

The Drafting of Contracts in South Africa

by

Michele Marié van Eck

Submitted in fulfilment of the requirements for the degree

LLD

in the Faculty of Law,
University of Pretoria

November 2015

Supervisor: SJ Cornelius



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

University of Pretoria

Declaration of originality

This document must be signed and submitted with every essay, report, project, assignment, mini-dissertation, dissertation and/or thesis

Full names of student: **Michele Marié van Eck**

Student number: **13416210**

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this **thesis** (eg essay, report, project, assignment, mini-dissertation, dissertation, thesis, etc) is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature of student:.....

Signature of supervisor:.....

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

UNIVERSITY OF PRETORIA

PLAGIARISM POLICY AGREEMENT

The University of Pretoria places great emphasis upon integrity and ethical conduct in the preparation of all written work submitted for academic evaluation.

While academic staff teaches you about referencing techniques and how to avoid plagiarism, you too have a responsibility in this regard. If you are at any stage uncertain as to what is required, you should speak to your lecturer before any written work is submitted.

You are guilty of plagiarism if you copy something from another author's work (eg a book, an article or a website) without acknowledging the source and pass it off as your own. In effect you are stealing something that belongs to someone else. This is not only the case when you copy work word-for-word (verbatim), but also when you submit someone else's work in a slightly altered form (paraphrase) or use a line of argument without acknowledging it. You are not allowed to use work previously produced by another student. You are also not allowed to let anybody copy your work with the intention of passing it off as his/her work.

Students who commit plagiarism will not be given any credit for plagiarised work. The matter may also be referred to the Disciplinary Committee (Students) for a ruling. Plagiarism is regarded as a serious contravention of the University's rules and can lead to expulsion from the University.

The declaration which follows must accompany all written work submitted while you are a student of the University of Pretoria. No written work will be accepted unless the declaration has been completed and attached.

Full names of candidate: **Michele Marié van Eck**

Student number: **13416210**

Date:.....

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.

SIGNATURE OF CANDIDATE:

SIGNATURE OF SUPERVISOR:

ACKNOWLEDGMENTS

I extend my gratitude to the University of Pretoria for the opportunity to pursue this study, as well as Prof. SJ Cornelius for his insights, guidance and mentorship throughout the process. This research is the product of a lifetime of support and encouragement of my parents and would not have been possible without them. Finally, my family, friends and colleagues that contributed and assisted me in some way, shape or form - to each of you, you have my thanks.

SUMMARY

The drafting of contracts is mostly viewed as a practical process. Both contractual practices and theoretical sources imply that contract drafting entails no more than the mastering of language. Drafting practices have diluted the understanding of why drafters do what they do in contracts. These practices include the use of precedents in a “one-size-fits-all” approach and the cutting, copying and pasting of clauses when using so-called standard provisions.

Every contractual provision has a specific purpose and reason for its inclusion in a contract. There must be reasons why a contract looks as it does, reads and is structured in the manner and style in which it is. These purposes and reasons should be able to be traced back to substantive law and contract theory.

The purpose of a written contract is to have stronger evidentiary proof of the agreement concluded, but the requirements for a valid contract remain the same irrespective of whether it is written or not. A drafter must then, in some way, shape or form capture these requirements of substantive law in the written contract.

This study proposes that a new approach to the drafting of contracts be considered. There are no specific rules or requirements detailing the right way of drafting a contract, but there are better ways of drafting contracts. The question to be answered throughout this study is why drafters do what they do in a written contract and how such practices are linked back to substantive law.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION.....	1
1.1 INTRODUCTION.....	1
1.1.1 CONTRACTUAL PRACTICES.....	2
1.1.2 THEORETICAL BASE	5
1.2 PURPOSE	6
1.3 TERMINOLOGY AND RESEARCH METHODOLOGY	6
1.4 SCOPE	7
CHAPTER 2: PHILOSOPHY OF CONTRACT DRAFTING	11
2.1 INTRODUCTION.....	11
2.2 POWER RELATIONSHIP MODEL FOR CONTRACT DRAFTING	16
2.2.1 MACRO POWER RELATIONS.....	19
2.2.2 MICRO POWER RELATIONS.....	21
2.2.3 POWERS FLOWING FROM THE WRITTEN DOCUMENT	23
2.2.4 POWERS OF THE DRAFTER	25
2.3 CONCLUSION.....	28
CHAPTER 3: HISTORY OF CONTRACTS.....	30
3.1 INTRODUCTION.....	30
3.2 ROMAN LAW.....	31
3.2.1 EARLY DEVELOPMENT	31
3.2.2 CLASSIFICATION OF CONTRACTS.....	33
3.2.3 DEVELOPMENT OF THE WRITTEN CONTRACT POST-CLASSICAL PERIOD	38
3.3 ROMAN-DUTCH LAW	41
3.3.1 THE USE OF WRITTEN DOCUMENTS AND NOTARIES IN EUROPE.....	41
3.3.2 INFLUENCES ON ROMAN-DUTCH LAW.....	44
3.3.3 NO FORMALITIES REQUIRED	46
3.4 ENGLISH LAW.....	49
3.4.1 BACKGROUND AND BASIS OF THE WRIT SYSTEM	49
3.4.2 EARLY FORMS OF ACTION.....	52
3.4.3 LATER DEVELOPMENTS OF ACTIONS AND WRITTEN AGREEMENTS.....	55

3.5	SOUTH AFRICAN LAW.....	57
3.6	CONCLUSION.....	59
	CHAPTER 4: APPROACHES TO DRAFTING.....	61
4.1	INTRODUCTION.....	61
4.2	CIVIL LAW LEGAL SYSTEMS.....	65
4.3	COMMON LAW LEGAL SYSTEMS.....	68
4.4	EXAMPLES OF THE DIFFERENT APPROACHES.....	71
4.4.1	GOOD FAITH AND FAIRNESS	71
4.4.2	THIRD PARTY RIGHTS.....	74
4.4.3	<i>FORCE MAJEURE</i> AND DOCTRINE OF FRUSTRATION	74
4.4.4	PENALTY PROVISIONS AND LIQUIDATED DAMAGES	76
4.4.5	IMPLIED TERMS	77
4.5	SOUTH AFRICA AS A MIXED LEGAL SYSTEM.....	79
4.6	CONCLUSION.....	80
	CHAPTER 5: THE BASIS OF THE WRITTEN CONTRACT	82
5.1	INTRODUCTION.....	82
5.2	OBLIGATIONS	86
5.3	THE BASIS OF CONTRACTS.....	88
5.3.1	DEFINITION.....	88
5.3.2	REQUIREMENTS OF CONTRACTS	91
5.3.3	THEORIES	93
5.4	CONCLUSION.....	94
	CHAPTER 6: CONSENSUS.....	96
6.1	INTRODUCTION.....	96
6.2	CONSENSUS.....	99
6.2.1	OFFER AND ACCEPTANCE	99
6.2.2	DATE AND TIME OF ACCEPTANCE	104
6.2.3	MEETING OF THE MINDS.....	113
6.2.4	COUNTERPART PROVISION	113
6.2.5	TESTIMONIUM PROVISION	114

6.3	DEFECTIVE CONSENSUS	115
6.3.1	MISTAKE	116
6.3.2	MISREPRESENTATION	119
6.3.3	DURESS AND UNDUE INFLUENCE.....	121
6.4	RECTIFICATION	123
6.5	CONCLUSION.....	124
CHAPTER 7: CONTRACTUAL CAPACITY		126
7.1	INTRODUCTION.....	126
7.2	PARTIES	127
7.2.1	MULTIPLE PARTIES.....	128
7.2.2	THIRD PARTIES	130
7.2.3	SUBSTITUTION OF PARTIES	133
7.3	CONTRACTUAL CAPACITY	135
7.3.1	NO CAPACITY	136
7.3.2	LIMITED CAPACITY	138
7.3.3	AGENTS AND JURISTIC PERSONS.....	139
7.4	ANALYSIS IN RELATION TO THE DRAFTING OF CONTRACTS	142
7.4.1	DESCRIPTION OF THE PARTIES	143
7.4.2	WARRANTIES AND REPRESENTATIONS	144
7.4.3	REPRESENTATIVE CAPACITY	145
7.5	CONCLUSION.....	147
CHAPTER 8: FORMALITIES		150
8.1	INTRODUCTION.....	150
8.2	FORMALITIES REQUIRED BY THE PARTIES	151
8.2.1	WRITING AND SIGNATURES	153
8.2.2	WITNESSING	157
8.2.3	VARIATION AND WAIVERS	160
8.3	FORMALITIES REQUIRED BY LAW.....	163
8.3.1	WRITING AND SIGNATURES	164
8.3.2	WITNESSING	166

8.3.3	NOTARISING AND REGISTRATION	167
8.3.4	PERMISSIONS	169
8.3.5	SPECIFIC REQUIREMENTS	171
8.4	CONCLUSION.....	173
CHAPTER 9: LEGALITY AND LAWFULNESS		175
9.1	INTRODUCTION.....	175
9.2	LAWFULNESS AND LEGALITY	177
9.2.1	CONTRACTS CONTRA STATUTE	180
9.2.2	CONTRACTS CONTRA COMMON LAW	183
9.2.3	CONSEQUENCES OF UNLAWFUL OR ILLEGAL CONTRACTS	186
9.3	ANALYSIS IN RELATION TO THE DRAFTING OF CONTRACTS	187
9.3.1	STATEMENTS, WARRANTIES AND REPRESENTATIONS	188
9.3.2	SEVERABILITY PROVISIONS	190
9.4	CONCLUSION.....	191
CHAPTER 10: CERTAINTY.....		193
10.1	INTRODUCTION.....	193
10.2	SOURCES OF UNCERTAINTY	194
10.2.1	AMBIGUITY	197
10.2.2	UNDUE GENERALITY	201
10.2.3	INCONSISTENT USE OF WORDS	203
10.2.4	REDUNDANCY AND GAPS	204
10.2.5	VAGUENESS.....	205
10.2.6	DISCRETION OF A PARTY	206
10.3	ANALYSIS OF CONTRACT DRAFTING MECHANISMS.....	207
10.3.1	DEFINITIONS	208
10.3.2	TYPOGRAPHICAL READABILITY.....	209
10.3.3	LINGUISTIC READABILITY	212
10.3.4	SUBSTANTIVE MECHANISMS	212
10.4	CONCLUSION.....	215

CHAPTER 11: POSSIBILITY	217
11.1 INTRODUCTION.....	217
11.2 SUPERVENING IMPOSSIBILITY.....	221
11.3 ANALYSIS IN RELATION TO CONTRACT DRAFTING.....	223
11.3.1 <i>FORCE MAJEURE</i>	224
11.3.2 <i>HARDSHIP AND INTERVENER PROVISIONS</i>	226
11.3.3 <i>AMIABLE COMPOSTER</i>	227
11.3.4 <i>WARRANTIES</i>	227
11.4 CONCLUSION.....	228
CHAPTER 12: END-GAME PROVISIONS	230
12.1 INTRODUCTION.....	230
12.2 FRIENDLY TERMINATION PROVISIONS	232
12.2.1 <i>FULFILMENT OF OBLIGATIONS</i>	233
12.2.2 <i>EFFLUXION OF TIME</i>	234
12.2.3 <i>AGREED TERMINATION AND TERMINATION BY NOTICE</i>	236
12.2.4 <i>NOVATION</i>	237
12.3 TERMINATION THROUGH OPERATION OF LAW.....	238
12.3.1 <i>SET-OFF</i>	239
12.3.2 <i>PRESCRIPTION</i>	240
12.4 OTHER TERMINATION PROVISIONS.....	241
12.5 BREACH.....	242
12.5.1 <i>REMEDIES THAT KEEP THE CONTRACT ALIVE</i>	247
12.5.2 <i>REMEDIES THAT BRING THE CONTRACT TO AN END</i>	252
12.6 CONCLUSION.....	255
CHAPTER 13: DISPUTE RESOLUTION.....	257
13.1 INTRODUCTION.....	257
13.2 LITIGATION	260
13.2.1 <i>CONTRACT WITH AN INTERNATIONAL ELEMENT</i>	261
13.2.2 <i>CONTRACT WITHOUT AN INTERNATIONAL ELEMENT</i>	263
13.2.3 <i>EXCLUSIVITY OF JURISDICTION PROVISION</i>	264

13.2.4	COSTS	265
13.3	ALTERNATIVE DISPUTE RESOLUTION	267
13.3.1	INFORMAL MECHANISMS	268
13.3.2	FORMAL MECHANISMS	269
13.3.2.1	EXPERT DETERMINATION	270
13.3.2.2	MEDIATION	271
13.3.2.3	ARBITRATION	273
13.3.2.4	FORMAL HYBRID MECHANISMS	278
13.4	CONCLUSION.....	279
	CHAPTER 14: OPERATION OF A CONTRACT	281
14.1	INTRODUCTION.....	281
14.2	PROVISIONS OF A CONTRACT	282
14.2.1	TERMS	283
14.2.2	DECLARATIONS	287
14.2.3	CONDITIONS	288
14.2.4	THE PHRASE “TERMS AND CONDITIONS”	290
14.2.5	BUILDING BLOCKS	292
14.3	INTERPRETATION	297
14.4	NOTICES.....	299
14.5	CONCLUSION.....	302
	CHAPTER 15: PRACTICAL APPLICATION.....	303
15.1	SEQUENCE OF CONTRACTUAL PROVISIONS.....	303
15.2	AGREEMENT ANALYSIS	307
15.3	EXAMPLE AGREEMENT	316
15.4	PROPOSED REDRAFT OF THE EXAMPLE AGREEMENT	320
	CHAPTER 16: CONCLUSION.....	324
	BIBLIOGRAPHY	327
	ABBREVIATIONS	328
	OLD AUTHORITIES.....	330
	PRIMARY SOURCES	332

CASE LAW: FOREIGN	332
CASE LAW: SOUTH AFRICAN	335
LEGISLATION: FOREIGN	344
LEGISLATION: SOUTH AFRICAN	346
SECONDARY SOURCES	348
BOOKS	348
JOURNALS	356
OTHER RESEARCH	365
OTHER	367

CHAPTER 1

INTRODUCTION

1.1	INTRODUCTION.....	1
1.1.1	CONTRACTUAL PRACTICES.....	2
1.1.2	THEORETICAL BASE	5
1.2	PURPOSE	6
1.3	TERMINOLOGY AND RESEARCH METHODOLOGY	6
1.4	SCOPE	7

1.1 INTRODUCTION

In considering the drafting of contracts one must take into account contractual drafting practices as well as the theoretical base thereof.¹ Both these elements influence the approach taken when contracts are drafted, but also highlight misconceptions and preconceptions relating to drafting. The most obvious of these is that the drafting of contracts is viewed as a practical process with minimal or no consideration of the substantive law embedded in the drafting process. The drafting of contracts is also often viewed as being purely practical and, therefore, seen as standing outside the scope of substantive law. Both contractual practice and theoretical sources imply that contract drafting entails the mastering of language. As will be seen, this is not the case and the drafting process includes other factors which are not limited to linguistic elements only.²

¹ The theoretical base sets out the literature available on the drafting of contracts.

² See par 1.4.

1.1.1 CONTRACTUAL PRACTICES

In the case of *Elliott Associates v Peru*,³ the use of the boilerplate⁴ provision *pari passu*,⁵ illustrates a common scenario found in contract drafting. A provision was included in a contract as it was considered to be a standard provision which was normally found in similar types of contracts.⁶ Gulati and Scott found that the *pari passu* provision had similarly been used in other sovereign debt instruments since the nineteenth century and that the provision showed relatively little deviation from one contract to another.⁷ The decision of *Elliot* shed a different light on the commonly understood interpretation of the provision. Although the outcome was criticised, what is of interest to contract drafting is what occurred after the decision of *Elliot*. Despite the outcome, many similar types of contracts still included the *pari passu* provision with few or no changes thereto.⁸

³ *Elliott Associates LP v Peru* General Docket No 2000/QR/92, Court of Appeals, Brussels, 8th Chamber, 26 September 2000; Gulati & Scott *The Three and a Half Minute Transaction* (2013) 12-13, in this case Peru undertook to only make payment to bondholders who agreed to the restructuring agreement. Elliot Associated, being a bondholder, refused to enter into the restructuring agreement. Elliot Associated subsequently sought an injunction in order to prevent any payments from being made. Their argument was that, as a result of a *pari passu* provision the payments under the restructuring agreement could not occur without making a proportionate payment to Elliot Associated.

⁴ A boilerplate is a term used for standardised clauses in contracts. Stark *Negotiating and Drafting Contract Boilerplate* (2003) 9-10, explains that the term boilerplate has two historical sources. The first source relates to the ship building industry with the invention of steam powered ships in which two potential origins for the term boilerplate is possible. The first is the standardised process for iron to build boilers on the ship and the second relates to the identification plate used for boilers which was a standard size. The second source originated from the newspaper printing process in which a syndicated printing press would distribute identical plates to ensure that the same documents were printed accurately. In both industries the term boilerplate came to mean something standardised. This meaning has been adopted in contracts where terms are considered to be standard or used in similar types of contracts. See also Anderson & Warner *A-Z Guide to Boilerplate and Commercial Clauses* (2012) 1.

⁵ Meaning “in equal step”.

⁶ Gulati & Scott 12-13, explain that there was uncertainty as to what the *pari passu* clause actually meant. It was normally used in liquidation processes to recover debts in a *pro rata* fashion, but in the case of a country, which cannot be liquidated, the meaning of the clause was unclear.

⁷ Gulati & Scott 13.

