicating his/her marital status. Where it is for the married person whose matrimonial regime is the community of the property, the full identity of the spouse will also

be required. This is quite logical as this would mean shared ownership of the same property. The description of the land whose registration is sought is also a prerequisite just as having justifying documents from the local authorities concerned to prove that the applicant is truly the owner.

There are various problems attached to the registration of land in Rwanda, among which we note the following:

a) The population has not yet been sensitized to or educated regarding the registration of their lands. They have no interest in this exercise since they are convinced, even without the registration; the land that was given from their forefathers automatically belongs to them.

b) They also claim that the registration exercise itself is not only complicated but especially the transfer of ownership where one wants to dispose of his/her land. When you sell or give away a portion of the registered land, it will be necessary to call for the new certificate and registration of the transfer of this ownership. If the land is not re-registered the ownership will remain with the one who sold or transferred it. So, such legal complications and perceived difficulties limit the people's rush to register.

c) Another problem is the delay in this exercise caused by lack of the technical staff to effect it.. This is accompanied by lack of suitable and effective equipment to facilitate the exercise, such as computers, suitable software and other accessories which would otherwise simplify the work.

d) Last but not the least, is the fear of taxes. A tax is imposed on every immoveable that has been registered. This tax has to be paid annually and whenever such an immoveable is sold, a duty or deposit of 6% of the total cost of that immoveable is given to the administrative authority where this property is located.[31] This does not encourage registration. It should however be noted that, there is an express will by the government to scrap this percentage and replace it with a flat rate not exceeding 20.000Rwf.

C. Consolidation and commercialisation of rural land

Scattered settlements, lack of land law and policy need a framework for the use and management of land. Land should be managed by written law and appropriate mechanisms. The land Use and Management Law grants the state the power to consolidate land 'to improve rural land productivity' and delegates authority to establish procedures for consolidation to the Ministry of Agriculture (article 20). Articles 61 and 62 impose productivity requirements on tenants. Article 63 designates 'the relevant authorities' as the promulgators of criteria by which to assess productivity. Articles 73 and 74 confer local and national-level officials with authority to impose sanctions on landowners who are not sufficiently maximizing productivity and to confiscate unexploited land.

These measures indicate a clear policy shift towards commercial exploitation over subsistence farming. This land consolidation would come down to encouraging increased production through formation of adjacent plots with similar crops. Nobody will lose their plots but each person will have the responsibility to register his/her plot separately (see article 20).

Another new issue under this new law is that, one is not that free to "alienate" his piece of land in any way as he/she may wish. Where one owns a parcel of one or less hectare, he/she cannot reduce or divide it further (art.20 (3)). In other words, he cannot for example sell any piece of it save where the parcel was not meant for agricultural purposes. Implicitly, one can conclude

[31] Generally, this should be the district as it used to be in the previous law. However, the tendency of decentralization and considering the current trend, it is obvious that in a few years such activities and therefore the charges will be for the sectors since they have already taken over most activities that were previously being performed by districts.

that where that piece of land was meant for settlement purposes for example, sale of part will not be forbidden. Where the land is meant for agriculture, the owner of land that is between one and five hectares will only be free to divide his/her land upon authorization from the land commission at the level of jurisdiction where the land is situated; *(Section four of chapter three (art 31-32) is dedicated to land registration).*

D. Transfer of rights over land

The land law authorizes landowners to freely transfer rights over the land. Thus 'Rights' based on Land may be transferred through different individuals or it may be guaranteed through succession; it may be guaranteed gratuitously, leased or sold; it may be mortgaged according to requirements and procedures provided for by ordinary civil law' (article 34). However, for the family interest's sake, final transfer of rights on land by sale, donation or exchange by a representative of the family requires the prior consent of all other members of the family who are joint owners of such rights. This consent is indicated by a document signed or finger printed by the concerned people, and done before a registrar of civil status or before the registrar of lands of which he or she shall record in his or her registers (articles 35 and 37).

§5. Rights and obligations of the landowner

A. Nature of rights over land

The principle states that every Rwandan should have the right to access land without any discrimination. However, the right to access the land and the right to own land are very different. The land law says of ownership over land but when we look at its provisions, we find that this is not complete ownership (Article 3); one could argue that the real nature of these rights is that of long-term leases. For example article 5 of the Organic law states that 'Any person or association with legal personality that owns land either through custom, or who acquired it from competent authorities or who purchased it are allowed to own it on long term lease in conformity with provisions of this organic law'. However, ' Any person whether a Rwandan or a foreigner who invested in Rwanda, or an association with legal personality shall enjoy full rights of ownership of land reserved for residential, industrial, commercial, social or cultural and scientific services (article6). Even for this category, the State retains rights to expropriation (with compensation) due to public interest (article 3).

Under this system, the State retains its ownership of the land but "loans" it to an individual for an extensive period (For exact term of land leases see articles 6 and 7 of the Presidential Order N° 30/01 of 29/06/2007 Determining the exact number of years of land lease). This gives the individual the necessary sense of security to encourage investment in the land but allows the government more easily to dictate how the land should be used and managed. Nonetheless, even with long- term leases, come rights which can be sold, exchanged or mortgaged in much the same way as rights of ownership.

B. Scope of rights over land

Rights based on Land may be transferred through different individuals or it may be guaranteed through succession; it may be guaranteed gratuitously, leased or sold; it may be mortgaged according to requirements and procedures provided for by ordinary civil law (article 34). The State recognizes the right to freely own land and shall protect the owner from being dispossessed of the land whether totally or partially (art.56).

The land law states that ‘all buildings, crops and other works found on land are presumed to have been performed by the owner of the land using his or her money or otherwise, and are presumed to be his or hers in case there is no proof to the contrary. However, this does not prohibit any other person to own buildings, crops or any other works on other persons' land in procedures provided for by law’ (art. 57) In addition the law entitles any person deprived of land ownership to receive a fair and prior compensation, such expropriation must be in public interest, which itself is left to the appreciation of the authorities concerned (whether national or local authorities) (art. 67).

C. Limitations of rights over land

The ownership of land under the new organic law governing the management and use of land in Rwanda is without doubt limited in some respects. First, the landowner has no right over minerals or any other wealth underground; they belong to the State. However, he or she is allowed before others to enjoy rights of their exploitation upon his or her request and if he or she is capable (article 55). Secondly, the landowner(s) shall enjoy full rights to exploit his or her land without prejudice to laws related to human settlement, general land organization and use. For example a landowner cannot freely decide to plant trees on a land earmarked for housing invoking his or her ownership rights or building houses on a land not earmarked for that purpose (article 54). Thirdly, a landlord shall not hinder underground activities or those in the space above his or her land when such activities are of general interest. If such activities cause any loss to him or her, he or she shall always receive appropriate compensation (article 67). Lastly, the landlord shall not act against other people's rights by refusing access to his or her neighbours homes when there is not any other way, blocking water that is naturally flowing through his or her land from other persons' land above his or hers, or refusing other people to draw water from a well found on his or her land unless he or she can prove that such a well has been dug or built by him or her; unless it is considered to be necessary(article 60).

D. Obligations of the landowner

The landowner, as well as any other user of the land is obliged to obey laws and regulations regarding protection, conservation and better exploitation of the land (article 61). Assignment, concession and lease contracts shall specify conditions to be fulfilled for the conservation, and exploitation of the land in accordance with the intended use of the land (article59).

Landowners shall always respect clauses in the national general land organisation and utilisation plan (article 66). They also have an obligation to pay land tax determined by a specific law (article 68). They also have an obligation to register their land (article 30).

§6. Prescription term relating to land rights acquisition

Prescription has a particular meaning in the Rwandan context. In general, some acquire land by prescription if they are the uncontested occupant for a certain period specified by law and genuinely believe during that period that no one else has any rights to the land, e.g. they believe it is vacant or voluntarily abandoned. In Rwanda, the notion of acquiring land by ‘’prescription’’ refers to the rights acquired by those who took over the properties of the Rwandans who fled into exile in 1959 and during the sixties and seventies. The 1993 Arusha

Peace agreement stated that anyone who has been absent from Rwanda for more than ten years should not reclaim their property if it has been occupied by someone else (Article 4). This was agreed by the warring parties at that time because they knew that there would be massive social tension if people who had fled the country decades earlier suddenly returned and tried to reclaim their properties. However, this provision is quite controversial in law because it cannot be said that the refugees left their homes voluntarily and relinquished rights to their property. Moreover because of the occurrence of genocide in 1994, part of provisions of the Arusha Accords became inoperative. However since 1996 the government addressed the issue in a way to improving social harmony. Thus in some provinces, it facilitated the sharing of land between the land occupiers and the returnees. Still a law was needed to regulate the question.

Accordingly the 2005 Organic Law, "in matters related to land, the right to pursue landlordships shall be prescribed for thirty (30) years)" (article 70). "Persons, who by force, or through fraudulent means, occupy vacant and escheat land or other people's land, cannot invoke the interests of the right to prescription to claim that the right to pursue the land extincted*(sic)*, prescribed or that they have full ownership, even if they have occupied it for a period longer than the period of prescription." (article 71). Persons who own other people's property, whether borrowed land for use or residential houses found on that land shall not definitively own the land due to reasons of prescription whatever the length of the period of time of their occupation (article 72 para. 1). Among the members of the same family, there shall be no extinction of rights of prescription. If a person disappears, although he or she spends a long time, at any time he comes back he can pursue his or her rights in accordance with the family civil code (article 72, para. 2). This provision aims at protecting the family interests. The 2005 Land Law recognises land sharing which was conducted from the year nineteen ninety four (1994) and states that holders of such land shall enjoy the same rights as those under customary holdings. However, matters related to this sharing of land are not subject to compensation that is provided for by this organic law (article 87).

§7. Penalties

The current law provides for both administrative as well as penal sanctions. Of the administrative sanctions is the confiscation of the degraded or unexploited land. Such sanctions will be imposed following the reports that will have been given by the land commission that will have monitored the use of the land by the owner. The owner will however, after proving the capacity to exploit the confiscated land, have a right to repossess this land through a request that will be submitted to the lands commission (art.78). The penal sanctions on the other hand will include imprisonment as provided for by the penal code and this law, as well as fines.

§8. Settlement of disputes over land rights

Matters arising from land disputes are heard by competent courts and through procedures provided for by law. Before the matter is taken to the court, the parties to the dispute are required to seek a solution of the problem from the mediation committee at Sector level. This concerns the land that has no authentic title deeds (article 53).

Extra-contractual or tort obligations arise from one's act or omission which causes a damage to someone or his/her property (for example, from wilful acts or negligence). Extra-contractual obligations are subdivided into tortuous and quasi-tortuous obligations.

- Example of tortuous liability arising from intentional homicide, voluntary injury, etc. (Art. 258 CC B II);

-Examples of quasi-tortuous (non-intentional) civil liability/obligation results from negligence, civil action arising from non-intentional homicide (manslaughter), involuntary injury, etc.

Chapter 13 – Nature and Classification of Companies

The expression "company law" may be defined as a branch of law governing the companies. It deals with all aspects relating to companies, such as incorporation of companies, allotment of shares and share capital, memberships in companies, borrowing by companies, management and administration of companies, winding up of companies. Thus, the company law is that law which exclusively deals with all matters relating to companies.

A. DEFINITION OF COMPANY

In Rwanda, commercial companies are governed by the N°07/2009 of 27/04/2009 relating to companies.

The concept of commercial company is defined on article 2, 12° of company law as a corporate body composed of one or more persons for making profit. Thus, is legal sense, a company is one which is formed and registered under the companies' law aforementioned.

It may be noted that legally, a company is regarded as a person, which has rights and duties at law. However it is not a natural person as human beings are. It is only a legal or artificial person, recognized by the law. Since, the company is created by the law *i.e* by registration under the law, it is known as a legal person, and as it has no body, no soul or conscience, no physical existence except in the eyes of law.

According to the legal definition of the company under Rwandan law, it is evident from this definition that the contractual character is not more compulsory for companies. Article 3 of the law goes on to say that a company is a legal entity which is made up with one physical person or corporate person for commercial purposes and after filling in a form thereto related and basing up on the provisions of this Law. The company shall be formed by filling in the form attached herewith as Appendix I.

In addition article 2, 16° defines a corporation by eliminating all categories of persons which are not regarded by this as body corporate, they include:
a) a statutory corporation;
b) a sole proprietorship;
c) a registered co-operative society;
d) a trade union;
e) a registered organization;

At the face of the above list, one sum up the list of exclusion as follows: the first element corresponds to a government company which may be a trader such as RECO RWASCO or ONATRACOM. The second category excluded from corporation merely because the trader in this category is a real person (not a group of individuals putting together their credit and assets). The last three categories are rather civil society organizations.

The contractual conception of the company prevailed for a long time. It has been followed then by another tendency that considered the company like a mixture of both the notions of contract and moral person to some extent depending on the type of companies. The present conception has the tendency to become gradually a combination of two notions but with a predominance of the institutional conception of a company.

B. THE COMPANY AS CONTRACT

Insofar as a company is a contract, it supposes a minimum of two parties and thus complies with general conditions of validity of the contracts with regard to its incorporation: consent of the parties, capacity to inter into agreement, actual object and legal cause.

However, besides the above conditions common to all contract, a company contract has particular conditions. The mere contractual explanation is indeed insufficient insofar as the legislator regulates in an imperative way conditions to create a commercial company.

In the same way a company legally comes into existence after its compliance with an administrative formality of registration with the Office of the Registrar General (art.4).

As with regard to company contract, the shareholders agree to put in together the values, goods or how know in order to share the profits.

The content of this agreement governs the functioning of the company. There is no company contract unless there is a combination of the following elements:

- The shares from one or several shareholders;
- The vocation of all to the profits;
- The *affectio societatis*.

C. SHARES

In order to contribute to the formation of a share capital of the company, every shareholder must commit to make a share and is debtor of the share that he vowed to give. He owes to the company a guarantee similar to that of the seller in case of eviction. The share differs from a sale in that in return to the good of which it property transferred, a shareholder doesn't receive a price, but titles representing the share capital of the company which is the beneficiary of shares. Besides, to the difference of the sale that is a commutative contract, the share has an uncertain character because even though a shareholder knows the value of that he brings, he ignores the value of the share that he receives in return.

The company contract implies therefore putting together shares by each of the contracting parties. The share indeed, is the good which is transferred to the company by the shareholder in trade of which he is entitled some shares. In other words, it is good that the shareholder commits to put at the disposal of a company for a common exploitation. The notion of shares is instrumental to the constitution of a company, especially when it comes to corporations, where without share the whole idea of a company lacks substance. Article 31 of company law states Share capital shall mean all the shares received whether paid or not. The same article refers to other types of shares other than in cash without précising whether they are physical or know how as it was the case in the previous law.
A contract involving shares implies two kinds of successive contract:

- the commitment to issue a share: the subscription
- the actual performance of the obligation which entails the dispossession of share to the profit of company: fulfillment.

In principle, the proportion of share capital which must be availed at the time of the subscription and that of the date of the calls for the outstanding is determined by articles of association. In return for his contribution, the shareholder gets some shares. Article 77 of company law provides, any shares created or issued after the commencement of this Law may either be of par value or of no par value.

1. The share par value

The share is said to be paid in cash or par value when the contribution is nothing other than money; which is the most usual and simplest of the shares.

2. The share no par value

It consists in a contribution of a physical or incorporeal good. In other words, it is any share apart from those paid in money or in industry. The rule is that any goods that are legally in trade may be object of a share.

D. VOCATION TO PROFITS SHARING

The company is constituted to achieve profits which will be thereafter shared between members. Thus, the decisive criterion is not the search of profits but the sharing of profits between members. It is this criterion that distinguishes a company from an association. With the latter, profits are not shared between the members.

The term profit has three possible significances:

- to begin with, it has been considered as a way of making money or a positive gain;
- then profit their benefit when there is an economy out of an expense;
- finally the profit is any pecuniary or material gain that is added to the fortune of the shareholders.

The profits and the modes of payment depend on the contractual will of the shareholders. The shareholders can adopt in the articles of association modes of distribution, but when the articles of association are mute, distribution of profits is proportionate to shares held by every shareholder.

Indeed, their profits should be measured against the involvement in investment. Also shareholders commit to contribute to losses.

E. AFFECTIO SOCIETATIS

Two essential elements at stake are estate sharing and vocation to the profits, it is necessary to add an intentional element which is in Latin "*affectio societatis* ".

This notion is multiform, as it is subject to several doctrinal definitions. The least common denominator is the will of all shareholders to collaborate, on an equal footing to the success of the common enterprise; this common will must not exist at the time of the creation of the company only, but must also continue during the whole social life. The *affectio societatis* is often strong in small size company but inexistent in the immense majority of companies ranked in stock market.

In short, the *affectio societatis* must be understood as the shareholders desire to unite in order to collaborate to the common enterprise success without any subordination to one another while accepting common risks. Some authors estimate that *affectio societatis* is of no value, since the contract of company requires the consent. It is therefore obvious that this contract implies the intention to create a company. The *affectio societatis* is however more of a feeling than a legal concept.

F. COMPANY AS INSTITUTION

Once formed, a company must appear as, a living organism, oriented toward a profit meant for its shareholders.

In order to achieve that, the company is provided with organs to allow it decide without requiring its shareholders consensus.

What is evident is that the company contract doesn't have for main effect to create the subjective rights and obligations, but rather create that of its shareholders and issues rules to such group. It is that organization that is referred to as an institution.

The institutional theory is enshrined by the law, since article 2, 12 of company law defines a company as being a legal entity.

It is necessary to underline however that neither of these two theories, contractual or institutional, is satisfactory enough in itself to exclude the other. This is how the legislator took into consideration both aspects.

G. FORMS OF BUSINESS ORGANISATION

Civil law distinguishes in the first place between a combination of individuals for the purpose of profit and a combination for some other purpose. The business association is termed a company, whereas any other combination is termed an association.

COMMERCIAL ACTIVITIES

General notions (Generalities)

The Decree of August 2nd, 1913 on Traders and the Proof of Commercial Agreements uses the expression "commercial activities" without defining it. It is almost impossible to have a unique notion of lucrative (commercial) activity because of the diversity of its forms.

Although it is next to impossible to enlist all possible commercial activities, the decree of 1913 has attempted an exhaustive list of what might be regarded as commercial activities under Rwandan law.

It is important to bear in mind that this list must not be interpreted strictly for two reasons:

Commercial activities are both changing and limitless and

The Decree law that is being referred to was enacted more than 85 years ago.

All commercial activities present a common character; they are made in order to gain a profit. The spirit of lucre must characterise the commercial operation. Without this, the activity is not commercial.

Enumeration of commercial activities

According to the provisions of article 2 of the decree of August 2nd, 1913, commercial activities can be divided into three broad categories:

- Commercial activities by nature;
- Commercial activities by form;
- Commercial activities by relation or by the theory of accessory.
- Very often, mixed commercial activities are considered but they do not constitute another category; they are merely a modality of commercial activities. They are activities, which present commercial character for one of the parties.

COMMERCIAL ACTIVITIES BY NATURE

Some activities are commercial even when they are isolated and others must be repeated (theory of enterprise or "venture").

Definition of a commercial organisation

The commercial company is a legal person which is the result of a contract ofseveral persons who agree to contribute their assets in cash, in kind or in the form of services to an activity for the purpose of sharing profits or benefits or losses arising there from.

H. DISTINCTION BETWEEN COMPANIES AND OTHER BUSINESS ORGANISATIONS

Rwanda law recognizes five types of commercial companies:

1. General partnership;
2. Limited partnership;
3. Partnership limited by shares;
4. Private limited company:
5. Public limited company.

These commercial companies are commonly separated into two groups: partnership or companies where the liability is not limited and a company or partnership who's liability is limited by shares. The former includes the companies of the first, second and fourth types, in which, in principle, the interests of the participants are neither assignable nor heritable, The rationale for the interest of the participants not being assignable nor heritable is that the personality of the participants is of paramount importance. The organisation with shares, on the other hand, which comprise, the third and fifth types, fulfil the same functions as the public limited company.

The company being the result of a contract comprising several persons, a couple i.e., husband and wife may by themselves or in association with other persons be partners in the same company and take part together or not in the management of the company. However a husband and wife may not be partners in the same partnership or private company in which they shall be jointly and severally liable without limit for the debts of the organisation.

I. LEGAL STATUS OF COMPANIES

Every company shall be a public company unless it is stated in its application for incorporation that it is a private company.

Type 5 above – a Public Limited Company shall be:

1. a company limited by shares;

2. a company limited by guarantee;

3. a company limited by both shares and guarantee;

A company limited by shares and by guarantee may be public or private. However, a company limited only by guarantee or an unlimited company shall not be public.

