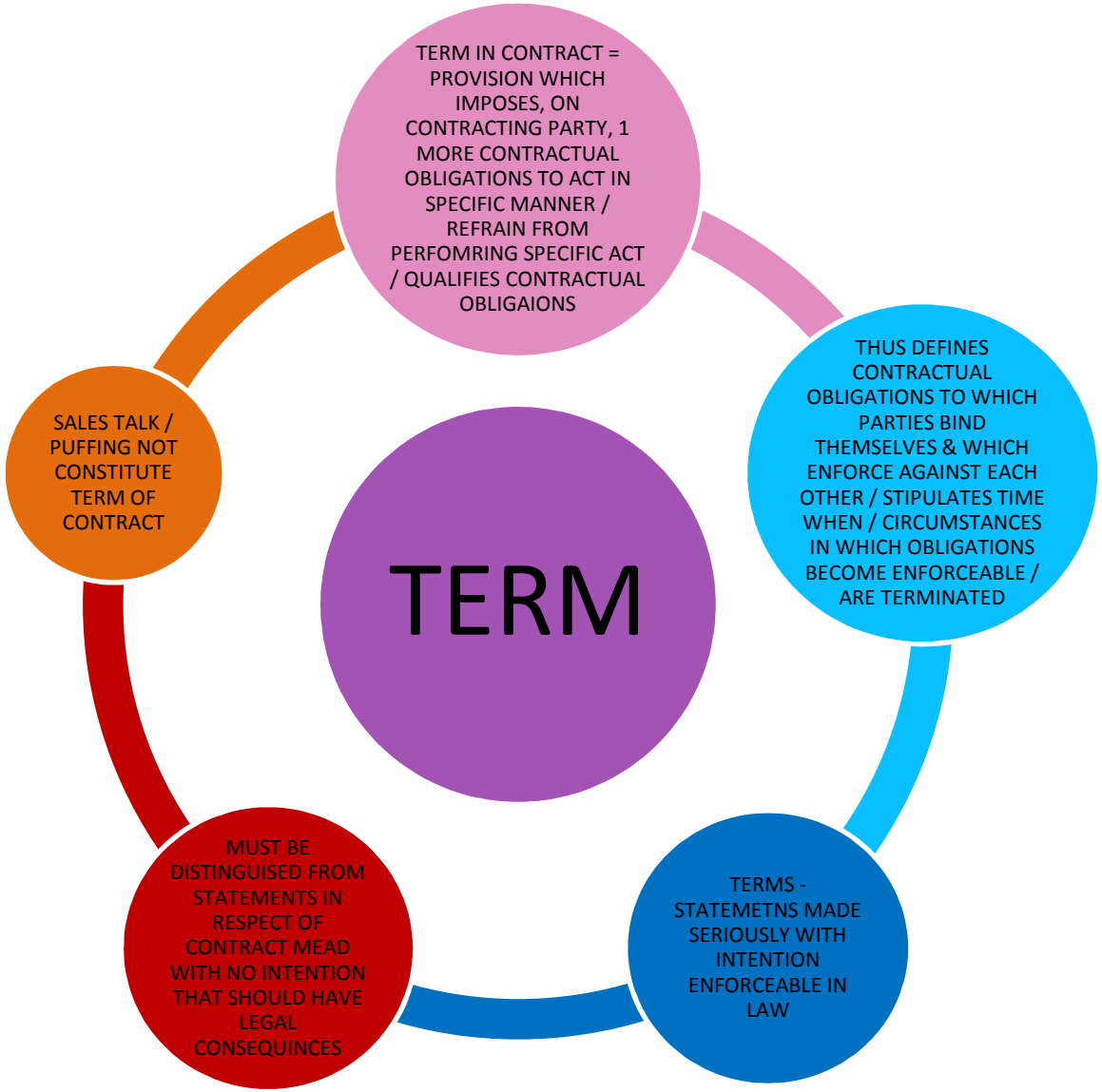
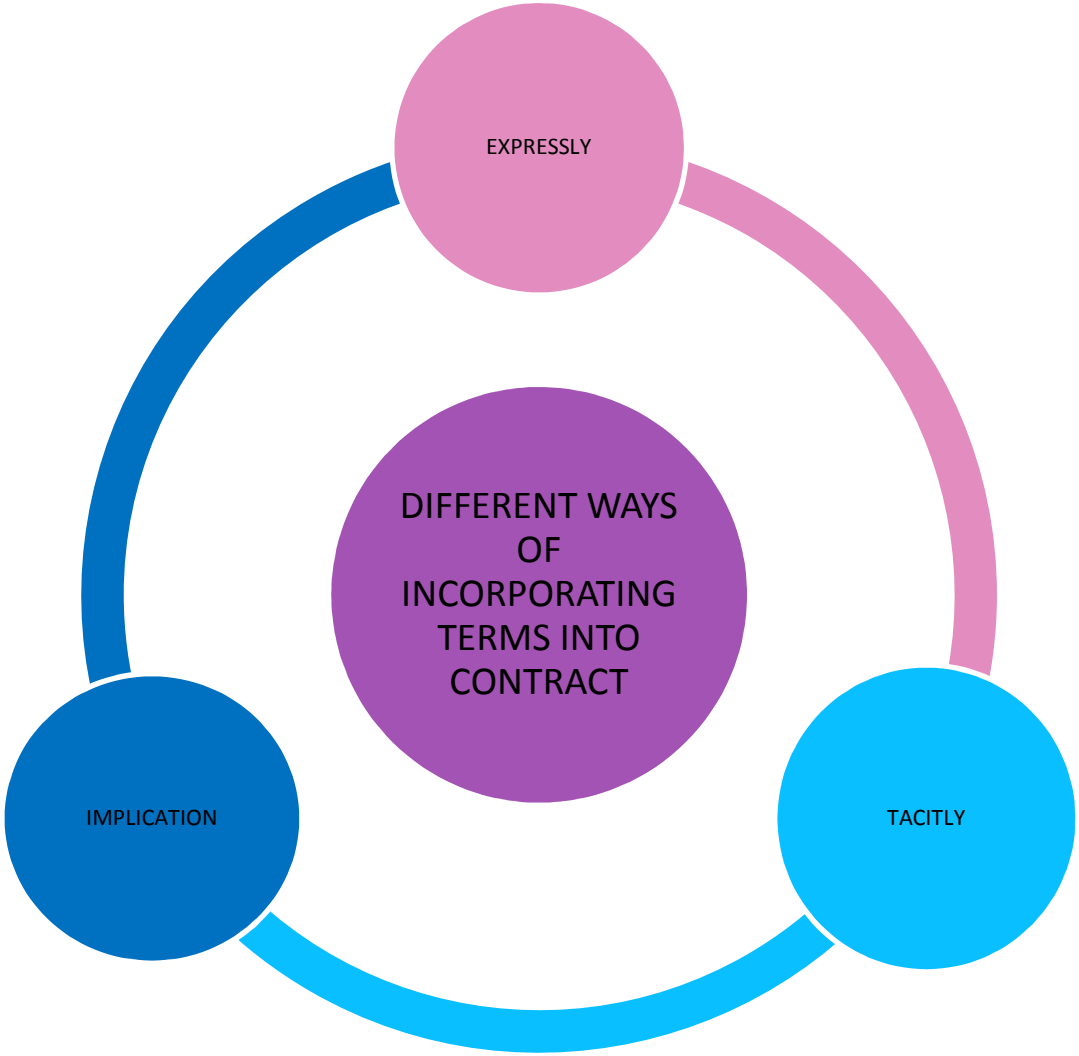
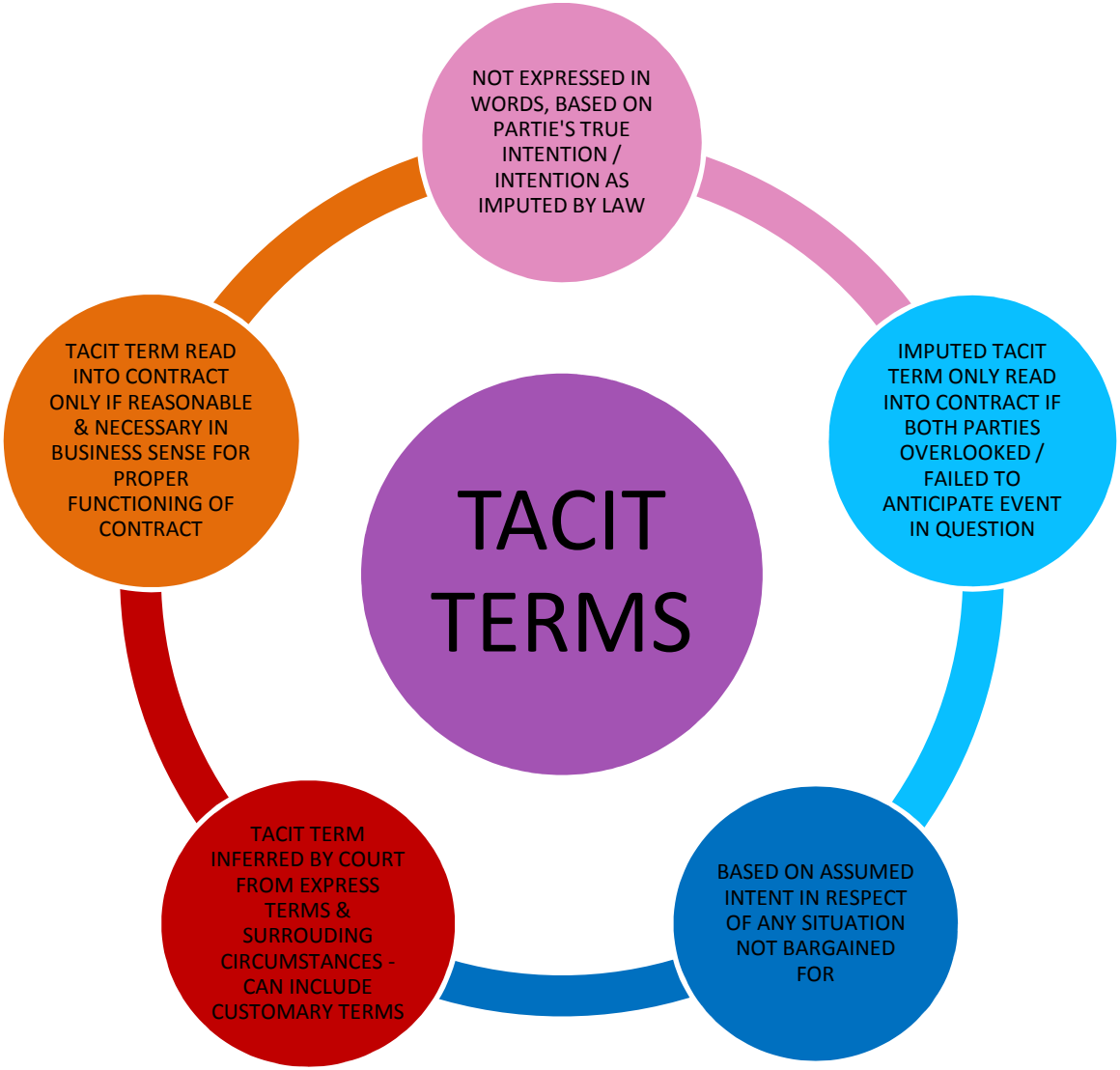
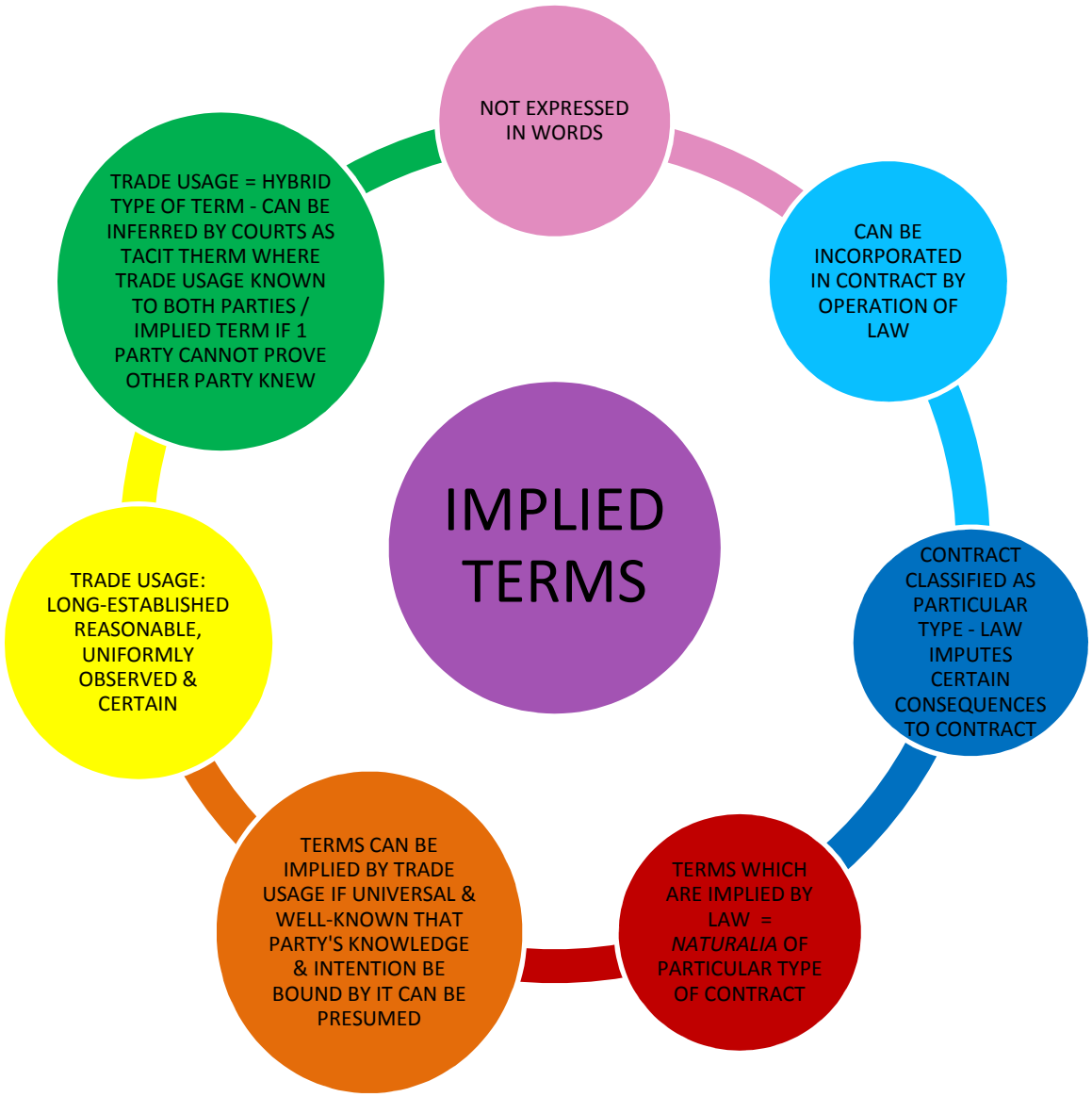
CHAPTER 8

