

## CHAPTER 3

### 3: 0 CONTRACT

#### 3:1 CONTRACT (Defined)

Outside the insurance context, a contract is defined as an agreement between two contractual parties and the terms of the contract must be enforceable at law.

Within the insurance context, an insurance contract is a contractual agreement between two parties namely: - the insurer and the insured. The insured pays a consideration usually called "premium" to the insurer, who promises to indemnify the insured of the occurrence of the insured event. An insurance contract is normally evidenced by the policy document.

#### 3:1:1 FORMS OF CONTRACT

The simpler forms of contract are:

- (a) Bilateral contract and
- (b) Unilateral contract.

**A BILATERAL CONTRACT** is one that is effectuated by two parties, usually known to either party.

**A UNILATERAL CONTRACT** comes into effect when a person, whose car or property is stolen or lost, goes to the electronic or print

media and offers a reward to any person who gives a vital information that will lead to the recovery of the stolen or lost car or property. Note that one person, at the inception of the contract effectuates it (i.e. a unilateral contract) and above all, he does not know the other party to the contract.

The broader forms of contract come in three categories namely: -

- (a) Simple Contracts.
- (b) Contracts under Seal and
- (c) Contracts of Records.

(a) **Simple Contract** could be in an oral or written form. It is stress-free and less demanding to attach. In a sale of goods or trade contract, the mere production of purchase receipt is enough evidence of the contract. In an insurance contract, the cover note, certificate of insurance or the policy document is sufficient proof of the contract.

(b) **Contract under Seal**, statutory must be formal (i.e. in writing) with a seal affixed on the contractual paper or document. The essential properties of a contract under seal are namely:

- (a) It must be made in writing.
- (b) It must be sealed.
- (c) A stamp duty must be paid on it. (i.e. it must be stamped).
- (d) It must be signed and delivered.

Some examples of contracts under seal are: - debenture agreements, trust deeds, conveyance deeds and bills of sale. Insurance contract under seal are: - bid bonds, performance bonds, advance payment bonds, credit bonds, fidelity bonds etc.

(c) **Contracts of Records**, strictly speaking, are not contracts per se, by reason of the absence of the pre-requisites of a valid contract in them. They are usually the pronouncements of the judgment of a court of competent jurisdiction, which requires a person to perform or refrain from performing or make a payment (usually fines) to effect an amendment. Non adherence to these pronouncements usually results to contempt of the court and is punishable at law.

### 3:1:2

## THE ESSENTIAL PROPERTIES OF A VALID INSURANCE CONTRACT

Insurance contract, as in normal contract, is a simple contract that is between two parties: - the insured and the insurer. To effect a valid insurance contract, there must be these essential properties in it namely:

- (a) Offer and Acceptance.
- (b) Consideration. ✓
- (c) Intention to create a Legal Relationship. ✓
- (d) Legality of the contract and
- (e) Legal Capacity of contract.

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## (a) OFFER AND ACCEPTANCE

An offer may be defined as a definite undertaking or proposition that is made by a party, with the intention that it shall become binding on the other party, to whom the offer is addressed.

An offer must satisfy the following provisions: -

- (a) It must be definite.
- (b) The proposition or undertaking must emanate from the person liable to be bound by it, if the offeree accepts the terms of the offer.

An acceptance is a definite undertaking or an affirmation or assent to the terms of the offer. A valid acceptance must be devoid of any qualification, variation, or modification of the original offer. Within the insurance context, the proposer or the insured usually makes an offer when he completes signs and returns the proposal form given to him by the insurer. In the case of the more technical classes of insurance like industrial fire insurance, petroleum or oil risks, marine or engineering insurance, where the surveyor's or engineer's reports are mandatory, the counter signing of the certified report by the proposer or his agent, qualifies for a valid offer. Where a broker uses a "Slip" to place the insurance, the initiating of the slip by the co-insurers or their agents amounts to a valid acceptance.

In general insurance practice, an acceptance takes place as soon as the insurer accepts the initial premium (unqualified) paid to it by the prospective insured.

## ---- INVITATION TO TREAT

Effort should be made to distinguish an "Offer" from an "Invitation to Treat". When an insurer displays the proposal forms, with a view to attracting a prospective insured to make an offer, this action amounts to an invitation to treat. Invitation to treat comprises such other actions as lobbying, advertisement, canvassing and promotion.

## ---- COUNTER OFFER

An acceptance must correspond with the offer. Any modification or amendment to the offer constitutes a "Counter Offer" which cancels or destroys the original offer. Vide **Hyde v Wrenda (1540) 3 BRAVER Report 334.**

## (b) CONSIDERATION

Another essential of a valid insurance contract is termed "Consideration". A valid insurance contract must have either form: -

- (i) Be made under seal

Or

(i) Have consideration.

However, there is an exception to this rule. In a contract that is restrained to trade, it must always be supported by consideration, whether or not it is made under seal. The term "Consideration", is a price or any amount of payment or something else that is made by both parties to a contract such that the contract could be enforceable and effective. In **Currie v Misa** **{(1875) L.R. Ex. 153 at p 162}**, consideration was ably defined as:-

*"...some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, offered or undertaken by the other"*.