Where the liability of the shareholders of a company is limited, the registered name of the company shall end with the word "Limited" or the abbreviation "Ltd".

PRIVATE LIMITED COMPANY

The private limited company must have at least two members and a maximum of 100 members, Employed or formerly employed not included *(Article 8).* The minimum capital required is 500.000frw and the capital must be entirely subscribed and paid up. The capital shall be divided into equal shares whose face value shall not be less than 1000 Frw.

The public are not invited to be shareholders, no prospectus is to be issued

Company name: The company's name may either be one descriptive of its business or one composed of the names of one or more of its members, In either case the name must be immediately followed by the words Limited.

Limited Liability: As the name suggests the liability of members is limited to the amount of their contributions.

Management: Management is insured by a Board of Directors (BoD) or managers. It is by the law that on the BoD, there must be a minimum of 3 up to a maximum of 12 directors.

Transferability of shares: Shares cannot be offered to the public., except the articles of association provide otherwise. Shares may be freely transferred between shareholders, the spouse of the transfer, the deceased shareholder orthird party as prescribed by the articles of association.

Dissolution: The death, bankruptcy, incapacity or retirement of a member does not involve the dissolution of the company unless the articles of association so provide.

PUBLIC LIMITED COMPANY:

According to Article 7 of Law 7/2009 - " Every company shall be a public company unless it is stated in its application for incorporation that it is a private company".

In order that a public limited company is validly constituted there must be a minimum of seven members. There are two types of public limited companies: a public limited company that does not offer its shares to the public and one that offers its shares to the public. In the former case the minimum share capital required is 100.000.000frw while 200.000.000 frw is required in the latter.

Company Name: It is forbidden for the name of a shareholder to appear in the company name. The name of the company must be followed by Limited or Ltd.

Liability: As the name suggests the liability of the shareholders is limited to the amount of their contributions.

The incorporation procedure for a company that offers its shares to the public requires the completion of a series of acts. Drawing up and publication of the draft articles of association in the Official Gazette (OG), publication of the prospectus, subscription of the share capital and payment for shares. In the second place, there must be a statutory meeting of the shareholders with a notary attending. This meeting (i.e. statutory or constituent meeting applies to both types of limited company) must appoint not less than three and not more than twelve persons, adopt the Memorandum of Association and, if there are to any, the articles of association. It must also appoint one or more auditors whose function is to watch over the accounts in the shareholders' interest.

The acceptance of their office by the directors and auditors marks the birth of the company. But it is still essential for the details of the company to be registered with the Office of the Registrar General before the company can start doing business. The company must also comply with publication requirements.

It is a condition of valid incorporation that where the share contribution is in kind this must be entirely paid up at the time the company goes operational while where the contribution is cash 1/3 must be paid up when the company goes operational and the balance within two years of the company's existence

THE LEGAL STATUS OF COMMERCIAL COMPANIES

When commercial companies have been constituted they are required in law) to register with the Office of the Registrar General before commencing any commercial activity in Rwanda. Upon registration a commercial company acquires legal personality. This is to say that it is treated as an entity separate and distinct from that of its owners. Hence it is capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members except to the extent and in the manner provided by law. The consequences of legal personality are that the commercial company possesses

- a name;
- domicile;
- nationality;
- patrimony.
- One or more shares
- Limited or Unlimited liability
- One or more diretcors
- A business occupation – *Memorandum and Articles of Association*

1. The company has a name

All commercial companies must have a name. Commercial companies of which the liability of its partners is unlimited i.e. partnerships (general and limited partnerships) have a firm name which comprises the names of all the partners or of some of them. As regards commercial companies having shares the name of the company must be followed Limited or Ltd. Note that although the owners of a commercial company are at liberty to choose a name for their company, the name must not be identical or too similar to the name of an already registered company.

2. The company has a domicile

A commercial company also has a domicile, which is distinct from that of its individual members. The domicile is the place where the commercial company has its principal place of business i.e. its registered office. The registered office is the place where the company has, principally, its legal, administrative, financial and technical office as opposed to where it merely does business (irrespective of its importance and the presence of a secondary administrative or ex[ploitation unit).

The distinction between the registered office and the exploitation office is important for it is the registered office that determines the territorial competence of the court, in the event where someone institutes proceedings against the company, the place where an action in bankruptcy can be instituted, including the nationality of the company.

3. The company has a nationality

A commercial company has a nationality, which is determined by the laws of the country, which regulates its organisation and functioning (definition of powers of management, procedure of shareholders meetings, rules as to liquidation etc.).

4. The commercial company has a patrimony

The commercial company has a patrimony, which is constituted by its assets and liabilities distinct from that of its members. Although the members of the company make a contribution which constitute the patrimony of the company they do not have ownership rights over company property, all they have during the life time of the company is a right to a claim during the distribution of the assets of the company. Note that the patrimony of a company serves as security to its creditors.

5. The commercial company acts through its legal representatives

Although the commercial company possesses a legal personality, as it is not a human being, it cannot act for itself.

It is represented in its daily activities by human beings - managers. It is through these persons that the company can acquire and dispose of property, institute legal proceedings as well as defend an action against the company However, the company is liable for the wrongful acts committed by its legal representative as far as civil matters are concerned.

THE DISAPPEARANCE OF LEGAL PERSONALITY

When a commercial company acquires a legal personality the personality does not persist for life i.e., it is not permanent, some day it will end. The disappearance of legal personality is the consequence of dissolution of the company, which entails the dissolution and distribution of its patrimony among shareholders (partners).

1. Causes of Disappearance

The causes of disappearance are of two types, the one is applicable to all commercial companies; the other relates to individual partners and is restricted to those companies in which the personality of the participant is fundamental.

a) General Causes

There are four general causes:

1. A commercial company established for a certain and defined period of time dissolves at the end of that period in the absence of a resolution extending its life.

2. A decision taken by the shareholders (partners) to dissolve the company before the time agreed upon.
3. Loss of the object or impossibility of performance
4. If the object has been attained

b) Peculiar causes

The causes peculiar to an individual do not apply to all commercial companies. They relate exclusively to partnerships. Accordingly the death, incapacity or insolvency of a partner will result in dissolution.

However in practice, partnership agreements usually contain a provision (clause) making it possible for the partnership to continue doing business not withstanding any of the above causes that may lead to its dissolution.

A partnership cannot be dissolved by the unilateral will of one partner except if he acts in good faith. The last cause for dissolution, which is applicable to all types of commercial companies, is the dissolution for just cause. Here dissolution may be requested by an individual shareholder or partner. The just cause is left to the appreciation of the court. Some of the factors, which may be considered as just cause, include failure by a partner to respect his obligations, permanent disability of a partner, antagonism that makes it impossible for the partners to work together etc.

Note that the regular transformation of a commercial company from one form into another shall not entail the creation of a new legal entity. The same shall apply to an extension of the existence of a company or any other amendment of its Articles of Association (partnership Agreement) with formalities of publication both at the time of constitution (formation) to any amendment of its Articles of Association (partnership Agreement)

COMMERCIAL LAW

INTRODUCTION

Law is a social science: it has to provide for the changing needs of a developing Community and consequently is inseparably bound up within the community it has to serve. For a thorough understanding of the law, it is essential to have knowledge not only of the community in which it functions, but also of its history and of the factors, which led to its origin and development. This is one of the reasons why every study of the law includes a study of the history of the law. Another reason is that a knowledge of legal history helps in evaluating probable trends of future development.

Rwandan commercial law, unlike for example most European continental legal systems, is not codified (that is recorded in one comprehensive piece of legislation) a knowledge of the law applying in the Republic is based on Roman-Germanic law. This means that our system finds its roots in Roman as well as in Germanic law. Although Rwandan commercial law is based on Romanic law, we shall not analyse the Romanic law instead, we shall concentrate on basic principles of Rwandan commercial law.

Commercial law or business law is in essence part of private law and regulates legal relationships, which are commonly found in commercial life.

DEFINITION

The term Commercial law known as Mercantile Law may be defined as that branch of law, which comprises laws concerning trade, industry and commerce. It is an ever-growing branch of law with the changing circumstances of trade and commerce.

With the increasing complexities of the modern business world, the scope of commercial law has enormously widened. It is generally understood to include the laws relating to contracts, sale of goods, partnership, companies, negotiable Instruments, insurance, insolvency, carriage of goods, and arbitration.

The commerce is the exchange of merchandises or services especially on a large scale: buying and selling. Commercial law can be defined as a body (*corpus*) of judicial rules relating to the commerce. This means that it is the law which governs traders and commercial related activities.

Commercial rules only apply to a determined category of persons, traders, for activities performed in case of their professional activity; To different transactions (operations) or activities to which the legislator has attributed a commercial character.

The commercial law is part of private/civil law which regulates matters between individuals. It is a branch of civil law that deals exclusively with the juridical implications of commercial activities either among traders themselves or between traders and their customers. The commercial law is thus a special law distinct from the civil law which constitutes its basis: some provisions (articles) apply where the commercial law or commercial usages do not settle a case.

Commercial activities are primarily governed by a collection of several laws[32] dealing with different aspects of commercial law. It is important to keep in mind that commercial law is neither autonomous nor self sufficient (i.e. it must not be understood that commercial law provides answers and deals with every aspect of commercial and industrial activities), but applies within the general scope of civil law.

Business law is different from commercial law. Business law, may be defined as a branch of private law which by derogation from civil law, regulates in a specific manner activities of production, distribution and services.

Business law is seen by a majority as being more extensive than commercial law, which was traditionally perceived as the private law of commerce. Business law encompasses questions which are under public law (intervention of the state in the economy) such as tax law, labour law etc. Business law also encroaches into civil law, notably in the protection of consumers. In addition, business law applies not only to traders, but also applies to non-traders such as farmer and members of the liberal profession.

NECESSITY OF COMMERCIAL LAW

The exercise of commerce cannot always follow rules of the private law because:

It requires conditions of:

- *Promptness*: the speed of commercial operations and their frequent repetition require a minimum of formalities that is not necessary in private law:
- *Credit (or loan)*: hence the creation of documents allowing the raising of debts (credits);
- *Guarantee*: with regards to the importance of credit the guarantee of debts must be provided. In this case, dispositions of commercial law will have to be more rigorous (hash) than those of civil law.
- Its proper institutions require a particular regulation. Here, we should notice that till now the institution of commercial tribunal does not exist in Rwanda.
- It uses certain practices which require a certain control.

[32] Such as:

- The Decree of August 2nd, 1913 relating to Traders and the Proof of commercial agreements;
- The Decree of April 24th, 1924 relating to Marriage Settlements of Traders.

- It was thus necessary to have a commercial law adapted to the needs and usages of commerce.

In addition to the above, commercial law facilitates planning. This function of law is very important as business is concerned, e.g. contract and sales law. In making the courts available to enforce contracts, the legal system ensures that the parties to the contract will either carry out their promises or be liable for damages. For example, through contracts, a manufacturing company can count on either receiving the raw materials and machinery it has ordered or else getting money from the contracting supplier to cover the extra expense of buying substitutes.

Commercial law is also used as an instrument to promote social justice. For example, tax laws seek not only to raise revenue for government expenditure but also to redistribute wealth by imposing a higher income tax on wealthy people. The antitrust laws seek to prevent certain practices that might reduce competition and thus increase prices. Similarly, consumer laws among others seek to prohibit the sale of unsafe products.

SOURCES OF COMMERCIAL LAW

The Rwandan law consists of a number sources. Some sources are authoritative while others merely have persuasive authority. Actually, the sources of commercial law are the same as the sources of other aspects of Rwandan law. The sources of Rwandan commercial law, in the order in which they are usually consulted, are the followings:

In order i.e.

- legislation (written law),
- custom,
- the general principles of law and equity,
- courts' decisions (case law) and
- scholarly opinions (doctrine).

STATUTE LAW OR COMMERCIAL LEGISLATION

Legislation is the making of law by competent authority. Today, legislation is the most important source of the law. The law is to be found in statutes enacted by parliament and provincial legislatures.

With Rwandan Commercial law, there is no commercial code in Rwanda. In 1967, there was an attempt, which resulted in a draft of commercial code. However, until now the process of elaboration of a commercial code stagnates. The commercial legislation is made up of scattered legal instruments (texts), which have been introduced in Rwandan law during the Belgian mandate and trusteeship. It is really time for the legislator to enact rules and regulations, which take into account the evolution of commercial profession.

However with all the attempts mentioned above, Legislation may be defined as the setting down of binding rules of law in a formalised way, by an authority, such as that vested in Parliament, or subordinate, such as that vested in administrative authorities.

Parliament may pass any law, subject to the constitution. It may also pass laws allowing other bodies to make certain laws for certain purposes. In this way, Parliament gives administrative authorities the capacity to pass regulations called subordinate or delegated legislation because they are subject to the laws passed by Parliament. If there is any conflict between the law passed by Parliament and any subordinate legislation, the law passed by Parliament will prevail.

Legislation consists of the Civil Code and statutes (law voted by Parliament) together with provisions of legislative acts of subordinate authorities, such as presidential decree and that of other administrative authorities. These constitute the primary source of business law.

CIVIL (PRIVATE) LAWS

As said above, commercial law is not self-sufficient. It does not contain a complete regulation of all aspects of commercial and industrial activities. The civil law must apply to commercial matters as long as an express disposition does not exclude it. If it happens that there is a conflict between the civil law and the commercial law the latter is applied (*Specialia generalibus derogant*) *special things derogate from the general one.*

CUSTOMS, THE GENERAL PRINCIPLES OF LAW AND EQUITY

Certain rules of conducts are observed because it has become customary in a particular group of people to respect such usages. Customary law does not consist of written rules, but develops from the habits of the community and is carried down from generation to generation.

In modern communities where the rate of development is very rapid, custom has less opportunity to develop into law. Once the need for a particular legal rule arises, the legislature simply steps in and lays down such a rule. Yet, even today it may still happen that custom develops into law.

In order for the custom to be recognised as a customary rule:

- It must be reasonable
- It must have existed for a long time
- It must be generally recognised and observed by the community
- The contents of the customary rule must be certain and clear.

It is generally understood that in matters not provided for in the existing law, Rwandan tribunals and courts have to apply local customs and general principles of law and equity. Furthermore, article 98 of the Rwandan Constitution of 1991 calls for the application of customs provided the custom in question meets certain conditions. These conditions are:

- An existing law has not modified it:
- It does not contradict the Constitution and/or any other laws, rules and regulations:
- It is not against public order and good morality.

Article 201 of the 2003 Rwandan constitution also recognises the applicability of customary law. Article 201(3) states that " unwritten customary law remains applicable as long as it has not been replaced by written laws, is not inconsistent with the constitution, laws and regulations, and does not violate human rights, prejudice public or offend public decency and morals".

Customs generated by trade activities may provide the legal basis for matters not covered by the legislation. For example, certain usages within a particular type of trade can become part of the expectations of those engaged in trading activities. The same might apply on some simple activities of buying and selling.

There are two types of customs: contractual customs and binding customs.

Contractual customs are not mandatory; they may be discarded by agreement of the parties. For this reason, it is said that they derive their authority from the theory of contractual freedom. Accordingly, if the parties have not expressly excluded a custom, they are deemed to have adopted it. Note that a custom will supplement a contract when the law is silent on a point.

Binding customs are those that do not depend on the law or the free will of the contracting parties because they are mandatory in character. We find these customs in commercial law as opposed to civil law. A binding custom supplements the law. For instance, there is a presumption of joint liability of creditors as opposed to the Civil Code which provides that there is no presumption of joint liability of creditors.

INTERNATIONAL CONVENTIONS

The implications of international conventions on commercial law have been compounded by recent developments and increasing interdependence in international commercial activities. Some might even argue that the result of these developments might have had same or uniform (unified) international law. The implications of international conventions on Rwandan commercial law are both direct and indirect.

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

Indirect implication of international conventions can be found in the adoption of Rwanda of the Vienna Convention on the International Sale of Goods of April 1980, which deals primarily with external trade relations.

CASE LAW (JURISPRUDENCE) OR DECIDED CASES

The courts and tribunals through their traditional role of judicial interpretation of laws, represent a significant source for both the understanding and application of commercial law rules. It is through this role that different areas of the law are clarified and resolved.

By decided cases we mean a judicial determination of an issue of law in a uniform and consistent manner, such that it has a declaratory force (persuasive weight) in any other case. It does not establish rules of law which are binding in a formal sense, they only possess persuasive authority.

SCHOLAR OPINIONS (DOCTRINE)

Although the doctrine is not considered as a formal source of law it can be consulted in order to create new concepts or to suggest some solutions, which can be followed by the jurisprudence or the legislator.

Doctrine has to do with the opinions of academic lawyers to be found in textbooks, learned journals and the notes to cases reported in law reports. It depends on its capacity to persuade the judges and through them legal practitioners; and its persuasiveness depends, not only on the prestige of the individual academic lawyer, but also on the extent to which the individual judge is willing to be persuaded.

USAGES OR MERCANTILE PRACTICES

The importance of commercial usages comes from the fact that the commercial law must adapt itself to new concepts and the world of business create some relations between professionals and those relations become sometimes habits or usages. The commercial custom and practice can be regarded as one of the essential sources of commercial law.

J. COMPANIES MORAL PERSONALITY

The object of this part is to shed light on the notion of companies' legal personality, show the government position concerning recognition of company moral personality, as well as determine its attributes.

GENERAL NOTIONS ON MORAL PERSONALITY

The legal technique assigns the status of recipients of right to an entity created by man aiming at the realization of different interests to those of natural persons who enliven it. Even though the moral personality is man's work, its conditions of existence can only be determined by the law.

The moral personality likewise the natural personality is nothing else than the faculty to become a recipient of rights and obligations. It consists therefore in assigning to a group of people or goods legal personality.

The modern doctrine considers the notion of moral person as a mere technique devised by jurists in order to succeed in achieving some desirable results only. A moral person has no actual will of its own, but people lend it the will of its organs. The moral person however is entitled to rights and assumes liability as in the case of natural persons despite the existence of its members.

STATE'S POSITION CONCERNING RECOGNITION OF COMPANIES' MORAL PERSONALITY

States are free to recognize or refuse moral personality to such group so that its propensity to granting or refusal differs from a State to the other.

ATTRIBUTES OF THE MORAL PERSONALITY

Legal persons of companies like natural persons stems from several features that one can legally group in two points:

- Anything that serves to identify a company as compared to other companies (a name, an address, a commercial activity, etc.)

- Patrimonial autonomy and the legal capacity of companies.

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Chapter 14
Registration of Companies

The partnership agreement, Memorandum of Association or Articles of Association must be drawn up and or signed by a notary or witness – *see Appendix 1*.. From the foregoing it is evident that the contract establishing the commercial company must be in writing. The nullity must be pronounced by a court. Where nullity of the company has been pronounced it produces effects as from the date the nullity was pronounced. Accordingly it puts an end to the execution of the contract but does not have retroactive effect. Note that as soon as the nullity has been pronounced by the courts the commercial company shall be dissolved immediately and liquidation shall follow.

The decision pronouncing the annulment of the company is required to be published in the Official Gazette (OG) as well as in one or several newspapers designated by judge. The essence of the publication is to notify all those who may be personally affected by the information (publication). The categories of persons who may be interested in the publication are: the shareholders (partners), creditors of the company and the personal creditors of the shareholders. Note that the cost of publication of the court's decision is the responsibility of the company and in case of need by the promoters.

However neither the company nor its members may rely on a nullity as against third parties until the 30th day subsequent to the publication of the decision of the court in the OG, except where the company can establish that the 3rd party knew that the company had been annulled by a decision of the court.

A. PUBLIC LIMITED COMPANY

A public limited company shall be a company formed by natural persons or corporate bodies in which the liability is limited to the amount of their contribution in the capital of the company and the company shares are represented by negotiable instruments called shares. The number of shareholders in the public limited company must not be inferior to seven.

A public limited company shall be known by a company name, which shall immediately be preceded or followed by the words "public limited company" abbreviated Limited or Ltd. It is forbidden for the name of the shareholders to appear in the company name. This may be explained by the fact that the identity of the shareholders will be changing just as often as the company shares change hands.

B. FORMATION OF THE PUBLIC LIMITED COMPANY

In order for the public limited company to be validly formed it must satisfy both substantive and procedural requirements.

C. SUBSTANTIVE REQUIREMENTS

The substantive requirements correspond to the general conditions of validity of a contract: Consent, capacity, object and purpose; requirements common to all companies: shares must be in cash or in kind; participation of each shareholder in the profits and losses of the company; and to the conditions of validity peculiar to the public limited company: number of shareholders, nominal (face) value of shares and the paying up of shares.

