

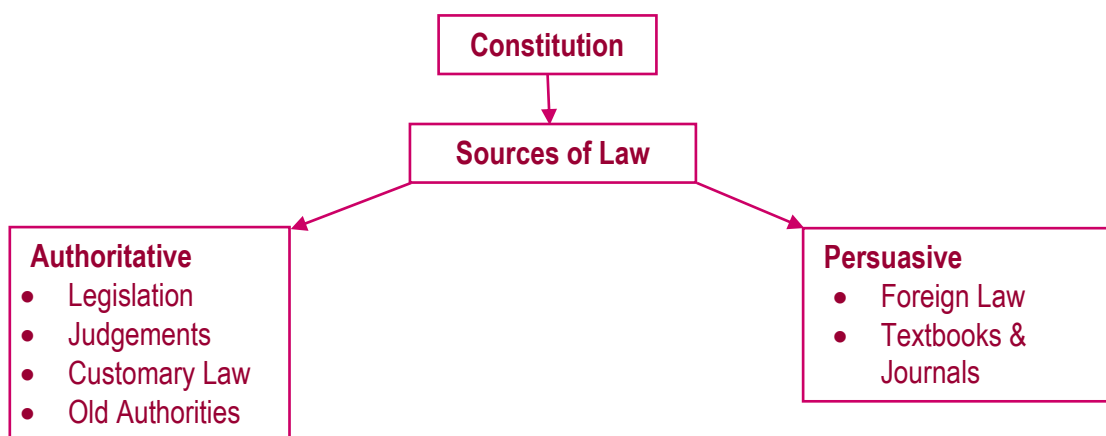
COMMERCIAL LAW CLA1501

THE SOUTH AFRICAN LEGAL SYSTEM 078 548 0303

ORIGINS

Roman Law → Dutch Customary Law → Roman-Dutch Law → 1652 with Van Riebeeck landing in Cape Town → 1814 Law system influenced by English Law

SOURCES OF THE LAW



Note: Roman law was codified in the *Corpus Iuris Civilis* during reign of the emperor Justinian – was first time law was codified (recorded in one comprehensive legislation) – SA Law not codified.

AUTHORITATIVE SOURCE OF SA LAW:

2 types of sources: Authoritative – court is bound by & Persuasive – used/interpreted in particular way to convince court ruling.

1) Statute Law or Legislation

1.1 General:

- Dutch legislation passed between 1652 -1806 if approved & accepted by SA Law
- English statutes don't apply to SA unless by official proclamation regarding the union of SA or colonies

1.2 The Constitution of RSA 1996

- Is the supreme law of the Republic
- Any law contrary to its provisions may be declared invalid
- Regulates government – sets out structure of state & its organs – providing for their functions & powers

- Constitution was adopted to (*achieved through Bill of Rights*):
 - i. Heal divide of past & establish society based on democratic values, social justice & basic human rights
 - ii. Foundation for democratic society in which government is based on will of people and all are equally protected by Law
 - iii. Improve quality of life & free potential of each
 - iv. Build united democratic RSA & enable it to take rightful place as sovereign state

Note: Bill of Rights:

- Applies to all law
- Binds 3 branches of government: legislative, executive & judiciary
- State must protect, respect, promote & fulfil the rights of BOR
- Divided by 1st & 2nd generation

1st generation: takes power away from the state – imposing duty not to act in certain way e.g. discriminate

2nd generation: positive socio-economic rights = obligates state to provide society with certain basic needs e.g. health care

Legislature: branch of government having the power to make laws
Executive branch: administrative or supervisory authority in government
Judiciary: all judges of the government

2) Customary Law (*Trade usages*)

- Does not consist of written rules – develops from habits of community & carried throughout generations.
- For customary rule to become legal:
 - a) Must be reasonable
 - b) Must exist for long time
 - c) Must be recognised & observed by community
 - d) Contents of rule must be clear

3) Judgements of Courts

Must keep record of proceedings

2 types of courts:

1. Superior Courts (<i>unlimited jurisdiction</i>)	2. Lower Courts (<i>limited jurisdiction</i>)
<p>Constitutional Court (Hears matters regarding the interpretation of the Constitution – Jhb)</p> <p>Supreme Court of Appeal (Only court of appeal for High Courts; all matter except constitutional – Bloemfontein)</p> <p>High Court (Can hear any matter arising within their jurisdiction & certain constitutional matters e.g. fundamental rights entrenched- most major cities)</p> <ul style="list-style-type: none"> • Divorce • Mental Capacity • Sequestration of estate • Liquidation of Company • Will 	<p>Magistrate Court</p> <p>Small Claims Court</p> <p>Courts of tribal leaders</p>

4) Old Authorities

Body of law by old authorities (Dutch & Roman) = **Common Law**

5) Foreign Law

Judge may turn to modern countries' law for guidance – not an authoritative law in SA, only persuasive. Constitution provides for interpreting BOR a court of law must consider international law & consider foreign law.

6) Textbooks & Law Journals

No authority of their own but persuasive influence.

OFFICERS OF THE SUPERIO COURTS:

Registrar (<i>Superior Court</i>)	Appointed in each Superior Court = smooth running of court. Issue process (Summonses/ warrants etc), enrolment of cases, issuing orders of court & maintain records
Sherrifs (<i>High Court</i>)	Serve processes & execute judgement & orders of court
Master (<i>in some High Courts</i>)	Various administrative & quasi-judicial function regarding deceased & insolvent estates, liquidation & judicial management of companies, minors, & disabled people.
Legal Practitioners	<i>Advocates</i> – appear in High Courts <ul style="list-style-type: none">• Don't deal directly with the public, nor do they appear in Magistrate Courts.• Deal with litigations & legal opinions.• Has passed Bar Exam <i>Attorneys</i> – appear in Magistrate Court <ul style="list-style-type: none">• Aid in drawing up contracts/ will (can act as notary & conveyancer)• Deal directly with members of public who need legal advice or representation.• May refer clients to advocates• Passed Board Exams & done articles of clerkship & can appear in High & Low courts
Clerk (<i>Magistrate Court</i>)	Same duties as registrar but only in Magistrate Court

COURT JUDGEMENTS:

Doctrine of Stare Decisis: ^{“decision stands”}

Function of judge – state, interpret and apply existing law – does not make new law unless: “Judge-made law” = new interpretation, adaptation or extension of Common Law principle may give rise to new law. E.g. if principle is no longer in accordance of modern views, judge may decide principle no longer exists.