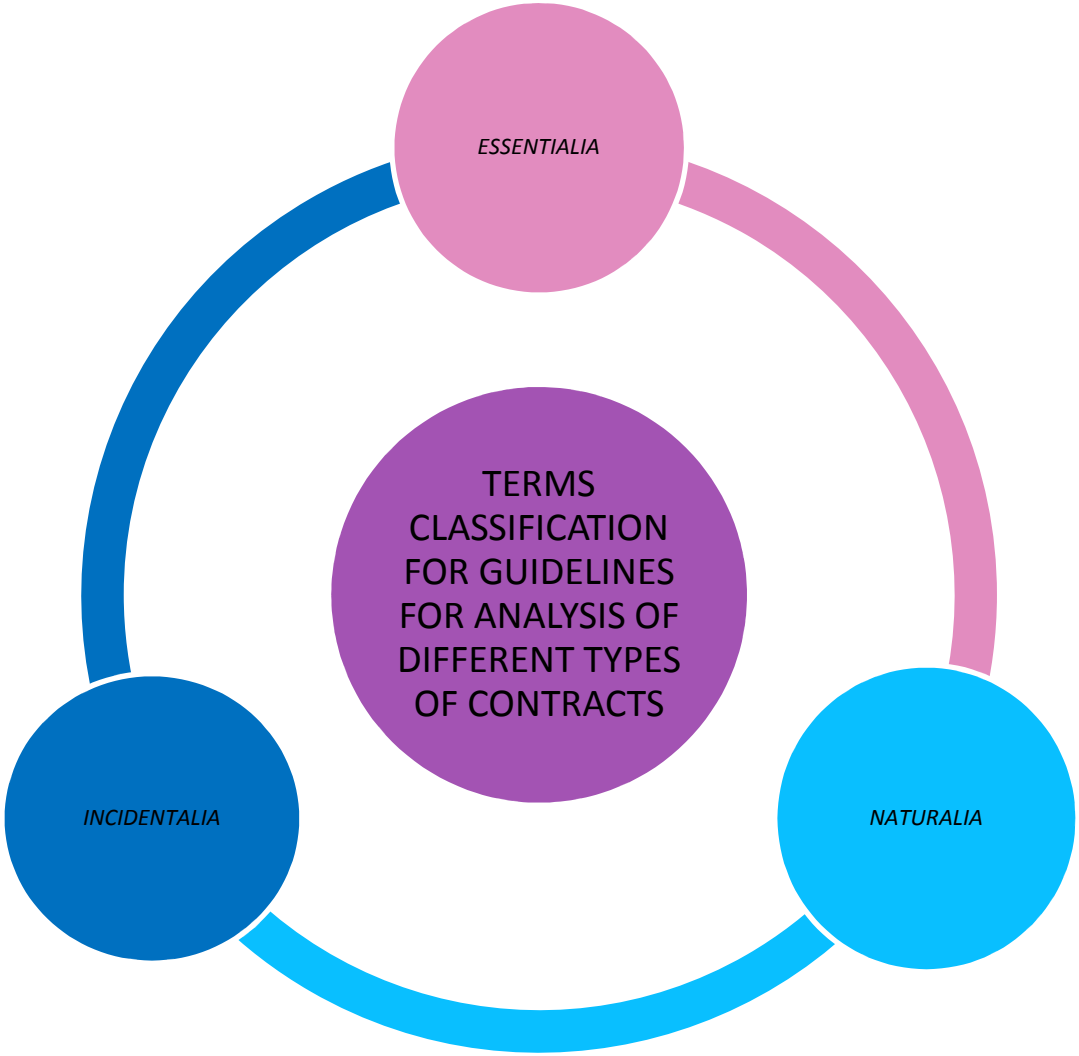

TERM
TERM IN CONTRACT = PROVISION WHICH IMPOSES, ON CONTRACTING PARTY, 1 MORE CONTRACTUAL OBLIGATIONS TO ACT IN SPECIFIC MANNER / REFRAIN FROM PERFOMRING SPECIFIC ACT / QUALIFIES CONTRACTUAL OBLIGAIONS
THUS DEFINES CONTRACTUAL OBLIGATIONS TO WHICH PARTIES BIND THEMSELVES & WHICH ENFORCE AGAINST EACH OTHER / STIPULATES TIME WHEN / CIRCUMSTANCES IN WHICH OBLIGATIONS BECOME ENFORCEABLE / ARE TERMINATED
TERMS - STATEMETNS MADE SERIOUSLY WITH INTENTION ENFORCEABLE IN LAW
MUST BE DISTINGUISED FROM STATEMENTS IN RESPECT OF CONTRACT MEAD WITH NO INTENTION THAT SHOULD HAVE LEGAL CONSEQUINCES
SALES TALK / PUFFING NOT CONSTITUTE TERM OF CONTRACT


