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TECHNOLOGY (EXHIST)**

COURSE TITLE:
LABOUR LAW, BUSINESS LAWS AND COMPANY LAW

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PART ONE

LABOUR LAW

INTRODUCTION

I- SIGNIFICANCE AND FUNCTIONS OF LABOR LAW

Labor law is an assembly of rules which govern the relationship which comes to exist as a result of a labor contract. Labor law is not interested in individual work. That is, a work in which an individual is doing his work alone. It regulates only those work in which a person works in the account of another person of which the principle of subordination is respected. The principle of subordination means that the employer can give instructions to the employee, he can control the employee and he can sanction the employee. Since the employee is subordinated to the employer, labor law comes in to protect the employee who is the weaker person. This is to prevent the employer from using his stronger powers to take arbitral decisions against the employee. Since labor law protects the employee who is a weaker person, we can say that labor law is a partisan law.

In addition to its protection function, labor law also has other functions. Here, we are referring to the economic and the social functions of labor law. These functions deals with the search for jobs, the organization of the enterprise etc.

II: THE SOURCES OF LABOR LAW

The rules which govern labor relationships can be seen in international and national text. The international text refers to the conventions and regulations which are concluded by the international labor organization. In addition to these conventions, we also have bilateral conventions which are concluded by Cameroon. For example the bilateral convention dealing with the free circulation of workers which has been concluded by Cameroon.

Talking on the national text, there are many of these national text. For example the labor code which was created by **law n° 92/007 of 14th August 1992** dealing with the **Labor Code**. We can also add circulars, decisions of ministers and collective conventions like the labor contract, internal rules and regulations of the enterprise etc.

All the rules, both national and international respect the principle of hierarchy of laws. That is the constitution is at the summit, followed by the international conventions and then the national laws. When there is a conflict between a law which is in a superior position and a law which is placed in an

inferior position, what prevails is the law which is in the superior position. For example, when there is a conflict an international labor convention and the labor code, what prevails is the international labor convention.

However, it is possible to have a situation on labor law when there is a conflict between an inferior law and a superior law and what prevails is the inferior law. This applies in those cases where the inferior law protects the employee more than the superior law.

III-The enterprise as the scope of application of labor law:

Relationship in an employment contract is generally done at the level of the enterprise. This enterprise is the place where the work is executed.

Individual relations in a labor contract will start to exist from the moment when the labor contract is formed between the employer and the employee (chapter one) it will continue with the execution of the contract (chapter two) and the payment of wages (chapter three). This labor relationship can also be a collective Labor relation (chapter four), but this relationship can also lead to constraints which can cause the labor contract to be terminated (chapter five).

CHAPTER ONE:

THE FORMATION OF AN EMPLOYMENT CONTRACT

By virtue of article 23 of the labor Code, an employment contract is defined as a convention through which a worker will engage to render his professional activity under the authority of the employer in exchange for remuneration.

Except where the law will provide for the contrary, an employment contract can be proven using any means. An employment contract is concluded between the parties in an employment contract (Section one), this contract will state the objectives of the contract (Section two) and the objectives of the contract will permit us to know the different forms or types of employment contracts (Section three).

SECTION ONE: THE DIFFERENT PERSONS IN AN EMPLOYMENT CONTRACT

In an employment contract, there are two persons called the employer and the employee. This is applicable irrespective of whether the enterprise is an individual enterprise or it is a company. Therefore an employment contract is formed between the employer (paragraph one) and the worker or the employee (paragraph two)

P-1-The employer:

Question: who is an employer?

He is the proprietor or the owner of the enterprise. The employer can be identified using a simple hypothesis (A) and a complex hypothesis (B).

A-The identification of the employer using the simple hypothesis:

The employer is that person (moral or physical) who concluded the employment contract with the worker. He is different from the head of the enterprise (chef d'un entreprise) who is that person who shall exercise the powers that labor law and labor contract gave to the employer. Sometimes, the employer is confused with the head of the enterprise. This is generally in those cases where the enterprise is operated in the form of a company. In which case the employer is different from the head of the enterprise. In a company, the company is the employer and the physical person who controls the activities of the company is called the head of the enterprise.

This confusion does not exist when the enterprise is operated by a physical person in which case the physical person is at the same time the employer and the

head of the enterprise. A critical example can be seen at the level of private schools. In this case who is the employer of the enterprise? Is it the founder, or the director of the school? The Supreme Court answered this question by saying that, private schools are responsible for the management of personnel in their establishment and the directors or principal are their employee. In order to ensure efficiency, the employer/owner of the enterprise can delegate his powers. This delegation is limited because the decision delegating power must state the extent or scope of the delegated powers.

B-Identification of the employer using the complex hypothesis:

This complex hypothesis is as follows:

1- Identification of the employer when there is the temporal labor enterprise:

The temporal labor enterprise is a situation in which there is an enterprise who recruits workers and keep them at his disposal and any person who is in need of these workers can get them from him and use the workers. In this case, the employer is the person who recruited the workers and not the person who is to use the workers.

2- Identification of the employer in those cases where there is a group of companies

This generally will apply in those cases where there are groups of companies. That is, there is a company having branches in different places. Here, when one company recruits a worker and sends him to work in another branch of the company, the problem is to know who is the employer? In this case, labor law has established the concept of duality of employers. That is the employer and the co-employer.

The main objective of identifying the employer is to know the party who shall pay indemnity in the event of dismissal.

3-The hypothesis of confused activities

Firstly, this can be because the employer is rendering services to many enterprises who have formed a group of which it is difficult to identify the employer. In this case, the employer is the person who is more solvent (richer person).

Another problem can be when the employer is on secondment (detachment). This is a situation where the employee has been removed from this original corps or service and sent to another corps temporally which requires his service. In this case, the employer is the person with whom he signed the original contract. But when the employee is on secondment concluded on another contract of employment with his new master, then his employer will be his new

master. The first contract in this case will be suspended until when the period of secondment is over.

P-2-The Worker or Employee

Question: Who is a worker?

From the broad sense, the employee is that person who concluded the labor contract with the employer. *Stricto sensus*, a worker according to article 1(2) of the Labor Code, is a person that without taking into consideration his nationality, race, language, sex, ethnic group will undertake to render his professional activity in exchange for remuneration under the authority of a physical or moral person irrespective of whether it is a moral person of public law or a moral person of private law.

Therefore for a person to be considered to be a worker, he must exercise a professional activity in exchange for remuneration under the authority of the employer.

By virtue of article 1(3) of the labor Code, there are some workers who are not governed by the labor Code. This refers to the civil servants. This is because the civil servants are governed by special rules. Civil servants are governed by the General Rules and Regulation of the public service.

SECTION TWO: THE DIFFERENT FORMS OF AN EMPLOYMENT CONTRACT

An employment contract is concluded when the parties agree. An employment contract can be written as well as it can be oral. These contracts which are frequently witnessed in an enterprise can be classified with regards to their duration as contracts for unspecified duration(P1), contracts for specified duration(P2) of which any of the contracts can commence by way of the trial or the probation period(P3).

P-1-Contracts for unspecified duration

This is a contract in which does not have fixed duration. It can be terminated at anytime with the initiative of any of the parties.

P-2-Contracts for a specified duration

This is a contract in which the duration is fixed in advance. These contracts exist in two types which are:

-Contracts for a specified duration proper

The terms of these contracts are fixed in advance. The date when the

contract will come to an end is clearly stated in the contract at the time when the parties were entering into the contract. The duration of this contract must not be more than 2 years. It can only be renewed once for the same duration of 2 years. This means it has a maximum duration of four years. For this contract to be renewed after two years, it will vary depending on whether the contract involves a foreigner or it involves a national.

For a foreigner, article 25(2) of the labor Code demands that an authorization must be taken from the minister of labor before the contract can be renewed. This contract can be renewed as many times as possible. For a national, this contract can only be renewed once. At the expiration of the renewal, if the contract continues to exist, then the contract is transformed into an employment contract for an unspecified duration.

-Contracts which are assimilated to contracts for a specified duration:

In this case, the duration is not known in advance. The most important thing is that, it must not exceed two years. For example, a contract to realize a structure (chantier). For a Cameroonian national, if the contract is renewed, it is transformed into an employment contract for an unspecified duration whereas for a foreigner, renewal has no effect.

P-3-The probation or the trial period

We talk of an engagement period or a probation period when the employers and the employees decide to test or appreciate certain elements before entering into an employment contract for a specified duration or an employment contract for an unspecified duration. For the employer, the trial period will permit him to test the capacity or ability of the employee to execute the service in question. For the employee, it will permit him to test the climatic condition, hygiene and security conditions of the enterprise. The trial period is regulated by article 28 of the Labor Code and arret no. 017/MTPS/SG/CJ of 26 May 1993.

CHAPTER TWO

THE EXECUTION OF AN EMPLOYMENT CONTRACT

The execution of an employment contract means that, each party shall perform his own part of the labor contract as stipulated in the contract. Therefore, we shall not go detailly into the nitty-gritty's of the execution of an employment contract. But we shall dwell on the various obligations of the employer (Section 1) and employee (Section 2) in an employment contract.

SECTION ONE: THE OBLIGATIONS OF AN EMPLOYER

The head of the enterprise also have some obligations. During the execution of the employment contract, some obligations are given to the employer when he is exercising his power. His decision when exercising his powers as an employer must respect rules of form, rules of substance and procedural rules. The power of the employer in this domain varies depending on whether he is exercising his power to economically manage the enterprise or his powers to manage the personnel of the enterprise. When he is exercising his powers to manage the enterprise economically, this is limited to procedural rules. Some of these obligations are;

- The obligations to respect fundamental rights of the employee
- Obligation to provide the work to do for the employee
- Obligation to pay the employee

SECTION TWO: THE OBLIGATIONS OF THE EMPLOYEE

The employee is expected to respect his obligations in order to keep a good relationship with his employer. This will make it possible for the employee not to be dismissed from the enterprise. Some of these obligations are;

- The obligation of obedience and respect
- The obligation of integrity
- The obligation to execute the promised work in good faith
- Obligation of non competition with the employer
- Obligation to keep professional secrets
- Obligation to be disciplined

CHAPTER THREE

REMUNERATION OF A WORKER

Remuneration is a very important element as far as a labor contract is concern. For this reason, the problem of remuneration is not regulated only by the employer. The public authorities also intervene in the determination of remuneration (Section-1) in the payment of wages (Section-2) and in the protection of the credits of the employee (Section-3).

SECTION ONE: THE DETERMINATION OF WAGES

Wages/Salary is a financial compensation which is given to an employee for services rendered or service to be rendered. This provision can be seen in article 61(1) of the Labor Code. There are two important elements to be noted as far as the determination of wage is concern. These elements are the fixation of wages (a) and the components of a wage (b).

a-The Fixation of a Wage

Concerning the fixation of wages, the following information must be noted;

-Even though the amount of a wage is freely negotiated, the parties in the employment contract must respect the lowest amount which is fixed by the law. The lowest salary/wage to be earn by a worker has been fixed by the Salaire Minimum Interprofessionnel Garanti (SMIG). This minimum salary since the decree of July 2014 was 36270CFA. Minimum wage has been updated in Cameroon from 21st March 2023. The national minimum wage has increased from 36,270frs to **41,875frs per month**. This is the minimum amount to be paid to a worker irrespective of the profession of the worker. The only workers who are excluded from this minimum salary are workers who are not regulated by the Labor Code.

- A wage is fixed by way of negotiation: This is what is referred to as the liberty to fix wages. This liberty must be exercised in accordance with the law as stipulated in article 62(2) of the Labor Code. The problem of fixation of wages, cannot be separated from the problem of fixation of category person to be recruited because, the category of a person will determine the salary of the person. It is for this reason that the Labor Code clearly provides that salary and professional category is freely negotiated by the parties in the employment contract. This provision can be seen in article 62(1) of the Labor Code. In Cameroon, there are 12 categories which are: category 1 to 6 (manoeuvres, ouvriers et employés), category 7 to 9 (agents de maitrise, techniciens et assimilés), category 10 to 12 (ingenieurs et cadre). These categories can be attributed to an employee based on his experience or his

certificate. Within each category, there are echelons. For example under decree no.20 of 29 October 1970, there are six ordinary echelons called a, b, c, d, e, f, and there is an exceptional echelon called echelon G. Echelon A is the lowest echelon of a category and echelon f is the highest echelon of a category. Echelon G is an exceptional echelon which is fixed between the employer and the employee. This echelon are for persons whose wage is more that of persons who are placed in echelon f but which their qualification cannot permit them to change category or grade. The movement from one category to another can be by way of longetivity of service or by presenting a higher diploma which has been obtained in the course of working. When a person who has been recruited thinks that he or she hasn't been placed in the correct category, he/she can file for a lawsuit.

-Exceptionally, wages can be fixed by regulatory measures: This is done when the parties are silent in their collective convention. For a regulatory measure to be taken in this domain the opinion of the national commission for labor must be taken.

-The fixation of salary must respect the principle of equality of remuneration: This principle is found in article 61(2) of the Labor Code. Equal wages should be given to persons who have the same qualification and who are doing the same work with the same working hours without any discrimination as to their sex, their origin, their status, their religion etc. Wages can be different only when the persons have different qualifications, the have different working hours and different conditions of work.

Question: The fixation of salary.

b- The Components or constituent elements of a wage:

A wage is made up of two elements called the basic wage (1) and the accessory wage(2)

1-The basic wage/salary:

This is the steady wage/salary which the employer will give to the employee for service rendered. The base for calculating this wage is time.

Wage with regards to time (longetivity) is that which is calculated depending on the length of time which the employee has been working in the enterprise of the employer. This salary is established with regards to hours or months. When it is calculated with regards to months, it will just look at the number of months which has been spent in the enterprise without looking at some hours like the hours of resting days when there was no work. This is the one which is used in Cameroon.

Another way to calculate wages is through task wages (salaire de

rendement). This is calculated with regards to the task or activities which is rendered. This provision can be seen in article 63 of the Labor Code.

It can also be calculated based on the diploma of the employee. It is interested in the quality of the employee.

2-Accessory Wages/salary:

According to article 65 of the Labor Code, this refers to that salary which shall be added in the basic salary of the employee. Some of these accessories are in kind while others are in cash.

Accessory in cash:

This includes indemnity, premium (bonuses) and gratification.

-Indemnity: This refers to money which is given to the employee to reimburse the professional charges lost by the employee in the course of exercising his functions. It can also be a compensation for damage incurred. . For example transport indemnity.

-Premium (bonuses): This is a sum of money which is given to the employee by the employer because of satisfaction in the way the work was done. For example end of year incentive, efficiency incentive.

-Gratification: This is equally a token given by the employer to the employee to epitomize his satisfaction on the work done. Contrary to premium, gratification is given when the employee is a family member of the employer. For example when the employee is the wife of the employer, child of the employer etc.

Accessory in kind:

This includes housing, feeding etc. It is obligatory for displaced workers and workers who are not resident in their place of work. This provision can be seen in article 66 of the Labor Code. This type of accessory salary is fixed by decree no.18 of 26th May 1993.

The regime or the rules governing accessory salary is fixed by article 65(1) of the Labor Code.

SECTION TWO: THE PAYMENT OF WAGES

Here, we shall be interested in the modalities of payment(a)the prove of payment and an action for payment(b) is fixed by the legislator in other to see to it that there should be effectiveness, punctuality as far as the payment of a wage is concern.

a-The modalities of payment

Based on the modalities for payment, the following information are to be noted:

-The debtor of the payment: The debtor of the payment is the employer. When there is a change of employer, in which the activities of the enterprise are still

going on, the employee in the enterprise has the right to ask for his payment from the new employer.