NB: Court is bound by its decision regardless if it is later considered incorrect. Unless over ruled by a Superior Court. Only time a court can override its own legal opinion is if previous decision is clearly shown to be wrong.
A High Court is bound by judgements of another High Court’s decision (they usually stick to it any ways)
Magistrate Court is bound by judgements of Superior Courts, if High Courts are conflicting then Magistrate Court is bound by its High Court within its jurisdiction.

Ratio Decidendi:

“Reason for decision” – underlying reason for court’s ruling
Every decision is not imposing rule of law

Obiter Dictum:

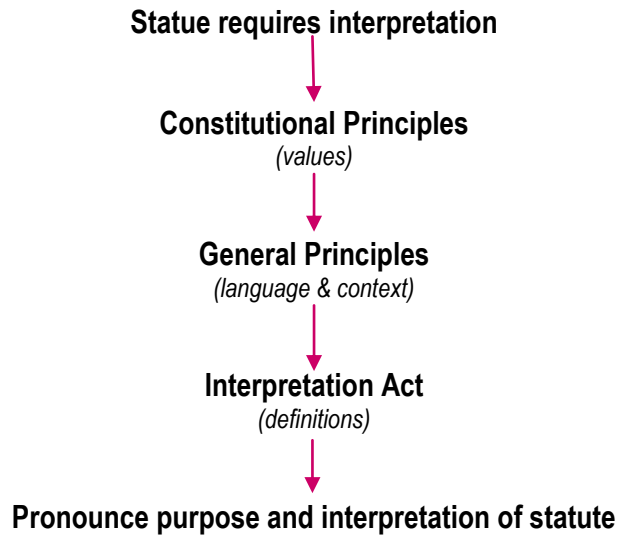
“Incidental Remark” = Additional Remarks
Can be persuasive for other court rulings

INTERPRETATION OF STATUTES

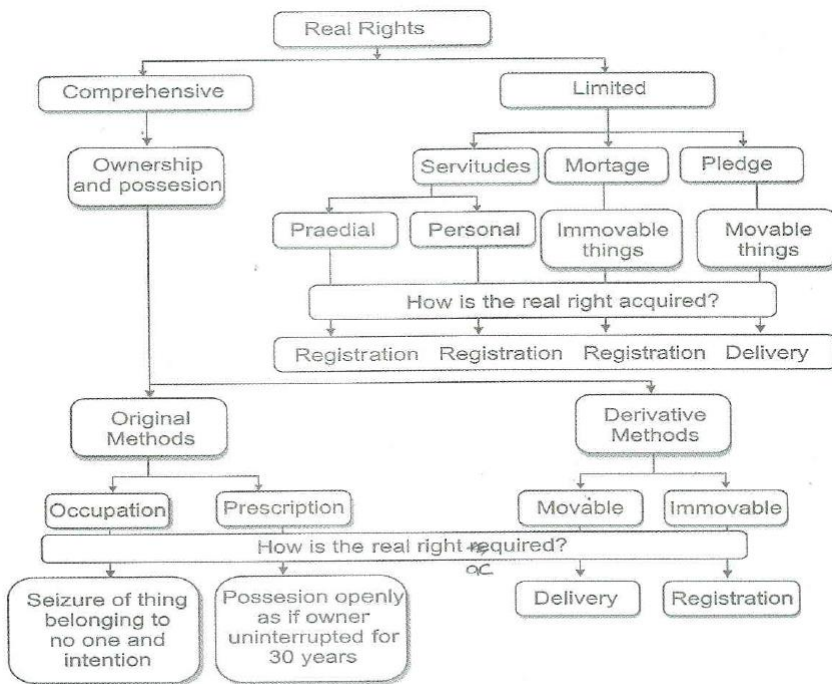
Law of an Act of Parliament or legislation must be determined.
Various theoretical rules and methods used objectively to determine what the Statute seeks to achieve.
Stare Decisis shows that a source of law is decisions of judiciary on what law is – courts are bound by legislation as interpreted by the court until Superior Court places different interpretation on it or legislature amends it.

Note NB: *Does NOT mean court determines statute law but does mean Lower Court applies Higher Court’s interpretation of the wording rather than the wording of the Act itself.*
Any statute that conflicts with Constitutional Law can be declared invalid.

Process to ascertain meaning:



INTRODUCTION TO THE SCIENCE OF LAW



Law- system of rules which apply in a community

Right - any right a legal subject has regarding specific legal object and which is protected by law = subjective right.

Law is divided in 2:

Public Law

Private Law

overlap

÷ International/ constitutional/ administrative/ criminal laws & law of procedure

÷ law of persons/ family/ personality/ patrimonal

Person's assets/ liabilities etc = monetary measurable

Control relationship between citizens & the state

Legal rules govern relationship between citizens & their dealings with each other

Legal Subjects:

Natural persons – human beings

Juristic person – e.g companies, universities, municipality etc

SUBJECTIVE RIGHTS:

Right of Legal Object (legally claim to right)

Real Right	Intellectual Property Right	Personality Rights	Personal Rights
<ul style="list-style-type: none">◆ Ownership◆ Servitudes (Property rights)◆ Mortgage and Pledge (Right of security – fail to settle debt then mortgagee can sell property)	<ul style="list-style-type: none">◆ Artist, writer inventor◆ Right to a patent	<ul style="list-style-type: none">◆ Physical integrity or reputation of person	<ul style="list-style-type: none">◆ Rights in terms of conduct, performance (doing or giving something)◆ One person owes another money