EXPRESSLY
DIFFERENT WAYS OF INCORPORATING TERMS INTO CONTRACT
IMPLICATION
TACITLY

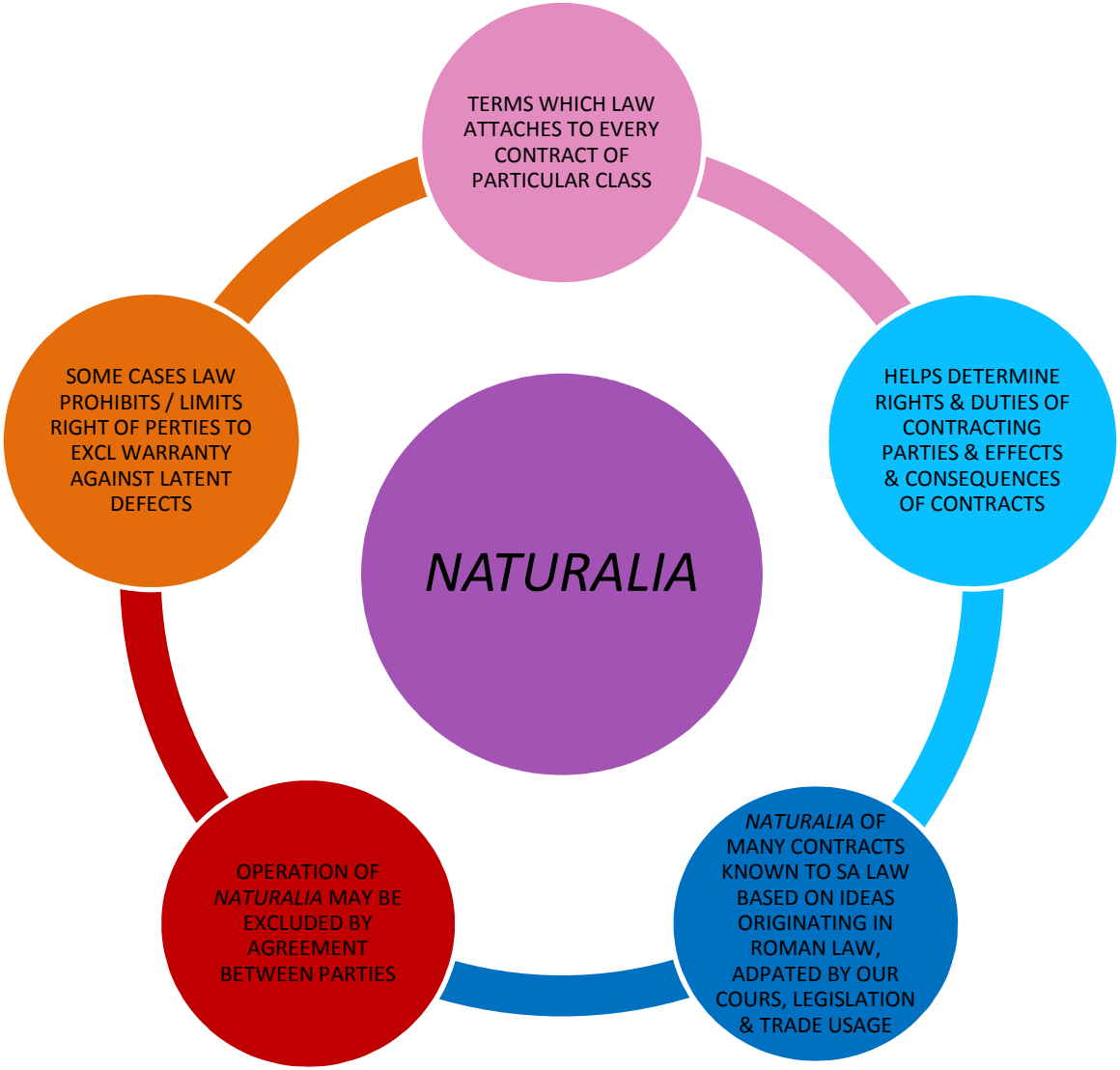
EXPRESS TEMRS
ARTICULTAED DECLARATIONS OF INTENT
ARTICULATED IF EXPRESSED IN SO MAY WORDS, WHETHER IN WRITING / ORALLY
USUALLY WHEN INCLUDING / EXCLUDING TERM TO CONTRACT
CONSUMER PROTECTION ACT 68 OF 2008 PROVISIONS
CONSUMER CONTRACT MAY NOT CONTAIN UNFAIR, UNJUST / UNREASONABLE T&C'S
IF CONSUMER CONTRACT CONTAINS TERM / CONDITION MAY AFFECT CONSUMER'S RIGHTS / COULD NOT REASONABLY BE EXPECTED - SUPPLIER MUST DRAW CONSUMER'S ATTENTION TO SUCH TERM / CONDITION

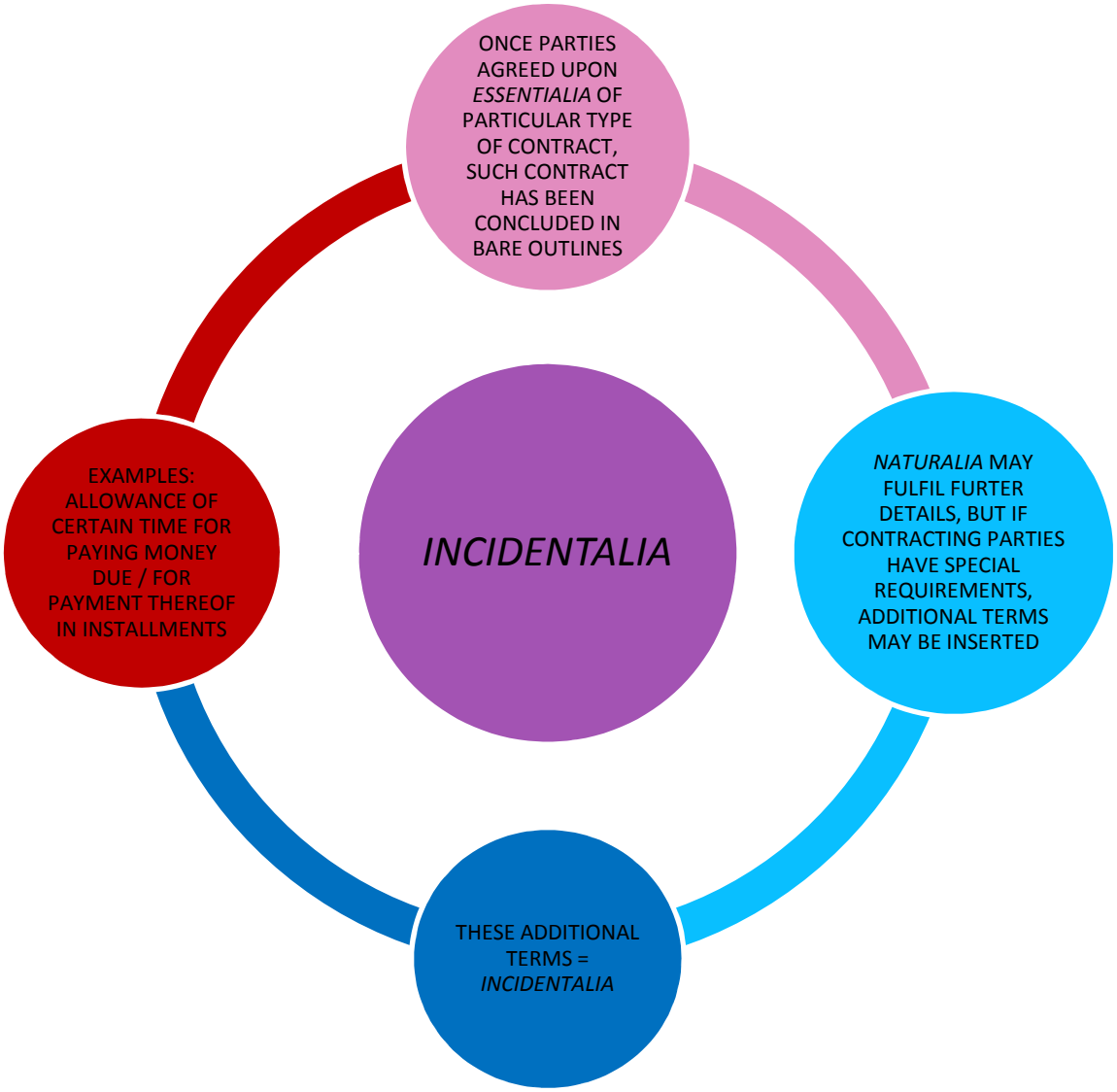

TACIT TERMS
NOT EXPRESSED IN WORDS, BASED ON PARTIE'S TRUE INTENTION / INTENTION AS IMPUTED BY LAW
IMPUTED TACIT TERM ONLY READ INTO CONTRACT IF BOTH PARTIES OVERLOOKED / FAILED TO ANTICIPATE EVENT IN QUESTION
BASED ON ASSUMED INTENT IN RESPECT OF ANY SITUATION NOT BARGAINED FOR
TACIT TERM INFERRED BY COURT FROM EXPRESS TERMS & SURROUDING CIRCUMSTANCES - CAN INCLUDE CUSTOMARY TERMS
TACIT TERM READ INTO CONTRACT ONLY IF REASONABLE & NECESSARY IN BUSINESS SENSE FOR PROPER FUNCTIONING OF CONTRACT


IMPLIED TERMS
NOT EXPRESSED IN WORDS
CAN BE INCORPORATED IN CONTRACT BY OPERATION OF LAW
CONTRACT CLASSIFIED AS PARTICULAR TYPE - LAW IMPUTES CERTAIN CONSEQUENCES TO CONTRACT
TERMS WHICH ARE IMPLIED BY LAW = *NATURALIA* OF PARTICULAR TYPE OF CONTRACT
TERMS CAN BE IMPLIED BY TRADE USAGE IF UNIVERSAL & WELL-KNOWN THAT PARTY'S KNOWLEDGE & INTENTION BE BOUND BY IT CAN BE PRESUMED
TRADE USAGE: LONG-ESTABLISHED REASONABLE, UNIFORMLY OBSERVED & CERTAIN
TRADE USAGE = HYBRID TYPE OF TERM - CAN BE INFERRED BY COURTS AS TACIT THERM WHERE TRADE USAGE KNOWN TO BOTH PARTIES / IMPLIED TERM IF 1 PARTY CANNOT PROVE OTHER PARTY KNEW

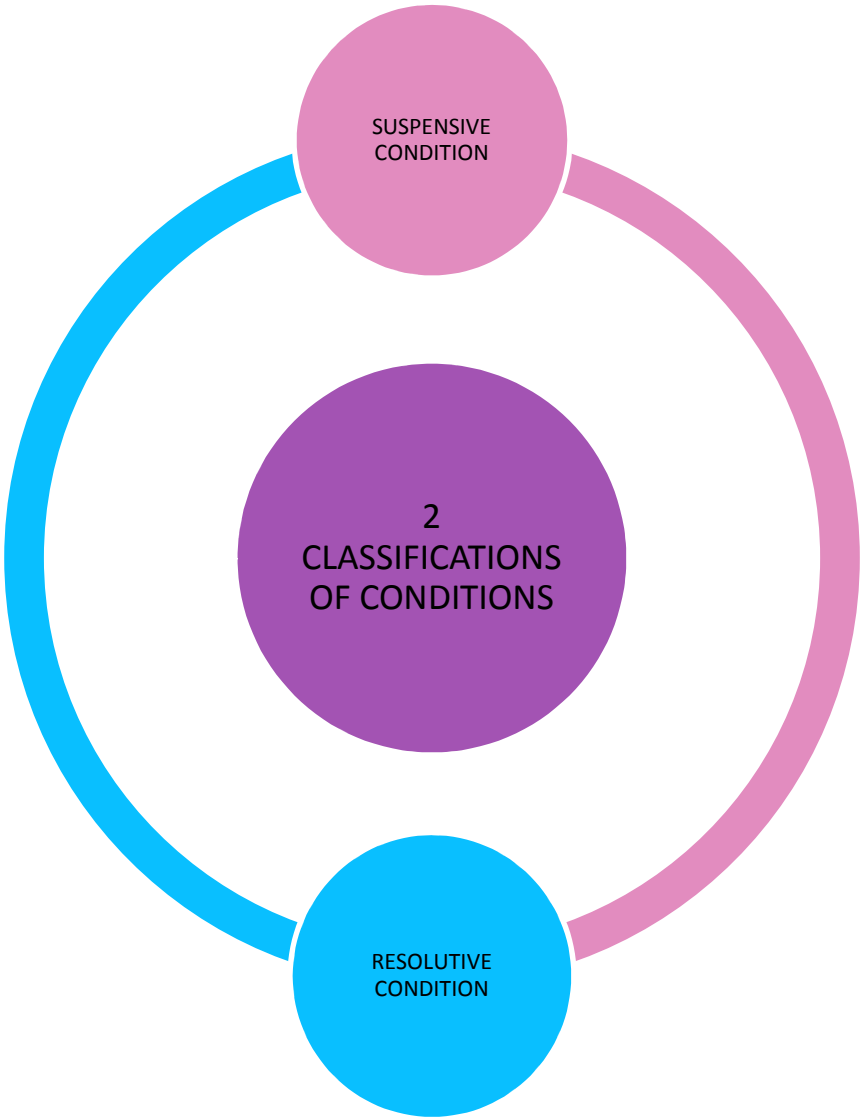

ESSENTIALIA
TERMS CLASSIFICATION FOR GUIDELINES FOR ANALYSIS OF DIFFERENT TYPES OF CONTRACTS
INCIDENTALIA
NATURALIA

ESSENTIALIA
THOSE TERMS WHICH ARE ESSENTIAL FOR CLASSIFICATION OF CONTRACT BELONGING TO PARTICULAR CLASS / CATEGORY OF CONTRACT
EXAMPLE: 2 ESSENTIALIA CONTRACT OF SALE:
(1) SELLER BINDS HIMSELF TO DELIVER SOMETHING TO BUYER
(2) BUYER BINDS HIMSELF TO PAY SUM OF MONEY IN EXCHANGE FOR ASSET
IF BUYER = BOUND NOT TO PAY PRICE, BUT DELIVER OBJECT IN EXCHANGE FOR ASSET - NO CONTRACT OF SALE - ESSENTIALIA FOR CONTRACT OF SALE = MISSING
MAY BE CONTRACT OF EXCHANGE
ESSENTIALIA OF CONTRACT SERVE TO IDENTIFY PARTICULAR CONTACT AS BELONGING TO PARTICULAR CLASS / CATEGORY OF CONTRACT
IDENTIFICATION = IMPORTANT AS CATEGORY OF CONTRACT DETERMINES NATURALIA OF PARTICULAR CONTRACT