-The creditor of the wage: This refers to the worker. The salary or wage of a worker is given directly in the hands of the worker. However, in exceptional cases, the salary of an employee can be given to the agent of the employee. In this case, the agent must present a power of attorney which shows that he has been authorized by the employee to take the salary of the employee. If the power of attorney was not presented and the employer decided to give the money of the employee to his agent, then the employer shall pay another salary to the employee. This is based on the expression “he who pays badly shall pay twice” (qui paie mal, paie deux fois).

-The currency or the money used in payment: The currency of payment must be a legal currency. All other modes of payment are prohibited. This provision can be seen in article 67 of the Labor Code. A currency is considered to be legal when the currency is one which the law can oblige creditors to accept it. This type of money can be coins as well as banknotes. However, a cheque is also accepted in this domain. It is prohibited to pay the wages of a person in kind. For example payment through the use of drinks, food etc is prohibited.

-The period for payment: By virtue of article 68 of the Labor Code, salary/wages are paid in a regular interval which must not exceed one month. The employee can at the mid of the month demand that he should be paid half of his salary. The fact that salary must be paid within one month interval can only be modified in some professions in which there are different period of payment. This type of profession is determined by a decree of the minister of labor. **Salaries must be paid latest 8 days after the end of the month.** This provision can be seen in article 68(2) of the Labor Code. In the event of late payment, this can give rise to the payment of indemnity by the employer. When the employment contract is terminated, salary and indemnity is no longer paid at the end of the month. It is paid immediately at the moment the employment contract is terminated.

-The time and place of payment: This is fixed by article 68(5) of the Labor Code. The salary of the employee is paid at the place of work or closer to the place of work. It is prohibited to pay the salary of a person in a drinking spot or in a place where things are sold.

b-Prove of payment and an action for payment:

-Prove of payment : Prove of payment is regulated by the article 69 of the Labor Code. Prove of payment can be done using the following documents;

a) Pay slip: The employer is obliged to give an individual pay slip to the employee at the time of payment. The form of the pay slip is freely established. But, it must contain the obligatory elements which are noted in arrêt no. 14 of 15 July 1968 relating to the documents which can be used to prove the payment of salary. The pay slip will assist the employee to know the constituent elements of his salary and how his salary was evaluated. When the employee does not contest the content of his pay slip, he cannot turn subsequently to say his salary was wrongly calculated.

b) The payment register: This is the duplicate of the pay slip which is kept. They are presented to the labor inspector when he requests for them. To this effect, see section 69(1) of the labor code.

-An action or litigation for payment:

An action of payment can be made by the employee in the following circumstances: When the employee has not been paid part or all of his salary, when the employee has not been paid his indemnity after he was dismissed and when a pay slip has not been given to the employee after the dismissal of the employee. This action is a means to force the employer to respect his obligation in relation to any of the above reasons why an employee can bring an action against the employer.

The deadline for an employee to bring an action for payment is three years. This provision can be seen in article 74 of the labor code. This deadline will start running from the moment when the employee was not paid. The deadline will elapse from the moment when the employee seizes the labor inspector or when he brings an action in justice.

Section-3-THE PROTECTION OF WAGES/SALARY

Because of the importance of wages, it must be protected against the employer(A) and against third parties (B).

A-The protection of wages against the employer.

In an employment contract, the employer is in a stronger and privileged position as compared to the employee. For this reason, the law has decided to protect the employee so that the employer should not use his privileged position and abuse the employer in his salary. The law has protected the

employee by establishing rules relating to the withholding of salary (1) transactions of salary, rules relating to the renunciation and the amount of salary (2).

1-The withholding of salary:

The employee may finally end up without a salary if the employer was given the power to decide on the reasons to withhold the salary of the employee. The provision relating to the protection of the employee as far as withholding of salary is concerned is article 75 of the labor code. This article prohibits the employer from withholding the salary of the employee either for himself or for the benefit of a third party. Any provision in the employment contract which gives power to the employer to withhold the salary of the employee is null and void (article 73(3) of the labor code). If the employer withholds the salary of the employee for his benefit or the benefit of a third party, he shall reimburse this amount to the employee together with an indemnity. If the employee intends to bring an action for withholding of salary, he must do so within a deadline of three years (article 75(4) of the labor code)

However, in the following situations, the law has accepted that the salary of an employee can be withheld.

-Retention because of the effects of the law: This refers to the instances where the law has accepted that the salary of the employee can be withheld by the employer. This can be in order to pay the trade union contribution of a worker as stipulated in article 21 of the labor code. Here we can also add retention to pay the social insurance contribution of a worker and to pay the tax of a worker.

-Voluntary retention: This is when the employer and the employee decide that the employer should retain the salary of the employee. The employee alone can also ask the employer to retain his salary. Also the employer can unilaterally decide to withhold the salary of the employee. But there are three cases which are prohibited by the law in this domain namely: firstly les prelevement des consignationas

Provided in article 75(1) of the labor code(.....Copy this section in the labor Code). This can be done only when this was stipulated in the employment contract. Secondly, l'acession volontaire de salaire..... that is,

the employer decides to withhold the salary of the employee for his benefit or benefit of a third party. This is regulated by article 75(1) of the Labor Code and decree n° 69 of 30th July 1969 dealing with seizure. Thirdly, when advance payment had been given to the employee. This is when the employer gave the employee advance salary stating that he shall deduct this amount in the salary of the employee when it is time to pay the employee. See section 75(2) of the labor code.

-Retention due to compensation: This principally refers to judicial compensation.

2) Transaction of salary, renunciation of salary and the amount of salary:

Transaction is possible between the employer and the employee. But the transaction must be monitored by the labor inspector. See article 69(4) and 69 (3) of the labor code...

B-The protection of wages against third parties:

Since the wage/salary of the employee is very important for the employee, the law has protected the salary of the employee against the creditors of the employer(1) against the creditors of the employee(2) and against the debtors of the employee(3).

1) Protection of the salary of the employee against the creditors of the employer: When the enterprise is in difficulties, the creditors of the employer can be running after the employer. This can lead to a conflict between the salary of the employee and the creditors of the employer. In this situation, the labor code in its section 71 has protected the salary of the employee when it provides that, if the property of the employer or the properties of the enterprise are to be sold to settle the debts of the employer, the salary of the employee shall be paid in a priority position. That is the employee shall be paid before other creditors of the employer shall be paid. To this effect, also see section 70 and 49 of the Labor Code.

2) Protection of salary against the creditors of the employee: In order to protect the salary of the employee against his creditors, decreen.94/197 protects the employee against his creditors by saying that, the employer cannot use the salary of the employee to settle the debts of the employee towards the creditors of the employee. See, article 2 of decree no. 94 of 9th May 1994 dealing with the holding of salary.

3) Protection against the debtors of the employee: The principal debtor in this case is the employer of the employee. Here article 73 of the labor code has given two guarantees to the employee which are: firstly, if the employer was housing the employee, then when the employee is in difficulties, the employer can not send the employee away. Secondly, the employee can benefit judicial assistance.

CHAPTER FOUR

COLLECTIVE REPRESENTATION

SECTION ONE: THE WORKERS REPRESENTATIVE

The workers representative has the power to represent the workers in the enterprise. We shall be interested in the election of the workers representatives (P-1) the missions or functions of the workers representatives (P-2) and the protection of the workers representatives (P-3).

P-1- The election of the workers representatives

For a person to be elected as a worker representative, that person must be a worker who is at least 28 years old and he must have been working for at least six months in an enterprise. The family members of the employer cannot be voted as workers representative in the enterprise of the employer. The workers representatives are elected by way of a two round proportional representative ballot.

P-2-The missions of the workers representatives

The functions of the workers representative are listed in article 128 of the labor code. These functions are;

- Present to the employer the problems of the employee relating to the working conditions of the employee.
- Ensure the application of the sanitation rules of the employee in the enterprise.
- Communicate to the employer measures which deals with the amelioration of the enterprise.

From the above, we can say that the functions of the workers representatives can be grouped in to two namely the representation of the workers and to participate in dialogue within the enterprise.

P-2-The protection of the workers representatives

He has special protection as far as dismissal is concern. For him to be dismissed, this must be authorized by the labor inspector who is territorially competent. When the workers representative commits a gross misconduct, the employer can take temporal suspension measures against the workers representative while waiting for the decision of the competent labor inspector. The labor inspector has a deadline of one month to make his

decisions known. The persons who are protected as workers representatives are: current workers representatives, former works representatives for a duration of six months, from the date when their mandate came to an end, persons who have been short listed as candidates for the election of the post of workers representatives for a duration of six months from the date when they deposited their documents to be candidate during the election of the workers representatives.

The employer who fails to respect the above measures before dismissing the workers representatives shall be given a civil sanction in the sense that his decision shall be null and void and a penal sanction in that he can be asked to pay a fine. To this effect, see article 122-130 of the labor code and decree no. 019 of 26 Mai 1993 dealing with the modalities to elect the workers representative and the conditions in which the workers representatives shall exercise their functions.

SECTION TWO: REPRESENTATION OUT OF THE ENTERPRISE: THE SYNDICATE OR THE TRADE UNION

Here, we are expected to know the liberty to form a trade union(P-1) and the constitution or formation of a trade union(P-2).

P-1-The liberty of Trade Union

In the preamble of the Cameroonian constitution, liberty of association, liberty to form a trade union etc are inalienable and sacred rights of an employee. The role of the trade union is to protect the workers. Today in Cameroon, the number of trade unions have increased as compared to the number which existed initially. To guarantee the liberty of trade union, article 3 of the labor code stipulates that the formation of a trade union is not subjected to a prior authorization.

P-2-The formation of a Trade Union

When a trade union has been formed, for the trade union to have a moral personality, the trade union must be registered. Decree no. 93/574 and 576 of 15 July 1993 dealing with the forms of professional trade union has clearly given the procedure to register a trade union and the form that the registration certificates shall take. When this certificate has been given, the trade union has the right to bring an action in justice and to acquire property in its own name as stipulated in article 17 of the labor code. See also article

CHAPTER FIVE

TERMINATION OF A LABOUR CONTRACT

There are several ways in which a labor contract can come to an end. A labor contract can come to an end when the duration of the contract has expired. In this case it brings the contract to its natural termination. The employer can only decide to renew the contract, if not it will come to an end.

The employment contract can also come to an end through mutual agreement between the employer and the employee.

Lastly, the labor contract can come to an end through dismissal of the employee. When this dismissal is an abusive dismissal, the employer has to pay damages. But if the dismissal is as a result of gross misconduct on the part of the employee, he is not entitled to any compensation (damages) but entitled to his/her payment for the work done within that period. An employee can also be dismissed for economic and/or technical reason.

PART TWO

BUSINESS LAWS

General Introduction

Business law is a very broad branch of private law. French speaking African States have harmonized business laws to be uniformly applied in their States. This is through the institution of the OHADA (Organization for the Harmonization of Business Laws in Africa) and its various Uniform Acts. Business law under the OHADA touches several domains, some of which are general commercial law, company law, law of arbitration, Insolvency law, Debt resolution law, Corporate Accounting etc. Thus, Cameroon as a signatory to the OHADA treaty makes this law applicably in Cameroon.

For the purpose of our work study, we shall dwell some aspects of business law which is; **Arbitration law, Banking law, Insurance law, contract law and general commercial law.**

A) LAW OF ARBITRATION

A-What is Arbitration?

The concept of arbitration is a simple one. Parties who are in dispute agree to submit their disagreement to a person whose expertise or judgment they trust. They each put their respective cases to this person-this private individual, this arbitrator-who listens, considers the facts and arguments, and then makes a decision. International Arbitration has become the principal method of resolving disputes between States, individual, and corporations in almost every aspect of International Trade, Commerce and Investment. The established centres of arbitration report increasing activity year on year; new arbitration centres have been set up to catch this wave of new business; states have modernized their laws as to be seen to be “arbitration friendly”; firms of lawyers and accountants have established dedicated group of arbitration specialists ; conferences and seminars proliferate; and the distinctive law and practice of international arbitration has become a subject for study in universities and law schools alike. arbitration may be

encountered at two separate stages: (a) First, during the course of the negotiation of a contract when it is suggested as a means of resolving disputes (clause compromissoire) – Arbitration clause (b) Secondly, when disputes have arisen, and the parties agree that such disputes are to be submitted to arbitration (compromis)- submission agreement)

B-"Arbitration", and the significance of the labels "international" and "commercial"

Arbitration" may be broadly described as a private process which commences with the agreement of parties to an existing, or potential, dispute to submit that dispute for decision by a tribunal of one or more arbitrators. This course is about those arbitrations which may be characterized as "international" and "commercial". Such characterization has both a legal and a practical significance.

i-Legal significance—"International" Character

The principal legal significance of the "International" Character of an arbitration is that a number of countries, such as France, Italy and Switzerland, apply different legal regimes to "international" arbitrations than they do to those which are domestic. (Since domestic arbitrations involve a state's own domiciliaries and nationals, a state is likely to wish to maintain a closer control of the arbitration procedure in such arbitrations than it would for those arbitrations in which one or more foreigners seek to have a dispute settled by arbitration.) If an arbitration looks as if it might be "international" in character, one must remain alert to the fact that special rules (differing to a greater or lesser extent from those applicable to domestic arbitrations) may be applied to it by the legal system of the Country under consideration. Arbitrations which are regarded as "international" are those: (a) which involve parties which have their places of business in different countries, or (b) which deal with disputes (i) arising out of obligations to be performed, or (ii) connected with subject matter in a different country from the place of business of at least one of the parties.

ii-"Commercial" nature

The UNCITRAL Model Law envisages that it should "be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not" (note to Article 1 (1)). The "commercial" nature of a dispute is of particular importance when an attempt is made to enforce an arbitration agreement, or recognition or enforcement of an award is sought,

pursuant to the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. A large number of countries have availed themselves of the reservation permitted by the Convention that they need only apply the provisions of the Convention to disputes which are regarded as commercial by their own internal system of law. This makes it clear that, as with the term "international", there is no generally accepted definition of "commercial"

iii-Practical significance

The practical significance of the fact that an arbitration is "international" rests in the fact that for one or both of the parties (and probably for the arbitrator as well), at least one foreign country and one foreign legal system will be involved, thus affecting the ease with which they (and their advisers) are able to deal effectively with the legal issues in the dispute, and the procedural issues. This will also have a bearing on: (a) the level of costs and the amount of inconvenience associated with the arbitration, (b) obtaining evidence which may be abroad, and (c) enforcing the award on assets which may be in a country different to that in which the award was made. It should always be remembered that one of the fundamental principles of international arbitration, to which there are only limited exceptions, is that of "party autonomy"-i.e. that the parties have the power, by agreement between themselves, to determine what the main elements of an arbitration are to be. Thus;

II-Arbitration and other means of dispute resolution

Question: distinguish between arbitration and other mode of dispute resolution

The parties to a dispute which they are unable to settle between themselves have three principal means available to them by which they may resolve that dispute. These include: (a) court proceedings; (b) arbitration; (c) some form of alternative dispute resolution, usually known by its acronym "ADR". It is as well to give some thought to these not only when considering whether or not to enter into an arbitration agreement, but also at the stage when court proceedings or an arbitration are about to be commenced. The importance of thinking about the options prior to entering into an arbitration agreement is obvious. What is not so obvious is the value of giving some further thought to the options once a dispute has arisen. Even if an arbitration agreement was not included in the main contract entered into between the parties, they may, nevertheless, both come to the conclusion that the dispute is of such a kind (e.g. its existence causes embarrassment to both of them) that it would best be resolved by arbitration. If that

is the case, the parties still have the opportunity to enter into an agreement to arbitrate the dispute, and thereafter have the dispute resolved in arbitration proceedings.