⁸ *Ibid.*

Gulati and Scott interviewed a number of practitioners to understand why similar types of contracts still included the *pari passu* provision. Many practitioners agreed that the *pari passu* provision made little sense in agreements that related to sovereign debt instruments, but despite this, they were still hesitant to change or exclude the provision.⁹ The argument was based on the belief that: (i) the courts would penalise the party who adopted a different language compared to previously negotiated contracts,¹⁰ (ii) the change in contract language would result in the bond market penalising their clients,¹¹ (iii) standard contract terms have “stood the test of time”,¹² and (iv) the use of contract terms over a period of time created a familiarity which was better understood and as such standardised provisions were “battle tested”.¹³

The *Elliot* case is not unique and illustrates the phenomenon commonly found in contract drafting. One standard provision is often reproduced from one contract to another. “Problems arise, however, when the provisions become iconic and drafters no longer think through whether the standard, off-the-rack provision actually fits the needs of the contract and the parties.”¹⁴ This leads to the argument that the reason why a provision is found in a contract is often not understood by the drafter who put it there. Irrelevant and inappropriate provisions often find their

⁹ Gulati & Scott 13.

¹⁰ Gulati & Scott 12.

¹¹ *Ibid.*

¹² Gulati & Scott 33; Stark (2003) 6, contends that the continued use of some precedence has created a renowned status for the use of such a precedence or boilerplate provision. A benefit that Stark points out is that the use of precedence and boilerplates results in less time being spent in drafting a contract and, as a result saving money for clients. Another view could be that the clause was used because everyone else used a similar provision.

¹³ Gulati & Scott 34; Stark (2003) 6, states that the repeated use would presumably ensure that the precedent or boilerplate provision was adapted to take into account any judicial findings and interpretations. The scenario put forward by Gulati & Scott brings such a statement into question as no adaption occurred to the *pari passu* provision after a court decision. Adams *A Manual of Style for Contract Drafting* (2008) xxvii, states that the use of standard wording has already been tested and litigated on and, as such, the words used should remain as is, because they already have a standard, established meaning. The difficulty with this approach is that unchanged provisions often still find their way into contracts regardless of new court decisions. Gulati & Scott illustrate this with the continued use of the *pari passu* provision in sovereign debt instruments.

¹⁴ Stark (2003) 6.

way into contracts for as little reason as accepting that it is a standard provision. It will be seen that there is no such thing as a so-called standard provision. Every contractual provision has a specific purpose and reason why it has been included in a contract. The purpose of certain provisions and why drafters do what they do will be traced back to substantive law and contract theory.

In addition the process of contract drafting has, over time, developed practices which are not limited to the example illustrated in *Elliot*. These practices include the almost reckless use of precedence in a “one-size-fits-all” approach,¹⁵ the phenomenon of “cutting, copying and pasting” of clauses,¹⁶ the use of “standard forms” and the argument of “this is how it has always been done” or it is a “standard clause”.¹⁷ It will be seen that the so-called standard provision is a myth. There are provisions commonly found in contracts, but this hardly makes a provision standard. The content of such provisions may change from one contract to another. The reason for the inclusion or exclusion of a specific provision is found in substantive law and contract theory.

¹⁵ Adams (2008) xxix, is of opinion that the copying of contracts (or contract provisions) is the core problem found in contract language. Copying is not limited to the linguistic dimension as Adams seems to imply. The copying of contracts also influences other dimensions of contract drafting, as discussed later in par 1.4.

¹⁶ Stark (2003) 6, points out that the cutting and pasting of precedent reduces the likelihood of errors; Adams “Dysfunctional Contract Drafting: The Causes and the Cure” *Tenn J Buss L* (2014) 331, states that “waste and confusion are hallmarks of traditional contract language and the traditional contract process”. Adams (2014) 331, argues further that the contract drafting process has relied on the “wholesale copying” of provisions from one contract to another.

¹⁷ Espenschied *Contract Drafting: Powerful Prose in Transactional Practice* (2010) 2, is of the view that “... in many cases lawyers simply adapt old documents to their specific needs, perpetuating poor drafting language.” Gulati & Scott 10, explain that boilerplates remain, in most cases, largely unchanged and there is a significant resistance to changing boilerplates.

1.1.2 THEORETICAL BASE

The basis for contract drafting should be found in the theoretical texts, but the literature on contract drafting seems to fuel the preconception that the drafting of contracts is a highly practical process. Available theoretical texts relating to contract drafting predominantly focus on the linguistic dimension of contract drafting.¹⁸ The focus in most of the theoretical texts is on the use of language and the linguistic ambiguities found in the text of a contract.¹⁹ Although this element cannot be overlooked, it is apparent that little or no attention is paid to the substantive dimension of contract drafting.

Substantive law is perceived to be vaguely connected to contract drafting, but they are seen as separate from each other. Although all texts seem to agree that substantive law is important to contract drafting, it seems limited to the application of or compliance with substantive law in contract drafting.²⁰ Little explanation is thus given as to why a contract is drafted in the way it is and how such drafting practices are linked to substantive law. Contracts are drafted in the manner in which they are for specific reasons and those reasons are found in substantive law.

¹⁸ For example Kuney *The Elements of Contract Drafting with Questions and Clauses for Consideration* (2011); Anderson & Warner; Stark *Drafting Contracts How and Why Lawyers Do What They Do* (2007); Fox *Working with Contracts: What Law School Doesn't Teach You* (2008); Paris *Drafting for Corporate Finance* (2007); Espenschied; Armstrong & Terrell *Thinking Like a Writer: A Lawyers Guide to Effective Writing and Editing* (2009); Haggard & Kuney *Legal Drafting in a Nutshell* (2007), which include some, but limited mention of substantive law requirements in the drafting of contracting; Lewis "The Contract Drafting Process: Integrating Contract Drafting in a Simulated Law Practice" *Clinical L Rev* (2005) 241; Hutchinson *The Law of Contract in South Africa* (2012), has a section dedicated to the drafting of contracts and although referring to the substantive law, it fails to explain in sufficient detail the reason why a contract is drafted in the manner that it is.

¹⁹ See ch 10, which discusses the ambiguities found in written contracts.

²⁰ *Supra* (n 18).

1.2 PURPOSE

This study proposes a new approach to the drafting of contracts. Every element in the drafting and formulation of a contract should be couched in, or linked back to, substantive law. There must be reasons why a contract looks as it does, reads and is structured in the style and manner in which it is. In other words, every aspect of a contract must have a reason why it is drafted in such a manner and one should be able to trace it back to the substantive law and contract theory.²¹

The purpose of this study is to consider why, from a legal theory and substantive law perspective, contracts are drafted and formulated in the manner in which they are. As will be seen throughout the study, there are no specific rules or requirements detailing the right way of drafting a contract, but there are better ways to draft a contract.²²

1.3 TERMINOLOGY AND RESEARCH METHODOLOGY

The focus of this study is on considering the drafting and formulation of contracts in South Africa. The term “drafting” has a specific meaning in the context of contracts and infers language usage, verbiage, sentence construction, layout and structure of a contract.²³ The term “drafting” is often seen as synonymous with the process of writing and viewed as a skill learnt by practitioners.²⁴ Drafting is also described as a specific category of legal writing which is used

²¹ Hutchinson 394, confirms that in the process of drafting contracts, understanding the substantive law is essential.

²² Hutchinson 394; Espenschied 2.

²³ The Collins Dictionary defines the term “draft” as a verb meaning to draw up an outline or sketch of something or to prepare a plan or design (<http://www.collinsdictionary.com/dictionary/english> accessed 1 August 2015).

²⁴ Espenschied 1, 9-10, describes the characteristics of legal drafting as accuracy, clarity, brevity, simplicity and tone; Sjoström *An Introduction to Contract Drafting* (2013) 1.

for compiling legislation, wills, documents and contracts with the aim to control certain future events.²⁵

As this research proposal intends to consider contracts in a wider context than merely the use of language and document structure, it seems appropriate to also use the term formulation. The term “formulation” implies a process that is wider than merely the construction of language.²⁶ It implies the application of a formula which, for the purposes of contracts, encompasses the rules and requirements found in substantive law. Unless indicated otherwise, the use of the term “drafting” in this study will include both the aspects of drafting and the formulation of contracts, and should be read as such.

This study will be an academic and literary study, which will include the consultation of various sources such as textbooks, journal articles, case law and the like. The study will include some elements of comparative studies of foreign jurisdictions to the extent that such a comparison would be helpful. The exact scope of the comparative law will be considered in detail later in the study.²⁷

1.4 SCOPE

To limit the influences of contract drafting to one particular element would be naive. There are various elements that influence the manner in which contracts are drafted. The most prevalent

²⁵ Espenschied 2-3.

²⁶ The Collins Dictionary defines the term “formulation” as a verb meaning to put into or express in systematic terms; to express in; as if in a formula or to devise (<http://www.collinsdictionary.com/dictionary/english> accessed 1 August 2015).

²⁷ See ch 4.

influence, as seen above, is the linguistic dimension of contract drafting.²⁸ The linguistic dimension is, however, not the only influence that exists in contract drafting.

The various theoretical influences in contract drafting can be illustrated through three broad categories *inter alia*, the systemic, linguistic and functional context.²⁹ Each category, in turn, has a number of dimensions. The systemic context consists of substantive, interpretational and constitutional dimensions. The substantive dimension relates to substantive law, contract theory and legislation.³⁰ The interpretation dimension relates to the rules and theory of interpreting contractual texts, which in itself goes hand in hand with the drafting of contracts.³¹ Finally, the constitutional dimension relates not only to the influence of the Constitution and the Bill of Rights, but also to the *bona mores*, public policy and fairness in contracts.³²

The linguistic context consists of the language, syntax and structural dimensions.³³ The language and syntax dimensions relate to the language used in the contract, including plain language,³⁴ linguistic ambiguities, proper English language and sentence structure. The structural dimension relates to the form and manner in which a contract is presented, and includes the use of headings, spacing, numbering and the like.

²⁸ *Supra* (n 18).

²⁹ Adapted from Lategan “Die Uitleg van Wetgewing in die Hermeneutiese Perspektief” *TSAR* (1980) 114.

³⁰ For example, an insurance contract for a motor vehicle must comply with the Short-Term Insurance Act 53 of 1998. So too, the selling of immovable property must comply with the Alienation of Land Act 68 of 1981. See ch 8.

³¹ See for example Cornelius *The Interpretation of Contracts in South African Law* LLD (1999), which study focuses on the interpretational dimension in depth; Cornelius *Principles of the Interpretation of Contracts in South African Law* (2007).

³² The Constitution of the Republic of South Africa and chapter 2 of the Bill of Rights, sets out certain overarching principles and rights which influence contracts as a whole.

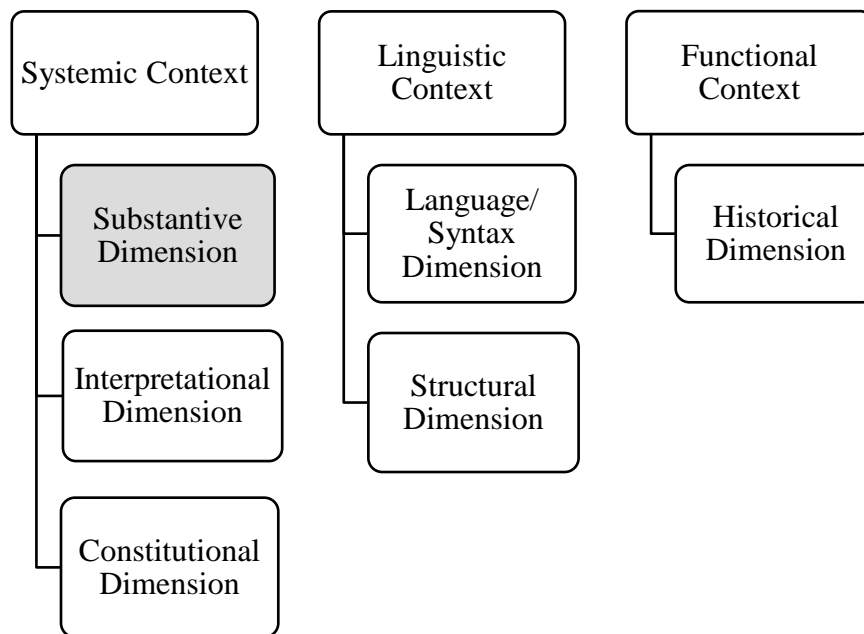
³³ *Supra* (n 18).

³⁴ See for example the Consumer Protection Act 68 of 2008 and National Credit Act 34 of 2005, which details specific requirements for plain language; Louw *The Plain Language Movement and Legal Reform in the South African Law of Contract* LLM (2010), whose study focuses on plain language.

The functional context includes the historical dimension, which covers the history of the negotiations between the parties and the manner in which past conduct influences the text and interpretation of the contract. The historical dimension goes hand in hand with the negotiations and the negotiated position of the parties.

All these aspects have an influence on the drafting of contracts and can be illustrated by the following diagram.

Figure 1.1: Theoretical Influences of Contract Drafting³⁵



To consider all the theoretical influences of contract drafting falls outside the scope of this study. The focus of this study will be limited to the systemic context and in particular the substantive dimension, and how the substantive dimension is applied and portrayed in the drafting of contracts. Some areas may overlap, and where applicable, such areas will be discussed in relation to its influence on the substantive dimension.

³⁵ Adapted from Lategan 114.

This study will not be considering the practical aspects of contract drafting, which are often found in the linguistic context.³⁶ As such, this study is not intended to function as a practice manual, or to consider how to draft a contract, or to teach the skill of drafting or in any way consider the practicalities of drafting. Further to this, although some comparative law will be considered where necessary,³⁷ the scope of this study excludes the influences of international trade law, customs, treaties and conventions.³⁸

This study can be viewed in three parts. The first part will consider the philosophical, comparative and historical elements that have influenced the drafting of contracts. This is discussed in Chapters 2 to 4. The second part will consider theories relevant to the contract document itself, the analysis of the different requirements of a contract as well as breach, termination, cancellation and operational aspects of a contract. This is discussed in Chapters 5 to 14. The third part is the practical application of the principles discussed in this study. This is discussed in Chapter 15.

³⁶ This study is not intended to be similar to the text found in *supra* (n 18).

³⁷ See ch 4.

³⁸ Excluded from this study are detailed comparisons in relation to the likes of the United Nations Convention on Contracts for International Sale of Goods (Vienna, 1980), (also known as *CISG*); the International Institute for the Unification of Private Law (also known as *UNIDROIT*); International Commercial Terms (also known as *INCOTERMS*) or the General Agreement on Tariffs and Trade (also known as *GATT*). Reference will be made to international rules and regulations insofar as they may assist in the study of drafting contracts in South Africa, but detailed consideration of such international rules or regulations falls outside the scope of this study.

CHAPTER 2

PHILOSOPHY OF CONTRACT DRAFTING

2.1	INTRODUCTION.....	11
2.2	POWER RELATIONSHIP MODEL FOR CONTRACT DRAFTING	16
2.2.1	MACRO POWER RELATIONS.....	19
2.2.2	MICRO POWER RELATIONS.....	21
2.2.3	POWERS FLOWING FROM THE WRITTEN DOCUMENT	23
2.2.4	POWERS OF THE DRAFTER	25
2.3	CONCLUSION.....	28

2.1 INTRODUCTION

Traditionally, power has been perceived as one person acting in his own best interest, to the detriment of another person.¹ The concept of power can be illustrated by means of a pyramid. At the apex of the pyramid sits the king or state.² The middle of the pyramid consists of the ministers and officials.³ Finally, the subjects of the king or people of the state are at the base of the pyramid.⁴ The orders of the king or state are implemented by the ministers and officials, which are then carried out over the subjects or people.⁵ This example illustrates the traditional

¹ Visser *The Limits of the Law of Obligations* (1997) 26; Winter “The ‘Power’ Thing” *Va L Rev* (1996) 796, mentions that traditionally, power is assumed to be: (i) violent, (ii) an external force that operates on a passive victim, (iii) is the property of one party which exercises it over another party and (iv) is expressed through means of a hierarchy.

² Taylor *Michel Foucault Key Concepts* (2011) 13.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

view that power emanates from the top echelon of the pyramid and is then exercised over the persons lower down in the pyramid.⁶

The traditional view of power can further be described by utilising three theories.⁷ The first theory states that party A has power over party B, to the extent that party A can get party B to do something that party B would not otherwise do.⁸ The second theory extends the first to situations where party A not only forces party B to do something, but could also prevent party B from doing something.⁹ The third theory of power includes the power of party A to manipulate party B, so that party B wants to do or refrain from doing what party A wants him to do or not to do.¹⁰ This traditional view has a common thread which implies that power forces people to act against their own interests.¹¹

The concept of power in contracts appears to have followed a similar line of thought as the traditional view of power and can be described in both a front-end and back-end dimension.¹²

⁶ Taylor 13, 17, states that the characteristics of the traditional view of power (which Michel Foucault describes as the *juridico-discursive*) is that: (i) power always operates negatively, (ii) power always takes the form of a rule of law, (iii) power operates through a cycle of prohibition, (iv) power has a level of censorship which permits or prevents a person from saying or doing something, and (v) power is universal.

⁷ Hart “Contract Formation and the Entrenchment of Power” *Loy U Chi L J* (2009) 178-179; Digester “The Fourth Face of Power” *The Journal of Politics* (1992) 978.

⁸ Digester 978; Winter 764.

⁹ *Ibid.*

¹⁰ Digester 979; Winter 764, mentions that party A may exercise power over party B by influencing, shaping or determining what party B wants and desires.

¹¹ Winter 766.

¹² Bridgeman “Misrepresented Intent in the Context of Unequal Bargaining Power” *Mich St L Rev* (2006) 993, describes power in contracts as a situation where party A wants party B to commit to its projects, while party A commits to nothing and keeps all future courses of action open. Party B wants the same thing. As such, each party usually has to settle for less than what they originally wanted. This description obviously relates to scenarios where there is no disparity in bargaining power. Morant “The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context” *Mich St L Rev* (2006) 926, contends that power in contracts relates to the interdependency of the parties and how parties control and distribute valuable resources. The party, who possesses a resource over another party who desires the resource, creates power. The level of power is proportional to the party’s needs and the availability of resources.