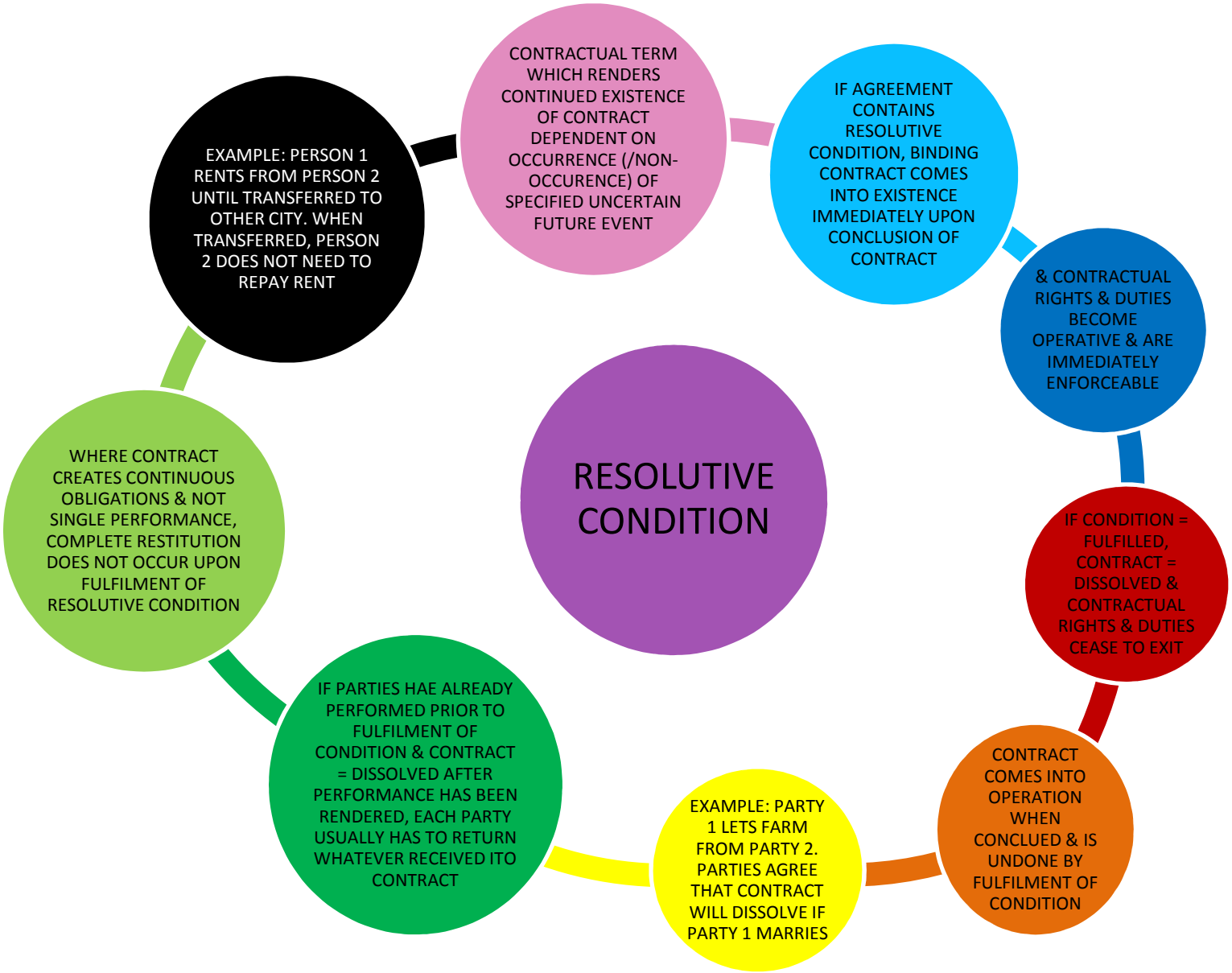

NATURALIA
TERMS WHICH LAW ATTACHES TO EVERY CONTRACT OF PARTICULAR CLASS
HELPS DETERMINE RIGHTS & DUTIES OF CONTRACTING PARTIES & EFFECTS & CONSEQUENCES OF CONTRACTS
NATURALIA OF MANY CONTRACTS KNOWN TO SA LAW BASED ON IDEAS ORIGINATING IN ROMAN LAW, ADPATED BY OUR COURS, LEGISLATION & TRADE USAGE
OPERATION OF NATURALIA MAY BE EXCLUDED BY AGREEMENT BETWEEN PARTIES
SOME CASES LAW PROHIBITS / LIMITS RIGHT OF PERTIES TO EXCL WARRANTY AGAINST LATENT DEFECTS

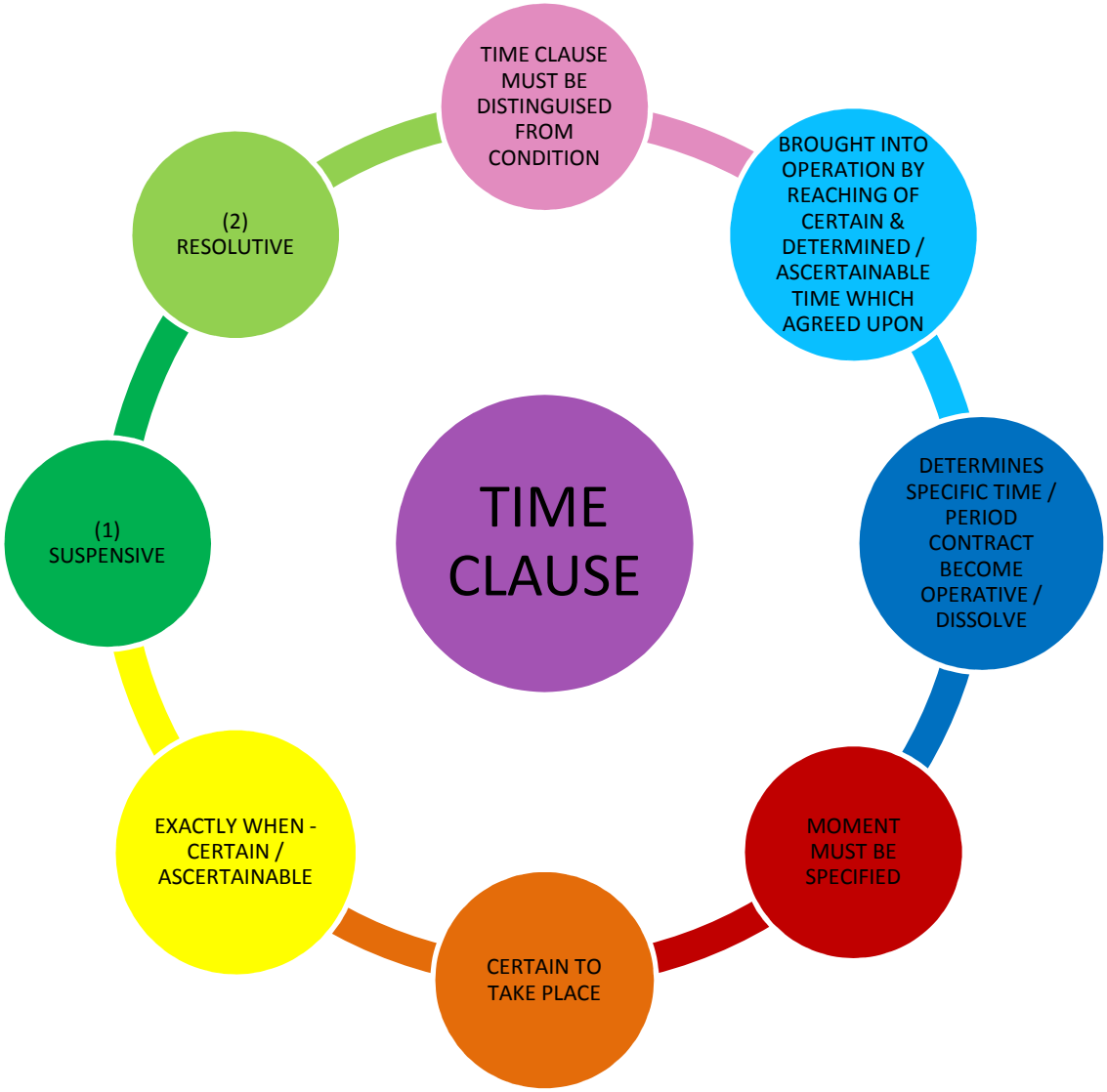

ONCE PARTIES AGREED UPON *ESSENTIALIA* OF PARTICULAR TYPE OF CONTRACT, SUCH CONTRACT HAS BEEN CONCLUDED IN BARE OUTLINES
NATURALIA MAY FULFIL FURTER DETAILS, BUT IF CONTRACTING PARTIES HAVE SPECIAL REQUIREMENTS, ADDITIONAL TERMS MAY BE INSERTED
THESE ADDITIONAL TERMS = *INCIDENTALIA*
EXAMPLES: ALLOWANCE OF CERTAIN TIME FOR PAYING MONEY DUE / FOR PAYMENT THEREOF IN INSTALLMENTS
INCIDENTALIA