A-Choosing between arbitration and court proceedings

Question: what is the advantage of showing arbitration over court proceedings?

A seemingly obvious point, but one which must nevertheless be made, is that the jurisdiction of a judge or an arbitrator to settle a particular dispute is an exclusive one. Either a judge of a national court will decide a dispute, or the parties to that dispute may agree, whether before or after it arises, that it should be submitted to an arbitrator for decision. Where the parties have a valid agreement for arbitration, the courts of most countries will, particularly where the state in which the court in question is situated adheres to the New York Convention of 1958 (see Article II of that Convention), enforce the arbitration agreement and will stay (i.e- prevent from going forward) any court proceedings brought, in contravention of the agreement. This important point is subject to the following qualifications:

(a) National courts are frequently called upon to act in support of arbitrations. They may be asked to: (i) assist in the appointment or removal of an arbitrator; (ii) issue an injunction protecting property in dispute; (iii) compel production of documents by a third party, or attendance of a witness at a hearing; (iv) assist in the enforcement of an arbitrator's award. **(b) An unsuccessful party may seek to challenge an awarding the courts of the country in which it has been made and (c) It is possible for parties to a contract to agree that certain disputes arising under the contract are to be submitted to arbitration, whilst others are to be settled in the courts.**

The choice between the courts of a particular state, or arbitration, is not a choice that can be made in a complete vacuum. The nature of the dispute (actual, or potential), the identity of the parties, the courts which might otherwise have jurisdiction, and the location of assets are only some of the many factors which will have to be taken into account in making the choice. Arbitration of international commercial disputes may be appropriate when: (a) The parties cannot agree upon the courts which are to have jurisdiction and one of the parties considers that the courts which might otherwise have jurisdiction are inadequately

developed or unfavourable (for logistical or whatever other reasons). b) The courts would insist, as most do, upon the translation of submissions and evidence into the language of those courts, and that language is a foreign one for one of the parties, or not the language of their contract and correspondence. (c) The dispute is to be resolved in a country in which the respondent party does not have the bulk of its assets. d) The parties wish to keep their dispute private. On the other hand, Arbitration may be neither appropriate nor possible when: (a) The dispute is not "arbitrable" under the law applicable to the arbitration agreement itself, the law of the country where it is intended that the arbitration should take place, or the law of the country where the award is to be enforced. (b) One of the intended parties lacks the capacity, under the law of its domicile, to participate in an arbitration. For example, neither the Saudi Arabian nor the Belgian states may be a party to an arbitration agreement. Coercive action may be required by way of final relief - e.g. where final injunctions are required. d) Quicker and cheaper proceedings are available in the courts - for example, summary judgment on liquidated debts and (e) the proceedings involve more than two parties and involve disputes arising out of related contracts.

B-Alternative Dispute Resolution

Question: Distinguish between arbitration and alternative dispute resolution

Whilst this course is essentially about international commercial arbitration, it is nevertheless appropriate to take a brief look at ADR. This is because it is now encountered so often, either before the commencement of arbitration, or during the course of one, that anyone having to deal with an arbitration should at the very least be aware of what it entails. Furthermore, international arbitration institutions such as the American Arbitration Association (the AAA), the ICC and the International Centre for the Settlement of Investment Disputes (ICSID), as well as UNCITRAL, have published rules to govern ADR procedures involving conciliation. The inclusion of the word "alternative" in ADR has led to some confusion. To what is it an alternative? At one stage ADR procedures were regarded as including all the different methods by which disputes may be resolved other than by proceedings in the courts. It could therefore be said to include arbitration. The current practice is to exclude arbitration from the scope of ADR procedures. This is for the following reasons:

(a) The recent popularity of ADR procedures is the result of concern about the

length and cost of both court proceedings and arbitration, particularly where there are many factual issues which have to be resolved (as in construction disputes).

(b) **ADR procedures** are not designed to result inevitably in a binding determination of the parties' rights and obligations, as is the case for court proceedings and arbitration. ADR procedures require the active co-operation of the parties (frequently, but not always, assisted by a third party such as a mediator) in an attempt to achieve an agreed settlement of their dispute. Agreement is not the invariable result of an ADR procedure, and the process will break down as soon as one party withdraws its co-operation. No party to such a procedure can be compelled to conclude a settlement agreement.

(c) **ADR often takes place** concurrently with an arbitration or court proceedings (sometimes getting referred to as "Complementary Dispute Resolution" in the process). When it does so, the arbitration or proceedings may, but do not have to, be put on hold until the ADR procedure has been brought to its conclusion.

(d) **Unlike court proceedings or** arbitration, ADR is not a self-contained process. If it fails to result in an agreed settlement, the parties will have to fall back on arbitration or court proceedings to resolve their dispute. This is of particular significance in the international context. Unless the parties have agreed upon a forum (be it the courts of a particular country, or arbitration), one of the parties may find that it is compelled to litigate the dispute in a forum which it finds undesirable.

Some Forms of ADR

Question: discuss the forms of alternative dispute resolution

(a)**Mediation:** For many lawyers, "mediation" and "conciliation" are synonymous. Their separate descriptions, as set out in here, do however enjoy a considerable degree of general acceptance. In a mediation, the mediator (who is appointed by agreement between the parties) attempts to assist the parties to a dispute to negotiate a settlement. He may do so by discussing the dispute separately with each of the parties, drawing attention to the strengths and weaknesses of each case and attempting to get the process of negotiation going. If the parties so wish, this may all take place in joint session, or may be a combination of separate and joint sessions.

(b)**Conciliation:** This is similar to mediation, but with the difference that the conciliator will take a view on what he considers would be fair to settle the dispute. That view will be put to the parties as a recommendation, which may be accepted

by them or which may form the basis of further negotiations between them. The recommendation is not binding on the parties.

(c)Mini-trial: This involves the parties' representatives making a presentation of their party's case to a panel which is usually made up of a senior executive from each party (having the power to commit the party to a settlement agreement) sometimes together with a neutral chairman. The presentations are made within a strictly limited period of time (often a morning or an afternoon). The object of the exercise is to provide the executives with a brief overview of what both parties regard as the most important parts of their case, and the weaknesses of their opponents' case. (The weaknesses of a party's case may previously have been withheld from its senior executives by staff wishing to protect their own position or that of their subordinates.) The executives will then be able to form their own views as to the merits of the dispute, divorced from the emotions of those so far involved in the dispute, and proceed with negotiations for settlement on the basis of them.

(d)Non-binding arbitration or expert finding: The parties may appoint a neutral person (not strictly an "arbitrator") to make a reasoned finding on a particular issue or issues, or on the basis of a very restricted amount of evidence. This can be particularly helpful if the principal issue between the parties is of a technical nature. The finding is not binding on the parties. As with a conciliator's recommendation, the parties may accept the finding or use it as the basis for further negotiations. Where the finding deals with only some of the issues in the dispute, it may provide a platform from which to negotiate the resolution of the entire dispute. Because ADR can lead to the early resolution of a dispute, it is worth considering including in the parties' contract, at the time it is being negotiated, a provision for ADR which should take place prior to the commencement of legal proceedings or arbitration.

III-The Law which will be applicable to the different Aspects of Arbitration

Question: what a party should consider when choosing the appropriate law in arbitration dispute

A party to a potential dispute can really only begin to consider its position once it knows which laws will be applicable. Having established what those laws are, it can then go on to consider their effect. Unfortunately there is no complete code for determining applicable law which has general international application.

The legal system of each country has its own particular approach and, if clarification of that approach is required, advice from lawyers in the relevant country will have to be obtained. What is set out below can be no more than a brief resume of approaches which have some measure of general acceptance.

A-Capacity

The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. Accordingly, the parties to such agreement include individuals, as well as partnerships, corporations, States, and State agencies. The rules governing capacity to contract can vary from state to state. Thus in the context of an arbitration agreement it is generally necessary to have regard to more than one system of law. Nevertheless it is important to examine the principles for establishing the law that is applicable to the capacity of individuals, corporations and more importantly State and State entities to enter in an arbitration Agreement.

Firstly, The capacity of an individual to enter into a contract within the State of his place of domicile and residence will depend upon the law of that State. But in the context of international contract it may become necessary to have regard also to the law of contract. For instance a person aged 20 may well have the capacity to enter into an agreement under his own law, but not under the law the law governing the transaction in question. If that transaction turned out badly, a party who lacked capacity under one or other of the two systems of law might rely upon this reason for not carrying out the contract. However, there may be an applicable rule of law that defeats such sophistry. For instance the Rome Convention provides: *In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may not invoke his incapacity resulting from another law only if the other party to the contract was aware of his incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.*

In the case of corporations the capacity to enter into a contract is governed primarily by its constitution and the law of its place of incorporation. As far as State and State agencies are concerned it is usual to find States or State agencies that are not permitted to refer disputes between them and a private party to arbitration. This means that before entering into agreement with a foreign State or State entity it is advisable to check that the person entering into the contract on behalf of the State or State agency have the necessary authority to do so. Some

writer have argued that restrictions imposed by a State on its capacity to enter into an arbitration agreement should not be qualified as issues of capacity, but rather as issues of arbitrability. It is argued that the restriction is self-imposed and could be waived at any time by the State concerned. It is not a true limitation on Capacity, such as the protection of persons under mental disability. Accordingly, it should be treated as a matter of 'subjective arbitrability' rather than as a matter of capacity.

B-The Arbitration Agreement

The Arbitration Agreement may be set out in a purpose made submission agreement or much more frequently in an arbitration clause. When drafting a submission agreement or an arbitration clause it is important to make clear what law is to apply to that agreement. This will govern disputes that may crop up in relation to the arbitration agreement. If no such express designation has been made and it becomes necessary to determine the applicable law to the agreement to arbitrate what are the choices? There are other possibilities but the principal choice-in the absence of any express or implied choice by the parties—appears to be between the law of the seat of the arbitration and the law which governs the contract as a whole. The other possibility will be: a) the parties' common intention, which is known as the French third way. b) the Swiss model of combining several approaches. A dispute which is not "arbitrable" under the law applicable to the arbitration agreement cannot be settled by arbitration. Even if a dispute exists, this may not be sufficient. It must be a dispute which, in the words of the New York Convention is 'capable of settlement by arbitration'. The arbitrability of a dispute is therefore an important issue and one to which attention should be given at each of the three principal stages of an arbitration - that is when: (a) the arbitration agreement is being made; (b) the arbitration is commenced; and (c) the enforcement of an award is sought.

C-The Arbitration Proceedings

There has been a move recently, especially in certain countries in continental Europe, to have international commercial arbitration treated as a means of dispute resolution which is completely independent of any, form of state control, except at the stage of the enforcement of an award. In other words, the courts of the country in which arbitration is taking place are not to become involved with the arbitration and, in particular, they may not interfere with the procedure under which the arbitration is conducted or with any decisions made by the arbitrator. This move has been promoted under a number of titles the best known of which is the

“delocalization” theory of international commercial arbitration. It was conceived, in large part, to deal with the difficulty of reconciling the immunity of states involved in arbitration proceedings with control of those proceedings by the courts of the country in which they take place. It is now said to apply to international commercial arbitrations, whether or not they involve a state. Its proponents point out that the country in which arbitration takes place is often selected in a most haphazard way, and that it is inappropriate that that country's laws should have any bearing on the conduct of the arbitration. All that should be required is compliance with the norms of international public order. This theory does not have general acceptance, particularly in countries with legal systems based on the common law. It must however be mentioned because it may be encountered in practice - often when a state, or a state entity, is involved in the arbitration. The more widely accepted (and, it is submitted, correct) view is that cannot be conducted in a legal vacuum. There may be occasions when it may be necessary to: (a) appoint an arbitrator, if the parties to the arbitration cannot agree on his identity; (b) remove an arbitrator for bias, or other misconduct, and replace him; i 20 (c) provide assistance to arbitrators (e.g. by enforcing attendance by witnesses at a hearing); (d) establish whether an award is valid and final.

D-The Dispute Proper

We are concerned here with the principles for establishing the law (lexcausae) applicable to the dispute. The most important principle (a principle which is widely accepted and fundamental in international arbitration) is that of party autonomy - i.e. the freedom of the parties to choose what they want for their arbitration. In the context of the determination of the law applicable to the dispute, this has two facets: (a) The parties may choose the law which is to apply to their dispute (so long as the choice is bona fide and legal); (b) Failing such a choice, the parties may establish how the arbitrator is to choose the applicable law. So, if the parties have decided that the ICC Rules of Arbitration are to apply, Article 13 (3) of those rules provides that the "arbitrator shall apply the law designated as the proper law by the rule of conflict he deems appropriate".

Where nothing has been agreed between the parties as to the law applicable to the dispute, or as to how it is to be determined, care has to be exercised. Some countries, such as France, the Netherlands and Switzerland, have in their laws applicable to international commercial arbitrations a provision that the arbitrator is able to decide for himself what rules he considers are appropriate to settle the

dispute. Where the parties are on a more equal commercial footing, they may adopt other techniques to arrive at a law applicable to disputes which will be acceptable to both of them. One such technique is to make the contract subject to the *lex mercatoria* or international trade law - i.e. to those principles governing the conduct of international trade which are generally accepted by international traders. Another technique which is frequently encountered in practice is to supplement the applicable national law by requiring the arbitrator to take into account relevant "trade usages" (which would include generally accepted meanings for terms which are in common use in contracts made in the relevant trade). The laws of a number of countries permit or require this in any event. The ICC Arbitration Rules (Article 13 (5)) and the UNCITRAL Arbitration Rules (Article 33 (3)) require it. Finally, the discussion of the law applicable to the dispute cannot be closed without a brief mention of the power of "amiable composition", or the power of an arbitrator to decide "ex aequo et bono". Another important matter to keep in mind is the nature of the law which is applicable to an international commercial contract. Because the parties may come from very different legal backgrounds they may find it difficult to come to a compromise as to the system of law which is to govern the contract between them.

E-Recognition or enforcement of awards

The law which is applicable to the recognition or enforcement of an award is that of the country in which enforcement is sought (i.e. where the debtor's assets are located). That law will determine not only the procedure to be adopted for applications for recognition or enforcement, but also the defences to any such applications. For these purposes many countries have incorporated into their laws the provisions of the New York Convention of 1958. Article V (1) of the New York Convention provides that recognition and enforcement may be refused, *inter alia*, where: (a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity; (b) the arbitration agreement is not valid under the applicable law agreed upon by the parties or, failing any indication as to that, under the law of the country where the award was made; (c) the composition of the arbitral tribunal, or the arbitral procedure used, was not in accordance with the agreement of the parties, or, failing agreement, was not in accordance with the law of the country where the arbitration took place.

Question; identify the various international convention governing arbitration

A-Multilateral Conventions (1) The Geneva Protocol of 1923(2) The Geneva Convention of 1927(3) The New York Convention of 1958(4) The Washington Convention of 1965

B-Bilateral Treaties: These are treaties made between two countries. Whilst multilateral Conventions are of greater significance for international commercial arbitration as a whole, that fact should not obscure the usefulness of bilateral treaties) particularly where the dispute involves a party or, more importantly, a party which has an asset not located in a contracting state to the New York Convention.

B) BANKING LAW

The history of banking law in Cameroon.