The Memorandum of Association and the Articles of Association, if any, should contain the following information - *See Appendix I*

1. a description of the promoters
2. The name of the company
3. The company does/does not have articles of association
4. The address of the registered office and the exploitation office
5. The person to be managing director
6. The object (s)
7. The amount of subscribed capital
8. The amount of paid up capital
9. A table showing the name and details of each subscriber/promoter, the number of shares subscribed and a signature

The articles of association may also include

1. For each category of shares, the number, nominal or face value, their nature (cash, kind) and the rights attached thereto:
2. A description of each contribution in kind, the value attributed to such share and the mode of evaluation; if the contribution is in the form of a building the conveyance for valuable consideration it has been subjected to for
3. The modalities for the distribution of profits
4. The manner of appointment and number of organs charged with the administration and control of the company:
5. The rules relating to the holding of general meetings;
6. The duration of the company
7. The beginning and end of the financial or accounting year
8. The estimated cost of the formation of the company;
9. The cause and special benefits given to the promoters.
10. The authority limits of the Directors (Managers)

D. PROCEDURAL REQUIREMENTS

As regards procedural requirements the formation of the public limited company results from the completion of a series of formalities. The rules applicable to the formalities of formation depend on whether the limited company is offering its shares to the public or not.

A company is said to be offering its shares to the public if its shares are listed on the stock exchange or the shares are deposited with a bank or financial institution for publicity purposes.

The procedural requirements concern:

- Drawing up and publication of the draft memorandum of association in the Official Gazette
- Publication of the prospectus
- Subscription of share capital
- Payment for shares.

E. OFFICE OF THE REGISTRAR GENERAL (ORG)

Drawing up and submitting the Memorandum of Association and, if any, the Articles of Association to the Office of the Registrar General (ORG)

As per Article 14, an application for registration of a company shall be sent or delivered to the Registrar General, and shall be :

1. in the prescribed form;
2. accompanied by :
    a) a memorandum of association *See Appendix I of this manual*
    b) the articles of association, if any;

The promoters have the obligation to ensure that the draft memorandum and articles of association are in writing and witnessed or authenticated (notarised) which should be published in the Official Gazette.

The rationale for the publication of the draft articles of association is to provide prospective subscribers with information concerning the characteristics of the proposed corporation. Note that the publication of the draft articles of association does not exonerate the company from subsequently publishing the articles of association in the OG as soon as the formalities for the formation of the company have been completed i.e. when the company is born.

Publication of the draft articles of association serves an important purpose. It renders it difficult for the promoter or founding member to alter the original draft articles of association during the period of formation.

F. MEMORANDUM & ARTICLES OF ASSOCIATION

The constitution of a commercial company consists of one or two documents, namely:

1. The memorandum of association which contains the most important provisions setting out the sort of activities which the company can carry on. It is of interest to the outsiders who wish to deal with the company.

2. Also articles of association in some instance are necessary to outsiders since they contain the powers of the directors.

A memorandum of association for a company limited by guarantee shall indicate that liability is limited. A memorandum of association for a company limited by guarantee shall also state that every member shall undertake to contribute to the assets of the company in the event of its being wound up.

For the case of a company with share capital, the memorandum of association shall state the following:

1. the amount of share capital;

2. the number of shares making the share capital unless where the company is an unlimited company;

3. the full name and the number of shares of every shareholder.

See Appendix I for the forms of Memorandum of Association

Any company may have or may not have articles of association. *Article 54*

Where a company has articles of association, the rights, powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in this Law except to the extent that they are restricted, limited or modified by the constitution of the company in accordance with the Law.

Where a company does not have articles of association, the rights, powers, duties, and obligations of the company, the Board of directors, each director, and of each shareholder of the company shall be those set out in the Law No. 7/2009 of 27/04/2009 Relating to Companies.

Articles of association of a company shall :

1. be a document signed by the applicant for registration of the company;
2. be a document that is adopted by company shareholders as its articles of association.

Articles of association contain rules governing the internal management of the company such as the appointment of directors and the powers of the board, the rights of different classes of shareholders and the holding of meetings of the company.

The limited company carries on business under a company name, which may be either one descriptive of its business or if a private company composed of the names of one or more of its members. In either case the name must always be followed by the words " limited company" abbreviated Ltd .

Requirement for publicity

There is also the requirement for publicity, which is common to other commercial company: registration in the ORG and publication of the articles of association in the Official Gazette.

Substantive Requirement

In addition to the procedural requirements the law also prescribes certain substantive requirements, which are specific to the limited company.

1) Objects of the Company

In the first place the limited company should not be constituted to undertake an illegal business. In as much as the objects of the limited company must be lawful. There are certain businesses, which cannot be undertaken through the instrumentality of a limited company because of the inadequate guarantees which this type of business entity offers. The businesses are: insurance, banking, savings bank or issuance of debentures.

2) Conditions relating to Shareholders

For private limited companies there must be a minimum of two and a maximum of 100 shareholders who may be natural persons or corporate bodies in order that a private limited company is validly constituted. This number excludes employees or former employees

In a public company there must be a minimum of

In addition the shareholder must give his consent to become a shareholder either in person or through his agent. The shareholder must also posse's legal capacity. As such in principle, minors and persons who suffer from incapacity are excluded from the membership of a private limited company.

3) Conditions relating to the Capital and shareholding

The law prescribes that the share capital of a private limited company shall

be at least 500,000 RWF and that the share capital must be entirely subscribed and paid up. The capital shall be divided into equal share whose face value shall not be less than 1000 RWF.

Each share confers an equal right to the distribution of profit as well as the bonus subsequent to liquidation. A certificate is issued to represent the shares, which constitute evidence of ownership. It follows that there is only one type of share in the limited company viz., registered shares (that exclude bearer shares and warrants).

4) Conditions relating to duration

The articles of association can define the duration of the company. In practice the duration is usually not too short because an extension of the life of the company implies the payment of a new registration tax. It has become fashionable for the duration of the company to be fixed at 99 years.

On the other hand if the duration of the company is indefinite, then, any shareholder may at his pleasure call for the dissolution of the company after notifying the other shareholders.

G. PROMOTERS

A promoter is a person who takes the preliminary steps to the founding or organization of a company. He finds people who are willing to finance it - buy shares, lend money. Contracts must be made for building or leasing space, buying or renting equipment, advertising and whatever else is required for the early operation of the business.

Any company wishing to offer shares shall issue a prospectus**. It will be issued by a promoter.**

A prospectus is a notice, circular, advertisement or request inviting applications or offers from the public to subscribe for or purchase, a share in or debenture of a company or proposed company;

No person shall have the right to issue, circulate or distribute any form of application for shares or debentures unless :

1. the form is accompanied by a prospectus whose date of publication is a date within the period of six months immediately preceding the date on which the form was issued, circulated or distributed;
2. a copy of the prospectus and particulars of the issue, circulation or distribution shall have been lodged with the Registrar General ;

3. the company or proposed company undertakes, in its prospectus that it will, within two (2) months after receiving the money, issue to that person a document to acknowledge receipt of the money. *Articlwe 65*

Every company shall keep a copy of every share application form at its registered office within seven (7) days after the prospectus is lodged and shall keep every such copy, for a period of at least six (6) months after the lodging of the prospectus, for the inspection by company's members and creditors.

Where a company has accepted any money as a deposit or loan, it shall within 2 months after the acceptance of the money, issue to that person a document which acknowledges or evidences or constitutes an acknowledgement of the indebtedness of the company in respect of that deposit or loan.

Every advertisement which is issued, circulated or distributed and which offers or calls attention to an offer or intended offer of shares in, or debentures of a company or proposed company to the public for subscription or purchase, shall be treated as a prospectus if it contains the following:

1. the number and description of the shares or debentures concerned;

2. the name and date of registration of the company and its paid-up share capital;

3. a concise statement of the main objective and main business of the company;

4. the names, addresses and description of -

    a) the directors or proposed directors;

    b) the brokers or underwriters to the issue;

    c) the debenture holders' representatives;

5. the name of the stock exchange, if any, of which the brokers or underwriters to the issue are members;

6. particulars of the opening and closing dates of the offer and the time and place where copies of the prospectus and forms of application for the shares or debentures may be obtained;

7. statements with respect to the sale price of shares, the yield there from or other benefits received or likely to be received by holders of shares, in relation to an authorised mutual fund.

Every prospectus shall comply with the form and content prescribed by instructions of the Registrar General

The prospectus shall :

1. be printed in type of a font size approved by the Registrar General;

2. be dated and that date shall, unless the contrary is proved, be taken as the date of issue of the prospectus;

3. be signed by every director or person named in the prospectus as a proposed director, or by his or her agent authorised in writing;

4. state that a copy has been lodged with the Registrar General

5. and also state immediately after that statement that the Registrar General assumes no responsibility as to its contents.

COMMITMENTS MADE ON BEHALF OF A COMPANY UNDER FORMATION

Acts done and commitments entered into by the founder (promoters) on behalf of the company, under formation are required to be taken over by the company prior to its registration

In the register of commercial companies similarly acts done or commitments entered into on behalf of the company during its formation may also be taken over by the company after its registration in the RC. However, if the acts and commitments are not taken over by the company within two (2) months from the date of its registration, the persons who made them (promoters) shall have unlimited liability for the obligations they entail. Similarly, if company is not constituted within two years from the date the obligation was contracted, the promoters shall be personally liable. Once ratified contracts concluded by promoters are considered as having been signed originally by the commercial company.

H. LEGAL CONSEQUENCES OF INCORPORATION

Every company shall always have a registered office in Rwanda to which all communications and notices may be addressed and which shall constitute the address for service of legal proceedings on the company.

The Board of Directors of a company may, at any time, change the registered office of the company. The change of the registered office shall be notified to the Registrar General.

A company shall keep at its registered office the following records:

1. the memorandum and articles of association;

2. minutes of all meetings and resolutions of shareholders within the last ten (10) years;

3. an interests register for directors;

4. minutes of all meetings and resolutions of directors and directors‟ committees within the last ten (10) years;

5. certificates given by directors under this Law within the last ten (10) years;

6. the full names and addresses of the current directors;

7. copies of all written communications to all shareholders or all holders of the same class of shares during the last ten (10) years, including annual reports;

8. copies of all financial statements ,for the last ten (10) years completed accounting periods;

9. the accounting records for the last ten (10) years;

10. the shares register;

11. the copies of instruments creating or evidencing charges required to be registered under this Law.

The documents for the company’s current and previous financial years shall be kept at the company’s registered office. Other documents for the previous years may be kept in any other place and notice of which shall be given to the Registrar General.

I. CONSTITUENT ORDINARY MEETING

The final stage in the formation process is the holding of a constituent ordinary meeting.

Where there are articles of association all the promoters/founding members shall participate in signing the articles of association either in person or through their authorized agents. A constituent ordinary meeting grouping all the promoters or their nominees must be held. This meeting shall appoint not less than 3 and not more than 12 persons to be directors or ratify their appointment by the articles of association; it must also appoint one or more auditors whose function is to watch over the accounts in the interest of shareholders. The acceptance of their office by the directors and auditors marks the birth of the company. But it is still important for the legal validity of that birth that the company shall be entered in the ORG.. Finally the principal documents must be published in the official gazette.

Note that as far as the private limited company that does not offer its shares to the public is concerned only some of the procedural requirements examined above are applicable: drawing up of an authenticated articles of association (not draft articles) payment for shares and the holding of a constituent ordinary meeting.

As regards a public limited company that offers its shares to the public, the business of the constituent ordinary meeting comprises:

1. Verification of the substantive requirements for the formation of the company;

2. Adoption of the final text of the articles of association, which it shall amend by special resolution of all the members being the subscribers and promoters;

3. Approval of the evaluation of shares in kind and the benefits given to the promoters which it shall be amended by a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters;

4. Appointment of the organs of administration (directors) and control (auditors) and fix their remuneration;

5. A vote on the final formation of the company requiring a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters.

The acceptance of their office by the directors and auditors marks the birth of the company. As it is the case with other commercial companies there must be registered in the ORG;

The memorandum and articles of association and minutes of the constituent ordinary meeting and a list of shareholders must be filed with the registrar of the CIF within whose jurisdiction the company proposes to establish its registered office. Finally the principal documents must be published in the Official Gazette.

The promoters are, notwithstanding any clause to the contrary jointly and severally liable towards third parties:

1. For the eventual difference between the share capital and the minimum capital as well as that part of the share capital which shall not be validly subscribed, they shall be deem to be the subscribers for that part;

2. The effective payment for shares in accordance with the law;

3. Liable to pay damages which is the consequence of either the nullity of the company or inaccuracy in the wording of the articles of association or overvaluation of any shares in kind or insufficiency of capital;

J. THE MAIN DIFFERENCES BETWEEN A PRIVATE AND A PUBLIC COMPANY

1. *Purpose:* public company and private companies fulfill different economic purposes. The purpose of a public company is to raise capital from the public to run the enterprise. This ability to offer shares to the public is now the only advantage of a public company. The purpose of a private company is to confer separate legal personality on the business of a sole trader or partnership.

2. *Issue of capital:* A private company may not raise capital by issuing its securities to the public. There is no restriction on the offer of securities by a public company. A public company must, however, issue a prospectus (a document which gives minimum essential information to potential members).

3. *Transferability of shares:* the shares of a public company are freely transferable. A private company will, in contrast, wish to remain under the control of the family or partners concerned. Its articles will therefore contain a clause restricting the right to transfer shares.

Chapter 15
Share Capital

A. SUBSCRIPTION OF SHARE CAPITAL

Subscription is the acceptance by the subscriber of the offer to subscribe for shares made by the promoters or their agents (usually a bank). By subscribing the subscriber promises to take up the number of shares subscribed. The shares may be paid for in cash or in kind, but never in the form of services, because the capital of a company is conceived as a security (collateral) to creditors of the company who can never proceed against shareholders personally for the debts of the corporation beyond their investment. The exception is where the company has unlimited liability – see 3.23 below

Note that by virtue of subscription promoters are bound to either constitute the company or reimburse the amount of subscription if the company is not constituted within six months from the date the proposed company account was opened at a bank.

For their part, subscribers may not withdraw their subscription; they must honour their promise to take up shares. The option open to a subscriber who no longer desires to become a shareholder is for him to assign (transfer) his undertaking (promise) to take up shares

B. PAYMENT OF SHARES

a) Share Capital

The share capital of the public limited company varies depending on whether the company is offering its shares to the public or not. For a company that does not offer its shares to the public the minimum capitalization requirement is 100 million RWF and 200 million RWF for a company that offers its shares to the public.

b) Payment for Shares

To subscribe is a promise to make payments for the shares subscribed. The shares have to be paid for so as to ensure that the company is born. If the shares are to be paid for in cash, at least 1/3 of the amount representing the share capital must be paid up and the remainder within two years from the birth of the company. Payment may be effected in cash, certified cheque or Treasury bill.

Note that payment in cash is required to be lodged in a special account opened at a bank in the name of the company being formed. The organs of management of a company cannot draw

from this account except the notary who was present during the constituent ordinary meeting informs the bank in writing that the articles of association have been adopted.

On the other hand, if payment is to be effected in kind then all the shares representing the share capital in kind must be entirely paid up. The evaluation of the shares in kind is admissible after corroboration by experts appointed by the promoters. In addition, within 6 months from the date of birth of the company the manager and auditors are required, on pain of their joint and several liabilities, to verify the evaluation of the payments in kind. Should the verification reveal an over valuation the managers and auditors shall without prejudice to whatever action that may be taken against the defaulting shareholders, proceed to adjust the share capital and a suppression of the redundant shares

Note that as long as the verification has not been undertaken by the manages and auditors, the shares cannot be negotiated (transferred)

C. TYPES OF SHARE CAPITAL

Ordinary shares

Debentures

COMPANY SECURITIES

One of the major reasons that promoters select the corporate form of business is the variety of funding sources available to the public limited companies. An important source of financing is the sale of company securities. A security is evidence of a debt or property (ownership), such as a share, or debenture. The basic legal distinction between them is that a share constitutes the holder a member of the company whereas the debenture holder is a creditor of the company but not a member of it.

SHARES

Rights in a company are represented by negotiable instruments called shares. A share may be defined as "the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of natural covenants entered into by all the shareholders inter se". The contract contained in the articles of association is one of the original incidents of the share.

A share is not a sum of money… but is an interest measured by a sum of money and made up of various rights contained in the contract, including the rights to a sum of money of a more or less amount".

The shares of each shareholder represent a fraction of the share capital of the company. Certain rights are attached to these shares, they are:

1. The right to vote during general meetings (annual or special);
2. Right to dividends;
3. Rights to return of capital on a winding up i.e., liquidation (or authorized reduction of capital.

a) Right to vote:

A shareholder has a right to attend meetings and to vote. The right to vote attached to shares must be proportional to the fraction of capital it represents – 1 share = 1 vote. Nevertheless, the right to vote attached to shares whose contribution is in kind is suspended if the shares have not been entirely paid up.

b) Right to dividend

If at the end of a financial year shows an excess of profit over losses, this excess constitutes profits for the financial year and is available for distribution to the partners/shareholders as dividends proportional to the capital it represents. Once distributed, dividends, corresponding to the profits realized by the company, are finally vested in the shareholders. As such, if in a subsequent financial year the company does not make profits, the creditors of the company cannot compel the shareholders to restore to the company the sums as dividends, which were paid in accordance with the law.

However, if profits are not realized at the end of the financial year, the company is not competent to pay dividends. The payment of fictitious dividends amounts to a reduction of the share capital of the company. We stated earlier that the capital of a company constitutes a security (collateral) to company creditors. Accordingly, if fictitious dividends are distributed to shareholders creditors have a right to protect their interest by requesting the court to nullify the distribution and compel the shareholders to restore to the company the sums paid as dividends in violation of the law.

c) Right to return of capital on liquidation (or authorised reduction of capital)

The liquidation of a company requires the distribution of losses or the surplus of liquidation as the case may be to the shareholders. In the case of an authorised reduction of capital shareholders are entitled to part of the capital to the extent of the reduction.

Types of Share Contributions

Contributions to the capital of a company may be made in cash or in kind. If the contribution is in the form of cash at least 1/3 of the amount due must be paid at the time of the formation of the company and the balance within two (2) years from the date the company is formed. If the contribution is in kind it must be entirely paid up at the time of formation of the company.

Negotiability of shares

Negotiability of shares means the transfer of shares. We stated that shares are negotiable instruments issued by the company in return for the contribution of the shareholder to the capital of the company. In principle, shares issued by a public limited company are freely transferable. The procedure to be followed depends on the nature of the share is whether it is a registered share or bearer share

a) Registered shares

The registered share is represented by registration in the register of shareholders maintained by the company at the registered office (headquarters). Upon registration the director issues a certificate to the member (shareholder) certifying that he is the holder of a specified number of shares (giving their distinguishing numbers if they have them and stating the extent to which they are paid up). The purpose of this is to give the shareholder some document, which he can use as evidence of his title. It also provides the company on a check on the identity of the registered holder and the company will not normally register any dealing unless the certificate is produced.

Note that the holder's legal rights depend not on the certificate but upon entry in the register, and the certificate is merely a declaration by the company stating what these rights are and affording prima face evidence of them.

Registration may be made by the party himself or a director and the certificate should be delivered within one month of registration. A certified copy of the registrations in the register is required to be deposited by the directors within one month of registration at the ORG.

Negotiation of registered shares shall be effected by transfer on the registers of the company, the holder's rights resulting from the single registration on the company's register.

b) Bearer shares

In contradistinction to a registered share is the bearer share. It is represented by a piece of paper paginated and detached from a counterfoil book carrying a number of indications but the most important characteristic is the absence of a name. A least two directors must sign the paper.

The holder's rights depend on the mere possession of the paper. Consequently, negotiation is by simple delivery of bearer shares. The bearer of the share shall be deemed to be the owner.

Dividends, if any are due and payable, are paid on physical presentation of the bearer share at the company's registered offices to the person holding the bearer share. Because the bearer share has no name, the owner cannot be notified of any meetings or when dividends are due.

c) Restrictions on the transfer of shares

Although shares (registered or bearer) are freely transferable, they can only be transferred after the company has acquired legal personality i.e., after registration in the Commercial Register. Furthermore, the articles of association may low down certain limitations to the transfer of shares, e.g., transfer to the company's competitors or a certain class of persons.

