

Commercial Law 1A

**Only study guide for
CLA101S**

**Department of Mercantile Law
University of South Africa, Pretoria**

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CONTENTS

Instructions for the use of this study guide	(iv)
Section A <i>Introduction</i>	
1 The South African Legal System	2
2 Introduction to the Science of Law	10
Section B <i>General Principles of the Law of Contract</i>	
3 Law of Contract: Introduction	19
4 Consensus	22
5 Capacity to Perform Juristic Acts	44
6 The Agreement must be possible	57
7 Formalities	63
8 Terms of the Contract	67
9 Interpretation of the Contract	76
10 Breach of Contract	80
11 Remedies for Breach of Contract	89
12 Transfer and Termination of Personal Rights	105

INTRODUCTION

Welcome to Commercial Law 1A. This module consists of one paper, namely **CLA101-S**.

First of all, in this module you are introduced to the South African legal system and to the science of law. Secondly, you study all the general principles of the law of contract, which form the major part of this module. The general principles of the law of contract are important to you if you decide to register for additional modules in commercial law.

The module has dual outcomes: the study units that deal with the South African legal system and science of law provide you with a general overview of the law and enable you to relate the different sections of the law to one another. The outcomes of the study units that deal with the general principles of the law of contract ought to enable you to identify, analyse and solve basic legal problems relating to the law of contract. You ought to be able to give advice on how contracts arise, what the effect of a particular clause in a contract is, what the implications of breach of contract are and how contracts are terminated.

PRESCRIBED STUDY MATERIAL

In conjunction with this study guide, the **prescribed textbook** for the module is

Havenga, Michele (gen ed) et al *General Principles of Commercial Law* 6th ed (2007).

THE STRUCTURE OF EACH STUDY UNIT

Each study unit is based on a **chapter** of the prescribed textbook.

At the beginning of each study unit, the **outcomes** for that particular study unit are set out. When you have carefully and methodically worked through a study unit, you should have mastered these set outcomes.

Each study unit is divided into different **headings**. The headings correspond to the headings used in the prescribed textbook. Under each heading you will find comments on various aspects of the study material belonging to this heading. The length of the comments varies in relation to the degree of difficulty of the subject concerned.

These comments do not attempt to replace or summarise the textbook. Usually the comments provide an explanation or additional notes to help you to understand the material in the textbook, as well as forming part of the material for the examination.

Most of the study units contain **activities** and **feedback**. The activities are based on the study material. In order to complete each activity, you are expected to understand the work to which it relates. The answers provided are not necessarily complete and may simply refer to relevant paragraphs of your textbook.

HOW TO USE THIS STUDY GUIDE

The aim of this study guide is to steer you through the prescribed textbook. You need to make your own summaries of the course material in both the textbook and this study guide. For this study guide to make sense to you, you must have a copy of the prescribed textbook.

We suggest that you set about your studies in the following way: begin each study unit by reading attentively through the relevant chapter of the textbook. Then you should take the headings one by one

and both read and study the contents in the textbook, together with any comments which you might possibly find under the same heading in the study guide. Please note that, to a large extent, the comments in the study guide supplement the study material in the textbook. For this reason the two books should be studied in conjunction.

When you have mastered the material under a specific heading, you should try and do the activity/ activities, if any. Try to do these without looking at the answers. The activities form an important component of the study material and we want to encourage you to do them. These activities also provide practical exercises intended to achieve the outcomes mentioned. When you have done the activities, you should compare your answers with the answers in the study guide. Hopefully the activities will indicate any problems the study material might present. By doing the activities with care, you will be able to determine your progress through the study material on a continuous basis.

The activities are similar to the questions you will encounter in the examination. Thus if you are able to do the activities, you will have achieved some of the outcomes set at the beginning of the study unit. Remember, however, that in the examination room you do not have access to your textbook and study guide. At that stage, you should be in a position to answer the set questions without the assistance of these resources.



SECTION A

INTRODUCTION

STUDY UNIT 1

THE SOUTH AFRICAN LEGAL SYSTEM

In this study unit you are introduced to the history and sources of South African law, and to the judicial process in South Africa. The aim of this study unit is to provide a broad outline of the South African legal environment within which the state, subjects and the business world function.

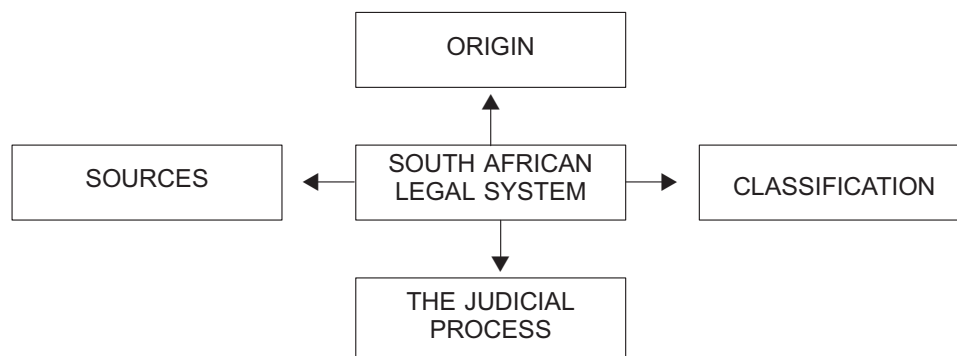
When you have completed this study unit, you should be able to understand the different origins and sources of South African law, the South African court structure and the doctrine of stare decisis.

Prescribed study material: textbook chapter 1

INTRODUCTION

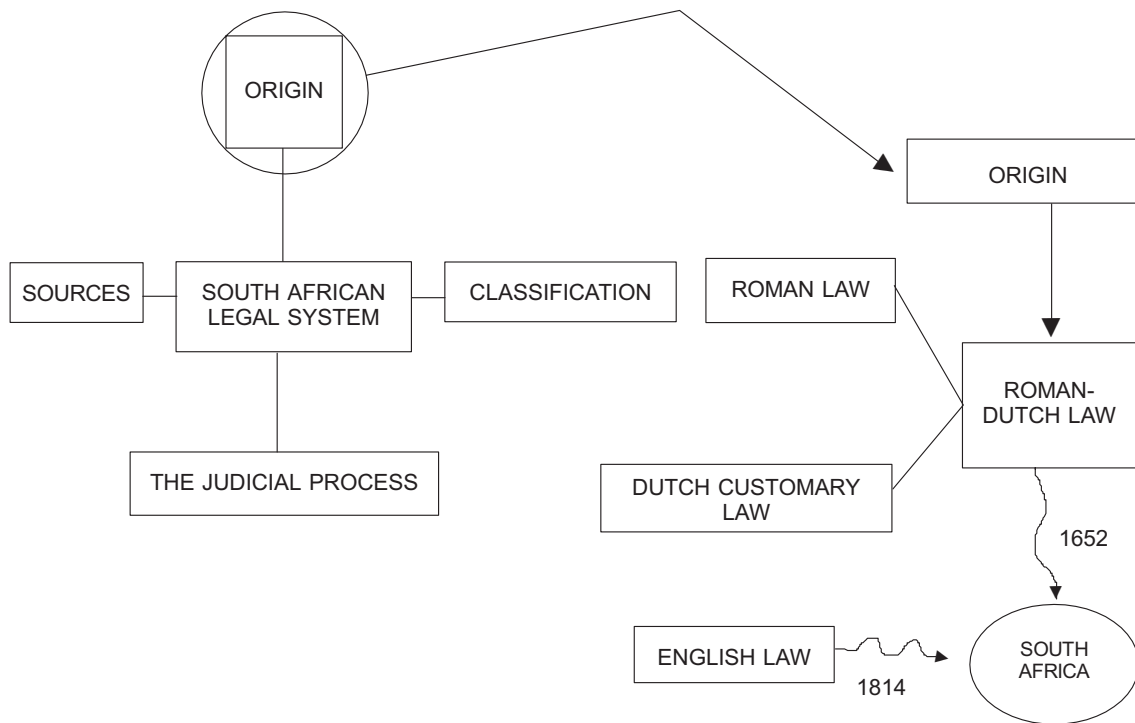
In Section A you learn about the South African legal system. Since this is intended as background information, it is described in broad outlines. We use diagrams to explain the relevant matters to you, so that you may form a comprehensive impression of how these various aspects relate to one another.

The following diagram forms the basis of the first two study units. You will note that we add more details about a specific aspect as we deal with that aspect.



1 A BRIEF HISTORY OF THE LAW (TEXTBOOK PAR 1.1)

A short historical overview is important in order to establish where South African law comes from. Current South African law is a unique mixture of legal systems, firmly rooted in Roman law, Roman-Dutch law and English law. The following diagram indicates the origin of South African law:



ACTIVITY

Indicate whether the following statements are correct or incorrect:

- (1) Indigenous legal systems applied at the southernmost tip of Africa before 1652.
- (2) Before 1652 in the Netherlands, Roman law was in force.
- (3) The law from 1652 onwards at the Cape was Roman-Dutch law.
- (4) After the formal cession of the Cape to England in 1814, the English legal system was adopted in the Cape.



FEEDBACK

- (1) This statement is correct. Communities living at the southernmost tip of Africa before 1652 most probably functioned in terms of indigenous legal systems.
- (2) This statement is incorrect. Roman law as such was never in force as a legal system in the Netherlands. What happened was that, over a period of centuries, Dutch customary law was fundamentally influenced

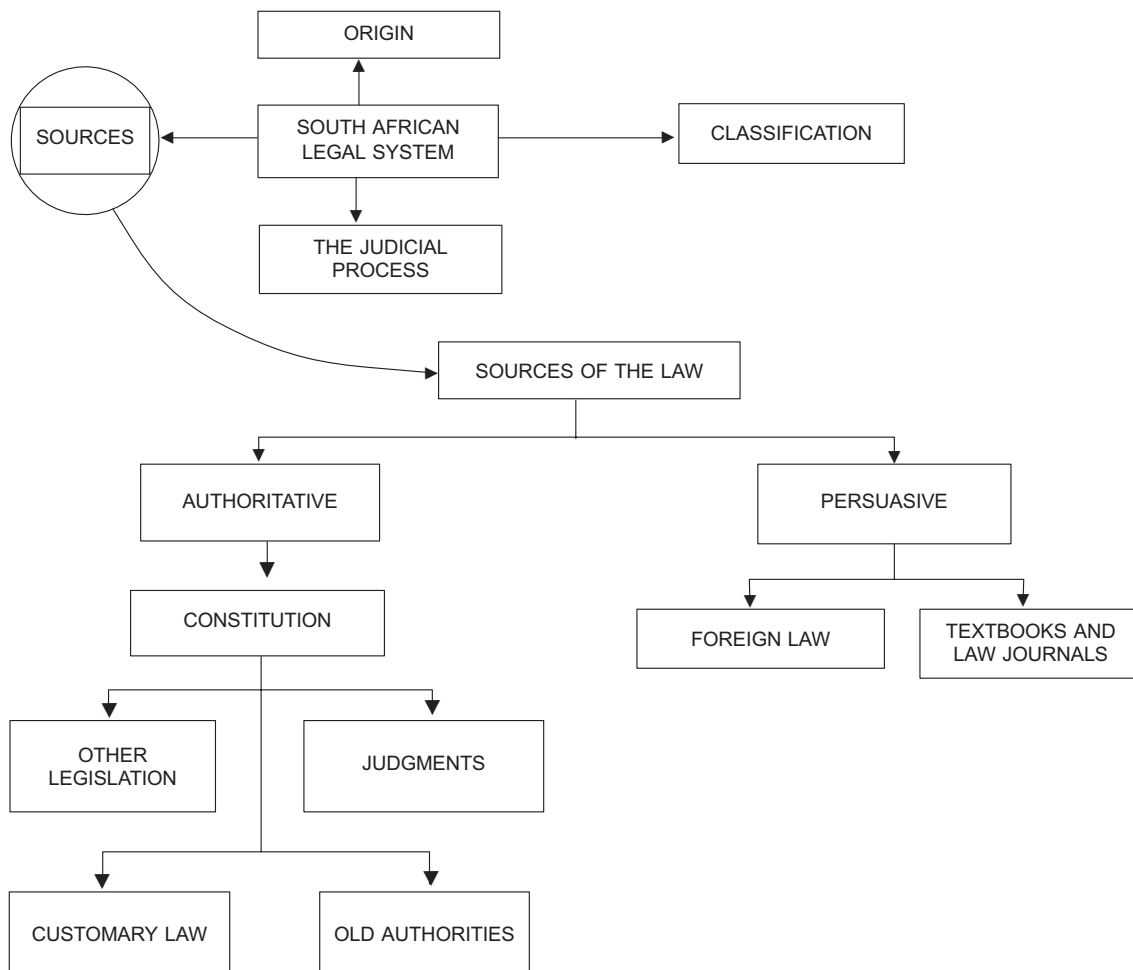
by Roman law, to the extent that, in due course, the legal system was typified as a Roman-Dutch legal system. By 1652, this system prevailed in the Netherlands.

- (3) This statement is correct. The arrival of Van Riebeeck in 1652 saw the adoption of Roman-Dutch law as a legal system to the Cape.
- (4) This statement is incorrect. English law was never adopted as a system to replace Roman-Dutch law. Admittedly the result of occupation of the Cape in 1806 and, particularly of the formal cession of the Cape to England in 1814, was that the local legal system was influenced by English law.

2 SOURCES OF THE LAW (TEXTBOOK PAR 1.2)

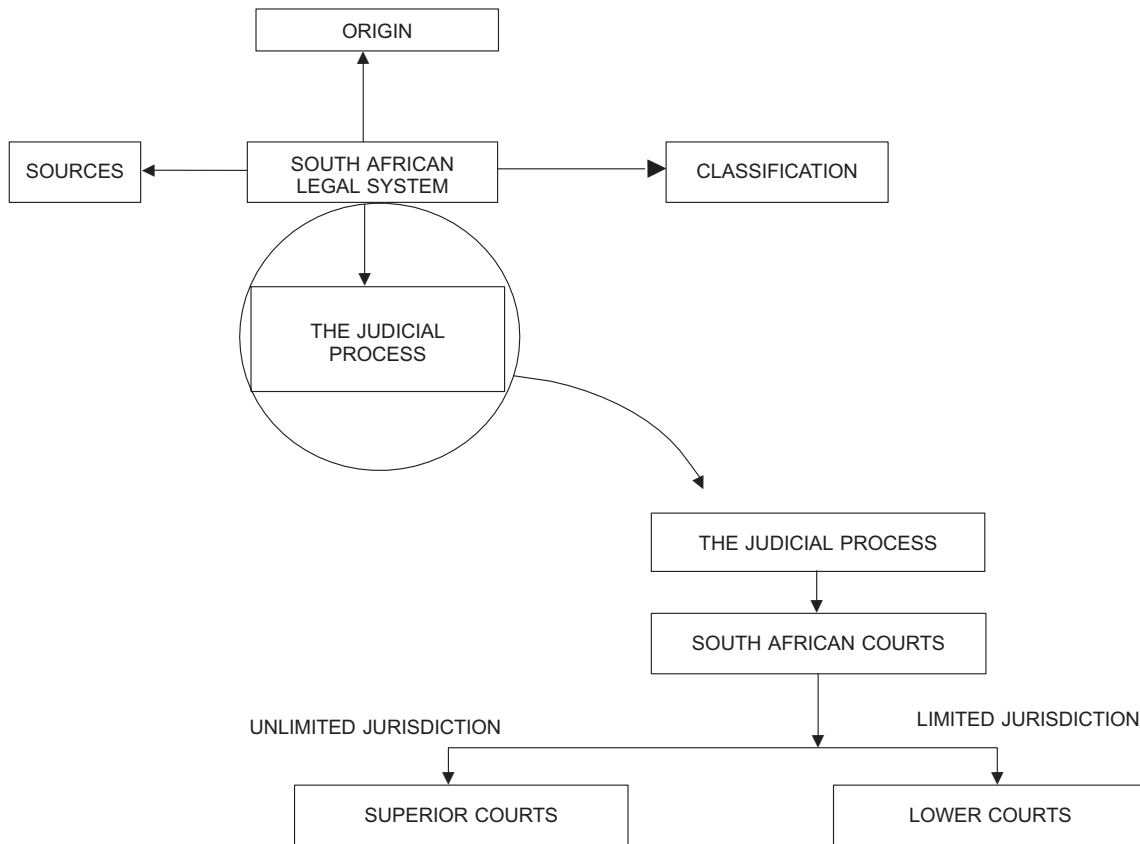
It is important to distinguish between the origins of our law (where it comes from) and the sources of our law (where it is found).

The sources where we find South African law can be shown as follows:



3 THE COURTS IN THE REPUBLIC (TEXTBOOK PAR 1.3)

The following diagram shows the different courts in South Africa:



Jurisdiction means the capacity to hear a case and pass a valid judgment. The jurisdiction of a High Court is unlimited in the sense that such a court can hear any **type** of criminal or civil case. It is, however, limited in the sense that a High Court exercises its jurisdiction within a specified **area**. A High Court can hear constitutional matters, except those matters which in terms of the Constitution may be heard only by the Constitutional Court.

4 THE DOCTRINE OF STARE DECISIS (TEXTBOOK PAR 1.4)

As is clear from the textbook, the hierarchy of the courts determines how the stare decisis doctrine is applied. The following diagram represents the application of this doctrine.

Binding authority

Constitutional Court (only in respect of constitutional matters — irrespective of the number of the judges)



Supreme Court of Appeal (irrespective of the number of judges)



Full bench of the High Court



Two-judge bench of the High Court

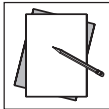


Single judge of the High Court

Persuasive power



High Courts in other areas of jurisdiction



ACTIVITY

A case is heard in the Bronkhorstspruit magistrate's court. An appeal is lodged with the High Court in Pretoria. There are conflicting judgments made by the following Courts:

- (1) a single judge of the High Court in Pretoria
- (2) a single judge of the High Court in Pietermaritzburg
- (3) three judges of the Supreme Court of Appeal
- (4) a full bench of the High Court in Cape Town

To which decision will the High Court in Pretoria be bound? Give reasons for your choice.

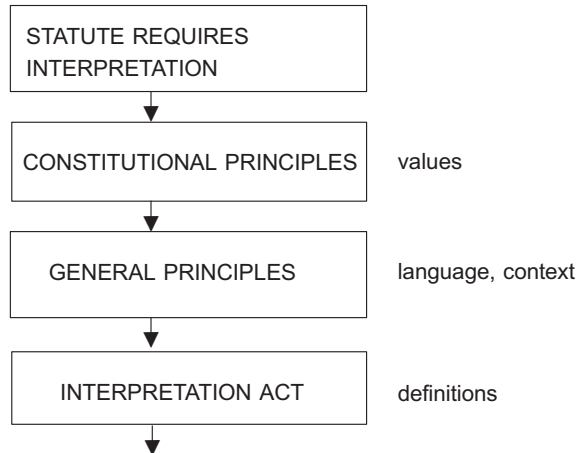


FEEDBACK

The High Court in Pretoria will be bound by the decision of the Supreme Court of Appeal, because all higher (and lower) courts are bound by the decisions of this court. If the Supreme Court of Appeal has not decided the matter, the High Court would be bound by its own earlier decision. The decisions of the court in Pietermaritzburg and even the full bench in Cape Town would, in the absence of a decision from the Supreme Court of Appeal and the earlier decision by the High Court in Pretoria, simply have persuasive power.

5 INTERPRETATION OF STATUTES (TEXTBOOK PAR 1.5)

It sometimes becomes necessary for a court to determine what precise meaning must be given to a word or phrase in an Act. The diagram that follows illustrates the process that a court follows to ascertain this meaning.



Court pronounces on purpose and interpretation of statute

6 COURT JUDGMENTS (TEXTBOOK PAR 1.6)

The contents and typical aspects of a court judgment are explained in the textbook. There is an example of a court case, *National Sorgum Breweries Ltd v Corpcapital Bank Ltd* 2006 (6) SA 208 (SCA). All specific references in this section will be to that case. Although the South African Law Reports (abbreviated as SA) are the official law reports of South Africa there are other law reports as well, such as the South African Criminal Law Reports (SACLR).

Even if a previous decision is said to have binding authority, only certain parts of the judgment are important. We can (and should) distinguish between two types of expression in a court judgment, namely ratio decidendi and obiter dicta.

Put most simply, the ratio decidendi or 'ratio' is that part of reasoning in the judgment which is essential for the decision in the particular case before the judge. The doctrine of stare decisis provides that only the ratio decidendi is binding on other courts in the hierarchy.

The term 'obiter dictum' (plural: obiter dicta) refers to a statement of the court which does not form part of the ratio. For example, the court may refer to an alternative argument, or it may state what the position would have been had the facts been different. Although an obiter dictum is not binding it may have persuasive authority, particularly if it was expressed by the Supreme Court of Appeal.

In *National Sorgum Breweries Ltd v Corpcapital Bank Ltd*, the ratio is that a creditor is free to cede its rights and a non-variation clause in a contract does not restrict this power. Anything else that was said about lease or sale agreements is obiter — that is a comment that will not be binding in terms of the doctrine of stare decisis.

7 EXPLANATORY NOTES

Advocate: An LLB graduate who has been admitted as an advocate of the High Court. When an advocate practises as such, he or she is usually also a member of a Bar. There is a Bar for each of the High Courts. In order to become a member of a Bar a candidate must complete a pupillage and pass the Bar examination. An advocate may appear in any court, except the small-claims court. Advocates do not deal directly with the public, but are instructed by attorneys on behalf of their clients. Unlike attorneys, they are involved primarily in litigation and legal opinion work. A person may not be an advocate and an attorney at the same time.

Appeal: Taking a decision of a lower court to a higher court. The person bringing the appeal hopes to persuade the higher court to change the decision of the lower court.

Attorney: A LLB graduate who has completed the board examination and articles of clerkship. Attorneys may appear in the lower and high courts. Attorneys deal directly with members of the public who need legal advice or representation, and they may refer these people to advocates. Apart from litigation, attorneys also give assistance in all kinds of nonlitigious matters, such as the drawing up of contracts and wills.

Clerk of the court: The official who receives and issues legal documents and pleadings in civil actions in the magistrate's court.

Codified: Recorded in one comprehensive piece of legislation. The *Corpus Iuris Civilis* is a codification of the Roman law which appeared during the reign of Emperor Justinian in the sixth century. South African law is not codified.

Common law: The term is used in both a wide and a narrow sense. In the wide sense it is used to indicate law that is not contained in legislation, namely the Roman-Dutch law as influenced by English law. In the narrow sense it is specifically used to refer to the works of the old authorities.

Constitutional Court: The highest court in South Africa for constitutional matters.

Defendant: The person who is sued by the plaintiff in a civil action.

Government Gazette: The state's official newspaper in which all acts, proclamations and other information that needs to be brought to the public's notice is published. The Government Gazette is published by the Government printer.

Judge: A court officer who hears and decides cases in the superior courts.

Judgment: The decision of a judge or magistrate or other judicial officer in a case.

Jurisdiction: This could refer to a court's authority to hear a particular matter (eg a magistrate's court may not decide on a divorce) and/or the geographical region within which it may function (eg the jurisdiction of the magistrate's court in Potchefstroom is confined to the relevant magisterial district of Potchefstroom, and such court would not have jurisdiction over an offence committed in Bloemfontein).

Magistrate: The court officer who hears and decides cases in the magistrate's court.

Minority judgment: The judgment of a judge or judges who disagrees/disagree with the judgment of the majority of judges who hear a case.

Obiter dictum: A remark in passing which was unnecessary for the decision of the case, and is hence not binding in subsequent court cases.

Plaintiff: The person bringing an action in a civil case.

Quasi: A prefix that means similar to, resembling.

Ratio decidendi: The underlying reason for the court's ruling.

Registrar: The official who receives and issues legal documents or pleadings in a superior court.

Statute law: The law created by the passing of an Act by Parliament or a provincial legislature.

Supreme Court of Appeal: The highest court in the country, except for matters that fall within the jurisdiction of the Constitutional Court. Parties cannot take their cases directly to the Supreme Court of Appeal, because this court hears only appeals against the decisions of the High Courts.

STUDY UNIT 2

INTRODUCTION TO THE SCIENCE OF LAW

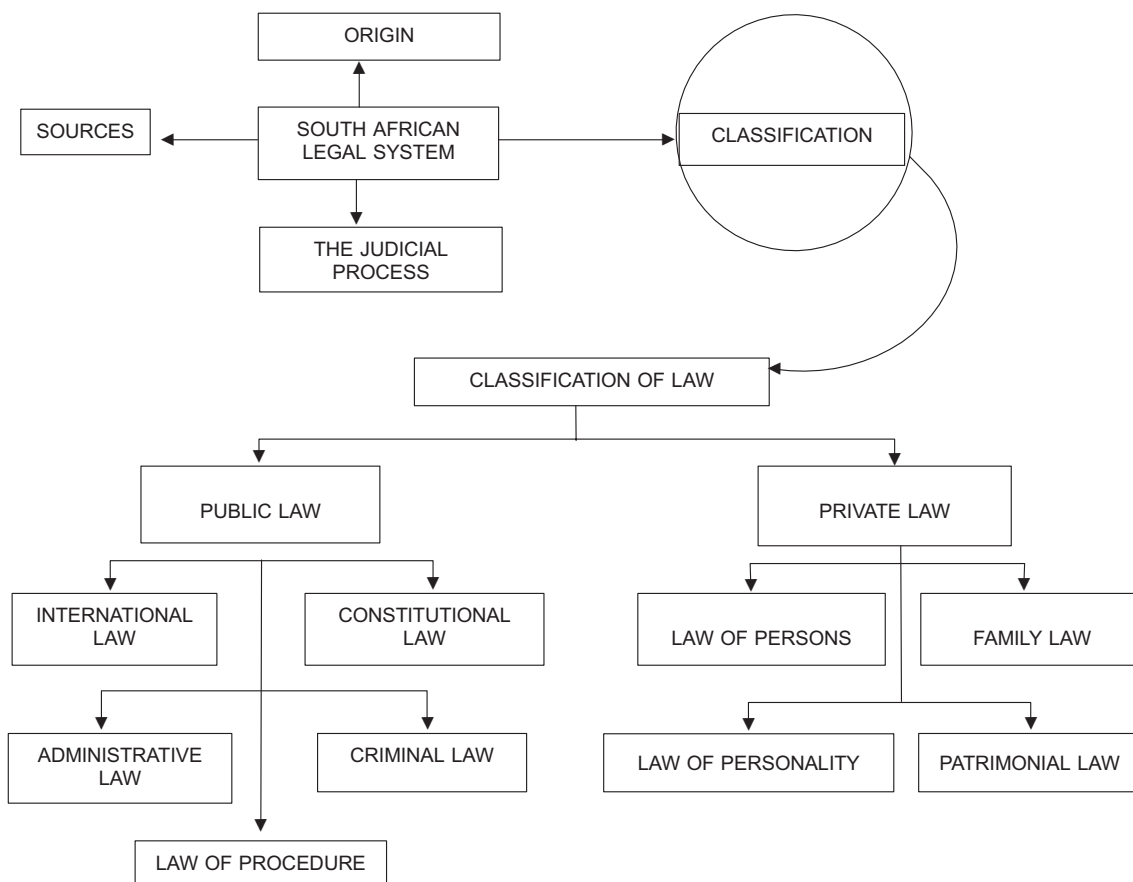
When you have completed this study unit, you should be able to distinguish between law in the objective sense and law in the subjective sense. You might be expected to do a simple objective classification of the law, as well as to categorise subjective rights. You will need basic knowledge of certain aspects of private law in order to enable you to understand the concepts of legal obligation, delict, contract, personal rights — a prerequisite for mastering the rest of the study units in this module.

Prescribed study material: textbook chapter 2

1 THE TERM 'LAW' (TEXTBOOK PAR 2.1)

'The law' refers to a system of rules which applies in a community, and which is binding on people. Different kinds of rules apply in society, but not all of these are legal rules. People also abide by other sets of rules, for example social and religious rules. Legal rules are characterised by the fact that they can be enforced through coercion. If a person does not follow the rules, he or she may for example be imprisoned, or may be made to pay another person compensation.

