EDO UNIVERSITY IYAMHO

FACULTY OF LAW

COURSE: **PPL 211- LAW OF CONTRACT I**

COURSE CREDIT UNIT: **3 Credits**

DAY & TIME OF LECTURE: **Tuesdays- 11 am -12 noon; Wednesdays- 1-3pm**

CLASS VENUE: **LC6, FAMASS**

LECTURER I: **Professor Ambrose Ekpu**

LECTURER II : **DR (Mrs) Florence U Masajuwa, Associate Professor (Law)**

CONTACT OFFICE: **Faculty of Law Building**

OFFICE HOURS: **Monday and Tuesdays 1 pm -3 pm or by Appointment**

Email: florence.masajuwa@edouniversity.edu.ng

SECTION "1" THEME: INTRODUCTION AND SOURCES OF CONTRACT LAW

Date/Time of Lecture: Tuesday 15 January 2019. TIME- 11am-12 Noon

This section of the course has two parts, A & B. Part 'A' is a general introduction while Part 'B' is on the sources of contract law**.**

Summary and Learning Outcome for Part A: General Introduction

Learning Outcome

At the end of this part, students will have learnt the following:

A. General Introduction

1. Nature and definition of contract
2. History of contact law
3. Relationship between contract law and other Private Laws.

4. Importance of contract law
5. Principles of contact law
6. Forms of contract

A. WHAT IS CONTRACT

Here we shall be dealing with issues such as:

1. Types of contract law
2. Why we need contract law
3. What are the main principles of Contract
4. How does contract Law ("CL") relate to other fields of private Law
5. History of Contract Law

B. WHAT ARE THE SOURCES OF CONTRACT LAW?

1. Rights and obligations of Contracting partners or parties
2. The rules and regulations that govern contract as found in the party agreement, in official sources (e. g National and European legislations and case Law and International treaties) and in informal rules

GENERAL NATURES OF CONTRACT

To most people, a contract has to do with a piece of paper – the documents you sign when you start a job, buy a house or hire a television, for example. While it is certainly true that these documents are often contracts, in law the term has a wider meaning, covering any legally binding agreement, written or unwritten. In order to be legally binding, an agreement must satisfy certain requirements, (these will be discussed as the lectures on contract law progresses) but with a few exceptions, being in writing is not one of those requirements. We make contracts when we buy goods at the supermarket, when we get on a bus or train, and when we put money into a machine to buy chocolate or drinks – all without a word being written down, or sometimes even spoken. Thus, contract relationship can come in many forms. E. g employment letter, receipts issued when we buy a bag, house, TV set etc. each of these contract relationships can pass for valid contracts. In law what constitute a contract is given a broader definition.

Generally and irrespective of the jurisdiction, contracts are seen or defined by law as legally binding agreements – whether written or not. To this end , when one enters a shopping mall like Shoprite and buys hand bags, perfumes, goes to Niccon Insurance to take out a life insurance policy, buys air ticket from a travel Agency, visit a hair salon, tailor, doctor etc. such acts can be said to constitute entering into contract. See *Onyema v Opute (1997) 3NWLR (pt. 60)259; Benue Cement Co. Ltd v Sky Industry (Nig.) Ltd (2002)7 NWLR, 86*

Note: Most rules of contract law are designed to apply to any contract regardless of party and the type of obligations the parties take upon themselves. It does not also matter whether the contract involves a million naira or one naira.-because the law must treat all contracts and parties equally, no matter what the contract is about or who the parties are. What one party is entitled to must also be given to the other party. Contract could also be seen to be concluded in law where words are not even spoken at all. For example putting money in a machine to buy a recharge card, to pay for packing space at Airport parking Arena. Etc.

HISTORY OF CONTRACT LAW

Some Contract Law rules date back to some centuries; but majority of these rules came into being in the early 19Century. Before this time Contract Law existed as part of the family private laws. Issues relating to contracts received only few pages in text books written on those other family of private law such as trust, tort, family and property law.