PRIVATE LAW

Law of Persons	Family Law	Law of Personality	Patrimonial Law
<ul style="list-style-type: none"> ● Who are legal subjects ● Becomes legal at birth only if born alive, ceases at death (but body & assets still protected for sake of creditors & heirs) ● Classes of legal subjects (minors don't have same rights as adults) ● Status (affected by age/ sex/ marriage/ sanity/ decent etc.) 	<ul style="list-style-type: none"> ● Marriage: Husband & Wife ● Parents & Children ● Excluding cousins & in-laws 	<p>(right to privacy/ non defamation etc)</p> <ul style="list-style-type: none"> ● Physical being, dignity and reputation. ● Protected by Criminal Law and Civil Law ● Relation between people concerning their physical & psychological integrity 	<ul style="list-style-type: none"> ● Sum of assets & liabilities (anything with \$ value) ● Law of Succession <ul style="list-style-type: none"> ▪ Will of deceased estate – consist of assets & liabilities. ▪ Executor not bound to deceased debts but can be and can sue ● Law of Intellectual Property <ul style="list-style-type: none"> ▪ Products of human spirit that may be of economic value to discoverer/ inventor. Patents, copyrights, trademarks, goodwill etc ● Law of Obligations <ul style="list-style-type: none"> ▪ Contract (1 obligated to deliver, 1 obligated to pay) ▪ Delict (crime/offense) – damage is caused by delict then offender must pay damages to owner ▪ Unjustified Enrichment (If A erroneously deposits \$ into B's account, B must return it to A) ● Law of Property <i>*(see below table for further details)</i>

***Law of Property:**

“Granting and recognition of rights over property”

- The Right of Ownership
 - Power over property
 - May not use as you like: dependant on public law
 - Ownership: Person who has the right of ownership over property is not necessarily the possessor.
 - Possession direct or indirect control over property – physical control and at same time intends to possess it

■ Acquisition of Ownership

Original methods of acquiring ownership

- ☀ Occupation
 - Seizure of property that belongs to no one (think catching wild bird)
 - Original method of acquiring ownership

☀ Prescription

Take ownership after 30 years as if you were the owner (but only if you've been using it uninterrupted for 30 years)

Derivative methods of acquiring ownership

- ☀ Movable Property
 - Delivery of property (e.g. delivery of bought vehicle)
- ☀ Immovable Property

Property only after registration at Deeds office (even if \$ paid its not yours till it is registered)

■ Servitudes

■ "Limited Real Right over the property"

- Ownership protected by the remedy "*reivindicatio*". Owner may reclaim their property from any person who wrongfully possesses it (think: D stole B's pen & gave it to C). But owner can not forcefully take it from person but should claim item in court action of rightful ownership. Also if A damages/destroys B's property, B can claim damages against A.

Note: You can't deprive someone of possession against their will even if its your stuff

- Praedial – have the right to drive or walk over the plot of another

- Personal Servitudes – Usufruct: wife may live on property if husband dies, and children receive ownership upon her death.

■ Mortgage and Pledge

- Limited real rights over property

Protection of ownership & possession

LAW OF DELICT:

Elements of delict:

- ◆ Voluntary human act
- ◆ Unlawfulness
- ◆ Fault (either intent or negligence)
- ◆ Causation
- ◆ Damage or impairment of personality

Grounds of justification

- a) Necessity
- b) Self-defence
- c) Consent
 - Consent to injury
 - Consent to risk of injury
- d) Statutory authority
- e) Provocation

Remedies:

Interdict & payments of damages – 3 types of proven loss:

- 1) Patrimonial loss
- 2) Recovering sentimental damage
- 3) Pain & suffering

LAW OF CONTRACT

Contract: Agreement concluded by two or more persons with the serious intention of creating legally enforceable obligations.

Obligation is a bond between persons, which creates rights and privileges between persons. Obligation may arise from a contract but also from a delict.

A right is an advantage that entitles the holder of the right to demand that another person should do something or refrain from doing something.

A duty is a responsibility imposed by law, and obliges or binds a person to performance

2 Most NB aspects of a contract are:

- i. Intention/ aim of creating the legal obligation
- ii. The legal results rights and duties that follow

Requirements for the formation of a valid contract:

- ✿ Consensus between parties & objectives of contract
- ✿ Legal capacity to act (can they perform that particular act which gives rise to the contract?)
- ✿ Legally (juridical) possibility of the agreement
- ✿ Physical possibility of performance (e.g. walking to Mars is not possible)
- ✿ Observation of any formalities prescribed for the contract (if all formalities observed is it valid)

Valid contract only if all the above requirements have been satisfied – there may still be an agreement if some of these conditions exist but will NOT constitute a contract.

Freedom to Contract

- Cornerstone of modern law
- Generally free to choose with whom and on what grounds one wants to contract
- Freedom to contract can be limited in certain circumstances. A person may for e.g. not conclude contracts which are unlawful or illegal.

Contracting electronically:

E-Commerce – business conducted over internet/web – not a contract unless stated so.

CONSENSUS

Consensus = "agreement between parties involved"

Consensus is basis for every contract

A contract cannot be valid in the absence of consensus

Consensus can only be reached if:

- Intention to be contractually bound – to create legal obligation seriously

- Common Intention (same intention) – if one thinks they are selling and the other that they are hiring it is not common intent i.e. they must be on the same page
- Make the intention KNOWN – can be written contract or oral agreement can also be intentional like buying groceries at a shop.
= subjective attitude

Offer and Acceptance

Proposes T's & C's

Note: Advertising a product is an invite to do business, it is not an offer to sell the item instead the purchaser makes offer to buy

- Declaration made by person (offerer)
- Acceptance by offereree

Falling away of offer: (5 reasons)

- 1) Expiry of offer
- 2) Revocation – withdraws offer but must inform offereree & do so before they accept
- 3) Rejection – if offereree rejects offer they cannot change their mind & try to accept
- 4) Counter-offer
- 5) Death – of either party before acceptance

Requirements regarding offer and acceptance

(Reaching consensus requires every party must declare his or her intention to create enforceable rights and duties)

- Offeror will be legally bound by the mere acceptance
- Offer must be complete (i.e. contain all details re offer)
- Clear and certain
- Accepted verbally or written
- Addressed to specific person
- The offer and acceptance must be communicated to all parties concerned

What is not considered an offer?

- i. Invitation to make an offer
- ii. Statement of intent
- iii. Calling for tenders/ quotes etc.
- iv. Auctions

Dispatch theory

Contract comes into being at the place and time when the letter of acceptance is posted

CONSENSUS AND DEFECTS IN WILL

The distinction between void and voidable contracts hinges on whether or not consensus existed between the contracting parties.

1) Absence of consensus – mistake:

Mistake exists when 1 or more of the parties misunderstanding a material fact/legal rule relating to proposed contract. ≠consensus, therefore ≠contract.