Traditionally, the main division in law is the one between **public law** and **private law**. Public law is concerned with the distribution and exercise of power by the state and the legal relations between the state and the individual. Private law, on the other hand, is concerned with the legal relations between individuals. The following diagram shows a traditional classification of the law:



2 PRIVATE LAW (TEXTBOOK PAR 2.2)

2.1 The law of persons

The law of persons determines

- ◆ who are legal subjects
- ◆ how one becomes, or ceases to be, a legal subject
- ◆ the various classes of legal subjects
- ◆ the legal position (status) of each of these various classes of legal subjects

2.2 Family law

Family law comprises the following two subdivisions:

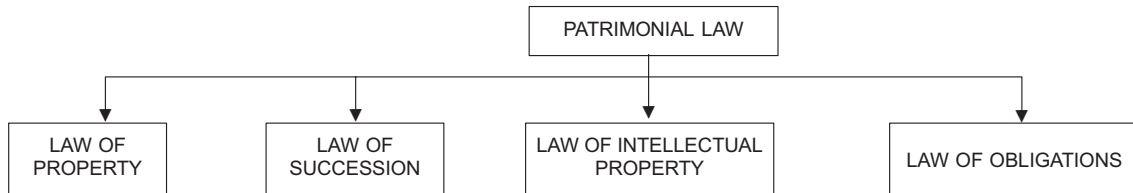
- ◆ the law of husband and wife
- ◆ the law of parent and child

2.3 Law of personality

The law of personality is concerned with the protection of the physical and psychological integrity of legal subjects.

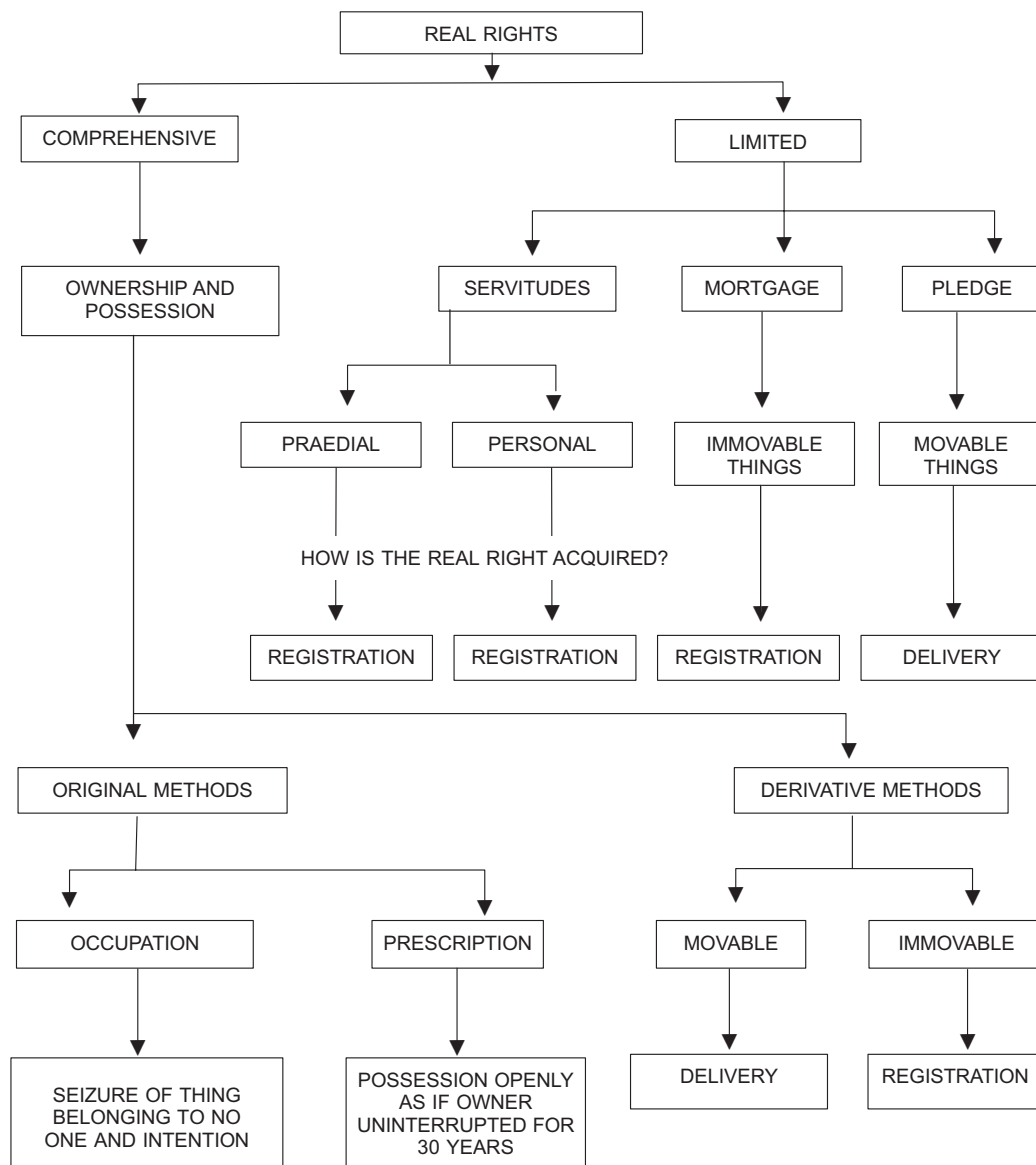
2.4 Patrimonial law

The following diagram shows the different subdivisions of patrimonial law:



2.4.1 The law of property

The subjective right which a legal subject has towards material objects is called a 'real right'. The classification and acquisition of real rights can be shown as follows:





ACTIVITY

In what way is the right of ownership obtained in each of the following cases, if at all?

- (1) John buys the farm Blomhof from his neighbour, Gavin.
- (2) Sizo catches rabbits on his farm.
- (3) Freda gives her sister, Brenda, a car as a birthday present.
- (4) In 1960 Solly fenced his stand and turned it into a garden. When the stand was surveyed in 1992, it appeared that the part which bordered on the municipal park, did not form part of his stand, but was part of municipal land.



FEEDBACK

- (1) John will gain ownership of the farm by having it registered in his name at the Deeds Office.
- (2) Since the rabbits do not belong to anyone else, if Sizo succeeds in catching them, he will become their owner by taking possession of them.
- (3) Brenda will become the owner as soon as the car is delivered to her, since this is a movable thing.
- (4) Solly obtained ownership through prescription, because he has openly owned the land for more than 30 years (he fenced it and turned it into a garden).

2.4.2 The law of succession

The law of succession deals with the rights of legal subjects to the property of a deceased person.

2.4.3 The law of intellectual property

Copyright law, patent law, trade mark law and design law form part of intellectual property law.

2.4.4 The law of obligations

An obligation between legal subjects may come about through

- ◆ contract
- ◆ delict
- ◆ various other causes, for example unjustified enrichment

The general principles of the law of contract are discussed in greater detail in Section B. We shall deal with only the law of delict and unjustified enrichment here.

2.4.4.1 Introduction to the law of delict

The law of delict lays down what is required for an act that causes damage to qualify as a delict and what remedies are available to the party who suffers the damage.

The elements of a delict are the following:

- (a) a voluntary human act
- (b) unlawfulness
 - Grounds of justification are special circumstances which convert an otherwise unlawful act into a lawful act. The following grounds of justification are usually distinguished:
 - (i) necessity
 - (ii) self-defence
 - (iii) consent: consent to injury
 consent to the risk of injury
 - (iv) statutory authority
 - (v) provocation
- (c) fault (intent or negligence)
- (d) causation
- (e) damage or impairment of personality

The remedies in the case of delict are an interdict and payment of damages for proved patrimonial loss, sentimental damages and compensation for pain and suffering. The *actio legis Aquiliae* is aimed at recovering patrimonial damage (economic loss or loss which can be assessed in terms of money). The *actio iniuriarum* is aimed at recovering sentimental damages, and the action for pain and suffering is aimed at recovering compensation for injury to personality — for example for emotional shock that is wrongfully or culpably caused.



ACTIVITY

Maria has a heart problem. She is very attached to her nephew, Boswell, whom she has brought up. David is jealous of the relationship between Maria and Boswell and decides to do something to hurt Maria. Knowing that she has a heart problem, he visits her one evening and tells her that Boswell has been involved in a burglary, caught red-handed by the police and fatally wounded in a wild shooting incident. As a result of the shock, Maria suffers a heart attack. This causes her considerable medical expenses.

Explain the steps you would take in order to establish whether David's behaviour meets the requirements for a delict.



FEEDBACK

In order to determine whether David has committed a delict, his behaviour must satisfy all the elements of a delict, namely:

- (1) An act: The things David said comply with the requirement of capricious human conduct and he was in control of his behaviour.
- (2) Wrongfulness: David's conduct is in conflict with the community's sense of reasonableness and violates Maria's physical and psychological integrity.
- (3) Fault: David behaved intentionally. He foresaw the consequences and reconciled himself to them.
- (4) Causation: David's intentional, wrongful behaviour caused the heart attack and the predictable patrimonial damages that ensued.
- (5) Damage: Maria's medical expenses resulting from the heart attack constitute damage.

Comment: Medical expenses are patrimonial damages that have to be recovered by way of the *actio legis Aquiliae*. Any possible compensation for shock is recovered by way of the action for pain and suffering.

2.4.4.4 Introduction to the law of unjustified enrichment

The performance that is the object of the right in the case of unjustified enrichment is the payment of an amount equal to the amount by which one person has been enriched to the detriment of another person, or restitution.

In South Africa, an action based on unjustified enrichment can be instituted only in certain specific instances. We do not yet recognise a general enrichment action.

The obligation imposed upon the enriched person therefore takes one of two forms, namely

- (a) restitution
- (b) payment of a sum of money

3 EXPLANATORY NOTES

Immovable things: This is property that cannot be physically moved, such as land, houses, flats and other buildings.

Negligence: This is a form of fault that is manifested in a blameworthy attitude (a legal reproach) of a person who behaves in a way that is different from that of a reasonable person in a particular situation.



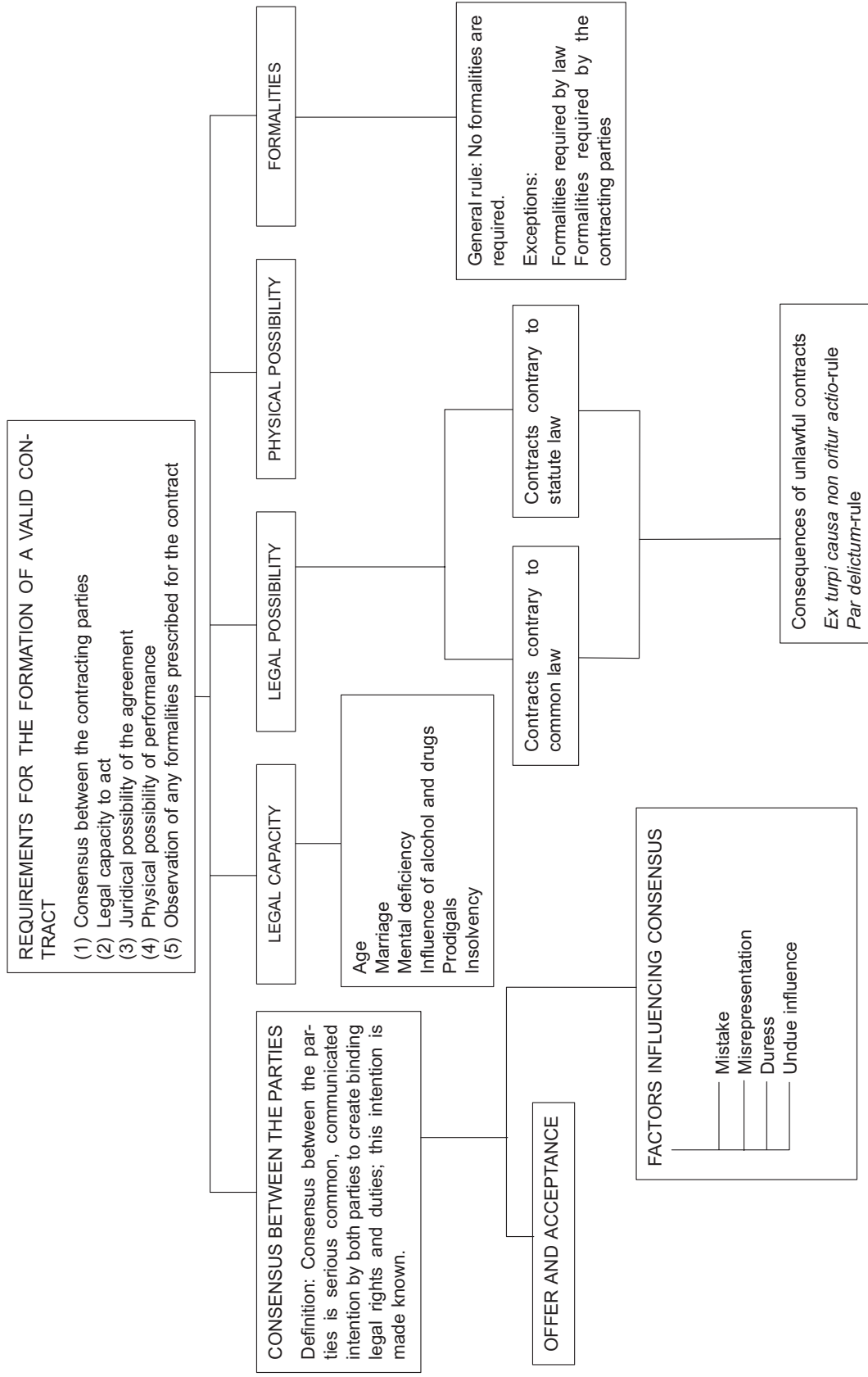
SECTION B

GENERAL PRINCIPLES OF THE LAW OF CONTRACT

In Section A you were given a general overview of the origin and sources of the law, as well as the judicial process and the classification of the law. Now, when you are faced with a legal problem, you should be able to identify the part of the law into which the problem falls. The purpose for doing this is to trace the correct sources so that you may determine the current legal position on the matter or refer the matter to a specialist in that particular field of law. You could also categorise the law of contract as a subsection of the law of obligations (together with the law of delict and the law of unjustified enrichment) which, in turn, is part of patrimonial law which is a subsection of private law.

Section B is devoted to the general principles of the law of contract. The comprehensive aim of this part is to familiarise you with the basic principles of the law of contract. Although you may never be expected to draw up contracts, in practice you may find it necessary to advise clients, employees or an employer on this or on whether existing contracts or proposed contracts meet the requirements for legally valid contracts (chapters 3 to 7), which stipulations may be found or included in contracts and what their legal consequences are (chapter 8), how to interpret contracts (chapter 9), and how to determine whether there has been a breach of contract and what the remedies for this are (chapters 10 and 11). In addition you must be able to determine in practice when the rights that arise out of a contract have been terminated or transferred (chapter 12). If you should find that a certain juristic act does not constitute a contract, you need to be able to determine whether, nonetheless, another obligation has come about and what the remedies would be if there were reference to other obligations, as already discussed in chapter 2 and as repeatedly referred to.

Scheme 1: Requirements for the formation of a valid contract



STUDY UNIT 3

LAW OF CONTRACT: INTRODUCTION

The aim of this study unit is, firstly, to guide you towards an understanding of the distinction between contracts and other agreements. Secondly, you should be able to list the requirements laid down for the creation of a valid and enforceable contract — since these requirements are discussed in greater detail in the study units to follow. Finally, you need to realise that a person's freedom to enter into a contract with whomever he or she wishes to, is subject to restrictions.

Prescribed study material: textbook chapter 3

1 THE CONTRACT AS A SOURCE OF OBLIGATIONS (TEXTBOOK PAR 3.1)

By definition, a contract is an agreement between two or more people. One cannot, of course, agree with oneself, so there must be more than one person to a contract. (But see the textbook paragraph 3.1(c).) There may be several persons: for example, fifteen friends may decide to go into business to make a profit, and they form a partnership that creates legal rights and duties for all the partners.

Not all agreements are contracts. A social appointment or engagement is an agreement, but not a contract. Take the example of a hostess who engages a professional caterer to provide food for a party to which ten guests have been invited. If five of the guests fail to attend the party, the hostess has no right to sue any of them for breach of contract. But if the caterer fails to supply the food and drink, or supplies unsatisfactory food and drink, the hostess has a right to sue the caterer for breach of contract.

Thus the distinction between a contract and other agreements is that there is a requirement that there should be a serious intention on the part of the contracting parties to be legally bound, that is to bring about one or more **obligations**. The concept of an 'obligation' is wider than the concept of a 'contract'. An obligation is a bond or tie between two persons, which creates rights and privileges. An obligation may arise from a contract but also from delict. Both contracts and delicts create rights and duties.

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, or pay a sum of money. In contrast, a duty is a responsibility imposed by law, and obliges or binds a person to performance (ie to do something or to refrain from doing something or to pay a sum of money).

So the two most important aspects of a contract are the parties' intention (aim) to create legal obligations, and the legal results (rights and duties) that follow.



ACTIVITY

Victor and Yvette arrange to go to the theatre together. In vain Victor waits for Yvette who, in the meantime, has decided to go ice-skating with Sonya and Liesel. Victor is upset and wishes to know whether he may take legal action against Yvette. What do you think?



FEEDBACK

Victor and Yvette's arrangement was purely a social engagement and not a contract. They had no intention of creating a legal obligation. All that Victor has at his disposal is a social sanction (eg to end their friendship).

2 REQUIREMENTS FOR THE FORMATION OF A VALID CONTRACT

(TEXTBOOK PAR 3.2)

Please note that there are **at least four** requirements for the formation of any valid contract. A fifth requirement, namely formalities, is set in exceptional cases. We expect you to memorise these requirements. They are discussed in greater detail in chapters 4 to 7. At this point we merely list the requirements:

- (1) *Consensus*. This comes from the Latin word meaning 'unanimity', or 'agreement to the same thing'.
- (2) *Capacity to act*. This is the ability in law to perform the act of entering into (concluding) the contract.
- (3) *Juridical possibility*. The agreement must be **juridically** possible — in other words, legally possible. So, for example, an agreement to rob a bank is not juridically possible, because it is against the law.
- (4) *Physical executability*. The rights and duties must be **physically executable**.
- (5) *Formalities*. If any **formalities** are prescribed, they must be observed.

3 FREEDOM TO CONTRACT

(TEXTBOOK PAR 3.3)

Another example of conduct to which the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 relates, is the following: in an existing partnership agreement, partners may not impose unfair and discriminatory stipulations or conditions to their prospective partners, which means that they may be forced to accept partners against their will.

4 CONTRACTING ELECTRONICALLY

(TEXTBOOK PAR 3.4)

The Electronic Communications and Transactions Act 25 of 2002 (ECT Act) regulates all electronic transactions. The textbook provides details of what transactions are included, and what is excluded, from the ambit of this Act.

STUDY UNIT 4

CONSENSUS

The aim of this study unit is to familiarise you with the term 'consensus', which forms the basis of every contract. You need to be able to explain the requirements for a valid offer and acceptance and indicate where and when contracts are formed. Furthermore you should be familiar with the nature of error, misrepresentation, duress and undue influence as factors that could influence consensus, and the legal consequences that the presence of these circumstances can have for contracting parties.

Prescribed study material: textbook chapter 4

1 THE CONCEPT OF CONSENSUS

(TEXTBOOK PAR 4.1)

1.1 Consensus as the basis for contractual commitment

The basis of consensus is a common intention to be contractually bound, an intention which the respective contracting parties make known to one another.

1.2 The intention to be contractually bound

The parties must intend to create a **legal obligation**. This intention to create a legal obligation is absent if the parties are not serious about their contract but enter into it, for example, as a joke. Similarly, this intent is absent if a lecturer pretends, say, to sell one of her students a book as a way of explaining the rights and duties of the respective parties to a contract of sale. So when Jill, in explaining the duty of the seller to deliver the thing sold, hands over her book to Peter as a way of showing him her obligation to deliver it, neither she nor he intends to be contractually bound, and so no contract has arisen. And parties would again lack the intention to create a legal obligation if they agreed to perform the impossible: for example, if Sheila says that she will pay Jim R1 million if he flies to Mars, she lacks the intention to create a legal obligation.

1.3 Common intention

The parties to the proposed contract must share the same intention. This shared intention would be absent if, for example, one party intends to buy the house in question, and the other party intends to let that house to him or her under a lease contract. In these circumstances, the parties are negotiating at cross-purposes, and disagreement (not agreement) results. Agreement would arise here if both parties intended either a lease of the house or, alternatively, a sale and purchase of the house.

1.4 Making the intention known

An intention is a subjective attitude. Unless communicated or expressed or manifested, it remains only a thought. It must be transmitted from one person's mind to another person's mind. The intention can be declared in some way or another.

One way is a declaration in writing. The written terms according to which a party is willing to contract may be detailed and formally expressed. An example would be a joint-venture contract between multinational companies, in which the scale of the proposed business and the money involved necessitate that the terms of the contract be set out in detail. Building-construction contracts are often exceptionally detailed, too, and so they are written down.

A second way in which a party's intention can be made known is through spoken words. Because the words are spoken, the contract that results is known as an 'oral agreement'.

Words are not necessarily essential to the formation of a contract. Intention can also be made known through people's conduct. For example, a customer enters a shop, chooses twelve apples and puts them down on the shop counter. The shopkeeper rings up the total price on the till. The customer sees this total and out of a purse takes enough money to pay the price. The customer hands over the money, picks up the twelve apples, and walks out of the shop. No words have passed the lips of either the customer or the shopkeeper. Yet a contract of sale has been concluded between the two parties, and then performed. By going up to the counter with the apples that he or she wished to buy, the customer implicitly offered to buy them. The shopkeeper accepted this offer to purchase by ringing up the price on the till. In these circumstances intention was declared through conduct.

2 OFFER AND ACCEPTANCE (TEXTBOOK PAR 4.2)

2.1 The concepts of offer and acceptance

Contracts are usually concluded through the process of offer and acceptance. The person making the offer (the offeror) proposes terms to the other party (the offeree) for the offeree's acceptance. By accepting the offer, the offeree agrees, in words or by conduct, and finally and without reservation, to the offeror's proposed terms. An example of an express offer would be the following: 'I offer to sell you this car in front of us for R10 000.' And an express acceptance of that offer would be the following: 'I agree to buy it.'

2.2 Requirements for the offer and acceptance

OFFER	ACCEPTANCE
(a) Undertaking made with the intention that the offeror will be legally bound.	(a) Undertaking that the offeree will be legally bound.
(b) Complete.	(b) Unconditional.
(c) Clear and certain.	(c) Clear and certain.
(d) Usually made in words or by conduct. <ul style="list-style-type: none"> — Legal requirements (eg, sale of land). — If the offeror specifies as a term of the offer that the offer must be accepted in a specified manner. 	(d) Usually made in words or by conduct. <ul style="list-style-type: none"> — Legal requirements (eg sale of land). — If the offeror specifies as a term of the offer that the offer must be accepted in a specified manner.
(e) Addressed to the following: <ul style="list-style-type: none"> — A specific person or persons (eg, Mrs Jones). — Unknown persons (eg, all teachers). This class of offerees has several members, but as a restricted group it is not as numerous as the general public. — The general public — anyone who is willing to do what the offer requires (eg, in the case of a reward). 	(e) Accepted by the following: <ul style="list-style-type: none"> — Mrs Jones or Mrs Jones's authorised agent. — Any teacher (ie, a member of this restricted group). — Any member of the public who does what the offer requires <p>Here it is important that the offeree must know about the offer. Take the example of a reward: Will offers a reward for information; Jim does not know about Will's offer but gives Will the information. No contract arises between Will and Jim, so Will has no legal duty to pay Jim the reward.</p>
(f) Communicated.	(f) Communicated.

Regarding requirement (a) above, namely that the offer and the acceptance must contain an undertaking made with the intention to be legally bound, note that by advertising an item for sale a shopkeeper makes an invitation to do business concerning that article, that is with a view to attracting offers. The shopkeeper does not make an offer to sell the item. Instead, it is the purchaser who makes the offer to buy the item.

Regarding requirement (c) above, namely that the offer and the acceptance must be clear and certain, one example of an unclear and uncertain offer would be an offer stating, 'The lowest price that I will accept for this book is R50.' This offer leaves the offeree guessing what price the seller would accept — R55? R65? R100? We do not know: the terms of the offer are too vague.

2.3 The falling away of the offer

How long does the offer remain open for acceptance? It falls away in the following **five** circumstances:

- (a) **Expiry.** An offer expressly limited to a certain time falls away if not accepted within that time. So, for example, an offer of employment that will remain open for four days may be accepted on the third or the fourth day, but not on the fifth. An offer that contains no time limit will expire within a reasonable time if it is not accepted before then.
- (b) **Revocation.** Here the offeror withdraws, revokes, or annuls the offer before acceptance. Note that the offeror does not revoke or annul the contract, because no contract has yet been formed. It is important that the offeror must inform the offeree about the withdrawal of the offer, and that he or she does so before the offeree accepts the offer.

Example: If Charles offers to sell his car to Bill and later changes his mind and wishes to sell the car to Edward, Charles must inform Bill that he withdraws the offer before the offer is accepted by Bill. If the offeree has already accepted the offer a contract exists, and the offeror's attempt to withdraw the offer may amount to breach of contract (in the form of repudiation). (See chapter 10.)

- (c) **Rejection.** If the offeree rejects an offer he or she cannot then change his or her mind and try to accept it.

Example: Alfred says to Bill, 'I offer to sell you this lawn mower for R250.' Bill replies, 'No, thank you.' Even if Bill changes his mind immediately after his refusal Alfred's offer has fallen away. It is still possible that this offer may be superseded by another new offer that can be accepted.

- (d) **Counter-offer.** See example.

Example: Anne says to Betty, 'I offer to sell you this washing machine for R500.' Betty replies, 'I will buy it for R450.' An important term of Anne's offer is that the price should be R500. Betty does not accept this term and instead proposes a lower price, thus altering a term of Anne's offer. Anne's offer falls away. Betty's counter-offer is now open for Anne to accept or to reject.

- (e) **Death** of either party before acceptance.



ACTIVITY

In the following situations, could we speak of a valid offer?

- (1) Vusi is considering selling his motor cycle as soon as he takes delivery of his new car.
- (2) Ratanama Butchery has the following notice on the shop window: 'Half a lamb at R18.99 a kilogram.'
- (3) An advertisement in the newspaper reads as follows: 'Beach cottage at Hartenbos for exchange. Call Steve at 033-43 5656.'
- (4) Rupert puts his house on the market because he wishes to move to an old-age home. Daphne views the house and sends Rupert a letter in which she informs him that she will purchase it for R250 000. Rupert passes away before he receives the letter.



FEEDBACK

- (1) Vusi's intention has not yet been made known to a potential addressee with the intention of being legally bound.
- (2) This is simply an advertisement, an invitation to do business. Clients who are interested and inquire about the meat will make offers to buy the meat.
- (3) All we have here is an intention in principle to enter into an exchange contract. An offer must contain complete details of the contract which the offeror has in mind. There are still several essential uncertainties.
- (4) Daphne's expression of her intention does not amount to an offer. An offer is only valid if it comes to the notice of the addressee.

2.3.1 The continued existence of the offer: the option

It is possible to entrench the continued existence of the offer by means of an option. By the word 'entrench' we mean the application of an extra safeguard to ensure the continued existence of the offer. The offer cannot be withdrawn while the safeguard exists. This safeguard is a separate contract, namely an option. The option gives the option-holder the right to choose whether or not to conclude the main contract (which will arise from the entrenched substantive offer) with the option-giver. The option-holder's right is usually limited to a specified time.

