Law of Banking and Negotiable Instruments

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Chapter One
Introduction to Negotiable Instruments

1.1 **Definition and Nature of Negotiable Instruments**

1.1.1 Definition of NI

- Negotiable is to mean transferable and instruments documents
- Thus, NI are documents containing rights that can be transferred by delivery.
- As per Art 715/1/ of the Commercial Code: NI has three elements
- 1. Documents; permanence and portable.
- 2. Incorporate a right
- Right for payment of money – commercial papers
- Right of ownership of company – share certificate
- Right for payment of principal and interest from a government – bond/treasury bill
- Right for payment of principal and interest from a share company – debenture
- Right to receive goods on voyage – bill of lading
- Right to receive goods in warehouse – warehouse certificate

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- 3. Inseparability of the right and the instrument
- The physical possession of the document is mandatory to exercise for the rights incorporated in it.
- What makes NI different from other documents of title deeds?
- 1. They are transferable either by delivery only or by endorsement followed by delivery.
- 2. inseparability of the right and the instrument.

- 1.1.2 Nature of NI
- NI are contracts, and they should satisfy the four elements of a contract.
- Negotiable instruments are issued or negotiated based on other contracts; NI are accessory contracts.
- The property right established by NI is rights in personam/chose in action/, not rights in rem/chose in possession/.
- The transferee has a better right than the transferor, exception to ‘no one may transfer a better title than he has’.

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- 1.1.3 Economic Significance of NI
- Facilitation of commerce
- Reduce the risk of loss and theft
- Convenience transaction
- Commercial papers - Mode of payment of money
- Shares, debentures and bonds - raising of capital
- Bill of lading and warehouse certificate - Convenience transaction.

- 1.2 Types of NI
- i. Commercial instruments/papers/
- Incorporates rights for payment of a certain amount of money
- It substitutes money.
- Ii. Transferable Securities
- Right to receive dividends and to share in the assets of the share company where the share company is dissolved.

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- Iii. Documents of title to goods
- Right to receive goods/right of ownership over goods.
- 1.3 Forms of NI
- i. order instrument
- Ii. Promise
- 1.4 Mode of Negotiation of NI
- Mere delivery
- Endorsement followed by delivery

- 1.5 Obligation Arising out of NI
- The debtor has the obligation to pay on the delivery of the instrument.
- The debtors (drawers, drawee, maker, acceptors, endorsers and acceptors for honor) of a NI are jointly and severally liable to the holder. (Art 790(1))
- The holder may claim against all these persons individually or collectively without being required to observe the order in which they have become liable. (Art 790(2))
- Proceedings against one of the parties cannot bar proceedings against the others. (Art 790(3)).

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- 1.6 Holder Vs Debtor
- i. Holder
- Is a person who has actual possession of the NI and who has the right to be paid the said amount from the debtor/s of the NI.
- The holder of the NI is usually called payee.
- ii. Debtor
- Is a person who has the obligation to pay to the holder upon delivery of the document.
- The drawers, makers, acceptors, endorsers, drawee, and acceptor for honor are the debtors of NI.

- 1.7 Defences Available to Persons Sued on NI

There are two types of defenses;

i. Personal Defenses; defenses which may be raised because of the personal relationship emanated either from a contract, tort or unlawful enrichment. (Art 717(1) and Art 752)

ii. Universal Defenses; defenses which are related to the form of the NI, on the text of the instrument, forged of the NI, falsified signature, lack of capacity, absence of power of representation to issue the NI, and the absence of necessary condition for bringing the proceeding. (Art 717(1&2)).

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- 1.8 Holder in Due Course and the Limited Scope of Valid Defences
- i. Holder in Due course
- Ii. Limited Scope of Valid Defences
- Only universal defences

Chapter Two
The Form of BOE and the Parties

2.1 Definition of BOE

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

2.2 Maturity Dates of BOE

The date in which the payment of the bill falls due. The bill may be drawn payable:

a. At sight (on demand)
b. After fixed period after sight
c. After fixed period after date
d. At a fixed date

See Art 769(1) Commercial Code.

BOE at other maturities (other than those four mentioned above) and payable by installment shall be null and payable. (Art 769(2))

Why BOE payable on installments is null and void?

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2.3 Negotiation of BOE

An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof.

There are three modes of negotiation of BOE:

i. Mere delivery of the BOE; if the BOE bearer instrument, it is negotiated by the mere delivery of the BOE. (Art 746(1)

ii. By endorsing and delivering of the BOE; if the BOE is order instrument, it can only be negotiated by endorsement and handing over of the instrument. (Art 746(2))

iii. By assignment; if the drawer of the BOE inserted words ‘not to order’, ‘not negotiable’ and the like, the BOE can only be transferred according to the form, and with the effect of ordinary assignment.