But: Parties can be held to their **declaration of intent** (instead of their true intention) unless circumstances are such that the mistake is reasonable.

Requirements to be met to render mistake contract void.

- i. The mistake relates to a fact, or a legal rule or principle
(thinking that the appliance is a washing machine when it is actually a tumble dryer)
- ii. The fact or rule or principle is material
(material means essential/relevant/NB to the contract & in eyes of the law)
(identity of parties known, time/place of transaction (performance) known, but mistake about object performance = reasonable mistake hence consensus not met)
- iii. The mistake (whether of fact or of law) is also reasonable
(the reasonableness of the mistake is tested objectively – one asks whether the reasonable person in this situation would make the same mistake)

Note: Can't escape from a contract if the mistake is your own fault – if can be shown you didn't do your 'homework'/ read the contract etc before signing

2) Misrepresentation

“Untrue statement or representation concerning an existing fact/state of affairs by a party with the aim and result of inducing the other party into concluding the contract”

A contract will be voidable due to misrepresentation if following requirements are met:

- a) **Misrepresentation:** Untrue statement concerning an existing fact/condition
- b) **Duress:** Unlawful threat of harm or injury made by a party to conclude a contract
- c) **Undue Influence:** Contracting parties must not abuse their power of influence to persuade other parties to conclude contracts.

Misrepresentation	Duress (intimidation)	Undue Influence
<p>Contract will be voidable if following requirements are satisfied:</p> <ol style="list-style-type: none"> 1) Untrue statement concerning an existing fact or condition can be made by express statement or conduct. Given honest option or estimate is not misrepresentation. Representation must concern existing state of affairs (i.e. facts of past or present) 2) If third party falsely represents one of the contracting parties 3) Unlawful representation e.g. omission of NB facts that may sway contracting party from signing. 4) Made intentionally, negligently or innocently <ul style="list-style-type: none"> ~ Intentional (fraudulent) ~ – knows it's false or doesn't care if its true or false. ~ Negligent – person honestly believes its true but doesn't check their facts, 	<p>Requirements</p> <ul style="list-style-type: none"> → Unlawful threat of harm or injury (must be actual violence/ damage or threat of violence/ damage direct to life, limb or freedom) → Threat must be imminent or inevitable (victim can't escape) → Must be unlawful i.e. contract would not have been signed otherwise → Made by one contracting party's representative → Which causes other contracting party to conclude contract <p><i>Voidable & grounds of declict ∴ damages can be claimed</i></p>	<p>Described as:</p> <p>Improper, unfair conduct by one contracting party that persuaded the other contracting party to conclude the contract against the latter's free will.</p> <p>(differs to duress that there is not need to be threatened)</p> <p>Usually occurs with parties with special relationships e.g. doctor/patient, attorney/client.</p> <p>“Stronger” more authoritative person takes advantage of other's ignorance, naivety, frailty, stupidity, mental dependence.</p> <p>Requirements for undue influence</p> <ul style="list-style-type: none"> ~ Contracting party acquired contract by influencing victim ~ Victim's independent will easily influenced by contracting party using their influence to weaken victim's ability to resist. ~ Influence must have been used

<p>made with intent to induce contract.</p> <p>~ Innocent – statement is made without intention or negligence on misrepresenter’s part, however made with intent to induce the contract.</p> <p><i>Remedy for Intentional & Negligent: Contractual: uphold or recind. Delictual: damages</i></p> <p><i>Remedy for Innocent: uphold or recind. Delictual: no, was not intentional . : no delict</i></p>		<p>unscrupulously with lack of regard for morality or rightness of conduct to persuade victim to agree to which they would under normal circumstances not have agreed to.</p>
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FORMALITIES

- Those requirements relating to outward, visible form in which agreement must be cast to create valid contract.
- Usually compliance with formalities consists of reducing contract to writing (with or without signatures)

General Rule – No Formalities Required

Parties are free to choose way in which to create a contract

- ~ Contract in writing
- ~ Contract orally
- ~ Contract tacitly (intent)

(May even put some of contract in writing & agree to other points orally.)

Contracts Where Formality is required by Law

Mainly to prevent fraud, reduce uncertainties and evidential problems.

These must be reduced to writing and signed to be valid

- 1) Contracts for alienation of land
- 2) Contracts of suretyship
- 3) Contracts of donation in terms of which performance is due in the future (must have 2 witnesses)
- 4) Consumer contracts

(Under Consumer Act, consumer must get copy of record of transaction and must have certain information on it e.g. business’ name, VAT reg no etc)

- 5) Ante Nuptial Contract *(agreement must be registered with Deeds Office to be valid against 3rd party – is valid between spouses even if not registered)*

Formalities Required by the Parties

- Parties may prescribe certain formalities
- If Offeror requires that acceptance of offer be put in writing – acceptance of offer will only occur once it is in writing.
- If parties negotiate content orally & agree final agreement will be in writing its only valid once written.
- If agreed orally & decided to write agreement as proof of oral agreement’s term it is valid once orally agreed.

Writing & Signing Electronic Transactions

- ECT Act 25 of 2002 data messages is recognised as writing if the document or information is accessible for future use.
- Electronic signature can legally fulfil same function in certain circumstances. *Can be scanned signature, just a name etc. i.e. anything that's intended to represent a signature*
- Where signature is required by law only advanced electronic signature complies. *Done by accredited body that can certify/ validate your signature*

Transactions under Certain Acts Cannot be Signed Electronically

- Agreement of alienation
- Long term lease of immovable property in excess of 20 years
- Execution, retention and presentation of a Will or Codicil *Supplement to a Will, containing an addition, explanation, modification, etc.*
- Execution of Bill of Exchange *Written order to pay sum of money on given date to drawer or to a named payee; (a promissory note)*
- Stamp Duties

INTERPRETATION OF CONTENT

Content = germs incorporated by parties in contract
= can be incorporated orally, tacitly, writing

Signed written agreement meant you understood all within the contract (content) and ∴ bound to it = *caveat subscriptor* rule. Only defence to signatory would be misrepresentation, fraud, illegality, duress, undue influence & mistake.

PRINCIPLES OF INTERPRETATION: GUIDELINES

In principle there's no difference between contracts concluded in writing, orally or by conduct.

Purpose for interpreting a contract is to determine party's intention.