ANDREW ————— **► BRIAN**

(1) Retrenched substantive offer (to sell a horse)

ANDREW ————— **► BRIAN**

(2) Offer to keep the retrenched substantive offer (1) open for two weeks

If Brian accepts offer (2) but has not yet accepted the retrenched substantive offer, an option exists in which Andrew is the option-giver and Brian the option-holder. At this point, the horse has not yet been sold. Now Brian has two weeks in which to decide whether he wishes to accept Andrew's offer to sell the horse. During these two weeks Andrew may not withdraw this (retrenched) substantive offer; nor may Andrew offer, in the meantime, to sell the horse to a third party, Charles. The option binds Andrew to keep the retrenched offer open in favour of Brian for two weeks. Before the end of those two weeks, Brian may decide to reject Andrew's substantive offer. If Brian rejects Andrew's substantive offer within, say, four days, the option comes to an end, and the substantive offer also comes to an end. Since the option ended before the end of the specified two weeks, Andrew now has the right to offer the horse to Charles or to accept Charles's offer to buy it.

But if Brian accepts Andrew's substantive offer within the specified two weeks of the existence of the option and he lets Andrew know that he wishes to buy the horse, the option comes to an end, and the contract of sale is concluded.



ACTIVITY

Gabriel is transferred from Kuruman to Kimberley and wishes to rent a house from Tracy but he is uncertain about whether his wife, Nancy, who is temporarily still living in Kuruman, will be satisfied with the house. Tracy gives Gabriel an option for two weeks to reach a final decision as to whether or not he wishes to rent the house.

Discuss the following cases briefly:

- (1) On the first weekend, Nancy comes to visit but is not satisfied with the house. Gabriel informs Tracy that he will not be renting the house.
- (2) Nancy becomes ill and, only after three weeks, is able to undertake the journey to Kimberley.
- (3) Nancy is so anxious to see the house that she comes to inspect it the very next day. She likes it and Gabriel informs Tracy of their decision to rent the house.



FEEDBACK

- (1) Both the option and the substantive offer (to rent the house) expire as soon as Gabriel informs Tracy that he is no longer interested in the house.
- (2) Both the option and the offer to rent expire after the two-week period of the option has elapsed.
- (3) As the option is exercised the lease is concluded.

2.4 Special rules in regard to offer and acceptance

In the following instances, special rules may apply to the offer and acceptance:

- ◆ invitation to make an offer (par 4.2.4.1(e) as well as par 4.2.2(a) above)
- ◆ offers of reward (par 4.2.2(e) above)
- ◆ options (par 4.2.3.1)
- ◆ an undertaking to contract (par 4.2.4.2)
- ◆ calling for tenders (par 4.2.4.3)
- ◆ auctions (par 4.2.4.4)

Let us now study the special rules for auctions. Auctions are either public auctions organised for official purposes (eg sales of unclaimed goods; sales in judicial execution of a court order), or else auction sales (sales on the initiative of private persons). Both kinds of auction are subject to the rules of sale published before the sale. Auctions are either subject to reservation or else not subject to reservation, and this difference is illustrated in the following table:

AUCTIONS SUBJECT TO RESERVATION	AUCTIONS NOT SUBJECT TO RESERVATION
<ul style="list-style-type: none"> ● General: if the conditions of auction expressly provide that goods will be sold subject to reservation; or if conditions are silent on the matter. 	<ul style="list-style-type: none"> ● Exceptional: if the conditions of auction expressly provide that goods will be sold without reserve.
<ul style="list-style-type: none"> ● Goods are sold only if the minimum price set before the sale begins is reached or exceeded. The auctioneer is the agent of the seller and runs the sale on the seller's behalf. The minimum price is the lowest price at which the seller is willing to sell the goods. A reserve price of R10 000, for example, would mean that a buyer's bid to purchase the goods for R10 000 would be acceptable, but that a bid for R9 500 would not be acceptable. 	<ul style="list-style-type: none"> ● The terms of sale expressly (orally or in writing) state that the goods are sold without a reserve price. Actually, there is a reserve price here: the goods must be sold for at least one cent (the smallest unit of currency) because if they are sold for nothing the contract would not be a sale — it would be a gift (donation).
<ul style="list-style-type: none"> ● Offerors: interested potential buyers attending the auction, or their duly authorised representatives. These buyers or their agents bid for the goods (make offers to buy them). 	<ul style="list-style-type: none"> ● Offeror: the auctioneer.
<ul style="list-style-type: none"> ● Offeree: the auctioneer. 	<ul style="list-style-type: none"> ● Offeree: the buyer or agent who makes the highest bid.
<ul style="list-style-type: none"> ● Offer to buy. An interested buyer or his or her agent makes a bid. The auctioneer controls whether or not a contract comes into existence. The auctioneer may accept or reject bids, and need not choose the highest bid. The auctioneer decides 	<ul style="list-style-type: none"> ● Offer to sell to the highest bidder. The auctioneer offers to sell the goods to the highest bidder. So, the person who controls whether or not a contract comes into existence is the buyer (or his agent) with the highest bid. If that buyer or his agent accepts the auc-

AUCTION SUBJECT TO RESERVATION	AUCTIONS NOT SUBJECT TO RESERVATION
whether to accept any bid. If he does decide to accept a bid, a contract is formed.	tioneer's offer to sell the goods a contract is formed.

3 THE MOMENT AND PLACE OF FORMATION OF A CONTRACT (TEXTBOOK PAR 4.3)

A contract arises at the moment when and at the place where consensus is reached. It is important to establish the exact **moment** of consensus for deciding whether the offer can still be revoked (withdrawn), whether the offer has expired because of the lapse of time, and whether and when the contractual duties become enforceable. Contractual duties are enforceable if one contracting party has the right to compel the other contracting party to perform the latter's contractual duties.

It is important to establish the exact **place** of consensus for deciding which court has jurisdiction to hear a claim concerning the contract.

Example: If the contract was formed in Pretoria, the Pretoria magistrate's court will in principle have jurisdiction regarding the contract, because the contract was concluded in the district over which that magistrate's court exercises authority.

3.1 PARTIES IN EACH OTHER'S PRESENCE (HERE AND NOW)	3.2 PARTIES NOT IN EACH OTHER'S PRESENCE (NOT HERE, OR NOT NOW)
<p>General Rule — Ascertainment theory Anna offers and Bert accepts. Anna learns of this acceptance when and where Bert accepts. Then and there the contract comes into existence. Bert's acceptance comes to Anna's notice. The justification for the ascertainment theory is that if Anna is to become contractually liable, it is fair that she should first know whether or not her offer has been accepted by Bert.</p> <p>The ascertainment theory also applies to contracts concluded by telephone. Because of the immediacy of communication between the telephoning parties they are treated as though they were in each other's presence even though they may be speaking to each other by satellite link-up from opposite ends of the earth, thousands of kilometres apart.</p>	<p>Exception — Dispatch theory (expedition theory; posting rule) Communication by post or telegraph is not as direct as communication by telephone.</p> <p>For example, Anna in Cape Town posts an offer to Bert in Johannesburg. This offer is governed by the dispatch theory (also called the 'expedition theory' or the 'posting rule'). The dispatch theory is an exception to the ascertainment theory. In terms of the dispatch theory, the contract is formed when and where the letter of acceptance is posted. In the above example, the contract is concluded in Johannesburg when Bert posts Bert's letter accepting Anna's offer.</p>

The dispatch theory applies if the offeror in the letter containing the offer does not specify any particular method of acceptance. By his or her own conduct in sending the offer by post, the offeror in these circumstances is taken to have silently indicated to the offeree that the offeree may validly accept the posted offer by post. The posting rule is not absolute or compulsory: for example, if Anna wished to make sure of knowing about Bert's acceptance, she would still be free to state, in her letter containing the offer, that if Bert wishes to accept her offer, his letter of acceptance must come to her attention. This term of Anna's offer would exclude the application of the posting rule (the dispatch or expedition theory) and would apply the general rule (the ascertainment theory) to Anna's offer.

The application of the dispatch theory can also be excluded if the posted acceptance is cancelled by a method of communication quicker than post. So, if Bert has posted his letter accepting Anna's offer and then changes his mind and decides to reject her offer, he is free to communicate his rejection to Anna — for example, by telephoning her.

The function of the dispatch theory is to protect the offeree.

In the case of contracts concluded by electronic media other than the telephone the particular circumstances of the case will determine which theory will apply, and will consequently also determine the time and place of conclusion of the contract. As indicated above, the offeror may regulate the matter in his or her offer.



ACTIVITY

Susan in Klerksdorp makes a written offer by letter to Gerald in Kenton-on-Sea to purchase his beach cottage for R200 000. Gerald accepts her offer by letter but, while the letter is in transit, he receives an offer of R250 000 from Olga. What should Gerald do if he wishes to accept Olga's offer? Explain with reference to the theories and the way they work.



FEEDBACK

The dispatch theory (expedition theory or posting rule) would apply to Gerald's acceptance of Susan's offer and the contract between them comes into being as soon as Gerald posts the letter in which he accepts the offer. However, the law permits Gerald to undo the consequences of the dispatch theory (the forming of the contract between Gerald and Susan) by refusing her offer by way of communication medium that is faster than the post. Thus, if Gerald can succeed in reaching Susan telephonically, or by e-mail and can tell her that he no longer accepts the offer, the ascertainment theory will apply.

4 CONSENSUS AND DEFECTS IN WILL (TEXTBOOK PAR 4.4)

We shall now discuss the circumstances that affect consensus and therefore the existence of the contract; they are mistake and improperly obtained consensus. If mistake complies with certain requirements consensus is absent and no valid contract comes into existence. If consensus is obtained by improper means, a valid contract does come into existence, but it is voidable.

4.1 Absence of consensus — mistake

Mistake is a misunderstanding by one or more of the parties to a contract about some aspect of the proposed contract — for example a fact that is material to the contract or a legal rule.

If mistake meets the requirements discussed below there is no consensus and no contract arises. If mistake does not meet these requirements, a valid contract arises, even though consensus is absent, and the party who is labouring under mistake is held to his or her intention as expressed, which, because of mistake, is not his or her true intention. This means that, although consensus is set as a requirement for a valid contract, there is an exception to the rule, namely where consensus is absent and there is mistake regarding aspects which the law regards as irrelevant.

Example: John takes a white appliance to the cashier, thinking that it is a washing machine, while the cashier knows it is in fact a tumble dryer. If the requirements for mistake are not met, John is kept to his intention as expressed (here, by his action, which says 'I offer to buy this washing machine').

4.1.1 Requirements to be met before mistake will render a contract void

It is important to note that a contracting party who seeks to rely on the ground of mistake to deny the existence of a contract will have to prove all the requirements discussed below, and will have to prove that a contract was therefore not formed. In other words, these requirements are cumulative. The requirements are that the mistake must relate to a fact, legal rule or legal principle, that the fact, legal rule or legal principle to which the mistake relates must be material, and that the mistake must be reasonable.

We shall now look at the requirements that mistake must meet for consensus to be absent and for the contract to be void.

4.1.1.1 *The mistake must relate to a fact, legal rule or principle*

Thinking that the appliance we used as an example in paragraph 4.1 is a washing machine, when it is actually a tumble dryer, will be an example of a mistake of fact.

4.1.1.2 *The mistake must concern a material fact, legal rule or principle*

'Material' means essential, important, relevant (to the contract). 'Legally material' means essential, important or relevant in the eyes of the law, for legal purposes.

MISTAKES REGARDED AS LEGALLY MATERIAL	MISTAKES NOT REGARDED AS LEGALLY MATERIAL
<p>(a) Mistake about the identity of the other party: for example, because of a misdialled telephone number, an employer offers a job to someone other than the offeree actually intended.</p>	<p>(a) Mistake about a person's attributes: for example, his or her full names or his or her character.</p>
<p>(b) Mistake about the content of the intended contract:</p> <ul style="list-style-type: none"> — Time of performance: one contracting party thinks that the contract relates to the renting of a bus on 31 May, while the other party thinks it relates to the renting of a bus on 30 June. — Place of performance: one party thinks that the goods will be delivered in Bloemfontein, but the other party thinks that the goods will be delivered in Port Elizabeth. — Method of performance: one party thinks that the goods must be delivered by courier, but the other party thinks that they must be delivered by train. — Performance to be rendered: one party thinks it is leasing a bus, but the other party thinks it is leasing out a truck. 	<p>(b) Mistake about the attributes of the object of performance: Here there is no mistake about the performance to be rendered (identity of the subject matter of the contract), but about its attributes — for example whether the bus is green or red, has plastic or cloth seats, et cetera, unless the attribute has been made a condition of the contract. (See ch 8.)</p>
<p>(c) Mistake about the interpretation the law attaches to the proposed contract: for example the nature of the contract. One party thinks he or she is acquiring ownership by paying a monthly amount, but the law interprets the contract as a lease contract.</p>	<p>(c) Mistake in the motive (the underlying reason) for concluding the contract: In the textbook example of the person who, mistakenly thinking that his or her bicycle has been stolen, buys a new bicycle from a dealer, the underlying reason for the purchase of the new bicycle is the mistaken belief that the old bicycle has been stolen and should be replaced. The mistake in motive can be caused by the misrepresentation of the other party, or his or her agent, and the contract that results will then be voidable. Suppose that my bicycle has not been stolen, but that the dealer, desperate for business and aware that my</p>

MISTAKES REGARDED AS LEGALLY MATERIAL	MISTAKES NOT REGARDED AS LEGALLY MATERIAL
	bicycle has not been stolen, lies to me that it has been stolen. Because of this lie, I buy a new bicycle. I later find out that my old bicycle has not been stolen. My reason for buying the new bicycle was the dealer's lie (his or her intentional misrepresentation) that my bicycle had been stolen.

In the example of the appliance there is no mistake about the identity of the other party (John wishes to buy from the shopkeeper), or the time and place of performance (the appliance will change hands there and then) or the performance (it is a contract of sale).

There is mistake about the object of performance (a washing machine and not a tumble dryer).

If this mistake is also reasonable, the requirements for absence of consensus are met. Mistakes that are not legally material in this example are the following: the name of the shopkeeper (attributes of the other party), whether the appliance is white or cream (attributes of the object), or John's mistaken belief that his old washing machine has been stolen (mistake in motive).

4.1.1.3 *The mistake in fact or law must be reasonable*

If the mistake is unreasonable the contract does exist, even though consensus is absent.

The reasonableness of the mistake is tested objectively. The standard of reasonableness is the reasonable person. One asks whether the reasonable person in this situation would make the same mistake if he or she were to judge the particular circumstances.

The reasonable person has no fault. He or she is innocent of intention and negligence. So, if a particular contracting party wishes to rely on mistake to deny a contract, then that contracting party must have no fault in respect of the mistake. The contracting party will fail in the task of showing this lack of fault if he or she was negligent or careless, or paid insufficient attention to the proposed contract. As RH Christie (*The Law of Contract in South Africa* 3 ed (1996) 354) puts it:

However material the mistake, the mistaken party will not be able to escape from a contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, ie failure to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention...



ACTIVITY

When, in the light of the quotation above, do you think mistake in relation to the scenario of the tumble dryer would be unreasonable?



FEEDBACK

The mistake would be unreasonable if, for instance, John had not examined the appliance; carelessly failed to notice that, say, there were no pipes leading out of the appliance; or had not read the instruction brochure. If, however, the party who is relying on mistake, can prove that his or her unreasonable mistake can be laid at the door of the other contracting party and blamed on that party, the position is different. In that case, he or she can rely on the guilty party's misrepresentation, which is one of the improper ways of achieving consensus.

4.2 The improper obtaining of consensus

Here we study methods of achieving consensus frowned on, or disapproved of, by the law. Why does the law come to the assistance of victims of these improper methods?

- (1) **Misrepresentation:** Contracting parties must not make untrue statements when negotiating contracts. The legal system regards untrue statements as unlawful.
- (2) **Duress:** Contracting parties must not intimidate other contracting parties to bring about contracts. The legal system regards intimidation as unlawful.
- (3) **Undue influence:** Contracting parties must not abuse their power of influence to persuade other parties to conclude contracts. The legal system regards undue influence as unlawful.

4.2.1 Misrepresentation

We shall analyse the requirements of all forms of misrepresentation and discuss each rule separately.

To misrepresent something to a person in order to persuade him or her to conclude a contract, could possibly amount to a delict if it meets the requirements for a delict. This means that you should bear in mind the principles of the law of delict (as discussed in study unit 2) when you are studying this part.

Misrepresentation can be described as follows:

- A false (untrue)
- statement about an existing fact or state of affairs (including qualities or characteristics)

- made by one party to the proposed contract (Abel)
- to the other party to the proposed contract (Bob)
- before or at the time when the contract is entered into
- with the aim of inducing (influencing) Bob to enter into the contract
- with the result that, on the basis of this statement, the party to whom the statement is made (Bob), concludes a contract which would not have been concluded otherwise, or would still have been concluded, but subject to materially different terms.

Let us now look at some aspects of misrepresentation:

Regarding **requirement (a)** in the textbook: misrepresentation may be made by expressed statement (words written or spoken) or in silence by conduct (eg, one party shows the other party a sample of the goods).

Misrepresentation can also take place by concealment of the facts (by nondisclosure). One party stays quiet when he or she has a duty to speak. Whether or not a duty to speak does exist will depend on the particular circumstances of a case. The textbook gives the example of an applicant for an insurance policy. This applicant has a duty to make certain relevant statements and may not simply remain silent — otherwise his or her failure to mention the relevant facts will constitute misrepresentation. Another example comes from the law of sale. In *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 (0) the hotel's septic tank was on the municipality of Smithfield's land. The municipality stated that the tank could no longer remain on the municipality's land. The defendant company sold the hotel to Cloete, but did not inform Cloete that the tank would have to be moved. Cloete claimed damages for the defendant company's fraudulent concealment of this important fact that the municipality no longer wanted the tank to be located on municipal land. The court awarded those damages: the defendant company had a duty to tell Cloete about this important change.

Giving an honest opinion or estimate does not constitute misrepresentation, but giving a dishonest or reckless opinion may.

Regarding **requirement (b)** in the textbook: the person who makes the misrepresentation must be:

- the contracting party himself or herself,
- the contracting party's employee acting within the course and scope of the employee's employment,
- the contracting party's authorised agent,
- the contracting party's co-conspirator

Regarding the co-conspirator: when we say that someone is in 'collusion' with a contracting party we mean that the two parties conspire with each other, and agree to commit a crime. The crime here would be the crime of fraud (intentional misrepresentation), which is discussed in paragraph 4.4.2.1.1(a) of the textbook.

Example of collusion: James and Ken hate Lionel and agree to deceive him. James owns a mare. They agree to tell Lionel that the mare is in foal. In this way, they aim to persuade Lionel to buy the mare. The mare is in fact not in foal. A few days later Ken sees Lionel in town and tells him that James's mare is in foal. Without checking the facts independently himself, Lionel, very keen to buy this mare because he understands her to be in foal, telephones James and offers to buy the mare. James

sells the mare to Lionel, who later finds out that the mare is not in foal. The person who made the misrepresentation was Ken. But since Ken had conspired (colluded) with James to deceive Lionel, Ken's intentional misrepresentation to Lionel may be laid at James's door, and so Lionel may rescind the contract.

The feature common to the employee, the agent, and the co-conspirator is that they are all linked to the contracting party who is responsible for the misrepresentation. Contrast this set of circumstances with a different set of circumstances in which a misrepresentation is made to one of the contracting parties by an outsider — a person who has no contractual link with the contracting parties.

Example: Nick owns a farm. Paul wishes to buy a farm in the district. One day he hears Oscar saying that the water supply on Nick's farm is good. Without further making his own enquiries Paul offers to buy the farm from Nick. Nick does not know that Paul (mistakenly) thinks that the water supply on the farm is good. Nothing is said about this. After the sale, Paul finds out that the water supply on the farm is in fact poor. Oscar is neither an employee, nor an agent, nor a co-conspirator of Nick's. Here Paul will not be able to have the contract of sale that he concluded with Nick set aside on the grounds of misrepresentation. Nick made no misrepresentation to Paul.

The misrepresentation must have occurred during the negotiations before the contract was concluded. It must have occurred while the parties were discussing the terms on which each of them would be willing to do a deal with the other. So this requirement would not be met if the misrepresentation had been made long, long before the negotiations started. Nor would this requirement be met if the misrepresentation was made after the contract had already been formed.

Regarding **requirement (c)** in the textbook, the misrepresentation must be unlawful.

An innocent misrepresentation is made without any fault on the part of the person who makes it. You may wonder why the victim of an innocent misrepresentation should be granted a contractual remedy when the person making the misrepresentation was innocent, blameless. The answer is that the fault or innocence of the person making the misrepresentation is an aspect different from the lawfulness or unlawfulness of the conduct (here, the making of a misrepresentation). In general it is unlawful to mislead another person, whether deliberately, negligently or even innocently.

Regarding **requirement (d)** in the textbook, there must be a chain of causation between the misrepresentation and the contract as it stands. Before this requirement can be met we must be able to say that if the misrepresentation had not occurred, the contract would not have been concluded on those particular terms. The victim of the misrepresentation would either not have entered into the contract at all, or else, even if he would have entered into the contract, he would have done so on terms different from those to which he or she finally agreed.

Example: During a drought, the soil on a particular farm looks dry and unsuitable for growing mealies. An interested buyer approaches the farmer and casually asks whether the soil is suitable for mealies. The farmer, anxious to sell the farm, which has never been fertile, tells the potential buyer that the soil is very fertile and has produced good crops. If the buyer then buys the farm because of this misrepresentation by the farmer we can say that if the farmer had not made the misrepresentation the potential buyer would not have bought the farm.

Regarding the possibility that, but for the misrepresentation, the deceived party would not have concluded the contract on the same terms we can vary the facts of the present example as follows:

Suppose the interested buyer has already decided to offer the farmer R1 million for the farm. After being assured that the soil is fertile the interested buyer decides to offer R2 million for the farm. The farmer accepts this offer, and a contract results. Here, if the farmer had not made the misrepresentation about the fertility of the soil, the interested buyer would have offered R1 million, instead of the R2 million that he or she did offer.

The importance of the element of causation in requirement (d) in the textbook is also apparent from the last sentence in paragraph 4.4.2.1(d): a contracting party who knew that the statement was false before he or she entered into the contract is not entitled to argue that the misrepresentation led him or her to conclude the contract.

Example: Let us change the facts of the sale of the arid farm yet again. Suppose the farm is very dry during the drought, and the interested buyer who approaches the farmer has himself or herself attended agricultural college and so recognises an arid farm when he or she sees one. The farmer tells him or her that the soil is very fertile and that it produced good crops in the past. The prospective buyer tells the farmer that he or she will consider whether or not to buy the farm. After the farmer's misrepresentation, but before the conclusion of the contract, the prospective buyer finds out that the soil of this farm has always been poor and has never produced good crops. Yet for his or her own particular reasons the buyer decides to go ahead and purchase the farm. After buying the farm he or she is not entitled to complain that the farmer's misrepresentation concerning the fertility of the soil led him or her to buy the farm.

As regards **requirement (e)** in the textbook: a contract is voidable even though the misrepresentation occurred innocently without any form of intention or negligence, in other words, innocently. If, however, there was any intent or negligence present, it gives rise to the possibility that the misrepresentation could meet the requirements for delictual liability, in which case the additional delictual remedy for damages is available to the injured party.

4.2.1.1 The effect of misrepresentation

As regards the consequences of misrepresentation, consensus does exist between the parties. Yet the consensus is defective in nature. So the contract itself is **voidable** at the instance of the deceived party because the legal order protects contracting parties against unlawful conduct such as misrepresentation. The contract may be set aside by the person who is the victim of the misrepresentation, but not by the person who made the misrepresentation. The deceived party may elect or choose whether to rescind or to uphold the contract. If the deceived party decides to uphold the contract it means that as far as he or she is concerned, the contract still stands: the deceived party still regards himself or herself as bound by his or her contractual duties, and regards himself or herself as entitled to expect the misrepresenter to perform his or her contractual duties.

But if the deceived party decides to rescind the contract, he or she demands that the parties be returned to the position before the contract was formed. This choice between upholding the contract and rescinding the contract is a golden thread running through all three kinds of misrepresentation (intentional misrepresentation, negligent

misrepresentation, and innocent misrepresentation). The remedy of rescission is a contractual remedy based on the wrongfulness of the deed. Whether or not there may also be a further delictual remedy open to the deceived party depends on whether the misrepresentation was done intentionally or negligently.

Let us now study the three forms of misrepresentation.

(a) Intentional misrepresentation

Intentional misrepresentation is also called 'fraudulent misrepresentation'.

A special aspect of intentional misrepresentation: The statement was made by a misrepresenter who knew that the statement was untrue or who did not honestly believe in the truth of the statement; or who recklessly made the statement, indifferent to whether it was true or false. For examples of misrepresentations that were made knowingly see Kerr (*Principles of the Law of Contract* (1989)) 197–198:

[W]here a seller represented that the land enclosed by a wall was his property when he knew that part of it belonged to the municipality; where a seller represented that a farm was 997 morgen [a unit of land measurement, 100 by 100 yards, or 0,856 hectares] in extent whereas it was in fact only 766 morgen in extent and the seller knew that the figure 997 was incorrect; where a seller represented that a farm of 1 160 acres was an excellent sugar farm when he knew that approximately one-half of the whole farm was, because of the soil, stones and rocks and the steepness of the hillsides, unsuitable for sugarcane growing and that only 200 acres were registered quota land; where a seller represented that he intended to remedy defects in a car before delivering it when in fact he had no such intention.

As an example of a statement made recklessly, Kerr, on pages 334 and 335, mentions *Marais v Edlman* 1934 CPD 212. A seller said the following to a buyer about a borehole: 'I have pumped that water for three years ... day and night if it was necessary, and it never failed, and you can do the same.' When the buyer asked how deep the borehole was the seller replied that it was 125 feet deep. Actually, it was only 104 feet deep. Also the water supply was limited: no water had been pumped from the borehole for the past fourteen years. Furthermore, the borehole was obstructed. The court held that the seller's statement that water had been pumped from the borehole for a period of three years, that the supply had never failed, and that the plaintiff could be assured of getting some water, was a statement that was so reckless as to be fraudulent. The seller had not mentioned that although water had been pumped from the borehole for a period of three years, no water had been pumped from the borehole for the past fourteen years. Consequently, no one could safely predict what the water supply would be like at the time of the negotiations.

Remedies

Contractual remedies: The victim has the choice whether to uphold or to rescind the contract.

AND

Delictual remedies: Damages, whether the victim chooses to uphold or to rescind the contract. These damages for misrepresentation are delictual: the victim must be placed, as far as money can achieve this, in the position in which he or she would have

been if the delict (intentional misrepresentation) had never happened. The law looks back at the position of the victim before the misrepresentation took place. These delictual damages are awarded for the victim's negative interest. Note that these damages are not contractual damages — they are delictual damages. The contractual basis of damages does not apply to misrepresentation, but to breach of contract. (If the contract has been breached the damages are awarded for the victim's positive interest. As far as money can achieve this, the victim of the breach of contract must be placed in the position in which he or she would have been if the contract had been properly performed.)

(b) Negligent misrepresentation

A special aspect of negligent misrepresentation is that the representation was made negligently, with the aim of inducing the contract. Here the misrepresenter does not intend to make a false statement; otherwise he or she would be guilty of making an intentional (fraudulent) misrepresentation. But the misrepresenter does intend to induce the contract.

Here the misrepresenter honestly believes that the statement is true: the belief is genuine, sincere and actually held. But the misrepresenter fails to take the steps that a reasonable person would have taken in the particular circumstances to satisfy himself or herself that the statement is true.

Remedies

Contractual remedies: The victim has the choice to uphold or to rescind the contract.

AND

Delictual remedies: These damages hold good, whether the victim chooses to uphold or to rescind the contract. These damages for misrepresentation are claimed in terms of the law of delict: the victim must be placed, as far as money can achieve this, in the financial position in which he or she would have been if the delict (negligent misrepresentation) had never happened.

(c) Innocent misrepresentation

A special aspect of innocent misrepresentation: The statement is made without intention or negligence on the misrepresenter's part. It is, however, made with the intent to induce the contract.