Note that if a company allows bearer shares the holder is at liability to convert his bearer shares into registered shares and vice-versa

D. RAISING SHARE CAPITAL

DIFFERENT TYPES OF CONTRIBUTIONS

In order to qualify as a shareholder of a company each partner must contribute to the capital of the company. In return for their contribution the partner shall receive shares issued by the company.

A partner may contribute to the company:

1. Money, as a contribution in cash;

2. Rights on moveable or immovable tangible or intangible property, as a contribution in kind:

3. Services as a supply of labour.

1) <u>Contributions in cash</u>

Contribution in cash is required to be effected by the partner (shareholder) transferring to the company the ownership of the amount of money that he has pledged to contribute. The date of payment depends on the type of company. For partnerships, the partnership agreement may stipulate the time within which payment (contributions) is to be effected. As regards the SARL i.e., private limited company contributions in cash must be fully paid up at the time of the formation of the company. Cash contributions are said to be fully paid up when the company has acquired ownership and the contributions are fully and finally paid up.

As regards the SA, i.e., public limited company a minimum of 1/3 of the contribution is required to be paid up at the time of formation of the company and the balance within 2 years from the day the company is formed.

Note that in case of delay in payment, the balance due to the company shall automatically bear interest at the official rate from the date payment became due.

Contributions for shares not in the form of cash

From Article 31

Where a share is issued for consideration other than cash, the Board of directors shall determine the cash value of that consideration for the purposes of sub-paragraphs 1° or 2° of paragraph 2 of this article.
Where a share involves an obligation other than the obligation to pay, and that such obligation is met by the shareholder:

1. the Board of directors shall determine the cash value, if any, of that performance;

2. the cash value of that performance shall be deemed to be a call which has been paid on the share for the purposes of sub-paragraphs 1° or 2°of paragraph 2 of this article.

2) Contributions in kind

Contributions in kind is made by the transfer of the property or rights to use the property contributed and the effective conveyance to the company of the property to which those rights are attached. It is mandatory for contributions in kind to be fully paid up at the time of formation of the company.

Where the contribution is in the form of property the contributor shall stand warranty (security) for the company as a vendor for the buyer.

However the risk of the property passes to the company on the day of the transfer. On the other hand if contribution is in the form of a mere right to use the property contributed i.e., the contribution is in the form of a leasehold, the contributor shall guarantee the company undisturbed use of the property contributed, like a lesser for lessee. However, the risk of the property remains with the shareholder (partner).

3) Contribution in the form of services

Contribution may also be in the form of services. Where contribution is in the form of services the contributor is obliged to render services in the form of labour to the company. In the absence of a provision or clause as to the time frame within which such services is to be rendered, the presumption is that the services will be supplied during the life time of the company. Article 31 sub para 2 may be read as to imply that the service in lieu of cash payment has been performed.

Previously, thecontribution in the form of services could only be made to companies whose shareholders (partners) had unlimited liability. Thus, contribution in the form of services is available to partnerships and not to “companies”. The rationale for the exclusion of companies

may be explained by two factors. The one, is that, since share contributions are required to be entirely paid up either at birth or within two years of the existence of the company, contributions in the form of services cannot satisfy this requirement. Secondly, the capital of a company is conceived as security (collateral) to creditors of the company, as such, services cannot serve as security.

Note that a shareholder's (partner's) contribution may be in the form of aclaim. In the event where the contribution is in the form of aclaim all that is required of the contributor is to establish the existence of the debt and not the solvency of the debtor

Subject to the constitution of the company, different classes of shares may be issued in a company. *Article 76*
Shares in a company may :

1 be redeemable;
2 confer preferential rights to distributions of share capital or income;
3 confer special, limited, or conditional voting rights;
4 not confer voting rights.

E. VARIATION OF SHAREHOLDERS' RIGHTS

Any existing company may at any time, convert any class of shares of the company into shares of no par value provided that seventy five per cent (75%) of shareholders vote for the resolution. Notice of the terms of the conversion is given to the Registrar General for registration within forteen (14) days of the approval of the conversion.

The shares converted shall not affect the rights and liabilities attached to such shares. In particular, such conversion shall not affect:

1 any unpaid liability on such shares;
2 the rights of the holders of the shares in respect of dividends, voting or repayment on winding up or a reduction of share capital.

F. RIGHTS AND OBLIGATIONS OF THE SHAREHOLDERS

RIGHTS OR POWERS OF THE SHAREHOLDERS

The law chose the expression powers instead of rights. This difference in terminology doesn't present a big interest especially as the rights and the powers are synonymous.

Articles 140 to 142 of the law articulate responsibilities of the shareholders in these terms.

The powers conferred to the shareholders of a company shall be exercised :

1. at a meeting of shareholders;
2. by a resolution of shareholders in lieu of a meeting;
3. by a unanimous resolution;
4. by a unanimous shareholder agreement.

The power conferred to shareholders may be exercised by an ordinary resolution. An ordinary resolution shall be a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the matter which is the subject of the resolution.

The shareholders exercise a power to:

1. adopt articles of association , if it has , to alter or to revoke them ;
2. approve a major transaction;
3. approve an amalgamation of the company;
4. put the company into liquidation;

Such power shall be exercised by special resolution.

With regard to the modification of the rights, the article 149 provides: Where the share capital of a company is divided into different classes of shares, a company shall not take any action which varies the rights attached to a class of shares unless that variation is approved by a special resolution.

Where the variation of rights attached to a class of shares is approved and the company becomes entitled to take the action concerned, the holder of a share of that class, who did not consent to or cast any votes in favor of the resolution for the variation, may apply to the Court for an order against acts that are prejudicial to a shareholder, or may require the company to purchase those shares.

"When the share capital of a company is distributed in different categories of Shares, the company cannot take any Share that modifies the rights bound to a category of Shares, unless this modification is approved by special resolution.

Note wording of article 146, Where the Board of directors agrees to the purchase of the shares by the company, it shall, within seven (7) days of issuing the notice:

1. state a fair and reasonable price for the shares to be acquired;

2. give written notice of the price to the shareholder.

It is important to note that article 156 talks about rights of shareholders to the dividends in these terms: " The shareholders, who are entitled to receive dividends, exercise pre-emptive rights to acquire shares or any other right or receive any other benefit under this Law or the article of association, shall be required to attend a meeting on the date fixed by the Board of Directors".

The shareholders of a company may, by unanimous resolution or by unanimous shareholder agreement, approve any payment, provision, benefit, assistance or any other distribution provided that there are reasonable grounds to believe that, after the distribution, the company is likely to satisfy its solvency test (art.209).

A company shall make available for inspection by a shareholder of the company or by a person authorized in writing by a shareholder any documents of the company, except those documents regarded as confidential for the company if they suspect any misdeeds by managers. This should be by written notice of intention to inspect the records served to the company (art. 270).

OBLIGATIONS OR "LIABILITIES" OF SHAREHOLDERS

Liability of shareholders is addressed by articles 137 to 139. Indeed, article 137 limits the liability of the shareholders, the article 138 talks about liability for call, whereas article 139 exempts shareholders from some liabilities in case of alteration of articles of association.

In fact, according to the article 137, a shareholder shall not be liable for an obligation of the company by reason only of being a shareholder. The liability of a shareholder shall be limited to:

1. any amount unpaid on a share held by the shareholder;

2. any liability to repay a distribution received by the shareholder to the extent that the distribution is recoverable;

3. any liability expressly provided for in the constitution of the company.

Regarding liabilities for call, article 138 states that Where a share renders its holder liable to calls, or otherwise imposes a liability on its holder, that liability shall attach to the holder of the share for the time being, and not to a prior holder of the share, whether or not the liability became enforceable before the share was registered in the name of the current holder.

In case a shareholder has not agreed in writing to be bound by the alteration Article 139, makes it clear that he shall not be bound by an alteration of the constitution of a company which:

1. requires the shareholder to acquire or hold more shares in the company than the number held on the date the alteration is made;

2. increases the liability of the shareholder in the company.

Relevant Rules of General assemblies of shareholders

The shareholders have the right and the duty to sit at the general assemblies (ordinary or extraordinary).

Annual general assembly

The general meeting of shareholders is annually convened by the Board of directors as per article 151 of the law which adds the following precisions: not more than once in each year; not later than 6 months after the balance sheet date of the company; and not later than fifteen (15) months after the previous annual meeting.

A company may not hold its first annual meeting in the calendar year of its incorporation but shall hold that meeting within eighteen (18) months of its incorporation. The company shall hold the meeting on the date on which it is called to be held.

The business to be transacted at an annual meeting shall deal with the consideration and approval of the financial statements, the receiving of any auditor's report, the consideration of the annual report, the appointment of any directors, the appointment of any auditor and other issues as may be deemed necessary by the annual meeting (art. 152).

In the same vein article 153 adds, where the financial statements are not approved at the annual meeting, they shall be presented at a further special meeting called by the Board of Directors within ninety (90) days.

Special meeting of shareholders

According to article 154, a special meeting of shareholders entitled to vote on an issue put before it where : 1° it is called by the Board of Directors or a person who is authorized by the constitution to call the meeting; 2° it shall be called by the Board of Directors on the written request of shareholders holding shares carrying together at least 50 per cent of the voting rights .

Proceedings at the meeting

The provisions specified in an order of the Registrar General shall govern the proceedings at meetings of shareholders of a company except to the extent that the constitution of the company provides otherwise (art. 155).

G. PROSPECTUSES

PUBLICATION OF THE PROSPECTUS

An invitation to subscribers is evidenced by a prospectus signed by all the promoters. A prospectus may be defined as a document published by a corporation or by persons acting as its agents or setting forth the nature and objects of an issue of shares, debentures, or other securities created by the company, the investment or risk characteristics of the security and inviting the public to subscribe to the issue. The prospectus must contain:

a) The draft memorandum of association and reference to the fact that it has been published in the OG,
b) The place and date of the constituent ordinary meeting;
c) The subscription rate (prices) for shares;
d) The date marking the beginning and end of issuance of shares; and
e) The subscription office

H. ALTERATION, MAINTENANCE AND REDUCTION OF SHARE CAPITAL

VARIATION OF CAPITAL

A company may by ordinary resolution:

1 divide or subdivide its shares into shares of a smaller amount if the proportion between the amount paid, and the amount, if any, unpaid on each reduced share remains the same as it was in the case of the share from which the reduced share is derived;
2 consolidate into shares of a larger amount than its existing shares.

Where shares are consolidated, the amount paid and any unpaid liability thereon, any fixed sum by way of dividend or repayment to which such shares are entitled, shall also be increased. *Article 88*

Where a company has altered its share capital, it shall within fifteen (15) days of the date of the alteration file a notice to that effect with the Registrar General

Notwithstanding the provisions of the articles of association, where a company issues shares which rank equally with, or in priority to existing shares as to voting or distribution rights, those shares shall be offered to the holders of existing shares in a manner which would, maintain the relative voting and distribution rights of those shareholders. An offer shall remain open for acceptance for a period, which shall not be more than fifteen (15) days. *Article 92*

Since the amount of capital is mandatory fixed by the memorandum of association any increase or reduction of capital necessitates an amendment of the memorandum of association.

a) Increase of Capital

The share capital of a company may be increased by issuing new shares, incorporation of reserves into the capital or by conversion of debentures into shares.

i. Increase of capital by issuing new shares

If the increase in capital is by issuing new shares the shares may be paid for in cash or in kind. Note that a company may not be allowed to increase its share capital if the outstanding capital has not been entirely paid up. The sanction for this restriction is the nullity of the increase. Nevertheless, this restriction does not apply if the increase results in the issuance of new shares in kind.

Shares shall carry a pre-emptive right of subscription of increases in capital. Accordingly, shareholders shall in proportion to their shares, have a pre-emptive right of subscription for shares issued for an increase in capital. This right is lost after the time limit allowed for the exercise of this right. Similarly, a shareholder may renounce the exercise of his pre-emptive right.

The formalities to be followed when issuing new shares is identical to that during the formation of the company: publication of prospectus, subscription and paying up of shares.

ii. Increase of capital by incorporating reserves

This increase is effected by the simple transfer of the reserve account to the capital account. All that is required is a decision of the special meeting. Two methods may be employed to give effect to this increase following a decision by special resolution at the special meeting:

- By increasing the nominal (face) value of shares:
- By issuing new shares and allocate them gratuitously to existing shareholders in proportion to the amount of their shares.

iii. *Increase in Capital by Converting Debentures into Shares*

As earlier stated, an increase in the capital of a company may be the result of the acceptance by the company creditors to transform their status from that of creditors to shareholders. If there is an agreement between the company and its shareholders, the agreement is given life by a decision of the extraordinary general meeting.

b) **Reduction of Capital**

A reduction of capital is usually justified by losses. The registered capital of a company may be reduced by decreasing either the face value or the number of shares.

The decision to reduce the share capital is within the competence of the special meeting of shareholders and must be resolved by special resolution where there is a 75% majority. This resolution may delegate all the powers to the BOD or managing director as the case may be, to effect the reduction.

The draft instrument of the reduction of capital shall be communicated to the auditor before the date of the special meeting, which shall authorize the reduction of capital.

The auditor is required to table before the special meeting a report in which he shall set out his assessment of the reasons for and condition of the reduction of capital.

Since a reduction of capital reduces the security (collateral) of the creditors the law empowers the creditors of the company to object to the reduction of the capital where it is not justified by losses.

The time limit for lodging an objection by creditors to the reduction of capital shall be 30 days from the date of depositing at the registry of the court of the minutes of proceedings, which ordered or authorized the reduction of capital.

Where the objection is admitted, the capital reduction procedure shall be suspended until the claims are reimbursed or guarantees are provided for creditors where the company offers such guarantees and where they are considered adequate.

Article 101 gives details conditions and these include the sub paragraph

A company shall not take any action:
1. to extinguish or reduce a liability in respect of an amount unpaid on a share;
2. to reduce its share capital for any purpose unless there are reasonable grounds on which the directors may determine that, immediately after the taking of such action, the company will be able to satisfy the solvency test.

I. THE ACQUISITION AND REDEMPTION BY A COMPANY OF ITS OWN SHARES

A company may request buy back from the shareholders its own shares where the Board of Directors is satisfied that:

1. the acquisition is in the best interests of the company;

2. the terms of the offer or agreement and the consideration to be paid for the shares are fair and reasonable to the company;

3. in case where the offer is not made to, or the agreement is not entered into with all shareholders, the offer or the agreement, is fair to those shareholders to whom the offer is not made, or with whom no agreement is entered into;

4. shareholders to whom the offer is made have available to them any information which is material to an assessment of the value of the shares;

5. the company shall immediately after the acquisition satisfy the solvency test. *Article 105*

Any offer by a company to purchase or otherwise acquire its own shares on a stock exchange shall be made in accordance with such conditions as prescribed above.

Before an offer is made by a Company to acquire its own shares, it shall send to all its shareholders a public notice requesting the repurchase of its own shares.

Purchased shares or those shares redeemed by the company shall, immediately upon purchase, be struck off the company's register. Shares shall become the property of the company as of the date on which it has the power to use the rights linked with such shares. *Article 107*

A company may hold its own shares but no rights must be accorded to these shares

Share holders have a right of objection to the purchase of shares by the company not withstanding the resolution was a special rresolution and required a 75%majority who attended the special meeting.

J. FINANCIAL ASSISSTANCE BY A COMPANY FOR THE PURCHASE OF ITS OWN SHARES

A company shall not give financial assistance to acquire its own shares, except where the Board of Directors has previously resolved that:

1. giving the assistance is in the interests of the company;

2. the terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholders not receiving that assistance;

3. immediately after giving the assistance, the company shall satisfy the solvency test. *Article 114*

A company shall not provide financial assistance exceeding ten per cent (10%) of its share capital.

K. DIVIDENDS

Dividends can only be paid out of profits.
Dividends to one class of shares can only differ between shareholders where there is an outstanding liability by the shareholder in respect of those shares – *Article 102*

The Board of Directors may issue shares to any shareholder who has agreed to accept the issue of shares, in lieu of a proposed dividend provided that:

1. the right to receive shares, in lieu of the proposed dividend or proposed future dividends has been offered to all shareholders of the same class on the same terms;

2. all shareholders elected to receive the shares in lieu of the proposed dividend, their relative voting or distribution rights, or both, would be maintained;

3. the shareholders to whom the right is offered are afforded a reasonable opportunity of accepting it.

Chapter 16
Debt Capital

Debt capital is generally represented by Debentures.

A. DEBENTURES

Public limited companies have the power to borrow money necessary for their operations by issuing debt securities (debentures). Unlike shares debentures do not create an ownership interest in the company. They create a debtor- creditor relationship. Accordingly, the company's obligated to pay a periodic interest charge as well as the balance of the debt on maturity date.

A debenture is a negotiable instrument constituting a long -term debt. Debenture is the term applied not to the indebtedness itself but to the document evidencing it. It is normally, but not necessarily, secured by a charge over company property.

CONDITIONS OF ISSUE OF DEBENTURES

Public limited companies shall not be allowed to issue debentures except if they have existed for three years and have drawn up three balance sheets duly approved by the general meeting of shareholders.

Furthermore, the issue of debenture is not allowed for companies whose capital is not paid up.

In addition, the amount of debentures issued by the company cannot be superior to the company's share capital. Note that the company, which issues debentures, is allowed to reduce its share capital only to the extent of the reimbursements effected on the debentures.

NEGOTIABILITY OF DEBENTURES

Like shares, debentures are negotiable instruments, which can easily be transferred. The procedure to be followed depends on the type of debenture i.e., whether it is a registered debenture or bearer debenture.

REGISTERED DEBENTURE

Much the same as registered shares, debenturesare represented by registration in a register of debenture holders. Following registration a certificate is issued certifying that he is a holder of a certain number of debentures.

Note that the holder's legal rights depend not on the certificate but upon entry in the register. The certificate merely states what these rights are and constitutes evidence of these rights. Registration may be made by the party himself or any of the directors.

Transfer of registered debenture is effected by the transfer in the register of the company, the holders rights resulting from registration on the company's register of debenture holders.

BEARER DEBENTURES

Bearer debentures are represented by a piece of paper paginated and detached from a counterfoil book carrying a number of indications but the most important characteristics is the absence of a name. The paper must be signed by two directors.

The holder's rights depend on the mere possession of the paper; consequently, negotiation is by the simple delivery of bearer debentures. The bearer of such a debenture shall be deemed to be the owner.

GROUP OF DEBENTURE HOLDERS

Holders of debentures issued at the same time shall as of right be grouped together to defend their interests.

A representative of debenture holders shall represent the group, according to the decision taken by the general meeting of debenture holders.

The following may not be chosen to represent the group:

- Organs of the company;
- A parent or relation up to the fourth degree;
- An agent or intermediary of the company.

GENERAL MEETING OF DEBENTUREHOLDERS

The general meeting of debenture holders of the same group may meet as required by law. The law recognizes two types of meetings: annual meeting and special meeting.

Annual Meeting

The annual meeting is one convened to do the following acts:

- Appoint and dismiss the representative of debenture holders:
- Determine the emoluments of the trustee, in case of any disagreement the emoluments shall be fixed by the Court of First Instance:
- Vote the discharge of the representative of debenture holders:
- Deliberate on measures aimed at defending the interests of debenture holders and the execution of the contract with the company as well as the expenses concerning the execution of the decisions.

Special Meeting

The special meeting has the following business:

- A modification or suppression of the security;
- The extension or suppression of one or more maturity dates of interest payment, the reduction of the interest rate and modalities of payment;
- The extension or suppression of one or several amortization schedules, modification of the amount of amortization and the modalities of payment;
- The substitution of debentures by the shares of the company or of the debentures or shares of another company.

Notice of Meetings of debentures

A meeting of debenture holders may be convened by any of the following persons:

- By the directors of the company;
- The representative of debenture holders;
- Debenture holders having at least 1/3 of the debentures
- At least eight (8) days before the holding of the meeting every debenture holder must be notified of such meeting. The notice convening the meeting shall contain the agenda of the meeting.

Attendance

The following shall attend meetings of debenture holders with a right to vote: holders of registered debentures and holders of bearer debentures. On the other hand the representative of debenture holders and agents of the company provided they are not debenture holders, may attend the meeting with a consultative voice only.

Quorum and decisions

The quorum required for annual meeting of debenture holders is 1/ 2 of the debentures and decisions are taken by a simple majority of those voting. As regards a special meeting the quorum is 1/2 for the first meeting and ¼ for the second meeting. In either case decisions will be taken by ¾ of those voting.

Note that the decisions of the extraordinary general meeting shall be valid if they are taken in view of a recent financial situation verified by the auditors and upon a report of the board of directors justifying the measures proposed.