In a valid insurance contract, consideration, is the premium (on the part of the insured) that he pays to the insurer. On the part of the insurer, consideration is the sum assured or benefits that he promises to pay when the insured event occurs in lie with the terms of the insurance contract. In the absence of consideration, in an insurance contract, it is a mere gratuitous promise and this contract is only enforceable, only if it is in the form of a "specialty contract" such as a contract made under seal. In keeping with the provisions of the Insurance Decree No 2 of 1997, any insurance contract that is not supported by consideration (and indeed in full) is not valid, and hence the saying in insurance parlance:- "No premium-No-Cover"

However, in life assurance, the first installment of the premium paid by the insured, when accepted by the insurer, unqualified amount to a consideration. The

subsequent premium installments are mere pre-requisites to keep the policy in force. Consideration in an insurance contract takes form, as soon as the offer is made by the proposer, and acceptance, made by the insurer.

### (c) INTENTION TO CREATE A LEGAL RELATIONSHIP

At the earliest stage of an insurance contract, (i.e. the offer and acceptance stage) the parties to the contract must exhibit a mutual intention to create a legal relationship. Where there is difficulty in ascertaining if there exists an intention to create a legal relationship between the contractual parties, the law court will determine it, by looking at the overt acts of the contractual parties to ascertain the substance and the type of insurance. If the contract is commercial in nature (as in haulage of goods or hire purchase agreement), then the court will infer that the parties assumed to have created a legal relationship between them.

A commercial bus owner takes up a third party insurance cover to cover his liabilities to the third parties (inclusive of the fare-paying passengers). Three months later, into the twelve-month policy, the bus crashed, injuring three passengers in the bus. The laws will stop either of the contractual parties, who may plead the absence of an intention to create a legal

Relationship because of the nature of the insurance contract, which in that case was commercially oriented.

Inversely, in a case where a private car owner, gives his friend (whose car got broken down) a ride, and gets involved in an accident and the friend got injured in the accident, there is no intention to create any legal relationship between them. The action brought by the private car owner's injured friend against both the car owner and his insurer failed because the contract was merely gratuitous. Such cases are usually settled out of court.

#### (d) LEGALITY OF THE CONTRACT

Generally speaking, an illegal contract cannot be enforceable at law. Insurance contract, being of a commercial nature, it necessarily follows that it must be legal and never against public interest. Therefore any insurance contract (and indeed any contract) that has an immoral tendency or contrary to the public interest, will naturally be unenforceable at law.

The following insurance contracts that bother on illegalities cannot be enforceable at law. They are namely:- Insurance of contrabands that are prone to destruction or confiscation, Insurance of brothel against fire ***Pearce v Brooks (1866) 2.Q.B. 129.*** Insurance against unlawful possession of property or unlawful use of property, Insurance against arson, suicide, internal collusion or conspiracy that leads to fraud or financial loss.

Ironically, an insurance contract, with a view to committing sin is a valid contract, because in the case law, the tendency to sin, has no place in our laws as it is a mere case of morality. {***Beresford v Royal Exchange (1938) AC 586***}. If the court detects that both contractual parties are aware of the illegal nature of the contract, it has the duty to invoke the principle of "Suo Motu" which means "bring it up". The court, in this case, is duty bound to prevent the parties from benefiting from their own illegal acts. [***Gedge v Royal exchange (1900) 2 Q.B. 214 at p 220***] cited in Okonkwo, V. I. (2002) 30.

#### (e) LEGAL CAPACITY TO CONTRACT

As a general rule, any person may enter into any type of contract and as such, both the insured and the insurer must have the required legal capacity to enter into a contract. The absence of such legal capacity makes the contract illegal and unenforceable at law. The insurer in Nigeria is a legal person authorized by law, after due legal processes to engage in insurance business. The insurer could be namely:

A co-operative insurance society that is registered to operate as per the enabling laws governing the operations of the co-operative societies. However, in Nigeria today, the co-operative insurance societies operate beyond and outside the scope granted them by

the enabling laws to the disadvantage of the conventional insurance companies.

To excesses, the National Insurance Commission (NAICOM) in 2004 came up with a distinguishing the adequately recapitalized and genuine companies from the fake ones. Ironically, the production and implementation of the "VISER" had since been put on hold because of some administrative lapses.

A company registered to contract insurance or re-insurance as per the provisions of the Insurance Decree No 2 of 1997.

- (i) A mutual insurance company.
- (ii) An incorporated limited Liability Company, duly registered as per the companies and Allied Matters Act of 1990. One of the highlights of the Act, provided for a minimum share (of any stockholder in the company) of 25% of the company's share capital.

There are however, a few exceptions to this general rule as mentioned below:

**a. MINORS:** A minor is any person under the age of eighteen years. In an insurance contract, in which a minor, who has a terminal illness, takes up an endowment assurance policy, at a level far above his total income, it was ruled by the court that since the policy was not advantageous to him, he (the minor) was entitled to void it.

INSANE

**b. INSURANCE AND DRUNKEN PERSON:** A person certified as mentally unsound, may be subject of the Court of Protection. If so, contracts are made on his behalf, by a receiver appointed to look after his affairs. Apart from this, a contract made by an insane or drunken person is binding upon him if it is for necessities. All other contracts made by people in these classes are avoidable, but only if at the time of making of the contract, the other party to the contract was aware of the sanity or drunkenness. For this purpose, a person is not to be considered insane or drunken unless at the time of making the contract, he was incapable of realizing what he was doing. Where such a contract is voidable, it becomes binding on the erstwhile insane or drunken person, unless he repudiates it within a reasonable time of the cessation of the disability. (George James. 1985, 6/12).