19th Century marked a water shade in the birth of Contract law as a separate distinct subject of study. This was so due to the series of changes occurring in the society in the 19th Century. The evolution of market economy helped the birthing of contract law as a distinct subject. Market economy was facilitated by the advent of industrial revolution-whereby society moved from being agrarian society to Industrial one.

CONTRACT LAW AND OTHER PRIVATE LAWS

Contract Law is seen as part of a system of private law or as part of law of obligations. This mode of seeing contract law is mostly found in Civil Law Countries- such as France, Germany, Netherlands, Poland, Italy, Austria, Belgium etc.

Contract Law as a System of Private Law under the Civil Law Legal Tradition: Private law consists of the rule and principles that deals with the relationships between private actors such as individuals and companies. Thus, contract law is said to belong to a comprehensive system of private law. Other branches of law under the system of private law in civil law jurisdictions include law of tort (also called law of "delict" or law of "civil wrongs"), law of restitution, property law, law of trust, inheritance law.

Contract law as part of the law of obligation: Under this categorization, the law of Contract alongside the law of tort, restitution are grouped together as law of obligations in civil law jurisdiction. They are so called because they can lead to bring about obligations. The word obligation is a legal term that indicates that an enforceable duty exists of one person vis-à-vis another person or several other persons.

While the relationship between parties (e.g. bilateral contract) to a contract is voluntary (self-imposed), relationship in tort is non-voluntary (or imposed). The distinction between

voluntary obligations have been an integral feature of the Civil Law legal tradition for example it was set out as Summa disio (ultimate partition) in a book for law student written by a Roman Jurist, Gaius around 160 AD titled the Institutes: a Text Book for Law Students:

Contract law in common law jurisdictions: The practice of having a system of law of obligation as obtained in Civil Law Countries is a novelty in common law jurisdictions. For example, England, the bastion of the common law legal tradition only had its first comprehensive text in English law of obligations published in 2010. The practice in common Law Countries is to have individual texts in Contract Law, Tort Law, Property law (Land Law etc.)..

CLASSIFICATION AND TYPES OF CONTRACT LAW

Contract Law can be classified according to certain criteria. Some of the criteria are:

- Types of parties- the parties involved
- The main characteristics of the contract
- The reason/reasons why parties want to be bound.
- Who concludes the contract
- Reason for performance
- Type of performance

TYPES OF CONTRACT

Arising from this classification, the following types of contract are distinguishable.

1. Commercial Contract- (i.e. between two commercial entities- i.e. business-business or B2B. contracts) eg contract between Shell and NNPC
2. Consumer Contract-(i.e. contract between business and a customer or B2C contract) eg, contract between Shoprite and a grocery buyer in side a Shoprite's shopping mall.
3. Contracts concluded between two individuals (not business) are called Consumer-to-consumer (C2C- Contract)
4. Bilateral
5. Unilateral
6. Regulated contract

7. Others (for example, Formal Contract, Simple contract, Express contract, Implied contract)

Points to NOTE

These categorizations are relevant because the legislatures and the Courts make rules specifically designed for B2B, or C2C Contracts.

Contracts classified on the basis of their main characteristics: here, what parties need to do under the contract depend on the type of contract they concluded. E.g. contract between a seller and a buyer for the sale of goods is expected to do something different from employer and employee in an employment contract for example. Specific contract, seller needs to deliver goods as agreed while buyer needs to pay right price as agreed

Employment contract, employer need to pay agreed salary why employee is required to do the agreed work. These are all specific contracts and are governed by their own codes or developed by the Courts. Codes= Civil Law Court – made rules or case law precedents under common law. Examples of specific contracts in civil codes are sale of goods, batter, lease, mandate, donation and the employment contracts.

Reasons for performance -Contracts could also be classified according to reasons why parties want to be bound. This categorization arises from a definition of contract as an "agreement in which two parties reciprocally promise and engage, or one of them singly promises and engages to the other to give some particular thing, or to do or abstain from doing some particular act"(Definition by a popular French Jurist, Pothier: I Traite des obligations 1761 1.)