- a) **Ordinary grammatical meaning** and words that carry a **technical meaning** will be interpreted in accordance with their specific use
- b) **Context of words** are used, the contract in its entirety & surrounding circumstances taken into account. (Literal meaning of word/phrase is ascertained prior to considering context)
- c) **Ambiguity interpreted against the author**
- d) **Presumptions** [(1) that parties intend their agreement to be valid & enforceable; (2) parties don't intend to alter common law.] – Where the parties express themselves on a particular matter but omit some detail, common-law rules will regulate that aspect.
- e) Written contract, **parol evidence** rule is used.

Note: '*Ticket cases*' – unsigned documents used e.g. bus/flight/show tickets etc

Special interpretive rules used to deal with Ticket Cases:

- i. Customer reads/understand document and by conduct (entering theatre, boarding plane) accepts T's & C's.
- ii. Supplier to take all reasonable steps to ensure customer is alerted to T's & C's & customer thereafter by their conduct indicate acceptance of T's & C's.

If contract is obscure that the parties' intent cannot be determined even with aid of the guidelines then contract is void.

'Click-wrapped' – services offered by website = click on icon to accept T's & C's

PAROL EVIDENCE OR INTEGRATION RULE

- When agreement is reduced to writing brings parol evidence rule into effect
- Once reduced to writing or integrated into a single complete document, this is the only document to be interpreted in order to determine content of the contract.
- Contract appears to reflect whole contract on a particular subject matter, contracting party may not submit evidence in form of agreements reached prior or simultaneously with the conclusion of the written agreement which contradict, alter or adds to the T's & C's of the integrated written document.

Parameters of the rule will not apply to:

- Does not affect evidence of an agreement concluded subsequent to written contract
- Does not prohibit evidence of e.g. prior inducing agreements where the terms of the earlier (or simultaneous) document don't contradict, alter, add to or vary the terms of the integrated written agreement.
- The rule only extends to facts/ information not embodied in the written agreement which contradicts the terms of the integrated written contract, evidence to prove
 - ~ The nullity or voidability of the contract as a whole is not subject to the rules
 - ~ Objectively determinable facts recorded in the document are not subject to the rule (e.g. if evidence that the document was signed at a particular time/ place is allowed)

Note NB: *Exception to the integration rule: Court may allow to take into account evidence outside the written record of the contract in interpreting the T's & C's if the court needs to establish that if there were, and to what extent any negotiations between supplier and consumer.*

Rectification:

Under appropriate circumstances a written contract may be improved in order to record the parties' true intention.

Permissible if the parties who apply for it can prove

- i. The parties' true intention
- ii. That the written document does not accurately reflect it

Note: Rectification cannot rectify a failure to comply with a formal statutory requirement (e.g. law requires a signature, failure to sign an agreement cannot be rectified).

Exception is in the case of a drafted Will (on instruction of a testator) and testator dies before signing.

BREACH OF CONTRACT

One of the parties does not honour the terms/ their performance towards the contract

NOTE NB: In Law of Contract:

Party that must perform = “debtor”

Party with corresponding right to receive that performance = “creditor”

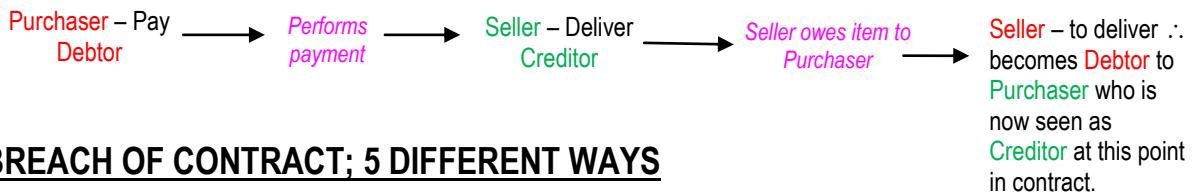
Refers to specific obligations/points of performance in the contract & not contract as a whole

Reciprocal contracts – contract of sale- both parties are simultaneously obliged to perform and entitled to performance = both debtor & creditor in respect of different performances. Refer to table on page 113 of manual

Not all forms of breach of contract can be committed by debtor & creditor:

Type of Breach	Can be committed by Debtor	Can be committed by Creditor
Default of the debtor	✓	x
Default of the creditor	x	✓
Positive malperformance	✓	x
Repudiation	✓	✓
Prevention of performance	✓	✓

Same transaction between parties may create several different rights and duties, hence in context of breach of contract it's NB to ascertain which performance obligation gave rise to a 'problem' and then determine if it was the debtor or creditor in respect of that performance who is responsible for the breach.



BREACH OF CONTRACT; 5 DIFFERENT WAYS

1) DEFAULT OF DEBTOR

Default of Debtor = they fail to perform on time and the delay is their fault

2 Requirements for default by debtor to occur:

<p>1. Performance must be late</p>	<p>→ Pertains to time only and no other aspects of contract</p> <p>→ Debtor in <i>mora</i> if not performed on date/time agreed then letter of demand issued to allows debtor to perform in new reasonable time frame. If performance still late then = debtor default = <i>mora ex persona</i></p> <p>→ Reasonable time dependant on contract & circumstances, court takes following into consideration</p> <ul style="list-style-type: none"> • Parties' intention • Nature of performance due
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	<ul style="list-style-type: none"> • Difficulties/delays experienced by the parties at conclusion of the contract • Assumption that the debtor is expected to act promptly, appropriately and carefully – also considers commercial and other interests. <p>→ Contract must have stipulated the original time frame, i.e. must not be vague</p>
2. Delay due to debtor's fault	<ul style="list-style-type: none"> ➤ Due to Debtor's fault – either intentionally or negligently cannot honour their obligation. ➤ Forces beyond Debtor's control – not his fault e.g. cargo ship sinks <i>Note however that if debtor warranted performance they take risk of delay on themselves, hence if ship sinks = breach of contract</i> ➤ Delay due to debtor's negligence = <i>mora debitoris</i> ➤ Delay of debtor due to creditor = <i>mora creditoris</i>

Consequences of the debtor's default

- Creditor entitled to remedies which law grants to innocent part in case of breach of contract
- Contract of sale, Debtor is in mora will influence passing of the risk
- If performance becomes impossible after Debtor is in mora = supervening impossibility of performance will not release a Debtor of their duty to perform if already in mora when impossibility of performance occurs, hence liable for damages.