The banking profession existing today was not the same during the colonial period. Before the contact with the colonial masters, they were small groups known as “Njangi Groups” or Tontine where money circulated providing credits and savings. The first banks were created by the Germans which were; **Deutsch Westafrikanische Handelsgesellschaft M.B.H. in Bibundi and Westafrikanische Pflanzungsgesellschaft Victoria**. After the defeat of the Germans in 1926, the territory was partitioned between the British and the French. The British proceeded to create the Barclays bank (Dominion colonial and overseas) in British Cameroon. They also the creation of other banks of west African even though their activities were not as extended as those of the Barclays bank.

In 1959, the government of southern Cameroon decided to create a National Bank for better economic dependence. A proposal for the development of a commercial bank was sent to the central bank of Nigeria where the response was favorable on the 19th of November 1960. Thus the Cameroon Ltd bank was incorporated on the 29th July 1961 which started with a capital of 250million divided into 250 thousand shares of 1000 FRS each.

In the French part of Cameroon, the Bank de l’Afrique Occidentale created under the French law of 1921 provided banking services. In 1962 after the unification of the two countries, decree no 62/df/90 of 24th March was passed regulating banking profession in Cameroon. This decree had two consequences. That is steps were taken to create new banks and banks under foreign law be it British or French had to fold up or amalgamate. Some of the banks created after this include, Credit Lyonnais helped to create Societe Camerounaise des Banques, Societe Generale became an associate of SGBC that is Societe Generale de Banques du Cameroun. Other banks that emerged include; Boston bank, Chase bank, first investment bank, international bank of Africa Cameroon, Cameroon bank Ltd(1989), Paris Bas, Cameroon development bank, etc. today, some of the banks in Cameroon include; Afriland first bank, Citibank Cameroon, Eco bank, CCA bank, UBA bank etc.

Laws Applicable to banking profession in Cameroon

The growth of banking activities requires regulations. The sources of banking law is principally textual. But there are also other sources.

1. Textual sources of banking law

Here, we distinguish between national sources, community sources and international sources.

A. National sources

The first law relating to control of banking profession in Cameroon was decree no 62/df/90 of 90 of 24th march 1962 relating to banking profession in Cameroon. This law was repealed by law no 73/27 of 30th August 1973 regulating banking profession in Cameroon. In 1985, ordinance no 85/02 of 31 August 1985 relation to the operation of credit establishment was established. This law repealed the 1973 law, we also no 2003/004 of 21 December 2003 is applicable.

B. community sources

here, we are referring are referring to the text and works of the institutions of CEMAC relating to banking activities. The following text should be noted here.

- We have the convention of 1992 of 17 January on the harmonization of banking regulations in the central African states and other CEMAC legislation.
- , we have the convention of October 16th 1990 creating the banking commission of central African states.
- CEMAC regulation R2009/01/ of April 1, 2009 on the minimum capital of credit institution
- **CEMAC regulation R2009/02/ of April 1, 2009 establishing** the category of credit establishments, their legal form and authorized activities
- **CEMAC Regulation 01/17/UMAC/COBAC** of 27 September 2017 relating to the condition for the exercise and the control of micro finances institutions within the CEMAC zone
- **CEMAC regulation of October 2, 2012** relating to various provisions relating to overall effective rate and establishment of banking conditions
- The CEMAC regulation 01/CEMAC/UMAC/CM of 01 October 2012 relating to suppression and definition of money lending within the CEMAC members states
- CEMAC regulation No 02/14/CEMAC/UMAC/COBAC/C of 25th April 2014 on the treatment of credit establishment in difficulties within CEMAC
- Some uniform acts are also applicable in banking activities like UCCEIG, Uniform act on securities and Uniform act on collective proceedings and wiping-off debts.

C. International sources

This comes principally from the body known as Basel Committee on banking supervision. It is the global standard setter for prudential regulations of banks and provides forum for banks supervisory matters. This body was created in 1974 by the committee of governors of central banks of group 10 countries and serious disturbance in international currency and banking market. This committee now has 45 institutions from 28 jurisdictions. Beginning with Basel Concordat, issued first in 1975 and revised several times, this committee has establish what is called **Basel I, Basel II and Basel III**. The **main** function of this organ is to establish international rules on banking supervision in order it ensure security of banking system..its texts are in documents called the **Charter Basel Committee** but are not binding on its members but adopted by the members and non-members. The governing body of the Basel committee is the GHOS(Group of Central Banks Governors and Head of Supervisory of Banking). The Head office is situated in **Switzerland**.

2. Other sources

These are technical sources and customs and usages

- a. **Technical sources.** This deals with the decisions of the management and control bodes. They play important role in banking activities. These are opinion and decisions from the competent authorities charge with the responsibilities to oversee banking matters be it national like minister of finance or sub regional like COBAC or BEAC
- b. **Custom and usages.** These two terms are used in commercial law but there are different. A usage is a repetition of acts while a custom is the law or general rule that arises from such repetition. The two are often merg by the courts. They are important in the regulation of banking activities. The usage in calculating banking calendar for interest is 360 days.
- c. **Common and civil law.** These are there to fill the gaps of the law in banking activities when the national legislations and conventions are silent, these laws will be applicable.

The definition of the term bank.

The word bank is derived from an Italian word **Banco which means a bench**. This is because the Jewish bankers did their transactions on the benches in the market places. When the banker failed at the time, the bench was broken up and hence the word bankrupt. It is difficult to have an embracing definition of the

term bank but however, the following definitions are of help.

Firstly Dr Harts define a bank as; a person or company carrying out the business of receiving money and collecting drafts for customers subject to honoring checks drawn upon them from time to time by the customer to the extent of the amount available on their current account.

Secondly, Halsbury law dictionary defined banks as an individual, partnership or corporation whose sole or predominant business is banking; that is the receipt of money on current or deposit accounts and the payment of checks drawn by and collection of checks paid in by customers.

Thirdly, according to the banking cap 49 of the 1958 laws of the federation of Nigeria, section 2 defined bank as the business of receiving money from the general public or paying or collecting checks or paid in by customers and making advances.

Fourthly, according to article 1 of the 1961 Cameroon decree, a bank is defined as an establishment whose activity is to receive funds from the public in the form of deposits in a view to carry out discount and credit operations, investment and other financial transactions.

Credit establishments and its various forms of classification:

A. Definition of credit establishment

According to article 1 of COBAC regulation 2009/02 of 01 April 2009, credit establishments are defined as organization which carries out banking transaction on regular basis. Thus three conditions are required as per this definition which is:

-firstly, you must be an artificial person to be able to exercise such an activity. Thus natural persons are excluded. The form of this artificial person is indicated by law under the UACCEIG which can be a public limited company with a board of directors

Secondly, it is necessary to carry out the activity on a regular basis. That is to say as a profession

Finally, it is necessary to carry out banking operations like the reception of deposit from the public, the granting of credits, the deliverance of guarantee in favor of credit establishments and putting at the disposal of customers the means of payment. According to article 5, credit establishments may also carry out the operations like, exchange transactions, operations on gold, investments, subscription of shares, purchase, management, custody and sale of stocks and share and financial products, advice and assistance in financial management etc. Thus all those who do not meet these requirements, cannot be considered as credit establishments.

Classification of credit establishments

They are classified into two namely; banking institutions and financial institutions

1. Banking institutions

According to COBAC regulation no 2009/02, banking institutions are define as institutions which carry out all banking activities. These institutions are two in number namely; universal banks and specialized banks

Universal banks

It is provided in article 9 of the regulation as those which are authorize to receive funds from the public in a general manner. They have the right to carry out the functions as listed article 1 to 5 as indicated above. The peculiarity of this bank lies in the limitation of the possibility of taking holdings in companies. But this does not apply in shareholdings in other banks, financial establishments or in companies necessary for their operations.

Specialized banks

As for specialized banks, article 10 of the regulation provides that; they are authorize to receive funds from the public but are different from universal banks because of their restrictive character of their activity. Banks can be specialized by for specific operations like long term credit, equity investments. Banks can also be specialized for a sector of activities or customers like agricultural credit, foreign trade credit etc.

1. Financial institutions

There are two in number which are; financial companies and specialized financial institutions

As for financial companies, it is provided in article 11 and can only receive short term funds from the general public nit exceeding two years. They finance their own activities with their own capital and loans from other credit establishments (in their method). In nature of their operation, financial companies only carry out their banking profession resulting from their operations authorization decision specific to them.

The following are example of financial companies; consumption promotion institutions, investment promotion establishments specialized in medium and long term term loans for 2 years and up to 30 years respectively, financial brokerage establishments, factoring establishments and leasing establishments

Lastly for specialized financial institutions, it is found in article 12 and is institutions which can receive only short term funds from the public not exceeding two years. They have a single characteristic which is the fulfillment of public interest mission decided by the national authority. A good example is the national

Investment Company of Cameroon. Their activities are defined by a specific text. They may be responsible for acquiring and managing shareholding other companies, granting loans, ensuring the investment guarantee and sale of company securities to the public etc.

Microfinance institutions

A. Definition of microfinance institutions

Micro finance is an activity carried out by registered entities which does not have the status of banks or financial institutions as defined by convention of 17 January 1992 convention harmonizing and regulating banking activities in central African states and which carry out on regular basis, loan operation or saving collections and offer specific services to the population who mainly operate outside of the traditional banking channel. Article 1(10) of CEMAC Regulation No 01/17/UMAC/COBAC of 27th September 2017 relating the conditions for the exercise and the control of micro finance institutions within CEMAC.

B. Classification of microfinance institutions

Microfinances are classified into through categories.

The first category is the one which collect the savings of members they employ in credit operations for their benefit. No minimum capital is required. This can be seen in article 30 of the CEMAC regulation of 2017.

The second category is that which collect saving and grants loans to third parties. This function and organization is very similar to banking establishments. This is can be seen in article 41 of the 2017 regulation of CEMAC. The minimum capital is fixed by COBAC and seen in article 43 of the 2017 CEMAC regulation.

The third category is the one that grant loan to third parties without collecting savings. This can be seen in article 44 of the CEMAC regulation. The minimum capital of this is provided for in article 46 of the CEMAC regulation of 2017 and is fixed by COBAC.

No matter their category, MFIs can only carry out those specific operations provided for by the law. They include; collection of savings, financial investments with commercial banks in the host state, the subscription of treasury bills, leasing operations, training operations etc. these institutions can also exercise their activity either alone or within a network. This network is a set of approved establishment, with the same objective and who have decided to come together voluntarily to adopt the same rule of organization and operation. The COBAC draws up and publish the list of MFI within the CEMAC zone. The conditions for their

operations, fall within the competence of the national credit council.

THE NATURE OF CONTRACT AND THE RELATIONSHIP BETWEEN THE BANK AND CUSTOMER

The nature of contract between the bank and customer is a bilateral contract. This is because it creates reciprocal obligations and duties between the parties. This is what known in French as synallagmatic contract. This contract exists when a bank account has been open in the bank by the customer. This is based in Cameroon mostly by custom and usages.

As to the nature of the relationship, it that of debtor creditor relationship, principal agent relationship and bailor bailee relationship.

1). Debtor creditor relationship.

In banking activities, the bank is considered the debtor and the customer the creditor. This is through the nature of agreement between them. The customer deposits in the bank make him a creditor to the bank. When he makes such deposit, it gives him the right to make draw on funds by means of check. The importance of the contract permit the make to use the money for it own purpose and to repay an amount equal to what was deposited when requested by the customer. The nature of contract was seen in the case *Foley v Hill*.

2). Principal agent relationship.

This operates in those instances where the customer can instruct the bank to act in certain circumstances in his name for example like buying goods on behaves of the customer.

3). Bailor bailee relationship.

The banks can recieve valuables from the customer to keep on his behave. In this case, the bank is considered to be the bailee and the customer bailee.

C) INSURANCE LAW

Question: DISCUSS THE CATEGORIES OF PERSONS THAT INSURANCE LAW IS DIRECTED TO OR DISCUSS THE FINGERS POINTING AT INSURANCE

This course taught in masters 1, aim at teaching the students some aspects of insurance theory and practice under the CIMA code as practice in Cameroon. This is Course is designed to introduce students to students to some fundamental principles of insurance law under common law and the CIMA code. This course should be of interest to all but this course is directed to five categories of persons:

Firstly, this course is directed to a layman who provides premium out of which the funds of the industry is build. This layman ought to have elementary knowledge of how the business of insurance operate in Cameroon as it bears rights and obligations in such transactions

the second category is the student taking up the course in the university in insurance

Thirdly, the insurance official, particularly claims official who has to be conscious of the dual responsibility in insurance contracts as she acts a trustee on one hand holding the funds on behave of the insuring community and on the other hand as business man providing business which should be on a sound bases as to maintained a sound relationship between the insurer and the insured

The forth category of persons are foreign investors or non-Cameroonians who intend to get a working knowledge of the basic principles and law governing insurance activities in Cameroon.

The fifth category is the legal practitioners who are needs the knowledge on insurance activities to refresh his mind in Cameroon and the world at large.

QUESTION: ATTEMPT A JURISPRUDENTIAL DEFINITION OF THE COURSE INSURANCE

The definition of insurance is not unique. This is because different persons, books have given different definition to the subject. Thus insurance law can be defined as follows below

According to all lexicon dictionary, insurance law has been defined as” a contract whereby a person called the insurer or assurer, agrees in consideration of money paid to him, called premium, by another person called the insured or assured to indemnify the later against lost resulting to him on the happening of certain evens”

According to the author Ivamy, Insurance is a contract whereby a person called the insurer undertakes in return for agreed consideration called premium, to pay to another person called the assured a sum of money or its equivalent on the happening of certain events

John Birds on his part define insurance contracts as one to pay money or provide service on the occurrence of a future uncertain event or a certain event, the date of which is uncertain provided the insured has an interest in that event.

Georges Bierre also define insurance contracts as one by which one person the insurer contract undertakes, subject to the payment of remuneration known as premium or contribution, either to indemnify the person who took the policy, the insured or third party designated by him should a specified, future and uncertain event occur known as risk occur.

Robert mehr on his part define insurance as a devise for reducing risk by combining a sufficient number of exposure unit to make their individual loses collectively predictable. The predictable lose is then shared by or distributed proportionately among all units in the combination. This author insist that an adequate definition of insurance must include either their accumulation of the funds or transfer of risk but not necessarily both.

From his definition, the important characteristics of the concept of insurance are that; uncertain risk is reduced and losses are shared by or distributed among exposure unites. The important aspects of risk are: uncertainty and risk and it reduce uncertainty and provide a planned financing technique that distributes losses.

Hansell on his part puts it that, insurance has to do with uncertainties or risk for each of us and we have is subject to a slings and arrows of outrage fortunes. Insurance soften the blow when it comes by transferring the risk which fall on the individual to the insuring community.

Irukwu, also opined that insurance is the purchase of security. The insured with the intention to protect himself from risk buys from the insurer the right to be indemnified if the risk happens. The purchase paid is called premium often paid annually.

QUESTION: INSURANCE CONTRACTS ARE CONTRACTS SUI GENERIS. DISCUS

Generally, the formation f insurance contracts must respect the rules of law of contract. Thus the elements for the validity of contract like offer, acceptance, intention to create legal relations, consideration, formality capacity, legality of the object, and certainty of terms must be present in the formation of insurance contracts. The forms issued by insurance companies are not offers but mare invitation to treat. Thus article 6 of the CIMA code is to the effect that' *the insurance proposal shall commit neither the insured nor the insurer, only the*

policy or their cover not shall establish only their reciprocal commitment. There is generally offer when the proposer complete the form and hand it over to the insurance company and if the insurer accepts the proposal form without any qualification, and then there is a binding contract.