Bilateral or Unilateral contract: This distinction of contract came about from – Pothiers Definition. These contracts forms are now codified in many civil codes. For example Articles 1102-1103 of French Code Civil: contract synalagmatique and Unilateral, Article6:261 Dutch's Civil Code: wederkerige and eenzijdige ove-eekomst.

In bilateral contracts: Here party A only want to bound to party B because party B is also willing to oblige itself to party A. Eg Anu promises to pay Bisi a particular amount for the shoes Bisi is selling to him (Anu). This is the type of contract in sales, lease, employment.

Unilateral contracts: Under this contract type, a party is not promised anything in return for its performance, it's a kind of gratuitous promise, for example Ade promised to dash Bola his wrist watch as soon as he (Ade) buys an Omega brand watch he intends to buy. In this contract, note that Ade willingly decided give out his old watch to Bola, not because he intends to receive any favour from Bola. Ade only wants to benefit Bola. It must be pointed out that a promise for which nothing is given in return is called a gratuitous promise, and is not usually enforceable in law (the exception is where such a promise is put into a formal document called a deed).

Regulated Contracts: In these contracts type, the main decision to be taken by parties is whether to enter into the contract, while the freedom left to decide upon its terms is severely curtailed. It is beyond doubt that most contracts relevant to the average person are heavily regulated by the public authorities. There is a good reason for this: despite the presumption that everyone is free to conclude the contract he or she wants, reality is different. Economic and societal factors can have a grave impact on the freedom to choose. In particular the liberalisation of markets for energy, infrastructure (air transportation), mass media and telecom from the 1990s opened up a wide potential for the use of contracts as regulatory instruments: what used to be public law was turned into (heavily regulated) private law. The regulation aims to ensure access to these basic services and to avoid abuse of position by suppliers.

Other Good examples that can be cited with regards to regulated contracts are employment contracts and residential leases. Both contracts are characterised by the strong bargaining position of employer and landlord - in particular in times of shortage of labour and housing - and most jurisdictions therefore lay down detailed rules aiming to protect the employee (on dismissal, maternity leave, sick leave, safety at the workplace, etc.) and the tenant (on access to the property, notice, maintenance, etc.)

FORMS OF CONTRACT LAW

Contract can be written or oral. Written contract is when contracting parties document their intentions in a form of a written agreement. Oral contract like the name suggests is a contract entered by mere word of mouth by parties.

INPORTANCE OF CONTRACT LAW

1. To regulate transaction in market economies (except North Korea) - e.g. Chinese Socialism, American & Western Capitalism, Norche Social Model etc. In such a society, people buy and sell fairly freely, making their own bargains, both on the small scale of ordinary shoppers in supermarkets, and on the much bigger one of a project such as the construction of oil refineries or oil pipelines which involved many different parties, each buying and selling goods and services. Although, as we shall see, there are areas in which government intervenes, but in general we choose what we want to buy, who from and, to some extent at least, at what price.

2. Contract Law ensures that contracts are binding It would be impossible to run a society on this basis if promises were not binding. Long-term projects show this very clearly – contractors working on the Benin Water Storm project, oil pipelines in the Niger Delta, Railway lines from Lagos to Kaduna, Okene Road bypass for example, would have been very reluctant to invest time and money on the project if they knew that the Governments that awarded them the contracts could suddenly decide that they did not want these projects again, and not be expected to compensate the contractors. On a smaller scale, who would book a package holiday if the tour operator was free to decide not to fly you home at the end of it? How would manufacturers run their businesses if customers could simply withdraw orders, even though the goods had been made especially for them?

3. It allows planning- A market economy will only work efficiently if its members can plan their business activities, and they can only do this if they know that they can rely on promises made to them. For example, landlord cannot evict a tenant when he/she gets another prospective tenant who is willing to pay a higher rent. Also, it checks instances where for example you ask an online shop like Jummia, Jinji, etc to bring you a Watch and while they have already packaged and shipped your order you call back to say no, no I don't want to buy again!