2) DEFAULT OF CREDITOR

Default of Creditor – Creditor fails through own fault without lawful excuse to co-operate in receiving the Debtor's due and valid performance.

4 Requirements for default by creditor to occur:

Debtor's performance must be dischargeable	<p>→ Performance must be due in terms of a valid/existing contract and which is legally and physically possible of being performed. (<i>think buying a TV but unable to collect TV till you have TV License</i>)</p> <p>→ Performance in not dischargeable unless the time for performance, as agreed to in the contract has arrived. (note if performance occurs prior to the agreed time and the creditor refuses – then it is not <i>mora creditoris</i> – <i>think snacks being delivered 3 days early</i>)</p>
Debtor must tender performance and the performance they tender must be proper performance	<p>→ If quality of performance not up to par then it is not the Creditor's default. <i>e.g. dressmaker does phone for fitting, cupcakes delivered are raw etc</i></p>
Creditor delays performance by not co-operating but performance must still be possible at later stage	<p>→ Delay – later performance possible: client does not pitch for dress fitting, rescheduled for later date. <i>Mora ex re</i></p> <p>→ Delay – later performance impossible: client order's snacks for Saturday, upon delivery it's found the client has gone on holiday and the snacks can not be delivered and will be spoilt by time client returns</p>
Default must be due to fault of Creditor	<p>→ If the intent of the Creditor is to avoid the conclusion of the contract i.e. doesn't allow Debtor to complete their performance. (<i>think: avoiding the dressmaker for two weeks</i>)</p>

→ If the Creditor causes the Debtor by no fault of their own to be unable to complete their performance it is not Creditor Default e.g Creditor being run over by a car and being hospitalised.

CONSEQUENCES OF CREDITOR'S DEFAULT

- a) Debtor's duty of care is diminished if Creditor is in default – Debtor' is liable only for intentional loss or gross negligence (*think: dressmaker burns clients dress material/ selling a shop to B, but then leave it unattended etc before B gets chance to take occupation*)
- b) In case of reciprocal agreements the debtor remains liable to render their performance (at a later date if need be), even if Creditor delays the possibility of rendering that performance. The Creditor remains liable for payment to the debtor. (*think: F agrees that E builds wall by set date but forgets to buy bricks in time for date set – E must still build wall – by new date – F still owes E payment*)
- c) If Debtor's performance becomes impossible while the Creditor is in default, debtor is set free from performing their obligations – Creditor must still perform their own obligations. Supervening impossibility of Debtor's performance must not result from Debtor's intention or gross negligence (*think: potter completed pot, client didn't fetch on time and studio burns down – potter doesn't owe client pot, but client must pay for pot that was originally made*)
- d) If Debtor already in default, their default is ended by Creditor's subsequent default (both can't be in default at same time for same performance) Note however that although the earlier *mora debitoris* is cancelled by the later *mora creditoris*, ANY damages caused during the time of the Debtor's *mora* is not cancelled. (*think: G sells goods to H for delivery X date, but doesn't do so = mora debitoris, agree to deliver goods new date Y, but H doesn't pitch = mora creditoris, but G liable for damages suffered by H during the period between X-Y*)

3) POSITIVE MALPERFORMANCE

- Debtor tenders defective / improper performance
(e.g. use of inferior quality product)
- Debtor commits an act which is contrary to terms of the contract
(e.g. agree not do start business within fix period of time in proximity of another business but then start a business across the street although the fix period of time has not expired)

4) REPUDIATION

“Party indicating that they will not honour the obligations of the contract – either through conduct or orally”

A party repudiates the whole contract by:

- ☒ Denying the existence of a contract
- ☒ Trying , without valid reason to withdraw from the contract
- ☒ Giving notice that they cannot perform
- ☒ Giving notice that they refuse to perform
- ☒ Indicating that they will not perform

Note: *repudiation of part of the sum total of their obligation can = repudiation of whole contract
forgetting to perform obligation is not the same as indicating non-performance ≠ repudiation*

Test for repudiation:

Has the alleged defaulter behaved in such a manner that would let a reasonable person to conclude that the repudiator doesn't intend on performing their contractual obligations?

5) PREVENTION OF PERFORMANCE

Debtor:

Debtor prevents their own performance through their own fault (intentionally/ negligently).

Intentionally: Debtor sells item to higher bidder Z, but still obligated to sell item to L who originally contracted to purchase said item. Debtor still owes L's item regardless that he now has none in stock.

Unintentionally: Caterer writes down wrong date for function and doesn't deliver – can't fulfil performance at later date.

Creditor

Prevention of Performance by Creditor vs. Default of Creditor

Creditor makes it permanently impossible for debtor to perform

Creditor delays the debtor's performance but does not make it impossible for the debtor to perform

Debtor can never perform

Debtor can still perform

NOTE:

Merx Seller to deliver property

Mora debitoris Debtor commits breach

Mora creditoris Default of creditor & also where creditor causes debtor's performance to be delayed

Mora ex re If specific date or time for performance has been stipulated is not met by debtor i.e. contract must state when performance is due, and if that is not adhered to by debtor then is *mora ex re*

Mora ex persona Where no exact date for performance has been specified and creditor indicates date/time post contract conclusion and debtor does not perform (note creditor must provide date/time notification timeously)