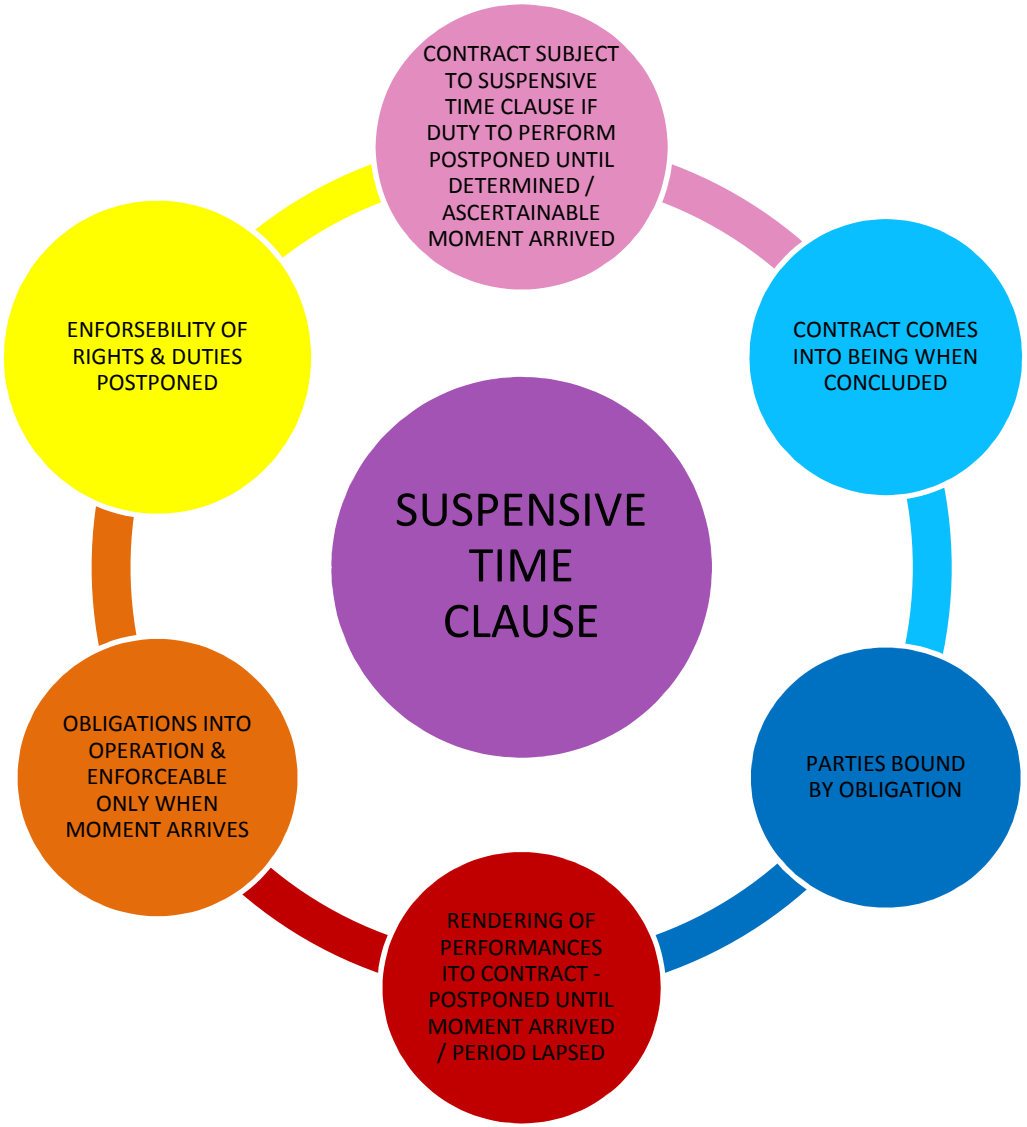
CONDITION
CONDITION = PARTICULAR KIND OF TERM & DOES NOT INCL ALL TERMS GENERALLY FOUND IN CONTRACTS
CONDITION DESCRIBED AS CONTRACTUAL TERM WHICH RENDERS OPERATION (COMING INTO EFFECT / TERMINATION OF CONTRACTUAL OBLIGATIONS) & CONSEQUENCES OF CONTRACT DEPENDENT ON OCCURENCE / NON-OCCURENCE OF SPECIFIED UNCERTIAN FUTURE EVENT
EVENT MUST BE SPECIFIED
EVENT MUST BE UNCERTAIN (UNCERTAIN WHETHER EVENT WILL OCCUR)
CONTRACT SUBJECT TO CONDITION & CONTRACT BECOMES OPERATIVE ONLY IF CONDITION IS FULFILLED
CONDITION MUST REFER TO FUTURE EVENT
CONDITIONS CLASSIFIED INTO VARIOUS CATEGORIES
CATEGORIES: POSITIVE & NEGATIVE, VOUNTARY, INCIDENTAL & MIXED, ETC

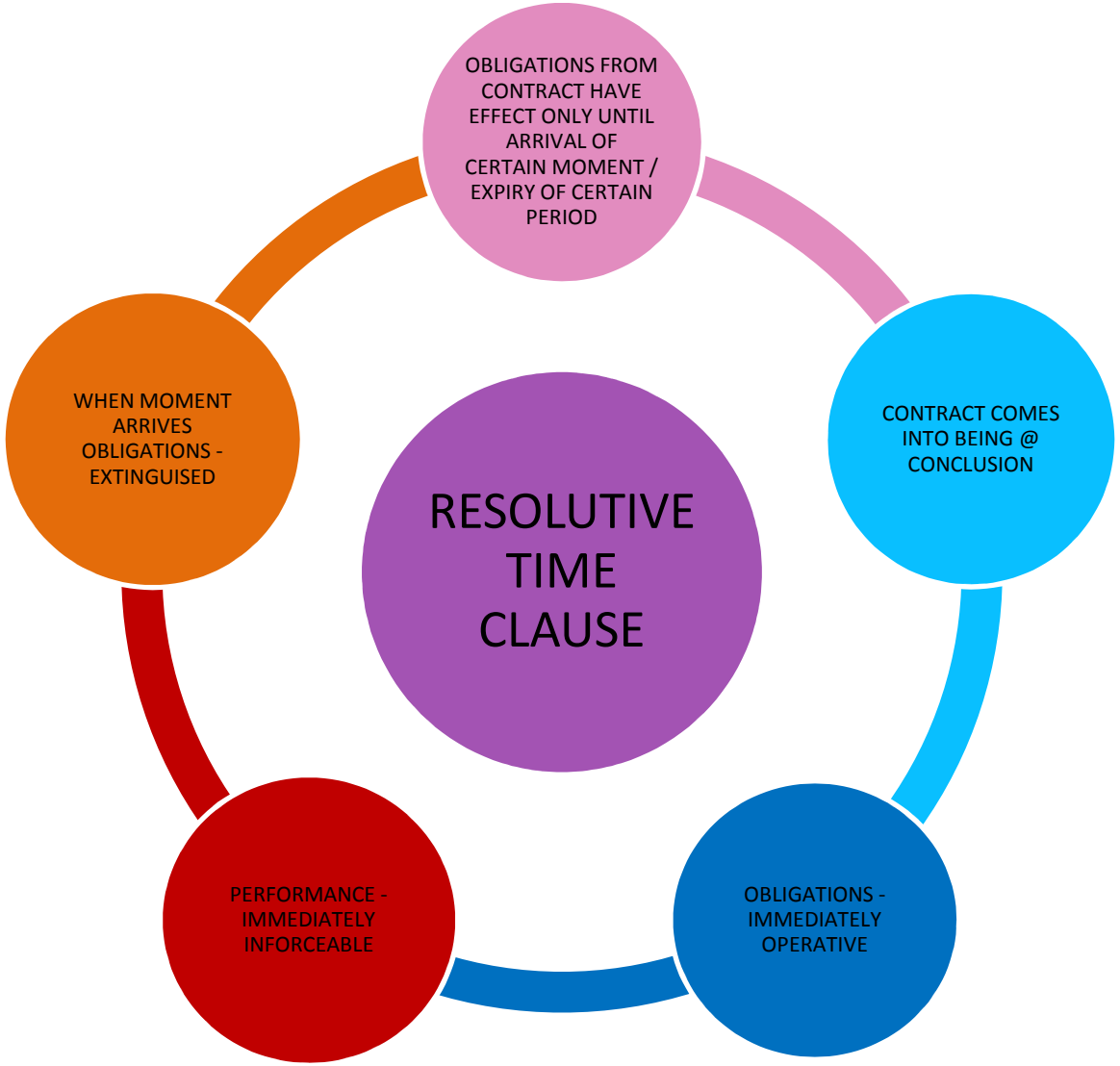

SUSPENSIVE CONDITION
2 CLASSIFICATIONS OF CONDITIONS
RESOLUTIVE CONDITION

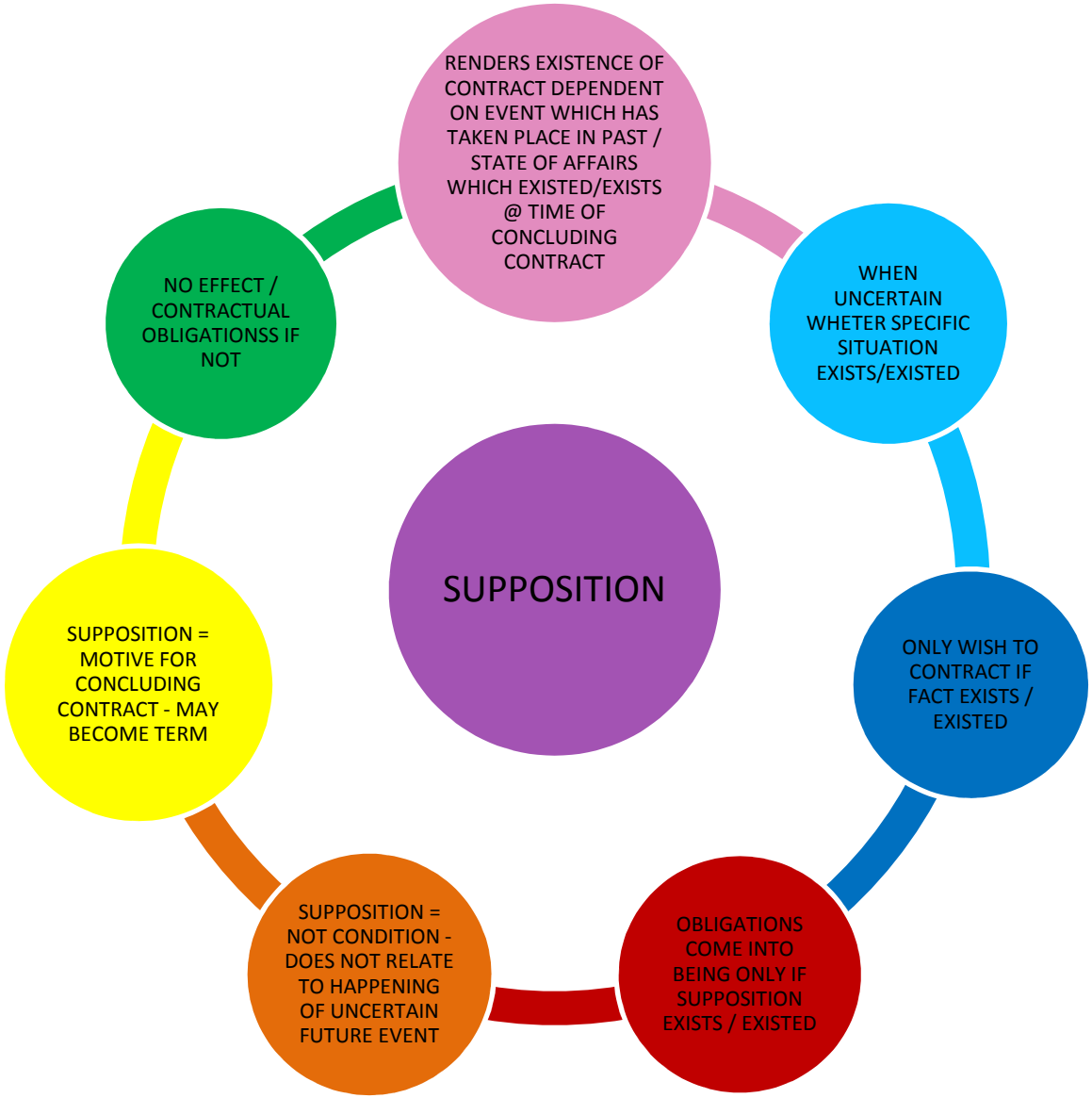
SUSPENSIVE CONDITION
CONTRACTURAL TERM WHICH SUSPENDS OPERATION OF CONTRACTUAL OBLIGATIONS ITO CONTRACT UNTIL CONDITION HAS BEEN FULFILLED
UPON CONCLUSION OF AGREEMENT CONTAINING SUSPENSIVE CONDITION, VALID CONTRACT ARISES & BINDING CONTRACTURAL RELATIONSHIP EXITS FROM WHICH PARTIES CANNOT RESILE
ALTHOUGH CONDITION AL, RIGHTS & DUTIES EXIST
RIGHTS & DUTIES CAN BE CEDED, ARE TRANFERABLE UPON DEATH & ARE ACKNOWLEGED IN EVENT OF INSOLVENCY
CREDITOR CAN PROTECT CONDITIONAL RIGHT BY MEANS OF INTERDICT
CONTRACTURAL RIGHTS & DUTIES COME INTO OPERATION & BECOME ENFORCEABLE ONLY WHEN CONDITION IS FULFILLED
EXAMPLE: OFFERER MAKES OFFER MAKES OFFER TO LEASE OFFEREE'S' CAR SUBJECT TO CONDITION THAT OFFERER OBTAINS SALARY INCREASE WITHIN CERTAIN PERIOD OF TIME
IF OFFEREE ACCEPTS OFFER, CONTRACTUAL RELATIONSHIP COMES INTO EXISTENCE - ONLY COMES INTO EXISTENCE IF CONDITION IS FULFILLED
IF DISSOVLED, NEITHER PARTY HAS OBLIGATION TOWARDS THE OTHER
CONTRACT = TERMINATED