Regarding the example in paragraph 4.4.2.1(c) in the textbook about the sale of the painting, note that the contract is between Fikile (the seller) and Willem (the buyer). Also note that nothing is said about whether the art expert is Fikile's (the seller's) employee or agent. The art expert is not Fikile's co-conspirator: there is no agreement to commit a crime.

Remedies

Contractual remedy only: The victim has the choice either to uphold or to rescind the contract.

BUT NOT

Delictual remedies: Because the misrepresenting party's misstatements were not intentional or negligent, the requirement of fault has not been met and there can be no question of delictual damages.



ACTIVITY

Indicate which type of misrepresentation features in each situation:

- (1) In Erna's family there is a porcelain jug which her family has always believed came to South Africa from Batavia in 1680. When Erna urgently needed funds for an expensive operation, she wished to sell the jug and told prospective buyers that it was over 300 years old. She did not, however, consult any antique dealer to ascertain whether the jug was actually as old as she maintained. It turned out to be no more than 100 years old, since her grandfather brought it back with him from Ceylon in 1902.
- (2) Because he is keen to sell his car, Bradley declares that it is a 1998 model, in spite of the fact that he knows it is a 1995 model.



FEEDBACK

- (1) Erna is guilty of negligent misrepresentation. A reasonable person would have had the age and origin of an antique confirmed before making any claims about it.
- (2) Bradley is guilty of intentional misrepresentation. He is under no illusion as to the true facts, yet makes untrue statements. Intentional misrepresentation could constitute the crime of fraud if requirements for this crime are met, and this could also, as in this case, be the delict of intentional misrepresentation, if the requirements for delict are satisfied.

4.2.2 Duress

Duress (intimidation) can be described as follows:

- Duress is an unlawful threat of harm or injury
- made by one contracting party or someone acting for that party
- and which causes the other contracting party to conclude the contract

Effect of duress

Because the coerced party does consent to the contract there is consensus and a contract results. However, because the consensus is obtained in an improper way, the contract is **voidable**. The party that is coerced to agree to the contract may also claim damages on the grounds of delict, because duress constitutes a delict.

Requirements

- (a) There must be actual violence or damage or a threat of violence or damage directed at the life, limb or freedom of the threatened person, or his or her property, which causes a reasonable fear that the threat may be executed.
- (b) If duress is caused by a threat, the threat must be imminent (about to occur) or inevitable (so that the victim cannot escape).
- (c) The duress must be unlawful — that means that the party exercising it uses it to obtain some benefit he or she would otherwise not have obtained.
- (d) A party to the contract or someone acting on his or her behalf, must be responsible for the duress.
- (e) The duress must cause the victim to conclude the contract. This requirement will not be met if the threat has been removed and the victim freely enters into the contract anyway, or if the victim ratifies the contract (confirms its validity with retrospective effect). This requirement is also met if the party placed under duress concludes the contract on particular terms he or she may not have accepted but for the duress.

An example of duress that convinces a person to conclude a contract on particular terms is the following: a car owner is willing to sell his or her car for R10 000. But a prospective buyer comes up to the seller and holding a pistol to the latter's head, says, 'If you do not sell me this car for R1 000, I will kill you.' The seller hands over the car and accepts the R1 000. We may deduce that, but for the buyer's threat to the seller's life, the seller would have been willing to sell the car for R10 000, rather than for the R1 000 that the seller actually agreed to receive as the price.

Remedies

Contractual remedies: The victim of the duress has the choice whether to uphold or to rescind the contract.

AND

Delictual remedies: These entail damages, whether the victim chooses to uphold the contract or to rescind the contract. These damages are delictual in nature: the victim must be placed, as far as money can achieve this, in the position in which he or she would have been if the delict (duress) had never happened. The law looks back at the position of the victim before the duress took place.

4.2.3 Undue influence

Undue influence may be described as follows:

- Improper, unfair conduct
- by one contracting party (Abel)
- that persuades the other contracting party (Bob) to conclude the contract
- against the latter's (Bob's) free will

Undue influence differs from duress in that there does not need to be a threat.

Special relationship

Undue influence occurs mainly where there is a special relationship between the parties, such as between a doctor and a patient, an attorney and a client, and a guardian and a minor. But the existence of such a special relationship does not necessarily mean that undue influence has occurred. The existence of this special relationship does not even lead the courts to presume the presence of undue influence. Nor is a special relationship an essential requirement for undue influence.

In *Patel v Grobbelaar* 1974 (1) SA 532 (A), the plaintiff owned a farm. For the balance owing on money apparently lent by the first defendant to the plaintiff the plaintiff registered a second mortgage over the farm. The plaintiff firmly believed that the first defendant had supernatural powers. As a result of this belief, the plaintiff successfully claimed that he had been unduly influenced by the first defendant into passing the second mortgage over the farm. The bond was set aside.

If there is a special relationship, one has to look for a possible abuse of that relationship. Has the 'stronger' or more intelligent party taken advantage of the other's ignorance, naivety, frailty, stupidity, or mental dependence? The abuse of this relationship weakens the independent will of the victim and allows it to be easily influenced by the other party. But for the abuse of the relationship, the contracting party would not have concluded the contract.

Effect of undue influence

The victim of undue influence has exercised his or her will and has entered into a contract. Consensus exists, but it is defective in nature. The contract is therefore **voidable**.

Requirements for undue influence

- (a) The contracting party who allegedly exercised the undue influence must have acquired an influence over the victim.
- (b) The contracting party must have used his or her influence to weaken the victim's ability to resist, so that the victim's independent will became easily influenced.
- (c) The influence must have been used unscrupulously, with a lack of regard for the morality or rightness of the conduct, to persuade the victim to agree to a transaction which the victim would not have concluded of his or her own normal free will, and which was to the victim's disadvantage. The example given in the textbook of the elderly farmer who gives his doctor a farm is based on the most important court case regarding undue influence (*Preller v Jordaan* 1956 (1) SA 483 (A)).

Remedies

Contractual remedies: The victim of the duress has the choice of whether to uphold or rescind the contract.

In South African law there has been no recognition of a delictual remedy of damages for undue influence to date.

AN ADDITIONAL EXPLANATION OF THE DIFFERENCES BETWEEN VOID AND VOIDABLE CONTRACTS

VOID CONTRACTS	VOIDABLE CONTRACTS
<ul style="list-style-type: none"> No contract exists at all. It may help to indicate this fact by putting inverted commas around the word 'contract'. 	<ul style="list-style-type: none"> The contract does exist. But because consent to the conclusion of the contract was improperly obtained the consensus is flawed, defective.
<ul style="list-style-type: none"> The contract does not give either party contractual rights. The contract is a nullity. Neither party has the right to enforce the contract. 	<ul style="list-style-type: none"> The party whose consent was improperly obtained may set aside the contract if his or her consent was obtained by misrepresentation, duress, or undue influence.
<ul style="list-style-type: none"> The contract cannot be ratified. It cannot be given validity afterwards, that is with retrospective effect. 	<ul style="list-style-type: none"> Until that party does set the contract aside the contract remains current, with concomitant rights and duties on either side.
<ul style="list-style-type: none"> Both contracting parties may disregard the contract, as though the contract was never concluded. 	<ul style="list-style-type: none"> The party whose consent was improperly obtained has a choice whether her or she will uphold the contract or whether he or she will rescind the contract. If a party upholds the contract he or she recognises the continued existence of the contract; but if he or she rescinds the contract he or she does away with the contract. So the party that exercises the choice must choose one of these courses — he or she may not choose both courses. The alternatives are mutually exclusive: that is, if one is chosen, the other one is automatically lost and can afterwards never be chosen again.

STUDY UNIT 5

CAPACITY TO PERFORM JURISTIC ACTS

When you have completed this study unit, you should be able to judge whether contracting parties have the capacity to contract or not. You should also know what protection the law gives to persons with limited capacity to perform juristic acts and what the consequences are if contracts are concluded by persons without the required capacity.

Prescribed study material: textbook chapter 5

1 INTRODUCTION (TEXTBOOK PAR 5.1)

Although all legal subjects (see ch 2, par 2.2 again) have legal capacity, not all legal subjects have capacity to perform juristic acts.

The differences between legal capacity and capacity to act have been summarised in the following diagram:

LEGAL CAPACITY	CAPACITY TO ACT
<ul style="list-style-type: none">• The capacity to acquire and bear rights and duties	<ul style="list-style-type: none">• The capacity to<ul style="list-style-type: none">— perform juristic acts— participate in legal transactions, and— conclude valid contracts.
<ul style="list-style-type: none">• All legal subjects have this capacity, namely:<ul style="list-style-type: none">— natural persons (human beings)— juristic persons (eg companies)	<ul style="list-style-type: none">• Only natural persons have this capacity. Natural persons must act for juristic persons.
	<ul style="list-style-type: none">• Exceptions:<ul style="list-style-type: none">— natural persons with no capacity to act— natural persons with limited capacity to actReason for exclusion or limitation of capacity to act: the law's view of whether the person can<ul style="list-style-type: none">— form and declare his or her will— judge the rights and duties (the consequences) that ensue from his or her acts
	<ul style="list-style-type: none">• Example of a person with full capacity to act on his or her own: an unmarried major

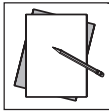
2 AGE

(TEXTBOOK PAR 5.2)

The age of a natural person affects his or her capacity to perform juristic acts.

2.1 Majority

A person attains full capacity to perform juristic acts when he or she reaches majority, that is when he or she turns 18 (comes of age), or by marrying (before turning 18).



ACTIVITY

Discuss the capacity or otherwise to perform juristic acts, of the following persons:

- (1) Karin, sixteen years old and unmarried
- (2) Adam, 17 years old, divorced
- (3) Jenny, aged 25, unmarried
- (4) David, aged 26, certified mentally deficient
- (5) Ajax Gardening Services, CC, a close corporation



FEEDBACK

- (1) Because Karin is under 18, she probably does not have the capacity to perform juristic acts (but see par 5.2.2.3(b) in the textbook).
- (2) Adam attained capacity to perform juristic acts when he married, a status which he does not lose with divorce (par 5.2.1 in the textbook).
- (3) Jenny has capacity to perform juristic acts because she is older than 21 and there are no factors indicating that the position could be altered (par 5.2.1 in the textbook).
- (4) Whether David has capacity to perform a juristic act will depend on whether he was mentally deficient at the time of the act (par 5.4 in the textbook).
- (5) Although it has juristic capacity, a legal entity does not have capacity to perform juristic acts. Natural persons must act on behalf of legal entities (par 5.1 in the textbook).

2.2 Minority

A minor is any natural person who has not yet turned 18 and is still unmarried.

Minors are under the guardianship of their parents or certain other guardians.

Who is the guardian of a minor child? In the case of children born in wedlock, both the parents have guardianship, which they usually exercise independently. In certain circumstances, the law requires both parents' permission. These circumstances are explained in the textbook (par 5.2.2.1 in the textbook).

On the death of one of the parents, the other parent becomes the minor child's only guardian. If both parents should die, the court appoints a guardian for the minor.

In the case of a child born out of wedlock (a child whose parents are not married) the mother is usually the child's guardian. The Children's Act provides for parental rights of unmarried fathers in certain circumstances.

If the court grants the parents of a minor child an order of divorce, the court may make any order that it considers to be in the interests of the children, including an order regarding the guardianship of the minor children. Such an order could, for example, award the guardianship exclusively to one of the parents.

2.2.1 The minor under the age of seven years

Absence of capacity to act: The child under the age of seven has no capacity to act whatsoever. He or she may not contract — even on terms that are to his or her advantage.

A guardian must act for the minor. The guardian needs to have capacity to act. The guardian sees to the minor's maintenance (including food, clothing, shelter, education, health requirements). The guardian may create rights (eg, the purchase of a book for the minor) and duties (eg, paying for the book) in connection with the separate estate of the minor.

If a minor suffers loss because of a contract that was concluded on his or her behalf by the guardian the minor may apply to the High Court for restitution (ie an order cancelling the contract and for the return of everything that has been performed in terms of the contract). The minor must apply within one year of reaching majority. The minor must also prove that the loss was already inherent when the contract was concluded.

2.2.2 The minor over the age of seven years

Limited capacity to act: The minor over the age of seven has restricted capacity to act.

General rule

A guardian must **assist** the minor. How? In one of the following ways:

— by being present and giving assent when the contract is concluded

OR

— by giving permission before the conclusion of the contract

OR

— by ratifying the contract (giving approval retrospectively — that is, after the conclusion of the contract)



ACTIVITY

How could a valid contract of purchase have come about if Vicky, aged nine, who only has limited capacity to act, walks into a café on her own and buys herself an ice-cream?



FEEDBACK

Vicky's parents either gave her their permission in advance to conclude the contract or they ratified (approved retrospectively) the transaction.

Exceptions to the general rule that the guardian must assist minors over the age of seven years:

Common-law exception

If a minor over the age of seven concludes a contract without the assistance of his or her guardian and in terms of the contract the minor acquires only rights and no duties the contract will be valid. Examples of such contracts are the following: donations and contracts that release the minor from debt, and contracts in which the other party has a duty to perform, but the minor does not.

Statutory exceptions

A minor may act without the assistance of his or her guardian in certain instances. These instances are the following:

The Children's Act includes a number of provisions regarding the health care of children. In this regard the Act now makes more detailed provision for children at a lower age to consent to medical treatment or operations. The Act includes provisions regarding HIV tests on children and makes provision for children's rights regarding access to information on various health issues. The Act also provides for children over the age of twelve years to have access to contraceptives in certain circumstances.

If the minor is older than 16: making deposits in a building society or bank, withdrawing from the deposits and ceding or burdening the investment (the Mutual Banks Act 124 of 1993 and the Banks Act 94 of 1990).

Example: The minor may deposit money in a savings account at a bank. This money earns interest. If the minor wishes to buy something and he or she needs the money he or she may withdraw the money from the savings account, but he or she must still obtain the guardian's consent to buy the article.

If the minor is 18 years old: taking out an insurance policy on his or her own life and paying the premiums as if he or she were major (the Long-term Insurance Act 52 of 1998).

2.2.3 Special situations

(a) Contracts for which the guardian's assistance is insufficient

Sometimes the consent of the High Court or some other specified person in addition to the guardian is needed.

Example: The alienation (eg, sale, long lease [more than ten years]) or mortgaging of a minor's **immovable** property.

IF THE VALUE IS UNDER R100 000	IF THE VALUE IS OVER R100 000
<ul style="list-style-type: none">● Consent required of:<ul style="list-style-type: none">— guardian and— Master of the High Court	<ul style="list-style-type: none">● Consent required of:<ul style="list-style-type: none">— guardian and— judge of the High Court

(b) Tacit emancipation

The guardian allows the minor to lead an economically separate life.

The guardian's consent may be **express**:

Example: 'I give you permission to run your own bicycle-repair shop.'

Or the guardian's consent may be **tacit (silent)**:

Example: A minor, John, passes matric and wishes to move away from home and find a job. The parents do not forbid him to do so. His mother helps him to choose the flat and makes curtains for the windows. His father hires a truck to help him move his furniture from his room at home into the flat. Fortunately, he finds a job. His parents come to his flat-warming party.

Here there is no inattentiveness or indifference on the parents' part; indeed, there is cooperation.

Test for tacit emancipation:

— economic independence

AND

— the guardian's allowing the minor some contractual freedom

Signs (not conclusive proof) of tacit emancipation:

— the minor's separate dwelling

AND

— the minor's carrying on his or her own business

THE EMANCIPATED MINOR'S CAPACITY TO ACT

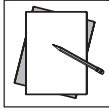
FULL CAPACITY TO ACT	LIMITED CAPACITY TO ACT
<ul style="list-style-type: none"> ● Question of fact. 	<ul style="list-style-type: none"> ● Question of fact.
<ul style="list-style-type: none"> ● Minor has full capacity to act, except to <ul style="list-style-type: none"> — conclude a marriage — alienate or encumber immovable property 	<ul style="list-style-type: none"> ● Minor has capacity to act, but only in respect of <ul style="list-style-type: none"> — minor's business (eg, photographer) — minor's occupation (eg, student)
<ul style="list-style-type: none"> ● Guardian consents to the minor's complete freedom to decide about and to pursue his or her lifestyle and way of earning a living. 	<ul style="list-style-type: none"> ● Guardian retains power relating to other areas of the minor's life.

(c) *Contracts which the minor concludes without the necessary assistance in spite of a limited capacity to act*

What are the consequences if a minor concludes a contract without the assistance of his or her guardian? We distinguish the following circumstances:

SITUATION	CONSEQUENCE
<ul style="list-style-type: none"> ● The contract is ratified <ul style="list-style-type: none"> — by guardian during minority — by 'minor' once he/she attains majority 	<ul style="list-style-type: none"> — contract is valid — both parties are liable to perform — contract is valid — both parties are liable to perform
<ul style="list-style-type: none"> ● The contract is not ratified <ul style="list-style-type: none"> — The other party has not yet rendered performance — The other party has rendered performance 	<ul style="list-style-type: none"> — contract is invalid, but contract has certain consequences. Minor may claim performance without rendering own performance, but needs assistance of guardian to claim performance. This assistance is ratification by implication. Contract thus valid. Minor consequently liable to perform. Other party now has contractual defence that he or she need not perform until minor has performed or offered to perform. — no contractual liability. Liability on unjustified enrichment: Luxury items: Minor liable for what remains in his or her possession when claim is instituted. Necessities: Guardian is liable.

Note that the defence mentioned above, which one party has when his or her performance is claimed — that he or she need not perform until the other party has performed, or offered to perform — is available in all contracts, and not in the case of 'contracts' with minors only.



ACTIVITY

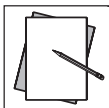
Which consent requirements, if any, apply in the following cases?

- (1) Rachel, aged six, for a contract for computer lessons
- (2) Amanda, 17, for the sale of a farm to the value of R800 000, which she inherited from her grandfather
- (3) John, 14, for a contract for the purchase of school books
- (4) Francine, 16, for permission to have her leg set after a motor car accident



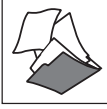
FEEDBACK

- (1) Because Rachel is under the age of seven, her guardian must conclude the contract on her behalf.
- (2) For the disposal of immovable property to the value of more than R100 000, Amanda has to be assisted by her parents and, in addition, she has to obtain the consent of a judge or judges of a High Court.
- (3) Only one of John's parents need assist him. In this case, either of the parents may act.
- (4) Since Francine is older than 14, she herself may consent to the medical treatment.



ACTIVITY

Margaret is 15 years of age and concludes an agreement in terms of which she undertakes to take care of the children of Ismail and Rashida at R15 per hour. Her guardian refuses to ratify the agreement. After Margaret has received her remuneration from Ismail, she fails to appear for the task of minding the children. Instead she goes to Century City Mall and buys the school books she needs, perfume for her best friend and make-up for herself. Has a contract been concluded? What are Ismail's remedies?



FEEDBACK

Because Margaret has only limited capacity to act and the contract has not been ratified by her parents, the contract is unenforceable. All that Ismail can do is reclaim his own performance on the ground of unjustified enrichment. Ismail can claim the amount for the school books from Margaret's parents because these are necessities. The perfume and cosmetics are luxuries and Ismail would be entitled to the value of the part which Margaret had not given away or consumed by the time the claim was made.

(d) *Fraudulent misrepresentation of majority*

A minor who concludes a contract without the assistance of his or her guardian is *normally* not liable on the contract, as explained above. However, there is one exception: when a minor fraudulently poses as a major and another party concludes a contract with the minor on the strength of the misrepresentation the minor is bound to the contract as if he or she had indeed been a major.

Example: In reply to a question about her age, Lize, a minor lies and says she is 18. If her fraudulent behaviour leads Motu, a third party, to contract with her, Lize is bound by the contract as though she were a major with the capacity to act.

Note that 'fraudulent' misrepresentation is required, and not innocent misrepresentation.

3 MARRIAGE

(TEXTBOOK PAR 5.3)

Our interest in matrimonial law lies mainly in the effect that it has on the acting capacity of natural persons. In the case of some types of marriage, the capacity to act of certain of the spouses is or was limited.

Here we must distinguish the following three possibilities:

3.1 Agreements concluded prior to 1 December 1993 in cases where the husband had marital power

Although marital power has been abolished completely, some contracts may still exist in which the husband's consent was required, but not obtained.

Such contracts may be ratified by the husband, but if they are not, such contracts are unenforceable, and any claim must be based on unjustified enrichment.

3.2 Agreements concluded by a spouse married *in community of property*

The general rule is that each spouse may act independently of the other. In certain cases a spouse may not take any action at all relating to the joint estate and in other cases the consent of the other spouse is required in order to conclude contracts affecting the joint estate.

Note that the husband and the wife are subjected to the same limitations — in other words, the wife needs the consent of the husband in circumstances in which consent is required, and the husband also needs the consent of the wife in circumstances in which consent is required.

The two exceptions to the general rule are the purchase of domestic necessities in cases where the parties live apart but are not divorced, and where the Matrimonial Property Act 88 of 1984 prescribes certain forms of consent by spouses for certain transactions.



ACTIVITY

What type of consent is required in the following situations if spouses are married in community of property?

- (1) You are the cashier at the bank where Nthabiseng wishes to withdraw money from an account which was opened in the name of her husband, Godfrey.
- (2) You are the estate agent who found a buyer for the house belonging to Nthabiseng and Godfrey.
- (3) Godfrey gives the couple's minibus as a gift to Frans.



FEEDBACK

- (1) You will have to insist on written consent from Godfrey. It is also possible that the transaction can be ratified.
- (2) Either Godfrey or Nthabiseng can conclude the contract of sale but the other one has to give written consent to the transaction, and the consent must be given in advance. The transaction may not be ratified later.
- (3) It is sufficient for Nthabiseng to know about the donation and not to object. If, however, she only learns about the donation later, she may consent then. Of course she could also raise objections to the donation, which would mean that Godfrey did not have the capacity to enter into the transaction. If Frans was unaware that Godfrey did not have the necessary consent, and could not reasonably have been aware of this, the transaction may be regarded as having been concluded with the necessary consent.

What is the consequence if a spouse acts without the other spouse's consent when it is required? Unless the other party knows, or should know, that consent has not been given, the contract is treated as if consent has indeed been given.

And if a spouse unreasonably refuses consent? The other spouse may apply to the High Court to dispense with the requirement of consent.

And if a spouse acts in such a way that the estate is placed at risk (eg, by squandering the assets)? The other spouse can apply to the High Court for a suspension of that spouse's powers regarding the joint estate.

3.3 Agreements concluded by a spouse married out of community of property

Remember that if parties to a marriage do not make alternative arrangements, they are automatically married in community of property. Also note that if parties to a marriage do conclude an antenuptial contract the accrual system will automatically apply to their marriage unless they exclude it expressly. Also remember that an antenuptial contract *will be binding on the spouses* even if it is not notarially executed and registered in a Deeds Office, but that it will not be binding on others.

You should also know what responsibility each spouse has regarding household necessities.

4 MENTAL DEFICIENCY

(TEXTBOOK PAR 5.4)

Here we refer to persons whose mental condition prevents them from understanding the consequences of their conduct. They have no capacity to conclude contracts. If they do conclude 'contracts', those 'contracts' are **void**. No contractual rights or duties result.

Everyone is presumed normal until proved mentally deficient. The High Court has jurisdiction to declare someone mentally deficient and to appoint a curator to look after that person's estate and affairs.

Mental deficiency is a question of fact. The test is the following: Was the person normal or mentally deficient when he or she entered into the contract? Mental illness may come and go: while it is absent, the person (even if declared mentally deficient by the court) has what is called a 'lucid moment'. During such a lucid interval he or she may acquire contractual rights and duties.

Once a person has been certified as mentally deficient the burden of proof shifts. In such a case it must be proved that the person indeed had capacity to act, in spite of the certification, whereas in the case of a person not certified it must be proved that the person had no capacity to act, in spite of the fact that he or she has not been certified as mentally deficient.

5 THE INFLUENCE OF ALCOHOL OR DRUGS (TEXTBOOK PAR 5.5)

Question of fact: When he or she concluded the contract, was the person so drunk or so drugged that he or she

— could not understand the nature and consequences of his or her actions

OR

— could understand the nature and consequences of his or her actions but could not control those actions

If the answer is 'yes', the contract is **void**. The contracting party had no capacity to act. No contractual rights and duties result.

If the answer is 'no', the contract is completely valid. The contracting party, though influenced by alcohol or drugs, could still form his or her independent will.

Burden of proof: Everyone is presumed able to act till proved unable to do so. Therefore the contracting party who alleges that alcohol or drugs prevented a contracting party from forming an independent will must prove this allegation.

6 PRODIGALS (TEXTBOOK PAR 5.6)

A prodigal is a person who habitually spends his or her money recklessly and extravagantly. Yet this person still has capacity to act until the High Court actually declares him or her a prodigal and appoints a curator to look after the prodigal's estate and affairs. After that, the prodigal has **limited** capacity to act.

General rule: The court forbids the prodigal to perform juristic acts without the curator's consent. The prodigal must be **assisted** by the curator.

Exception: The prodigal may conclude contracts by which he or she acquires rights, but not duties, without the curator's assistance.

Return to full capacity: If the court sets aside the order declaring the person a prodigal, the former prodigal will regain complete capacity to act.

7 INSOLVENCY (TEXTBOOK PAR 5.7)

Some provisions of the Insolvency Act 24 of 1936 affect the insolvent's capacity to act after sequestration of his or her estate. The insolvent may not dispose of any of the assets that were in his or her estate at the time of sequestration.

As far as assets acquired by the insolvent after sequestration are concerned: the insolvent may dispose of these only if they are excluded from the insolvent estate by statute or at common law.

The insolvent still has capacity to enter into contracts, provided that they do not dispose of the assets of the estate. So, for example, the insolvent may agree to repair someone else's car for remuneration.



ACTIVITY

You have to enter into a contract with the following persons. How would you ensure that the contracts are valid as regards capacity to perform juristic acts?

- (1) Alison, aged six
- (2) John, 14 years of age
- (3) Richard, married in community of property
- (4) Georgia, who is mentally deficient
- (5) Billy, who is addicted to cocaine
- (6) Lucy, who has been declared a prodigal
- (7) Dale, an unrehabilitated insolvent
- (8) Jane, married out of community of property



FEEDBACK

- (1) Alison has no contractual capacity. Any contracts she, herself, concludes, will be void. Contracts with Alison will only be valid if her guardian enters into them on her behalf.
- (2) John has limited capacity to act. Here you need to distinguish between two types of contracts: contracts in terms of which John has rights only and is not required to perform himself will be valid and enforceable even if John concludes them without assistance. Other contracts will be unenforceable if John himself concludes them and will only be enforceable if John's guardian assists him to conclude them.
- (3) Richard has full capacity to perform juristic acts. In certain circumstances, however, the law places specific limitations on this juristic capacity. You should therefore look at the type of transaction. Richard will have no capacity to bind the joint estate for domestic necessities if he and his wife have separate households and he is to blame for their having separate households. Furthermore, he will need his wife's consent in some or other written form in order to enter into certain transactions relating to their joint estate.
- (4) Of course, someone who is mentally deficient, could experience moments of clarity. To ensure that a contract with Georgia is valid, you must make sure that she grasps the nature and consequences of her action when you conclude the contract with her and that, consequently, she has capacity to act. The position is similar where she has been certified mentally deficient by the court. The only difference is that, if there should be a dispute about the validity or otherwise of the contract, and she has not been certified to be mentally deficient by the court, Georgia will have to show that she did not have capacity to perform juristic acts when she entered into the contract. If, however, she has already been certified mentally deficient, you will have to prove that she nonetheless

had the capacity to act when she concluded the contract. If you are uncertain whether Georgia actually understands the nature and consequences of her action when you wish to enter into the contract with her and a curator has been appointed for her, the curator may act on her behalf.