4. Contract Law try's to compensate the innocent party/ parties financially, usually by attempting to put them in the position they would have been if the contract had been performed as agreed. This has the double function of helping parties to know what they can expect if the contract is not performed and encouraging performance by ensuring that those who fail to perform cannot simply get away with their breach.

5. Where people make their own transactions, unregulated by the state, it is important that they keep their promises, and as a result, contract law became an increasingly important way of enforcing obligations. Contract Law are rules and principles that govern transactions among parties. Contract Law is the cement of modern Society-in that market actors are empowered by business men, companies, NGOs, Government etc. Contract Law helps one to participate in economic and social life. The overall place of contract law in modern society today is captured by in this statement by Aristotle;

   ……."So that if you destroy the authority of contracts, the mutual intercourse of men is destroyed" (in his Rhetoric 1, 14, 22)

PRINCIPLES OF CONTRACT LAW

The word "Principles" has various meanings. But for this course, it means a fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning. In law, what constitutes the principles of a particular field of law may be down in legislations or arises from Court Cases. In some other instances, what constitutes principles is so evident that they are not put down in writing. The main principles of contract law are as followed:

1. Freedom of Contract principle
2. Binding forces principle
3. The absence of formalities principle
4. Contractual fairness principle

1. **Freedom of Contract**: this is an aspect of the economic and liberal politics of laissez-faire which preaches that individuals should be free to make their choices they so wish. To this end, individuals have the freedom to enter any contract they desire. The law presumes that a party will only choose a contract term that is most favourable to the party. Art 19 of Swiss Code of bligations says: within the limit of the law, the parties may determine the terms of their contract as they please in effect, the principles of the freedom of contract not only entails that a person is allowed to conclude a contract on whatever terms it deems fit (choice of contents), but also whenever it desires (freedom to contract at all)and with whoever it wants (freedom to choose the other party).see: *Merchant Bank Nig. Ltd V Adalma Tanker (1990)5 NWLR (pt153)747 CA*

2. Binding Force: This means that once enforced, the contract is binding on the parties. Each party must perform its own part of the Contract, otherwise the Court will intervene to help the other party should he or her so requests the Court to intervene by compelling erring party to pay damages, perform the contract etc. The principle of binding force is captured in French Civil Code Art1134 – Agreement lawfully entered into have the force of Law for those who have made them. The courts can at the request of a party to the contract, set aside a contract, if it is found to contain clauses that are seen by law as unfair or against public policy. *See Metibag v Narelli International Ltd*

3. Absence of Formalities: This principle arises from the previous ones – that means if parties are legally bound to the contract because they intend to be bound, their intention is apparently sufficient and there may be no need to put the contract in writing, have a witness, visit a lawyer etc.

4. Contractual Fairness: what this means is that contracting parties should follow what they agreed upon when they entered that contract. This principle is explained further in the English Cases of *Printing and Numerical Registering Co v Sampson (1875)* where the English Judge- George Jessel held: If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by court of Justice.

Study Questions

1. How did contract as a course you study today evolve in both civil and common law jurisdictions?
2. Contract law has no definite benefits. Discuss.
3. Attempt a categorization of contract
4. Identify and discuss the various types of contracts you studied.
5. Contract law has no links to with other private laws. Do you agree?

For further Reading

Fagbohun, Funke,You and the Law: Laymans guide to rights and liabilities. Lagos, Nigeria: MIJ Professional. Publishers Ltd, 1986

Adams and Brownsword, 'The ideologies of contract' (1987) 7 Legal Studies 205

Atiyah (1985) The Rise and Fall of Freedom of Contract, Oxford: Oxford University Press

Steyn, 'Contract law: fulfilling the reasonable expectations of honest men' (1997) 113 Law Quarterly Review 433

Treitel and Peel (2007) Treitel on the Law of Contract, London: Sweet and Maxwell

Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition, Cape Town (Juta) 1990 (paperback edition with Oxford University Press, Oxford 1996).