RESOLUTIVE CONDITION
CONTRACTUAL TERM WHICH RENDERS CONTINUED EXISTENCE OF CONTRACT DEPENDENT ON OCCURRENCE (/NON-OCCURENCE) OF SPECIFIED UNCERTAIN FUTURE EVENT
IF AGREEMENT CONTAINS RESOLUTIVE CONDITION, BINDING CONTRACT COMES INTO EXISTENCE IMMEDIATELY UPON CONCLUSION OF CONTRACT
& CONTRACTUAL RIGHTS & DUTIES BECOME OPERATIVE & ARE IMMEDIATELY ENFORCEABLE
IF CONDITION = FULFILLED, CONTRACT = DISSOLVED & CONTRACTUAL RIGHTS & DUTIES CEASE TO EXIT
CONTRACT COMES INTO OPERATION WHEN CONCLUED & IS UNDONE BY FULFILMENT OF CONDITION
EXAMPLE: PARTY 1 LETS FARM FROM PARTY 2. PARTIES AGREE THAT CONTRACT WILL DISSOLVE IF PARTY 1 MARRIES
IF PARTIES HAE ALREADY PERFORMED PRIOR TO FULFILMENT OF CONDITION & CONTRACT = DISSOLVED AFTER PERFORMANCE HAS BEEN RENDERED, EACH PARTY USUALLY HAS TO RETURN WHATEVER RECEIVED ITO CONTRACT
WHERE CONTRACT CREATES CONTINUOUS OBLIGATIONS & NOT SINGLE PERFORMANCE, COMPLETE RESTITUTION DOES NOT OCCUR UPON FULFILMENT OF RESOLUTIVE CONDITION
EXAMPLE: PERSON 1 RENTS FROM PERSON 2 UNTIL TRANSFERRED TO OTHER CITY. WHEN TRANSFERRED, PERSON 2 DOES NOT NEED TO REPAY RENT

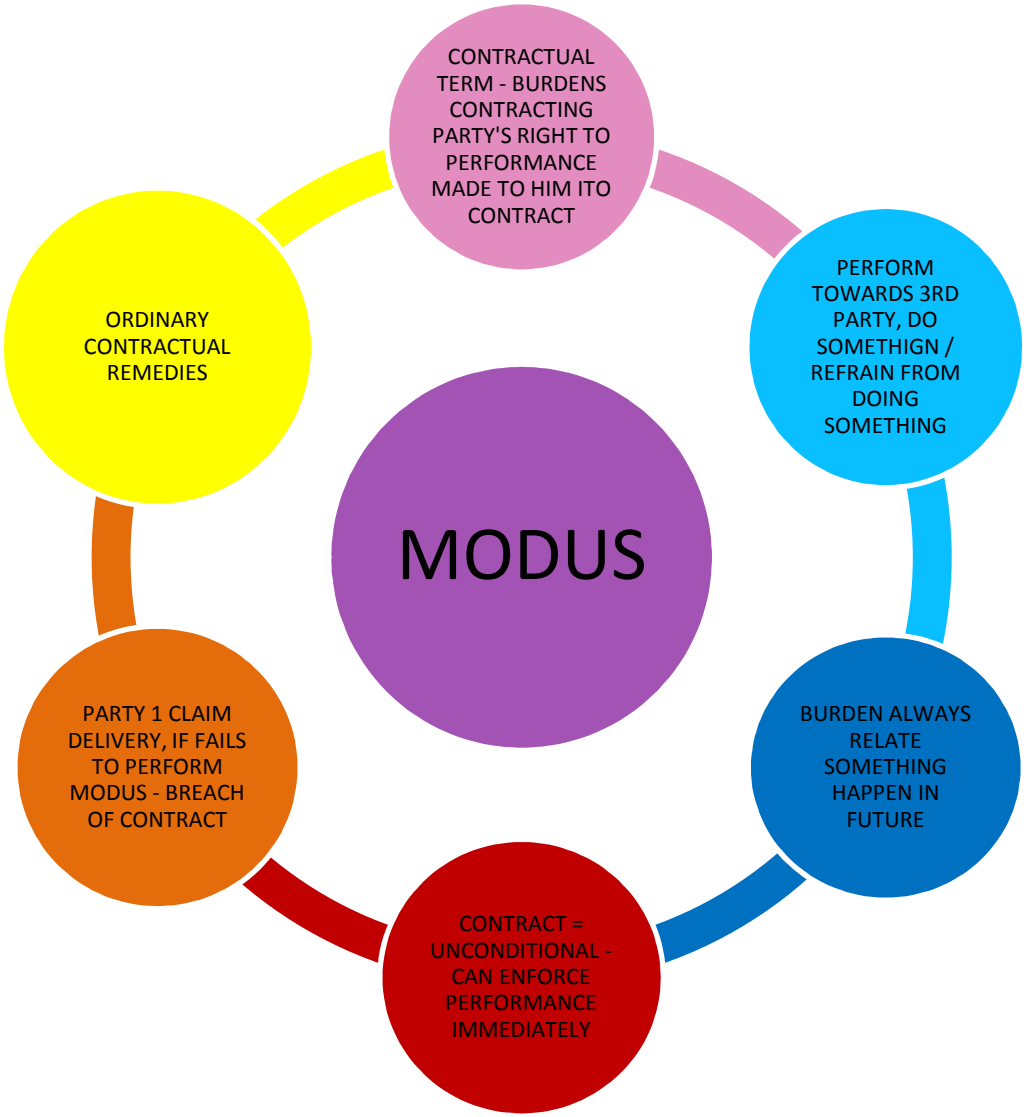

TIME CLAUSE
TIME CLAUSE MUST BE DISTINGUISED FROM CONDITION
BROUGHT INTO OPERATION BY REACHING OF CERTAIN & DETERMINED / ASCERTAINABLE TIME WHICH AGREED UPON
DETERMINES SPECIFIC TIME / PERIOD CONTRACT BECOME OPERATIVE / DISSOLVE
MOMENT MUST BE SPECIFIED
CERTAIN TO TAKE PLACE
EXACTLY WHEN - CERTAIN / ASCERTAINABLE
(1) SUSPENSIVE
(2) RESOLUTIVE

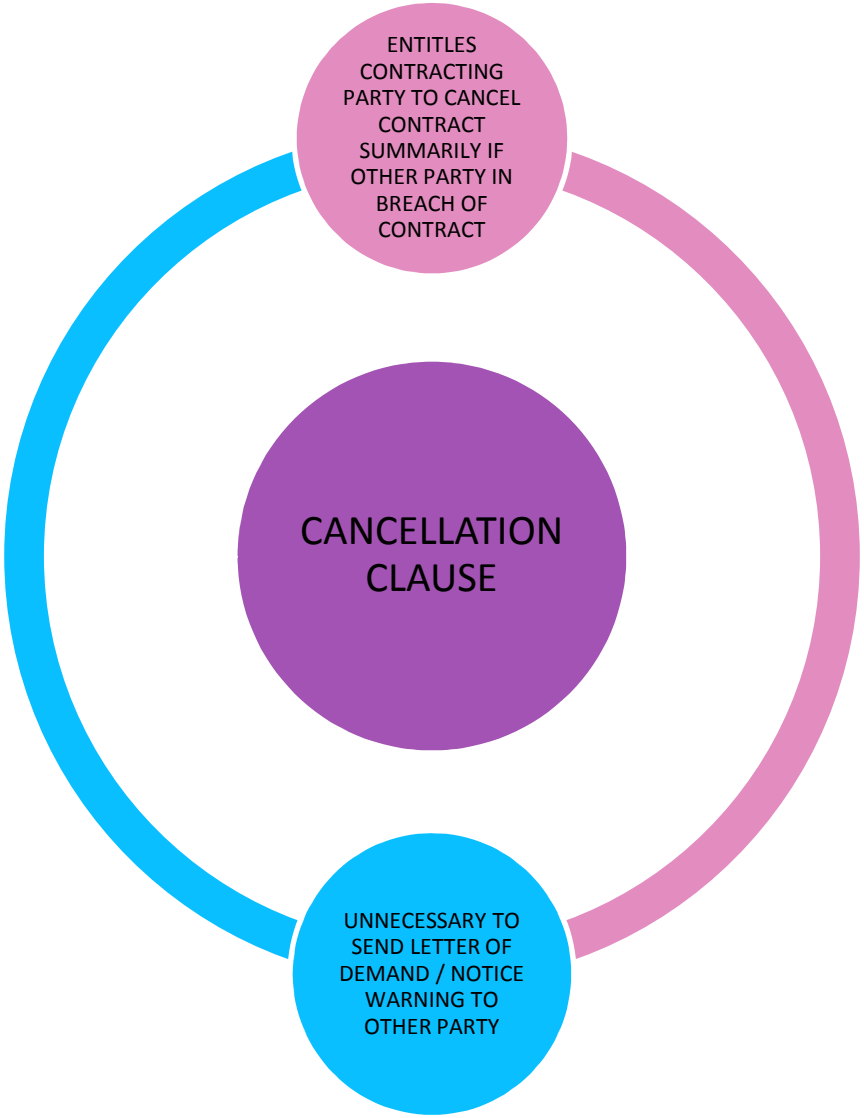

SUSPENSIVE TIME CLAUSE
CONTRACT SUBJECT TO SUSPENSIVE TIME CLAUSE IF DUTY TO PERFORM POSTPONED UNTIL DETERMINED / ASCERTAINABLE MOMENT ARRIVED
CONTRACT COMES INTO BEING WHEN CONCLUDED
PARTIES BOUND BY OBLIGATION
RENDERING OF PERFORMANCES ITO CONTRACT - POSTPONED UNTIL MOMENT ARRIVED / PERIOD LAPSED
OBLIGATIONS INTO OPERATION & ENFORCEABLE ONLY WHEN MOMENT ARRIVES
ENFORSEBILITY OF RIGHTS & DUTIES POSTPONED