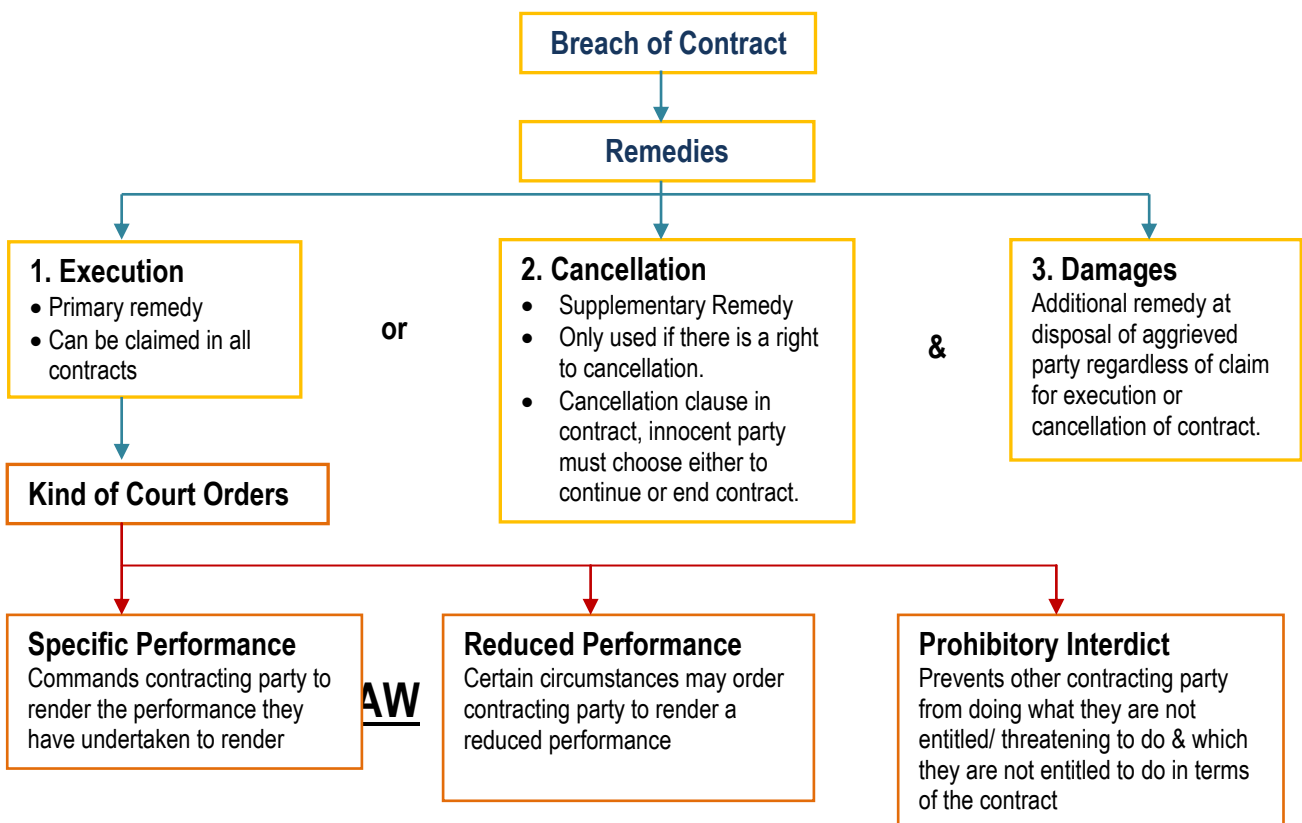
REMEDIES FOR BREACH OF CONTRACT

THREE Remedies to innocent party

1. Execution of the contract
2. Cancellation of the contract
3. Damages

(Note: claiming damages is not an alternative remedy, but available in both 1 & 2 above)

A breach of contract entitles the aggrieved party to contractual remedy/ies. Remedies = legal means for protecting the aggrieved party's contractual rights. ∴ the aggrieved party may sue the party in breach of the contract and may enforce these remedies with assistance of the court.



TRANSFER AND TERMINATION OF PERSONAL RIGHTS

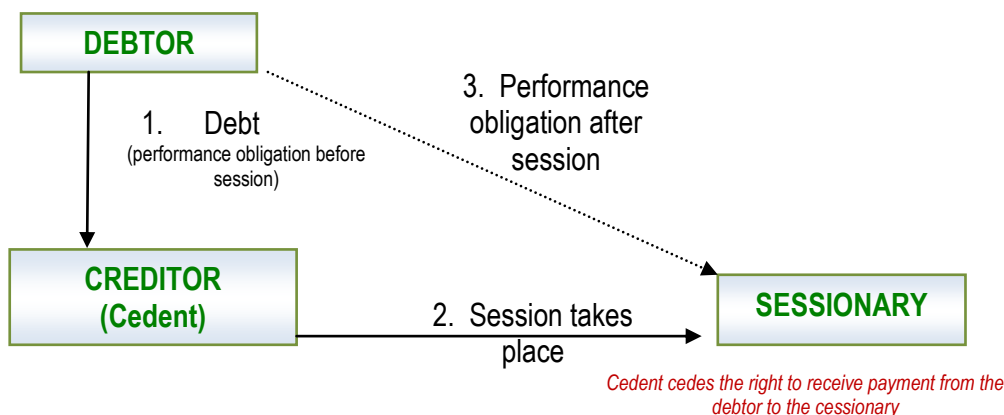
Personal rights can be terminated in various ways but transferred in 1 way = cession

- Person transferring rights = cedent
- Person receiving = cessionary

Cession ≠ termination of neither obligation nor does it create new obligation.

E.g. debtor owes x \$ but x owes y same amount ∴ x cedes to y ∴ Debtor owes y now. Think of debtors being handed over from creditors to debt collector lawyers.

CESSION IN GENERAL:



WHEN CAN YOU NOT CEDE?

Cession is generally done freely, but can be prohibited by agreement or law:

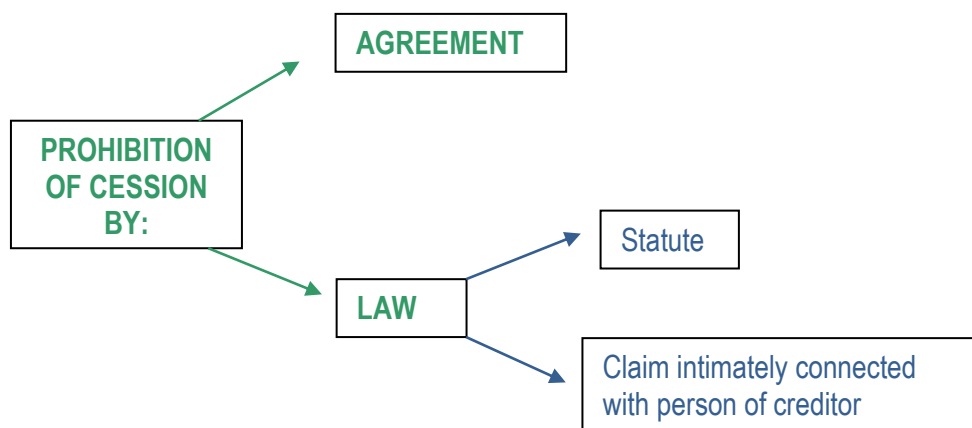
Law (statute) can prohibit cession:

e.g. can't cede pension fund or maintenance (divorce situation).