The front-end dimension¹³ relates to where there is a disparity in bargaining power, which normally occurs prior to the conclusion of an agreement.¹⁴ The back-end dimension¹⁵ relates to contractual powers conferred on a party through the provision of a contract itself and includes a party's right to use its discretion based on the contract provisions.¹⁶ The back-end dimension only occurs after the conclusion of the agreement, but could be the result of the disparity of bargaining power found in the front-end dimension. The front-end and back-end dimensions are examples of how power has been viewed in contracts, which has been described as one party having power, dominance or a level of coercion over another party, usually as a disparity in bargaining power or some discretionary right contained in a contractual provision. It seems incomplete to view contracts in this light alone. The front-end and back-end dimensions cannot be the only aspects of power when considering the drafting of contracts.

There are, in relation to power, two types of contracts. The one is contracts of a "take-it-or-leave-it" nature, also known as the so-called adhesion contracts.¹⁷ The standard agreement illustrates

¹³ Adapted from Arnow-Richman "Cubewrap Contracts and Worker Morality: Dilution of Employee Bargaining Power *via* Standard Form Noncompetes" *Mich St L Rev* (2006) 977, who describes the front-end dynamic as the balance of power at the point of contract formation.

¹⁴ Hart 178-179, is of the opinion that unequal bargaining power has a level of coercion exercised by one party over another. One party is thus compelled by the actions of the other party to do what they would normally have refused to do. Kim "Bargaining Power and Background Law" *Vand J Ent & Tech L* (2009) 93, states that power in contract relations typically refers to the bargaining power of the parties. This is the bargaining strength of one party in comparison to the other, after having taken into account factors that are specific to both parties.

¹⁵ Adapted from Arnow-Richman 963, who describes back-end dynamics as the balance of power at the potential termination or exit of the contract.

¹⁶ Visser 26-27, mentions that power is conferred in the law of contract, public law and the law of persons. Slawson "Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form" *Mich St L Rev* (2006) 855, defines contractual discretionary power as "a power the contract gives to one of the parties to perform as she, in her discretion chooses, subject to such limitations as the law or the contract provides." Some examples of contractual discretionary power are the setting of additional provisions or the inclusion of terms in a standard form.

¹⁷ *Weidman v Tomaselli* Country Court Rockland Country 81 Misc.2d 328 (1975) 331, describes a contract of adhesion as a contract "drafted by or for the benefit of a party for that party's excessive benefit, which party uses its economic or other advantage to offer the contract in its entirety for the acceptance or rejection by the offered." This illustrates a "take-it-or-leave-it" situation.

the classical scenario for the traditional view of power.¹⁸ Not all standard contracts cover a “take-it-or-leave-it” scenario and some standard form contracts are for convenience, which can be negotiated between the parties and falls within the second type of contract.¹⁹ The second type of contract is fully negotiated with little or no disparity in bargaining power. The exercise of control and coercion is absent from this type of agreement.

The traditional view of power cannot satisfactorily explain the power dynamics in a scenario where contracts are negotiated or where there is little or no disparity in the bargaining power. It seems apparent that power in contracts, and in particular the drafting of contracts, cannot satisfactorily be described through the traditional view. It is then necessary to expand the view of power. Foucault’s view of power assists in this regard as it expands the traditional view of power.²⁰

Unlike the pyramid example where power flows downward, according to Foucault, power moves upward from the bottom to the top of the pyramid. One, therefore, looks at power from the

¹⁸ This is where one party has undue influence over another party or because there is a level of coercion being exercised. Cartwright *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (2014) 9, states that many contracts are not negotiated at all. Consumer contracts normally fall within this category. This is not only because of the limited scope of negotiation, but also relates to the process of purchasing goods or services.

¹⁹ Naudé “Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application” *Stell LR* (2006) 368; Chrysotome *The Future of Standard Form Contracts in South Africa with Particular Reference to Recent Developments in the Law* LLM (2009) 9, indicates three types of standard form contracts as being: (i) precedence in the guise of a model form, (ii) forms of contract established before the contract takes place which are also known as “take-it-or-leave-it” contracts, and (iii) terms imposed by statute where only the residual terms are negotiated by the parties. Braun *Policing Standard Form Contracts in Germany and South Africa: A Comparison* LLM (2014) 10, details characteristics of a standard contract which are focused on the disparity found in standard documents with consumers. These characteristics are: (i) the agreement contains pre-drafted terms used by a business; (ii) the agreement is used to supply mass demand for goods and services, (iii) consumers are to accept the terms without negotiation, (iv) the acceptance of the terms can occur without knowledge or understanding of the terms, and (v) there is a clear differentiation in bargaining power between the consumer and the business.

²⁰ Winter 795; Foucault *The History of Sexuality Volume I: An Introduction* (1978) 94, views power not as something that can be acquired, seized or shared, as was the traditional view.

bottom level upwards.²¹ Power would then be seen to originate “at local relations of force rather than at the macro-level of hegemonies and states”.²²

It is then the individual’s behaviour and interactions of people that function as a starting point. Power can then be seen as a network of interacting forces between individuals, groups and institutions.²³ Power is present at each interaction between these individuals, groups and institutions.²⁴

People are the vehicles of power, as power is conveyed by their practices and interactions.²⁵ Every interaction between individuals, groups and institutions creates a power dynamic between such interacting individuals, groups and institutions.²⁶ Taking this as a starting point in the drafting of contracts, there should be a power dynamic at each point where an individual, group or institution interacts with one another. Based on this, the power relationship model for contract drafting is discussed and each power relationship is assessed.

²¹ Foucault 94.

²² Taylor 18, 22, states that power develops from an individual’s choices, behaviours and interactions and combines ways to constitute larger social patterns.

²³ Powers “The Philosophical Foundation of Foucaultian Discourse Analysis” *CADAAD* (2004) 1; Taylor 18; Morant 925.

²⁴ Powers 29-30; Morant 925.

²⁵ Digester 982; Piomelli “Foucault’s Approach to Power, its Allure and Limits for Collaborative Lawyering” *Utah L Rev* (2004) 435, says power is a set of relationships in which parties try to govern, shape or manage the behaviours of others by reacting to what others have done or may do in the future.

²⁶ Digester 984, mentions that, unlike the traditional view of power, Foucault’s view of power is that power is exercised, for the most part, without being done intentionally.

2.2 POWER RELATIONSHIP MODEL FOR CONTRACT DRAFTING

There are a number of dynamics at play that influence the process of contract drafting.²⁷ Some of these dynamics are factors external to the parties to the contract, while others may relate to the parties themselves. These dynamics are determined when the parties agree to a specific set of rules that will govern their relationship.²⁸ These rules of engagement are determined once the negotiations and contract drafting process starts. The rules of engagement set the parameters of the negotiation, drafting of the contract, the manner in which the parties interact with each other and ultimately the enforcement of the contract.²⁹

The rules of engagement for the drafting of contracts are twofold. The first being, that the written contract will regulate the future conduct of the parties to the contract and secondly, that the written contract will embody the agreement of the parties which will be enforceable in law.³⁰

A clue and a starting point in analysing the contract power dynamics may be found in the term “drafting”. Drafting is often used synonymously with the act of writing which points to the

²⁷ *Home Builders & Loan Association v Blaisdell et al.* 290 Supreme Court of the US 398 (1934) [435]-[436], quoting *Long Island Water Supply Co v Brooklyn* 166 US 685 692, “But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed and must be presumed, to be known and recognized to all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.”

²⁸ This is also known as “the rules of engagement”. Barnhizer “Inequality of Bargaining Power” *U Colo L Rev* (2005) 161; Kennedy “The Stakes of Law, or Hale and Foucault!” *Legal Studies Forum* (1991) 328.

²⁹ Morant 942, states that where parties follow the established procedures for contract formation, the parties will reach their goal of the enforcement of their agreement.

³⁰ Klass “Three Pictures of Contract: Duty, Power, and Compound Rule” *NYU L Rev* (2008) 1730, states that by requiring certain formalities in contracts, such as affixing a seal, the parties expect their actions to have legal consequences. So too by entering into a written contract it can be said the parties expect that their actions would have legal consequences.

language used, verbiage, sentence, layout and structure of a document.³¹ Drafting, however, is not only the act of writing, but rather implies a specific form of legal writing. Where legal writing is generally used to act persuasively in an attempt to sway a person to a point or a way of thinking, drafting is used with the aim of controlling certain future events.³² Therefore, an inference can be drawn that the process of drafting a contract is the process of attempting to control future events and control the actions of the parties to the contract. Contracts are a form of discourse. If one applies Foucault's theory that discourse is a form of controlling the listener, one could infer that contracts, and in particular the drafting of contracts, are attempts to exert control or power over parties to the contract. However, the ability to control is but one element of various forces and powers that tug, pull and influence the process of contract drafting. These various power relationships therefore create a system of interactive power influences.³³

The process of contract drafting predominantly plays out in two arenas.³⁴ The first being the macro power relations that relate to powers, influences and controls exerted over the parties which are not parties to the written contract. The macro power relations are external forces, which include legal rules, legislative and judicial controls over the contract and the parties to the contract. The second is the micro power relations, which relate to the powers, influences and

³¹ The Collins Dictionary defines the term "draft" as a verb meaning to draw up an outline or sketch of something or to prepare a plan or design (<http://www.collinsdictionary.com/dictionary/english> accessed 1 August 2015).

³² Espenschied *Contract Drafting: Powerful Prose in Transactional Practice* (2010) 2-3, states that drafting is found in specific legal instruments such as wills, legislation and agreements.

³³ Powers 28.

³⁴ Sithole *Beyond Contract Drafting and Enforcement: The Future of Contracting in Emerging Markets* MBA (2014) 12, mentions the design of the contract which impacts on the behaviour of the parties.

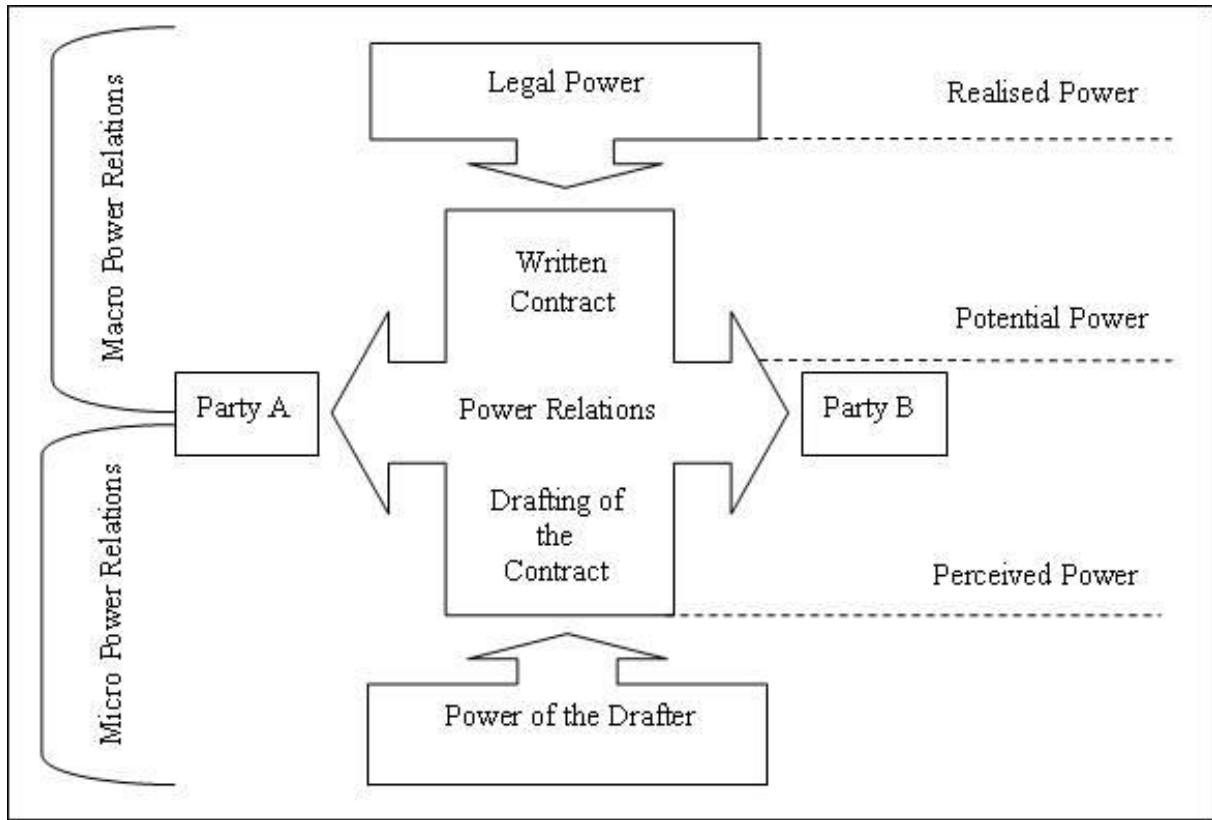
controls exerted between the parties to the contracts and can include the disparity of bargaining power, negotiation tactics and the like.³⁵

The macro power relations and the micro power relations are independent, but interdependent on one another, as it is impossible to have an enforceable contract without both spheres of influence. The micro power relations act on the rules of the macro power relations and anticipate the manner in which such macro power relations may enforce the contract, thereby adapting so as to ensure that the contract that is being drafted is, in fact, enforceable. The macro power relations, therefore, set out the rules of engagement. The process then starts at the level of the micro power relations, but at all times considering and adhering to the rules detailed in the macro power relations. The dynamics found in the macro and micro power relation spheres influence the drafting of the contract, and may have a greater or lesser influence depending on the circumstances at play when the contract is drafted.

The following diagram depicts the basic power dynamics at play in contract drafting and will be considered in more detail below.

³⁵ Barnhizer “Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions” *Wake Forrest L Rev* (2010) 605, describes external factors as: (i) the parties’ status, (ii) trade usage and custom, (iii) performance of the parties, (iv) background political social and economic context. These external factors are usually described in determining a party’s bargaining power.

Figure 2.1: Power Relationship Model of Contract Drafting



2.2.1 MACRO POWER RELATIONS³⁶

In the power relations model for contract drafting, the macro power relations relate to the written, fully executed, contract. It is the state of affairs that the parties negotiated and drafted in the micro power relation sphere and details the rules of engagement to which the parties have agreed to submit themselves.³⁷ The drafting of a contract would therefore not be possible, within the rules of engagement, without first considering the macro power relations.

³⁶ This terminology has been adapted from Foucault’s “power relations”. Also referred to as “elocutionary force” in Van Dijk “Structures of Discourse and Structures of Power” *Communication Yearbook* (1989) 27; Karlberg “The Power of Discourse and the Discourse of Power: Pursuing Peace through Discourse Intervention” *International Journal of Peace Studies* (2005) 10, describes a similar term as adversarial power relations.

³⁷ Scott *Power* (2006) 2.

This sphere can be described as the embodiment of institutional and governmental power, which is enforced through control, authority and coercion.³⁸ Two institutional and governmental powers, being legislative power and judicial power, play a role in this sphere.³⁹

Judicial power has a specific function as it enforces the rules laid down by the legislative power.⁴⁰ Judicial power does not create the rules, but enforces them. It determines whether the parties have actually complied with, and are acting within the rules and obligations created by the legislative power.

Legislative power does not determine whether the parties are acting within the parameters of the rules, but merely states what the rules and obligations are. In terms of contract drafting, legislative power interacts in two directions. The first, and the most obvious, is legislative power manifesting in a vertical line between the contracting parties and the state, through the rules and obligations embodied in legislation. This vertical power of the legislature lays down the rules which the judicial power will enforce and by which the contract will be judged. Legislative power, through this vertical interaction, penetrates the sphere of micro power relations.⁴¹ By means of legislative power, the parties must act and draft the contract to ensure compliance with the legislative power. Failure to do so would be counterproductive to the agreed rules of

³⁸ Kennedy “The Stakes of Law, or Hale and Foucault!” *Legal Studies Forum* (1991) 329, mentions that the state ensures obedience to legal rules by means of force. As such, in instances of a contract breach through the arm of the judiciary, the legal rules, in other words the rules of engagement to which the parties agreed to, are enforced by judicial power. Turner “Explaining the Nature of Power: A Three Process Theory” *European Journal of Social Psychology* (2005) 7; Van Dijk 27, includes powers in the institutional and governmental powers such as commands, laws, regulations and compliance with laws and legal institutions.

³⁹ Powers 28, mentions that the manifestation, strategies and practices of power are embodied in the law and organisational structures of government.

⁴⁰ Hart 186, states that the court’s role is to enforce the bargain the parties entered into and to ensure that there is procedural fairness when disputes are brought before the court.

⁴¹ For example, s48 the Consumer Protection Act 68 of 2008 prevents a party from including certain unfair terms in a contract. Therefore the legislative power through the enactment of the Consumer Protection Act holds power and controls the manner in which certain terms of a contract may be drafted and ultimately enforced.

engagement and circumvent the intention of the parties (being that the written contract must be enforceable). It may also result in the judicial power not enforcing such contract provisions.

The second direction of legislative power, being the horizontal line between the contracting parties, does not constitute institutional and governmental power, but has the effect of such power. The written contract between the parties is a form of *ad hoc* law or *inter partes*.⁴² The parties therefore exert some form of legislative power over each other when entering into a written contract.⁴³ This control rarely gives a party the ability to determine whether the other party has actually complied with the rules, as this would be enforced through the judiciary.⁴⁴ It, however, is an agreed set of rules and obligations that the parties intend to have enforced.⁴⁵ The ability to have individual contracts enforced in this manner is afforded by the state which steps in and corrects situations where there are abuses.⁴⁶

2.2.2 MICRO POWER RELATIONS⁴⁷

Micro power relations relate to the interaction between parties of the contract while the document is still being drafted.⁴⁸ These micro power relations develop during negotiations and continue while the contract is being negotiated and drafted. It must look towards the macro

⁴² Klass 1727; Slawson 874. See also ch 8 which discusses formalities of a contract.