- (5) Billy has full capacity to act. Nonetheless, at the time of contracting with him, you will need to make sure that he realises the nature and consequences of his actions and can control them. If Billy is unable to comply with these requirements because of a befuddled mind, he has no capacity to perform juristic acts and the contract will be void. If Billy meets the requirements, he has capacity to act even though he is under the influence of the drug. In other words, it is a difference in degree.
- (6) Since Lucy has already been declared a prodigal, she has limited capacity to act. This requires you to distinguish between two types of contracts: contracts in terms of which Lucy obtains rights only and is not required to produce any counter-performance, will be valid even if she concludes them without assistance. Other contracts will be valid if her curator assists her, and voidable if he or she does not assist her.
- (7) Because rehabilitation is a process which begins after sequestration, you may assume that Dale's estate has been sequestered. Once again, you will need to distinguish between different types of transactions, in this case three types of transactions. With reference to the disposal of assets in the insolvent estate, Dale has no capacity to act, and his curator has to act on his behalf. In relation to other contracts which could have a detrimental effect on Dale's estate, he has limited capacity to act and needs the assistance of his curator. Without the necessary assistance, the contract is unenforceable. As far as other contracts are concerned, namely those that do not affect his estate, Dale has capacity to act.
- (8) Jane has full capacity to perform juristic acts and you may freely conclude a contract with her. It would, however, be advisable to make sure that Jane is really married out of community of property.

STUDY UNIT 6

THE AGREEMENT MUST BE POSSIBLE

Performance must be physically possible and contracts that are concluded must be permitted by the legal system if they are to be valid. You should be able to determine which contracts and performances are illegal, unenforceable or impossible, what the consequences of such contracts are and what remedies are available.

Prescribed study material: textbook chapter 6

Most of this chapter in the textbook is reasonably straightforward and must be studied.

2 LEGAL POSSIBILITY

A performance is legally impossible if it is in conflict with common law or statutory law. In terms of common law a contract may be legally impossible if it cannot be legally executed, or is contrary to good morals or public policy. Contracts could be contrary to public policy because they abuse or thwart the course of justice, amount to offences or delicts, jeopardise the safety of the state, restrict people's freedom to participate in legal or commercial intercourse or constitute gambling.

(d) *Agreements restraining a person's freedom to participate in legal intercourse*
(TEXTBOOK PAR 6.2.1.3(d))



ACTIVITY

Indicate whether the following agreements would be valid or not and give reasons for your answers.

- (1) While their father is still alive, two brothers, Onego and Aresha, agree that, on the death of their father, Onego will forego his inheritance so that it will pass to Aresha.
- (2) Onego and his father agree that the father will leave nothing to Onego, so that Aresha will inherit everything.



FEEDBACK

- (1) This agreement is invalid. During the father's lifetime, Onego may not agree to forego his inheritance one day. It is contrary to public interest to allow persons to restrict their right to participate in legal intercourse if the restriction infringes too much on the person's freedom.
- (2) This agreement is also invalid. The law does not permit the father to restrict his freedom to decide who will receive legacies and bequests.

As an exception, the law does allow engaged couples to include a clause in their antenuptial contract to the effect that the one spouse makes the other spouse his or her heir. This exception enables the first-dying spouse to provide for the maintenance of the surviving spouse.

- (e) *Agreements restraining a person's freedom to participate in trade*
(TEXTBOOK PAR 6.2.1.3(e))

Not all contracts that restrict a person's right to take part in trade will be contrary to public policy and result in these contracts being null and void. You need to be able to determine when such contracts actually are invalid.

See the example in the textbook concerning the sale of a hairdressing business. Other **examples** may be the following:

- (1) Dr Ali and Dr Ben are veterinary surgeons practising in partnership. Ali, who is afraid that if Ben were to leave their partnership, nearly all the customers would take their sick animals to Ben, prevails on Ben to promise that if he were to leave the partnership, he would not be entitled to practise as a veterinary surgeon in a specified geographical area (Cape Town) for a specified time (one year).
- (2) Cas Ltd, anxious to protect its trade secrets and keep its important clients, requires its employee, Don, to agree to a restraint that will prevent him from doing the same work in a specified geographical area (South Africa) for a specified time (ten years).

Here the principle of freedom to work and trade conflicts with the principle that contracting parties must uphold their contracts. The second principle (contractual commitment) is generally preferred, and contracts in restraint of trade are regarded to be **valid and enforceable**.

For this reason Ben and Don would have to prove that the restraints on their freedom to practise and work are contrary to public policy. The court may take into consideration whether the restraint is reasonable to both parties at the time of its taking effect (ie when Dr Ben and Don leave their present places of work and Dr Ali and Cas Ltd seek to enforce the restraints). Ben's restraint is limited: he could start practising immediately somewhere else (even near Cape Town) or, if he wishes to continue practising in Cape Town, he need wait only a year. Thus, because the

restraint on his freedom to trade is reasonable and consequently not contrary to public policy, it is valid. However, Don's restraint is too long and extensive, and therefore unreasonable. The restraint against Don is therefore contrary to public policy and it is unenforceable.

It is at the discretion of the courts to alter the period or the area of the constraint in order to bring the contract within the sphere of reasonableness.

(f) *Gambling contracts*
(TEXTBOOK PAR 6.2.1.3(f))

The purpose of a contract is that the parties thereto perform in terms of the contract. Problems arise when a party does not perform as he or she has undertaken to do. So, in the case of a valid contract, the law provides certain remedies for breach of the contract and a party wishing to enforce his or her rights in terms of the contract can institute action in a court of law against the party in breach. (See chapters 10 and 11 on breach of contract and the remedies the law provides.) In some cases the law recognises the contract as valid, but does not afford the usual remedies for breach of contract. It is then that we speak of valid, but unenforceable contracts. Typical of these are common-law wagering contracts.

(Revision: You have now been introduced to invalid contracts, to valid but voidable contracts, to valid and enforceable contracts and also to valid but unenforceable contracts. Can you give examples of each of these contracts? It might be worth attempting to do this without paging back and simply going back to each chapter in your imagination.)

In terms of common law, wagering contracts are valid but unenforceable. In contrast to this, gambling contracts were illegal and therefore invalid.

In addition to the common law there are now two statutes regulating gambling contracts, which serve as examples of how public policy changes with time. Both these Acts make provision for certain gambling debts to be enforceable. Gambling contracts and debts not covered by the Acts are still regulated by the common law.

2.3 Consequences of illegality

(TEXTBOOK PAR 6.2.3)

Most unlawful contracts are **void**.

Contracts that conflict with statutory prohibitions are void if the law determines that such contracts will be invalid. If the law does not determine what the result of such contracts will be, we need to try and ascertain what the legislator's intention was, namely, whether the contract is invalid or valid, and furthermore whether the parties are committing a crime (eg a credit agreement that is not committed to writing — see chapter 16 par 16.2.1.1).

No contractual rights or duties can arise from a void contract. In the case of unlawful contracts, this fact is expressed by the rule that no action arises from a shameful cause (*ex turpi causa non oritur actio*).

What is more, the parties may not turn to the law on unjustified enrichment in order to obtain performance. This is established by the *par delictum* rule, which has the effect that the person that has possession of the performance is in a stronger position.

However in the past the courts sometimes relaxed the par delictum rule when it was in the public interest to do so. This can, for example, be the case where the contract is in contravention of a statutory prohibition and the contravention is of a technical nature.

Contracts connected to the unlawful 'contract' may also be void if they have the following consequences:

- if the connected contract indirectly enforces the unlawful 'contract'

OR

- if not, if it is close enough to the unlawful 'contract' to help, or promote or encourage it



ACTIVITY

Tom pays Gwelo R50 000 to burn down the Pretoria city hall. However, Gwelo has second thoughts and refuses to perform as agreed. Is Tom legally entitled to enforce Gwelo's performance or, alternatively, to demand the sum of R50 000 back?



FEEDBACK

The contract between Tom and Gwelo is invalid. It conflicts with common law because it would amount to the committing of a crime. In terms of the ex turpi causa rule, Tom cannot demand Gwelo's performance, but neither can he demand his own performance of R50 000 back because, where parties are equally guilty of an illicit contract, the par delictum rule applies and it stipulates that, in a situation like this, the person in possession is in the stronger position. It is improbable that, under these conditions, the par delictum rule will be relaxed by a court.

3 PHYSICAL POSSIBILITY AND CERTAINTY

(TEXTBOOK PAR 6.3)

3.1 Objective possibility to perform

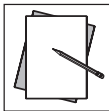
(TEXTBOOK PAR 6.3.1)

You should note that impossibility of performance is relevant in three different stages of a contract, namely at the conclusion thereof (which applies here), where breach of

contract in the form of prevention of performance occurs (see par 10.6 in the textbook), or where rights are terminated by the supervening impossibility of performance (see par 12.8 in the textbook). You should make a point of distinguishing between these three situations.

It is only objective physical impossibility of performance that prevents the conclusion of a contract. If the performance is not objectively or absolutely impossible, the contract is valid. In chapter 8 we look at terms that may be included in contracts, such as a condition, that could be relevant here.

Note the difference between divisibility in character and divisibility in law. A performance which is divisible in character will not necessarily be divisible in law: that would depend on the subject matter itself and the intention of the parties. A set of chairs is an example of a performance which is physically divisible, but which may not be divisible in a particular contract.



ACTIVITY

Lerato sells a dining room suite consisting of a table, six chairs and a sideboard to Estelle. The suite actually belongs to Alex, Lerato's previous husband. Answer the following questions and give reasons for each of your answers:

- (1) Is the contract between Lerato and Estelle valid in the light of the fact that Lerato does not own the suite?
- (2) Suppose that, on returning home, Lerato finds that her father had burned the suite to spite Alex, even before Lerato concluded the contract with Estelle. What is the status of the contract now?
- (3) Suppose that Lerato arrives home after her father has only thrown three of the chairs onto the fire. Will the contract between Lerato and Estelle be valid or not?



FEEDBACK

- (1) The contract is not invalid because it is simply subjectively impossible to perform. Objectively it is still physically possible to perform because Lerato can always buy the suite from Alex in order to meet her contractual obligations. Failing that, she commits breach of contract.
- (2) In this case performance would be objectively physically impossible and the contract would be invalid.
- (3) The dining room suite is physically divisible into the sideboard, the table and the chairs. This does not, however, necessarily mean that the law views the dining room suite as a divisible performance. If the law does view the performance as divisible, a valid contract comes into being, and the performance is that part of the divisible performance which is still

possible. If the law does not view the performance as divisible, the contract is null and void. So, it is necessary to determine whether the dining room suite is a legally divisible performance. One way of determining whether the performance is indivisible is to see how the price is expressed. If the price of the suite is R5 500, the performance might not be divisible but if the price is set at R1 000 for the table, R1 500 for the sideboard and R500 for each of the chairs, the performance might possibly be viewed as divisible.

3.2 Determined and ascertainable performance

(TEXTBOOK PAR 6.3.2)

The requirement that performance must be physically possible includes the requirement that the performance must be determined or ascertainable. If performance is neither determined nor ascertainable, the contract is invalid due to vagueness because then performance is impossible. A contract will be valid if the performance is determined or ascertainable: either of the two would suffice.

In view of the last statement, you should note the difference between a facultative obligation (which is a specific type of determined performance) and the alternative obligation (which is a type of ascertainable performance). In the case of the facultative obligation, if the determined performance becomes impossible, the debtor is relieved of his or her obligation. In the case of the alternative obligation, the obligation to deliver continues if one of the alternatives becomes impossible, provided the other alternatives still exist. This means that the personal right is not terminated. The performance that arises from a generic obligation, and the personal right to it also continues because it is accepted that the genus continues to exist. (The termination of contracts is discussed in ch 12.)

STUDY UNIT 7

FORMALITIES

The aim of this study unit is to introduce you to the formality requirements for contracts so that you can ensure that in this respect, the contracts which you encounter will, in fact, be valid. You should also know what the consequences of non-compliance with the formality requirements are.

Prescribed study material: textbook chapter 7

1 INTRODUCTION (TEXTBOOK PAR 7.1)

The word 'formalities' refers to the external, visible form that the agreement must take in order to be a valid, enforceable contract. Formalities may be required either by law or by the parties themselves. Usually these formalities entail that the parties must write down their agreement and sign it.

If no formalities are expressly required by the law or the parties, the contract arises once the parties with capacity to act reach consensus on rights and obligations that are physically and legally possible.

2 THE GENERAL RULE: NO FORMALITIES REQUIRED (TEXTBOOK PAR 7.2)

As a general rule, no formalities are needed for the formation of a valid contract.

Contracts may be entered into

- through spoken words (orally)
- through written words
- through conduct (tacitly) only

Most contracts are formed orally or by conduct. Think of shopping at a supermarket. In the example concerning a lease given in the textbook, Anna's formal letter or informal note would contain an offer in written words, and her oral offer to Bob may be, 'Hello, I'd like to hire this house from you for R2 000 a month.'

Bob could accept in a formal letter or an informal note (written words), or, if he is a man of few words, he could merely nod his head or hand over the house keys to Anna (conduct).

Some aspects of the contract may be agreed to orally or through conduct, and some may be agreed to in writing. For example, Bob could hand Anna a note about who is to be responsible for maintaining which parts of the house and garden, and then hand Anna the keys to the house.

3 CONTRACTS WHERE FORMALITIES ARE REQUIRED (TEXTBOOK PAR 7.3)

There are some exceptions to the general rule that no formalities are required. They are discussed below.

3.1 Formalities required by law

TYPE OF CONTRACT	PRESCRIBED BY	FORMALITIES REQUIRED	CONSEQUENCE OF NON-COMPLIANCE
Alienation of land (sale, exchange, donation)	Alienation of Land Act 68 of 1981	<ul style="list-style-type: none"> — Contained in a contract of alienation — Signed by parties or their agents — Agents must have written instructions 	Invalid, but deemed to be valid if both parties have fully performed and transfer to the new owner has occurred.
Suretyship	General Law Amendment Act 50 of 1956	<ul style="list-style-type: none"> — In writing — Signed by or on behalf of surety (surety may orally authorise agent to sign on his or her behalf) 	Invalid
Contracts of donation in which performance is due in future	General Law Amendment Act 50 of 1956	<ul style="list-style-type: none"> — Contained in a written document — Signed by donor or someone on his or her behalf — Donor must give written authorisation to the person to sign on his or her behalf — Authority must be granted in presence of two witnesses. 	Invalid
Antenuptial contracts	Deeds Registries Act 47 of 1937	<ul style="list-style-type: none"> — Must be registered 	Invalid against third parties; nevertheless valid between parties to contract

An antenuptial contract concluded in the Republic must be notarially attested and then registered in a deeds registry within three months of its conclusion. A specially qualified attorney called a 'notary' attests the contract (certifies the written contract as valid). An antenuptial contract concluded outside the Republic must be notarially attested and registered in a deeds registry within six months of its execution. For both types, the registration period may be extended by the court.

In the case of the National Credit Act 34 of 2005, a contract that does not comply with the prescribed formalities is not invalid, but the parties involved commit an offence.

3.2 Formalities required by the parties

Two situations need to be clearly distinguished here:

First, the parties may have a clear common intention that the contract between them should be in writing in order to be valid. The parties require writing as a formality. Thus, before the contract is written down, there will be no binding contract.

Secondly, it could be the parties' intention that the oral contract be valid but that they are putting it in writing to facilitate proof of the oral contract.

Which of these two possibilities actually reflects the intention of the parties, needs to be ascertained from the contract itself.

3.3 Writing and signing electronic transactions

The ECT Act 25 of 2002 provides that electronic messages are recognised as writing if the document or information is accessible for future use, except in respect of transactions concluded under the following Acts:

- the Wills Act 7 of 1953, including the execution, retention and presentation of a will or codicil as defined in this Act
- the Alienation of Land Act 68 of 1981, including an agreement for alienation of immovable property and an agreement for a long-term lease of immovable property in excess of 20 years, both as provided for in this Act
- the Bills of Exchange Act 34 of 1964, including the execution of a bill of exchange as defined in this Act
- the Stamp Duties Act 77 of 1968

The ECT Act also provides that in certain circumstances an electronic signature can legally fulfil the same function as a traditional handwritten signature.



ACTIVITY

Which of the following contracts are valid with regard to the formalities required by law for these types of contracts?

- (1) Suretha purchases a puppy orally from Vusi. They arrange that she will collect the puppy in two weeks time, when it is mature enough.
- (2) Naidoo undertakes verbally to stand surety for his son, Vally's study loan.
- (3) Dirk and Gerda enter into a written antenuptial contract but the attorney neglects to register the contract at a deeds registry.
- (4) Moodley pays cash for his father's house when his father moves into a retirement village. Although their agreement is verbal, they succeed in having the transfer of the property registered in Moodley's name at the deeds office.
- (5) John, who has relocated to England, leases his house to Jack via the Internet for a period of 21 years.



FEEDBACK

- (1) The deed of sale between Suretha and Vusi is valid. There are no requirements for the sale of movable things.
- (2) This contract is invalid. Contracts of surety are only valid if they comply with the required formalities. It must be in writing and signed by Naidoo or someone on his behalf. Naidoo cannot be held liable for his son's student loan on the basis of this agreement.
- (3) The antenuptial contract is mutually valid between Dirk and Gerda, but is not binding on third parties.
- (4) Since the property has been transferred to Moodley, and both parties have fully performed their obligations, the contract is regarded as valid, even though it does not meet the validity requirements for the alienation of immovable property.
- (5) The lease agreement between John and Jack is invalid. In terms of the ECT Act, an agreement in terms of which an immovable property is leased in excess of 20 years cannot be concluded electronically.

STUDY UNIT 8

TERMS OF THE CONTRACT

The aim of this study unit is to introduce you to a variety of terms that can be included in contracts, and to the advantages and consequences of including these in contracts. This will enable you to utilise these terms to your advantage in the contracts which you might possibly encounter.

1 INTRODUCTION: THE TERM (TEXTBOOK PAR 8.1)

It is important to distinguish between terms of a contract and statements made about the contract that do not form part of it.

TERMS OF A CONTRACT	STATEMENTS MADE ABOUT THE CONTRACT
<ul style="list-style-type: none">● A 'term' is a provision in a contract. It obliges a party to act in a specific manner, or not to perform a specific act. It may also qualify (limit) the contractual obligations. It has legal consequences that may be claimed and enforced.	<ul style="list-style-type: none">● If the statements about the contract are misrepresentations, they do have legal consequences (see ch 4 of the textbook). But if the statements are merely sales talk intended to attract customers (ie the item or product is presented as the best, the cheapest, the prettiest, the funniest, etc), they do not have legal consequences.
<ul style="list-style-type: none">● A term defines the parties' rights and duties, or specifies when or in what circumstances obligations will become enforceable or will terminate. <p>Ten kinds of terms are discussed in this chapter.</p>	

There are three ways in which a term can be made part of a contract. They are:

(a) *Express terms*

These are terms that are expressed in words, whether written or spoken.

These words must express the essential terms that are relevant to and characterise a particular kind of contract (eg, a contract of sale: an agreement to buy and sell). In the case of specific contracts, the essential terms must be expressed.

(b) *Tacit terms*

These are terms that are not expressed, but that are based on the parties' true intention, or on the intention that the law regards them as having.

Such a term is imported into a contract if it is reasonable, and also necessary for achieving the contract's desired commercial effect.

The test for such an importation is the following: If someone else were to ask the parties, 'What will happen in such and such a case?', and both contracting parties' answers would state the same position as that set out in the alleged tacit term, the term would be imported into the contract.

Example: A breeder of stud cattle acquires a stud bull for breeding purposes. In due course it becomes evident that the bull is infertile. The purchaser brings a claim against the purchaser on the grounds of the bull's infertility. The court finds that, although there is no explicit term in the agreement that the bull must be fertile, there is a tacit term to this effect.

(c) *Implied terms*

These are terms not expressed in words but incorporated into the contract by operation of the law or trade usage.

Implied terms that are included in contracts of a specific type are known as the naturalia of that type of contract.

Note that trade usages can be incorporated into a contract as either tacit or implied terms. If both parties are aware of a particular trade usage, the term will be part of the contract as a tacit term. If one party cannot prove that the other was aware of the trade usage, the trade usage could become an implicit term of the contract. For a trade usage to be implied as a term of a contract it will need to meet the requirements of being long established, reasonable, uniformly observed and certain. If these requirements are met, it can be presumed that the other party knew of its existence and intended to be bound by it. (See also ch 1 par 1.2.2.)

**2 ESSENTIALIA, NATURALIA AND INCIDENTALIA
(TEXTBOOK PAR 8.2)**

ESSENTIALIA	NATURALIA	INCIDENTALIA
<ul style="list-style-type: none">• These essential terms identify the contract as being a certain kind of contract, for example a contract of sale.	<ul style="list-style-type: none">• These terms are automatically incorporated into the contract as implied terms, unless they are excluded by the parties to the particular contract.	<ul style="list-style-type: none">• These special terms serve two purposes: they allow the parties to add special provisions not provided for by the essentialia and naturalia, and they allow parties to exclude or alter the naturalia to suit their particular needs.
<ul style="list-style-type: none">• Once the essentialia identify the particular contract as being a certain type of contract, then the relevant naturalia for that contract follow unless excluded by the parties.	<ul style="list-style-type: none">• Example: In the contract of sale, the warranty against latent defects forms part of the contract unless expressly excluded.	<ul style="list-style-type: none">• Example: a clause that specifies that the goods bought must be delivered by train.

3 THE CONDITION (TEXTBOOK PAR 8.3)

Example: Andy and Bill agree that Andy will buy Bill's car on condition that Andy's sister gives him the money to pay the price.

This is a valid condition. It makes the purchase dependent on the occurrence of a future event (the sister's giving Andy the money to pay the price). The event is specified. The event is also uncertain (no one knows whether Andy's sister will actually give him the money), and the event has yet to happen (it is a future event).

3.1 The suspensive condition

The above example of the purchase of a car contains a suspensive condition. The contract of sale already exists: neither Andy nor Bill may withdraw from it. But the **operation** of the contract is suspended until the condition has been fulfilled: until then, neither Andy nor Bill may enforce the contract by demanding delivery or payment. If Andy's sister gives Andy the money to pay the price, the condition will be fulfilled. Then the contract will become enforceable.

However if Andy's sister does not give him the money to pay the price, the condition will stay unfulfilled. The contract will not become enforceable and will come to an end.

3.2 The resolutive condition

Example: Carl agrees to let his house to David indefinitely, on a monthly basis, on condition that if Carl ever needs it, it must be returned to Carl.

The contract of lease of the house exists, is effective, and can be enforced. If Carl refuses to allow David to take occupation, David may demand occupation or the payment of damages. It is uncertain whether Carl will ever need the house. If he does, the lease will end. David will then have to vacate the house so that Carl can take occupation again: in this way David will return what he has received under the contract. But since David, as a tenant, has a continuous duty to pay the rent, he will not get back the rent that he has paid for the completed period.



ACTIVITY

Dudu agrees with his wife, Tandeka, that he will buy her a car on condition that she obtains a BCom degree. Is this condition suspensive or resolutive?



FEEDBACK

This is a suspensive condition. There is a valid contract but its operation is suspended until Tandeka obtains the BCom degree.

4 THE TIME CLAUSE (TEXTBOOK PAR 8.4)

The difference between a condition and a time clause is the following: a condition depends on an **uncertain** future event. A time clause depends on a **certain** future event, although the specific time at which the event will occur may be uncertain. (For example: although it is certain that Bertie will die, it is uncertain precisely when this will happen.)

Example: On 1 June 2006, Eddy sells his car to Fatima. They agree that delivery and payment will occur on 1 August 2006.

This time clause specifies the time when delivery of the respective performances must take place. According to general human experience it is certain that 1 August 2006 will arrive.

4.1 The suspensive time clause

The above sale of the car contains a suspensive time clause. The contract exists: neither Eddy nor Fatima may withdraw from it. But Eddy must deliver the car to Fatima, and Fatima must pay for it, only when the time (1 Aug 2006) comes. Until then, both parties' obligations are unenforceable.

4.2 The resolutive time clause

Example: Gugu agrees to work for Hassan for three years.

This is a contract of employment subject to a resolutive time clause. The contract exists: each party may render and claim performance. At the end of three years, the resolutive time clause brings the contract to an end.



ACTIVITY

Tucker and Abraham agree that Tucker will pay Abraham R1 000 a month until the day that either Tucker or Abraham dies.
What type of term is this?



FEEDBACK

This is a resolutive time clause. The contract comes into being immediately and Tucker is liable to Abraham. The contract comes to an end with the death of either of the two, that is, it is terminated when a certain future event takes place.

5 THE SUPPOSITION (TEXTBOOK PAR 8.5)

Example: Jabu agrees to buy Kanu's farm provided that the soil contains gold ore, because (as Jabu tells Kanu) he wishes to mine for gold on the farm. Kanu does not know whether the soil is gold-bearing, and so the parties agree that Jabu will buy the farm provided that the soil contains gold ore.

The sale is based on a supposition. The sale depends on whether or not the farm soil contains gold ore now. Either it does or it does not. If the farm does have gold ore, the supposition is fulfilled, and the contract's obligations arise and are effective and enforceable.

But if the farm soil does not contain gold ore, the supposition is not fulfilled, and the contract's obligations are not created.

Jabu has included, as a term of the contract, his reason (motive) for buying the farm: he wishes to mine gold on it. If the farm is unsuitable for his gold-mining plans, he is not bound to buy it.

If Jabu had not subjected the operation of the contract to the supposition that the soil is gold-bearing, his motive for buying the farm (mining gold) would not have relieved him of his obligations in terms of the contract and he would have been bound. By making use of the supposition Jabu can ensure that he will incur no liabilities unless there is indeed gold ore on the farm.



ACTIVITY

Themba is a collector of old books. He is missing one volume of a valuable set. At an exhibition he comes across one volume but is unsure whether it is the volume he needs to complete his set. How would you advise him to formulate the contract of sale?



FEEDBACK

Themba should make the purchase subject to the supposition that this is the specific volume that is still missing from his set. In this way he can insert his reason for purchasing the book in the contract. If it turns out that the specific book is not the volume he is seeking, the supposition has not been met and the contract of sale does not come into being. If it **is** the volume concerned, the obligations stemming from the contract arise.

6 THE WARRANTY

(TEXTBOOK PAR 8.6)

Example: Lindi lets a dwelling house to Kara. The terms include a warranty that the fence will be high enough so that no dogs will be able to leap over the fence. (Kara is a breeder of champion cats.)

As the landlord, Lindi has a duty to deliver and maintain the house in a condition fit for the purpose of the lease. Kara has a right to the performance of this common-law duty. But by giving the warranty, Lindi has assumed an **additional** obligation, namely to make sure that the fence is high enough so that no dogs will leap over the fence. She must take appropriate steps to make the fence high enough. If dogs do leap over the fence, Lindi is in breach of contract.

7 THE MODUS

(TEXTBOOK PAR 8.7)

Example: Modise gives Nola a car, subject to the modus that Nola must give up smoking within two months.

This is an example of a contract subject to a modus to refrain from doing something (stop smoking, after the following two months). Nola may claim delivery of the car now, before having stopped smoking. But if after two months she has not stopped smoking, she will be in breach of contract, and Modise will then be contractually entitled to reposses the car.

The example in the textbook of Nelson and Podile, is an example of a burden to do something, and the one of the father and son is an example of a burden to perform against a third party.

8 THE CANCELLATION CLAUSE

(TEXTBOOK PAR 8.8)

Example: Olly and Pete incorporate into their lease a clause that if (for whatever reason) Pete is late in paying rent, Olly is entitled to cancel the contract.

This is a cancellation clause that makes the punctual payment of rent a matter of particular importance as far as this contract is concerned. Pete has paid his rent punctually every month for ten years. One month he is only one day late in paying his rent: he forgot to pay it, because he had to arrange his father's funeral. Olly would nevertheless be entitled to cancel the lease summarily without warning Pete of his intention to do so. In such a case Pete would fail to persuade the court that the breach was so trivial and so understandable that it should be ignored and that it would not be a ground for cancelling the contract if it had not been for the cancellation clause. The fact remains that the contract does contain such a clause, and Pete has breached its provisions. (See ch 11.3.1 regarding cancellation in general.)