Cannot cede a right that is intimately connected with the person of the creditor that if exercised by someone else will encumber the debtor with a different material obligation.

e.g. Hire the services of a portrait painter.

i.e. a debtor's position may not be prejudiced by cession. ∴ a right can only be ceded in its entirety.



CONSEQUENCES OF CESSION

- 1) The right forms part of the patrimony (heritage) of the cessionary, not of the cedent
- 2) The cessionary alone has the right to collect the debt.
- 3) Once ceded, the right may not be ceded to another person by the cedent, but can be ceded by the cessionary
- 4) The debtor can no longer perform validly against the cedent
- 5) The claim is transmitted to the cessionary in its entirety, together with all benefits and privileges.
- 6) The cessionary also receives the right with all disadvantages attached to it.

TERMINATION OF PERSONAL RIGHTS

Personal rights arising from obligations may be terminated by agreement between the parties via:

- Discharge
- Rescission & Cancellation
- Prescription
- Merger
- Set-off
- Impossibility of performance supervening after conclusion of the contract
- Sequestration and subsequent rehabilitation
- Agreement
 - Release
 - Novation
 - Delegation

■ Settlement

Discharge

- Natural way in which a contractual relationship is terminated.
- Can be bilateral (both parties must perform an act) or a unilateral (only one party must perform an act) juristic act.
- Performance must take place as against the creditor or their representative, who must be authorised to receive performance.
- Parties can agree that the debtor will perform to a third party.
- Payment must be made in cash unless pre-agreed arrangement, must be in legal tender (e.g. notes/coins – cheque is not a legal tender)
- Payment may be withheld if creditor refuses to issue a receipt
- If debtor fails to allocate payment (e.g. if they are having to pay various accounts at same creditor)
 - Interest is paid before capital
 - Due debts paid before debts that are not fallen due yet
 - Onerous debts (e.g. mortgage bond etc)
 - Older debts have preference over newer debt

Rescission and Cancellation

- Rescission: withdrawing from a contract due to reasons other than breach of contract.
- Cancellation: withdrawal from contract due to breach of contract
- Voidable contracts the innocent party has choice of enforcing the contract or rescinding it = terminated

Agreement

- Contract can terminate upon conclusion of work done/delivered or can be pre-decided that contract will end at future date.
- Contract can contain requirements for termination e.g. 2 month notices – must be complied with.
- Agreement parties in a contract could agree too, to terminate contract = *release & novation*.
 - **Release (waiver)** creditor releases a debtor from their contractual obligations
Note = is an agreement so consensus NB
Release may occur expressly or tacitly (implied)
 - **Novation** agreement between creditor & debtor where old obligation is exchanged for new obligation in its place.
e.g. not paying pre-arranged instalment on time then can claim full amount from you → If novation is void or not honoured then original agreement remains valid.
Novation can be instilled by court judgement
 - **Delegation:** a new party is introduced to take over from either debtor or creditor. Must be agreed by all parties and new agreement is put into place, releasing party being replaced from all further obligations.
e.g. if contractor too busy to finish contract, can request another contractor on consent of creditor to finish job. In so doing he relinquishes any further dealings to new contract.
 - **Settlement** “compromise” – agreement by which parties settle a dispute about actual or supposed obligation.
(transaction)
Dispute over original obligation
If terms of settlement not adhered to, creditor may revert back to original debt (if it can be proven that this debt actually exists etc)

Merger (Confusio)

- Person becomes both creditor & debtor in same obligation. E.g. lessee buys leased property or debtor & creditor getting married in community of property.

Set-Off

- When debts which are owed reciprocally (equally/jointly) by two parties are extinguished.
- Must meet 4 requirements
 - i. Similar in nature
 - ii. Liquidated (monetary value certain/ can be ascertained)
 - iii. Claimable
 - iv. Between same persons

e.g. if X owes Y R1000 but Y owes X R600 due at same time, they can agree that X only pay the balance of R400 ∴ R600 is the set-off amount.

Impossibility of performance supervening after conclusion of the contract

- Performance cannot be delivered after contract has been agreed due to no fault of either party but by external force (e.g. nature/ war etc.)
- Subjective impossibility to perform – debtor's inability to perform (pay, e.g. person is robbed on their way to pay). Debtor is still liable to pay regardless.
- Objective impossibility – if there is no way to deliver goods (e.g. factory burnt down)
- Temporary & partial impossibility of performance – where divisible performance becomes partially impossible. Whole obligation is not terminated (e.g. think of the hiring of 3 horses and 1 is killed)

Note:

- **Possibility of performance:** required for valid contract (forming contract)
- **Prevention of performance** – performance is made impossible through fault of one of the party = breach (breach of contract)
- **Supervening impossibility of performance** – at time of contract agreement was possible but external force renders it impossible (after contract is formed)

Prescription

- It is possible to acquire or lose rights through the passage of time.
- A debt is not deemed claimable until creditor has knowledge of identity of debtor & fact resulting in the debt. **Note:** If creditor doesn't know due to own negligence they are deemed to know of the debt.
- Prescription can be delayed if:
 - i. Debtor is outside Republic
 - ii. Debtor & Creditor are married to each other
 - iii. Creditor is: minor/ insane/ under curatorship/ or is prevented by interruption of superior force.
 - iv. Debtor & Creditor are partners & debt arose out of partnership relationship
 - v. Creditor is a juristic person & debtor is member of governing body of such juristic person

Prescription Periods:

- 3 years for any other debt
- 6 years in respect of debt arising from bill of exchange

- 15 years any debt owed to State arising from advance/loan on sale/lease of land by State to debtor
- 30 years
 - ~ Debts secured by mortgage
 - ~ Judgement debt
 - ~ Taxation
 - ~ Debt owed to State in respect of shares/royalties etc.

Sequestration and subsequent rehabilitation

- Does not terminate contract concluded by insolvent before they become insolvent.
- Debtor unable to pay their debts – creditor/s may ask of High Court to sequestration of debtor's estate, assets are entrusted to trustee and sold off. Money made is divided amongst creditors.