⁴³ Klass 1727.

⁴⁴ In instances where a contractual provision confers a discretionary right or power may be the exception to the rule. See par 2.1 above.

⁴⁵ See ch 8 which covers formalities of a contract.

⁴⁶ O'Neill "The Disciplinary Society: Weber to Foucault" *British Journal of Sociology* (1986) 46.

⁴⁷ This terminology has been adapted from Foucault's "power relations". Also referred to as "persuasive discourse" in Van Dijk 27; Karlberg 10, describes similar power relations as "mutualistic power relations".

⁴⁸ Cartwright 11, says that during negotiations there is already a relationship between the parties. The negotiations may increase or decrease depending on how the negotiations are progressing and the hopes of concluding the contract.

power relations to ensure that the parties conduct themselves appropriately and that the contract is drafted within the rules of engagement to ensure that the written contract is enforceable. The parties therefore voluntarily submit themselves to the authority and power of the macro power relations.⁴⁹

This sphere of power relates to persuasion rather than control.⁵⁰ In the process of drafting the contract, one party attempts to exert power over the other through their interactions with one another. The level of power allowed is as much as the resistance of the other party may allow.⁵¹ With every relationship and at every interaction there is some level of power at play. The effect of power between the parties is not focused on the dominance of one party over the other, but rather on the relations between the parties.⁵² These power relations are not intentional, but are the natural product of such interactions between the parties.⁵³

The micro power relations manifest themselves in different ways. The first and most obvious is in the disparity of bargaining power, which influences and affects the provisions of the contract.⁵⁴ The party in a better bargaining power position will frequently be able to have a more favourable position negotiated and drafted for that party.⁵⁵ A party's ability to negotiate with another is influenced by a number of factors such as, demand and supply conditions, market

⁴⁹ O'Neill 56.

⁵⁰ Turner 7.

⁵¹ Foucault 95, mentions where there is power, there is resistance. Power can thus only be exercised insofar as a party will allow power to be exercised over him. Rouse "Power/Knowledge" *University WesScholar Division I Faculty Publications Arts and Humanities* (2005) 12, indicates that points of resistance are found throughout the power network and a party may challenge or evade the power being exercised over him.

⁵² Powers 29-30; Rouse 10.

⁵³ Powers 30.

⁵⁴ Choi & Traintis "The Effect of Bargaining Power on Contract Design" *Va L Rev* (2012) 1667.

⁵⁵ Choi & Traintis 1674.

concentration, provided information, patience and risk aversion and negotiation skills and strategy.⁵⁶

The power interplay between the parties will be balanced between the power of the one and the resistance of the other.⁵⁷ In these instances, a party will have so much power exercised over him as he may allow. The fact that the parties interact in some form of discourse will in itself create power relations between the parties. These power relations occur naturally.

2.2.3 POWERS FLOWING FROM THE WRITTEN DOCUMENT⁵⁸

Scott asserts that power in a general sense is the product of causal effects.⁵⁹ He uses two examples to illustrate this. The first is that the power of a river can be seen, or as he puts it, manifests casual effects, by eroding the river bed, moving rocks from the river bed or even causing a flood.⁶⁰ So too the power of electricity is evidenced through the light of a light bulb, the oven heating and so on.⁶¹ The measure of power thus is seen through the manner in which it manifests itself. Power in contract drafting can then also be seen in the contractual document that has been produced.

⁵⁶ Choi & Traintis 1676.

⁵⁷ Powers 31.

⁵⁸ The terms “perceived power”, “potential power” and “realised power” have been adapted from the model presented in Kim, Pinkley & Fragale “Power Dynamics in Negotiations” *Acad Manage Rev* (2005) 799.

⁵⁹ Scott (2006) 1.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

The contract sets down various legal obligations, which consist of rights and duties.⁶² Each one of these obligations either confers a right or a duty on a party to the contract. The act of negotiation and consequently drafting then rests on each one of these rights and duties and to what extent a party is willing to accept or reject such an obligation.

In such power relations there is always a party that exercises the power, the principal, and someone that is affected by the power of the principal, the subaltern.⁶³ In a contract, a party can be a principal and a subaltern in the same contract, depending on which obligation one looks at.

This interaction between the principal and the subaltern manifests on a micro power relations level, as perceived power.⁶⁴ A party will thus have a perception of its own and the other's power, and as such, the perception of power will permeate through a party's interactions in the negotiation and drafting of contracts.⁶⁵ Once the contract is executed, the agreement which is embodied in the written document contains the potential power. For as long as the parties act in the manner as is prescribed by the contract, neither party has the ability to use the potential power.⁶⁶ Only once the contract has been breached and a party enforces it through the judicial power, does the potential power transform into realised power. Realised power manifests in the macro relational sphere through the judiciary or an alternative dispute resolution institution which enforces the written contract and thereby forces the parties to act in the manner described in the written contract. The document may also include a provision which uses alternative

⁶² Klass 1727, argues that there are two ways of looking at contracts. The first is that it revolves around power-conferring rules, which enable a party to create or modify legal obligations. The second is that it creates duty-imposing rules which create duties to perform actions.

⁶³ Scott (2006) 2.

⁶⁴ Bacharach & Lawler "The Perception of Power" *Social Forces* (1976) 123.

⁶⁵ This is usually seen as disparity of bargaining power.

⁶⁶ Barnhizer 150.

methods to resolve a dispute such as arbitration provisions or provisions relating to expert determination.⁶⁷ As a result, the written document controls the future actions of parties.

2.2.4 POWERS OF THE DRAFTER

A contract can be divided in two types of contractual provisions which play a role in the power dynamics of drafting. The first are business provisions, which represent the negotiated provisions relating to the party's business and which could also be called the commercial provisions.⁶⁸ The second are non-essential business provisions, which represent all the other provisions found in a contract.⁶⁹ These non-essential business provisions are usually provisions that relate to the performance of the contract, boilerplates or what some call "legalese".⁷⁰ The non-essential business provisions include provisions that regulate the conduct of the parties after the execution of the contract and as such, these provisions would exercise some power over the parties and their conduct in the future.

In most instances, the parties to the contract will negotiate the business provisions and will provide the drafter with instructions to draft such provisions. In such instances, the business provisions would mostly be the only information given to the drafter and it would be left to the drafter to include the necessary non-essential business provisions. It is the inclusion of the non-essential business provisions, mostly at the drafter's own discretion, which allows the drafter to exercise a level of control and power over the contract drafting process and consequently the

⁶⁷ See ch 13.

⁶⁸ Hakes "Focusing on the Realities of the Contracting Process – an Essential Step to Achieve Justice in Contract Enforcement" *Del L Rev* (2011) 104.

⁶⁹ Also called legal terms.

⁷⁰ Hakes 108.

contracting parties. The provisions may also include aspects to adapt legislative provisions or instruct the judiciary on how the contract is to be interpreted or which default rules have been adapted.

Against the backdrop of business provisions and non-essential business provisions, there are three categories of contracts which further affect the role and power of the drafter.

The first category is those contracts where a standard contract has been drafted for the benefit of one party and, should the other party wish to enter into a transaction, it must accept the standard contract as is.⁷¹ In this first category, none of the contract provisions are negotiated.⁷² This is usually prevalent in situations where there is a significant disparity of bargaining power between the parties.⁷³ In such a case, the drafter has complete autonomy not only to draft the business provisions in line with his instructions, but also to include any non-essential business provisions that the drafter may deem appropriate or relevant.⁷⁴ There is usually only one drafter who exerts power over both parties to the contract and decides how to draft non-essential business provisions and which non-essential business provisions will be included in or excluded from the contract.⁷⁵

⁷¹ Naudé 368; Hakes 101; Morant 945; Scott “Empirical Studies Strike Back Against the Force of Contract Theory” *Jurisprudence Review* (1997) 259, states that the most powerful party in the market can create a “take-it-or-leave-it” situation. This is usually done through standard contracts. This is an example of disparity of bargaining power through the use of standard contracts.

⁷² Naudé 366, mentions for example that consumers usually have no opportunity to negotiate non-negotiated provisions and negotiation amongst businesses is rare with non-negotiated provisions.

⁷³ Naudé 366,

⁷⁴ Hakes 101; Deutch “Standard Contracts-Methods of Control: The Conceptual Framework of the 1982 Law” *Tel Aviv U Stud L* (1985-1986) 164, mentions that the terms are usually constructed in a way to protect the party against most eventualities. The nature of a standard agreement gives a drafter *carte blanche* to make the document one-sided.

⁷⁵ Hakes 104; Deutch 164, states that standard contracts are drafted only by one party. The other party must either accept the terms or walk away from the contract altogether. There is no room for negotiation.

The second category is reflected on the opposite side of the spectrum to the first. In this instance, nearly all the provisions of the contract are negotiated.⁷⁶ In such an instance, the bargaining power is balanced between the parties. There may be more than one drafter in this category, which will simulate similar power relations as found between the contracting parties. In this category non-essential business provisions are also negotiated, but unlike the business provisions, the drafters would negotiate these provisions between themselves.

The third category is a hybrid of the first and second categories in which some of the provisions have been negotiated and others have not.⁷⁷ In such an instance there may be a disparity of bargaining power, but such influences will affect the business provisions only. In this category the business provisions are usually negotiated, but the non-essential business provisions are not negotiated. The reason for this is that in this category there will only be one drafter involved.

The drafter's power and influence over the contract-drafting process starts with the first draft of the contract.⁷⁸ This draft usually represents the best position of a party and, dependent on the power relations and bargaining power between the parties, amendments to such a draft may occur.⁷⁹ It is, however, more difficult to make changes to the provisions of the first draft and the initial drafter has more power than other drafters in the process. In instances of the second category, the drafter of the first draft of the contract will always be in a better bargaining position than the other drafter.

⁷⁶ Hakes 102; Doberstyn "A Conceptual Approach to Negotiating Relational Contracts for the Small Business Client" *Clev St L Rev* (1988) 543, describes relational agreements as being of a longer duration than normal transactional agreements. Examples would include franchise agreements, labour agreements, manufacture and distribution agreements, joint ventures, output and supply agreements and personal service agreements. As a result of the nature of these types of agreements, being the cooperative nature and term of the agreements, they do not typically fall within the category of the standard agreement which is usually reserved for consumer type agreements.

⁷⁷ Hakes 103.

⁷⁸ Sithole 21, states that lawyers are an intrinsic part of the contracting process.

⁷⁹ Hakes 103.

A drafter does not only attempt to control the parties to the contract, but also attempts to control the macro power relations. In doing so the drafter attempts to amend default or common law rules through the actual provisions included, thereby changing the law to the extent it may be allowed in law. Where the drafter attempts to go too far in changing legal rules, it may result in a void or unenforceable contract.⁸⁰ Finally, the drafter attempts to instruct the judiciary as to how to enforce and interpret the contract. This is done by means of inclusion of interpretation provisions.⁸¹

2.3 CONCLUSION

As can be seen in the power relationship model for contract drafting, the interconnecting system of power relations is constantly shifting between individuals, drafters and institutions.⁸² It is continuously changing as power and resistance interact with each other at each power relation point.⁸³ These powers do not originate from a single place, but originate from everywhere, as every relation between parties and institutions creates a power relation.⁸⁴ Foucault's view on power seems to resemble the power dynamics in contract drafting, as discourse (being the contract) creates power which parties attempt to exert over each other.

At the point of drafting any contract, the power relations described in the power relationship model of contract drafting will be present. These powers will therefore influence the drafting of contracts at all stages of the process. What is evident is that the drafter, in the contract-drafting

⁸⁰ See ch 9.

⁸¹ See ch 14.

⁸² Powers 28; Karlberg 7.

⁸³ Powers 28; Rouse 11.

⁸⁴ Rouse 11.

process, is not a bystander who merely acts on the instructions of a party. The drafter influences and exerts a level of control over the parties and the process, depending on which provisions have been included in or excluded from the contract. The drafter also attempts to exert control over the macro power sphere. The drafter is, therefore, the most influential party in the drafting process and attempts to control, to varying degrees, all the parties in the drafting process.⁸⁵

⁸⁵ Sithole 21.

CHAPTER 3

HISTORY OF CONTRACTS

3.1	INTRODUCTION.....	30
3.2	ROMAN LAW.....	31
3.2.1	EARLY DEVELOPMENT	31
3.2.2	CLASSIFICATION OF CONTRACTS	33
3.2.3	DEVELOPMENT OF THE WRITTEN CONTRACT POST-CLASSICAL PERIOD	38
3.3	ROMAN-DUTCH LAW	41
3.3.1	THE USE OF WRITTEN DOCUMENTS AND NOTARIES IN EUROPE	41
3.3.2	INFLUENCES ON ROMAN-DUTCH LAW.....	44
3.3.3	NO FORMALITIES REQUIRED	46
3.4	ENGLISH LAW	49
3.4.1	BACKGROUND AND BASIS OF THE WRIT SYSTEM	49
3.4.2	EARLY FORMS OF ACTION	52
3.4.3	LATER DEVELOPMENTS OF ACTIONS AND WRITTEN AGREEMENTS.....	55
3.5	SOUTH AFRICAN LAW.....	57
3.6	CONCLUSION.....	59

3.1 INTRODUCTION

The drafting of contracts is based on a written instrument. To understand why contracts are at present being drafted in the manner they are, it is necessary to consider the history and development of the written contract. The practices of today will naturally be based on the developments of the past.

As this study relates to the drafting of contracts, this chapter will only be considering the historical development of the written contract. The development of the substantive law of

contracts will only be considered insofar as it may assist in illustrating the development of the written contract. The history of the written contract in Roman, Roman-Dutch and English law will be considered. Attention will also briefly be paid to the development of written contracts in South Africa.

3.2 ROMAN LAW

3.2.1 EARLY DEVELOPMENT

For as long as there has been trade there have been agreements in some form or another. The development, complexity and enforceability of agreements are inevitably linked to the sophistication of trade and the development of societies.

During the early stages of civilization illiteracy permeated society with only a select few having mastered the art of reading and writing based on their social status.¹ At this stage the written form of agreement could not develop. These early forms of agreement, known as a *pactum*,² were verbal, formless interactions between people, in which they trusted that the other person would keep their word.³ The enforcement of these agreements was inconsistent and often resulted in excessive forms of recourse.⁴

¹ Maine *Ancient Law* (1906) 302.

² Also known as pacts.

³ Buckler *The Origins and History of Contract in Roman Law Down to the End of the Republican Period* (1895) 5.

⁴ Buckler 5.

Religion also played a significant role in early society and to ensure the enforcement of agreements they were sometimes ratified through religious orders. In early society, these types of agreements were amongst the most binding of agreements, as a broken promise would bring down the wrath of the gods or the excommunication of an individual from the religious order.⁵

There were two different forms of recognised agreements. The first was the *iusiurandam*, which was a unilateral undertaking accompanied by an oath under religious sanction.⁶ It contained a set verbal formula in which a person would call on the gods to punish him should he breach his oath. As this was a unilateral undertaking, it was not strictly speaking a contract, however, the transaction had all the features that would be found in a contract. The second was the *sponsio*, which was a religious agreement through a question and answer which was set in strict formality.⁷ The *sponsio* appears to be the earlier form of the later more developed form of the *stipulatio*.⁸

These forms of agreements were limited to Roman citizens and did not cater for the requirements of the growing Roman culture and trade with foreign nations. In addition, the law in general was applied inconsistently. The codification of the law in the Twelve Tables intended to bring certainty to the uncertainty.

The Twelve Tables mentioned two specific forms of agreement that were only applicable to Roman citizens, being the *nexum* and the *mancipatio*. Table six stated that “when one has observed the forms of *nexum* and *mancipatio*, let the words used constitute the law between the

⁵ Buckler 21-22.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

parties”.⁹ Where a person’s words are found to be wrong, the person could be liable for twice the damages.¹⁰ Both the *nexum* and the *mancipatio* contained similar formalities. The *nexum* was a form of loan embedded with a formal ceremony, with a pre-set number of witnesses and specific words spoken. This agreement was often described as a “transaction with copper and balance”. The copper that was weighed symbolised the value of the loan given.¹¹

The *mancipatio* was used for the sale of property. Once again the transaction took place before a pre-set number of witnesses and specific pre-set words were spoken. This time, the bronze and weighing scales were used to signify the payment of money for the property.¹²

At this stage, the strict formalities of these agreements were still verbal in nature and the Twelve Tables brought reasonableness in the recourse a party would have for breach of an agreement. Yet, as these agreements had limited application to Roman citizens, the development of Rome and its progress created the need for more flexible agreements to support trade and a more sophisticated society.

3.2.2 CLASSIFICATION OF CONTRACTS

At the time of Gaius, a contract was considered to be an agreement actionable under civil law.¹³

The Romans never developed a general theory of contracts. The initial distinction in agreements

⁹ Table 6(1) (translated by Lobingier *The Evolution of the Roman Law from before the Twelve Tables to the Corpus Juris* (1923) 78).

¹⁰ Table 6(2).

¹¹ Lobingier 78.