THEME: INTRODUCTION AND SOURCES OF CONTRACT LAW

PART B. TOPIC: Sources of the Law of Contract

Date/Time of Lecture: Thursday 24 January 2019. TIME- 1am-3pm Noon

LEARNING OBJECTIVES ambivalence

At the end of this lecture, students will understand that contract law comes from sources such as:

1. **Rules made by parties to a contract (That is the agreement made by contracting parties)**
2. **Judges (cases) and legislation.**
3. **Rules that are made by official bodies: Governments, multilateral agencies, supranational sources**
4. **Informal rules.**

INTRODUCTION

Sources of contract law is another way of categorising contract law. Categorisation on the basis of sources allows us to distinguish between three types of rules relevant to contract law: rules that are made by the contracting parties themselves (the party agreement), rules that emerge from the official national, regional and supranational sources (official sources) and, finally, informal rules that are made by others than the official institutions, including non-state organisations and academics (informal rules). Thus, if Contract law is defined as the set of rules and principles that governs transactions among parties, thereby establishing those parties' enforceable rights and obligations, this segment of the course sets out to examine where these rules and principles are.

These rules of contract law originating at different geographical (national, European, supranational) and actor-specific (parties, legislators, courts and other actors) levels form what is often referred to as a 'multi-level' legal system. Any lawyer should be able to find their way through this system in order to identify the precise and detailed rules needed to solve a case or advise a client. If, for example, the seller of a good is confronted with a buyer who refuses to pay the price, one needs to be able to locate the relevant statutory rules and judicial decisions.

Meaning of Source

The term *'fons Juris'* may mean the origin and defined sources of law as something (eg the constitution treaty, statute etc.) that provide authority for legislation and for judicial decision,

a point of origin for law or legal analysis, authoritative statement from which the substance of the law is derived. It may also be described as: something (such as constitution treaty, statute or Custom) that provides authority for legislation and for judicial decisions. A source of law is thus, a point of origin for law or legal analysis. In the context of Contract Law, source(s) mean:

i. The origin of the contract principle

ii. Government institution or Agencies that formulate contract rules and regulations

iii. Published manifestations of the law of contract

Contract Law is a set of rules and principles that governs transactions among parties, thereby establishing those parties' enforceable rights and obligation so where do we find theses and principles?

The sources of Contract Law emanate from three types of rules relevant to Contract Law:

i) Rules made by the parties to a contract (party agreement)
ii) Official sources
iii) National sources/ Legislations
iv) Informal rules.

RULES MADE BY PARTIES TO A CONTRACT

The party agreement, consists of what the parties expressly agreed upon when they entered into the contract. The agreement typically includes the price of the good or service and the qualities it must possess. The importance of the parties agreement arises from contract principle of freedom of contract which entails that parties are not only free to decide whether they want to contract at all, and with whom, but also that they can determine the contents of their contract.

Contractual rules need not be made for one contract only. In practice commercial parties often make use of standardised sets of rules that are suited to their own interests. These so-called general conditions, or standard forms, are used by almost all professional parties (including supermarkets and retailers) for the contracts they conclude with consumers or other professional parties. The advantages of this are clear: it saves a party from having to negotiate and draft contract conditions for every new contract it wants to conclude.

OFFICIAL SOURCES

Official sources are default rules that are automatically applicable if the parties have not made any other arrangements. Often, parties only discuss those elements of the contract that they consider essential (such as the price and the time of delivery), not saying anything about other aspects (such as the place of delivery or what will happen if the other party does not perform the contract). Thus, it is clear that in most cases the party agreement alone cannot set all rights and obligations under the contract. In so far as such matters are not covered by general conditions, the law should provide so-called default (or 'facilitative') rules.

Sometimes, parties may go into contracts that are contrary to public policy or good morals such as hiring someone to steal a TV set, or - to give a more disputed example - paying someone to engage in sodomy. In such cases, the law may have to intervene with so-called mandatory rules that declare such a contract void, or at least avoidable by one of the parties.