RESOLUTIVE TIME CLAUSE
OBLIGATIONS FROM CONTRACT HAVE EFFECT ONLY UNTIL ARRIVAL OF CERTAIN MOMENT / EXPIRY OF CERTAIN PERIOD
CONTRACT COMES INTO BEING @ CONCLUSION
OBLIGATIONS - IMMEDIATELY OPERATIVE
PERFORMANCE - IMMEDIATELY INFORCEABLE
WHEN MOMENT ARRIVES OBLIGATIONS - EXTINGUISED

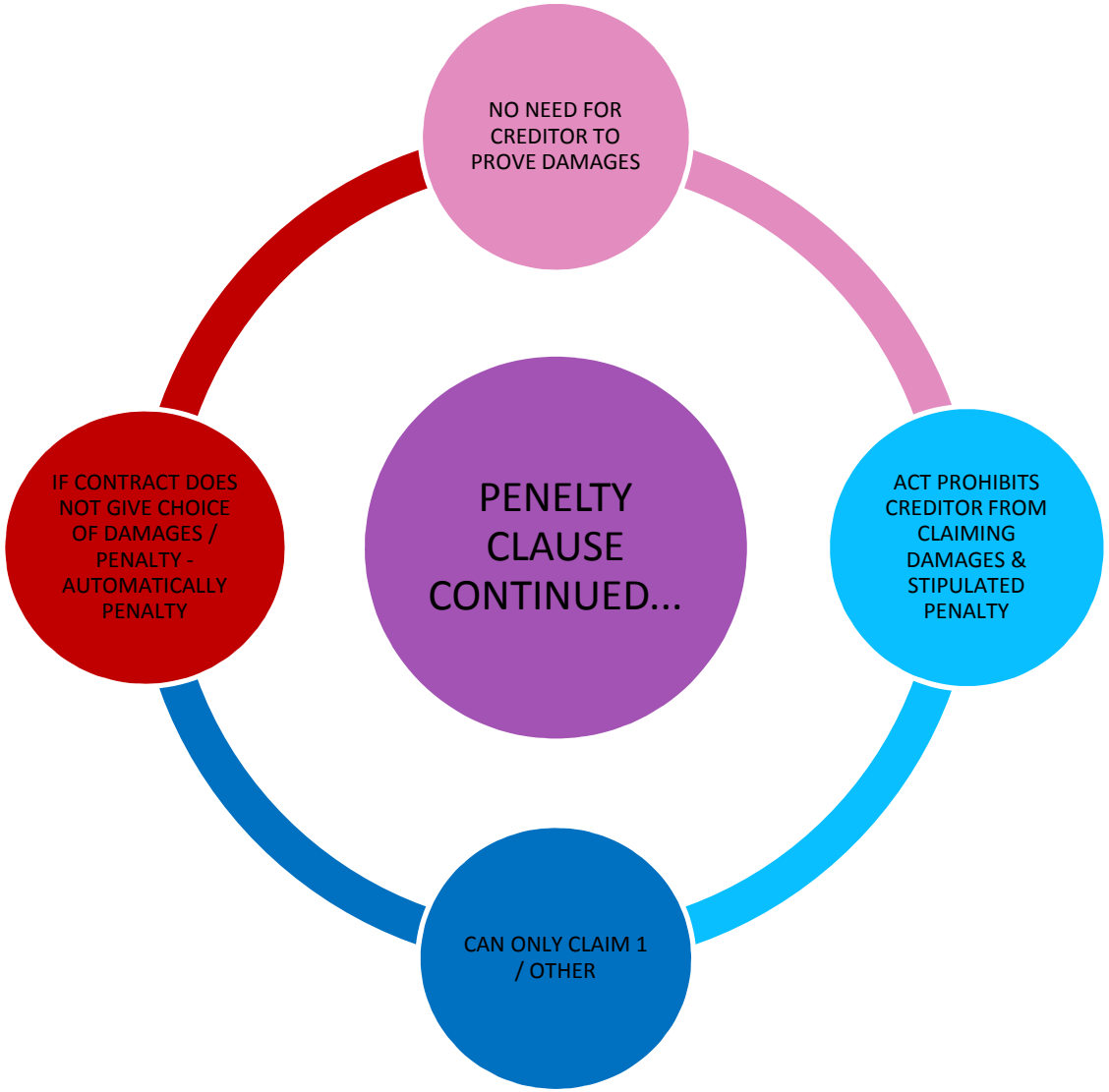

SUPPOSITION
RENDERS EXISTENCE OF CONTRACT DEPENDENT ON EVENT WHICH HAS TAKEN PLACE IN PAST / STATE OF AFFAIRS WHICH EXISTED/EXISTS @ TIME OF CONCLUDING CONTRACT
WHEN UNCERTAIN WHETER SPECIFIC SITUATION EXISTS/EXISTED
ONLY WISH TO CONTRACT IF FACT EXISTS / EXISTED
OBLIGATIONS COME INTO BEING ONLY IF SUPPOSITION EXISTS / EXISTED
SUPPOSITION = NOT CONDITION - DOES NOT RELATE TO HAPPENING OF UNCERTAIN FUTURE EVENT
SUPPOSITION = MOTIVE FOR CONCLUDING CONTRACT - MAY BECOME TERM
NO EFFECT / CONTRACTUAL OBLIGATIONSS IF NOT

WARRANTY
CONTRACTUAL TERM WHEREBY CONTRACTING PARTY ACCEPTS ABSOLUTE RESPONSIBILITY FOR PROPER PERFORMANCE RELATING TO ABSENCE OF DEFECTS IN WARRANTO'R PRODUCT / SERVICE
ADDITIONAL OBLIGATION - PART OF CONTRACT - RESULT OF EXPRESS INCL OF WARRANTY
CERTAIN WARRANTIES - OPERATION OF LAW
EXAMPLES: LATENT DEFECTS, EVICTION IN CONTRACTS OF SALE
BREACH OF CONTRACTUAL TERM = BREACH OF CONTRACT
INNOCENT PARTY - LEGAL REMEDIES
PURCHASES ENTITLED TO REMEDIES OF *ACTIO REDHIBITORIA / ACTIO QUANTI MINORIS*

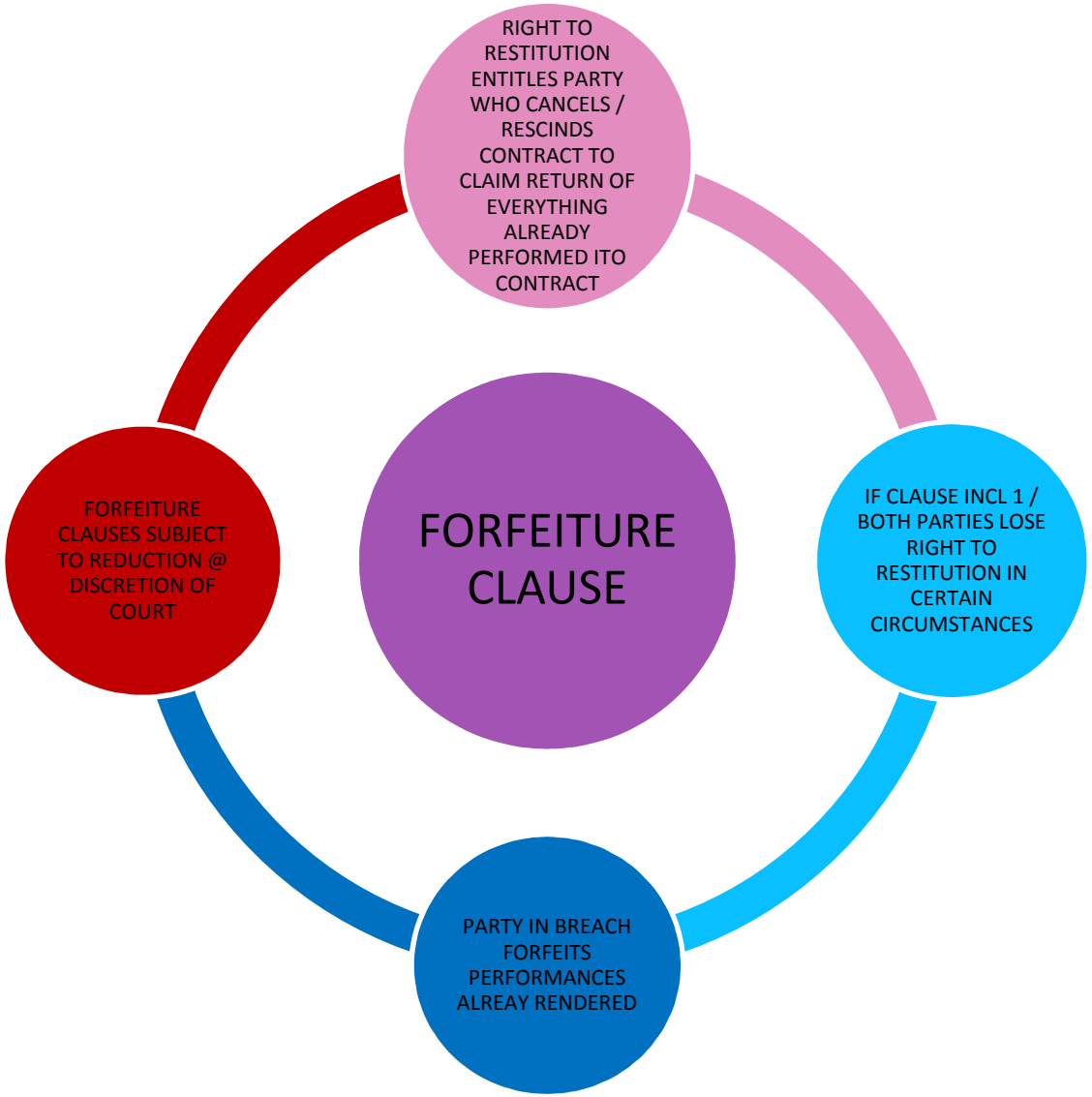

MODUS
CONTRACTUAL TERM - BURDENS CONTRACTING PARTY'S RIGHT TO PERFORMANCE MADE TO HIM ITO CONTRACT
PERFORM TOWARDS 3RD PARTY, DO SOMETHIGN / REFRAIN FROM DOING SOMETHING
BURDEN ALWAYS RELATE SOMETHING HAPPEN IN FUTURE
CONTRACT = UNCONDITIONAL - CAN ENFORCE PERFORMANCE IMMEDIATELY
PARTY 1 CLAIM DELIVERY, IF FAILS TO PERFORM MODUS - BREACH OF CONTRACT
ORDINARY CONTRACTUAL REMEDIES