¹² *Ibid.*

¹³ Thomas *Textbook of Roman Law* (1981) 227.

was made between the *pacta* which were not enforceable in law, and the *conventa* which were enforceable in the law.¹⁴ This second category included a specific set of contracts which were divided into groups.¹⁵

Gaius, and later on Justinian, classified contracts in accordance with the way in which they were concluded. For example real contracts were concluded by means of the delivery of a thing, verbal contracts were concluded orally, written contracts were concluded in writing and consensual contracts were concluded by means of consensus between the parties.¹⁶ Each type of contract had specific pre-set formalities that had to be complied with. These formalities were more important than the actual agreement between the parties and, without the strict compliance with these formalities, the contract would not be actionable.¹⁷

The contracts *re* and *consensu* were considered to be informal contracts and did not play a noticeable role in the development of the written form of contract. As such they will not be discussed in detail. What is noted is that *re* was a contract that came into force upon the delivery or transfer of a thing, which was to be returned *in specie* or in equivalent or dispensed with as the parties may have agreed.¹⁸ The agreement and the delivery were essential for this type of

¹⁴ D 2 14 7 4, a pact is a naked agreement that gives rise to a defence; Phillimore, *Introduction to the Study and History of the Roman Law* (1848) 116; Maine 304; Mackenzie & Alexander *Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland* (1991) 184.

¹⁵ Gaius *Gai Institutiones* (1904) 3 89, being contracts concluded by delivery of a thing, by words, by writing or by consent; J Inst 3 13 2; Thomas 226.

¹⁶ D 44 7 1 1; J Inst 3 8 2, states “there follows a division into four categories for obligations arising from contract or which are quasi-contract, from delict or quasi-delictal. Our first task is to consider those arising from contract. Of these contracts there are four species. For they are real (either by delivery of a thing), verbal (by a form of words), literal (by writing) and consensual contract (or by consent)”; Gaius 3 89, states that “contracts were classified by the delivery of a thing, by words, writing or by consent”; Thomas 248.

¹⁷ Maine 316.

¹⁸ D 44 7 1 2; J Inst 3 14; Gaius 3 90, says these were called real contracts, being contracts via delivery; Thomas 271-276. There were four types of contracts that fell in this category, namely: *mutuum*, which was a loan for consumption of money or other goods which the borrower had to restore; *commodatum*, which was a loan of use of a specific thing that had to either be returned or disposed of; *depositum*, which was very much like the

agreement. The *consensu*, on the other hand, developed only in the post-classical period and moved away from the narrow fulfilment of form, as it was concluded by means of consensus between the parties which represented their manifestation of the internal act or intention.¹⁹

The *litteris* and *verbis* were considered to be the two formal contracts. The *litteris*, one would assume, played a part in the development of the written form of contract but such an assumption would be wrong.

There is not much known about the *litteris*, but what is known is that it took the form of a ledger entry in the accounting books of the *paterfamilias* for the advance of a loan given to a debtor.²⁰ The debt could either have been an actual debt or a fictitious debt and the entry itself created a unilateral duty on the debtor. The debtor must have accepted such an entry, but the exact manner in which the debtor would have accepted it is unclear. There were two types of entries, those that evidence a debt²¹ and those that create a debt.²² The second form of *litteris* was created by *chirographa*, *syngraphai* or acknowledgements of debt and seemed to be used by non-Romans.²³

commodatum save for the fact that the loan was purely for the benefit of the transferor. The *pignus* was a pledge, pawn or mortgage used as a security for a debt.

¹⁹ D 44 7 2 2; J Inst 3 22; Gaius 3 135, mentions that in these instances simple consent created a contract in purchase and sale, letting and hiring, partnerships and agency; Gaius 3 136, indicates that consent creates an obligation and no form of words or writing is required; Thomas 305; Maine 334. These agreements were limited in number and were known as *emptio venditio* (a sales contract), *locatio conductio* (a letting and hiring contract), *societas* (a partnership of association in a common enterprise) and *mandatum* (a gratuitous undertaking).

²⁰ J Inst 3 21 1, notes that at one time there used to be an obligation in writing which was said to be effected by account-book entries of a type which in Justinian's time was no longer in use; Gaius 3 128, mentions that literal obligations are created by transcriptive entries of debit or credit in a journal; Thomas 264; Barkowski *Textbook on Roman Law* (1997) 312, highlights two types of entries, the first of those is evidence debt and the others are those that create a debt.

²¹ Gaius 3 131, says a cash entry is not a *litteris* but a real obligation as the money has already been received. It is therefore the evidence of the obligation and not the obligation itself.

²² Gaius 3 129, 130.

²³ Gaius 2 134.

The *litteris* declined with the development of banking, as the bankers started to keep the books of their clients.²⁴ The increased importance and use of the *cautio* and the *stipulatio* also contributed to the decline of the *litteris*. It finally became obsolete in the late Empire.²⁵

The last category of contracts was the verbal contract. It seems almost ironic that the verbal contract, specifically the *stipulatio*, would be the basis from which the written form of contract developed.

There were a number of verbal contracts, which included the *stipulatio*, the *dotis dictio*²⁶ and the *iusiurandam liberti*.²⁷ Arguably, the *stipulatio* was the most used and more popular of the contracts.²⁸ This was likely because of the flexibility that it provided as it could be adapted to almost any set of circumstances.

The *stipulatio* has its original roots in the *sponsio*.²⁹ The *stipulatio* took the form of a question and answer.³⁰ The way in which the question and answer was formulated was specific and any deviation from the formula would result in the agreement not being recognised under the *stipulatio*, which would result in the agreement being classified as a pact instead.³¹ This type of

²⁴ Thomas 268.

²⁵ Barkowski 312.

²⁶ Thomas 263, says it is a formal declaration of a dowry available only for a limited class of persons.

²⁷ Thomas 259, 264.

²⁸ Maine 316.

²⁹ See above; Barkowski 296.

³⁰ J Inst 3 15; Gaius 3 92, states that “a verbal contract is formed by question and answers.”

³¹ Thomas 259.

question and answer formula created a unilateral obligation and could potentially be adapted to any agreement.³²

The core of the *stipulatio* revolved around the verb. If a verb was used in the question phase of the ritual, then the verb had to be identical in the answering phase. Originally only one verb was recognised, being the “*spondes?* (Do you promise?) – *spondeo* (I do promise)”, which was only allowed to be used by Romans.³³ As trade developed, it demanded the ability to contract with non-Romans and resulted in recognising the use of other verbs as well.³⁴ Non-Romans could thus also be bound and held to account under the *stipulatio*. These verbs were on a closed list and included to pledge, to give, to promise and to swear.³⁵

The flexibility of the *stipulatio* developed even further in that the *stipulatio* could be concluded in two different languages through the means of an interpreter.³⁶ The requirement remained that the verb used in the question phase, which was spoken in one language, should correlate with the verb used in the answering phase, which was spoken in another language.³⁷ Thus, as long as the verb in the two languages correlated, it would be recognised under the *stipulatio*.³⁸

³² D 45 1 5 1, says “a stipulation is a verbal expression in which he who is asked replies that he will give or do what he was been asked.”; Thomas 259.

³³ Gaius 3 92, 93; Thomas 259; Barkowski 297.

³⁴ Gaius 3 92.

³⁵ Gaius 3 92, 93; D 45 1 1 6, states the closed list of verbs were *Promittes? Promittio; Dabis? Dabo; Facies? Faciam; Fidepromittes? Fidepromitto; Fideiubes? Fideiusbe*; Thomas 259; Dannenberg *Roman Private Law* (1980) 49; Harvey *A Brief Digest of the Roman Law of Contracts* (1878) 28.

³⁶ D 45 1 1 6; J Inst 3 15 1, states the language is immaterial as long as the parties understand one another.

³⁷ D 45 1 1 6, states that it makes no difference whether the reply is made in the same language or in another. It does not matter if a person asks in Latin and receives a reply in Greek or in another language, as long as the reply is consistent; J Inst 3 15 1, says it does not matter if it is in a different language; Thomas 260.

³⁸ D 45 1 1 6; J Inst 3 15 1; Thomas 259;

Finally, in 472 AD Leo further relaxed the requirements of the *stipulatio* in that any words which expressed the parties' intent would be recognised and would have full force and effect.³⁹ This meant that any verb used in the questioning and answering phase of the *stipulatio* and not only those on the closed list, would be recognised.⁴⁰

3.2.3 DEVELOPMENT OF THE WRITTEN CONTRACT POST-CLASSICAL PERIOD

The use of written documents for private juristic acts was initially foreign to Romans.⁴¹ Through the influences of Greek and Vulgar practices, the use of written documents became more prominent in the post-classical period.⁴² It became customary to record important transactions in writing which was known as the *cautio*.⁴³ The *cautio* was intended to provide evidentiary proof of the question and answer found in the *stipulatio*.⁴⁴ Should there be any other proof that discredited the written document, it would defeat the written document.⁴⁵ Although the *stipulatio* was reduced to writing in these instances, it still had to comply with all the requirements of the

³⁹ J Inst 3 15 1, says nothing was required other than for the parties to understand one another and agree to the same thing. The words expressed were immaterial; Thomas 260;

⁴⁰ Thomas 260; Barkowski 299, states that a stipulation should be valid whatever the form of words used, as long as the intentions of the parties were clear.

⁴¹ Dannenberg 50-51.

⁴² Dannenberg 50.

⁴³ Dannenberg 50; Harvey 27.

⁴⁴ Thomas 26; Harvey 2; Barkowski 299, says that during the late classical period it was presumed that a question had preceded the answer if the *cautio* alleged that a promise had been made.

⁴⁵ D 2 14 7 12.

verbal *stipulatio*.⁴⁶ Many draftsmen and notaries included a stipulatory clause to these documents to allow the agreement to fall under Roman law.⁴⁷

Another reason for the written form of the *stipulatio* could have been the increasing length and complexity of the stipulations.⁴⁸ Buckler mentions an example of a lawyer who, during the time of Cicero, dedicated his time to compiling the formulae for various stipulations.⁴⁹ In the classical Roman law, a document embodied the content of the *stipulatio* and could include more detail than was possible in the oral version of the *stipulatio*.⁵⁰ The document was used for evidentiary proof and was not necessary for the validity of the agreement.⁵¹ A view that developed later was that writing was necessary for the validity of transactions. However, it remains questionable whether this was actually the case.⁵²

There were, generally, two ways in which a written document was produced, which were largely considered to be *pacta*. The first was *testatio* (or *syngrapha*),⁵³ which included two or more waxed wooden tablets, which would be identical.⁵⁴ They were considered to be double documents.⁵⁵ These tablets would be bound together by thread and the executor and witnesses would append their names to it. The text was usually written in an objective third person style and included seven witnesses. It was flexible enough to be used for any type of document or

⁴⁶ Barkowski 299, mentions that it was never a requirement to have a stipulation placed in writing.

⁴⁷ Zimmerman *The Law of Obligations Roman Foundation of the Civilian Tradition* (1990) 79.

⁴⁸ Buckler 112.

⁴⁹ *Ibid.*

⁵⁰ D 2 14 7 12; D 45 1 120; D 17 2 71; Zimmerman 79.

⁵¹ Zimmerman 79.

⁵² Gaius 3 1 3 4; Zimmerman 79.

⁵³ Buckler 132.

⁵⁴ Dannenberg 52.

⁵⁵ *Ibid.*

transaction for recording.⁵⁶ In the post-classical period the *testatio* disappeared and was replaced by a document that was countersigned by witnesses.⁵⁷

The second format for a written agreement was the *chirographum*.⁵⁸ This format only came into being late in the Republican period and took the form of a declaration written in a person's own hand. Unlike the *testatio*, the *chirographum* was written in the subjective first person and did not require any witnesses to be valid. The fact that it was in a person's own handwriting influenced the evidentiary proof of the document.

Lastly, it also became customary during the post-classical period to have legal documents drafted by professional scribes, known as *tabelliones*.⁵⁹ On occasion, it was possible and sometimes required, to have the cooperation of authorities in addition to the drafting of documents. In such instances the private documents prepared by the *tabellio* were entered into public record known as the *ininuatio*.⁶⁰

It then appears that in the post-classical period, the written form of a contract was recognised to a degree, but had not developed to the level seen in modern forms of written contracts. The oral exchange became less popular and many agreements were converted into writing for evidentiary purposes.⁶¹

⁵⁶ Buckler 132.

⁵⁷ *Ibid.*

⁵⁸ Dannenberg 52.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ D 24 1 57; D 45 1 134 2.

3.3 ROMAN-DUTCH LAW

3.3.1 THE USE OF WRITTEN DOCUMENTS AND NOTARIES IN EUROPE

After the fall of the Roman Empire, Roman law was diluted and introduced in the surrounding European countries.⁶² German law, having started like many other systems, included the exchange of tangible things through a bartering system.⁶³ The exchange of tangible things, at different times, gave rise to the practice of giving security.⁶⁴ Should the promisor fail to fulfil his promise, the security would be forfeited. The security was initially a person, but could take many other forms.⁶⁵ The object of the security was known as a *vadium* or *wedde*, and promises with security became known as *vadium* contracts.⁶⁶ The *vadium* contract became customary and after a time the symbolic gesture was replaced with a *festuca* or *rod*, which symbolised a person's power over a thing.⁶⁷

The Greek and Byzantine influences caused the written form to be embedded into the German custom.⁶⁸ The Roman *cautio* eventually became the Frankish obligation *per cartam*, in which a debtor would hand the creditor a written acknowledgement of his obligation.⁶⁹ This would

⁶² Glendon, Gordon & Osakwe *Comparative Legal Traditions* (1994) 47.

⁶³ Grotius *The Introduction to Dutch Jurisprudence* (1985) 3 6 4; Lee *An Introduction to Roman-Dutch Law* (1946) 223-224.

⁶⁴ Lee 569.

⁶⁵ For example chattel, animals or other objects of value.

⁶⁶ Wessels *History of Roman-Dutch Law* (1908)569.

⁶⁷ Wessels 570; Lee 570.

⁶⁸ Watson *A Historical Introduction to Modern Civil Law* (1981) 298.

⁶⁹ Watson 298.

function firstly as evidence of the promise and secondly, the transfer of documents was a symbol of the promise.⁷⁰

Documents were largely used for the transfer of land and included: (i) *wadiato*, the delivery of the document which signified the creation of liability through self-suretyship, (ii) the receipt of money loans which were delivered to a creditor, which was called a *cautio*, and (iii) the creation of a legal duty through the delivery of a *wadia*.⁷¹ The delivery of the documents perfected the transaction like a handshake would. The obligation in the written document could be transferred to a third person by writing on the back of the document and endorsing it.⁷²

The popularity of the *carta* declined in the post-Frankish period.⁷³ During the thirteenth century, the law of obligations changed largely due to the sophistication in trade, state power and the influence of the church.⁷⁴ The use of written contracts was usually registered and should a document be registered, it was sufficient proof of the agreement.⁷⁵ This was usually drawn up by judges and registration could be done through the courts of the lord or the King, local courts of the parties, or the use of a seal by a gentleman as irrefutable evidence.⁷⁶

The dilution of Roman law into German customs did not appear to remove the written document from use, although the illiteracy would likely have resulted in the limited use thereof. The use of notaries in particular seems to reinforce the use of written documents during this period.

⁷⁰ Huebner *A History of Germanic Private Law* (2000) 502, says the document was not the obligation or agreement itself, but was merely a symbol of the agreement that had been entered into.

⁷¹ Huebner 502.

⁷² Watson 298.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Watson 301.

Initially notaries were used to record and keep documents such as contracts and wills, which parties wanted to keep secret.⁷⁷ These documents were called *notae heiroglyphicae*.⁷⁸ There was a distinction between notaries of the church and notaries recording so-called worldly transactions.⁷⁹ Gradually notaries were employed to keep written records of court and took over from judges in this regard.⁸⁰ This resulted in notaries authenticating documents as evidence of agreements and such authenticated agreements could only be challenged based on the document being a forgery.⁸¹ The authentication of agreements became a general feature in mercantile agreements.⁸²

In the period of the Frankish Empire, notaries resembled the *tabeliones* of Rome.⁸³ They consisted of firstly, the *tabeliones* who drew up extra-judicial documents, and secondly, *exceptores* and *actuarii* who wrote and recorded contracts, wills and other documents that were registered in the public registry of a judge.⁸⁴

The written document was seen as the manifestation of consent and some contracts were required to be evidenced in writing because of their nature or value.⁸⁵ The use of writing to record agreements could then be done in front of a notary public or register (also known as a *greffier*),

⁷⁷ Wessels 197.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Watson 301; Wessels 570.

⁸¹ Domat *The Civil Law in its Natural Order* (1850) 156, indicates that agreements made before notaries are in itself proof of the agreement; Watson 301.

⁸² Watson 301.

⁸³ Wessels 198.

⁸⁴ Wessels 198, these documents included *gestia*, *publica monumenta*, *instrumenta forensia*, *publicae chartae* and the *tabulae*.

⁸⁵ Watson 305. Pothier *A Treatise on the Law of Obligations, or Contracts* (Vol. 1) (1806) 4 1 694-695, says there are two kinds of proof, those which are verbal and those in writing.

which was known as an authentic act.⁸⁶ It could also be signed and sealed by the parties themselves, and were known as private writings.⁸⁷

In Europe, in particular France, there were also different types of private writings. These included: (i) acts under common private signature,⁸⁸ (ii) acts from public archives, (iii) tradesman's books,⁸⁹ (iv) domestic papers not signed,⁹⁰ and (v) tallies.⁹¹ Tallies were used by merchants to record the amount of goods supplied. This was done by using two woods joined together and making a notch in them indicating the goods supplied.⁹²

3.3.2 INFLUENCES ON ROMAN-DUTCH LAW

Roman-Dutch law was influenced by a number of factors, including the law of merchants, canon law, German customs and Roman law.⁹³ The law of merchants played a relatively minor role and

⁸⁶ Pothier 4 1 694-695, states that authentic acts are those instruments made and received by public office.

⁸⁷ Domat 154; Pothier 4 1 694-695, states that private acts are those writings and instruments made without the use of public office.

⁸⁸ Pothier 4 1 707, 710, mentions that certain requirements were also included for specific agreements. For example for the loan of money the person borrowing the money must not only sign the document, but must also write out in his own hand how much he is obliged to pay. This was required under the French King's Declaration of 22 September 1733 and was to prevent or make a person aware of the amount, should the person sign without reading the document.