Concerning the formality, the contract must be made in a special form. There is usually the debate whether the insurance contract should be evidence in writing. Initially, an insurance contract could be made orally as there was no statutory provision for the contract to be evidence in writing. But with the coming of the CIMA code and with article 7, *it provides that insurance contracts shall be drawn up in writing in the official languages of the member state of the CIMA in full print.*

Despite these above mentioned elements, insurance contracts are contracts sui generis: that is to say contract of its own kind. This is because of the special features or characteristics of insurance contracts which we shall be focus on. These features are; aleatory, contracts of adhesion, unilateral contracts, conditional contracts, contracts of utmost good faith, and privity of contracts which does not apply when it comes to motor accident.

Aleatory contracts

The insurance contracts are aleatory in the sense the monetary amount exchange between the insurer and the insured will not be equal. An aleatory contract is the one in which the monetary amount to be exchange is unequal to what was given. This means for example the insured receive more money than what was paid to the insurance company for the risk. Another distinguishing aspect about aleatory contracts is the presence of chance. This means that the insurer expects to collect more premiums to pay its claim and expenses

Unilateral contracts

A contract may be bilateral or unilateral. An exchange of a promise for a promise is bilateral but an exchange of an act for a promise is unilateral, insurance contracts is unilateral. Once the insured has paid the premium, only the insurer will be exposed to a legally enforceable promise.

Conditional contracts.

Insurance contracts are conditional contracts which require the insured to fulfil certain conditions before collecting his losses. A breach of such condition may make the contract unenforceable. In fire insurance, the insurer promise to indemnify the insured for losses suffered resulting from fire. The insured is subjected under certain conditions before collecting the loss. He must fill a proof of loss to the insurance company.

Contracts of utmost good faith.

Insurance contracts are contracts of *uberrima fides* that is to say contracts of utmost good faith. This is during the negotiation of the contract as the parties are bound to

disclose all the necessary information. The insurer depends on the insured to furnish all the necessary information which will permit them either to accept or determine the premium to be charge. If the information is false, the insurer can avoid the contract on the base of warranty, violation, misrepresentation or concealment.

Contracts of adhesion

A Contract of adhesion is a contracts in which the one of the parties prepares the terms of the contracts alone and live it to the other party on a take it or leave it bases. That is to say one of the parties does not have the possibility to alter any term on the contract.

Insurance contracts are contracts of adhesion par excellence. All the terms of the contract are prepared by the insurer alone and the insured either accepts or rejects it. The insured does not have the possibility to change anything on the contract form because the form is prepared in advance by the insurance representatives

The doctrine of privity of contract does not apply in motor vehicle insurance

Privity of contract means only parties to a contract has the right to bring an action in case of breach of a term of the contract. There are usually two parties in a contract of insurance that is the insurer and the insured and any other party is a third party because there are parties to the contracts between the insurer and the insured. For example a pedestrian knocked down by an insured car. In Moto policy, the doctrine of privity does not apply because it extends the liability to other members of the public at large. In Cameroon, law no 65/LF/ 9 of 22 may 1965 instituted compulsory third party insurance on the circulation of moto vehicle. Also, article 200 of the CIMA code has imposed moto vehicle liability to third party obligatory.

Question: WHY GOVERNMENT INTERVENES IN INSURANCE CONTRACTS OR WHY SHOULD THE BUYER OF INSURANCE BE PROTECTED

Generally, insurance contracts are contracts of adhesion. This means that the terms of the contract are drafted by insurance company and the insured is only to accept or leave it. They are also aleatory contracts as there is inequality in bargaining power. There is that need for government to intervene to protect the weaker party.

Government could control insurance companies by means of inspection, supervision or examination. Insurance companies are placed under governmental control because of the special nature or characteristics of insurance contracts.

Legal control of insurance companies by the state serves as a preventive or as a discovery measure to protect the public against fraud and other malpractices done by insurance companies. The insurance sector is characterize by fraud as its common to pay money to an insurance company and the next the company is no

longer existing disappearing with the funds of the citizens. Thus governmental interventions in insurance companies are for the following reasons.

Protection of the buyer of insurance who stands in a weaker position towards the insurer. The government intervenes in insurance companies so to make the insurance system more attractive and to elevate the discredit image of the insurance industry in the country.

There is that desire to protect the public from the possibility of loss through the operation of dishonest or incompetent insurers have been the one of the desire why government control insurance activities. The other desire is to control and direct the investment institution as its constitute a portion of the industries of the country. The government control insurance activities to protect the buyer and also to protect investment.

Also, the government control insurance activities because of the inequality of the parties to the insurance contracts. It is a contract of adhesion and par excellence as explained earlier. The buy cannot change anything on the insurance form. In Cameroon, the position of the insured is worst as we can have only one insurance company in town as the buyer has no possibility of comparing the form with that of another insurance company thus pushing the government to intervene.

Furthermore, the government intervene in insurance activities is because of the complexity of insurance companies. Prof Spencer Kinball one of the most influential writer of insurance does not think complexity should be a justification for government intervention in insurance activities. But for DR Fonkam in his article” the need for government regulation of insurance industry” insist that one does not see why government should not intervene in insurance activities. He is of the opinion that the insurance contracts is a specialized jargons, fine prints and many exclusion terms thus a more reason why government should control their activities. The government intervene in Cameroon because the policies drafted by the companies are too long, the print too fine etc.

Additionally, government intervenes in insurance activities in Cameroon because many Cameroonians are illiterate in both English and French which is the language in which the documents of the policies are printed. The lack of this general ideas of insurance activities, prompt government intervention.

Again, one of the most fundamental reasons for such government intervention is the need to protect the policy holder and third party beneficiaries against the insurer insolvency. This can be seen in article 55(10 of the 1985 ordinance on the control over investment. This is to ensure that the insurance company should be able to honor its obligations towards the insured in the promise to pay on a later date when the insured took the policy. The need to ensure the solvency of the company is even more important especially for long terms insurance policies like life assurance.

Again, the government intervenes in insurance activities because of the need to protect its own interest. That is to say, the state has her own interest to protect. This interest is basically economic. Insurance companies act as intermediaries between those who intend to lend money and those borrowing even though the insurance does not carry out the function of borrowing like banks. The insurance companies lend money to the government by purchasing government securities. As providers of long term finances, there is that need to control how these companies invest their assets. The CIMA code has even opted for strict and data control of insurance companies. This was because of the previous failures of insurance activities in Cameroon.

Questions: Discuss the remedies available for non-payment or premium

Generally, there can be no insurance contract until the premium is agreed and paid. But there are some insurance contracts the premium cannot be assessed during formation and thus a temporal premium is paid. Different persons have advanced different definitions of premium.

Premium has been defined by Colivaux as the price for which the insurer undertakes his liability. Ivamy defines premium as the consideration which the insurer receives from the assured in exchange for their undertaking to pay the sum insured in the event insured. John Birds on his part defined premium as the consideration given by the insured in return for the insurers undertaking to cover the risk insured against in the policy of insurance.

The payment of premium under the CIMA code is provided in article 13, 14, 15 and 16. It deals with the payment of premium by the insured to the insurers or the insurers' agents. In the case of *Lucena V Crawford*, premium was defined as the price paid adequate to the risk. Premium is assessed according to the risk. This is usually done by expert as the amount paid is appropriate to the risk. But this amount is not binding until accepted by the insured. The payment of this premium will be in the mode agreed by the parties and can be in cheque, cash, promissory note etc. This premium is paid immediately as the contract is concluded. Once this premium has been paid, the insured is entitled to receive an insurance form from the insurer.

However, if the premium is not paid, there are remedies available to the insurer for non-payment of premium. These remedies are two in number namely: Action and forfeiture.

Action.

The insurer has the right to bring an action for nonpayment of premium when it becomes due. In the case of *Municipal Mutual V Pontafact*, the insured cannot refuse to pay premium because the insurers may not be liable for any loss. This means that there can be no consideration for the insured before premium is paid. This was the same idea in the case of *Solvency V York*. This still signifies that

the insurer can sue the insured for the premium not paid.

Forfeiture.

Policies taken usually contain conditions that on the occurrence of a specific condition, any premium paid is to be forfeited. It could be because of a misstatement in the proposal form as was in the case of *Duke V Williams* or some alteration of risk as was in the case of *Sparenburg V Edingburg*. This forfeiture is usually enforced by the court. But in case when the risk or the renewal of the does not begin to run until the premium. In *Anderson V Fitz*, it was said forfeitures are near to penalties and must be construed strictly.

Thus there are two remedies available for the nonpayment of premium to the insurers.

Question: Discuss the circumstances under which the insured maybe entitle to the return of premium(he can still ask you explain when he will be return only to part of the premium or when he can be entitled to the return of all the premium

NB. Students should use the same instruction like the various definitions of premium.

The right to the return of premium is enforceable by an action on the for money and not for the policy. In *Pyrie v. fletcher*, Lord Mansfield was of the opinion that the insurers are under obligation to return the premium if the consideration for which it was given fails. Ivamy on his part pointed out that this principle of returning the premium is pushing the doctrine to its great length and is contrary to other branches of contract. Despite the above assertions, the insured has the right to the return of part of the whole premium, a right to the return of part of the premium and where there is no right to return of premium.

The right to return of the whole premium. This include the following circumstances

When there was no meeting of the mid that is *ad idem*. In **Fowley V Scottish Life Assurance**, the policy did not correspond with the terms of the contract of life assurance and the court ordered the contract to be cancelled and the premium returned.

Also, when the policy which was issued by the company is *autra vires*, the premium paid is recoverable.

Furthermore, when the policy is illegal as was in the case of **Brewster V national life assurance society**, the premium is recoverable totally. This is because illegal contracts are invalid and cannot be enforced before any court.

The insured maybe entitle to the return of the entire premium when he is guilty of innocent misrepresentation or non-disclosure which makes the policy avoidable from inception of the insurers. If they chose to avoid the contract, the must return all the premium paid in consideration of the policy. This was the reasoning the case of Imperial bank of Canada v Royal Insurance Co when the insurers were ordered to return the premium because the policy was no longer inforce.

A return of whole premium can be considered in the following situations
where there has been fraud or breach of good faith on the part of the insurers
where the subject matter of the insurance contract has already been destroyed
where the insured has no insurable interest in the subject matter

2. Right to a return of part of premium.

These are the circumstances in which the insured is entitled only to part of the premium. These circumstances include;

Firstly, when the insured has insured an amount in excess of sum, he can recover the balance from the insurance company even the subject matter of the insurance has been destroyed. This is because it is considered that some of the portion of the premium was paid without consideration. This is the same position in section 47(3) of the marine insurance act of 1906.

Secondly, there may be an express term in the policy that part payment maybe done on the happening of specific even like determination of the policy by the insurers or surrender by the insured on notice. This was the position in the case of Sun Fire Office V. Hart.

Thirdly, the insurers may bind themselves to the return of part of the premium on the performance of a condition.

Again, there exist specific or special statutory provisions to ensure that, in life assurance, personal accident, employer's liability, bond investment, moto vehicle insurance, aviation and transit insurance etc., the value of the current policy in the winding up of the insurance company is to be estimated on the bases of return of a proportion of the premium.

D) CONTRACT LAW

1). Definition of contract.

A contract is defined as an agreement which the law will recognize or recognize as affecting the legal rights and duties of the parties. In other words, a contract can be defined as a set or promise or promises which the law will enforce. This means that not all agreements will be enforce. For example, social and domestic agreements are not binding because there is no consideration and the parties did not intend to create any legal relations.

A contract was also defined in as an agreement between two or more parties which creates reciprocal obligations to do or not to do a particular thing **Orien Bank Plc v Bilante International Ltd.** It further states that for a contract to be valid there must be mutual purpose and intention.

II). Why contracts are binding

The economic life and commercial life of the society is based largely on agreement. Trade relations will be of chaos if the law permitted the promisor to break his promise as he wants. There is that need of the law to ensure the promisor respect his agreement and pay compensation in case he breaches his agreement. The law of contract generally cut across all human activities like sale of goods, agency, insurance, and carriage of goods by air etc. thus the law of contract ensure that promise made one a legal relation has been entered into should be respected by the parties.

III). THE CLASSIFICATION OF CONTRACT

Question: attempt a classification of contracts and make a distinction between the various types of contracts (3mks).

Under common law, there are two types of contracts that is formal contracts also known as contracts under seal or specialty contracts and informal contracts also known as simple contracts. Specialty contracts are those made by deed while simple contracts are those made in any form other whether writing, orally, or even by mere conduct. Generally, contracts can be classified in the following types:

1. CONTRACTS BY DEED AND SIMPLE CONTRACTS

A contract by deed or a contract under sealed is a contract whose terms are found in a written document which is signed, sealed and delivered by the parties or made known to the other party. Once these formalities have been respected, the contract is valid even if there was no consideration. Thus, a purely gratuitous or free contract can be enforceable when once the instrument is signed, sealed and delivered.

Simple or parole contracts are contracts which are validly created by a

simple exchange of words which can be oral, written or even by way of a conduct (behavior) which shows that the parties truly made an agreement which can be enforceable.

A simple contract is therefore different from a contract under sealed in that, a contract under sealed can be valid without a consideration, whereas it is predicted that for a simple contract to be valid, there must be consideration. Almost all contracts are simple contracts and thus or general study on law of contract is on simple contracts.

Question: Contract by deed is the most solemn form of contract under English law.

2. BILATERAL AND UNILATERAL FCONTRACTS

A bilateral contract is a contract in which the terms of the contract is fixed by both parties. Also, it is a contract in which a promise or a set of promises on the other side.

A unilateral contract is a contract in which the terms of the contract is prepared by one person and it is left for the opposite party to either accept the terms of the contract or enter into the contract or to reject the contract.

3. EXPRESS AND IMPLIED CONTRACTS

An express contract is a contract in which the intentions of the party are clearly stated in the contract. The terms of the contract are clearly written.

An implied contract is one in which the terms of the contract are not written clearly. In this case, the intention of the parties can only be deduced from their behavior or the general circumstances of the case. For example, when a passenger enters a car, it can be deduced that he has accepted to pay the transportation fee and the driver has accepted to transport him to his destination safely.

4. QUASI CONTRACT

These are contracts in which the obligations on the contract is imposed by law based on the special circumstances which exist between the parties such as where the owner of a house stays silent while a repair man is repairing his house mistakenly. In this case, the law may impose an obligation on the owner of the house to pay the repair man a reasonable amount.

5. VALID, VOID, VOIDABLE AND ILLEGAL CONTRACTS

A valid contract is a contract which has fulfilled the entire requirement necessary for the validity of a contract.

A void contract is a contract which has not respected one of the conditions for the validity of a contract.

A voidable contract is a contract which is valid until the time when it is valid until the time when it is brought to an end at the initiative of one of the parties in the contract.

An illegal contract is a contract which is illegal on grounds of public policy

(immorality) or because the contract has an illegal objective.

Question: Distinguish between valid, void, voidable and illegal contracts.

6. EXECUTED AND EXECUTORY CONTRACTS

An executed contract is a contract in which the obligations in the contract have been performed by all the parties in the contract.

An executor contract is a contract in which the obligations have been performed partially or not at all.

7. TRANSACTIONS AND RELATIONS

This type of contract established by **P.S Atiyah** is still to gain grounds in the law of contract.

Transaction for example means a one off sale between a buyer and a seller who are not likely to meet again. For example, a driver who buys petrol from a filling station of which he may never come back again to that filling station to buy petrol.

On the contrary, relation or long term contractual relations are contracts which shall last for some times such as a contract between the employer and the employee. Such contracts are regulated by statutes for example employment contracts are regulated by the labor code.