B. CHARGES

The present section is about issue of obligations on the one hand, and on the other hand, the registration of the liabilities.

1. Introduction

The debenture may be defined as a certificate of loan issued by the company, which creates or acknowledges an indebtedness of the company. The companies have to borrow the money for their extension or developments. The loan requirements may not be met by single money-lender. The loan may have to be split into several units. The most usual form of borrowing by a company in this way is by the issue of debentures. By the issue of debentures, the public is invited to lend money for a fixed period at a declared rate of interest to be paid on such money *e.g;* a company requires one million Rwandan francs. It may be divided into one hundred thousand units of RFW 1,000 each. A money-lender may purchase as many units as he please. The company will then issue certificate for the units purchased by a lender. A debenture is, therefore, a document issued by a company as an evidence of a debt due from the company, with or without a charge on the assets of the company. The Rwandan companies' law defines the debenture under article 2. 17º as 'a written acknowledgement of indebtedness issued by a company in respect of a loan made to it or to any other person or money deposited with the company or any other person or the existing indebtedness of the company or any other person whether constituting a charge on any of the assets of the company or not'.

2. Relevant provisions of the law in relation with the issue of debentures

The law provides for some requirements in relation to issuing of the debentures depending on whether or not they are of a same class.

Indeed, article 157, says that where a company issues or agrees to issue debentures of the same class to more than 25 persons, or to any one or more persons with a view to the debentures or any of them being offered for sale to more than twenty (25) persons, the company shall before issuing any of the debentures :

1. sign under its name and unique number;
2. and procure the signature to the deed by a person qualified to act as a debenture holders' representative.

Article 158, sheds more lights by clarifying that a debenture shall not be deemed to be of the same class where:

1. they do not rank equally for repayment when any security created by the debenture is enforced or the company is wound up;
2. different rights attach to them in respect of:

    a) the rate of, or dates for payment of interest;

    b) the dates when, or the installments by which, the principal of the debentures shall be repaid, unless the difference is solely that the class of debentures shall be repaid during a stated period of time and particular debentures shall be selected by the company for repayment at different dates during that period by drawings, ballot or otherwise;

    c) any right to subscribe for or convert the debentures into shares or other debentures of the company or any other company or corporation;

    d) the powers of the debenture holders to realize any security.

Where a company has given a debenture to secure advances on a current account, the debenture shall not be deemed to have been redeemed by reason that the account of the company with the debenture holder has ceased to be in debit while the debenture remains unsatisfied (article 163).

C. REGISTRATION OF CHARGES

Article 160 of the law provides that every company which issues debentures shall keep at its head office a register of debenture holders which shall contain the names and addresses of the debenture holders and the amount of debentures held by them.

Let's note that the register shall be open to the inspection of a shareholder (art.161). Concerning the content of the register of debenture holder, it must contain their names and addresses as well as the amount of the debentures they hold (art. 160).

Where a company has given a debenture to secure advances on a current account, the debenture shall not be deemed to have been redeemed by reason that the account of the company with the debenture holder has ceased to be in debit while the debenture remains unsatisfied.

Similarly, where a company has decided to issue debentures and to secure their payment by a mortgage or floating charge, the inscription of such mortgage or floating charge shall be valid when kept in the relevant register.

Finally, the company shall, within thirty (30) days after the date on which the security is provided, with the Registrar General a statement of the particulars of all securities provided. The particulars required to be given in the statement are the following:

1. the date of its provision;
2. the amount secured by the charge;
3. a description sufficient to identify the property charged;
4. the name of the person entitled to the charge.

D. REMEDIES FOR DEBENTURE HOLDERS

Article 277 states that an investigation by the OGR can be instituted where debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures make an application to the OGR.

E. COMPARISON BETWEEN A SHARE-HOLDER AND A DEBENTURE HOLDER

	Share-holder	**Debenture-holder**
1	He is the member and joint owner of the company	He is simply a creditor of the company who has given some loan to the company
2	He has a right to vote at the meetings of the company	He has no right to vote at any meeting of the company.
3	He is entitled to get dividends only out of profits. The rate of dividends is not fixed. It varies from year to year depending upon the profits of the company.	He is entitled to fixed rate of interest whether there are profits or not.
4	He has full right to control company`s affairs. In fact, the ultimate destiny of the company is in the hands of shareholders	He has no right to interfere with the business of the company. However, in case of company`s default in paying their debts, he may enforce their security.
5	He cannot be paid back so long as the company is a going concern	He can be paid back unless he is perpetual debenture-holder.
6	He does not have any charge over the assets of the company	He generally has a charge over the assets of the company
7	In case of winding up of the company, he is paid after satisfying all other claims	In case of winding up, a secured debenture-holder is paid prior to the share-holder.

Chapter 17
Membership of a Company

The member ship of a company is through the ownership of shares.

A. BECOMING A MEMBER

The shres can be purchased if a promoter invites a prospective member through a private invitation – for a private company – or through the public advertisement of the prospectus for a public limited company.

B. REGISTER OF MEMBERS

The company shall maintain a register of shareholders and of debenture holders and this shall be kept at the registered office or elsewhere as notified to or agreed with the ORG .
These registers should be available for inspection by the members.
The register shall record the shares and their holders.
The format of this register shall be determined by the Registrar General.

C. RIGHTS, OBLIGATIONS AND LIABILITIES OF MEMBERS

Rights and Obligations of Shareholders

The term shareholder is employed loosely to designate the participants (owners) in all types of commercial companies A company shall issue shares in return for the shareholder's contribution. Such shares shall represent the shareholder's rights and shall be referred to as 'shares'.

Company shares are personal property and shall confer on their holders the following rights and obligations:

1. A right to a share of company profits whenever they are distributed;

2. A right to the company's net assets when shared following the dissolution of the company or where the company's share capital is effectively reduced;
3. The obligation to share in the company's losses to the limit of the par value of the shares held
4. The right to participate in and vote on the collective decision of the shareholders.

And every company shall issue to a shareholder, on request, a statement that sets out:

1. the class of shares held by the shareholder,
2. the total number of shares of that class issued by the company and the number of shares of that class held by the shareholder;
3. the rights, privileges, conditions and limitations, including restrictions on transfer, attaching to the shares held by the shareholder;
4. the rights, privileges, conditions and limitations attaching to the classes of shares other than those held by the shareholder.

Note that the quota (portion) of each shareholder in the profits and losses is within the exception of General and Limited partnerships proportional to his or her contribution. This, notwithstanding the partnership deed may provide for the distribution of profits and losses based on the proportion of a partners share contribution. In addition, any clause, which attributes to one or some of the shareholders all the profits, is void. Similarly, any clause, which immunise one or some of the shareholders against the losses, is void. Note that it is unlawful to be paid dividends if a company does not make profits. Further more, the share of a partner's dividends whose contribution is in the form of services is equivalent to that of a partner who has the least contribution in cash or in kind. However, the partnership agreement may vary this requirement.

In the event where several persons are co-owners of a share, the company is at liberty to suspend the rights conferred on thei holders, until such a time that the co-owners can designate a joint representative. However, the co-owners remain jointly and severally liable for the obligations attached to the shares. On the other hand where a share is an object of a usufruct the company has a right to suspend the rights attached to the share(s) until such a time that the bare owner and the usufructuary designate a joint representative. However both the bare owner and the usufructuary remain jointly and severally liable for the obligations attached to the shares.

Usufruct: The right to use and enjoy the profits and advantages of something belonging to another as long as the property is not damaged or altered in any way.

Further, where a share is given as a collateral (security) the owner continues to exercise the rights attached to the shares. In addition the eventual payment of any outstanding contribution is the responsibility of the owner.

D. TERMINATION OF MEMBERSHIP

Membership is ended when the share is sold and the register is updated with the name of the new member who has acquired or purchased those shares or when the company has re-acquitred the sahares and the register has been accordingly updated

Membership is also ended when the company is dissolved or officially put into liquidation

Chapter 18
Shares

A. CLASSES OF SHARES

Shares in a company may :

1. be redeemable;
2. confer preferential rights to distributions of share capital or income;
3. confer special, limited, or conditional voting rights;
4. not confer voting rights.

B. ISSUE AND ALLOTMENT

Upon registration of the company any person named in the application for registration as a shareholder shall be deemed to have been issued with the number of shares specified in the application. *Article 84*

From Article 86 The terms of issuing shares approved by the Board of Directors shall be:

1. consistent with the articles of association of the company, and to the extent that they are not so consistent, shall be invalid and of no effect;
2. deemed to form part of its constitution and may be amended in accordance with this Law.

Within fifteen (15) days of the issue of shares under this Law, the company shall give notice to the Registrar General certifying:

a) the number of shares issued;
b) the amount of the consideration for which the shares have been issued, its value as determined by the Board of Directors;
c) the amount of the company's share capital following the issue of the shares;
d) and deliver to the Registrar General a copy of any terms of issue approved.

C. TRANSFER AND TRANSMISSION

Shares in public companies are deemed to be transferable subject to any limitation or restriction on the transfer of shares in the Articles of Association

D. SHARE WARRANT

A warrant is a document giving the holder the right to buy shares at a fixed price at a given future date.

Warrants are different from Bearer Shares

A Bearer share is an equity security that is wholly owned by whoever holds the physical stock certificate. The issuing firm neither registers the owner of the stock, nor does it track transfers of ownership. The company disperses dividends to bearer shares when a physical coupon is presented to the firm.

Because the share is not registered to any authority, transferring the ownership of the stock involves only delivering the physical document.

Bearer shares lack the regulation and control of common shares because ownership is never recorded. Similar to bearer bonds, these shares are often international securities.

Chapter 19
Meetings

A. CLASSIFICATION OF MEETINGS

There are 3 types of meeting

1. The Constituent meeting
2. The Annual Meeting (historically known as the Annual General Meeting or AGM)
3. Special Meeting of Shareholders (historically known as an Extra-ordinary General Meeting or EGM)

CONSTITUENT ORDINARY MEETING

The final stage in the formation process is the holding of a constituent ordinary meeting.

If the company is not offering it shares to the public the memorandum and articles of association must be authenticated. In addition all the promoters shall participate in signing the memorandum and articles of association either in person or through their authorized agents. A constituent ordinary meeting grouping all the promoters or their nominees and members must be held. This meeting shall appoint not less than 3 and not more than 12 persons to be directors or ratify their appointment by the articles of association; it must also appoint one or more auditors whose function is to watch over the accounts in the interest of shareholders. The acceptance of their office by the directors and auditors marks the birth of the company. But it is still important for the legal validity of that birth that the company shall be entered in the ORG. This is done by filing copies of the articles of association, the minutes of the constituent ordinary meeting and the list of shareholders. Finally the principal documents must be published in the official gazette.

Note that as far as the limited company that does not offer its shares to the public is concerned only some of the procedural requirements examined above is applicable: drawing up of an authenticated articles of association (not draft articles) payment for shares and the holding of a constituent ordinary meeting.

As regards a public limited company that offers its shares to the public, the business of the constituent ordinary meeting, which must be held in the presence of a notary, comprises:

1. Verification of the substantive requirements for the formation of the company;
2. Adoption of the final text of the memorandum and articles of association, is by special resolution.
3. Approval of the evaluation of shares in kind and the benefits given to the promoters which it shall amend by a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters

4. Appointment of the organs of administration (directors) and control (auditors) as well as fix their remuneration;
5. A vote on the final formation of the company requiring a majority of the votes attached to the shares subscribed by the subscribers present excluding promoters.

The acceptance of their office by the directors and auditors marks the birth of the company. As it is the case with other commercial companies these must be registered in the ORG; the articles of association and minutes of the constituent ordinary meeting and a list of shareholders must also be filed with the registrar of the CIF within whose jurisdiction the company proposes to establish its registered office. Finally the principal documents must be published in the official Gazette.

The promoters are, notwithstanding any clause to the contrary jointly and severally liable towards third parties:

1. For the eventual difference between the share capital and the minimum capital as well as that part of the share capital which shall not be validly subscribed, they shall be deem to be the subscribers for that part;
2. The effective payment for shares in accordance with the law;
3. Liable to pay damages which is the consequence of either the nullity of the company or inaccuracy in the wording of the memorandum of association or overvaluation of any shares in kind or insufficiency of capital;

The Annual Meeting of Shareholders

The Board of directors shall call an annual meeting of shareholders to be held :

1. not more than once in each year;
2. not later than 6 months after the balance sheet date of the company;
3. not later than fifteen (15) months after the previous annual meeting.

A company may not hold its first annual meeting in the calendar year of its incorporation but shall hold that meeting within eighteen (18) months of its incorporation. The company shall hold the meeting on the date on which it is called to be held.

A special meeting of shareholders

A special meeting of shareholders can be called by the Board of Directors or a person who is authorised by the constitution to call the meeting;
Also a special meeting can be called by the Board of Directors on the written request of shareholders holding shares carrying together at least 50 per cent of the voting rights .

B. NOTICE OF MEETING

A copy of the annual report shall be sent to every shareholder of the company not less than 15 days before the date fixed for holding the annual meeting of the shareholders.

C. AGENDA

The business to be transacted at an annual meeting shall deal with:

1. the consideration and approval of the financial statements;
2. the receiving of any auditor's report;
3. the consideration of the annual report;
4. the appointment of any directors;
5. the appointment of any auditor;
6. other issues as may be deemed necessary by the annual meeting.

The business of a special meeting will depend on the reasons given by the diretcors or by the shareholders requesting the meeting.

D. PROXIES

A Proxy is a person appointed by a shareholder to vote on his or her behalf at shareholders' meetings either according to instructions or, where specific instructions are not given, as the Proxy sees fit.

A proxy votes carries the same number votes as if the shareholder had attended the meeting in person.

E. QUORUM

The Articles of Association states the quorum for meetings but where there is no such statement, a quorum is usually taken as 1/ 2 of shares and decisions are taken by a simple majority of those voting.

As regards special meeting the quorum is 1/2 for the first meeting and ¼ for the second meeting. In either case decisions will be taken by ¾ of those voting.

F. PROCEEDINGS AT THE MEETING

The provisions specified in an order of the Registrar General shall govern the proceedings at meetings of shareholders of a company except to the extent that the constitution of the company provides otherwise.

G. RESOLUTIONS

The powers conferred to the shareholders of a company shall be exercised :

1. at a meeting of shareholders;
2. by a resolution of shareholders in lieu of a meeting;
3. by a unanimous resolution;
4. by a unanimous shareholder agreement.

The power conferred to shareholders may be exercised by an ordinary resolution. An ordinary resolution shall be a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the matter which is the subject of the resolution. *Article 141*

Where the shareholders exercise a power to :

1. adopt articles of association , if it has , to alter or to revoke them ;
2. approve a major transaction;
3. approve an amalgamation of the company;
4. put the company into liquidation;

Such power shall be exercised by special resolution.

A special resolution shall only be rescinded by a special resolution.

At any general meeting at which a special resolution is passed, the chairperson shall make a declaration as to whether such a resolution is so passed. The special resolution shall be passed upon the majority vote of three quarters (3/4) of shareholders who voted.

An **ordinary resolution** shall be a resolution that is approved by a simple majority of the votes of those shareholders entitled to vote and voting on the matter which is the subject of the resolution.

A **special resolution** is a resolution approved by a majority of seventy five per cent (75%) of the votes of those shareholders entitled to vote and who have voted on the issue under consideration. The articles of association may require a majority of more than seventy five per cent (75%);

A **unanimous resolution**: a resolution which has the assent of every shareholder entitled to vote on the matter.

H. MINUTES

The minutes of all meetings and resolutions of shareholders within the last ten (10) years shall be kept at Head Office;.

Chapter 20
Directors

A. MANAGEMENT OF COMPANIES

Although all the shareholders have equal rights in the company it is obvious that they cannot together participate in its management except where there are a few (two or three) shareholders. They are, therefore, obliged to entrust the management to one of their numbers or a few as necessity requires. It is not every shareholder who is competent to manage a company. As regards partnerships management is usually the preserve of active partners who are personally liable for the debts of the partnership. For their part limited liability companies are frequently managed by administrators.

The organs of administration are adorned with all the powers necessary for the achievement of the objects of the company and to represent the company at law. Although the law gives the organs of management enormous power for the management of the company these powers may be curtailed by the Arts, of Ass. While these restrictions of powers may be valid among shareholders they do not produce any effects vis-a-vis third parties even where they have been published. In other words, these restrictions cannot be set up by the company to oppose the interests of third parties.

In addition the Arts of Ass may delegate all the powers of management to one or several persons acting alone or jointly. Note that the clause delegating powers of management may be in yoked after 30 days following its publication in the official gazette except the company can establish that the third party had knowledge of such delegation of powers of management.

The company is linked to third parties through the acts of its representatives (managers) even where the acts undertaken by management go beyond the objects of the company, except the company can prove that the third party knew or ought to have known that the act was ultra-vires the company. Note that mere publication of the Art Ass does not constitute proof of such knowledge.

When an organ of the company fails to perform the functions entrusted to it by law or to act in the interest of the company a shareholder may after unsuccessful attempts to get it perform its duties petition the Court of First Instance to designate (appoint) an ad-hoc agent.

THE ORGANISATION AND FUNCTIONING OF PUBLIC LIMITED COMPANIES

The shareholders are the owners of the company. They can affect the way the business is run through their power to elect directors and amend the articles of association. They do not, however have the power to make management decisions. That power is given to the directors by the articles of association.

The functioning of the public limited company is the prerogative of three organs:

- The board of directors
- The general meeting of shareholders
- The committee of auditors.

Board of Directors

The public limited company is administered by a board of directors comprising not less than three (3) and not more than twelve (12) members. Members of the board of directors may be natural persons or third parties.

B. APPOINTMENT OF DIRECTORS

The first directors may be appointed by the articles of association or by the constituent general meeting. During the existence of the company, the directors shall be appointed by the ordinary general meeting.

The term of office of directors shall not exceed six years but they are eligible for re-election.

Note that following the appointment of directors the company cannot execute a contract of employment with the directors. Should a contract of employment be concluded with a director the same shall automatically come to an end the day the director assumes duty. This may be explained by the fact that directors are not considered in law to be employees of the company, but as the company's agent. It is for this reason that a general meeting can at any time dismiss the directors.

Vacancies

In the event of any vacancy on the board the remaining directors and auditors are given the powers to appoint an interim director to fill the vacancy. The appointment by the board of directors and auditors of the interim director shall be submitted to the next annual meeting for

ratification. Should the annual meeting refuse to ratify the appointment the decision or acts of the incomplete board shall nevertheless remain valid.

Powers and Duties of Board of Directors

The board is adorned with all the powers necessary for the attainment of the objects of the company as well as its representation at law. However, the articles of association may restrict the powers of the board. While these restrictions may be valid between shareholders they cannot be set up by the corporation against third parties even if they were published.

Directors do not have the powers to bind the company individually as it's the case with partnerships having several managers. They can only bind the company acting collectively i.e., to say there is collective management as far as the public limited company is concerned. Decisions are taken by simple majority of those present as long as the majority of board members are personally present.

The company is linked to third parties through the acts of its directors even where the acts undertaken by the directors go beyond the objects of the company except the company can establish that the third party knew or ought to have known that the act was ultra vires the company. The publication of the articles of association does not constitute proof of such knowledge.

Although the management of the company has been entrusted to the board of directors, in practice, the board generally serves as adviser to the management rather than as business decision makers. In the result the powers of management is usually delegated to a managing director or general manager. Even in the event where the powers of management have been delegated the board is still required to formulate the general policy of the company as well as supervise its execution.

Remuneration

The annual meeting may freely grant the directors, as remuneration for their activities a fixed annual duty allowance. The board of directors may also grant its member special remuneration for the mission and tasks entrusted to them or authorizes the reimbursement of travel and subsistence costs and expenses incurred in the interest of the company.

Appointment of Directors

They are appointed by the shareholders at the Annual Meeting or at Special Meetings if such a meeting is called.

If any director is appointed by the Board or the management of the company, his or her appointment must be ratified at the next annual meeting.

C. QUALIFICATION, DISQUALIFICATION AND REMOVAL OF DIRECTORS

CIVIL AND CRIMINAL LIABILITY OF DIRECTORS

As far as civil liability is concerned members of the board are jointly and severally liable to the company for any wrongs (tort) committed by them in the execution of their functions even if they had partitioned their responsibilities. Their liability is appreciated within the context of the law of agency.

Nevertheless, board members may be exonerated from liability for wrong committed in the exercise of their functions if they can establish that the fault in question cannot be attributed to them, provided they had disclosed this wrong doing to the general meeting as soon as they became aware of the same.