⁸⁹ Pothier 4 1 707.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Pothier 4 1 730.

⁹³ Manfred *The Common Law of South Africa: A Treatise Based on Voet's Commentaries on the Pandects* (1904) (Vol. 1) 4, 6, distinguishes between customs and Roman law being the main influences of Roman-Dutch law. Ordinances and laws obviously also modified the legal system; Van der Keesel *Select Theses on the Laws of Holland and Zeeland* (1855) 1 2 21; Lee 225.

is mentioned because these separate rules that were developed for merchants were occasionally enforced against established practices.⁹⁴

Canon law developed from religious oaths (where there was an obligation toward God). This is known as the *fides facta* and recognised as a nude pact giving rise to legal liability under the ecclesiastical courts.⁹⁵ This was distinct from Roman law which only provided limited recognition to pacts. Canon law recognised nude pacts as contracts because the church saw the breaking of a promise as a sin and that enforcing such a promise was the right and moral thing to do.⁹⁶

The rediscovery of the *corpus iuris* and the reception of Roman law brought the application of Roman law to the Netherlands. Roman law was, however, influenced and amended through local customs, which largely included the German customs. Roman-Dutch law is therefore the Roman law applied in the Netherlands at the time and which was influenced by local customs.⁹⁷

⁹⁴ Von Mehren “The French Civil Code and Contract: A Comparative Analysis of Formation and Form” *La L Rev* (1955) 698. Book 4 of Van der Linden *Institutes of the Laws of Holland* (1806) deals extensively with the law of merchants.

⁹⁵ Von Mehren 702; Berman “The Religious Sources of General Contract Law: An Historical Perspective” *Journal of Law and Religion* (1986) 109.

⁹⁶ Berman 109.

⁹⁷ Manfred 6.

3.3.3 NO FORMALITIES REQUIRED

Germans had a strong sense of honour and when a promise was made it had to be fulfilled.⁹⁸ As seen in the previous section, some level of formality and ceremony existed under German law. The use of such ceremony was to show the party's serious intent.⁹⁹ From the twelfth century, unnecessary customs and ceremonies were removed and the focus shifted to the consensus between the parties.¹⁰⁰

Under Roman law, a distinction was drawn between an agreement and a pact. The latter was not recognised and could not be enforced. Roman-Dutch law did not follow the distinction of Roman law,¹⁰¹ but adopted the influences of Canon law and German customary law.¹⁰²

Roman-Dutch law, therefore, did not require a contract to be in writing, nor did it require any formalities for a contract to be enforceable.¹⁰³ Whether a contract was in writing or not, did not make a difference to the legal effect of the contract.¹⁰⁴ An exception to this general principle would be where statute required some form of written documentation.¹⁰⁵

⁹⁸ Grotius 3 1 52, says Germans respected good faith amongst all other virtues and any promises that came from a reasonable cause whether it took a particular form or not, or whether the parties were in the same place or not, conferred a right to claim.; Lee 225.

⁹⁹ Wessels 579.

¹⁰⁰ Wessels 571; Lee 225.

¹⁰¹ Wessels 576.

¹⁰² Grotius 3 1 52.

¹⁰³ Domat 153; Pothier 2 18; Van der Keesel 3 3 45; Lee 225, says Roman-Dutch law viewed all contracts as being consensual and any pact was enforceable provided that it was freely entered into by competent persons for an object physically possible and legally permissible.

¹⁰⁴ Domat 153; Lee 225-226; Manfred *The Common Law of South Africa A Treatise Based on Voet's Commentaries of the Pandects* (Vol. 2) (1904) 517. Domat 2004, says it did, however, appear that the written document influenced proof of the agreement.

¹⁰⁵ Lee 227, states there was no requirement for a contract to be in writing. This was even the case with the transfer of land, but in modern day practice writing was used as proof of such a transfer.

Although there was no requirement for an agreement to be in writing, it did not mean that the agreement could not be put in writing.¹⁰⁶ An obligation could be confirmed in writing.¹⁰⁷ This could be done through: (i) bonds passed by a Magistrate, which was also known as judicial instruments or *schepenkennisson*,¹⁰⁸ (ii) bonds executed by a notary, which was also known as notarial instruments,¹⁰⁹ or (iii) by writing which has been signed by the promisor, which were also known as private instruments.¹¹⁰

All transactions, regardless of their nature, could be executed before a notary. The written document was used to prevent a lapse of memory and to prove the existence of the transaction.¹¹¹ Public instruments, being judicial and notarial instruments, carried greater evidentiary weight than that of private instruments.¹¹² Private instruments were writings under the hand of a parties and was good as proof against a third party but not against or in favour of a party who wrote or signed it.¹¹³ A person could therefore not create a document to prove something against or in

¹⁰⁶ Domat 2015, says reducing an agreement to writing had two effects. The first is that of proof and the second is to preserve the memory of the contracting parties.

¹⁰⁷ Grotius 3 5 1, refers to this written document as a *literarum obligatio*; Van der Keesel 3 5 1, points out that the term *literarum obligatio* in this context is used in a wider sense than in Roman law (which referred to a type of acknowledgement of debt) and refers in the Roman-Dutch law to any promise reduced to writing; Van Leeuwen *Commentaries on Roman-Dutch Law* (1886) 123.

¹⁰⁸ Van der Linden 1 17 2, states that a judicial instrument was passed before two members of court and their secretary; Grotius 3 5 1.

¹⁰⁹ Domat 154; Van der Linden 1 17 2, says it was passed before a notary and two witnesses; Grotius 3 5 1.

¹¹⁰ Domat 154; Van Leeuwen 123. According to Van der Linden 1 17 2, these were instruments or writings under the hand of a party. They are either made by themselves or by a third party by their order and are confirmed by the signatures of the contracting parties; Grotius 3 5 1.

¹¹¹ Domat 2017, says that for those who could not write notaries would come to assistance. This was done by the notary signing with two witnesses or having two notaries sign, which would signify the truth of the document. Van Leeuwen 123; Van der Linden 1 17 3, mentions that another type of proof is witnessing, which lacks the concreteness of written documents because of the credibility and memory of witnesses. Grotius 3 5 4, says writing is to be held as full proof of the agreement unless there was some type of fraud.

¹¹² Van der Linden 1 17 2.

¹¹³ Van der Linden 1 17 2; Grotius 3 5 8, states that where there is a private instrument, it would have no effect against third parties, unless three witnesses have subscribed their names thereto; Pothier 4 715. Grotius 3 5 8,

favour of himself, but could use it to prove something against a third party.¹¹⁴ Public instruments could also be classed into archives and records.¹¹⁵ There were private documents that could be admitted as evidence, such as the books of a merchant but this had to be confirmed by oath of the merchant.¹¹⁶

Roman-Dutch law of contract was based on the concept of *redelijk oorzaak* which required the contract to have reasonable cause for it to be enforceable.¹¹⁷ It had four requirements to be a valid contract, being: (i) consent, (ii) a voluntary and deliberate agreement, (iii) the parties must be capable of contracting, and (iv) the agreement must be physically possible and not contrary to the moral sense of the community.¹¹⁸

There was no general requirement for an agreement to be in writing, but could take the form of writing for the sake of proof.

states that a signature not made before a judge had to have three witnesses subscribe their names thereto otherwise it would have no effect against a third party.

¹¹⁴ Grotius 3 5 8; Van der Linden 1 17 2.

¹¹⁵ Van der Linden 1 17 2.

¹¹⁶ *Ibid.*

¹¹⁷ Lee 226.

¹¹⁸ Wessels 577.

3.4 ENGLISH LAW

3.4.1 BACKGROUND AND BASIS OF THE WRIT SYSTEM

Prior to the conquest of England by William, Duke of Normandy, English law of contract was rudimentary¹¹⁹ and considered to be an offshoot of the law of property.¹²⁰ This was a time when the economy was not directed by market forces, the status of a person's birth affected a person's rights and illiteracy permeated society.¹²¹ It is not surprising that the written agreement did not develop at that stage. The law was a mismatched mass of oral customs which differed from one place to another.¹²² The enforcement of promises was done, at this time, through a solemn oath, set in a specific set of words which were accompanied by some ritualistic gesture or the handing over of something of a symbolic nature.¹²³

The Church would also enforce oaths if it believed they fell within its spiritual jurisdiction.¹²⁴ This was often done through the *fides facta*,¹²⁵ a unilateral moral undertaking which was based on faith rather than on agreement.¹²⁶ If the oath was broken, it was believed that God would intervene as the agreement was between the individual who took the oath and God.¹²⁷ The Church took it upon itself to punish such individuals and intervene on behalf of God if such an

¹¹⁹ Baker *An Introduction to English Legal History* (1990) 14.

¹²⁰ Pollock & Maitland *The History of English Law Before the Time of Edward I* (1989) 184.

¹²¹ Teveen *A History of Anglo-American Common Law of Contract* (1990) 1.

¹²² Kiralfy *Potter's Outline of English Legal History* (1962) 7.

¹²³ Ibbetson *A Historical Introduction to the Law of Obligations* (1999) 4–5, says the thing handed over could be of substantial value or could be symbolic, such as a stick, rings or other symbols such as sharing wine or a handshake that would create relationship ties between the parties.

¹²⁴ Kiralfy 450.

¹²⁵ Literally meaning “pledged faith”; Kiralfy 451.

¹²⁶ Kiralfy 178.

¹²⁷ Ibbetson 4.

oath was broken. As such, a breach of an oath was considered to be a moral matter. Although the Church was the head of spiritual matters, there was an unsteady tension between the jurisdiction of the Church and the courts and solemn oaths were not necessarily enforced by law.¹²⁸

It was only after 1066 that the law began to develop into a coherent system of rules. This was largely due to the court system introduced into the country.¹²⁹ The local courts did consider contract disputes, but the royal courts were the forerunners for the development of modern contract law,¹³⁰ and consequently the drafting of contracts. The substantive law, in a way, moulded itself around the procedural requirements of the courts and the writ system would eventually form the basis of contractual claims.¹³¹

If a plaintiff wanted to institute an action he would purchase a writ,¹³² which authorised the commencement of the proceedings.¹³³ There were only a number of forms that a writ could take and they were placed in the Register of Writs.¹³⁴ A plaintiff would have to find a known formula within an existing writ to fit his case.¹³⁵ If the appropriate writ was not found, the plaintiff could potentially be without remedy. The plaintiff did have an opportunity to apply for a new type of

¹²⁸ Pollock & Maitland 189.

¹²⁹ Baker 61; Barbour *The History of Contracts in Early English Equity* (1914) 11, says the law of contract was founded on the common law of actions.

¹³⁰ Taveen 2; See also Blackstone *Commentaries of the Laws of England* (Vol. I & II) (1983) 3 3 1 2, in which civil rights are distinguished from public wrongs. Blackstone 3 3 1 3, says private wrongs are divided into three types, those that arise from the act of the parties, operation of law and out of the action of court.

¹³¹ Taveen 2; Gordley & Von Mehren *An Introduction to the Comparative Study of the Private Law: Reading, Cases Materials* (2006)16, say the knowledge of the procedures was the foundation of medieval jurisprudence.

¹³² Van Caenegem *The Birth of the English Common Law* (1988) 30, states that a writ can be defined as a “brief official written document ... ordering, forbidding, notifying something”. Gordley & Von Mehren 14, identify three forms of action being real, personal and mixed actions. Personal actions, of which the law of contracts forms part, are further divided into writs of debt, detinue, covenant, trespass, case, trover and assumpit.

¹³³ Baker 61, 64, says one would purchase a writ for a standard fee.

¹³⁴ The accepted writs were found in the Register of Writs. Taveen 5; states that the Provisions of Oxford (1258) prevented the Chancery from creating any new writs; Van Caenegem 30.

¹³⁵ Baker 61; Van Caenegem 30.

writ. Over time, the issuing of new types of writs became limited and could only be issued after applied for and approved by the Chancellor.¹³⁶

The choice of the original writ would govern the whole course of the litigation and, dependent on the writ, it may have different requirements and processes.¹³⁷ The plaintiff would often be forced to mould his case to the specific writ chosen. This brought a level of artificiality into the law, which obscured the underlying substantive law.¹³⁸

The general theory of contract law did not exist in the early development of common law,¹³⁹ but centred on two elements; the demand for a right and the complaint of a wrong.¹⁴⁰ The King's Court did not originally concern itself with the enforcement of private wrongs,¹⁴¹ but as this changed the appropriate writ had to be issued to gain entrance to the King's Court.¹⁴² A later development required all matters valued at more than forty shillings to be heard by the King's Court.¹⁴³

The formalistic approach of the legal system goes hand-in-hand with the issue of evidence and played a major role in claims. It could be argued that the King's Court was more concerned with the manner of evidentiary proof than the substantive law. There were a number of ways of

¹³⁶ Baker 61.

¹³⁷ *Ibid.*

¹³⁸ Ibbetson 11.

¹³⁹ Kiralfy 77.

¹⁴⁰ Milson *Historical Foundation of the Common Law* (1981) 243.

¹⁴¹ Glanville *A Translation of Glanville* (1812) 10 18 273-274.

¹⁴² Milson 243.

¹⁴³ Milson 243, 246, says the figure of forty schillings was never changed which meant that the King's court changed from dealing with exceptional matters to that of day-to-day matters.

proving the existence of an agreement.¹⁴⁴ In the local courts the wager of law¹⁴⁵ and the jury system were largely used, but the King's Court often required documents under seal.¹⁴⁶

In order to consider the development of the written contract, a distinction must be made between formal and informal class contracts.¹⁴⁷ A simple or informal contract is an agreement between two people that is enforceable in law and which is supported by consideration.¹⁴⁸ A formal contract is an agreement between two people, but enforceable by virtue of it being in a sealed document.¹⁴⁹

3.4.2 EARLY FORMS OF ACTION

In the early development of common law there were predominantly four types of writs that could be used in contracts, namely debt, detinue, covenant and account.¹⁵⁰ The writ of account did not play a major part in contracts or the development of written contracts. As such it will not be

¹⁴⁴ Glanville 10 5 251, states that duels and oaths were used to prove an agreement; Glanville 10 7 272-273, says that witnessing was also used in proving an agreement.

¹⁴⁵ See also Milson 245-247; McGovern "The Enforcement of Informal Contracts in the Later Middle Ages" *Cal L Rev* (1971) 1145, says, unless the plaintiff had a document under seal, many writs could allow a defendant to escape liability by denying his liability under oath by eleven other oath helpers, which was known as the Wager of Law.

¹⁴⁶ Milson 246.

¹⁴⁷ Kempin *Historical Introduction to Anglo-American Law in a Nutshell* (1973) 189; Blackstone 2 3 7 154, divides contracts into express and implied contracts. Express contracts include actions of debt, covenants and promises. Blackstone 3 3 9 153, states that contracts can also be divided into express and implied contracts; Blackstone 3 2 30 443, mentions that an express contract is where the terms of the agreement are expressed in some shape, manner or form, whereas an implied contract is as reason and justice would require.

¹⁴⁸ Kiralfy 446, states that it is otherwise known as *quid pro quo*; Blackstone 3 2 30 444, states that there must be something given in exchange for something that is mutual and reciprocal.

¹⁴⁹ Blackstone 1 294, 297, 304, 306, says it was considered to be a solemn and authentic act a person could perform. A deed must be written and printed on paper. Any other material would not be considered to be a deed. It should be sealed by means of a seal or a mark of authenticity and must be delivered. It must also be attested and signed by witnesses; Kiralfy 446.

¹⁵⁰ Blackstone 3 3 9 153, states that express contracts can be divided into debt, covenant and promises.

discussed, other than to say it was used for a defendant to account for monies over which he had control.¹⁵¹

The writ of debt and detinue was a claim for money and goods.¹⁵² It was originally one action, but detinue was later used for specific goods and chattel.¹⁵³ In the action of debt, there was no claim to enforce a promise but was used to demand restitution of something that belonged to the plaintiff.¹⁵⁴ There were two ways in which such a claim could be proven. The first was through witnesses and the second through a sealed document.¹⁵⁵ A sealed document became the foundation of the proof of the claim, but was not a requirement.¹⁵⁶ For as long as the defendant's seal was on the writ, the defendant would be liable to make payment.¹⁵⁷ In such a case, the defendant could only remove a debt, regardless of whether he had paid or not, by producing a sealed acquittance.¹⁵⁸ As the document was the proof, there was no discussion regarding the underlying liability.¹⁵⁹ The sealed document was therefore considered to be the embodiment of the agreement itself. By the time of Blackstone the use of simple agreements for the action of

¹⁵¹ Milson 275; Kiralfy 458, states that the process of account was a long and cumbersome process. See also Blackstone 3 2 30 464.

¹⁵² According to Blackstone 2 3 7 155, debt is money due by a certain and express agreement. Blackstone 2 3 9 155, also states that debt relates to a sum of money, whereas detinue only relates to goods and chattel.

¹⁵³ Ibbetson 11.

¹⁵⁴ Blackstone 2 3 7 155; Taveen 7.

¹⁵⁵ Blackstone 1 2 10 2, mentions that seal is sometimes called a *charter* or *carta*; Ibbetson 17-18; Simpson *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1996) 10, states that a sealed document was called a "specialty". Blackstone 3 2 30 465.

¹⁵⁶ Blackstone 2 3 7 155, contends that the shortest and surest remedy was upon a deed or an instrument under seal; Milson 250. Blackstone 3 2 30 465.

¹⁵⁷ Glanville 3 2 30 465; Ibbetson 20, says there were only two defences available to the defendant, the first being that the seal was not his and secondly that the document was not a deed at all.

¹⁵⁸ Ibbetson 20; Milson 250.