9 THE PENALTY CLAUSE (TEXTBOOK PAR 8.9)

9.1 General

Example: In *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (D), Maiden worked for David Co as a property salesman on a commission basis. As part of an enforceable restraint clause, Maiden promised that if he were to breach the restraint, he would pay David Co liquidated damages of R200 a month for each month that he was in breach. Maiden later sued David Co for commission due. David Co retaliated by claiming R1 200 ($R200 \times 6$) because Maiden had breached the restraint for six months.

The clause about liquidated damages was a penalty clause, and had been included to deter Maiden from breaching the restraint. It fell within the scope of section 1 of the Conventional Penalties Act 15 of 1962. It entitled David Co to claim the damages simply because Maiden had breached the provisions. It established the extent of the penalty before Maiden breached the restraint; David Co did not need to prove its damages.

Maiden tried to persuade the court to exercise its discretion and reduce the penalty to what it considered reasonable. Maiden failed: the court was not convinced that the liquidated damages claimed by David Co were disproportionate to the prejudice that David Co had suffered as a result of Maiden's breach of contract.



ACTIVITY

Nelson is a racing driver. His next race is on 28 March. He is paid R10 000 for each race in which he participates. He and George agree that George will replace the engine of his car and that the work will be completed on 26 March. In terms of a penalty clause in the contract, George will have to pay Nelson R500 for every day that the work is late. George breaches the contract and only delivers the car on 3 April. This prevents Nelson from participating in the race and, consequently, he loses R10 000. Advise Nelson about whether he may claim damages to the value of R10 000 from George.



FEEDBACK

Sometimes a contract contains a clause that offers the creditor the choice of claiming damages in the case of breach of contract or relying on the agreed penalty clause. It is not indicated whether this contract contains such a clause. If the contract does contain such a clause, Nelson could demand damages, in this case the R10 000. If, however, there is no such clause in the contract, Nelson would be restricted to the terms of the penalty clause: he would only be able to claim R500 for each day that George is late, in other words, $R500 \times 7 \text{ days} = R3\,500$. The Conventional Penalties Act 15 of 1962 prevents Nelson from claiming both.

9.2 The National Credit Act 34 of 2005

This Act also governs the enforceability of penalty clauses. A distinction is drawn between three types of contract:

- those contracts which are governed by the National Credit Act as well as the Conventional Penalties Act;
- those contracts which are governed by the Conventional Penalties Act only; and
- those contracts which are governed by neither the National Credit Act nor the Conventional Penalties Act.

10 THE FORFEITURE CLAUSE

(TEXTBOOK PAR 8.10)

Example: A clause in a contract of sale of land could read as follows: 'Should the purchaser fail to comply with the terms and conditions of this agreement and remain in default for a period of seven days after despatch per registered post of written notice requiring such default to be remedied, the seller shall be entitled to cancel this agreement at once and to retain, as a genuine pre-estimate of damages, the moneys paid to date by the purchaser after deduction of estate agent's commission payable in terms of clause 12 of this agreement.'

This forfeiture clause entitles the seller to cancel and keep the moneys paid by the buyer. So the buyer who breaches the sale will lose his right to claim restitution of these moneys. In terms of section 4 of the Conventional Penalties Act 15 of 1962, this Act is also applicable to forfeiture clauses: remember that a forfeiture clause is a species of penalty clause. Therefore, as in the case of other penalty clauses, the court may be asked to exercise its discretion to reduce the penalty. (See par 11.3.7 regarding the consequences of cancellation in general.)

11 THE ROUWGELD CLAUSE (ROUWKOOP CLAUSE)

(TEXTBOOK PAR 8.11)

Example: Because holiday accommodation is so expensive, Malebo concludes a contract in January with Lucy to rent her house at Umhlanga in December. In terms of the 'rouwgeld clause', Malebo pays a deposit which he will forfeit if he cannot continue with the lease. If Malebo withdraws from the contract, he does not commit breach of contract. The reason why he pays the amount (deposit) is to enable him to terminate the contract without his behaviour amounting to breach of contract.

12 THE ENTRENCHMENT CLAUSE

(TEXTBOOK PAR 8.12)

Example: A contractual clause reads as follows: 'No variation in the terms of this contract shall be of any force or effect if the variation is not in writing and signed by the parties or their duly authorised representatives.'

This entrenchment clause has the effect that all variations of the contract, including a variation of the entrenchment clause itself, must be in writing and signed by the parties or their agents. So if the parties are too busy to have the variations written down, the contract is not altered until the changes have been written down and signed.

STUDY UNIT 9

INTERPRETATION OF THE CONTRACT

The aim of this study unit is to introduce you to the basic principles of interpreting contracts. You need to be able to apply these principles when you are interpreting a contract. You also need to be able to identify and prevent problems entailed in drafting or judging existing contracts. This means that you should be familiar with the basic principle and other rules of interpretation, and also with the parole evidence rule which applies to written contracts. Finally, you should also be aware of the requirements for rectification of a written contract, in order to apply them in practice.

Prescribed study material: textbook chapter 9

1 CONTENT OF THE CONTRACT

(TEXTBOOK PAR 9.1)

The need to interpret a contract arises when there is uncertainty or conflict regarding the exact content of a contract, but also in other circumstances. Not all contracts are equally clear.

In order to interpret a contract the true intention of the parties and the obligations they intended must be established. This is achieved by looking at the content of the contract. The content of a contract consists of the terms included in the contract, either orally, tacitly or in writing.

In the case of agreements concluded orally or tacitly, the content of the contract is established by looking at the words and behaviour of the parties.

In the case of written and signed contracts, the content is established from the document. In such cases the person who has signed is bound by the ordinary meaning of the words in the contract which he or she signed, and by the effect of the contract. The true intention of the parties is taken as being reflected in the written and signed contract. The rule of caveat subscriptor applies, which means 'signatory beware'. Note the defences available to the signatory.

When the contract is written but not signed, which is often referred to as 'ticket cases', other evidence may be needed to prove that the document reflects the true intention of the parties. Remember that a written contract may consist of more than one document (eg an insurance contract which consists of the completed application form and the policy document(s)). Also remember that a written contract can include 'click-wrapped' information — that is, information that is available or accessible when an icon is clicked to indicate acceptance of the terms of a contract concluded on the Internet.

2 PRINCIPLES OF INTERPRETATION

Note that the first set of guidelines applies to written contracts (see par 9.2 of the textbook), but can be applied to oral contracts unless they are obviously inappropriate, and that the second set of guidelines apply to the 'ticket cases'.

Also note the effect on the contract if the intention of the parties cannot be established at all.

2.1 The parol evidence or integration rule

(TEXTBOOK PAR 9.2.1)

The parol evidence rule applies to written contracts, irrespective of whether the contract has been negotiated specifically by the parties or whether it is a signed standard-form contract.

According to the rule, the written document is the only record of the contract between the parties and it is this document that has to be interpreted to ascertain the contents of their agreement.

This means that the parties may not submit evidence of agreements reached before or at the same time as the written contract that contradict, alter or add to the written contract. What they may submit, as it falls outside the parameters of the rule, is the following:

- (a) evidence of an agreement reached **after** the written contract (even if this contains terms that vary, contradict, add to or exclude terms from the written contract) (remember that if the written contract contains an entrenchment clause, alterations will have to be in writing)
- (b) evidence of agreements reached at the same time or before the written contract that **do not vary, contradict, add to or exclude** terms from the written contract
- (c) evidence not relating to a term of the contract but to prove the **existence of the contract** as a whole, for example that it is void (eg, because of mistake) or voidable (eg, because of misrepresentation)
- (d) contradiction of **objectively determinable facts**, such as the date on which it was signed.

2.2 Rectification

(TEXTBOOK PAR 9.2.2)

Example: Alice owns two houses, one on plot 100 and the other on plot 101. Alice sells plot 100 to Barbara. The parties record this sale in writing in accordance with the statutory formality requirements. By mistake, the typist refers to the plot sold as 101. No one spots this typing error before the contract is signed.

The parol evidence rule applies to the contract, so Alice and Barbara may not submit evidence conflicting with the contract. But the contract incorrectly reflects their actual agreement to buy and sell plot 100. How should the problem be resolved?

In these circumstances either one of, or both, the parties will be allowed to approach the court for rectification of the contract. The party or parties must prove

- (a) what their true intention is (here: Alice sells Barbara plot 100)
- and**
- (b) that the written document does not reflect their true intention

The person claiming rectification may lead evidence to prove the true intention, even if this evidence conflicts with the terms stated in the document.

You may feel puzzled that, on the one hand, the parole evidence rule prevents extrinsic evidence from being led which varies the terms of the written document; but that, on the other hand, rectification allows the claimant to lead evidence which must be extrinsic, because the document, according to the claimant, incorrectly reflects the parties' true intention.

The law solves this conflict by placing the burden of proving the requirements for rectification on the claimant. This burden is heavy. As was decided in one case, the claimant must show the facts entitling him or her to obtain rectification in the clearest and most satisfactory manner.

Furthermore, rectification will not be allowed where the law requires formalities for the conclusion of the contract (eg, the sale of land), and where the parties have not made an effort to express their contract in clear detail in the written document. If, for instance, they have not filled in the blank spaces and have not bothered to put in any plot number, these gaps cannot be filled by rectification. In other words, rectification cannot be used to supplement defective consensus. Rectification arises only when defective documentation incorrectly represents the true intention of the parties.



ACTIVITY

In an oral agreement, Dada offers to employ Simba at a salary of R3 000 per month. However, in the subsequent written contract the salary is given as only R2 500. Simba signs the contract because he thinks that Dada will keep to his verbal offer of R3 000 but, when the first payment is due, Simba is paid only R2 500.

Indicate the correct legal position.

- (1) Simba is entitled to apply for rectification of the written contract.
- (2) Simba may rely on the oral agreement between him and Dada and demand that he be paid R3 000.
- (3) Simba cannot rely on the verbal agreement between him and Dada and he is obliged to accept the salary that is paid to him.



FEEDBACK

- (3) is correct. In terms of the integration rule, the written document is the only record of the agreement once the contract is reduced to writing. The document containing the parties' contract is the only evidence of the terms of the contract. The consequence of the operation of the rule is that Simba is not permitted to give evidence of the earlier verbal agreement that is contradicted by the written contract.

- (1) is incorrect. Sometimes a written document does not reflect the true intention of the parties because an error was made. In such circumstances, the contract may be rectified in order to represent the parties' true intentions. Simba may not apply for rectification, because no error was made when writing the contract.
- (2) is incorrect. Simba cannot rely on the oral agreement between him and Dada owing to the operation of the integration rule.

STUDY UNIT 10

BREACH OF CONTRACT

The aim of this study unit is to enable you to determine which actions amount to breach of contract, whether breach of contract has occurred and if so, in what form, because this determines the remedies (most of which are discussed in chapter 11) that are available to the prejudiced party.

Prescribed study material: textbook chapter 10

1 INTRODUCTION

(TEXTBOOK PAR 10.1)

All contracts are intended to be performed properly and on time. Most contracts are performed in this way. But some are not: because of the conduct of one of the parties, the terms of the contract are broken. This is breach of contract.

The table below indicates the forms of breach of contract and which party may be responsible for a particular kind of breach of contract.

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	✓	✓

Regarding the concepts of 'debtor' and 'creditor', note the following.

You will recall that in chapter 2 we said that when a personal right comes into existence between legal subjects, this bond is called an 'obligation'. One of the ways such a bond comes into existence is by contract. In the law of contract the word 'obligation' indicates not only the legal relationship between the parties itself, but also each duty that has to be performed in terms of the contract. (This is expressed as follows: there are as many obligations in a contract as there are duties to perform.)

You will recall that, in the law of contract (and thus also in respect of breach of contract), we refer to the party who has a certain obligation in terms of the contract (that is the party who has to perform), as the 'debtor', and to the party who has the corresponding right to receive that performance, as the 'creditor'. At all times it is important not to confuse the legal meanings of 'debtor' and 'creditor' with the meanings of 'debtor' and 'creditor' as accounting entries.

In reciprocal contracts (eg a contract of sale) both parties are simultaneously obliged to perform and entitled to performance, that is both parties are simultaneously debtor and creditor but, in respect of different performances (as the table below shows).

Example:

RIGHTS AND DUTIES (OBLIGATIONS) IN A CONTRACT OF SALE

DUTY	RESTS ON	THEREFORE CALLED	RIGHT	HELD BY	THEREFORE CALLED
To pay purchase price	The purchaser	The debtor	To receive the purchase price	The seller	The creditor
To transfer the merx	The seller	The debtor	To receive the merx	The purchaser	The creditor
To preserve the merx until delivery	The seller	The debtor	To receive the merx in same condition	The purchaser	The creditor
To protect the buyer against eviction	The seller	The debtor	Not to be evicted	The purchaser	The creditor
To deliver the merx free from latent defects	The seller	The debtor	To receive the merx free from latent defects	The purchaser	The creditor

As the table shows, the same transaction between the parties (eg a sale) may create several different rights and duties. In the context of breach of contract, it is always important to start by ascertaining which performance obligation gave rise to a 'problem', and then to decide whether it is the debtor or the creditor in respect of the performance, who is responsible for the problem (breach of contract).

**2 DEFAULT OF THE DEBTOR
(TEXTBOOK PAR 10.2)**

Default by the debtor is committed by the debtor when he or she fails to perform on time and the delay is due to his or her fault.

2.1 Requirements

Two requirements must be met for default of the debtor to occur. The one is that performance must be late and the other is that the delay must be due to the debtor's fault.

(a) Performance must be late

Please note the following:

This form of breach of contract has to do with the time of performance only, and not with any of the other aspects of the contract (eg the quality of performance). It occurs when performance does not take place at the time agreed upon in the contract.

Note that the debtor is automatically in mora if he does not perform by the date or time specified. This is called *mora ex re*. If, however, the contract does not specify a particular date or time for performance, the debtor will have to be placed in mora by a letter of demand that permits a reasonable time for performance. Only when performance does not occur by this date — as stated in the letter of demand — has the debtor defaulted. This is known as *mora ex persona*.

The reasonableness of the time depends on the contract and the circumstances: the court takes factors such as the following into consideration:

- the parties' intention
- the nature of the performance due
- the accompanying difficulties and delays, as actually contemplated by the parties at the conclusion of the contract or which would have been contemplated by a reasonable person at the time
- the necessary assumption that the debtor is expected to act promptly, appropriately, and carefully; and in this regard, the court also takes into consideration the parties' commercial and other interests
- the period specified in the demand for performance; and also the period that has already elapsed, because the debtor cannot do nothing and assume that when his or her performance is demanded, he or she will still be given the full period that is reasonable for performance.

It is advisable, though not essential, for purposes of certainty and proof to put the demand in writing.

It is also important to understand that performance can be late only if it is claimable: performance subject to a suspensive condition or time clause is not claimable. If Nic has agreed to buy Mandy a car when she gets her BCom-degree his performance is not claimable until she obtains the degree.

(b) The delay must be due to the debtor's fault

Unless the debtor has given a warranty that performance will occur at a certain time, he or she does not commit *mora debitoris* if the delay is caused by factors beyond his or her control, for which he or she is not intentionally or negligently responsible.

If the delay in the debtor's performance is caused by the creditor, we are dealing with *mora creditoris*.

2.2 The consequences of the debtor's default

The creditor is entitled to the remedies the law grants to the innocent party in the case of breach of contract (see ch 11).

In a contract of sale, the fact that the debtor is in mora will influence the passing of the risk (see ch 13).

If performance becomes impossible after the debtor has fallen in mora, the consequences are the following: although supervening impossibility of performance usually releases the debtor from his or her duty to perform (as you will see in ch 12),

this does not happen if the debtor was already in mora when impossibility of performance occurs. This is still mora debitoris, and the debtor's duty to perform is not extinguished, and since he or she is no longer able to perform, he or she will be liable for damages (one of the remedies for breach of contract discussed in ch 11).

3 DEFAULT OF THE CREDITOR

(TEXTBOOK PAR 10.3)

Default of the creditor is the creditor's failure, through his or her own fault and without lawful excuse, to cooperate in receiving the debtor's due and valid performance.

The creditor's default presupposes a bilateral juristic act, that is one requiring the creditor's cooperation if the debtor is to perform his or her own obligations.

Another example, Manus, a dressmaker, cannot fulfil his obligations properly (making the final adjustments to the dress) unless Ellen (the creditor) cooperates (by turning up for a fitting session).

3.1 Requirements

Four requirements must be met before default of the creditor can occur:

- (a) The debtor's performance must be dischargeable. This means that the performance must be due in terms of a valid and existing contract, and which is legally and physically possible of being performed. A performance is not dischargeable if a suspensive condition has not been fulfilled, or if the time for performance, as agreed in the contract, has not arrived yet.

Example of a suspensive condition not yet fulfilled: Ali sells his business to Brian, on condition that Brian obtains a trading license. Ali's (the debtor's) performance (the transfer of the business) is not dischargeable until Brian has obtained the license (fulfilment of the suspensive condition).

Nor is a performance dischargeable unless the time for performance, as agreed to in the contract, has arrived.

Example: Sibongile orders snacks for her cocktail party scheduled for Saturday, from Annemarie. Until Saturday, this performance by Annemarie is not dischargeable. If Annemarie delivers on Thursday, Sibongile's refusal to accept the snacks cannot constitute mora creditoris, because the performance is not yet dischargeable.

- (b) The debtor must tender performance and the performance he or she tenders must be proper performance.

Examples: the dressmaker must ask the client to come for a final fitting; Annemarie must deliver snacks of the quality agreed upon. If the dressmaker does not try to reach the client, or if the snacks are not of the quality agreed upon, the client and Sibongile do not commit default by the creditor.

- (c) The creditor must delay performance by not cooperating, and performance must still be possible at a later stage.

Example of delay, but later performance possible: the client does not come for the

dress fitting. But a later fitting will still enable the dressmaker to perform his or her obligation, albeit later than agreed. Default of the creditor takes place. Pay special attention in this regard to the difference between *mora ex re* and *mora ex persona*.

Examples of delay, but later performance impossible:

- (1) After the conclusion of an employment contract, Stephen tenders his services to his employer Khumalo. Khumalo delays in making use of these services. Stephen's performance for the period of delay is no longer possible. Khumalo has thus prevented performance for the period in question.
- (2) Annemarie undertakes to deliver the snacks to Sibongile before five o'clock on Saturday. Sibongile is not at home to receive the snacks. Annemarie is informed that Sibongile has gone overseas for two weeks. Time for performance is an integral part of the performance. Annemarie cannot perform later, because the snacks will have been spoilt. Sibongile has made it impossible for Annemarie to perform in terms of the contract. Sibongile's action amounts to prevention of performance and not default of the creditor.

- (d) The default must be due to the fault of the creditor.

Example: Ellen who concluded a contract to have a dress made, deliberately avoids the dressmaker for two weeks. This amounts to default by the creditor (if the other requirements are met).

Without acting negligently in any way, Ellen is run over by a car and hospitalised for two weeks. This delay is not due to any fault of Ellen's and there is no default of the creditor.

3.2 The consequences of the creditor's default

- (a) The debtor's duty of care is diminished if the creditor is in default. The debtor is liable only for intentional loss (eg after the client fails to arrive for the fitting, the dressmaker decides that he or she loathes the material which the client bought for the outfit, so he or she burns it) or gross negligence (eg Ali sells Brian a business and the shop in which it is located; Brian is late in taking occupation; Ali leaves the shop unstaffed and unguarded; the stock is stolen and the premises are vandalised: Ali is grossly negligent in failing to look after the shop and stock properly).
- (b) In the case of reciprocal agreements the debtor remains liable to render his or her performance, now later than originally intended, and is entitled to the creditor's counter-performance.

Example: Elias and Fred agree that Elias will build a wall on Fred's property on 11 May. Fred commits default of the creditor by failing to acquire the bricks on time. Elias may not use Fred's default to escape from his obligation to build the wall, and Elias remains entitled to payment by Fred.

- (c) If the debtor's performance becomes impossible while the creditor is in default, the debtor is set free from performing his or her obligations. But the creditor must still perform his or her own obligations. The supervening impossibility of the debtor's performance must not result from the debtor's intention or gross negligence.

Example: Under a contract of letting and hiring of work, a potter has finished a specially decorated pot for a client, who is late in coming to fetch it as arranged.

Lightning strikes the potter's home, and in the ensuing fire the pot is destroyed. The potter is set free from his or her obligation to deliver the pot. But the creditor must still pay the potter for making the pot.

- (d) If the debtor himself or herself is already in default, his or her own default is ended by the creditor's subsequent default. It is not possible for both the debtor and the creditor to be in default at the same time in respect of the same performance.

Example: Gary sells a car to Herman. They agree that Gary must deliver the car on 16 August. Gary does not perform on 16 August, so is in mora (in default). When Gary tries to deliver the car on 18 August, Herman is late for their appointment and Gary cannot deliver the car. Gary and Herman cannot both be in default at the same time in respect of the same obligation. Herman's default (mora creditoris) on 18 August purges (wipes out) Gary's default. From 18 August, only Herman is in default.

Two points to take note of here are the following:

Although the earlier mora debitoris is cancelled by the later mora creditoris, any liability for damages caused during the time of the debtor's mora, is not extinguished. Even though Herman's own default (by not being available to accept the car when Gary eventually attempted to deliver it) extinguishes Gary's default (of late delivery), the damages Herman may have suffered as a result of Gary's default, is not extinguished and Herman may still claim them from Gary.

In the case of different obligations, mora debitoris and mora creditoris can exist at the same time. If Herman had to pay when Gary delivered the car, there would have been two obligations: Gary's obligation to deliver and Herman's obligation to pay the purchase price. If Herman was not available to accept delivery of the car, he would have been guilty of default by the creditor in respect of Gary's obligation to deliver, and guilty of default by the debtor in respect of his own obligation to pay the purchase price.

4 POSITIVE MALPERFORMANCE

(TEXTBOOK PAR 10.4)

Positive malperformance is committed when the debtor tenders defective or improper performance.

Example: Billy, a building contractor, uses floor tiles of an inferior quality, contrary to the clear specifications about this in the building contract.

Positive malperformance is also committed when the debtor does something which, in terms of the contract, he/she may not do.

Example: Sandile buys Barbara's business. They agree that, for six months, Barbara will not start a business within a radius of 25 kilometres. After two months, Barbara starts an identical business across the road from Sandile's.

5 REPUDIATION

(TEXTBOOK PAR 10.5)

'Repudiation' means that either in words communicated to the other party, or through conduct, the debtor or the creditor shows that he or she does not intend to perform his or her contractual obligations.

A party may repudiate the whole contract or only some of his or her obligations or part of the contract.

A party can repudiate the whole contract by

— denying the existence of the contract

Example: 'We did not agree to form a partnership to sell hotdogs as you allege; those discussions between us last month were only negotiations; there was no serious offer and acceptance: I am not your partner in a hotdog business.'

— trying, without a valid reason, to withdraw from the contract

Example: Ulrich decides to rescind the contract because of undue influence; his view that there was undue influence later proves to be incorrect: so his attempt at rescinding the contract is not justified and amounts to a repudiation of the contract.

— giving notice that he or she cannot perform

Example: 'Unfortunately, I do not have the equipment to build your block of flats as agreed, and I have no way of acquiring the equipment.'

— giving notice that he or she refuses to perform

Example: 'I am not prepared to work for you; find someone else to type your work; I quit.'

— indicating that he or she will not perform

Example: 'I know that I promised last week to make your hat by next month; well, I'm very sorry, but I've got so much work I won't be able to get round to making your hat until the end of the year.'

A party's repudiation of only some of his or her obligations or a part of the contract could lead to repudiation of the whole contract.

Example: Arnold works hard when he is at work, but refuses to come to work at the agreed time, which he says is far too early for him.

The test for repudiation is the following: Has the alleged repudiator behaved in a way that would lead a reasonable person to conclude that the repudiator does not intend to perform his or her contractual obligations? Mere failure by the debtor to perform is not repudiation; so, for example, the debtor's forgetting that he or she is contractually bound to perform is not repudiation of the contract.

6 PREVENTION OF PERFORMANCE

(TEXTBOOK PAR 10.6)

6.1 Prevention of performance by the debtor

Here the debtor prevents his or her own performance: through his or her own fault (either intentionally or negligently) the debtor makes his or her own performance impossible. The debtor's obligation to perform continues.

Example: 'A sells something to B and then disables himself from fulfilling the contract by selling and delivering the thing to C, who will not part with it at any price' (*Wille's Principles of South African Law* (1991) 514). A's obligation to perform continues. Because A cannot now deliver the thing to B, A is liable to B for damages.

6.2 Prevention of performance by the creditor

The following table shows the differences between the creditor's prevention of performance and the creditor's default.

PREVENTION OF PERFORMANCE BY THE CREDITOR	DEFAULT OF THE CREDITOR
<ul style="list-style-type: none"> • The creditor makes it permanently impossible for the debtor to perform. 	<ul style="list-style-type: none"> • The creditor delays the debtor's performance but does not make it impossible for the debtor to perform.
<ul style="list-style-type: none"> • The debtor can never perform. 	<ul style="list-style-type: none"> • The debtor can still perform.
<p>— Example: Esau arrives to mend Fanie's stove; since having asked Esau to mend the stove, Fanie has intentionally destroyed it. It is Fanie's fault that Esau cannot mend the stove. So Esau is regarded as having performed his obligation to mend the stove. Esau may still demand payment from Fanie but must deduct from his claim any expenses that Esau has saved through his no longer having to perform (eg, the purchase of parts).</p>	<p>— Example: Thomas sells Ian a painting. They agree that Thomas must deliver it on 31 July by packing it for Ian to collect at Thomas's house on that day. Thomas duly packs the painting, but Ian forgets to collect it on 31 July. On 1 August, Ian is in default.</p>



ACTIVITY

On 3 February 2006, the management of Thutong University concluded a contract with Roy Building Contractors in terms of which Roy Building

Contractors undertook to build two hostels each of which would consist of 250 single rooms, 100 double rooms, a sitting room, a dining room and a kitchen. The contract stipulated that the building would be complete on 15 December 2006. They also agreed to the following:

- (1) If the hostels are not completed by 15 December 2006, Roy Building Contractors would have been liable for an amount of R10 000 a day after 15 December 2006.

- (2) Ten percent of the contract price would be held back until Smith, Thutong's architect, issues a final certificate.

What form of breach of contract, if any, has been committed in each of the following situations:

- (a) Roy Building Contractors only completes the work on 5 January 2007. The delay is caused by serious floods resulting from an unseasonable cyclone in September 2006.
- (b) Roy Building Contractors only completes the work 10 January 2007. The delay is caused a week-long strike by Roy Building Contractors' employees about the bonuses paid out by Roy Building Contractors in 2006.
- (c) On 6 January, Smith issues a final certificate but, owing to a cash flow problem, Thutong University does not pay the outstanding balance on the contract price.
- (d) In order to make a higher profit, Roy Building Contractors uses floor tiles of a poorer quality than was specified in the contract.
- (e) Roy Building Contractors only commences construction on 20 March 2006. The delay is caused by Thutong University's failure to provide the approved building plans to Roy Building Contractors on 15 February 2006, as agreed. The plans are only supplied to Roy Building Contractors on 25 February.
- (f) On 20 February 2006, Thutong University informs Roy Building Contractors that the University is 'cancelling' the contract because the University wishes to erect laboratories on the site instead.



FEEDBACK

- (a) There is no breach of contract here. The delay is not due to the fault of a contracting party. However, there is temporary impossibility of performance. (See par 12.8.3.)
- (b) Here there is breach of contract in the form of mora debitoris. The delay is due to the actions of Roy Building Contractors.
- (c) This is breach of contract in the form mora debitoris. Thutong University defaults by failing to meet its obligation on time.
- (d) In this instance Roy Building Contractors commits positive malperformance. They act contrary to the terms of the contract.
- (e) This is a case of mora creditoris. The creditor prevents the timely performance of the debtor by withholding its cooperation.
- (f) Thutong University is guilty of repudiation here, since it is clear that the university does not intend to honour the obligations stipulated in the contract. The university is attempting to withdraw from the contract without justification.