Furthermore, in the event of delegation of powers approved by a general meeting and duly published, the managers who are not part of the unauthorized delegation of powers are liable on the general policies or the failure to supervise its execution.

The right of action against directors belongs to the general meeting. The general meeting shall (may) designate one or several agents charged with instituting proceedings in the company's interest against the directors.

Similarly, shareholders representing 1/10 of the share capital and who did not vote during the discharge of the directors may appoint an agent to institute proceedings in the company's interest against the directors. Note that the withdrawal of one or more of the said shareholders in the course of the action shall have no effect on the continuation of the action. In the event where the action succeeds the shareholders shall receive a refund of the expenses of the action; if it fails the shareholders will bear the expenses of the action.

As regards criminal liability, the managing director or general manager shall be jointly and severally liable to the company or third parties either for offences against laws and regulations concerning companies or for violation of the provisions of the articles of association. Note that no decision of the general meeting may extinguish an action against the directors or managing director or general manager for an offence committed in the performance of their duties.

Dismissal of Directors

Shareholders may dismiss a director during the annual meeting for a legitimate cause. For instance, a director who has failed to or is unable to attend and participate in directors meetings or who has acted contrary to the interest of the company can be removed for a legitimate caused. Before being removed for just cause, the director must be given notice and a hearing. If a director is removed without just cause he will be entitled to damages.

Note that if a director was appointed by the annual meeting, then the decision removing the director shall be taken by shareholders representing more than ½ of the share capital. On the other hand if the appointment is by the articles of association then a vote representing ¾ of the share capital shall be mandatory given that an amendment of the articles of association shall be required during a special meeting

D. POWERS AND DUTIES OF DIRECTORS

CONTRACTS CONCLUDED BETWEEN THE COMPANY AND THE DIRECTOR

1- Contracts prohibited between directors and the company

Directors are forbidden to contract whatsoever loans from the company or for the company to guarantee a loan on their behalf except the transaction for which the loan is meant is not part of the object of the company and provided it is submitted to normal conditions. Normal conditions mean conditions that are applied, for similar agreements not only by the company in question, but also by the other companies in the same sector of activity.

2-Contracts submitted to authorization and control

Directors cannot without the authorization of the general meeting carry out either for their own benefit or for the benefit of others any activity, which is similar to that of the company.

The same shall apply to agreements indirectly involving a director or in which he dealt with the company through a third party. The director shall be bound to inform the board of directors as soon as he is aware of an agreement subject to authorization. He shall not take part in the voting on the authorization applied for. Note that all such agreements i.e., those authorized by the board must be submitted for the approval of the ordinary general meeting.

E. REMUNERATION OR COMPANSATION FOR LOSS OF OFFICE

The company shall by ordinary resolution approve the remuneration of the directors and any benefit payable to the directors, including any compensation to a director for loss of employment or to a former director. The Board of Dirctors may determine the terms of any service contract with a managing director or other executive director. The directors may be paid all travelling, hotel and other expenses properly incurred by them in attending any meetings of the Board or in connection with the business of the company. *Article 206*

Decisions that may be approved by the Board of Directors instead of the meeting of shareholders
The Board of Directors may, instead of the meeting of shareholders of a company and where it is provided for by the Law, approve:

1. the payment of remuneration or the provision of other benefits by the company to a director;
2. the payment by the company to a director or former director of compensation for loss of office.

Any shareholder who considers that the payment was not fair to the company and who holds at least ten per cent (10%) of the company‟s voting share capital, may, within one month of knowledge of that payment request the Board to reconsider these payments or request the Board to call a meeting of shareholders to approve or reject the payment by way of ordinary resolution. When the payment is not approved, it shall constitute a debt payable by the directors to the company. *Article 207*

F. LOANS TO DIRECTORS

A company may make a loan to a director but it must be approved by the meeting of shareholders of the company in so far as its application concern of the Board of Directors.;

A loan which was granted which is not in compliance with the Articles of Association or is not approved by the shareholders in meeting shall be cancelled shall be paid back .

G. REGISTER OF DIRECTORS

The list of Directors shall be lodged the with Office of the Registrar General and if thereare any changes appointments ,resignations or terminations, the ORG must be informed.

H. DISCLOSURE OF DIRECTORS' INTERESTS IN CONTRACTS

A director of a company may have an interest in a transaction that company is interested in where:

1. It can be shown that he / she may benefit from it financially
2. has relationship with any other person concerned with the transaction;
3. is amember of the Board of Directors, an employee or attorney of the person concerned with the transaction or
4. that can be interested in it and that is other than:
   a) a direct subsidiary company;
   b) a subsidiary company;
   c) a subsidiary of another subsidiary company;
5. is the parent, the child or the spouse of another party to the transaction and who may have financial interest in it;
6. is to some extent directly or indirectly interested in the transaction.

A director of a company shall, forthwith after becoming aware of the fact that he/she is interested in a transaction or proposed transaction with the company, cause to be entered in the interests register and disclose to the Board of Directors the company:

1. where the monetary value of the director‟s interest is able to be quantified, the nature and monetary value of that interest
2. where the monetary value of the director‟s interest cannot be quantified, the nature and extent of that interest.

A transaction entered into by the company in which a director of the company is interested may be avoided by the company at any time before the expiration of six (6) months after the transaction is disclosed to all the shareholders. A transaction shall not be avoided where the company receives fair value under it. The question as to whether a company receives a fair value under a transaction shall be determined on the basis of the information known to the company and to the interested director at the time the transaction is entered into.

I. THE TURQUAND'S RULE

No presumption of knowledge of articles of association.
A person is not affected by, or deemed to have notice or knowledge of the contents of articles of association of, or any other document relating to a company merely because:

1. the articles of association or that document is registered in a register kept by the Registrar General;
2. the articles of association or that document are available for inspection at an office of the company.

Article 35 of Law 7/2009.. relating to Companies

This stems from The Turquand Rule:

Royal British Bank v Turquand (1856) 6 E&B 327 is a UK company law case that held people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not. This "indoor management rule" or the "Rule in Turquand's Case" is applicable in most of the common law world. It originally mitigated the harshness of the constructive notice doctrine, and in the UK it is now supplemented by the Companies Act 2006 sections 39-41.

Chapter 21
The Secretary

A. THE COMPANY SECRETARY

Any company, other than a small private company shall have one or more employees who shall be designated as Company Secretary
Article 219 as modified by Law 14/2010 of 07/05/2010

The Company Secretary to replace the Employee of a company

The 2009 companies' law had scattered provisions on employees of a company. The article 219 stated out the duties of that company's employee in these words:

"Any company, other than a small private company shall have one or more employee whose duties shall be the following:

1. *to advice members of the Board of Directors on their duties and powers;*

2. *to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, reports thereof and their submission to different relevant organs provided for by the Law as well as the impact of failure to comply with such regulations;*

3. *to make sure minutes of the meetings of shareholders or the Board of Directors are well prepared and registers provided for by the articles of association are accurately kept;*

4. *to make sure annual balance sheet and other types of required documents are submitted to the registrar general as provided for by this Law;*

5. *to make sure copies of annual balance sheet and activity reports where necessary are submitted to all those provided for by this Law*".

Article 220 mentioned that an office of that employee shall not be left vacant for three (3) months. The name of such an employee shall be notified to the Registrar General. The company shall, within thirty (30) days, notify to the Registrar General whether the appointed employee resigned or was removed from office.

These provisions have since been amended. Art. 219 for example replaced the term "employee" with company "Secretary" and that article was amended as follows in the May 2010 amendments:

The duties of the Company Secretary

Article 219 of Law n° 07/2009 of 27/04/2009 relating to companies as modified and complemented by the May 2010 amendment states the duties of the Company Secretary as follows:
"Any company, other than a small private company shall have a Company Secretary whose duties shall be the following:

1. *to advice members of the Board of Directors on their responsibilities and powers;*

2. *to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, reports thereof and submission of all company documents required by the law to relevant organs as well as consequences due to the failure to comply with such regulations;*

3. *to ensure that minutes of the meetings of shareholders or the Board of Directors are well prepared and that registers provided for by the articles of association are accurately kept;*

4. *to make sure annual balance sheet and other types of required documents are submitted to the Registrar General as provided for by this Law;*

5. *to ensure that copies of annual balance sheet and activity reports are transmitted to relevant destinations n accordance with this Law and to any person as provided by the law".*

He / she is responsible for keeping registers of directors and shareholders and of directors' interests and keeping the Office of the Registrar General informed as required by law.

B. QUALIFICATION, APPOINTMENT AND REMOVAL

Whilst there are no rules as to qualification, appointment or removal, the office holder should be a person of suitable standing and hold a properly drawn up contract with the company.

C. LIABILITY OF A SECRATARY

Acts of the secretary in accordance with the agreement bind the company.

D. REMOVAL OF A SECRATARY

The Company Secretary is an employee and the relevant laws apply.
But in addition to this the office of the Company Secretary shall not be left vacant for three (3) months .
The name of such an employee shall be notified to the Registrar General.
The company shall, within thirty (30) days, notify to the Registrar General whether the appointed employee resigned or was removed from office.

E. REGISTER OF DIRECTORS AND SECRATARY

The Company Secretary must keep the ORG informed as required by law.

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Chapter 22
Auditors

ORGANS OF CONTROL

The directors render accounts of their management, once each year, before the annual meeting of shareholders.

They present the statement of accounts for the year under review. In order to control the authenticity of these figures it is necessary that persons having competence in accounting can verify the figures. This mission is entrusted to auditors.

A. QUALIFICATION, APPOINTMENT AND REMOVAL

A company shall, at each annual meeting, appoint an auditor.

The appointment of the company is ensured by auditors who may be natural persons or a corporate body. In addition they may be shareholders or third parties.

The appointment of auditors is the prerogative of the annual meeting of shareholders and never by the articles of association. The first auditors are appointed by the constituent general meeting. During the existence of the company, the auditors are appointed by the annual meeting. The term of office of the auditors shall not exceed six years, but they are eligible for re-election.

Note that shareholders representing 1/5 of the capital may appoint an auditor of their choice. In the event of any vacancy the President of the Court of First instance may appoint, upon a request by the directors or any interested parties, an interim auditor. The final appointment of an auditor will be made during the next general meeting.

In order to guarantee the independence of the auditors, the legislator has disqualified a category of persons from being appointed auditors. They are:

1. The directors;
2. The spouses and parents or relations to the fourth degree, directors of a company they control either directly or indirectly:
3. Employees of the company or former employees who have been working for the company within the last three years.

Qualifications of an auditor No person shall be appointed or act as auditor of a company, other than a small private company, unless he/she possesses qualifications of, or equivalent to those of any institution or association of chartered accountants.

Where at that annual meeting, the company fails to appoint an auditor during that annual meeting or the post continues to fall vacant for a one month period, the Registrar General shall have the powers to have the company appoint its auditor within thirty (30) days. *Article 238*

B. REMUNERATION

The salary and other expenses for the auditor shall be determined at the annual meeting of shareholders or the Board of Directors where the constitution so provides.

An auditing firm may be appointed to be the auditor of a company where :

1. at least one member of the firm is ordinarily resident in Rwanda;
2. all or some of the partners including the partner who is ordinarily resident in Rwanda are qualified for appointment as an auditor ;
3. is indebted to the company;
4. the firm is not
   a) one of the companys shareholders,
   b) member of the Board of Directors,
   c) does not work for the company or for its subsidiary;

C. POWERS AND DUTIES OF AUDITORS

Auditors are clothed with infinite powers for the control of all the operations of the company. Accordingly they can verify the regularity of all the accounting documents and the correctness of the information, which the directors have given to the shareholders. They have the power of investigation and can require officers to give necessary explanations. In the exercise of their functions they may seek the assistance of experts at their own cost. The auditors may convene a meeting of shareholders if the directors fail to convene it.

D. LIABILITY OF AUDITORS

The liability of auditors for acts committed in the exercise of their functions of control, as well as any eventual action against them is determined by the same rules applicable to the liability of directors.

E. DISMISSAL OF AUDITORS

An auditor of a company shall be automatically reappointed at an annual meeting of the company unless :

1. the company passes a resolution at the annual meeting appointing another person to replace the auditor;
2. a small private company passes a resolution that no auditor shall be appointed;
3. the auditor has given notice to the company that he/she does not wish to be reappointed.

Resignation

Where an auditor gives the Board of Directors of a company written notice that he/she does not wish to be reappointed, the Board shall, if requested to do so by that auditor :

1. distribute to all shareholders and to the Registrar General, at the expense of the company, a written statement of the auditor‟s reasons for his/her wish not to be reappointed;
2. permit the auditor or his/her representative to explain at a shareholders‟ meeting the reasons for his/her wish not to be reappointed. *Article 244*

An auditor may resign prior to the annual meeting of the company. This shall, after receiving the notification thereof, call on the Board of Directors to a special meeting to receive the auditor‟s notice of resignation. The auditor shall provide a written report which gives to him/her representative the opportunity to give an explanation why he/she does not wish to be re-appointed as auditor. Also during that meeting, the Board of Directors or the meeting of shareholders shall appoint of a new auditor. *Article 245*

Chapter 23
Company Accounts, Audit and Inspection

Members of the Board of directors shall provide such information and explanations as are necessary for auditing process to be conducted.

A. FORM AND CONTENT OF ACCOUNTS

.The Financial statements will include a balance sheet (Statement of Financial Position) as at the year end and a profit and loss statement (Income Statement)for the period ending the at the balance sheet date.

The financial statements shall, in the case of companies which are required to comply with the International Accounting Standards, also include:

1. a statement of changes in equity between its last two balance sheet dates;
2. a cash flow statement.

And in the case of a company not trading for profit, be an income and expenditure statement for the company in relation to the accounting period ending at the financial statement date;

B. BOOKS OF ACCOUNT

The accounting records shall contain:

1. receipts and expenses with their accounting documents;
2. a record of the assets and liabilities of the company;
3. where the company‟s business involves dealing in goods:
   a) a record of bought and sold goods, those who bought them and related invoices;
   b) a record of stock held and its variation;
4. where the company‟s business involves providing services, a record of services provided and relevant invoices

C. GROUP ACCOUNTS

The Board of Directors of every company shall ensure that, within three (3) months following the end of a financial year, a set of audited accounts shall be submitted to the ORG.

For groups of companies consolidated statements must be prepared in addition to the individual statements. For companies which are required to meet International Accounting Standards, must comprise a consolidated balance sheet and a consolidated income statement.

D. DIRECTORS' REPORT

The Board of Directors of every company shall, within six (6) months after the company's financial statement date, prepare an annual report on the affairs of the company during the accounting period ending on that date.

A copy of the annual report shall be sent to every shareholder of the company not less than fifteen (15) days before the date fixed for holding the annual meeting of the shareholders.

The annual report for a company shall be in writing and be dated and shall:

1. describe the state of the company's affairs and give details especially of any change during the accounting period in:
   a) the nature of the business of the company or any of its subsidiaries;
   b) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise;

2. include financial statements for the accounting period and any group financial statements for the accounting period completed and signed

3. include the auditor's report where this is required

4. state particulars of entries in the interests register made during the accounting period;

5. state the amount which represents the total of the remuneration and benefits by:
   a) executive directors of the company
   b) the non-executive directors of the company;

6. state the total amount of donations made by the company and other subsidiaries during the accounting period;

7. state the names of the persons holding office as directors of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting period;

8. state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and, as a separate item, fees payable by the company for other services provided by that person or firm;

9. be signed on behalf of the Board of Directors by two directors of the company or, where the company has only one director, by that director;

10. disclose related party transactions and full information about the nature and extent of the conflict of interest;

E. AUDITOR'S REPORT

The auditor of a company shall prepare an auditing report and submit it to the company's shareholders.

It shall state the following:

1. the work done by the auditor;

2. the scope and limitations of the audit;

3. the proof that there is no relationship, no interests and debt which the auditor has in the company;

4. whether the auditor has obtained all information and explanations he/she needed;

5. whether, proper accounting records have been well kept by the company;

6. whether, in the auditor's opinion, the financial statements give a true and fair view of the matters to which they relate, and where they do not, shortcomings are identified;

7. whether, the financial statements comply with the international accounting standards;

8. the auditor‟s opinion and problems that are linked with the company's management;

9. the auditor makes recommendations with regard to the identified problems.

F. INVESTIGATION BY THE REGISTRAR GENERAL

An investigation can be called where the Minister in charge of companies is satisfied that:

1. for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of a company should be investigated;
2. it is in the public interest that the affairs of a company should be investigated;

3. in the case of a foreign company, the appropriate authority of another country had requested that an investigation be made under this article in respect of the company;

He/she shall inform the Registrar General of the recommendation that there should be an investigation into the business of a local company or of a foreign company having its branch in Rwanda.

The Registrar General may without recommendation from the Minister of companies institute an investigation:

1. in the case of a company having a share capital, on the application of:
   a) one shareholder or a group of shareholders holding at least one-tenth (1/10) of the issued shares;
   b) debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures;

2. in the case of a company limited by guarantee, on the application of not less than one-fifth (1/5) in number of the persons on the share register;

3. where he/she considers that the appointment of an inspector is necessary to safeguard the interests of shareholders or debenture shareholders or is necessary in the public interest, require an inspector to investigate the affairs of a company or such aspects of the affairs of a company as are specified in the instrument of appointment and in the case of a debenture agency deed, the conduct of the debenture holders' representative, and to make a report on his/her investigation in such form and manner as the Registrar General may direct.

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G. APPOINTMENT AND POWERS OF INSPECTORS

An inspector of the business of a company shall be appointed by the Registrar General.

The powers of an inspector shall extend to the investigation of any circumstances which suggest the existence of an arrangement or understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of his/her investigation. *See Article 286*

Every person concerned shall give to the inspector all assistance in connection with the investigation which he/she is reasonably able to give for the investigation to be smoothly carried out.

H. INSPECTOR’S REPORT

A copy of the inspector's report shall be forwarded to the Registrar General, to the registered office of the company and to those who requested for it.

The Registrar General may, where he/she is of the opinion that it is necessary in the public interest to do so, ask the body that requested the investigation to cause the report to be published.

Where an inspector’s report suggests that any qualified auditor :

1. has been guilty of misconduct;
2. has conducted an audit in a manner that is not appropriate;

the Registrar General shall refer that matter to competent authorities for necessary action.

Chapter 24
Corporate Insolvency

A. THE DISAPPEARANCE OF LEGAL PERSONALITY

When a commercial company acquires legal personality the personality does not persist for life i.e., it is not permanent, it will some day end. The disappearance of legal personality is the consequence of dissolution of the company, which entails the dissolution and distribution of its patrimony among shareholders (partners).

Causes of Disappearance

The causes of disappearance are of two types, the one is applicable to all commercial companies; the other relates to individual partners and is restricted to those companies in which the personality of the participant is fundamental.

a) General Causes

There are four general causes:

1. A commercial company established for a certain period of time dissolves at the end of that period in the absence of a resolution extending its life.
2. A decision taken by the shareholders (partners) to dissolve the company before the time agreed upon.
3. Loss of the object or impossibility of performance
4. If the object has been attained

b) Peculiar causes

The causes peculiar to individuals do not apply to all commercial companies, they relate exclusively to partnerships. Accordingly the death, incapacity or insolvency of a partner will lead to the dissolution.

However in practice, partnership agreements usually contain a provision (clause) making it possible for the partnership to continue doing business not withstanding any of the above causes that may lead to its dissolution.

A partnership cannot be dissolved by the unilateral will of a partner except if he acts in good faith. The last cause for dissolution, which is applicable to all types of commercial companies, is the dissolution for just cause. Here dissolution may be requested by an individual shareholder or partner. The just cause is left to the appreciation of the court. Some of the factors, which may be considered as just cause, include failure by a partner to respect his

obligations, permanent disability of a partner, antagonism that makes it impossible for the partners to work together etc.