¹⁵⁹ Ibbetson 21.

debt fell in disuse because of the obstacles in proving the claim.¹⁶⁰ The use of the action of debt with special contracts under seal was the preferred basis of recovery.¹⁶¹

The writ of covenant was mostly used for leases and property.¹⁶² It was considered to be an “agreement” and the closest action to modern law of contract.¹⁶³ It was an action for the breach of a promise to do something in the future and the remedy was originally specific performance, but later developed into damages.¹⁶⁴ The action of covenant was somewhere between the entitlement-based action of debt and the loss-based action of trespass.¹⁶⁵

During the fourteenth century, the royal courts introduced a rule that an action of covenant could only be brought on a sealed document.¹⁶⁶ The focus was therefore on the proof rather than the substantive law.¹⁶⁷ By affixing the seal there was no dispute on what was agreed, but only on the performance.¹⁶⁸ As a result, the action of covenant could no longer be used for informal contracts. This process became archaic and impractical¹⁶⁹ and as a result the action of covenant

¹⁶⁰ According to Blackstone 2 3 7 154, the obstacles for using a simple contract was that: (i) the defendant would bring and wager his law and thereby escape the claim by oath and (ii) the plaintiff had to prove the whole debt or otherwise could not claim anything at all.

¹⁶¹ Blackstone 2 3 7 155.

¹⁶² Blackstone 2 3 9 155; Blackstone 3 3 9 153, says covenant is another category of an express contract.

¹⁶³ Ibbetson 21; According to Kempin 193, the action of covenant could be used for all except for the action of best by 1284.

¹⁶⁴ Taveen 6; Milson 247, indicated that the writ of covenant was intended to compel performance or compensating for the value of performance.

¹⁶⁵ Ibbetson 22.

¹⁶⁶ Ibbetson 24; Taveen 6; Barbour 21-22, states that the deed was more than evidence, it was the contract itself. The seal bound the owner of the seal, whether he was a party to the contract or not. The sealed document could not be contradicted through extrinsic evidence and the sealed document was absolutely conclusive; Simpson 23, states that the plaintiff has to rely on the precise terms of the deed, “a deed must be met with a deed”. Kempin 194, says that the seal was part of the formalities and without the seal there was no covenant.

¹⁶⁷ Milson 247.

¹⁶⁸ Milson 248.

¹⁶⁹ Taveen 7; Milson 249.

never became popular and other forms of actions were used, such as the action of debt.¹⁷⁰ During the fourteenth century the action of covenant was replaced by the action of debt, which was based on a conditional bond.¹⁷¹ The payment of a debt hinged on the fulfilment of a condition through the bond.

3.4.3 LATER DEVELOPMENTS OF ACTIONS AND WRITTEN AGREEMENTS

The formal actions over time became too restrictive and ineffective for the development of commerce and the increased use of informal contracts.¹⁷² The sixteenth century brought a transitional period between medieval laws, which were based on the law of actions, to modern law.¹⁷³ The movement from the law of actions began with a development from the action of trespass and case (which were used for wrongdoing) into the action of assumpsit.¹⁷⁴ The action of assumpsit recognised informal contracts and created the required flexibility for commerce during the transitional period.¹⁷⁵ The action of assumpsit replaced the action of debt and soon found itself to be the only action for all informal contracts.¹⁷⁶ The action of covenant was finally also included under the banner of the action of assumpsit.¹⁷⁷ Formal contracts were usually in the

¹⁷⁰ Ibbetson 30-31.

¹⁷¹ Ibbetson 92.

¹⁷² Taveen 27.

¹⁷³ Ibbetson 95; Taveen 27. This period was also known as the “Renaissance of the Common Law”.

¹⁷⁴ Taveen 71-72, says assumpsit was based on a promise whereas a debt was based on a duty; Holdsworth *Essays in the Law and History* (1946) 132.

¹⁷⁵ Blackstone 2 3 9 158.

¹⁷⁶ Ibbetson 150; Holdsworth 132.

¹⁷⁷ Taveen 27, 65.

form of a conditional bond, which was still used into the eighteenth century.¹⁷⁸ The popularity of the action of assumpsit eventually replaced both the formal and informal contract.¹⁷⁹

After the acceptance of the replacement of the assumpsit with debt and covenant, it became evident that the acceptance of informal contracts could not properly be supported by the jury system and evidentiary rules in place. This was particularly true relating to the uncontrolled discretion of the jury and the competency of witnesses.¹⁸⁰ As a result there was a possibility that parties to a contract could be held on promises that were never made.¹⁸¹ It was for this reason that an attempt was made to put the law back to the pre-assumpsit period by enacting the Statute of Frauds 1677.¹⁸²

The Statute of Frauds meant that the jury could not consider an action of assumpsit for a specific set of categories of contract,¹⁸³ unless there was written evidentiary proof of such an agreement. The Statute of Frauds had the effect of changing the sealed and unsealed documents to oral agreements and unsealed written agreements.¹⁸⁴ Unsealed documents were not at the level of sealed documents.¹⁸⁵ Sealed writings were of a higher level and could not be varied by a *parol*

¹⁷⁸ Ibbetson 150; Taveen 85.

¹⁷⁹ Street *The History and Theory of English Contract Law* (1999) 62, states that the action of debt was eventually replaced by the action of assumpsit; Blackstone 3 3 9 157.

¹⁸⁰ Willis “The Statute of Fraud - a Legal Anachronism” *Ind LJ* (1928) 429; Blackstone 3 3 23 374, for example says a jury could rely on their private knowledge and not only be limited to the written evidence.

¹⁸¹ Willis 427.

¹⁸² Blackstone 2 3 9 158, finds that some agreements by their nature are too important to rest on verbal promises alone. As a result the Statute of Frauds 1677 was passed and should a contract not comply with the provisions of the Statute of Frauds it would be void; Taveen 85; Baker 471.

¹⁸³ Taveen 85, mentions these categories included promises of the executor, marriage contracts, guaranty contracts (which constituted third party beneficiary contracts) and contracts of land, sale of goods over ten pounds and contracts of more than one year (which constituted valuable transactions).

¹⁸⁴ Taveen 88.

¹⁸⁵ *Ibid.*

agreement.¹⁸⁶ Later, it was determined that oral evidence could not vary unsealed written documents either.¹⁸⁷ The Statute of Frauds was largely a knee-jerk reaction to the recognition of informal contracts in the action of *assumpsit*. The Statute of Frauds was later mostly repealed as the impracticability of the requirements became obvious.¹⁸⁸ The Statute of Frauds underwent a number of amendments, however, under modern contract law there are still a number of contracts that are required to be in writing.¹⁸⁹

3.5 SOUTH AFRICAN LAW

The development of the South African legal system, including the law of contracts, is a result of the two legal systems that were transplanted in South Africa. Against this backdrop it is worth briefly mentioning two major influences.

Roman-Dutch law was introduced into South Africa in 1652 with the Dutch East India Company settling in the Cape.¹⁹⁰ The English legal system influenced the Roman-Dutch laws through the English occupation of South Africa between 1795 and 1900.¹⁹¹ English law changed some, but not all, of the Roman-Dutch laws applied in South Africa at that time.

¹⁸⁶ Taveen 88.

¹⁸⁷ *Ibid.*

¹⁸⁸ Taveen 88; Kiralfy 471.

¹⁸⁹ Law of Property Act 1925, which was later replaced with the Law of Property (Miscellaneous Provisions) Act 1989.

¹⁹⁰ Van den Bergh “The Remarkable Survival of Roman Dutch Law in Nineteenth Century South Africa” *Fundamina* (2012) 71-72.

¹⁹¹ Van der Merwe “The Origin and Characteristics of the Mixed Legal System of South Africa and Scotland and their Importance in Globalisation” *Fundamina* (2012) 94; Van den Bergh 72.

It has generally been accepted that, on the whole, Roman-Dutch law was retained in the field of the law of contracts. English law, however, had an influence on South Africa's law of contracts in two major areas, being the law of evidence and interpretation.¹⁹²

At first glance, these two areas do not appear to be related to the drafting of contracts. If one considers the reason for converting an agreement into a written instrument, it becomes clear that one of the main purposes for doing so is to ensure that the agreement is evidenced. On this basis, the law of evidence would have an influence on how written instruments are drafted. Failure to have a written contract enforced would make the process of drafting meaningless.

The second element is interpretation and, before the drafting of a document can occur, one must consider how the document will be interpreted. As English law was predominantly used for interpretation, it seems logical to deduce that the actual drafting of contracts would be heavily influenced by English law, as the first step to drafting is interpreting.

What will be seen in Chapter 4 is that South Africa has adopted the common law drafting method as opposed to the civil law drafting method. This alone evidences the English influence on South African contract drafting.

The drafting of written instruments does not wholly rest on English influences either. South Africa does not distinguish between contracts under seal or informal contracts, as English law does.¹⁹³ In this regard, South Africa has followed in the Roman-Dutch footsteps in that there is no distinction between contracts and pacts.¹⁹⁴ The one formality that has been reinforced is that

¹⁹² Manfred 521, 744.

¹⁹³ Schreiner *The Contribution of English Law to South African Law, and the Rule of Law in South Africa* (1967) 41.

¹⁹⁴ Schreiner 41.

of the sale of land,¹⁹⁵ and the influence of the English Statute of Frauds seemed to reinforce certain elements found in Natal.¹⁹⁶ These requirements were finally encapsulated in the General Law Amendment Act,¹⁹⁷ the Formalities in Respect of Sale of Land Act¹⁹⁸ and finally in the Alienation of Land Act.¹⁹⁹ The details of current South African formalities are discussed elsewhere.²⁰⁰

3.6 CONCLUSION

It has been seen that both Roman and English law of contracts had their origins in highly formalistic roots. Roman law, which represented one side of the spectrum, focused on ritualistic oral forms, whereas English law, being the other side of the spectrum, was based on formal written requirements. Both the oral and written rituals and requirements were considered to embody the agreement itself and the underlying obligation was not considered to be the basis for contractual liability.

As commerce developed, both systems required more flexible approaches to contracts and the recognition of informal contracts was developed in the law. In Roman law, this flexibility was seen through recognition not only of *pacts* but of written documents, albeit in a somewhat

¹⁹⁵ Myburgh *Statutory Formalities in South African Law* LLD (2013) 15. The requirement for writing was found in the Cape, Transvaal (s30 of the Transvaal Proclamation 8 of 1902), and the Free State (s49 of the Free State Ordinance 12 of 1906).

¹⁹⁶ Myburgh 15, the law in Natal seemed to echo those requirements found in the English Statute of Frauds in Natal's Law 12 of 1884.

¹⁹⁷ S1(1) of Act 68 of 1957.

¹⁹⁸ S1(1) of Act 71 of 1969.

¹⁹⁹ S2(2) of Act 68 of 1981.

²⁰⁰ See ch 8.

limited form. In English law, it saw recognition of informal agreements and unsealed written documents.

Roman-Dutch law was the continuation of Roman law, but showed little development in the written contract. This fact is notable in itself. It, however, appeared that Europe in general, continued to develop the use of written documents.

In South African law, the influence of English law in the written contract was notable to the extent that the drafting method employed is the common law drafting method, which will be seen in Chapter 4.²⁰¹ South Africa's law of contract, however, followed in the footsteps of Roman-Dutch law, in which no specific formalities were generally attached for recognising a contract.²⁰²

²⁰¹ See ch 4.

²⁰² See ch 8.

CHAPTER 4

APPROACHES TO DRAFTING

4.1	INTRODUCTION.....	61
4.2	CIVIL LAW LEGAL SYSTEMS.....	65
4.3	COMMON LAW LEGAL SYSTEMS.....	68
4.4	EXAMPLES OF THE DIFFERENT APPROACHES.....	71
4.4.1	GOOD FAITH AND FAIRNESS	71
4.4.2	THIRD PARTY RIGHTS.....	74
4.4.3	<i>FORCE MAJEURE</i> AND DOCTRINE OF FRUSTRATION.....	74
4.4.4	PENALTY PROVISIONS AND LIQUIDATED DAMAGES	76
4.4.5	IMPLIED TERMS	77
4.5	SOUTH AFRICA AS A MIXED LEGAL SYSTEM.....	79
4.6	CONCLUSION.....	80

4.1 INTRODUCTION

When considering similar contracts from different legal jurisdictions, it becomes apparent that contracts differ in length and style depending on the country in which they originate. For example, Van Hecke¹ recounts an event in which a Belgian and American company negotiated a share-exchange transaction. The American company had its attorneys draft an agreement for the transaction. They produced a document of ten thousand words. The Belgian company refused to continue with the transaction, apparently because of the length of the contract document and had Belgian attorneys draft the agreement instead. They produced a contract document of one

¹ Van Hecke *A Civilian Looks at the Common-Law Lawyer* (1962) 5, 10. The same is recounted in Langbein “Comparative Civil Procedure and the Style of Complex Contracts” *Am J Comp L* (1987) 381; Hill & King “How do German Contracts Do as Much with Fewer Words?” *Ch Kent L Rev* (2004) 894; Klass *Contract Law in the USA* (2010) 44.

thousand four hundred words. A further observation is that on some accounts, German contracts are one third or even half of the length of similar types of American contracts.² The difference in drafting styles appears not only to be limited to contracts, but also relates to legislative drafting,³ court decisions⁴ and even wills.⁵ There appears to be one common thread, however, which is that common law documents are generally longer than their civil law counterparts.

The reason for this discrepancy seems to be the result of two different drafting methods employed when drafting contracts. The one method is a conceptual approach originating from civil law countries, which results in a shorter contract.⁶ The other method is an exhaustive

² Hill & King 894; Nicholas *French Law of Contract* (1982) 57, says the same can be said about French contracts being shorter than their English equivalents.

³ Berry “Legislative Drafting: Could our Statutes be Simpler?” *Statute Law Review* (1989) 83-84, mentions that both the common law and civil law have their own styles. Common law appears to be more complex, taking the view of the all-inclusive, while civil law focuses on simplicity; Clarence *Legislative Drafting: English and Continental* (1980) 15, argues that the approach to legislative drafting is different and that common law countries’ legislation is more detailed and precise, which seems to cater for certainty in common law legal systems.

⁴ Oehler “Working with a Code: Is there a Difference between Civil Law and Common Law People?” *U III L Rev* (1977) 716, contends that there are different styles in civil law and common law judicial decisions; Dainow “The Civil Law and Common Law: Some points of Comparison” *Am J Comp L* (1966-1967) 419; Friesen “When Common Law Courts Interpret Civil Codes” *Wis Int’l LJ* (1996-1997) 14, says that common law decisions are much longer as the judge would consider the facts and vary his method of reasoning. The civil law judgments appear to be shorter as the judge merely applies the law; Cartwright *An Introduction to the English Law of Contract for the Civil Lawyer* (2007) 43, states that when a judge interprets legislation, he will not necessarily fill in any gaps left by the legislator and as such, legislation naturally is drafted in more detail than those of civil law countries.

⁵ Dick “Comparison in Legal Drafting” *Estates and Trusts Quarterly* (1977-1979) 195.

⁶ Friesen 7; Sanders “The Characteristic Features of Southern African Law” *CILSA* (1981) 198; Hill & King 894, describe an American contract, and by inference common law contracts, as being longer, containing more qualifications and explanations and including legalese that is similar but different from one contract to another; Baxter “Pure Comparative Law and Legal Science in a Mixed Legal System” *CILSA* (1983) 98, says common law contracts are intended to be self-sufficient and would include assumptions of the parties, purpose of the contracts, duties of the parties and remedies. In other words it would be a detailed document; Cornelius “The Unexpressed Terms of a Contract” *International Journal of Private Law* (2012) 300, argues that contracts of common law systems are drafted meticulously to express the intention of the parties. See also Hill “Why are Contracts Written in ‘Legalese’?” *Ch Kent L Rev* (2001) 59; Lundmark “Verbose Contracts” (2001) *Am J Comp L* 121.

approach from common law countries which produces a longer form of contract.⁷ To differentiate between the two drafting methods on the length of the contract alone would be inaccurate. The length of the document is the result of the drafting method employed, but the drafting method and the contract that it produces are directly influenced by the approaches of the legal systems and the legal families to which they belong.⁸

Although it seems apparent that the two different drafting methods would be influenced by the particular legal system, there are views that common law drafting techniques are the result of the unreliability of jury systems,⁹ a general distrust in the common law court systems,¹⁰ common law lawyers being trained to deal with every eventuality in contracts,¹¹ and an attempt to remove certain perceived elements of uncertainty that some have argued are inherent in common law systems.¹² These arguments may have some merit if one considers the development of

⁷ Sanders 198; Hill & King 894, describe a German contract, and by inference civil law contracts, as being shorter, containing fewer qualifications and explanations and including significantly less legalese that is similar from one contract to another; Cornelius 295, mentions that civil law contracts are drafted against the backdrop of the codes and are therefore simpler and shorter than their common law counterparts.

⁸ These legal systems set out different rules, procedures, norms, legal reasoning and approaches to the law in general. Merryman *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (1968) 1-2, distinguishes between a legal system which is an operating set of rules and procedures which are grouped into legal families, such as “common law” and “civil law” and legal traditions which are the historically conditioned attitudes about the nature of law, the role of law in society and the operation of the legal system. It seems a reasonable inference that the legal tradition has a direct bearing on the legal system in question; Sanders 198, distinguishes between specialised and non-specialised legal systems. Out of the specialised legal systems, which Sanders dubs as legal systems that are more developed, the civil law and common law groups are formed.

⁹ Hill & King 922; Klass 44; Van Niekerk “The Convergence of Legal Systems in Southern Africa” *CILSA* (2002) 315, says a legal system implies legal perceptions of the concept of the law, legal methodology and common legal ideology.

¹⁰ Hill & King 922; Klass 44.

¹¹ Hill & King 890, 922; Klass 44.