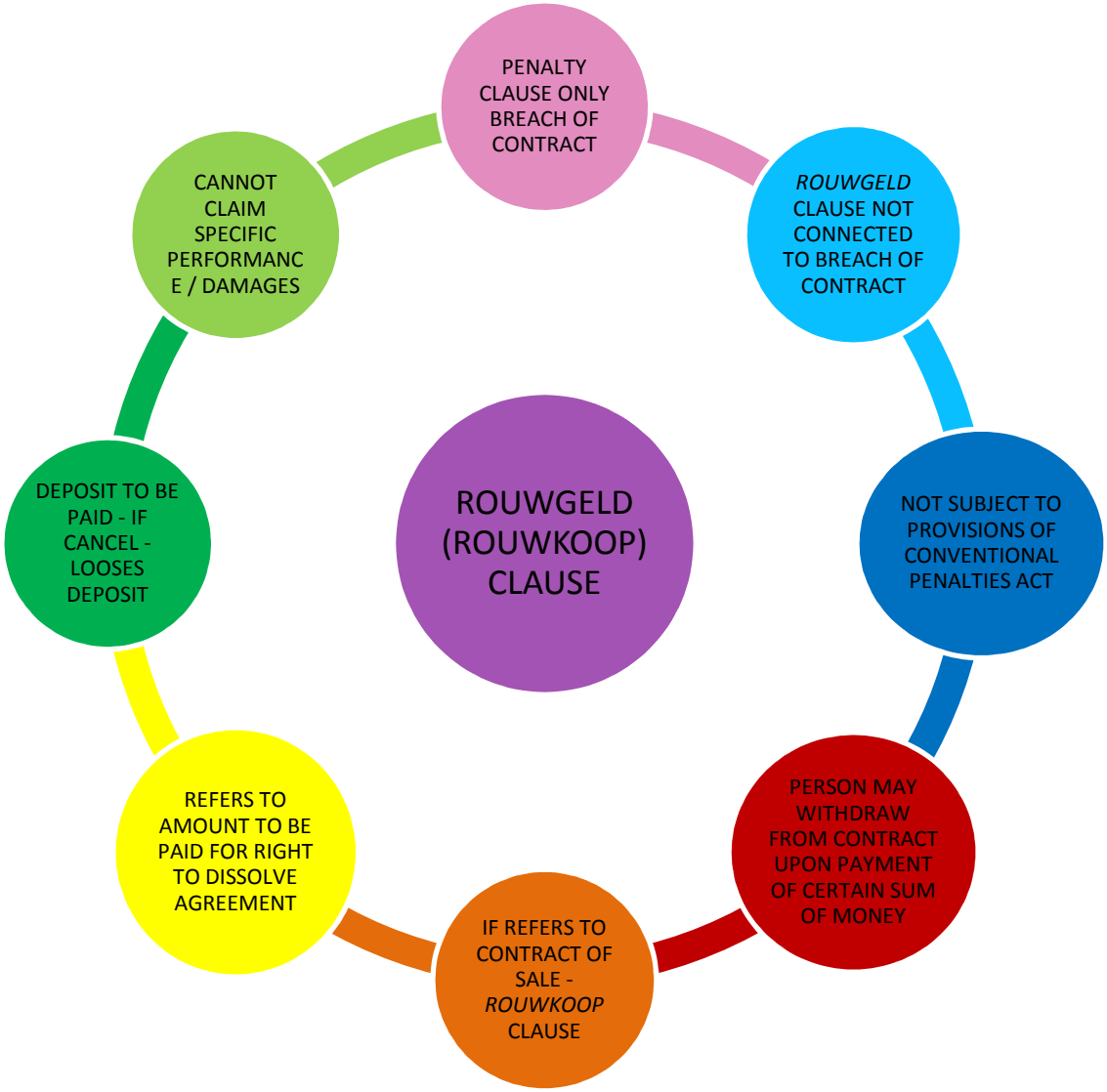

ENTITLES CONTRACTING PARTY TO CANCEL CONTRACT SUMMARILY IF OTHER PARTY IN BREACH OF CONTRACT
CANCELLATION CLAUSE
UNNECESSARY TO SEND LETTER OF DEMAND / NOTICE WARNING TO OTHER PARTY

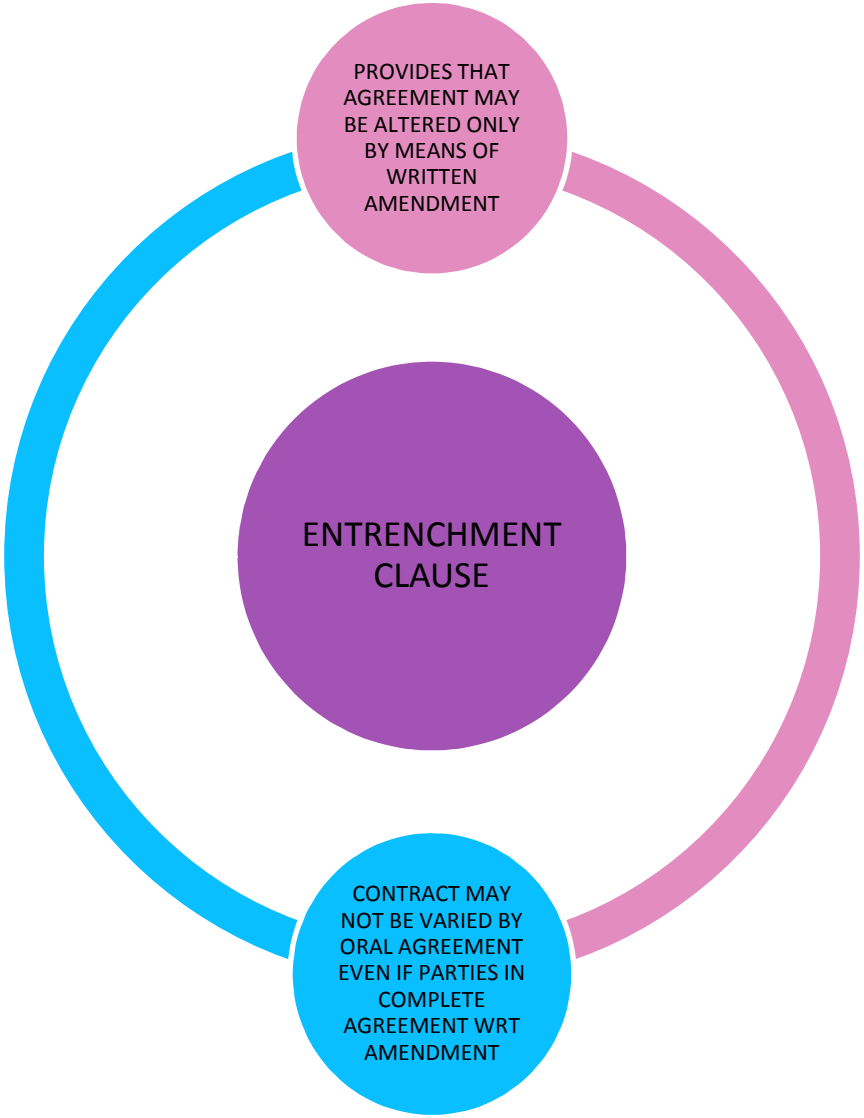
PENALTY CLAUSE
DEPENDING ON TYPE OF BREACH INNOCENT PARTY CAN CLAIM EXECUTION OF CONTRACT / CANCEL CONTRACT &/ CLAIM DAMAGES
USUALLY SUM OF MONEY
LATE COMPLETION OF WORK
CALCULATION OF DAMAGES IN ADVANCE
CONVENTIONAL PENALTIES ACT 15 OF 1962
PENALTY CLAUSE ENFORCEABLE, SUBJECT TO COURT'S DESCRETION TO REDUCE EXTEND OF PENALTY TO REASONABLE AMOUNT
CREDITOR DERIVES BASIC BENEFITS:
(1) PENALTY RECOVERABLE MERELY ON GROUND OF DEBTOR'S BREACH OF CONTRACT
(2) EXTENT OF PENALTY = PREDETERMINED


NO NEED FOR CREDITOR TO PROVE DAMAGES
ACT PROHIBITS CREDITOR FROM CLAIMING DAMAGES & STIPULATED PENALTY
CAN ONLY CLAIM 1 / OTHER
IF CONTRACT DOES NOT GIVE CHOICE OF DAMAGES / PENALTY - AUTOMATICALLY PENALTY
PENELTY CLAUSE CONTINUED...

NATIONAL CREDIT ACT & PENALTY CLAUSES
3 TYPES OF CONTRACT / SCENARIO:
(1) CONTRACTS GOVERNED BY NATIONAL CREDIT ACT 34 OF 2005 & CONVENTIONAL PENALTIES ACT
(2) CONTRACTS GOVERNED BY CONVENTIONAL PENALTIES ACT ONLY
(3) CONTRACTS NEITHER GOVERNED BY NATIONAL CREDIT ACT / CONVENTIONAL PENALTIES ACT
NATIONAL CREDIT ACT - DIFFERENT COST - PENALTY CHARGES
IF ACTS IN CONFLICT , NATIONAL CREDIT ACT - PREVAIL


FORFEITURE CLAUSE
RIGHT TO RESTITUTION ENTITLES PARTY WHO CANCELS / RESCINDS CONTRACT TO CLAIM RETURN OF EVERYTHING ALREADY PERFORMED ITO CONTRACT
IF CLAUSE INCL 1 / BOTH PARTIES LOSE RIGHT TO RESTITUTION IN CERTAIN CIRCUMSTANCES
PARTY IN BREACH FORFEITS PERFORMANCES ALREAY RENDERED
FORFEITURE CLAUSES SUBJECT TO REDUCTION @ DISCRETION OF COURT


ROUWGELD (ROUWKOOP) CLAUSE
PENALTY CLAUSE ONLY BREACH OF CONTRACT
ROUWGELD CLAUSE NOT CONNECTED TO BREACH OF CONTRACT
NOT SUBJECT TO PROVISIONS OF CONVENTIONAL PENALTIES ACT
PERSON MAY WITHDRAW FROM CONTRACT UPON PAYMENT OF CERTAIN SUM OF MONEY
IF REFERS TO CONTRACT OF SALE - *ROUWKOOP* CLAUSE
REFERS TO AMOUNT TO BE PAID FOR RIGHT TO DISSOLVE AGREEMENT
DEPOSIT TO BE PAID - IF CANCEL - LOOSES DEPOSIT
CANNOT CLAIM SPECIFIC PERFORMANC E / DAMAGES


PROVIDES THAT AGREEMENT MAY BE ALTERED ONLY BY MEANS OF WRITTEN AMENDMENT
ENTRENCHMENT CLAUSE
CONTRACT MAY NOT BE VARIED BY ORAL AGREEMENT EVEN IF PARTIES IN COMPLETE AGREEMENT WRT AMENDMENT