Both negotiation and assignment involves the transfer of right to receive the payment of a debit, but while in negotiation the transferee gets a good title (better right), in assignment, the assignee has only those rights which the

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2.4 Presentment for Acceptance of BOE

A BOE has to be presented for acceptance before it is presented for payment. But it is not every bill which has to be presented for acceptance. Presentment for acceptance is necessary only where the bill is payable;

i. At a fixed period after sight
ii. After a fixed period after date
iii. At a fixed date. (Art 757)

- But a bill payable at sight or on demand is can not be presented for acceptance, Why?
- An acceptance shall be written on the bill and expressed by the word ‘accepted’ or any other similar words. Simple signature of the drawee constitutes an acceptance. (Art 761(1)).
- Once the drawee accepts the bill, it has the obligation to pay the specified amount to the payee or

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2.5 Presentment for Payment of BOE

- Presentment for payment is the production or the exhibition of the bill before the drawee or the acceptor to get money in exchange of the delivery of the bill.
- The holder of a bill may present for payment on a fixed date or at a fixed period after date or after sight either on the day which it is payable or on one of the two working days which follow. (Art 774(1)).
- Partial payment of a bill is possible (Art 775(2))
- Payment of the bill may be denied (opposed) only upon;

i. The loss of the bill

ii. The bankruptcy of the holder

Why payment is opposed when the bill losses or the holder bankrupts?

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2.6 Dishonor and the Right of Recourse for Non-acceptance or Non-payment

The holder of the bill may exercise his right of recourse against the endorsers, the drawer and the other parties liable:

i. When payment has not made though the bill is matured.

ii. Before maturity;

a) If there is total or partial refusal to accept

b) If the drawee bankrupts

c) In the event of bankruptcy of the drawer of a non-acceptable bill. (Art 780).

2.7 Procedures of Exercising Right of Recourse

There are two procedural requirements to exercise the right to recourse by the holder;

i. Protest of non-acceptance or non-payment (Art 781(1))

ii. Default notice (Art 788(1))

Do we need protest of non-acceptance for bills payable on demand? Why? Why not?

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2.8 Liability of Parties and Available Defences

- The drawers, acceptors, endorsers and acceptors for honor of a bill are jointly and severally liable to the holder. (Art 790(1))
- The holder may claim against all these persons individually or collectively without being required to observe the order in which they have become liable. (Art 790(2))
- Proceedings against one of the parties cannot bar proceedings against the others. (Art 790(3)).

2.9 Extent of Right of Recourse

The holder of the a matured bill can recover from the debtors of the bill; (Art 791(1))

i. The principal money and the agreed interest

ii. If no prior agreement on interest, legal interest from the date of maturity

iii. Expenses of protest, default notices and any other expenses

iv. Commission not exceeding one third

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But if the holder is exercising his right to recourse before the bill matures, the amount of the bill is subject to discount according to the official rate of discount ruling on the date when recourse is exercised at the place of domicile of the holder. (Art 791(2))

2.10 Types of Defenses

There are two types of defenses;

i. Personal Defenses; defenses which may be raised because of the personal relationship emanated either from a contract, tort or unlawful enrichment. (Art 717(1) and Art 752)

ii. Universal Defenses; defenses which are related to the form of the bill, on the text of the instrument, forged of the bill, falsified signature, lack of capacity, absence of power of representation to issue the bill, and the absence of necessary condition for bringing the

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2.11 Loss of Right of Recourse and Alternative Remedies

- The holder of the bill may lose his right to recourse due to the expiry of limited time fixed for the presentment of the bill of exchange or due to period of limitation. Art 796 & Art 817.
- The holder who loses his right to recourse due to extinctive prescription or limitation of actions has the right to claim his right by unlawful enrichment. (Art 799(1))
- Endorsers are relieved from the claim made by the holder under unlawful enrichment. (Art 799(3))

Chapter Three
The Form of Promissory Note and the Parties

3.1 Definition

- It is unconditional promise to pay in writing made by one person to another, signed by the maker, engaging to pay on demand or a fixed determinable future time a sum certain in money to order or bearer. (Art 823)
- It is a two party commercial instrument: maker and the payee. But the payee can negotiate such promissory note by endorsement.