E) GENERAL COMMERCIAL LAW

General commercial law is a branch of private law. Contrary to other branches of private law like labour law, contract law, criminal law, it is not easy to define commercial law. In the broad sense, we can consider general commercial law **as an assembly of rules which determine the status of traders, the regime applicable to the commercial activity as well as the commercial acts**. As per this definition, commercial law has both a subjective and objective conception. The objective conception considers commercial law as the law of commercial acts while the subjective conception considers commercial law as the law of traders. Thus, commercial law is the law of traders as well as the law of commercial acts. This law is also applicable to non-commercial acts since commercial acts at times can be accomplished by non-traders.

I. SOURCES OF COMMERCIAL LAW

After independence and the unification of the two Cameroon, the national legislators, in 1980, adopted law n° 80/25 of 27 November 1980 fixing the orientation of commercial activities. This law was abrogated by law no 90/031 of 10 August 1990 regulating commercial activities in Cameroon. The 1990 law was abrogated by **law 2015/018 of 21 December 2015 on commercial activities in Cameroon**. Another law was adopted in 2016 that is law number 2016/004 of 18 April 2016 on external commerce of Cameroon.

On the community and international plan, treaties and accords were signed and ratified by Cameroon on commercial law applicable on the national territory. The principal one is the OHADA treaty of Mauritius on 17th October 1993 made of 14 countries now 17 in the French speaking zone. The **uniform act on commercial law was adopted in 1997** which entered into force in 1997. This uniform act was revised on the 15 of December 2010.

II. ACTORS OF COMMERCIAL LAW.

Traders are the principal actors of commercial law. With regards to the uniform act, there are different types of traders with different qualification but we distinguish habitually the **physical traders** and the **traders with moral personality**. Also, the legislators have given the quality of traders to certain

moral persons and also to some **intermediaries**.

By Article 2 of the Uniform Act on General Commercial Law (UAGCL), physical traders are those persons who carry out commercial activities by nature as their profession. Thus for a person to be considered as a trader, that person must accomplish commercial acts by nature and as his profession.

A moral person can also be a trader. Here we are regarding moral persons such as companies. In law, there are two types of persons called the natural or physical person and the moral person. The personality of a natural person who forms a moral person is different from that moral person. By virtue of the principle of specialty, a moral person cannot easily gain access to exercise a commercial activity as it is the case with a natural person. This rule is applicable to all moral persons including moral persons of public law. For a moral person to exercise a commercial activity, the act which created the moral person must be taken in to consideration. This is because the act which created the moral person can be used to identify whether the moral person is commercial or non commercial.

Only moral persons who are commercial in nature are competent to exercise a commercial activity. By article 6 of the OHADA UCEIG¹, of 30th January 2014, the commercial nature of a company can be determined using **the form** in which the company was created or **the object** of the company.

Lastly, **Commercial intermediaries can become traders**. By virtue of article 169 of the UAGCL, a commercial intermediary is defined as any person moral or physical who in a habitual manner is given the power to act in the name and account of another person irrespective of whether the person on whose account he is acting is a trader or not a trader with the objective of concluding a legal act which has a commercial character with a third party. Under the uniform Act, there are three types of commercial intermediaries namely the **commercial agent**, the **broker** and the **commission agent**.

III. TRADERS RESTRICTIONS

Trader's restrictions are prohibitions or rules to be respected by traders before engaging in trade as their profession.

A-Legal restrictions

This restriction can be seen firstly **in article 6 of the UAGCL²**. This article stipulates that: For a person to exercise a commercial activity as his profession, that person must have legal capacity to exercise the profession. As far as the

¹ Uniform Act on Commercial Companies and Economic Interest Group.

² Uniform Act on General Commercial Law

problem of capacity is concern, we must emphasize on the capacity of minors or incapacitated persons (1), profession or activities which are incompatible with commercial activities (2), persons prohibited from exercising a commercial activity(3) and commercial activities which requires a prior-authorization before they can be exercised (4).

1) The incapacitated persons and the married woman.

Concerning the incapacitated person, here, we are referring principally to **minors**. Minors here are all those persons who are below the age of 21 years. Article 7(1) of the UAGCL provides that a minor cannot exercise a commercial activity or acquire the status of a trader unless he or she is emancipated. A minor can be emancipated by way of marriage. An unemancipated minor cannot exercise a commercial activity and hence cannot acquire the status of a trader. Any commercial activity carried out by a minor is null and void. This however has a disadvantage in that a minor who inherited a business cannot exercise the activity. In this case, the minor can sell the business or he can place the business under a management lease (location gerance). The agreement to place the business under a management lease can only be concluded by his legal representative.

2) Profession or activities which are incompatible with commercial activities

By Article 8 of the UAGCL, a person cannot exercise a commercial activity if he/she is exercising a profession which is incompatible with a commercial activity. The incompatibility must be stated by law. By article 9 of the UAGCL, the following profession are incompatible with the exercise of a commercial activity; civil servants, personnel of public collectivity, ministerial officials, auxiliaries of justice, lawyers, bailiffs, notaries, judicial liquidators, public accountant's auditors. This is to prevent conflict of interest in the profession.

3) Persons prohibited from exercising a commercial activity

When a person has been condemned with a criminal penalty, the person can be prohibited from exercising a commercial activity. By Article 10 of the UAGCL, any person who has been prohibited from exercising a commercial activity either as a criminal or disciplinary sanction cannot exercise a commercial activity even by way of representation. Persons imprisoned for at least three months for an economic reason are prohibited from exercising commercial activities. By article 11 of the UAGCL, this prohibition can be uplifted by the competent court.

4) Commercial activities which requires a prior authorization before they can be carried out

There are some commercial activities that for security purpose, a prior authorization must be taken before a person can exercise the commercial activity in question. This authorization can be in the form of a license or even the requirement of a specific document. This is the case with the exercise of some activities like

pharmacy and laboratories. To operate these activities, an authorization must be obtained. For a foreigner to exercise a commercial activity in Cameroon, he must obtain an authorization from the public authorities.

B-Bilateral Restriction or Restriction by way of an agreement (non-competition clause)

This is when a person agrees that he shall not exercise a commercial activity which shall be in competition with another person or even a third party during or even after the period of their agreement. Even though this clause limits the liberty of a person to exercise a commercial activity, this clause protects the other party. This clause which is mostly found in employment contracts can be concluded by technicians or senior staff. An example of this clause can be signed in a situation where it is agreed that during the period of employment or even after the period of employment, the employee should not open a similar enterprise closer to his master.

IV. REGISTRATION OF TRADERS

Every trader is obliged to register his business in the Trade and Personal Property Credit Registrar (TPPCR). By article 44 of the UAGCL, every trader must within the first month of operating his business register the business in the TPPCR. The trader is expected within the first month of operating his business to make an application **to the registry of the competent court to register his business**. The court register will provide the trader with a form. This form which shall be filled by the trader is considered to be the application made by the trader to register his business.

The nature of the form given by the court register to the trader will vary depending on whether the trader is a physical person or he is a moral person. When the form is that which is given to a physical person, the form must contain a space to mention the civil status of the trader, his regime of registration, the activity exercised by the trader and a space which shall contain the identity of the trader. The form must be signed by the physical person.

When the form is that which is to be filled by a moral person, it must contain a space in which the moral person shall mention its place of business, its object or activity, the identity of its partners and the registered capital.

Once the application is complete, the court registrar will put a registration number on the application of the applicant. This number shall be transmitted to the trader or his agent. The number shall be used by the trader in all his documents like sale receipts.

Registration of a trader have some effects depending on whether the registration was for a physical or moral person. As seen below.

With regards to a physical person, registration in the TPPCR has a personal character. By article 60 of the UAGCL, upon registration, the person is presumed to be a trader.

With regards to moral persons, registration has as effect that, it is only upon registration that a company can acquire legal personality. Any company which is not registered does not have a moral or legal personality. By article 98 of the UACCEIG,³ when a moral person is registered, the moral person is not presumed to have acquired the status of a trader like a natural or a physical person, instead, it has the effect of attributing the status of a trader to the moral person.

³ Uniform Act on Commercial Companies and Economic Interest Group.

PART THREE

COMPANY LAW

Introduction

Traders can either natural or moral or legal persons. Commercial companies fall into this second category of traders. Having the status of a trader, companies are therefore first subjected to the rules governing commercial activity in general which constitute commercial law. But, because of their specificity, companies also have their own rules. This constitutes company law which is the object of this course.

The word “company” has two meanings. **Firstly, it designates** the contract by which two or more natural or legal persons agree to put something in common in order to share the profit or take advantage of the economy or savings that may result. In this sense, the company is a contract, as seen in article 1832 Civil code. It is thus distinguished from an association which is the agreement by which two or more people permanently put their knowledge or their activity for a purpose other than profits. **Secondly, the company designates** the legal or moral person born of this contract. It is a legal person distinct from the persons who formed it, to which is effected a “thing” is assigned and which is vested with the legal capacity to act in the name and in the interest of the collectivity. Company law is concerned with its two conceptions of company. That is the Company contracts (contrats de societe) and on the other hand that of the legal or moral person.

A - The sources of company law

As in most states formerly administered by France, the rules applicable to commercial companies in Cameroon were, in addition to the provisions of the Civil Code, constituted by the provisions of the French Commercial Code of 1807, which were amended several times. But above all, they were derived from the law of July 24, 1867 on joint-stock companies (sociétés par actions), the law of March 18, 1919 relating to the commercial register, and the law of March 7, 1925 on limited liability companies (sociétés à responsabilité limitée). These texts inherited from colonization, most of which have become obsolete, now replaced by OHADA law.

on the one hand, the Uniform Act of 17 April 1997 relating to general commercial law, revised in 2010, which applies to " any trader, natural or legal person " recently revised, and, on the other hand, the Uniform Act of April 17, 1997 relating to the law of commercial companies and economic interest groups, also revised and adopted on January 30, 2014 in Ouagadougou. If the first uniform

act constitutes the common law of traders, the second is the law specific to this particular category of traders that are commercial companies. In addition, commercial companies are and remain subject to the laws not contrary to the UAC⁴ which are applicable in each State party. This is particularly the case with the 2015 law on commercial activity in Cameroon, law no 2016/014 of 14 December 2016 on the minimum capital and on the modalities of notarial acts in the creation of a limited liability company in Cameroon.

B - The scope of company Law

It should be noted from the outset that there are several types of companies. First, a distinction is made between civil companies and commercial companies. The criterion of the distinction is that the civil company can carry out only civil operations whereas the commercial company is a company which, according to its statutes, engages in commercial operations. Then, among commercial companies, we distinguish between partnerships and capital companies (sociétés de personnes et les sociétés de capitaux). **Partnerships** are defined as companies in which the partners come together in consideration of their personality (intuitu personae). By Capital Company, we mean companies which are formed mainly for the purpose of capital which must be put together by the partners and not in consideration of the person of the partners (the public limited company). The limited liability company which borrows its features from one and the other does not fall within this category. Finally, a distinction is made between private companies and public or semi-public companies. While the former are formed between private persons, the latter are companies whose capital belongs either exclusively or in part to legal persons under public law (public capital company, semi-public mixed company).

Under article 1 of the AUS, " Any commercial company, including one in which a State or a legal person under public law is a partner, whose registered office is located on the territory of one of the States parties to the Treaty on the Harmonization of Business Law in Africa is subject to the provisions of this Uniform Act ". . This text therefore precisely delimits the companies that come under the empire of company law. The following are subject to it: commercial companies formed by persons governed by private law; companies in the public and Para public sector. On this subject, the law of December 22, 1999 on the general status of public establishments and public and semi-public sector companies specifies in its article 3(3) that "companies with public capital and semi-public companies are created and carry out their activities in accordance with the laws, regulations and practices governing public limited companies". This confirms the submission of state enterprises to the rules applicable to commercial

⁴Uniform act of companies.

companies. On the other hand, are excluded from the scope of application of UACCEIG, civil companies seen in art. 1845 of civil code, companies subject to a special regime, such as insurance companies governed by the provisions of the CIMA Code, credit institutions (banks) governed by the rules of COBAC (see art. 916 AUS).

This course is divided into two parts. Part one deals with The Common Law of Commercial Companies and second Part deals with Specific Rules For Each Type Of Commercial Company.

CHAPTER I: THE FORMATION OF THE COMPANY

The UA envisages two processes for the creation of the company. Firstly, article 4 of the UACCEIG⁵ stipulates that the commercial company can be created by a contract (known as contract of company). The company results from the will of two or more people. On the other hand, article 5 provides that “the commercial company can also be created by a single person, called “sole proprietor”, by written deed”. In this case, it is a one person company resulting from a unilateral legal act. Such a company can only be either a SARL (see art. 309 UACCEIG), an SA (see art. 385 UA) or SAS (see art. 853-1 AUS). Also, as with any contract, the general conditions set by articles 1108 of the Civil Code must be respected. Under this chapter, we shall examine the following;

Section one: The General Conditions of the Company Contract

By article 4 of the uniform Act, « a commercial company is formed by two or more persons who agree by way of a contract to put together properties in cash or in kind or even in the form of services with the objective of sharing the profit that shall be generated from the economic activity that they are operating". The Company is therefore a contract. As such, the company contract respects the conditions of validity of any contract set by article 1108 of the Civil Code. Thus conditions substance(Paragraph 1) and conditions of form, (Paragraph 2) will be studied.

P1. Conditions of substance

A. Consent of the parties.

The parties to the partnership contract are the future partner. They must clearly and freely express their desire to associate, that is to say to create a company. This will must be conscious, that is to say that the one who expresses it must be able to understand and want the accepts the commitments he makes. From the definition of commercial companies, it considers it to be an agreement. This means the parties must give their consent willfully during the formation of the company. This consent is given through their signature in the article of association creating the company. An agent can signed on behave of his principal. This consent is done through writing and the company can be nullified if there is an error in writing. Each party must therefore give its consent to the constitutive act of the company. This consent must actually exist; be sincere, that is to say express the will of the future partner. In any case, it is considered that the will is simulated when it gives

⁵Uniform act on commercial companies and economic interest group.

rise to an apparent legal act which covers a hidden act concluded between the same people and corresponding to the real will of the contracting parties. This simulation is valid if it is not fraudulent (see art. 1321 C. civ.). Moreover, a fictitious company is void if the partners were only nominees. But above all, the consent must be free from defects for example a company contract tainted with error like on the form of the company. The error on the value of a contribution is not a cause of nullity, fraud (fraudulent acts and false declarations, or violence (coercion exerted on a person for the cause to contract) is likely to be canceled. The nullity of a company is a very serious and very damaging event for both partners and third parties. When pronounced, it leads to the dissolution of the company and its liquidation.

B. capacity of the parties or partners

The partners of a company can be a physical person or a moral person. However, it is not all physical persons who are permitted to partners in a commercial company. According to **article 7** of the uniform act, physical persons who are prohibited by the law or those, who carry out an activity which is incompatible with a commercial activity or those who do not have capacity to carry out a commercial activity, cannot be partners in a commercial company. Thus according to **article 8** minors and incapacitated adults cannot be partners in a commercial company. However, incapacitated adults are prohibited to be partners only in companies where they have unlimited liabilities. Thus the incapacitated adult can be a partner in a company where his or her liability is limited to her contribution. In this light, the incapacitated adult can be a partner in a public limited company, private limited company, the simplified joint stock company and the limited partnership. In the limited partnership, the incapacitated adult can only act as a sleeping partner and not an active partner.