STUDY UNIT 11

REMEDIES FOR BREACH OF CONTRACT

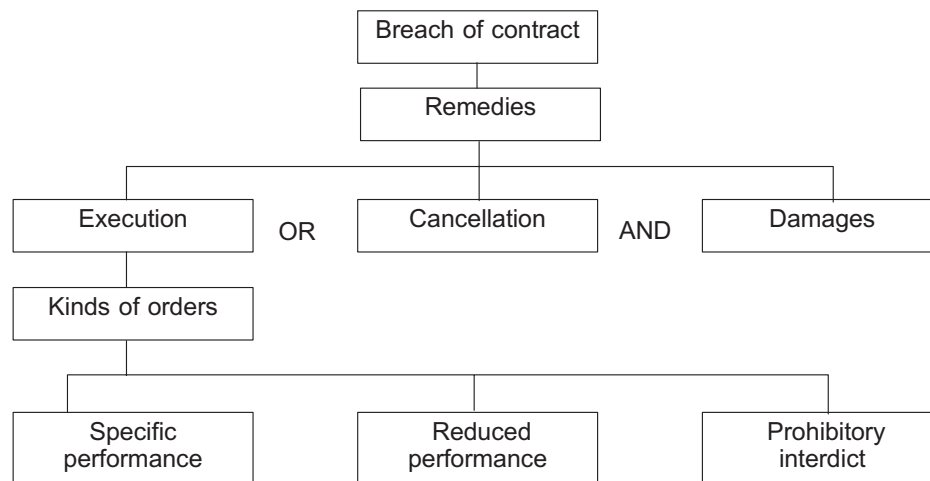
This study unit will equip you to determine in practice the appropriate remedy or remedies for each particular type of breach of contract.

Prescribed study material: textbook chapter 11

1 INTRODUCTION (TEXTBOOK PAR 11.1)

Where there is a contract between parties, the one party's breach of contract entitles the other party (the victim or the aggrieved or innocent party) to a contractual remedy or remedies. These remedies are the legal means provided for protecting the innocent party's contractual rights. The innocent party may sue the party who is in breach of contract; and may enforce these remedies with the assistance of the court and the court's officials, who carry out the orders of the court.

The following diagram shows the different remedies for breach of contract:



In general, the remedy of **execution** (specific performance) may be claimed in respect of all contracts. It is the 'primary' remedy for breach of contract since it is aimed at accomplishing the execution of the contract.

In contrast to this, **cancellation** is an 'supplementary' remedy since it is aimed at ending the contract. The remedy of cancellation may only be used if there is a right to cancellation. This means that an innocent party may only cancel due to breach of contract if the contract contains a cancellation clause, if such a right is stipulated or if it can be proved that the breach of contract is material.

The innocent party must choose either to continue the contract or to end it. He or she may not do both. The innocent party may claim the remedies in the alternative: this is done by claiming, for example,

- specific performance of the other party's contractual obligations

OR

- failing which, cancellation of the contract.

The above form of claim means that the innocent claimant now exercises his or her choice to continue the contract and claims an order for specific performance, but that if the court for some reason does not award the order for specific performance, the innocent claimant then seeks an order cancelling the contract. The contract continues until

- either the court refuses the order for specific performance and grants an order for cancellation

OR

- the claimant, having been awarded an order for specific performance, later finds that the defendant cannot or will not render the performance, and cancels the contract.

Note that in this sequence of events, the claimant does not enforce specific performance and cancellation of the contract at the same time.

The remedy of **damages** is an additional remedy at the disposal of the innocent party, regardless of whether the innocent party claims specific performance (execution) of the contract or insists on cancellation. The remedy of damages may also be claimed on its own.

Example: Ally sells her car to Buti. Ally refuses to deliver the car. Buti needs transport so, in the meantime, she makes use of taxis, when necessary. After a week, Ally decides to fulfil his contractual obligations, and delivers the car to Buti. Buti still wants the car, and no longer needs to claim specific performance because, after all, Ally is tendering performance. Nor does Buti wish to cancel the contract. But Buti can claim the taxi expenses he incurred as a result of Ally's breach of contract.

2 EXECUTION OF THE CONTRACT

(TEXTBOOK PAR 11.2)

Purpose: To achieve the same result as the parties intended to achieve when they entered into the contract, or, if that result cannot be achieved, then a result as close as possible to the one originally intended.

2.1 Orders for specific performance

Generally speaking, every party to a binding agreement who is ready to carry out his or her own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract.

Exception 1: Where the debtor's estate has been sequestrated specific performance will not be granted, for it could prejudice the insolvent's other creditors.

Example: Vusi owns a house worth R1 million. It is a valuable asset in Vusi's estate. When he concludes an agreement of partnership with Manu, Vusi promises to contribute the house to the partnership for use as the partnership's business premises. Before the house has been transferred to the partnership, Vusi is insolvent. The duty of Vusi's trustee is to take control of Vusi's assets and enforce claims against Vusi's debtors, so as to amass as large a sum of money as possible from which to pay Vusi's creditors. The house is due to be transferred to one of Vusi's creditors: the partnership. If the partnership were allowed to take transfer of the house, then Vusi's trustee would be left with a much smaller amount from which to pay Vusi's other creditors. In this way, the partnership would have an unfair advantage over Vusi's other creditors. Instead, the house falls into Vusi's insolvent estate and will be sold for the highest price possible, so that the proceeds of the sale may go towards increasing the sum of money available for distribution among Vusi's creditors in terms of the law of insolvency.

Exception 2: If, objectively speaking, the debtor cannot carry out his or her contractual obligation, an order for specific performance will not be granted, because that would imply that the law expects the impossible of the debtor.

Example: Callie sells his unique painting to Donna. Before delivery, it is destroyed. The court will not order Callie to deliver the painting to Donna.

In all other cases the court exercises its discretion whether to grant or to refuse an order for specific performance. It seeks to uphold legal and public policy, and to prevent unfairness. So it will refuse an order for specific performance if this remedy would have an unreasonably harsh effect on the defendant, and would be unfair in the circumstances. It will, for example, refuse the order if the cost of fulfillment of the contract to the party who has breached the contract would be out of all proportion to the corresponding benefit to the claimant and if the claimant could be equally well compensated by an award of damages. An example of this, given by a judge, is the following in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) 5:

[A] leased building is to be pulled down at or shortly after the expiration of the lease and the cost to the lessee of reinstatement would be considerable. The cost of, for example, replastering, painting, etc would be out of proportion to the benefit to the lessor owner, which would in the case postulated be nil or, at most, negligible.

(In the above passage, the word 'reinstatement' means 'returning the let property to the condition in which it was received at the conclusion of the lease, fair wear and tear excepted, so that the tenant (lessee) can then return the reinstated property to the landlord (lessor).')

There is no rule in our law that says that specific performance will be denied in the case of an obligation to render personal services. The situation will be judged according to the same principle applicable in any other performances, namely whether ordering specific performance will be equitable to the debtors. The court may order specific performance of one or some of the obligations undertaken by the debtor while refusing to do so in respect of other obligations or terms.

2.2 Orders for reduced performance

The principle of reciprocity:

Most commercial contracts create rights and duties for both parties. When the one party undertakes certain obligations in return for the other party's undertaking certain obligations, the principle of reciprocity applies to the agreement. This principle requires that if the claimant wishes to demand performance from the other party, he/she must either have performed or offered his or her performance to the defendant. Until the claimant has rendered or tendered performance, therefore, the defendant who is being asked to perform has a defence to such a claim and may withhold his or her own performance.

The defence of exceptio non adimpleti contractus:

This defence relating to an unfulfilled contract may be raised if

- both parties must perform at the same time

Example: In a cash sale, the seller must usually deliver or transfer the thing sold at the same time that the buyer must pay the price

OR

- the claimant must perform before the party raising the defence.

Example: In general, a landlord must perform before he or she may demand rent. If the landlord tries to claim payment of the rent before performing his or her obligation to deliver the premises to the tenant, or without undertaking to do so, the tenant may raise the exceptio non adimpleti contractus. The contracting parties may change the general rule by agreement: thus the landlord and a tenant may agree that the rent must be paid at the beginning of period of lease.

The defence of exceptio non adimpleti contractus **cannot** be raised if

- the contract is not one to which the principle of reciprocity applies

OR

- the claimant is not continuing the contract but terminating it (i.e. cancelling the contract) and claiming damages

OR

- the claimant has performed or offered to perform

OR

- the claimant need not perform

Example: In a contract of donation the donor cannot raise the exceptio non adimpleti contractus against the donee's claim for performance, because the donee need not perform.

The defence **may** be raised where the claimant has not rendered or tendered performance, or where the claimant has indeed rendered performance but this performance is defective.

What happens if the party who rendered defective performance, claims performance from the other contracting party (the defendant) who, while using the defective

performance, raises the defence of *exceptio non adimpleti contractus* and refuses to render his or her own performance? Here the claimant is the creditor in respect of the performance he or she is now claiming from the debtor, but which is being withheld by the debtor on the basis of the *exceptio non adimpleti contractus*.

Example: Andrew, a building contractor built a house that does not meet the agreed specifications, and now seeks payment from the owner, Simon, for the work done. The construction work is almost complete and Simon is already occupying the house.

Andrew, the claimant will have to persuade the court to exercise its discretion in Andrew's favour, to relax the *exceptio non adimpleti contractus* defence, and to order Simon to render a reduced performance of his own (up to now withheld). As Andrew's performance is incomplete or defective, Simon cannot fairly be ordered to make a full counter-performance.

To succeed in claiming a reduced performance, the plaintiff creditor must prove

(a) that the defendant is using the defective performance

Example: The defendant is living in the half-completed dwelling.

AND

(b) that in the circumstances it would be fair for the court to exercise its discretion in favour of granting the order

Such circumstances were absent in *Stemmet v Ackermann* 1916 CPD 536. Stemmet agreed to dig for water where Ackerman showed him and to deliver water by means of pipes to a dam. Stemmet was to be paid ten pounds per inch of water, and after that in proportion to every inch or part of an inch. Stemmet delivered less than one inch of water. The court held that the agreement contemplated that no payment would be made before Stemmet had produced an inch of water. Ackerman had received no benefit, and Stemmet was not entitled to any payment. In other words the court found that in the circumstances it would not be fair and equitable for it to exercise its discretion to relax the *exceptio non adimpleti contractus* defence and upheld it. The result was Ackerman was entitled to use the defence that he did not have to pay the money as Stemmet had not delivered water.

AND

(c) what the reduced contract price must be: that is, what the cost would be of rectifying his or her own performance, so as to establish by how much the contract price must be reduced

The court therefore does the following calculation:

The reduced contract price = the full contract price minus the cost of finishing or improving the performance to the standard required in the contract.

REQUIREMENTS FOR THE USE OF THE EXCEPTIO NON ADIMPLETI CONTRACTUS

REQUIREMENT	EXPLANATION	EXAMPLE
<ul style="list-style-type: none"> The principle of reciprocity must apply to the contract. 	<ul style="list-style-type: none"> One party undertakes certain obligations in return for the other party's undertaking certain obligations. 	<ul style="list-style-type: none"> Sam undertakes to deliver a car to Tom in return for Tom undertaking to pay the purchase price of R1 000.
<ul style="list-style-type: none"> Both parties must be obliged to perform at the same time or, 	<ul style="list-style-type: none"> Delivery of the thing sold must take place at the same time that the buyer must pay the purchase price. 	<ul style="list-style-type: none"> A cash sale: Sam must deliver the car at the same time that Tom must pay the amount of R1 000.
<ul style="list-style-type: none"> One party must be obliged to perform before the other party is obliged to perform. 	<ul style="list-style-type: none"> The party who claims performance from the other party must be obliged to render his or her own performance before the other party needs to render his or her performance; and he or she must have rendered his or her performance or have tendered his or her performance. 	<ul style="list-style-type: none"> Xolile must finish the garden shed he has undertaken to erect for Tshepo before he can claim the contract price.
<ul style="list-style-type: none"> The party who raises the defence must continue the contract. 	<ul style="list-style-type: none"> The party against whom breach of contract has been committed, cannot use the defence unless he or she decides to claim execution of the contract. The defence is not available if such a party chooses to cancel the contract. 	<ul style="list-style-type: none"> Xolile finishes the garden shed and claims payment from Tshepo. Tshepo refuses to pay the contract price, maintaining that the garden shed is defective. He can use the defence of exceptio non adimpleti contractus only if he decides to uphold the contract. If he decides to cancel the contract (and sue Xolile for damages) the defence is not available.
WHAT THE PLAINTIFF MUST PROVE WHEN HE OR SHE CLAIMS REDUCED PERFORMANCE		
(a) That the defendant is using the defective performance.		Tom is using the defective garden shed that Xolile has erected.
(b) That it would be fair in the circumstances for the court to exercise its discretion to relax the defence.		
(c) What the reduced contract price should be.		It will cost Tom R500 to rectify the garden shed.

2.3 Prohibitory interdicts

One contracting party can apply for a prohibitory interdict

- to prevent the other contracting party from doing what he or she is not entitled to do in terms of the contract,

OR

- to prevent the other contracting party from doing what he or she is threatening to do and which he or she is not entitled to do in terms of the contract.

Examples of situations in which interdicts are sought include the following:

- Double sales

Example: Nic sells the same thing first to Sam and then to Tom. The thing has not been delivered to Sam or to Tom. The rule that the person who is first in time has the stronger right has the effect that Sam may apply for an interdict preventing Nic from transferring the thing to Tom, and may claim specific performance, and so leave Tom to claim damages from Nic.

- Restraints of trade

Example: Harry agreed not to compete against Dick in Pretoria for a year after their contract has ended. The contract ends, and Harry opens a rival business. Dick may apply for an interdict enforcing the negative obligation not to compete against Dick in Pretoria for a year after their contract has ended. Here the interdict preventing Harry from continuing the rival business amounts to the specific performance of the negative obligation. Harry is entitled to do business that does not compete with Dick's. If interdicted from competing with Harry, Dick must obey the court's interdict, otherwise he will be in contempt of court and may be liable to punishment.

3 CANCELLATION OF THE CONTRACT

(TEXTBOOK PAR 11.3)

The contract is ended by cancellation, and not continued. Since parties should, in principle, uphold their contracts, cancellation may be used only

- if the parties have agreed to the remedy of cancellation (by including a cancellation clause in the contract)

OR

- if the breach of contract is serious

3.1 Cancellation and default of the debtor

The parties may agree orally or in writing that one or both will have the right to cancel if the other party breaches the contract. This clause is called a 'cancellation clause' (see ch 8).

Example: Omar and Pat incorporate into their lease contract a clause that if Pat is late in paying rent, Omar is entitled to cancel the contract. This will give Omar the right to cancel the contract even if Pat pays a few minutes late.

In the absence of a cancellation clause (see par 11.3.1(c) in the textbook), the creditor may cancel in the following two circumstances:

- (a) **If there is a specific date for performance and a tacit term that time is of the**

essence. Here the debtor is in default (*mora ex re*) once the time or date for performance has passed; and the absence of punctual performance is such a serious breach that the creditor has the right to cancel the contract. Time is of the essence. For example, the contract is one in which the price varies continuously (eg a sale of shares quoted on the Johannesburg Security Exchange), or the contract is a commercial contract (eg a sale of goods by a wholesaler to a retailer, or by a shopkeeper to a customer (*Kerr Principles of the Law of Contract* (1989) 450)).

(b) **By sending the debtor a notice of intention to cancel.** This can occur where

EITHER

— a date for performance has indeed been set but there is no tacit term that time is of the essence

OR

— no date for performance has been set

In the first of these two circumstances, the debtor is automatically in default because the date for performance has passed: he or she is in *mora ex re*. To acquire the right to cancel the contract, the creditor must give the debtor notice of his or her intention to cancel the contract on the grounds of the debtor's default. By giving this notice of intention to cancel, the creditor changes the importance of promptness of performance: before the notice, time was not of the essence; by the notice, promptness of performance becomes an essential aspect of the contract; after the notice, time is of the essence.

Example: Zolo sells his house to Bongiwe. They agree that Zolo must transfer his house on or before 3 June. On 3 June, Zolo has not yet transferred the house, so he is automatically in *mora ex re*. If Bongiwe also wishes to cancel the contract because of Zolo's default, he must give Zolo notice of his intention to cancel unless Zolo transfers the house within a reasonable time (eg two months) from the date of receiving the notice. Time is now of the essence.

In the second of the above two circumstances, the debtor is not yet even in default, so he or she is not in breach of contract. Before the creditor may cancel the contract, the creditor must place the debtor in default (*mora ex persona*) by means of a demand for performance. The creditor must also give notice of intention to cancel: having given this notice, he or she has the right to cancel the contract.

Example: John agrees to build a wall for Len. John and Len do not set the date by which John must finish building the wall. If Len wishes to cancel the contract, he must first place John in default (*mora ex persona*) by demanding that John must perform by building the wall within a certain time (say, two days) or by a certain date (6 June). Len must also then give John notice of his intention to cancel the contract if John does not build the wall within a set time or by a set date. If John then has not built the wall by 6 June, Len may cancel the contract.

The demand for performance must give the debtor a reasonable time in which to perform (see par 10.2.1 (a) (ii) of the textbook). The notice of intention to cancel must also give the debtor a reasonable time in which to perform, and must clearly state that the creditor will be entitled to cancel the contract if the debtor does not perform by the date set. These reasonable periods may be made to overlap — the creditor may

conveniently give the debtor one notice: this notice demands performance and states the intention to cancel, sets one reasonable period during which the debtor must perform, and states that if the debtor does not perform by then, the creditor may cancel the contract.

Example: In the above example of the contract to build the wall, Len's demand for performance must set a reasonable time for John to finish the wall. The reasonableness of the time will depend on the particular facts. Len's notice of intention to cancel the contract must also set a reasonable time for John to finish the wall; if John does not finish the wall by the end of that time, Len will cancel the contract. Len may include these two different communications (the demand for performance and the notice of intention to cancel the contract) in one notice to John; and the same reasonable period set in this notice may be common to both communications (the demand for performance and the notice of intention to cancel the contract).

3.2 Cancellation and default of the creditor

In the absence of a cancellation clause (see paragraph 11.3.2(c) in the textbook), the debtor may cancel in the following two circumstances:

(a) **If there is a specific date for cooperation and a tacit term that time is of the essence.** Here the creditor is in default (*mora ex re*) once the time or date for cooperation (to allow proper performance) has passed; and the absence of punctual cooperation is such a serious breach that the debtor has the right to cancel the contract. Time is of the essence. For example, the contract is one in which the price varies continuously (eg a sale of shares quoted on the Johannesburg Stock Exchange) or the contract is a commercial contract (eg a sale of goods by a wholesaler to a retailer, or by a shopkeeper to a customer (Kerr *Principles of the Law of Contract* 450)).

(b) **By sending the creditor a notice of intention to cancel.** This can occur where

EITHER

— a date for cooperation has indeed been set but there is no tacit term that time is of the essence

OR

— no date for cooperation has been set

In the first of the above two circumstances under (b), the creditor is automatically in default because the date for cooperation has passed: he or she is in *mora ex re*. To acquire the right to cancel the contract, the debtor must give the creditor notice of the debtor's intention to cancel the contract on the grounds of the creditor's default. By giving this notice of intention to cancel, the debtor changes the importance of promptness of cooperation: before the notice, time was not of the essence; by the notice, promptness of cooperation becomes an essential aspect of the contract; after the notice, time is of the essence.

Example: Under a contract of letting and hiring of work, Epsom has to paint a picture for Fikile. Epsom and Fikile agree that the painting will be handed over on 24 May. Epsom has the painting ready on 24 May, but the creditor for receiving the delivery (Fikile) does not collect it on that day. On 25 May, Fikile is automatically in *mora ex re*.

If Epsom wishes to cancel the contract so that he may sell the painting to Gina, Epsom must give Fikile notice of his intention to cancel their contract because of Fikile's default. He must set a reasonable time within which Fikile must collect the painting from Epsom.

In the second of the above two circumstances under (b) above, the creditor is not yet even in default, so he or she is not in breach of contract. Before the debtor may cancel the contract, the debtor must place the creditor in default (*mora ex persona*) by means of a demand for cooperation. The debtor must also give notice of intention to cancel: having given this notice, he or she has the right to cancel the contract. Take care not to muddle the two separate communications: the demand for cooperation, and the notice of intention to cancel the contract. The two communications serve different purposes.

Example: Koos agrees to varnish Lulu's table. Lulu agrees to buy the varnish. No date is set for the performance of the contract. When Koos is ready to start varnishing, Lulu has not yet bought the varnish. If Koos wishes to cancel the contract, Koos must first place Lulu in default (*mora ex persona*) by demanding that Lulu must cooperate by obtaining the varnish within a certain time (say, one week) or by a certain date (say, 6 June). Koos must also then give Lulu notice of his (Koos's) intention to cancel the contract if Lulu does not obtain the varnish within a set time or by a set date.

The demand for cooperation must give the creditor a reasonable time in which to cooperate (see par 10.2.1 (a)(ii) in the textbook). The notice of intention to cancel the contract must also give the creditor a reasonable time in which to cooperate, and must clearly state that the debtor will be entitled to cancel the contract if the creditor does not cooperate by the date stipulated. These reasonable periods may be made to overlap — the debtor may conveniently give the creditor one notice. This notice demands cooperation and at the same time states the intention to cancel, sets one reasonable period during which the creditor must cooperate, and states that if the creditor does not cooperate by then, the debtor will cancel the contract.

3.3 Cancellation and defective performance (positive malperformance)

If the contract contains a cancellation clause, the creditor has the right to cancel the contract even though the defect may be trivial.

However, if the contract does not contain a cancellation clause, the creditor has the right to cancel if the debtor's performance is so seriously defective that the creditor cannot be expected to abide by the contract.

Example: Ilse orders a long-sleeved, buttoned shirt from Rina; Rina delivers a shirt that lacks one sleeve and two buttonholes and has a poorly-sewn collar. The shirt is obviously so defective that Ilse may cancel the contract.

However, if the defect is trivial, such as when one of the buttons has not been sewn on tightly enough, the creditor does not have the right to cancel unless the contract contains a cancellation clause.

3.4 Cancellation and repudiation of the contract

If the contract contains a cancellation clause, the innocent party has the right to cancel the contract even though the obligation that has been repudiated is unimportant.

However, if the contract does not contain a cancellation clause, the innocent party has the right to cancel if the repudiator repudiates a material obligation.

Note that the innocent party is not obliged to cancel the contract in these circumstances, and may elect to seek performance.

Example: Stan and Yusuf conclude a lease, but Stan (the landlord) then refuses to place the use and occupation of the let premises at Yusuf's disposal. Yusuf may cancel the contract.

However, if the repudiator of the contract repudiates an unimportant obligation, the innocent party does not have the right to cancel unless the contract contains a cancellation clause.

Example: Doug rents a furnished and equipped flat from Zack. Zack subsequently denies that the toaster is also included in their agreement and threatens to remove it. Zack will not be able to cancel the contract unless the contract contains a cancellation clause.

3.5 Cancellation and prevention of performance

If the debtor prevented performance, the creditor is entitled to cancel the contract, because it can no longer be executed.

If the creditor prevents the debtor from performing, the debtor has two options. As he or she is regarded as having performed, he or she is entitled to claim the creditor's performance, but he or she is also entitled to cancel the contract.

Example: Moses agrees to repair Simon's stove for R100. We look at the following two possibilities:

Moses deliberately causes a short circuit while working on the stove and it is completely destroyed. This is an example of **prevention of performance by the debtor** (Moses who undertook to fix the stove). Simon (the creditor) can now cancel the contract. The contract can no longer be executed (the stove can no longer be repaired).

The second possibility is where, before Moses arrives to repair the stove, Simon deliberately destroys it. This is an example of **prevention of performance by the creditor** (Simon, to whom performance was owed). Moses (the debtor) now has two options: as he is regarded as having performed, he can claim Simon's performance (payment of R100) or he can cancel the contract.

3.6 The act of cancellation

Please note that a contracting party who has the right to cancel, cannot be forced to do so. Furthermore, the right to cancel must be exercised within a reasonable time.

The innocent party exercises the right of cancellation by notifying the other party of the cancellation. The notice can be in any form (oral or written), as long as it is clear and unequivocal. It is sufficient if the innocent party's decision to cancel, or his or her conduct indicating this election, is reported to the guilty party by a third person acting independently. A mere threat to cancel is not yet a cancellation.

3.7 The consequences of cancellation

As regards cancellation, the basic rule is that what has been performed, must be returned. However, if it is impossible to return a performance, the duty to return it is influenced by party's role in the cancellation of the contract:

If the innocent party, that is the one who cancelled the contract because of the other's breach of contract, cannot return the performance received, he or she is relieved of the duty to return the performance unless the impossibility is due to his or her own fault, but the party who committed the breach of contract, still has to return the performance he or she received.

If the party whose breach of contract caused the cancellation cannot return the performance he or she received, the innocent party need not return his/her performance either.

Note the difference in the parties' obligations in the case of a divisible contract and in the case of an indivisible contract. The sale of a lamp is an example of an indivisible contract; the lease of a house is an example of a divisible contract that continues from one period of the lease to the next period (say from month to month). If restitution is possible in an indivisible contract, it takes place. So the seller repays the price, and the buyer returns the thing sold. By contrast, if a continuing contract such as a lease is cancelled, the tenant restores the property let (eg the house), but the landlord is not obliged to repay all the tenant's payments dating from the conclusion of the lease. The landlord need return only the rent for the period for which the tenant has not been afforded the use and occupation of the premises let.

4 DAMAGES

(TEXT PAR 1 1.4)

4.1 Patrimonial loss

Breach of contract does not necessarily cause the innocent party to suffer loss. After cancellation of the contract, the innocent party may, for instance, conclude a contract on better terms than the cancelled contract, and actually even save money.

The law of contract provides a legal remedy called 'contractual' damages. Contractual damages can be claimed for patrimonial loss only. Compensation for non-patrimonial loss or damage, like hurt feelings, disappointment and irritation cannot be claimed on the basis of contract, but such compensation could possibly be claimed on the basis of delict, which was discussed in chapter 2.

How are damages calculated? The following two financial positions are compared:

— the financial position in which the plaintiff would have been had proper performance of the contract taken place

AND

— the plaintiff's actual financial position

Example: Barry sells his car to Clay for R60 000. He then refuses to deliver it. Car

prices rise. Clay cannot buy the same make of car for less than R65 000 and buys one from Amos. Clay would have paid R60 000 if Barry had delivered the car; instead, Clay had to pay R5 000 more (R65 000) because Barry repudiated the sale. So Clay is worse off by R5 000 — the sum of damages that he may claim from Barry.

If the injured party could have made a profit out of the contract, the lost profit may also be claimed.

Example: Clay wants to use the car he bought from Barry as a taxi and Barry knows it. Damages will then not only include the higher price of R5 000 explained above, but also the loss of profit Clay would have made with the taxi if, indeed this could be quantified.

4.2 Causal connection between breach of contract and loss

The breach of contract must cause the patrimonial loss. The guilty party is liable for all damages, even when the breach is merely one factor that contributed to the loss.

Example: Thebogo agrees to service Jake's car on Saturday morning. Thebogo doesn't turn up as agreed and he is in breach of contract. On Saturday afternoon Jake goes for a drive. If his car breaks down because of a fault Thebogo would have repaired had he serviced the car that morning, there is a causal connection between the breach of contract and the damage involved in having the car towed to the garage and repaired.

4.3 Foreseeable loss

As is shown in the example of the defective watch in the textbook, a breach of contract may lead to a series of events that culminate in disasters that seem very far removed from the breach of contract. The main task is to decide which events may fairly be blamed on the person who breached the contract.