3.2 Form Requirement of Promissory Note

As per the Commercial Code, a promissory should contain:

a. the word ‘promissory note’ inserted in the body of the instrument and expressed in the language employed in drawing up the instrument;

b. an conditional promise to pay a sum certain in money;

c. the time of payment;

d. the place of payment;

e. the name of the person to whom or to whose order payment is to be made or a statement that the note is payable to bearer;

f. the date when and the palace where the note is issued;

g. the signature of the person(maker) who issues the note

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- The form requirements which are mentioned in the above are mandatory requirements in which the non-existence of one or more of the requirements results a defective and invalid note. (Art 824)
- But, the absence of ‘time of payment, place of payment and place of issuance of the note’ does not result to an invalid note rather if the time of payment is not mentioned in the note, it is presumed as payable on demand; if the place of payment is not mentioned in the note, the domicile of the maker is considered as the place of payment of the note; and if the place of issuance of the note is not again in the note, the place of the place beside the name of the maker. (Art 824(a-c))

3.3 Maturity Dates of Promissory Note

- Art 825(1)(b) payment date, cross refer to the provisions of the bill of exchange Art 769-773.

3.4 Negotiation of Promissory Note

- Art 825(1)(a) endorsement, cross refer to the provisions of the bill Art 746-756.

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3.5 Intervention for Honor

- Art 825(1)(f), payment by intervention, cross refer to the provisions of the bill of exchange Art 802, 806-810.
- Why Art 803-805 are excluded from regulating the intervention for honor of promissory note?

3.6 Recourse for Non-payment

- Art 825(1)(c) recourse in case of non payment, cross refer to the provisions of the bill of exchange Art 780-793 and Art 795-797.
- Art 794 is excluded from applying to promissory note, why?

Chapter Four
The Form of Cheques and the Parties

4.1 Definition

- A check or cheque refers to a document that authorizes and provides instructions to order a certain amount of payment from a bank account. The person who provides the authority is known as the drawer. The drawer has a checking account.
- It is a bill of exchange drawn on a bank and payable on demand.

4.2 Form Requirements of a Cheque

As per the Commercial Code, a check should contain:

a. an unconditional order to pay a sum certain in money;

b. the name of the person who is to pay (payee);

c. the place of payment;

d. the date when and the place where the check is drawn;

e. the signature of the person who draws

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- These form requirements mentioned in the above are mandatory requirements in which the non-existence of one or more of the requirements results an invalid check. (Art 828)
- But, the absence of ‘place of payment’ does not result to an invalid check rather if the place of payment is not mentioned in the check, the place mentioned under the name of the drawee is presumed to be the place of payment, and again if several places are mentioned under the name of the drawee, it is presumed to be payable the first place mention. Where no place is mentioned under the name of the drawee, it shall be paid at the place of the principal establishment of the drawee (head office). Art 828(a&b))

4.3 Negotiation

- Art 842-852

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4.4 Certification of Cheques

- Certification of a check is an act whereby the drawee bank obligates itself to pay a check according to its terms. (Art 832(1))
- It is the drawer, not the payee or the following holders of the check, who can request for the certification of the check by the drawee bank.
- The amount of the certified check will remain blocked until the expiry of the time of presentment of the check. (Art 832(2)).

- Once the check is certified the drawee bank is primary liable for the payment of the check, and the drawer and the endorsers are secondary liable.
- It can be effected by the signature of the drawee at the face of the check. (Art 832(3))

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4.5 Crossed Cheques

- A cross check is a check with a mark comprising of two parallel lines. This mark provides additional instruction to the bank regarding the payment through the check. Two types of crossing are associated with these marks- general crossing and special crossing. Art 863-867.

- General crossing is obtained by making a mark on the check that is made by drawing two parallel lines across the top left-hand corner of the check. If the check is crossed and ‘or bearer’ is deleted, then it means that it cannot be just encashed at the counter by the bearer of check. If 'Account payee only' is added after canceling the bearer on condition stating that a bank will only make payment to the banker whose name is written in the crossing. These kinds

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4.6 Cheques Payable in Account

- Checks payable in account is a check which is only paid into the account of the person whose name is written on the check. Thus, settlement by book entry shall amount to payment. Art 867(1&2).

- Once the word ‘payable in account’ is written in the face of the check, the deletion of it does not have any effect. (Art 867(3))
- The drawee(bank) who make payment in cash to the person whose name is written in the check and causes damage is responsible to make it good.

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4.7 Recourse for Non-payment

- Similar to what we discussed in bill of exchange and for details read Art 868-876.

4.8 Travellers Cheque

- Travelers cheque is a document handed by a banker to his client under which an amount specified in the document is payable to the payee either at a branch of the bank issuing the document or at any other bank in

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- The form requirements of a travelers check are;

a. The word ‘travelers check’;
b. The name and the signature of the banker issuing the check;
c. The name of the payee;
d. The promise to pay a specified amount;
e. The words to ‘order’ or ‘not negotiable’;
f. The place and date of issue;
g. The period during which the check shall be valid; provided that such period shall not exceed one year.

- The provisions which regulate checks do not apply to travelers check.
- Why the provisions that regulate checks do not apply to travelers check?