Note that the regular transformation of a limited company from one form into another shall not entail the creation of a new legal entity. The same shall apply to an extension of the existence of a company or any other amendment of its Articles of Association (partnership Agreement) with formalities of publication both at the time of constitution (formation) to any amendment of its Articles of Association (partnership Agreement)

Dissolution of a Company

The dissolution of a company is the termination of its legal existence. Among the causes of dissolution of companies we may allude to the factors which are general and which apply to all types of commercial companies and those which that are unique to certain forms of commercial companies.

a) Causes Common to dissolution of all types of Companies

The factors that may occasion the dissolution of a company are:

1. The expiry of the period for which it was formed;
2. The realisation of the object or where the realisation of the object has become impossible;
3. On the decision of the shareholders under the conditions provided for amending the Articles of Association:
4. Upon a decision of the court at the request of a shareholder for a misunderstanding between shareholders hampering the normal functioning of the company:
5. Where all the shares are united in the hands of a single shareholder / when all the shares are held by one person;
6. Bankruptcy;

Expiry of the term (Exfluxion of time): If the articles of association provided for definite life (term) the company automatically terminates at the end of the designated time. However, the life of a company constituted for a fixed period may be extended by a decision of the shareholders in conformity with the condition provided for amending the Articles of Association. In the event where it is deemed necessary to prolong the life of the company, the managers (directors) are required to submit the question of prolongation to the shareholders at least six months before the expiry date.

Where a company is established for an indefinite period, then, a shareholder may if acting in good faith signifies his intention to withdraw from the company by giving the company six months' notice. Should that come to pass the other shareholders are required to reimburse the

dissenting shareholder the equivalent of his assets having regard to the situation of the company as at the time of withdrawal provided that he does not elect to dissolve the company

Note that where a company is established for an indefinite period the company is a company at will. Such a company may be dissolved at any time by any shareholder. All that is necessary is for a shareholder to notify the other shareholders.

Realisation of the object or where realization of the object becomes impossible.

A company that is formed for a certain objective such as to acquire a certain plot of ground and then to develop and sell residential lots dissolves when that objective is reached. Similarly where a company is formed for a certain objective and the realization of the object becomes impossible the company may be dissolved. Impossibility of achieving the objects may be the result of exhaustion of minerals, withdrawal of administrative concession nationalization etc.

On the decision of the shareholders.

Since a company is created as a result of the decision of the shareholders the shareholders can at any time decide to terminate the life of the company in accordance with the conditions provided for amending the Articles of Association

Upon a decision of the court.

A company may also be dissolved upon a decision of the court at the request of a shareholder for a serious misunderstanding between the shareholders, which leads to a malfunctioning of the company.

Where all the shares are united in the hands of a single shareholder.

When all the shares are held by one person this person can alone decide to dissolve the company. The person could be not only an individual but another company.

The bankruptcy of accompany is another factor that conduces to the dissolution of accompany. A company is said to be bankruptcy if it is unable to pay its debts as they are, or become due. Both bankruptcy and judicial administration are procedures controlled by the court.

LIQUIDATION OF COMPANIES

Liquidation of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. Upon liquidation of a company, a liquidator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights.

There are two types of liquidation: compulsory liquidation under an order of court and voluntary liquidation under a resolution of the company.

A company shall be under liquidation as soon as it is dissolved for any reason except by merger. The words "in liquidation" shall be added to the name of the company including letters, invoices and various publication of the said company.

The legal personality of the company shall continue to exist for liquidation purposes until the liquidation procedure is completed.

When a decision ordering the liquidation of the company has been taken the powers of the board of directors, managing directors or the managers shall end (be suspended) and the liquidator will assume their functions. The managing directors or managers are required as at the date of dissolution to establish a balance sheet, profits and loss account and a report, which shall be submitted to the auditors (if any) for verification and to the shareholders for approval.

The liquidator(s) are, in default of their designation by the articles of association appointed by the annual meeting. Note that one or more liquidators shall be appointed:

1. Unanimously by the partners in case of a general partnership;
2. Unanimously by the active partners and by the majority in capital in case of a limited partnership and limited partnership by shares;
3. By the majority capital of shareholders in case of private limited company
4. Under the quorum and majority conditions provided for a special meeting in case of a public limited company .

As seen before, every company shall be considered to be a commercial company.

It is therefore of paramount importance to discuss some matters relating to commercial activities, persons who carry out such activities (traders), and any other relevant matter that might fall within commercial sphere.

B. WINDING UP BY THE COURTS

Upon a decision of the court

A company may also be dissolved upon a decision of the court at the request of a shareholder for a serious misunderstanding between the shareholders, which leads to a malfunctioning of the company.

C. VOLUNTARY WINDING UP

On the decision of the shareholders

Since a company is created as a result of the decision of the shareholders the shareholders can at any time decide to terminate the life of the company in accordance with the conditions provided for amending the Articles of Association (i.e. in principle the unanimous decision of the partners (partnership) and the special majority for companies (SARL and SA).

D. LIQUIDATORS: APPOINTMENT AND DUTIES

Note that a liquidator may be chosen from among the shareholders or third parties. In addition, the liquidator may be a corporate body.

However, where the shareholders are unable to appoint a liquidator within three month of the dissolution of the company he may be designated by a court decision at the request of any interested party. In default, the managers or directors of the company at the time or moment of dissolution shall, in relation to the third parties, assume any obligation and liabilities of the liquidators.

Note that in case of nullity e.g. where the Articles of Association does not take the form of a notarial act it is only the court that is competent to appoint liquidators.

The liquidators are clothed with the widest powers possible to realize the act of liquidation as well as to represent the company i.e., legal proceedings (liquidation proceedings). However, the liquidator cannot without the consent of the shareholders (under condition for amending the articles of association) or authorization of the court, as the case may be, sell real estate, borrow give secured debts, transfer the assets of the company by private contract), assign or transfer the assets of the company to another company or stay the execution of a judgment.

Note that the effect of liquidation is to create concurrent rights between creditors of the company. As such, no cancellation of sale of movable property can be allowed against the interest of creditors.

The liquidator is empowered to pay creditors. Where the sums allotted to creditors have not been paid out, they shall be deposited in an account opened at the National Bank of Rwanda.

After paying off the creditors the balance available will then be shared among shareholders and any property that cannot be shared conveniently shall be handed over to the shareholders jointly.

In the course of performing his duties the liquidator is required to use the care and skill required of a paid agent. The liquidator is liable to the company as well as third parties for the actionable wrong resulting from any errors made by him in the exercise of his duties.

Each year the liquidator is required to submit to the general meeting a financial statement, profit and losses account as well as a written report in which he shall give an account of the liquidation exercise during the year together with reasons hampering the closure of liquidation. Nonetheless, the general meeting of shareholders or the court may at any time request the liquidator to submit a written report containing the state of the liquidation exercise and the reason hindering the closure of liquidation.

E. RELEASE OF LIQUIDATORS

At the close of liquidation it is mandatory for the liquidator to establish a written report on the liquidation exercise, which shall be submitted to the general meeting, failing this, to the auditors.

The shareholders shall take a decision on the final accounts, the discharge of the liquidator and auditors in respect of the performance of their duties. The discharge will be valid if and only if the report and profit and loss account do not contain errors or omissions.

The foregoing notwithstanding the court may at the request of any interested party pronounce the termination of liquidation once the liquidation exercise has been concluded. This, it will do after hearing the liquidator.

Notwithstanding the end of liquidation the court may order the reopening of liquidation at the request of any interested party:

1. If the decision pronouncing the end of liquidation was actuated by a fraud on his rights;
2. if the liquidators have not shared all that accrued to the company in liquidation

To make known his status of shareholder or creditor.

Should liquidation be reopened the former liquidators will be reinstated, if need be, they may be replaced.

PRESCRIPTION OR LIMITATION OF TIME

Prescription relates to the extinction of rights by lapse of time i.e. the time within which if an action is not instituted in court, the plaintiff's right of action is lost.

All actions against the company shall lapse after 10years from the date the right of action accrued. However, the following acts shall be barred after 5years:

1. all actions against the promoters of a company starting from the date of publication of the memorandum of association;
2. all actions against shareholders starting from the date of publication of their retirement or dissolution of the company;
3. All actions against the organs of the company for acts committed in the exercise of their functions starting from the date of such acts or if it was concealed by fraud from the date of discovery;
4. All actions against a company in liquidation from the date of publication of the closure of liquidation;
5. all actions for the restitution of dividends unjustly paid from the date of distribution;
6. all actions for the payment of dividends or for the reimbursement of part thereof, from the date it became due.

Chapter 25
Alternatives to Winding Up

A. RECONSTRUCTION

Transformation, Merger and Cessation

The transformation of a company is the operation whereby a company changes its legal form by decision of its partners. The transformation of the company does not result in the creation of a new corporate body. The act of transformation amounts to an amendment of the Articles of Association (PA) which is subject to the publication formalities seen above. Nevertheless, if the transformation of a company has the effect of increasing the commitment of a shareholder in which the shareholders liability is limited to their contributions into one in which their liability is unlimited the consent of the shareholder in question is required.

Transformation does not destroy the rights of creditors of the company. Accordingly creditors shall maintain their rights over the company prior to such transformation In addition the creditors may within three months from the date of publication of the act of amendment petition the court to nullify the transformation if they fail to obtain sufficient guarantee from the company.

For its part a merger is the operation whereby two or more companies merge to form a single company either by creating a new company or by one company acquiring the other (s). All the companies involved in the merger operation are each required to take and publish the decision in accordance with the rules regulating amendment of import aspects affecting the company in default in accordance with the requirements for constituting a new company.

A merger entails the dissolution without liquidation of the disappearing company and the universal transfer to the beneficiary company of their assets and liabilities in the state in which they are on the date of wrapping up of the operation.

Note that third parties (creditors) shall maintain their rights over the company prior to the merger. Furthermore, they may request the court within three months from the date of publication of the act of merger to declare the merger void if the fail to receive adequate guarantee from the company.

In addition a company may either alone or together with other companies create a new company by the partial transfer of its assets to the new company. Note that the decision transferring part of the assets of the company is taken and published in accordance with the rules to be observed when amending important aspects of the company. In default the rules regulating the reduction of the capital of the company must be strictly followed.

B. AMALGAMATION, MERGERS AND TAKE-OVERS

The transformation of a company is the operation whereby a company changes its legal form by decision of its partners. The transformation of the company does not result in the creation of a new corporate body. The act of transformation amounts to an amendment of the Articles of Association (PA) which is subject to the publication formalities seen above. Nevertheless, if the transformation of a company has the effect of increasing the commitment of a shareholder in which the shareholders liability is limited to their contributions into one in which their liability is unlimited the consent of the shareholder in question is required.

For its part a merger is the operation whereby two or more companies merge to form a single company either by creating a new company or by one company acquiring the other (s). All the companies involved in the merger operation are each required to take and publish the decision in accordance with the rules regulating amendment of import aspects affecting the company in default in accordance with the requirements for constituting a new company.

A merger entails the dissolution without liquidation of the disappearing company and the universal transfer to the beneficiary company of their assets and liabilities in the state in which they are on the date of wrapping up of the operation.

Note that third parties (creditors) shall maintain their rights over the company prior to the merger. Furthermore, they may request the court of the act of merger to declare the merger void if the fail to receive adequate guarantee from the company.

C. SCHEMES OF ARRANGEMENT

The transformation of a company is the operation whereby a company changes its legal form by decision of its partners. The transformation of the company does not result in the creation of a new corporate body. The act of transformation amounts to an amendment of the Articles of Association (PA) which is subject to the publication formalities seen above. Nevertheless, if the transformation of a company has the effect of increasing the commitment of a shareholder in which the shareholders liability is limited to their contributions into one in which their liability is unlimited the consent of the shareholder in question is required.

In addition a company may either alone or together with other companies create a new company by the partial transfer of its assets to the new company. Note that the decision transferring part of the assets of the company is taken and published in accordance with the

rules to be observed when amending important aspects of the company. In default the rules regulating the reduction of the capital of the company must be strictly followed.

D. RIGHTS OF SHAREHOLDERS

The rights of shareholders are safeguarded through Article 142 which states that a major transaction of amalgamation can only be approved by a special resolution at a meeting of the shareholders.

A special resolution can only be approved by a majority of 75% of the votes of those shareholders entitled to vote and who have voted on the issue under consideration.

E. RIGHTS OF CREDITORS

Transformation does not destroy the rights of creditors of the company Accordingly creditors shall maintain their rights over the company prior to such transformation.

In addition the creditors may petition the court to nullify the transformation if they fail to obtain sufficient guarantee from the company.

Chapter 26
Foreign Companies

This chapter deals with general notions on foreign company, obligations incurred by them as well as some provisions regarding the end of activities of a foreign company.

A. DEFINITION

A foreign company is a company incorporated outside of Rwanda and that has some of its activities in Rwanda by:

1. establishing a share transfer office or a share registration office in Rwanda;
2. administering, managing or dealing with property in Rwanda as an agent, personal representative or trustee, whether through its employees or an agent or in any other manner.

A foreign company has to be registered by the Registrar General. Where it is established that its name is confusing as far as companies inside the country are concerned, he/she shall require the name to be changed.

B. REGISTRATION OF FOREIGN COMPANIES

Every foreign company shall, before starting business file the following with the Registrar General :

1. a duly authenticated copy of its articles of association and the certificate of its registration delivered by the registration officer;
2. a duly authenticated copy of its certificate of incorporation, articles of association, memorandum of association depending on where it was established and any other instrument constituting or defining its being established;
3. a list of its directors residing in Rwanda;
4. a memorandum of or power of attorney to represent the company in Rwanda;
5. notice of its registered office in Rwanda;

6. a declaration made by the authorized agents of the company.

Where a foreign company has complied with the provisions of the law, the Registrar General shall register the company and shall issue a certificate thereof in the prescribed form.

C. OBLIGATIONS APPLICABLE TO FOREIGN COMPANIES

The law sets out obligations related to foreign companies, notably:

- Obligation to file with the Registrar General a court order (art. 328);
- Obligation by the Registrar General to approve changes (article 329);
- Obligation of a foreign company to deposit to the Registrar General has copy of a Balance Sheet (art. 330);
- Obligation to comply with requirements to local companies Rwanda of (art. 331);
- Obligation to comply with international accounting standards (art. 332);
- Obligation to give Notice by a foreign company of particulars of its business in Rwanda (art. 333);
- Obligation to keep at the head office, branch registers (art. 334);
- Filing with the Registrar General a notice as to a place where the register is kept (art. 335 and 336);
- etc.

D. CESSATION OF FOREIGN COMPANY ACTIVITIES

In the terms of the article 340, where a foreign company ceases to have a place of business or to carry on business in Rwanda, it shall, within seven (7) days of the date of the cessation, file with the Registrar General a notice to that effect, and as from the day on which the notice is filed, its obligation to file any document other than a document that ought to have been filed shall cease to operate, and the Registrar General shall within three (3) months after the filing of the notice remove the name of the company from the register.

Article 341 adds by saying that Where a foreign company goes into liquidation or is dissolved in its place of incorporation or origin:

1. an authorized agent in Rwanda shall, upon commencement of the liquidation, file with the Registrar General a notice to that effect;
2. the liquidator of a dissolved company shall have the powers of a liquidator for Rwanda.

The article 342 gives the procedure to follow by the liquidator in these terms, A liquidator of a foreign company appointed by the Court or a person exercising the powers and functions of such a liquidator shall:

1. before any distribution of the foreign company's assets is made, by advertisement in a newspaper circulating generally in each country where the foreign company had been carrying on business and where no liquidator has been appointed , invite all creditors to make their claims against the foreign company within a reasonable time before the distribution;
2. not, without leave of the Court, pay out any creditor to the exclusion of any other creditor.

Where a foreign company has been wound up so far as its assets in Rwanda are concerned and there is no liquidator for the place of its incorporation or origin, the liquidator may apply to the Court for directions as to the disposal of the net amount recovered (article 343).

Finally to the terms of the article 344 of the law says, On receipt of a notice from an authorized agent in charge of liquidation or dissolution of the company, the Registrar General shall remove the name of the company from the register.

Where the Registrar General has reasonable cause to believe that a foreign company has ceased to carry on business in Rwanda, shall remove it from the register of companies in accordance with the Law.

Chapter 27
Dormant Company

A. DORMANT COMPANY

Article 346 and 347 give this definition, a company shall be a dormant company for any period during which no significant accounting transaction occurs in relation to the company. Where a company has:

1. been dormant from the time of its formation;
2. has been dormant since the end of its previous accounting period; and is not required to prepare accounts for that period, by a special resolution passed at a meeting of shareholders, such company declare itself a dormant company.

A company shall not declare itself to be a dormant company where it is a company formed for the business of banking or insurance.
The company shall, within fifteen (15) days of the passing of the special resolution declaring itself to be a dormant company gives notice to the Registrar General of that resolution (art. 349).

Where a company which has declared itself to be a dormant company ceases to be dormant, a notice thereto shall be given to the Registrar General by that company (art.350).

It is worth mentioning exemption for dormant companies as envisaged by article 351 saying that any company, which is registered as being a dormant company, shall be exempted from the requirement of having its accounts audited and from the payment of any prescribed fee as is relevant to its situation.

Chapter 28
Removal from Register of Companies and Penalties

The present chapter approaches the removal of a company from register of companies as well as the penalties.

A. REMOVAL FROM REGISTRAR COMPANIES

Before speaking of actual removal from register, the law distinguishes a companies based on whether or not they have passed the solvency test. It is however difficult to establish.

B. SOLVENCY AND COMPANY'S INABILITY TO PAY

According to the wording of article 352, a company shall satisfy the solvency test where:

1. the company is able to pay its debts as they become due in the normal course of business;
2. the value of the company's income is greater than the sum of the value of its liabilities and the company's share capital.

A company shall be considered to be unable to pay its debts where:

1. a creditor to whom the company is indebted in a sum exceeding twenty thousand Rwanda francs (20,000 Rwf), has served at the registered office a demand under his/her hand or under the hand of his/her Lawfully authorized agent requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure it to the reasonable satisfaction of the creditor;
2. execution or other process issued on a judgment or order of any Court in favor of a creditor of the company is returned unsatisfied;
3. it is proved to the satisfaction of the Court that the company is unable to pay its debts, having regard to its existing, contingent and prospective liabilities.

C. PERTINENT PROVISIONS IN RELATION TO THE REMOVAL FROM THE REGISTER OF COMPANIES

A company shall be removed from the register of companies when a notice, signed by the Registrar General states that the company is removed from the register (art. 354).

Concerning reasons for removal from the register of companies article 355 specifies that The Registrar General shall remove a company from the register of companies where :

1. the company is an amalgamating company, other than an amalgamated company, on the day on which the Registrar General issues a certificate of amalgamation;
2. the Registrar General is satisfied that the company has ceased to carry on business.

However article 357 provides for possible objections in the following manner:

Where a notice is given of an intention to remove a company from the register, any person may deliver to the Registrar General, not later than the date specified in the notice, an objection to the removal on grounds that :

1. the company is still carrying on business or there is other reason for it to continue in existence;
2. the company is a party to legal proceedings;
3. the company is in receivership or liquidation, or both;
4. a person is a creditor or a shareholder, or a person who has an undischarged claim against the company;
5. the person believes that there exists, and intends to pursue, a right of action against the company;
6. for any other reason, it would not be just and equitable to remove the company from the register.

The proceeding of removal of a company from the register by the Registrar General are subject to prior assessment of objections as put by article 358, the Registrar General shall not proceed with the removal unless he/ she is satisfied that :

1. the objection has been withdrawn;
2. any facts on which the objection is based are not, or are no longer, correct;
3. the objection is frivolous or vexatious. The Registrar General shall give notice to the person objecting that his/her objection is receivable or not and provide grounds therefor.

The property of a company which is removed from the register includes leasehold rights and all other rights vested in or held on behalf of or on trust for the company prior to its removal but does not include property held by the former company on trust for any other person (art. 359).

Finally article 360 states that the removal of a company from the register of companies shall not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register and that liability continues and may be enforced as if the company had not been removed from the register.

D. PENAL PROVISIONS

Articles 361 to 376 give a whole range of the penal provisions mainly consisting in fine up to 10 millions Rwandan Francs, notwithstanding the existing penal Code provisions.

Those penalties are applied notably in the following cases:

- where a company fails to comply with the Law as to getting registered in the relevant
- register of companies is concerned (art. 361);
- where a company fails to keep the books required (art. 362);
- where a company fails or delays to provide the Registrar General with the documents that are required (art. 363);
- recidivism (art. 364);
- false or misleading notice (art. 365);
- deliberate submission of false document (art. 366);
- fraudulent us and destruction of company's property (art. 367);
- falsification of the records (art. 368);
- use of a fraudulent document (art.369);
- fraudulent exercise of the commercial activities (art. 370);
- fraudulent acts (art. 371);
- Etc.

Chapter 29
Accounting Records and Audit

A. DEFINITION

By audit, one should understand a mission of investigating entrusted to a professional (named auditor sometimes) by a person in quest of information on a concerned operation or on a situation of an enterprise that consists depending on the agreement in verifying the conformity of the operation or the situation under study to the rules of the law in general or those of a determined sector, it can also aim at assessing the risks of the initiative or the activity considered or even its degree of efficiency and eventually draw a report to the assignor.