In a partnership for a person to be a partner in the company, the person must be a trader. Also, the position of married persons to be partners has also been regulated by the law. In this light, article 9 of the uniform act stipulates that husbands and wife cannot be partners in a company in which they have unlimited liability. This means that husband and wife cannot be partners in a partnership. Husband and wife can only be partners in limited liability companies. (the public limited company, private limited company because their liability is limited to their contribution in the company). Husband and wife can be partners in the limited partnership on the condition that one partner is the active partner and the other partner is the sleeping partner.

There is one last category of people that AUSGIE does not deal with: these are foreigners. In accordance with the law of August 10, 1990 on commercial activity in Cameroon, foreigners can be members of a company governed by Cameroonian law, provided they comply with the conditions of residence and exercise of an

activity in Cameroon territory. However, if it is a company whose capital is held at more than 50% by foreigners, they must first obtain approval from the administrative authority, unless they are nationals of countries with concluded an assimilation agreement with Cameroon (see art. 9 of the aforementioned law).

C. The object of the contract

The object is two understandable in two social matters. On one hand, it can designate the “thing” shared by the founders of the company (see art. 4 AUSCGIE). These are the contributions. On the other hand, the object takes on a more concrete meaning: it is the social object, that is to say the kind of activity that the company proposes to carry out in order to obtain profits or savings. The activities of a commercial company are directed towards the generation of profit. The company created should have a lucrative objective and written in the article of association as provided in article 19 of UACCEIG. Any company has an object which is constituted by the activity which it undertakes and which must be determined and described in its statutes”. Any change of object would require a modification of the statutes (V. art. 22 UACCEIG), except in the case of an activity which is neither subject to prior authorization, nor prohibited, nor illegal or immoral. The object of the company should also be licit or legal as seen in article 20 of the uniform act. Thus if the object is illegal, the decree of nullity will be pronounce on the company. The legality is determined by the activity to be exercise by the commercial company.

D. The Cause

This design principally the motive which push the person to be a partner in a company. The motive must therefore be licit. This is the reason that led two or more people to set up a company. Like the object, the cause must exist and be lawful. Thus, companies created to defeat the general right of pledge of creditors or to a non-competition obligation or a professional prohibition weighing on a natural person were considered null and void.

These are the conditions common to all contracts that the partnership contract must absolutely respect in order to be valid. It should be remember that the non-observance of these conditions is sanctioned by nullity. This is a particularly serious sanction which can only result from an express provision of the law or texts governing the nullity of contracts in general (see art. 242, (1) UACCEIG). Thus, art. 242(.3) UA specifies that “In limited liability companies and in public limited companies, nullity cannot result either from a lack of consent or from the incapacity of a partner, unless this does not 'reaches all the founding partners '.

P2. Conditions of form or procedure

The condition of form is two in number and principally establishment of the article of association and publicity.

A. Establishment of article of association

Whether it proceeds from a contract or a unilateral act, the constitution of the company gives rise to the establishment of a written document called “Statutes”. Article 12 of the AUSCGIE confirms this by stating that " The articles of association constitute either the partnership contract, in the event of a plurality of partners, or the act of will of a single person, in the event of a single partner. ". This shows the importance of the statutes, the form (1) and content (2) of which we must now specify.

1. The form of the article of association

The article of association is the constitution of the company. A company is formed on the date when the article of association is signed by the partners of the company. By article 10 of the uniform act, except where there is a contrary provision, the article of association must be drafted by a notary or by any authentic act which is recognized in the country where the company is found. By article 11 of the uniform act, the article of association can also be drafted by a private act. This is just an exception to the principle that the article of association must be drafted by a notary. When the article of association is drafted by way of a private act, it must be made in many original copies as it is deemed necessary. Whether established by notarial deed or by private deed, the statutes must be signed by all parties. These can do so directly or through an agent with the necessary powers. The company is incorporated as of the signing of its articles of association (see art. 101 UA). Moreover, when the articles of association are drafted by private deed; they are drawn up in as many originals as necessary for the filing of a copy at the registered office and the fulfillment of the various formalities provided for by the texts. Finally, a copy of the statutes on free paper must be given to each partner and if it is an SNC or an SCS, an original copy must be given to each partner (see art. 11, al. 11 UA). In short, the memorandum of association of the company must be established in writing. This writing is the statutes. In the absence of such statutes, we are in the presence of a company created in fact which cannot be registered and therefore has no legal personality (see art. 115 UACCEIG).

2. Content of the article of association

Irrespective of whether the article of association is drafted by way of a private act, a notarial act or any authentic act, the article of association must contain all the elements stipulated in article 13 of the uniform act. These elements are: the form of the company, the name of the company, the object of the company,

the nature of the company, the place where the company is carrying out its activities, the duration of the company which must not exceed 99 years, the capital of the company, the name of the partners and the modalities in which the company functions. See article 75 of the uniform act

B. The formality of publicity.

The process of setting up the company ends with the performance of a number of acts of publicity. These are the registration, the filing of deeds or documents at the registry and the insertion of a notice in a newspaper authorized to receive legal announcements. Registration (see art. 34 et seq. AUDCG and article 73 to 75 UACCEIG) is the act by which the company enters into legal life. It is done in the Trade and Personal Property Credit Register kept by the court registry. The court clerks or the competent authorities require the filing of documents registered with the tax authorities only when registration is compulsory under the tax law of the State party (see Art258). Finally, a notice of incorporation of the company, signed by the notary or by the founders, must be inserted in a newspaper intended to receive legal notice in the State where the registered office is located. This insertion, which must contain certain statements, must be made within 15 days of registration (see art. 261 and 262 UA). All publicity formalities are carried out at the behest and under the responsibility of the legal representatives of the company (see art. 259). They are essentially intended to reveal the existence of the company to third parties. These are therefore information measures which have a protective effect for third parties, and in particular for the creditors of the founders. These now know, thanks to the publicity, that their debtor participated in the formation of a company and, therefore, they can use the legal remedies which are recognized to them to protect their interest.

The UA sanctions breaches of the rules of formation of the company. There is of course the nullity of which we have already spoken (see art. 242 et seq. UA). This is a serious sanction that hits society. There are others which rather strike the founders and the first legal representatives of the Company. Thus, it follows from article 78 that " the founders, as well as the first members of the management, direction or administration bodies, are jointly and severally liable for the damage caused either by the lack of a obligation mention in the statutes, either by omission or the irregular accomplishment of a formality prescribed for the formation of the company ". This text therefore opens a liability action to any person who can justify damage, an action which is prescribed by five years from the date of registration of the company.

Section two: Specific Elements of the Company Contract

The definition of the commercial company in article 4 of the AUSCGIE highlights the main characteristic elements of the contract of partnership, namely

the plurality of partners (Parag 1), the contributions (Parag 2), the participation in the results and contribution to losses (Parag. 3), affection societatis (Parag. 4). Only the last three will be studied.

Para. 1: Plurality of partners:

It is first necessary to clarify the notion of partner. By partner, we designate any person who is a member of a company, whatever its form. In joint-stock companies, the partner is commonly called " shareholder ", i.e. the holder of a share (the share is a negotiable security issued by the joint-stock company and which represents a fraction of the share capital) , even as the legislator prefers to use the term “ partner ” to designate the members of a simplified joint-stock company. Apart from the case of the one-person company which is made up of a single partner, the principle is that the company supposes, like any agreement, the meeting of at least two partners. These are the founding partners. According to case law, the sole quality of partner is the person who brings together the three characteristic elements of the partnership contract, that is to say, has made a contribution, participates in the profits and losses and who has had the willingness to associate. In general, the determination of quality does not cause difficulty. But, it is different in some hypotheses that must be quickly mentioned.

First, in the event of joint ownership (legal situation where several people hold concurrent rights to the same property without there being a division of their shares) affecting shares or shares; case law considers that each co-owner has the status of partner, and not the joint ownership itself : " the heirs of a deceased partner have, when it was stipulated that the company would continue with them, the quality of partners ”. In practice, co-owners must appoint a representative to exercise the rights attached to their units or shares.

Then, the attribution of the quality of partner can be difficult in the event of marriage. There is no problem if the spouses are married under a regime of separate property or participation in **acquêts** (each spouse being free to dispose of his or her property). The question is complicated when entry into company is carried out by means of common property. As already noted, both spouses cannot be members of a partnership. On the other hand, with regard to SA, two situations must be distinguished. When the contribution or the purchase of shares has been made jointly by the two spouses, each of them has the status of partner. When the contribution or the purchase has been made using joint assets by only one of the spouses, it is to this spouse that the status of partner must be recognized. Furthermore, in the case of a dealer's agreement (convention de croupier), by which a partner, without the consent of the others, agrees with a third party to share the profits and losses resulting from the social activity. Such an agreement, although valid, does not confer on the croupier, that is to say the third party, the status of partner.

Finally, in the event of a portage or shared agreement (convention de portage), that is to say an agreement by which a participation in a company is taken by a financial institution which does not intend to retrocede the corporate securities to a person who has remained in the shadows. The case law is divided. Some courts have decided that the financial establishment alone has the status of partner while others recognize this status in the person who has dealt with the establishment.

Para. 2: Contributions:

Question: Contribution in commercial companies

The word “contribution” has double meaning. In the first sense, it designates the contribution by which a partner performs his main obligation towards his partners and the company in creation itself by making available to her what he has promised. In a second sense, it designates the very object of the partner's contribution, that is to say the property or the activity necessary for the company. contribution is a legal obligation. It results from art. 37 of the UA that “Each partner must make a contribution to the company ”. It is the confusion of the contributions of the company which makes the basic element of the social patrimony. Each contribution entitles you to a consideration called a “share ” or “share ”. As stated in art. 38 “ In return for their contributions, the partners receive securities issued by the company... ”. These titles represent the rights of the partners (see art. 51 AUSCGIE).

There are different kinds of contributions (A) which constitutes in principle the social capital (B).

A- The types of contributions

Article 37 (2) states that “Each partner is indebted to the company for everything he has undertaken to bring to it in cash, in kind or in services ”. As a result, there are three main forms of contributions: contributions in cash, contributions in kind and contributions in services. The list of contributions is exhaustive as confirmed by art. 40 in fine: “Any other contribution is prohibited”.

1. Cash contribution

This contribution is said to be in cash when it consists of the payment of a sum of money for the formation of the company (see art 41 et UACCEIG). It is therefore cash given by the contributor to the legal representatives of the company who will deposit them in the hands of an approved depositary: bank or notary (see art 313 Sarl). However, in the event of a capital increase, the contribution in cash can be made by compensation with a certain credit, liquid and payable claim on the company (see art. 44 UACCEIG). Unless otherwise provided by law, contributions in cash must be fully paid upon incorporation of the company (see art. 41 al. 2 AUS). For example, in the case of a public limited company, art.389 UA specifies

that the shares representing contributions in cash must be paid up when the capital is subscribed, by at least a quarter of their nominal value and the payment of the remainder must take place within a period which may not exceed three years from the date of company registration. Funds deposited as contributions are unavailable until the day of registration (see art. 314 UA in case of Sarl).

The delay in the payment of the sums due to the company can give rise to two kinds of sanctions: firstly, these sums bear interest at the legal rate from the day on which the payment should have been made; on the other hand, the late partner may be ordered to pay damages if necessary (see art. 43 UACCEIG).

2. Contribution in kind

In simple words, we will say that contributions in kind include all contributions other than in cash. But the law is more specific. According to articles 40 par. 3 and 45 UA, it appears that contributions in kind are made by the transfer to the company of real rights relating to movable or immovable, tangible or intangible property and by effective availability of the property to which these rights relate. They can even consist of a contribution of personal rights (claims). Like contributions in cash, contributions in kind are fully paid upon formation of the company (see art. 45 al. 2).

contribution in kind can be made according to two methods: either in full ownership, or in enjoyment.

3. Contribution in service

It is considered to be a contribution of variety in-kind. Contributions in services are contributions to technical or professional knowledge or services (see art. 40 UA). In principle, this is an exceptional mode of contribution. The partner thus puts his activity at the service of the company, by making use of his technical or professional skills, his experience or his credit, etc. The contributing partner in services is not an employee of the company. His work or his activity has as counterpart, not a salary, but a possible share of the profits generated by the company contributed in service. However, like the employee, the contributor is bound by an obligation of loyalty with regard to the company (he must reserve his service for the company).

it should be noted that contribution in services is only admissible in partnerships. It cannot be carried out for the benefit of companies whose partners' liability is limited to the amount of their contributions (SA, Sarl, and SAS for example). Finally, this form of contribution poses the problem of its evaluation. It is generally accepted that the person who has contributed only his services must be treated as the contributor in cash or in kind who has contributed the least (see art. 1853 al 2 civil code): "As regards whoever contributed only his services, his share

in the profits or in the losses is settled as if his participation had been equal to that of the partner who contributed the least. It should be specified that whatever the form of the contribution, it must be real, effective (that is to say of such a nature as to provide the company with a good or an activity representing a certain value) and not fictitious. The fictitious contribution is null. The courts are sovereign to assess the fictitious nature or not of the contributions. The following were considered fictitious: the contribution of property by a person who does not or no longer owns it; property without monetary value (null or expired patent); of property that cannot be transferred to the company. This assessment must be made at the time of the formation of the company. That is day of the signature of the articles of association or the capital increase. This means that any subsequent loss of value of the asset should not be taken into consideration.

CHAPTER II: THE LEGAL PERSONALITY OF THE COMPANY

As a moral person, the company has legal personality, that is to say the capacity to have rights and obligations. Under this chapter, we shall look at the conditions for the existence of legal personality section I and the consequences of effects Section II.

Section I: The Existence of a Legal Personality

There have been controversies surrounding the concept of legal personality. Three conceptions have been put forward.

Firstly, for supporters of the theory **of fiction** (Ihéring), moral personality means a corporal existence and the will and ability to act, only natural persons can possess legal personality. Therefore, a group can only obtain it by decision of the law (artificial recognition: theory of legal attribution). **As for the promoters of the theory of reality** (Gény), legal personality exists even in the absence of legal recognition when a group has a collective interest distinct from that of its members and which involves a minimum organization. It is the will of the group that counts here, and not that of the law. **Finally, the defenders of** the patrimony of appropriation theory put forward the idea that legal personality is a means of transferring property from one patrimony to another. Legal personality can therefore be acquired through the following means.

Para. 1: Acquisition of Legal personality

According to art. 98 of the UACCEIG, “Any company enjoys legal personality from its registration in the TPPCR (Trade and Personal Property Credit Register)”. In other words, the company has a life only after its registration. It is this which gives it its status as an independent legal entity, distinct from that of its partners or shareholders or managers.

A. The regime of registration of commercial companies

The registration of companies is governed by art. 34 of UAGCL. It is a fundamental obligation that no company can escape. Art. 44 effectively specifies that any company must request its registration within one month of its incorporation with the RCCM⁶ in the jurisdiction of which its activity takes place. For the representative of the company, it is a question of formulating a request containing certain information (Art. 44 AUDCG or UAGCL) and to which are attached, under penalty of nullity, supporting documents (Art. 45 AUDCG).

Registration has personal character. It concerns only the targeted company

⁶ Registre du Commerce et de Credit Mobilier (Trade and Personal Property Credit Register)

alone. The branch does not have an independent and separate legal personality from that of the owner company Art. 117 UACCEIG). No company may be registered principally in several registers or in the same register under several numbers (Art. 49 AUDCG). In the event of transfer of the registered office to another jurisdiction, the company must request the cancellation of its first registration and request a new one from the RCCM of the new jurisdiction (Art. 51 AUDCG).