In contract, the defendant is liable for

(1) such loss as naturally and generally flows from the kind of breach in question

OR

(2) (a) such loss as was actually foreseen by the contracting parties when they concluded the contract

OR

(b) such loss (though not actually foreseen by them) as may reasonably be supposed to have been in their contemplation, as a probable consequence of breach of contract

Decided cases concerning element (1) have established the following (Christie *The Law of Contract in South Africa* 3 ed (1996) 607):

[T]he loss of an architect's time, labour and skill in preparing plans, but not the loss of a chance of winning an architectural competition, flow naturally from a breach of a contract to transport those plans safely; ... the cost of demolishing and renewing building work flows naturally from breach of a contract to supply good quality cement

or bricks ... when a contract of sale of a marketable commodity is broken by non-performance the normal measure of damages is the difference between the contract price and the market value, and the onus is on the plaintiff to satisfy the court that any other measure of damages selected by him is appropriate in the circumstances.

An example of foreseeable loss ((2)(a)) is the example of Clay, Barry and the taxi. The loss of profit in this example was foreseeable, as Barry was aware of Clay's intention of operating a taxi business.

An example of (2)(b) may be the following:

Gary sells Herb shares in a company listed on the Johannesburg Securities Exchange. If Gary does not transfer those shares to Herb, and Herb must buy others at a higher price per share from Izzy, Gary is liable to pay Herb damages. It is widely known that such shares tend to vary in price. Even if Gary and Herb did not actually contemplate that these share prices would vary, the likelihood of such variation is so widely known that the parties are deemed to have foreseen it.

4.4 The duty to mitigate damages

If the innocent party suffers loss because the guilty party has breached the contract, the innocent party is not entitled to recover those damages arising after the breach of contract that the innocent party could have prevented or reduced by his or her own conduct. In other words, the innocent party is not entitled to blame the guilty party for losses which the innocent party could have avoided.

Example: If Lydia and Cynthia agree that Lydia will rent Cynthia's flat for one year, and Lydia commits breach of contract by vacating the flat after six months, Cynthia cannot refuse to let the flat, and claim the rent for the remaining period of six months from Lydia. She has a duty to mitigate her loss by advertising the flat for rent and trying to find a new tenant for the remaining period or a portion thereof. Only if Cynthia fails to find a tenant, can she claim the rent for the remaining period from Lydia.

The burden of proving that the claimant has not mitigated his or her losses rests on the person who alleges this failure to mitigate (the party in breach of contract).

4.5 The proof of loss and the calculation of damages

Examples of the yardsticks mentioned in the textbook are the following:

- (a) Frans, a meat wholesaler, fails to deliver the regular meat order to Thabo, a butcher in Pietersburg. Thabo's damages amount to the difference between the contract price (which he would have had to pay to Frans) and the value of the meat price in Pietersburg on that day.
- (b) We must distinguish between *mora ex re* and *mora ex persona*. If the buyer does not pay the price before or on the date set in the contract, he or she is liable to pay interest on that sum from the next day. But if the contract does not set a date for payment, the buyer must first be placed in *mora ex persona*. If the buyer still does not pay the price before or on the date set in the demand for performance, he or she is liable to pay interest on that sum from that date onwards.
- (c) Arthur builds a swimming pool for Ben who, on completion of the work, pays the agreed price. A month later cracks appear in the swimming pool. Arthur refuses to

come and see what the problem is, so Ben approaches Tukishi to repair the swimming pool. Ben may recover the R2 000 in repairs caused by Arthur's mediocre work from Arthur.



ACTIVITY

What remedy or remedies are available to the innocent party in situations (b) to (f) in the set of facts in study unit 10?



FEEDBACK

- (a) Since there has been no breach of contract, Roy Building Contractors are not liable for any damage suffered.
- (b) Roy Building Contractors is the debtor regarding the construction of the buildings. In principle, the remedies that are available for default of the debtor (*mora debitoris*) to the creditor (Thutong University), are execution of the contract or cancellation of the contract and damages. It is unlikely that Thutong University would want to cancel the contract. Besides, cancellation is only available if the time of performance is material, which is not the case here, or if the contract contains a cancellation clause, or if the creditor sends a notice of intention to cancel to the debtor, which is inappropriate here, since the hostels have already been completed in the interim. The remedy of execution of contract would have been available but, in the meantime, performance has been tendered. Damages is the appropriate remedy. In terms of the Conventional Penalties Act 15 of 1962, however, a party forfeits the right to claim damages if a contract provides for payment of a penalty amount, unless the contract provides for the possibility of a party exercising a choice between the two. Thutong University may claim R50 000 from Roy Building Contractors (5 days' delay x R10 000 a day), unless the contract stipulates that Thutong University has the option of claiming damages instead of the penalty amount.
- (c) In relation to the payment of the contracted amount Thutong University is the debtor. Although, in principle, cancellation or execution and damages are available to Roy Building Contractors, the creditor, the appropriate remedy here is execution of the contract and, indeed, an order for specific performance. Together with this, Thutong University may claim damages which, in case of default to pay a sum of money, takes the form of interest, calculated from the date on which the debt became payable. Here the debt fell due on the date on which Smith issued his final certificate.
- (d) In principle, the remedies that are available for positive malperformance are execution of the contract or cancellation of the contract and damages. In this case, cancellation is not available because there is no material breach of contract. Thutong University may demand execution of the

contract, namely that Roy Building Contractors should replace the tiles with tiles as specified, and damages for loss of rental from the hostels for the period during which the restoration work is being done.

- (e) As regards the provision of the approved architectural plans, Thutong University is the debtor and Roy Building Contractors the creditor. In case of mora creditoris, cancellation or execution and damages are available in principle. The appropriate remedies in this case are execution of the performance and damages. Roy Building Contractors would not be able to use the default of Thutong University as a reason for not fulfilling its obligations.
- (f) Thutong University commits breach of contract in the form of repudiation. On the ground of this repudiation of a material obligation, Roy Building Contractors is entitled to cancellation. However, Roy Building Contractors is also entitled to insist on execution of the contract. Given the facts, Roy Building Contractors will probably accept the repudiation, cancel the contract and claim damages (for proved damage).

STUDY UNIT 12

TRANSFER AND TERMINATION OF PERSONAL RIGHTS

The aim of this study unit is to enable you to identify the legal principles relating to the transfer and to different ways of terminating personal rights and to understand the practical implications of these. You are required to be able put the principles that apply to cession and delegation to practical use.

Prescribed study material: textbook chapter 12

1 INTRODUCTION

(TEXTBOOK PAR 12.1)

This study unit deals with the transfer of personal rights by way of cession and also with the various ways in which personal rights can be terminated. We will first look at cession and then at the ways personal rights are terminated.

Transfer of personal rights

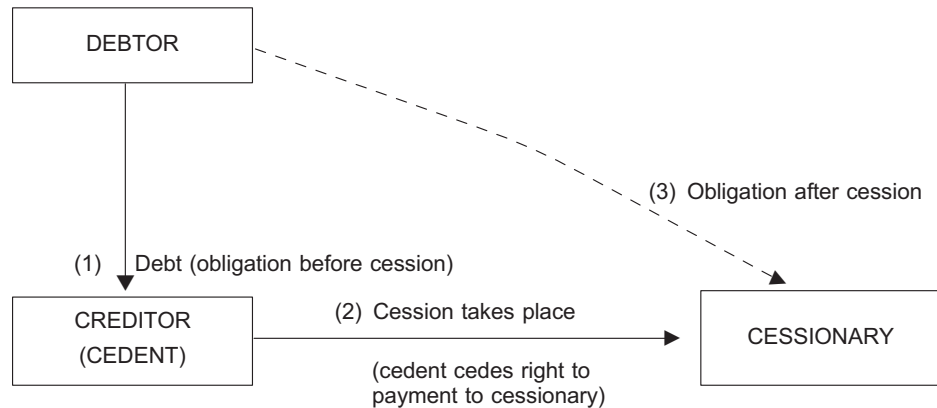
2 CESSION

(TEXTBOOK PAR 12.2)

Personal rights may be transferred in only one way, namely by way of **cession**. Since the rights which result from a contract are personal rights, they must therefore be **ceded** in order to effect their valid transfer. The transfer of a right by agreement is known as **cession**.

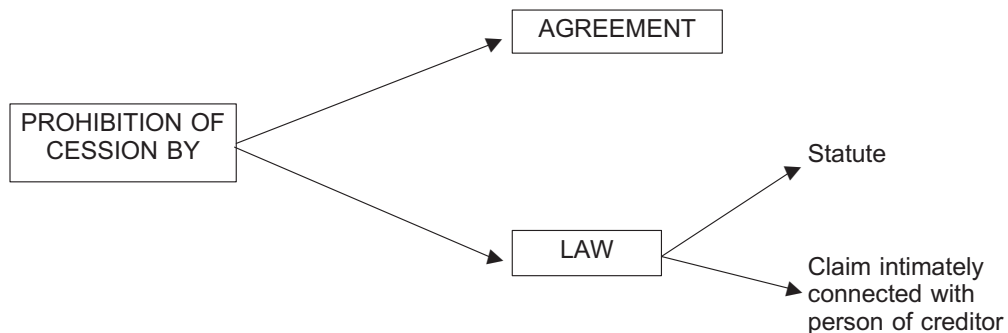
If a debtor owes a debt (eg R500) to a creditor, the creditor may cede his or her personal right (his or her entitlement to payment of the R500) to another party (eg because the creditor owes that party the same amount). In respect of the obligation between the creditor and the third party, the creditor is known as the **cedent** and the other party as the **cessionary**. The obligation between the debtor and the creditor is **not terminated** by the cession.

Schematically, cession can be illustrated as follows:



The cession does not create any new obligations, since the debtor's obligation is still to pay his or her original debt. However payment must now be made to the cessionary, and not to the cedent.

Rights may normally be ceded freely. Cession of a particular right may, however, be prohibited, as this scheme indicates:



A debtor may not be prejudiced by cession. This is the reason why a right can be ceded only in its entirety unless the debtor agrees to splitting. However, the debtor's loss of his or her right to set-off (set-off is discussed later in this chapter) is not regarded as prejudice.

The following is an **example** of the circumstances in which a debtor will lose his or her right to set-off: Henry owes Ron R500, which is payable immediately. Ron, however, owes Henry R200, but this is only payable at the end of the month. These two debts can be set off against each other, in other words, Henry can deduct the amount Ron owes him from the amount he pays Ron (R500 minus R200 = R300). However, if Ron cedes his right to payment of the R500 to Mervyn, Henry loses the advantage of set-off which he had before. He will have to pay Mervyn the R500 immediately and will only be entitled to the R200 from Ron at the end of the month. This is not considered to be prejudice, unless the cedent and the cessionary acted in bad faith to deprive the debtor of this right. In such a case, the debtor can use the defence he would have had against the cedent, namely that he, the debtor had a counter-claim, against the cessionary.

2.1 The consequences of cession

Several consequences arise from the valid cession of a personal right, namely:

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



ACTIVITY

At a golf day Chuck wins a three-day free holiday at Sun City, that is sponsored by Sun International. Chuck is not interested in the prize and cedes the right to it to Natalie. Who is the debtor, who is the cedent and who is the cessionary in this scenario?



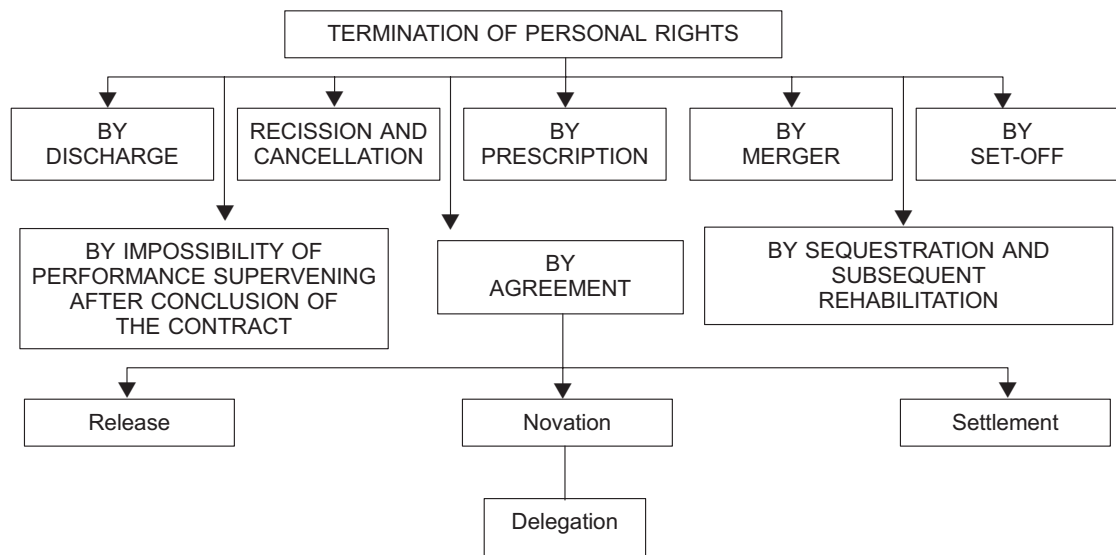
FEEDBACK

The debtor is Sun International, Chuck is the cedent and Natalie is the cessionary.

Termination of personal rights

Personal rights arising from obligations may be **terminated** in various ways. Some of these are achieved by operation of law, that is virtually automatically. There are also various ways in which personal rights may be terminated by agreement between the parties.

The following scheme shows eight ways in which personal rights may be terminated:



3 DISCHARGE (TEXTBOOK PAR 12.3)

The vast majority of contracts are properly performed by the parties. Performance of the obligation is called 'discharge'. This is the natural way in which a contractual relationship is terminated. Where the co-operation of the creditor is required to fulfil the obligation, discharge entails a bilateral juristic act, and where the co-operation of the creditor is not required, discharge entails a unilateral juristic act.

Usually discharge will take place even if performance is not rendered by the debtor personally. Except where performance is identified with the person of the debtor, proper performance can, for example, also take place by the debtor's agent, and through surety. Performance obviously has to comply with the terms of the contract in respect of the performance itself, and the time and place of performance.

Please note the following rules that apply if a debtor owes a creditor money in respect of several debts:

— The contract between them may regulate how payment should be allocated,

OR

— the debtor has the right to stipulate towards which debts the money should go.

AND

— in the absence of one of the above alternatives, the rules listed in the textbook in paragraph 12.3(a)–(d) apply,

AND

— if none of the rules point to a certain debt (eg only capital is owned, all the debts are due at the same time, all of them are onerous debts and were all concluded on the same day), then the payment is split between them.

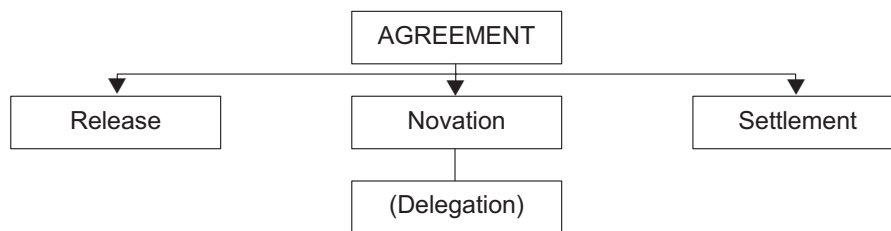
4 RESCISSION AND CANCELLATION (TEXTBOOK PAR 12.4)

In the case of **voidable** contracts, the innocent party has the right to uphold or rescind the contract. If he or she decides to rescind the contract, the contract and its obligations are thereby terminated.

Cancellation is one of the **remedies for breach of contract**. Where the innocent party (the party who, in the circumstances of a particular case, is entitled to cancellation of the contract) exercises the right of cancellation, the contract is terminated.

5 AGREEMENT (TEXTBOOK PAR 12.5)

Obligations may be terminated by means of the following agreements, whereby the parties to a contract agree to end the contractual relationship between them: release, novation and settlement.



Parties may agree in advance about the manner in which a contract may be terminated. This often happens with contracts involving continuous obligations, of unspecified duration. The exercise of such a contractual right of termination would have the same consequences as cancellation following breach of contract.

If formalities for termination have been prescribed in the original contract, these formalities must be complied with. For example, the parties to a contract of sale may agree that the contract may be terminated only by written notice to the other party at a specified address.

5.1 Release

This type of agreement occurs where a creditor releases a debtor from his or her contractual obligations. Release or waiver may be concluded expressly or tacitly.

Example: John lent Ben an amount of R500. They agreed that Ben should repay the full amount at the end of June. On 1 June John and Ben agree that Ben need no longer repay the amount. In this example, release was concluded expressly.

Note: John and Ben **agree** about the release. Release is an agreement. A mere offer of release does not constitute a release, since there is not yet consensus between the parties. Therefore, if John has decided that he does not want the R500 back, but he has not yet told Ben about his decision, Ben's obligation still exists. Also if Ben insists on paying back the amount in accordance with their agreement (ie he does not accept the offer of release), John's personal right will still exist.

The following is an example of tacit release: John lent Ben an amount of R500. John

and Ben agree that John will collect the money from Ben's home at the end of June. John decides to donate the money to Ben, so he does not go to collect the money at the end of the month. Ben notices that John is no longer interested in the money and decides not to approach him about it either.

5.2 Novation

Novation is an agreement between the creditor and debtor in terms of which an existing obligation is extinguished and a new obligation is created in its place.

Example: John lent Ben an amount of R500. They agreed that Ben should repay the full amount at the end of June. Subsequently they agree that Ben need not pay the R500, but that he will let John use his bicycle for a period of six months instead.

There must be a valid initial obligation before a valid novation may occur. Novation extinguishes this original obligation, as well as obligations which are accessory (related) to it.

Example: If, in the above-mentioned example, John and Ben had agreed that Ben would pay fifteen percent interest on the R500 until the date of payment, the obligation to pay interest is also terminated by their agreement on the use of the bicycle. No interest would be payable by Ben.

However if the novation is void, the initial obligation remains in force, unless the parties have agreed to abandon it.

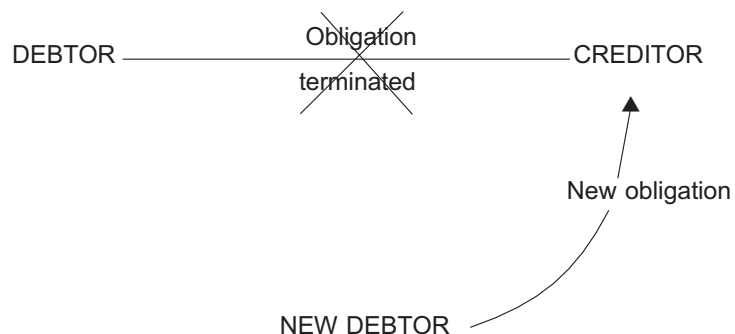
Example: If, in our example, Ben's bicycle *has already been stolen* when they agreed that he would let John use it for six months, that novation agreement is void because of initial impossibility of performance. Ben then still has to pay John the R500 and interest as agreed at the end of June.

5.2.1 Delegation

Delegation is a specific form of novation and entails the transfer of a debtor's obligation(s). It occurs when a **new party** is introduced **as the debtor** in the place of the initial debtor. A legally valid delegation may only take place with the permission of the creditor.

Example: Thandi owes Anne R200. They agree that Thandi no longer has to pay Anne the R200, but that it will be paid by Thandi's friend, Betty.

Schematically delegation may be illustrated as follows:



Delegation differs from cession. Cession pertains to the **transfer** of a personal right (see 5.2 above, and par 12.2 in the textbook). When delegation takes place, a **new**

obligation is created. In the above-mentioned example Thandi's obligation to pay the R200 to Anne is terminated. A new obligation arises *namely that, now, Bettie will pay the R200 to Anne*. Thus the consequences of delegation differ from those of cession. In the case of delegation, a new right arises which is not linked to the benefits and disadvantages which attached to the original right.

5.3 Settlement (transactio)

Settlement is also known by its Latin name, transactio. It is an agreement by which parties settle a dispute between them concerning an actual or a supposed obligation.

Study the example in the textbook. **Note** that the parties to the settlement do not agree about the existence of the debt. No valid debt is required for settlement to take place. In the example, Carla and Nell disagree about the amount that is owed. Settlement could also have occurred had Carla denied that she owed any amount at all.

Settlement terminates the original obligation (if indeed there was one). If the debtor does not perform according to the terms of the settlement, the original obligation may not be relied on unless this was specifically provided for in the settlement.

If the debtor makes an offer in full and final settlement, it will be regarded as an offer of settlement only if it is clear that the debtor (offeror) disputes the existence or extent of the indebtedness. It will, however, not be regarded as an offer of settlement if it appears that he or she is making the offer because he or she admits liability for that amount (of the offer).

6 MERGER (CONFUSIO)

(TEXTBOOK PAR 12.6)

Merger, or confusio, as it is known in Latin, takes place when one person becomes both the debtor and the creditor in respect of an obligation.

Example: Steve rents a flat and pays the rental to the owner. Subsequently he buys the flat. Once the flat is registered in Steve's name his obligation to pay the rent is extinguished, because he (Steve) is now the owner. One cannot simultaneously be both lessor and lessee of the same property.

7 SET-OFF

(TEXTBOOK PAR 12.7)

Set-off takes place when debts which are owed reciprocally by two parties are extinguished. The debts must meet four **requirements**. They must be

- (a) similar in nature
- (b) liquidated (monetary value certain or can be ascertained)
- (c) claimable
- (d) between the same persons

Set-off automatically terminates the obligation by operation of law.

Example: Tshepo owes Linda an amount of R1 000, payable at the end of May, for the

TV set she bought from her. In turn, Linda owes Tshepo an amount of R800, also payable at the end of May, she borrowed from her for her child's school fees. Tshepo and Linda agree that Tshepo will pay Linda only R200. In this example, an amount of R800 is set-off.

8 IMPOSSIBILITY OF PERFORMANCE SUPERVENING AFTER CONCLUSION OF THE CONTRACT (TEXTBOOK PAR 12.8)

Objective supervening impossibility of performance occurs when, **after** conclusion of the contract, performance becomes impossible as a result of an **external** factor which is beyond the control of the contracting parties.

Example: Rashid and Norman agree that Rashid will hire Norman's horse for a week. Even before the object of lease (the horse) can be delivered to Rashid, the horse is struck by lightning and dies. The contract of lease is terminated when the horse dies.

The supervening impossibility of performance also cancels any reciprocal obligations which may exist. In the example above, therefore, Norman is released from the obligation to make his horse available to Rashid and Rashid is released from his obligation to pay Norman for the lease of the horse from the date of its death.

Note the differences between the **initial** impossibility of performance (which relates to the forming of the contract), **prevention** of performance (a form of breach of contract) and **supervening impossibility** of performance (which arises after the conclusion of the contract).

8.1 The consequences of supervening impossibility of performance

Normally, supervening impossibility of performance extinguishes the obligations of the contract. Therefore, both the debtor and the creditor are relieved from their respective obligations.

However, do note: the obligation is not terminated in the following instances:

- In contracts where the risk of supervening impossibility attaches to one of the parties. This may happen by operation of law or by agreement.
- Where supervening impossibility of performance occurs after the debtor has fallen in mora (see the textbook ch 10).

8.2 Objective and subjective impossibility of performance

Subjective impossibility of performance concerns a specific debtor's inability to perform.

Example: Claudia concluded a contract to purchase a painting. When she wanted to pay, she discovered that the R1 000 with which she wanted to pay, had been stolen from her purse. She can now no longer afford the painting. This is an example of subjective impossibility of performance, since it is only Claudia who is unable to perform. If, however, the painting had been destroyed in a fire, the performance (delivery of the painting) would have become objectively impossible, since nobody would have been able to deliver the specific painting.

Note that the subjective impossibility of performance does not terminate the obligation. Claudia is not therefore released from her obligations in terms of the contract.

8.3 Temporary and partial impossibility of performance

Where a divisible performance becomes partially impossible, the whole obligation is not terminated. The debtor is released only proportionately.

Example: Joseph and Roger agree that Joseph will use three of Roger's horses for a period of one month. One of the horses is subsequently killed by lightning. Roger is still obliged to make his other two horses available to Joseph and Joseph must pay for the use of the two horses for the month, as well as for the use of the horse that was killed, for the time that he had had such use.

The same principles apply where performance has become temporarily impossible in the case of a continuing obligation.

9 PRESCRIPTION

(TEXTBOOK PAR 12.9)

9.1 The nature of prescription

Prescription has to do with the passage of time. It is possible to acquire rights through the passage of time. This is known as **acquisitive prescription**. Here we are concerned with **extinctive prescription**, which is the release from obligations through the passage of time.

Prescription starts running as soon as the claim becomes **enforceable**. If the parties have agreed that payment in respect of a debt will be due on a certain date, prescription will start running on that date.

The **Prescription Act 68 of 1969** provides that completion of prescription may be delayed in certain circumstances where the creditor is for some reason temporarily unable to enforce his or her rights (see par 12.9.1 of the textbook).

9.2 Prescription periods

The prescription periods are set out in paragraph 12.9.2 of the textbook.

10 SEQUESTRATION AND SUBSEQUENT REHABILITATION

(TEXTBOOK PAR 12.10)

As a rule, sequestration does not terminate the contracts concluded by the insolvent before he or she became insolvent, but certain contracts are indeed terminated, for example a contract of mandate is terminated when the estate of the mandator is sequestered. Once the insolvent is rehabilitated, all obligations arising from those contracts that continued after sequestration, are extinguished unless they arose from fraud on the part of the insolvent.



ACTIVITY

- (1) In what circumstances can a contract be terminated by rescission and cancellation?
- (2) Cassie concludes an agreement with Unisa in terms of which Cassie will receive tuition in exchange for the payment of tuition fees. Would it be valid for Cassie's father to pay Cassie's tuition fees?
- (3) Chalkie lends David a sum of money and they agree that David will pay back the amount plus 10 percent interest per month on the outstanding balance over two years. David faithfully pays off the amount for a period of eighteen months but thereafter he falls into arrears. Chalkie calculates that the outstanding balance is R15 000, but David maintains that the outstanding balance can be no more than R7 000. After negotiating they agree that David will pay back R10 000 immediately. What is the second agreement an example of?
- (4) Blair rents an office in Morgan's office building for a period of three years.

The office is damaged in a fire (caused by lightning) to the extent that, for two months, Blair is unable to use it. Explain whether the lease contract between Blair and Morgan is terminated. Give reasons for your answer.

- (5) Fancy Windows CC makes windows according to Thoko's specifications. When the windows are delivered, Fancy Windows fails to include an invoice and Thoko does not know what he owes. Fancy Windows undertakes to send an invoice later but does not do so. Four years later the accountant of Fancy Windows notices that Thoko has never paid for the windows. Fancy Windows now claims payment. Advise Thoko.



FEEDBACK

- (1) Rescission and restitution occur where the contract is voidable (eg as a result of misrepresentation, undue influence or duress), whereas cancellation and restitution occur where there is breach of contract (and a right to cancel exists and is exercised), or where the parties reach consensus to cancel the contract (by concluding a cancellation agreement).
- (2) The valid fulfilment of a contract can usually be done by someone other than the debtor personally, unless the performance is associated with the person of the debtor. Cassie's father would be permitted to pay the tuition fees.
- (3) Settlement occurred. It would also be settlement if Chalkie and David agreed that David will pay the R10 000, even though he denied that he owed Chalkie any amount at all.
- (4) Total impossibility of performance would have brought the contract to an end. However, in this case there is only temporary impossibility of

performance and the parties are only temporarily released from their obligations: Morgan is unable to lease the office to Blair for two months and, for that period of time, Blair need not pay rent.

- (5) Because three years have already passed since the debt fell due, there has been prescription of the debt and Thoko is released from his obligation to pay for the windows.

11 EXPLANATORY TERMS

Cedent: The person who transfers a personal right to another.

Cession: The transfer of a personal right from one party to another.

Cessionary: The person to whom a personal right is transferred.

Counter-claim: A valid claim which a debtor may use to oppose a creditor's claim.

Delegation: A specific form of novation which terminates the debtor's obligation(s) because a new debtor is now responsible to the creditor for performance. Delegation can only occur with the creditor's approval.

Discharge: The performance of an obligation.

Mala fide: In bad faith.

Novation: An agreement between a creditor and a debtor in terms of which the old obligation between them is extinguished and a new obligation is created in its place.

Prescription: The acquisition of rights or release from obligations through the passage of time.

Set-off: The extinguishing of debts owed reciprocally by two parties.