Some provisions related to the auditors

These provisions hinge on the appointment, fees and expenses, resignation of an auditor, etc.

Concerning an auditor's nomination article 238 specifies that a company shall, at each annual meeting, appoints an auditor. Where at that annual meeting, the company fails to appoint an auditor during that annual meeting or the post continues to fall vacant for a one month period, the Registrar General shall have the powers to have the company appoint its auditor within thirty (30) days.

When during a yearly assembly of the company, no auditor is named or takes back to his/her/its station and that the station remains vacant since one month, the Registrar General is authorized to order to the company to name a auditor within (30) days at most.

An auditor of a company shall be automatically reappointed at an annual meeting of the company unless:

1. the company passes a resolution at the annual meeting appointing another person to replace the auditor;
2. a small private company passes a resolution that no auditor shall be appointed;
3. the auditor has given notice to the company that he/she does not wish to be reappointed.

Where an auditor gives the Board of Directors of a company written notice that he/she does not wish to be reappointed, the Board shall, if requested to do so by that auditor :

1. distribute to all shareholders and to the Registrar General, at the expense of the company, a written statement of the auditor's reasons for his/her wish not to be reappointed;
2. permit the auditor or his/her representative to explain at a shareholders' meeting the reasons for his/her wish not to be reappointed.

Regarding an auditor's qualification, article 242 says that no person shall be appointed or act as auditor of a company, other than a small private company, unless he/she possesses qualifications of, or equivalent to those of any institution or association of chartered accountants.

It is worth highlighting that Small private companies need not to appoint an auditor according to article 251 of the law. Where a small private company decides to appoint an auditor, the provisions of this Law shall apply.

Where at, or before the time required for the holding of the annual meeting of a small private company, notice is given to the Board of Directors of the company, signed by a shareholder who holds at least five per cent (5%) of the shares of the company, the company shall appoint an auditor. Such resolution shall cease to have effect at the next annual meeting, and the auditor shall thereupon be re-appointed unless the shareholders by unanimous resolution agree not to appoint the auditor.

With regard to fees and auditor's expenses, they are determined by the meeting of the shareholders or by the Board of directors when it is specified by the articles of association of the company.

Where from a report of an inspector it appears that any qualified auditor:

1. has been guilty of misconduct;
2. has conducted an audit in a manner that is not appropriate;

the Registrar General shall refer that matter to competent authorities for necessary action.

Concerning an auditor's resignation, an auditor may resign prior to the annual meeting of the company. This shall, after receiving the notification thereof, call on the Board of Directors to a special meeting to receive the auditor's notice of resignation. The auditor shall provide a written report which gives to him/her representative the opportunity to give an explanation why he/she does not wish to be re appointed as auditor. Also during that meeting, the Board of Directors or the meeting of shareholders shall appoint of a new auditor (article 245).

Where from a report of an inspector it appears to the Registrar General that in the management and administration of a company, there is a shareholder who, by virtue of his/her company, shares and voting rights deriving from the classes of such shares and other benefits, alters the decisions that were taken through the vote, causes mismanagement for him/her to maintain control and where the latter helps him/her to unfairly discriminate other shareholders, the Registrar General may lodge a case before the Court following this Law.

Auditing report

According to the article 241 of the law, an auditing report required to be signed on behalf of a firm appointed as auditor of a company, by a member of the firm who is a qualified auditor.

Article 247 says that the auditor of a company shall prepare an auditing report and submit it to the company's shareholders. The auditor's report shall state the following:

1. the work done by the auditor;
2. the scope and limitations of the audit;
3. the proof that there is no relationship, no interests and debt which the auditor has in the company;
4. whether the auditor has obtained all information and explanations he/she needed;
5. whether, proper accounting records have been well kept by the company;
6. whether, in the auditor's opinion, the financial statements give a true and fair view of the matters to which they relate, and where they do not, shortcomings are identified;
7. whether, the financial statements comply with the international accounting standards;
8. the auditor's opinion and problems that are linked with the company's management;
9. the auditor makes recommendations with regard to the identified problems.

Article 250 lays down modalities for submitting auditor's report in these words, where the auditor of a company completes his/her report, he/she submits it to the company in a period not exceeding seven (7) days and reserve a copy of the same for the debenture holders or their representatives.

B. FINANCIAL STATEMENT AND ANNUAL REPORT

Financial Statement

The Board of Directors of every company shall ensure that, within three (3) months following the end of a financial statement the audit is made and signed by at least one representative of the company. Such an audit shall be submitted to the Registrar General (article 253).

The financial statements of a company shall comply with international standards. Members of the Board of directors shall provide such information and explanations as are necessary for auditing process to be conducted (art. 254).

Concerning registration of the financial statement, all company, with the exception of the small private companies, must insure that in the thirty (30) days that follow the date required for the signature of the financial states of the company and the financial states of the whole group, the copies of these financial states accompanied by a copy of the audit report on these financial states are deposited to the office of the Registrar General for registration.

With regard to the content of the financial statement, article 266 states that the consolidated financial statements shall, in the case of companies which are required to comply with the International Accounting Standards, contain:

1. a consolidated balance sheet for the group as at that balance sheet date;
2. a consolidated income statement;

Annual report

The Board of Directors of every company shall, within six (6) months after the company's financial statement date, prepare an annual report on the affairs of the company during the accounting period (article 267 of the law) ending on that date.

The Board of Directors of a company shall cause a copy of the annual report to be sent to every shareholder of the company not less than fifteen (15) days before the date fixed for holding the annual meeting of the shareholders.

Concerning the format, every annual report for a company shall be in writing and be dated and shall:

1. describe, so far as the Board believes is material for the shareholders to have an appreciation of the state of the company's affairs and is not harmful to the business of the company or of any of its subsidiaries, especially any change during the accounting period in:
   a) the nature of the business of the company or any of its subsidiaries;
   b) the classes of business in which the company has an interest, whether as a shareholder of another company or otherwise;

2. include financial statements for the accounting period and any group financial statements for the accounting period completed and signed in accordance with this Law;

3. where an auditor's report is required in relation to the financial statements or group financial statements, included in the report, include that auditor's report;

4. state particulars of entries in the interests register made during the accounting period;

5. state the amount which represents the total of the remuneration and benefits received by or due and receivable from the company and any related corporation by:
   a) executive directors of a company engaged in the full time employment of the company and its related corporations, including all bonuses and commissions received by them as employees;
   b) separate statement, the non-executive directors of the company;

6. state the total amount of donations made by the company and other subsidiaries during the accounting period;

7. state the names of the persons holding office as directors of the company as at the end of the accounting period and the names of any persons who ceased to hold office as directors of the company during the accounting period;

8. state the amounts payable by the company to the person or firm holding office as auditor of the company as audit fees and, as a separate item, fees payable by the company for other services provided by that person or firm;

9. be signed on behalf of the Board of Directors by two (2) directors of the company or, where the company has only one director, by that director;

10. disclose related party transactions and full information about the nature and extent of the conflict of interest;

11. any other details that are necessary for the report to be well understood.

A Company whose subsidiary companies is located outside Rwanda shall also comply with the provisions of this article within eight (8) weeks after the dates contained therein.

C. MANDATORY INVESTIGATION

Besides the inspection of the documents of a company made by the Shareholder(s), the law set out a series of provisions related to the inspection of the activities of a company and that is made by the inspector.

Mandatory investigation and appointment of an inspector

Where the Minister in charge of companies is satisfied that:

1. for the protection of the public, the shareholders or creditors of a company, it is desirable that the affairs of a company should be investigated;
2. it is in the public interest that the affairs of a company should be investigated;
3. in the case of a foreign company, the appropriate authority of another country had requested that an investigation be made under this article in respect of the company; he/she shall issue the instructions to the Registrar General as to investigating into the business of a local company or of a foreign company having its branch in Rwanda (article 274).

An inspector of the business of a company shall be appointed by the Registrar General and have the power to investigate the business of a company.
The appointed inspector should be a qualified, skilled and experienced professional manager. This expert shall prepare a report according to the format required by the Registrar General (art. 175).

However, the article 283 allows a company, with the exception of a declared company can, to appoint an inspector by ordinary resolution, to investigate its business.

In the same vein, article 294 provides that a foreign company with subsidiary companies in Rwanda may appoint inspectors for such subsidiary companies and the Registrar General shall be notified thereof.

Expenses and operating cost of the inspection of a declared company are paid by the office of the Registrar General.

An inspection cannot be ordered by the Minister, in this case the article 277 The Registrar General may :

1. in the case of a company having a share capital, on the application of:
   a) one shareholder or a group of shareholders holding at least one-tenth (1/10) of the issued shares;
   b) debenture holders holding not less than one-fifth (1/5) in nominal value of the issued debentures;
2. in the case of a company limited by guarantee, on the application of not less than one-fifth (1/5) in number of the persons on the share register;
3. where he/she considers that the appointment of an inspector is necessary to safeguard the interests of shareholders or debenture shareholders or is necessary in the public interest, require an inspector to investigate the affairs of a company or such aspects of the affairs of a company as are specified in the instrument of appointment and in the case of a debenture agency deed, the conduct of the debenture holders' representative, and to make a report on his/her investigation in such form and manner as the Registrar General may direct.

Publication or submission of copies of the reports

The Registrar General may, where he/she is of the opinion that it is necessary in the public interest to do so, ask the organ that requested for the investigation to cause the report to be published (art. 280).

A copy of the inspector's report shall be forwarded to the Registrar General, at the registered office of the company and to those who requested for it. (art. 279).

On the conclusion of the investigation, the inspector shall report his/her opinion in such manner and to such persons as the company’s general assembly indicated (art. 284).

Procedure and powers of the inspector

Every person concerned shall, if required to do so by the inspector, produce to the latter every book in his/her custody, control or possession and give to the inspector all assistance in connection with the investigation which he/she is reasonably able to give for the investigation to be smoothly carried out (art. 287).

An inspector may by written notice require any person concerned to appear for examination on oath in relation to the business of a subsidiary and the notice may require the production of every book in the custody, control or possession of the person concerned (art.288).

Where an inspector requires the production of a book in the custody, control or possession of a person concerned, he/she:

1. may take possession of those books;
2. may retain those books for such time as he/she considers necessary for the purpose of the accomplishment of his/her mission;
3. shall, where those books are in his/her possession, permit the company to have access, at all reasonable times to the book.

D. AMALGAMATION OF COMPANIES

It first fit to give the definition and types of amalgamation before speaking of the procedure of the amalgamation.

Definition and types of amalgamation

The term amalgamation has not been defined in the Companies Act, though this voluminous piece of legislation contains 44 definitions in Article 2. The terms amalgamation and merger are synonyms and the term '*amalgamation*', as per Concise Oxford Dictionary, Tenth Edition, means, *'to combine or unite to form one organization or structure'*.

There is amalgamation when a company is absorbed by another one that subsists alone or when two companies disappear to constitute a new company. It is therefore a legal operation that consists in bringing together several companies in one company.

According to article 295 of the law, two (2) or more companies may amalgamate and continue as one company, which may be one of the amalgamating companies or may be a new company.

Article 49 para.1 of the law of 1988 provided: "The amalgamation of two or several companies may be either by the absorption of one or several companies by another, either by the constitution of a new company ".

The amalgamation is characterized at a time by:

- a dissolution of the company absorbed that disappears as moral person.
- a transfer of the universality of properties of the absorbed company to the absorbing company or the new company emerging from the amalgamation.

PRELIMINARY PROCEDURE OF THE AMALGAMATION

Amalgamation proposal

As put by article 296, an amalgamation proposal shall set out the terms of the amalgamation, and in particular:

1. the name of the amalgamated company where it is the same as the name of one of the amalgamating companies;

2. the registered office of the amalgamated company;

3. the full name or names and address or addresses of directors of the amalgamated company;

4. the address for registered office of the amalgamated company;

5. the share structure of the amalgamated company, specifying :
   a) the number of shares of the company;
   b) the rights, privileges, limitations and conditions attached to each share of the company;

6. the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;

7. the consideration that the holders of those shares are to receive instead of shares of the amalgamated company;

8. any payment to be made to a shareholder or a director of the new amalgamated company;

9. details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company;

10. a copy of the proposed constitution of the amalgamated company;

11. the date on which the amalgamation proposal will be effective.

Concerning the resolution for amalgamation, article 297 disposes that the Board of Directors of each amalgamated company shall resolve that in its opinion, the amalgamation is in the best interest of the company and it is satisfied on reasonable grounds that the amalgamated company shall, immediately after the amalgamation becomes effective, satisfy the solvency test.

The directors who vote in favor of a resolution of amalgamation under this article shall sign a certificate stating that the amalgamation will benefit the company and the latter will satisfy the solvency test.

The Board of Directors of each amalgamating company shall send to each shareholder of the company, not less than thirty (30) days before the amalgamation is proposed to take effect :

1. a copy of the amalgamation proposal;
2. copies of the certificates given by the directors of each Board;
3. a summary of the principal provisions of the articles of association of the amalgamating company, if it has one;
4. a statement that a copy of the constitution of the amalgamated company shall be supplied to any shareholder who requests it;
5. a statement setting out the rights of shareholders of each company;
6. a statement of any material interests of the directors, whether in that capacity or otherwise;
7. such further information and explanation as

The amalgamation proposal shall be approved by the shareholders of each amalgamating company and any other interested parties by special resolution (art. 300)

The company’s creditors must not be caught by surprise as article 301 provides that the Board of Directors of each amalgamating company shall, not less than thirty (30) days before the amalgamation is proposed to take effect, give written notice of the proposed amalgamation to every creditor of the company.

Article 302 determines types of documents needed for the registration of amalgamation in these words, For the purpose of effecting an amalgamation, the following documents shall be delivered to the Registrar General for registration:

1. the approved amalgamation proposal;
2. a certificate that is signed by the Board of Directors of each amalgamating company;
3. a certificate signed by the Board of Directors of the new company resulting from the amalgamation;
4. the proof that the amalgamation will not jeopardize the interest of those creditors of amalgamating companies;
5. a document in the prescribed form, signed by each of the persons whose name is indicated in the amalgamation proposal as a director or employee of the amalgamated company consenting to act as a director or employee of the company.

Regarding the issue of certificate of amalgamation, articles 303 and 304 give the following precisions: On receipt of the application for amalgamation, the Registrar General shall forthwith :

1. where the amalgamated company has the same name as one of the amalgamating companies, issue a certificate of amalgamation;
2. enter the particulars of the company on the register;
3. issue a certificate of amalgamation;
4. issue a certificate of incorporation.

An amalgamation shall be effective on the date shown in the certificate of amalgamation.

Effects of the amalgamation

The absorbing company (or the new company) is going to acquire the assets of the absorbed company that will disappear (art. 305). It thus inherits the rights and liabilities of the absorbed companies (art. 307). The absorbed companies stop existing; they are however supposed to exist for the purpose of the possible nullity actions, for the period of proceeding until the court's decision becomes definitive. The shareholders of the absorbed companies become shareholders of the absorbing company according to the modes specified in the project of amalgamation. The third parties keep all rights that they possessed before the amalgamation.

E. ALTERATION OF THE NATURE OF COMPANIES

This section undertakes to explain the notion of the transformation of a company and the types of transformation.

Notion of the transformation of a company

If the law of 1988 on commercial companies laid down in its article 48, the principle of the transformation of a commercial company in its terms: "every company can adopt another form without losing its legal personality"; the new law is content with giving some situations of alteration or transformation of a company.

In a general manner, it essentially sounds like a modification of the articles of association that allows the company to adapt its structure to new needs. It allows the enterprise that grows to choose a form that facilitates a more complex management or to appeal more comfortably on new shareholders. It also occurs in order to benefit from fiscal advantages recognized to such type of company.

The transformation can be imposed to the shareholders like a necessary condition to the survival of the company. It intervenes every time a company complies no more with the requirements of current form. To avoid the dissolution, the company must upgrade its status, or otherwise transform.

Thus, in the terms of the new law related to companies a company limited by shares may be converted to a company limited by guarantee. In the same way a limited company turn into to unlimited one and vice-versa.

Types of transformation

1. Transformation of a company limited by shares to a company limited by guarantee

According to article 318 of the law company limited by shares may be converted to a company limited by guarantee when:

1. there is no unpaid shares;
2. all its members agree in writing to the conversion and to the voluntary surrender to the company for cancellation of all the shares held by them immediately before the conversion;
3. a new articles of association appropriate to a company limited by guarantee is filed; The new articles of association of the company limited by guarantee shall be filed to the Registrar General for registration.

The conversion of a company shall –

1. take effect on the issue of the certificate;
2. operate so that all shares are deemed to have been validly surrendered and cancelled;
3. have effect so that every member who has not agreed to contribute to the share capital of the company shall cease to be a member;
4. not affect any right or obligation of the company except as otherwise provided in this section or render defective any proceedings by or against the company.

2. Transformation of a limited company to unlimited company

Article 320 disposes that a limited company may convert to an unlimited company by passing a special resolution to that effect and by making any necessary amendments to its constitution and filing with the Registrar General a copy of the resolution.

3. Transformation of an unlimited company to limited company

In the terms of the article 321 of the law, an unlimited company may convert to an limited company by passing a unanimous resolution to that effect and filing with the Registrar General a copy of the resolution.

Appendix I

I Forms to be completed when a company is registered with the Office of the Registrar General

-A-

FORM OF MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES (ART. 14)

1) The name of the company is "…… limited (insert name of company)."

2) The category of the company is Private / Public.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be ……...

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are …… ……..…… …..... .....

7) The liability of the members is limited.

8) The share capital of the company is …….. (Insert the amount of share capital) divided into …… shares of …… Rwandan francs

WE, the several persons whose names and addresses are subscribed, desire to be formed into a company, under this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names

N°	**Names, postal addresses and occupations of subscribers**	**Number of shares subscribed**	**Signature of subscribers**
1.			

No	Names, postal addresses and occupations of subscribers	Number of shares subscribed	Signature of subscribers
2.			
3.			
4.			
5.			
	Total shares taken		

(*if more than 5, please attach a list of shareholders on separate paper*)

Date:
……..

Witness: ..... Signature: .....

-B-

FORM OF MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE (ART. 14)

1) The proposed name of the company is "…… limited (insert name of company)."

2) The category of the company is Private.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be situated …..……

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are ……
……..……
…..... .....

7) The liability of the members is limited.

8) Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up.

WE, the several persons whose names and addresses are subscribed, are desire to be formed into a company, under this memorandum of association.

N^{o}	**Names, postal addresses and occupations of subscribers**	**Amount of guarantee**	**Signature of subscribers**
1.			
2.			
3.			
4.			
5.			

(*if more than 5, please attach a list of shareholders on separate paper*)

Date: ……

Witness: ..... Signature: .....

- C-

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BOTH BY SHARES AND BY GUARANTEE (ART. 14)

1) The proposed name of the company is "…… limited (insert name of company)."

2) The category of the company is Private / Public.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be situated …..……

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are ……
……..……
…..... .....

7) The liability of the members is limited.

8) The share capital of the company is …….. (Insert the amount of share capital) divided into …… shares of …… Rwandan francs

No	**Names, postal addresses and occupations of subscribers**	**Number of shares subscribed**	**Amount of guarantee**	**Signature of subscribers**
1.				
2.				
3.				
4.				
5.				
	Total shares taken			

9) Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up.

WE, the several persons whose names and addresses are subscribed, are desire to be formed into a company, under this memorandum of association.

(*if more than 5, please attach a list of shareholders on separate paper*)

Date: ……

Witness: ..... Signature: .....

-D-

MEMORANDUM OF ASSOCIATION OF AN UNLIMITED COMPANY (ART. 14)

1) The proposed name of the company is "…… limited (insert name of company)."

2) The category of the company is Private.

3) The company has the articles of association/ doesn't have articles of association.

4) The registered office of the company will be situated …..……

5) The shareholders resolved that Mr./Mrs./Miss: …… will be the first Managing Director of the Company.

6) The objects for which the company is established are ……
……..……
…..
.....

7) The liability of the members is unlimited.

8) The share capital of the company is …….. (Insert the amount of share capital) divided into …… shares of …… Rwandan francs

WE, the several persons whose names are subscribed, desire to be formed into a company, under this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

N°	**Names, postal addresses and occupations of subscribers**	**Number of shares subscribed**	**Signature of subscribers**
1.			
2.			
3.			
4.			

5.			
	Total shares taken		

(*if more than 5, please attach a list of shareholders on separate paper*)

Date:

……..

Witness: .....

..... Signature: .....