B. The Continuity of legal personality:

During the life of the company, the structure of the company can be modified or its operating conditions: change of purpose, capital increase, admission of new partners, change of legal form of the company (Sarl becoming an SA, SA becoming SAS...), change of directors, extension, etc. The question is to know if these modifications have an influence on the legal personality, if the old one persists or disappears. The answer can only be depending on the cases. Thus, art. 99 provide that "*The regular transformation of a company into a company of another form does not entail the creation of a new legal person.* The same applies to extension or any other statutory modification" (see also art. 181 for conversion). However, it is provided for in art. 188 that " When the company, following the transformation, no longer has one of the social forms provided for by this uniform act, it loses legal personality if it exercises a commercial activity"

Para 2: Lack of legal personality:

If it is registration which confers legal personality on the company, it is obvious that the company in formation and the company formed but not yet registered do not have legal personality. The same applies to the joint venture (société en participation) and the de facto company (société créée de fait). These different notions must be analyzed separately.

SECTION II: THE EFFECTS OF LEGAL PERSONALITY

Legal personality of commercial companies has two effects.

Para 1: The individualization of Company:

Like a natural person, the company brings together a certain number of elements which make it possible to identify it: it has a name, i.e. a corporate name (A), a domicile, i.e. a head office (B), and assets (C).

A. The corporate name

The company, whatever its form has a name that is specific to it and that permit it to be distinguished. This name, which UACCEIG calls the company name, must be mentioned in the articles of association (Art. 14 UACCEIG) and appear on all deeds and documents issued by the company and intended for third parties (Art 17). It must be distinctive and lawful. This name is freely chosen by the partners.

To this end, they may choose the name of one or more partners or former partners, unless otherwise provided by law (art. 15), for example Renault, Fokou etc. It should be noted that the corporate name is an intangible asset whose value can become very high.

B. Head office:

The company has a domicile which is distinct from that of the partners, it is the registered office. This must be mentioned in its article of association. See art. 23 UA. The partners freely choose the registered office which can be located either at the place of the main establishment of the company, or at its center of administrative and financial management, that is to say the general management. See art. 24. In any case, the registered office is the place where the effective management of the company (the management organs) is located. A simple post office box cannot take the place of a registered office because the company must be located by an address or a sufficiently precise geographical indication. see art. 24. The domicile must be real and not fictitious (the registered office indicated in the articles of association does not correspond to the place where the company has its center of activity. Third parties may rely on it but it cannot be opposed to them by the company if the real seat is located in another place (see art. 26). The registered office may be modified under the conditions provided for in the articles of association.

B. Company assets

The company has her own assets which are different from that of the shareholders. This property is gotten during the formation of the company through the different contributions. This property, as seen earlier, is first from the various contributions of the partners. But it also includes all the assets that the company will acquire throughout its life. The distinction between the company assets and that of the partners is however difficult in partnerships because the partners are in principle jointly and severally and indefinitely liable for the social debts. However, it does exist as long as the company is not in difficulty: the company's assets are liable for the company's debts, the assets of each partner guarantee their own debts. It is only when the assets of the company are insufficient that the social creditors can put the assets of the partners to contribution.

Para. 2: Company capacity

Two effects will be studied here.

A. Company activity

The company as a person has the possibility to accomplish legal acts necessary for the good functioning of the company. It can take administrative acts, receives donations and helps. But she acts through intermediaries who are the managers of

the companies. These persons must act only with the limits of the powers given to them. It can therefore enter into contracts, exercise rights or be a party to legal proceedings. the company does not itself act directly, but rather through its governing bodies and through its employees who are natural persons: managers, administrators, managing directors, etc. The governing bodies are the legal representatives of the company, i.e its agents who act within the limits of the powers granted to them by the articles of association or the law. They must in all cases observe the rule of statutory specialty ,ie act within the limits of the corporate objective. The company therefore has its own activity, distinct from that of the partners. It has its own interests distinct from the partners, has a life of its own.

B. Corporate responsibility

The company is liable for the harmful consequences of its activity. This is essentially in civil liability because, as a rule, the company cannot be criminally liable. Only the leaders at fault are subject to the penalty in the event of an offense (V. art.886).It should be noted that under French law, the criminal liability of companies and legal persons in general is now accepted. Art. 121-2 of the New. Penal Code provides that “ Legal persons, to the exclusion of the State, are criminally liable under the conditions provided for by law or regulation, for offenses committed, on their behalf, by their organs or representatives” .

It remains to be specified that two types civil liability actions can be exercised against corporate officers. On the one hand, there is the **individual action**, which is the action for damages brought by a partner or a third party when one or the other suffers damage distinct from that suffered by the company.. On the **other hand, there is the social** action which is an action for compensation brought by the social leaders against the person or those who have caused damage to the company.

CHAPTER III: THE FUNCTIONING OF THE COMPANY

There exist different organs which help in the functioning of the company. These organs also has powers attributed to it in the exercise of their functions

SECTION I: The different organs of the Company

We can distinguish two kinds of organs involved in the functioning of a company. Firstly, we have organs responsible for the day-to-day management of the company (Paragraph 1) and organs for deliberation and control of social activity (Paragraph 2).

Para 1: Management Organs:

The management organs vary depending on the form of companies. We shall look at the methods of their appointment or designation (A), and the regime for termination of their functions (B).

A. Determination and designation or appointment of management organs or bodies

The management and administration of the companies, is the responsibility of the organs provided for by the articles of association in compliance with the legal provisions. These organs differ depending on whether it is a partnership and a limited liability company, or a joint-stock company (SA and SAS). Partnerships (SNC and SCS) and SARL are managed by managers. It may be one or more managers, natural or legal persons (except in the case of the Sarl where the managers are natural persons (see art. 323). In the case of the SCS, management can be provided by all the general partners or by one or more managers chosen from the general partners (see for the SCS, art. 298). In all cases, the managers are designated by the partners in the articles of association or in a subsequent act.

B. The termination of the functions of the executives

The functions of these executives can be terminated in two ways;

1. Resignation

This is express only with regard to the managers of the Sarl (see art. 327) and those of the SA (see for example art. 429). The question that is posed is that; does this mean that the directors of partnerships cannot resign?. The managers of these companies can freely resign. If all the leaders can resign, it should be noted that their responsibility can be engage, for some like (Sarl in particular) either in the event of resignation without just cause (art. 327) or for all because of the circumstances when these confer an abusive character on the resignation (eg

resignation surrounded by excessive publicity, or accompanied by threats against the company or made with the intention of harming). However, it should be noted that there are also cases of forced resignation. For example, there must be compulsory resignation when a person simultaneously exercises more than three PCA mandates in an SA having their registered office in the territory of the same State (see art. 479).

2. Revocation or dismissal

The UACCEIG provides two kinds of dismissal of managers: controlled dismissal or dismissal with justified motive and discretionary or ad nutum dismissal.

The dismissal is said to be controlled when the judge has the possibility of verifying the reasons for the dismissal decided by the competent organ. This is the case with partnership companies.

Dismissal is said to be discretionary or ad nutum when the managers or executive functions can be terminated at any time, without notice, without reason or compensation. This is the case in public limited companies

Paragraph 2: The organs of deliberation and control:

These are organs that do not participate in the day-to-day management of the company, namely the decision-making organs (A) and also control organs alongside the auditors (B).

A. Deliberative organs

1. The general assembly of shareholders

This is the superior organ of the company. All the partners of the company have the right to participate in the general assembly of shareholders as seen in article 125 of the uniform act no matter the form of the company. Article 53 provides that the shareholders have the right to vote in the decision making process of the company. In case of SARL or partnership, the assembly is summoned by the company managers as provided in the article of association. Also in private limited company as mentioned, the administrator can still summon the general assembly at the request of all the shareholders or a majority of them as seen in article 337. The ordinary general assembly can be summoned at least 6 months before the close of year. The general assembly is preceded over by the manager of the SARL as seen in article 341. In certain situations, the assembly can be preceded over by the partners as seen in article 288 in case of SNC and 306 in case of SCS.

In the case of a public limited company, the meeting of shareholders is convened by the board of directors or the general administrator, as the case may be. It may also be convened by the auditor (commissaire aux comptes) or by an agent appointed by the president of the competent court ruling expeditiously or by

the liquidator (see art. 516). Depending on the case, the AG is chaired by the DG, the PCA or the AG or by the partner having the largest shares or in the event of equality by the oldest member (Art. 529).

2. The Board of Directors

According to art. 416, “The public limited company may be administered by a board of directors composed of at least three members and at most twelve members who may or may not be shareholders”. It is therefore a collegiate body which may include directors who are not shareholders of the company within the limit of one third of the members. The first administrators are designated by the articles of association or by the constituent general assembly, and during life, the administrators are appointed by the AGO (Ordinary general assembly). The term of office is set freely by the articles of association and may in no case exceed six years (see art 415).

B. Organs of control

The shareholders' assembly and the board of directors have been given the prerogatives of controlling the activity of the corporate managers. This control can be done directly or through the use of external auditors. But control is also and above all provided by auditors. The new provisions of the UACCEIG generalize the presence of auditors to all forms of company.

SECTION 2: The powers of the management organs of the company

Para. 1: The powers of management and administrative organs

The company managers are the legal representatives of the company. As such, they have the powers to act on behalf of the company and bind it vis-à-vis third parties. Art. 121 of the UACCEIG effectively specifies that with regard to third parties, the management, direction and administration organs have " full power to engage the company, without having to justify a special mandate or authorization ". Normally, it is the article of association that must set the powers given to the managers. In the absence of provisions in the article of association, reference must be made to the law. Any limitation of the powers of the directors by the articles of association is unenforceable against third parties (Art. 121 UACCEIG).

A. Respect of the object of the company

The corporate officers or managers can in principle only act within the limits of the object of the company. They can perform all acts related to the object or purpose of the company regardless of the nature and importance. Thus, being in charge of the day-to-day management of the company, they can perform all the

acts necessary for the achievement of the social objectives and the defense of the interests of the company: purchase and sale of goods, purchase and renewal of material or equipment, acquisition of buildings, recruitment, dismissal, determination of staff remuneration, subscription and termination of insurance policies, opening and management of bank accounts, investment of capital, creation of branches, constitution of subsidiaries, acquisition of shares in other companies, granting guarantees on corporate assets, pursuing legal actions, etc.

B. Respect for specialization

Each company organ must act within the limits of the powers granted to it by the articles of association or the law. Indeed, the articles of association or the law provide for a distribution of powers between the corporate organs. For example, with regard to the public limited company with a board of directors, the UA fixes on the one hand the powers of the board of directors (Art. 435) and on the other hand, those of the PDG (Art. 465 UACCEIG) or the DG (Art. 487 AUSCGIE) as the case may be. Each organ must respect this separation of powers. What would happen in the event of non-respect of the specialty? Is the act null and void? It is clear that the UACCEIG does not answer this question directly.

Para. 2: The powers of the general assembly of shareholders:

Whatever the form of the company, it is the shareholders' assembly is competent to take collective decisions. All decisions that exceed the powers of the corporate managers are taken by the partners collectively. As specified in art. 125, “every partner has the right to participate in collective decisions. Any statutory clause to the contrary is deemed void”. Art. 892 penalize those who knowingly prevent any partners from participating in a meeting.

There are two kinds of collective decisions: ordinary decisions and extraordinary decisions. They are taken at a general assembly or meeting or by correspondence (in the event of written consultation of the partners).

CHAPTER IV: THE DISSOLUTION OF THE COMPANY

It should be pointed out that the causes of the dissolution of companies are numerous and varies. Some are specific to certain forms of society. We will not study them. On the other hand, only the causes of dissolution common to all companies will be examined. Section 200 of the UACCEIG lists the grounds for dissolution of the company (Section 1) and the effects of dissolution (Section 2).

Section I: Causes of Dissolution:

From the examination of the provisions of art. 200, it appears that the dissolution can take place either automatically (P. 1), or by decision of the partners or the judge (P.2).

Para. 1: Automatic dissolution

There is automatic dissolution when the disappearance of the company occurs automatically after the occurrence of an event provided for by law or by the articles of association. Thus, under the terms of art. 200, the company is terminated through the following means;

A. The expiration of the time

Art. 200 provides that the company is terminated “by the expiration of the time for which it was formed”. Art. 30 is even clearer when it states that “the expiration time entails the dissolution by operation of law of the company”. It should be remembered that each company is incorporated for a period which must be mentioned in its articles of association. This duration cannot exceed ninety-nine years (Art. 28). When the period provided for in the articles of association the company is automatically dissolved. The partners can however avoid this disappearance by deciding, before the arrival of the time, extend the time of the company (Art. 30). A problem may arise when, despite the expiration of the time, the partners, instead of liquidating the company, instead continue to operate it. In this case, the case law considers that a de facto partnership has been created between the partners for the activities carried out after the expired dateline.

B. Realization or extinction of the object of the company

These are two distinct situations here.

There is realization of the object of the company when the operation for which the company was created has been completed or achieved, even if the term set for the duration of the company has not yet been reached.

There is extinction of the object of the company when the activity for which the company was created has become impossible (e.g. cancellation of the sale

made to the company of the industrial buildings it was intended to operate; or cancellation of a trademark license contract which had mandated the formation of the company whose exclusive object was the implementation of the conceded know-how. The dissolution only occurs if the extinction of the object is total. If the extinction is only partial, the company remains.

The cessation of activity (economic or financial difficulties, political events, etc.) should not be confused with the realization or extinction of the object. It is not a cause for the automatic dissolution of the company. Dissolution could only take place if the cessation of activity is definitive.

C. Cancellation of the shareholders contract

In case of cancellation of the company by decision of the judge, it follows an automatic dissolution of the company. It should be noted that the cancellation of the company is never retroactive.

D. Liquidation of company assets

It should not be confused with the liquidation of the company which occurs after the dissolution. This is a collective procedure which has replaced bankruptcy. Thus, when the competent court orders the liquidation of the assets of a company that has ceased its payments, this decision automatically entails the dissolution of the company.

E. Statutory causes

The shareholders may provide in the article of association for causes of dissolution other than those provided for in art. 200. There is nothing to prevent them from providing for the automatic dissolution of the company.

Para. 2: Dissolution by decision of the partners or the judge

These are two distinct dissolution that must be studied separately.

A. Dissolution by decision of the partners

The partners can, at any time, decide to dissolve the company. It is therefore for the partners to end the company early. This dissolution can be direct or indirect. It is direct when it emanates from a decision of the general meeting of partners or occurs pursuant to a clause in the articles of association. It is indirect when it is the necessary consequence of another collective decision such as the fusion-absorption. Such dissolution decided by the partners must not be dictated by a fraudulent intent or by the intent to harm the minority.

B. Judicial dissolution

From the provision of art. 200 paragraph 5 that the company may be terminated “by early dissolution pronounced by the competent court, at the request of a partner for as a justified motive, in particular in the event of non-performance of

obligations by a partner or disagreement between partners preventing the normal functioning of the company .

Section II. Effects of dissolution

The first effect of dissolution is that the dissolved company loses its ability to act. It should be noted that such a company does not immediately lose its legal personality. This continues for the purposes of the liquidation and until its closure (see art. 201(3)). That is to say that the legal personality survives only for the accomplishment of the acts or operations necessary for the liquidation. In other words, the company can no longer carry out activities related to its corporate purpose

If the dissolution leads to the liquidation of the company, it is different in the event of the dissolution of a company in which all the securities are held by a single partner. In this case, the dissolution simply entails the universal transmission of the company's assets to the sole shareholder. In order to ensure the protection of the rights of company creditors, AUSCGIE allows them to oppose the dissolution before the competent court within thirty days of the publication of the decision. The court can either reject the opposition, or order the reimbursement of the debts, or decide on the constitution of guarantees if the company offers them and if they are deemed sufficient (see art. 201 al 4 AUSCGIE).