NATIONAL LAW

Official contract law at the national level is primarily produced by the legislature and the courts. In civil law countries, general rules on contract law are typically found in the Civil Code. Thus, the French Code Civil (CC) of 1804 places contract law in its Book III on the different ways of acquiring property, whereas the German Biirgerliches Gesetzbuch (BGB) of 1900 has general provisions on juridical acts (see Box 1.3) in Book 1 and specific rules on contracts in Book 2. The Dutch Burgerlijk Wetboek (BW) of 1992 places the provisions on juridical acts in Book 3, on contracts in general in Book 6 and on specific contracts in Book 7.

Next to the civil code, many civil law countries have more *specific statutes* in which contract law can be found. France, for example, has adopted a separate Consumer Code (Code de la Consommation) that collects and consolidates laws on consumer protection, as well as a Commercial Code that provides additional rules on B2B-contracts. Germany also keeps some laws outside the BGB, such as the Product Liability Act (Produkthaftungsgesetz) of 1989 and statutory implementations of recent European directives (see below).

Jurisdiction: The dominant source of contract law in the common law family is not legislation but the case law developed by the courts. This does not mean that specific statutes on contract law are absent in England and other common law jurisdictions. In England for example, the most important statutes on contract law are the Sale of Goods Act 1979 (Also

applicable in Nigeria), the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977 and the Contracts (Rights of Third Parties) Act 1999.

SUPRANATIONAL LAW

There have been efforts to unify parts of national contract laws on a regional or even global scale. A successful example is the unification of conflict-of-laws rules in the context of the Hague Conference on Private International Law (established in 1893). Also parts of substantive trade law have been unified, led by the United Nations Commission on International Trade Law (UN CITRAL). Its most important achievement is the Convention on Contracts for the International Sale of Goods (CISG), concluded in Vienna in 1980 and in force since 1988.

The CISG is inspired by the idea that the adoption of uniform rules promotes the development of international trade. This is in fact facilitated by the fact that the CISG is applicable in the world's largest economies, including the United States, China, Japan, Germany, Brazil and Russia. The most notable European trading country where the CISG is not applicable is the UK. It is said that the main reason for this lies in a lack of interest of domestic business and in the fear that London may lose its edge as one of the world's leaders in international arbitration and litigation if inroads are made on the applicability of English law.

INFORMAL RULES

As is the case in many other areas of law, contract law is increasingly influenced by rules that are not officially binding, but have the status of soft law. Soft law can take the form of, for example, guidelines, and codes of conduct, resolutions, action plans, principles and model rules. Although it is by definition not binding 'hard' law, it is important in practice for various reasons. One is that soft law is often a first step towards adopting a binding instrument: legislators tend to look at soft law as a blueprint for future statutory rules. Another is that soft law often reflects the more progressive *opinio juris*, the direction in which the law is to develop according to the cutting-edge opinion makers. This aspirational aspect of soft law can make it a very useful source in interpreting and criticising existing laws as well as in teaching the law. In the field of contract law, it can also be a reference point for parties having to draft a contract. Examples of informal rules are the Unidroit Principles of

International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) etc.

REVISION QUESTIONS

List the Sources of contract law. Explain any two of them?

Examine Contract law as a multi-level legal system?

In what ways are Default rules source of the law of contract?

Explain the main differences between the civil law and common law family?

What is the relevance of soft law for the law of contract?

FURTHER READING

1. Raoul van Caenegem, Judges, Legislators and Professors, Cambridge (Cambridge University Press) 1987.
2. James Gordley and Arthur Taylor Von Mehren, An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials, Cambridge (Cambridge University Press) 2006.
3. Basil S. Markesinis et al, The German Law of Contract: A Comparative Treatise, Oxford (Hart) 2006.

- Ugo A. Mattei et al, Schlesinger's Comparative Law: Cases-Text-Materials, 7th ed., New York

(Thomson Reuters) 2009.