¹² Langbein 383, quoting Van Hecke.

contracts,¹³ but does not satisfactorily explain the differences in drafting and length of contracts of the two methods.¹⁴

A major factor that seemingly contributes to the different drafting methods is that the civil law systems are codified, thereby eliminating the need to deal with every eventuality in a contract. The common law systems cannot rely on civil codes and therefore must deal with each potential possibility, which naturally produces a longer document.¹⁵ The common law contract is therefore structured to meet the requirements of the common law.¹⁶ So too, the civil law contract is structured to meet the requirements of its system. These requirements may differ between the legal families as well as from one legal system to another.

As mentioned, the history of a legal system plays a role in how the law and consequently the drafting of contracts are approached.¹⁷

¹³ See ch 3.

¹⁴ Moss “International Contracts between Common Law and Civil Law: Is Non-state Law to be Preferred? The Difficulty of Interpreting Legal Standards of Good Faith” *Global Jurist Advances* (2003) 2. International contracts often adopt not only English language, but also common law terminology and structure. Cartwright 56, argues that some of the reasons for common law systems producing lengthy and detailed contracts are the absence of the principle of special contracts and the same general principles apply to all contracts, although some special rules may occasionally be imposed by statute.

¹⁵ Langbein 384, argues against the differentiation based on the codification of the civil law countries as the reason for the difference in contracts between civil and common law systems. Langbein argues that default rules will apply regardless of the source of such a rule, thus regardless of whether the rule is based on precedence or codification. This line of argument fails to recognise that a contract document does not require repeating rules set out in the codes, whereas in common law systems the rules would be set out in the contract document. It would be naive to think that the two methods are the same, especially considering the difference in legal reasoning and history in the civil and common law systems. This, however, does not mean that the two systems would not get to the same result.

¹⁶ Moss 3.

¹⁷ See ch 3.

4.2 CIVIL LAW LEGAL SYSTEMS¹⁸

The decline of Rome, after Justinian's codification of the law in the *Corpus Iuris Civilis*, resulted in legal principles being diluted into surrounding cultures and customs. The rediscovery of the *Corpus Iuris Civilis* during the eleventh century brought about a revival of Roman law and legal science in Europe. Legal jurists, known as the Glossators and the Commentators, strongly influenced how civil law countries would eventually approach the law.¹⁹

One of the most distinguishing factors in the civil law systems is the codification of private law.²⁰ The age of codification was predominantly led by the French in the *Code Napoléon* of 1804²¹ and the Germans in the *Bürgerliches Gesetzbuch*²² of 1900.²³ The French and German civil codes had a lasting effect on the continent's legal systems and it is worth mentioning both codes as they signify the two opposites found in codification and formed the basis of other civil codes worldwide.²⁴

¹⁸ Also known as the continental legal systems.

¹⁹ Cartwright 8, states that it was the acceptance of the Roman legal principles that formed the basis of law for civil law countries. Smits *Contract Law a Comparative Introduction* (2014) 25, says the roots of civil law countries are found in the *ius commune* which was the reworked *Corpus Iuris Civilis*.

²⁰ Glendon, Gordon & Osakwe *Comparative Legal Traditions* (2004) 52; Mitchell, Goadby & Holdsworth *The English Legal Traditions, its Sources and History* (1935) xlvii - xlviii, state that the civil law systems are codified. As a result there is a dividing line between present and the past, and pre-codification will not be considered other than for historical purposes. Not all aspects of the civil law are codified, such as public law, but specific areas are completely codified, such as the private law; Cartwright 8, mentions that a common feature of many modern civil systems is that their private law is based on a set of general rules that are contained in legislative enactments known as a "code".

²¹ Also known as the French *Civilis* or the French Civil Code, and contains 3 books with 2283 articles.

²² Also known as the German Civil Code, and contains 5 books with 2385 articles.

²³ Tetley "Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified) (Part 1)" *Rev dr Unif* (1999) 600. See also Tetley "Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified) (Part 2)" *Rev dr Unif* (1999) 877.

²⁴ Smits 25, states that the effect of codification was to unify previously diverse laws and allow the country to make a new start. This can be seen with Germany's unification in 1871, where the laws were codified and the French Revolution in 1789, which resulted in codification in the law.

On the one side of the spectrum, the French Code was intended to be simplistic enough to be understood by the average person.²⁵ It contained concise provisions with enough flexibility of its rules so that it would be adapted to every eventuality.²⁶ Its influence was far reaching and was eventually modified and adopted by countries such as Belgium, Holland, Italy, Greece, Spain, South and Central American States and Egypt.²⁷

On the other side of the spectrum the German Civil Code was comprehensive and technical.²⁸ It had an almost mechanical approach, which only focused on the wording of the code.²⁹ It resulted in scientific ideals that were expressed at a level of abstraction.³⁰ It also influenced the codes in countries such as Switzerland, Japan, Mexico, China, Peru and Siam in their codification of the law.³¹

One could argue that the codification is legislation as found in all legal systems, but the approach in civil law systems is not the same as that found in common law systems. The civil law approach can be summarised as “[t]he code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves

²⁵ Hahlo & Kahn *The South African Legal System and its Background* (1973) 68-69.

²⁶ Marsh *Comparative Contract Law England, France, Germany* (1994) 8, 10, it was the intention that all aspects of that particular field of law should be covered by the codification.

²⁷ Hahlo & Kahn 69; Glendon, Gordon & Osakwe 58-59.

²⁸ Tetley 600.

²⁹ Hahlo & Kahn 69.

³⁰ Moss 11-12; Sanders 329, states that all civil law legal systems have the characteristic of a high level of abstraction a generality.

³¹ Hahlo & Kahn 69; Smits 27, contends that various civil codes were adopted throughout Europe and some replaced older codes.

the highest level of generalization based upon a scientific structure of classification.”³² The codes embody general principles that are adapted to specific situations through deductive reasoning.³³

The influence of the European Union’s directives should not be overlooked. The directives introduce pieces of separate legislation that operate outside the code. The directives would function similarly to legislation found in the common law systems, in addressing specific circumstances and situations. Each member state would have to pass the necessary laws for the enforcement of such directives.³⁴

The written contract resolves and its drafting is influenced by the manner which courts resolve disputes relating to contracts. There are many differences, but an in-depth analysis of the differences between procedural law of the civil and common law systems are outside the scope of this study. Every difference would have an influence on a legal system’s approach. Some additional differential factors are that civil law procedural law can be classified as being inquisitorial.³⁵ The court plays a significant role in finding facts and resolving any disputes. It is

³² Dainow 424.

³³ Tetley 596; Friesen 11, mentions that civil law countries can be described as a “closed system” in which answers can be found in an existing rule of law found in statutes.

³⁴ Some directives that have a bearing on contracts include: Directive 85/374 on the liability for defective products, Directive 86/653 on self-employed commercial agents; Directive 90/314 on package travel; Directive 93/13 on unfair terms in consumer contracts; Directive 1999/44 on the sale of consumer goods; Directive 2000/31 on electronic commerce; Directive 2002/47 on financial collateral arrangements; Directive 2002/65 on distant marketing of financial services; Directive 2005/29 on unfair commercial practices; Directive 2008/48 on credit agreements for consumers (formally Directive 87/102); Directive 2008/122 on timeshare (formally Directive 94/47); Directive 2011/7 on combating late payment in commercial transactions (formally Directive 2000/35); Directive 2011/85 on consumer rights (which replaced Directives 85/577 for door to door sales and 97/7 for distant contracts).

³⁵ Pejovic “Civil law and Common Law: Two Different Paths Leading to the Same Goal” *VUWLR* (2001) 830.

based on the principle that the court should know the law and that the parties should therefore not plead the law.³⁶

A further factor that influences the drafting of contracts in Civil law countries is how contracts are interpreted. Interpretation is the starting point of drafting, and it cannot be ignored that the codes will have an influence on the interpretation of a contract as each provision found in a contract will be interpreted against the backdrop of the civil codes. The interpretation of contracts is an attempt to ascertain the mutual intent of the parties, regardless of the literal meaning of the words in the contract.³⁷ The interpretation of contracts is mainly subjective.³⁸ This means that the drafter will not attempt to include all aspects in the written document, as is often found with common law documents.

Taking the procedural law into account, together with the codification of the law, it seems obvious that the method of contract drafting would be different from its common law counterpart.

4.3 COMMON LAW LEGAL SYSTEMS³⁹

The common law system has its historical development rooted in England. The history of English law has been discussed elsewhere in detail,⁴⁰ but what is worth mentioning here is that

³⁶ Pejovic 820.

³⁷ Hermida “Convergence of Civil Law and Common Law of Contracts in the Space Field” *Hong Kong Law Journal* (2004) 355.

³⁸ Hermida 355.

³⁹ Also known as the Anglo American legal systems; Cartwright 3, mentions that there are different meanings associated with the common law. The first is related to the decisions made by the courts in England, which were commonly applied. The second is that the court’s decisions are a primary source of law. Finally it could also mean legal systems that form part of the Commonwealth.

England did not have the same reception of Roman law as was found in civil law countries.⁴¹ By the time of the reception of Roman law in Europe, England was developing the King's court and its legal profession.⁴²

In England there was no central set of rules or authority other than the king, and justice was dispensed locally. As such, William the Conqueror set up circuit courts throughout England. The law was influenced by the strong English court system in place. The English law was therefore largely based on case law.⁴³ The courts were able to create and adapt the law and thereby allowed the law to develop.⁴⁴ The principle of *stare decises* supported the legal certainty as judges were bound by previous decisions of the courts.⁴⁵ Due to this history, codification never occurred and English law relied heavily on the decision of the courts and finally finding a coherent system through the *stare decises* principle.

Through colonisation by the British Empire the common law systems were transplanted to British colonies, which include countries such as Canada, Australia, New Zealand, the Republic

⁴⁰ See ch 3.

⁴¹ Cartwright 8.

⁴² *Ibid.*

⁴³ Gordley & Von Mehren *An Introduction to the Comparative Study of the Private Law: Reading, Cases, Materials* (2006) 3.

⁴⁴ Cartwright 4, states that the common law system's body of law is mainly found in decisions of particular cases and has no specific origin in legislation. Although some legislative interventions may occur in common law systems, these are limited and not a primary legal source; Friesen 11, says that a judge applies and defines legal rules and as such common law legal systems can be described as "open systems" where judges can modify and adapt the law to a specific case.

⁴⁵ Mitchell, Goadby & Holdsworth xlvii-xlviii, mention that the common law systems are not codified, although there may be some pieces of legislation dealing with specific portions of the law. There is also no dividing line between present and past, in which the laws as far as it is remembered will hold authority. Often the older the law, the more authority it has.

of Ireland, Hong Kong, Canada (except for Quebec, which has a civil code), India, as well as the United States of America (except for the state of Louisiana, which has a civil code).⁴⁶

The common law systems have generally remained uncodified, but common law systems do include legislation. Legislation does not usually include general principles, but is intended to regulate specific areas of the law and particular situations. Legislation therefore contains specific provisions which are limited to specific sets of circumstances. The approach taken in the common law countries is to look at similar, but not the same, factual scenarios and cases and to draw inferences therefrom regarding the specific legal principles that would apply, thus applying inductive reasoning.⁴⁷ Common law does not expect the law to fill in gaps, but attempts to draft comprehensive agreement to avoid these so-called gaps.⁴⁸

Unlike the civil law countries, the judges of common law countries do not play an active role in finding facts and uncovering the truth of the dispute. This is left to the parties, who must present their case and any relevant facts to the court. This is described as an adversarial system of procedure, in which the court will only consider such evidence as the parties may present to the court.⁴⁹

In common law systems a contract is not interpreted against the backdrop of a civil code. The focus is on the contract document itself and any specific legislation that may be relevant. In this instance the document itself plays a larger role. The *parol* evidence rule is applicable and restricts the rules of interpretation to the document itself. A contract is interpreted in an objective

⁴⁶ Hahlo & Kahn 69-70; Glendon, Gordon & Osakwe 450-451; Cartwright 9.

⁴⁷ Tetley 613.

⁴⁸ Cartwright 179. This does not mean that the contract is the only source. The law developed default rules to deal with situations where drafters did not deal with, or the parties did not agree to, all the elements in the contract.

⁴⁹ Pejovic 822.

fashion in the manner in which a reasonable person would read it in order to find the literal or ordinary meaning of the words in the contract.⁵⁰

The procedural law, together with the lack of codification, would influence the drafting style of contracts in common law countries and contracts would naturally be more comprehensive.⁵¹

4.4 EXAMPLES OF THE DIFFERENT APPROACHES

The following section details selected examples of differences between the common and civil law systems. Although there are many other differences between the two legal systems, these examples have been selected as they have a direct bearing on the drafting method and the explanation of the reason for different approaches to the drafting of contracts.

4.4.1 GOOD FAITH AND FAIRNESS

The civil law systems have an overarching good faith principle embodied in the codes.⁵² Their focus is on ensuring that justice is upheld.⁵³ The principles of good faith, fairness and fair dealing are therefore implied principles.⁵⁴ This comes from the Aristotelian philosophy and classification

⁵⁰ Hermida 354,

⁵¹ *Supra* (n 3, 4, 5).

⁵² Powell & Mitchell “The International Court of Justice and the World’s Three Legal Systems” *The Journal of Politics* (2007) 400.

⁵³ Moss 1.

⁵⁴ *Ibid.*

of virtues and natural law.⁵⁵ Take for example the German Civil Code, which includes various references to the principle of good faith.⁵⁶ Furthermore the French Civil Code states that all agreements must be concluded in good faith.⁵⁷

By including such good faith provisions in the code sets a standard for contracting parties to deal with each other. This results in contracts not necessarily having to deal with each and every aspect of a party's conduct.

Common law does not generally recognise that the parties must negotiate or perform their obligations in good faith.⁵⁸ There are concerns that the introduction of concepts such as good faith creates an element of uncertainty through the use of discretion, which goes against the grain of the common law system of certainty.⁵⁹ The common law system is based on the autonomy of the parties, predictability and the parties' ability to look after their own affairs.⁶⁰ The courts are reluctant to interfere with the affairs of the parties and function to enforce the agreement into which the parties had entered. "In the absence of statutory terms, however, the general rule is

⁵⁵ Moss 1.

⁵⁶ S157 states that when a contract is interpreted, the intention of the parties and customary practices must be taken into account. S242 includes a general obligation of good faith and that such good faith must take into account customary practices. S241(2) includes a general duty to take into account the legal position and other interests of the other party, thus implying a duty of good faith. S311 places the same obligation of s341(2) on the parties at the negotiation stage of the contract.

⁵⁷ S1134.

⁵⁸ Powell & Michell 400; Moss 9; Cartwright 61; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, civil law systems have an overriding principle of good faith while the English law does not have such an overarching principle, but deals with the principle of good faith in a piecemeal fashion, for example the principle of equity having intervened certain unconscionable bargains.

⁵⁹ Moss 1.

⁶⁰ Moss 9.

that a judge has only to interpret the contract that the parties have made, not to make the contract for the parties.”⁶¹

Despite this general common law principle, systems have introduced good faith in different areas of the law through the use of legislation. For example, in the United States of America, the Uniform Commercial Code and the Second Restatement of Contracts states that a party has a duty to act in good faith.⁶² The Unfair Contract Terms Act 1977 introduced this principle into the United Kingdom, as well as the Unfair Terms in Consumer Contracts Regulations 1999, which relates specifically to consumer contracts.

The common law system is focused on ensuring that contracts are being performed accurately, not to ensure that fairness is employed.⁶³ As a result of this, common law contracts usually go to great lengths to detail the specific conduct of the parties.⁶⁴ As the principle of good faith is enshrined in the codes, there is no need for civil law countries to do so. Therefore, the product of a common method of drafting would result in a more detailed contract.⁶⁵

⁶¹ *Phillips Electronique, Grand Publique SA v BSB Ltd* [1995] EMLR 472, as quoted by Moss 5.

⁶² UCC 1-203, “Every contractor’s duty within this Act imposes an obligation of good faith in its performance” and s205 of the Restatement (2d) Contracts “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”

⁶³ Moss 8.

⁶⁴ This is usually supported by the *parol* evidence rule, which generally prevents any evidence other than the contract itself to be presented to the courts.

⁶⁵ Powell & Michell 401.

4.4.2 THIRD PARTY RIGHTS

The common law legal system does not generally recognise a contract for the benefit of third parties. This concept is supported by the doctrine of privity of contract, which means that rights and duties in a contract can only flow to the parties who are actually party to the contract. Due to the impact and inconvenience of this doctrine, many common law countries have enacted legislation to amend the strict application of third party benefits in a contract.⁶⁶

In general the civil law allows for rights in a contract to be transferred to third parties.⁶⁷ These rights cannot be forced on a party and there appears to be a requirement for some sort of acceptance of such rights by the third party to be effective.⁶⁸

The difference in allowing third parties to obtain benefits from a contract may result in simpler provisions, which would in itself influence the approach to drafting.

4.4.3 FORCE MAJEURE AND DOCTRINE OF FRUSTRATION

The concept of *force majeure* was originally a civil law concept.⁶⁹ Common law systems apply the concept of strict liability of contracts, and as such the concept of *force majeure* was not originally recognised.⁷⁰

⁶⁶ Contracts (Rights of Third Parties) Act 1999, which allows for third parties to enforce rights on a contract.

⁶⁷ Pejovic 822.

⁶⁸ Pejovic 822. See for example the s328 of the German Civil Code which states that if the parties do not specifically state that a third party attains rights, then it will be inferred whether such a third party acquires rights. The French Civil Code allows for third party stipulations in s1165 and s1121 and should a third party accept such a stipulation, it may not be revoked later.

⁶⁹ This relates to unforeseen circumstances, which exclude a party's liability under the contract.

In the nineteenth century, the concept of impossibility of performance and frustration was introduced in England. This had some similarities to that of the *force majeure* concept.⁷¹ In a situation where the parties to a contract have made no provision for a change of circumstances outside their control, which has radically changed the obligations of the contract, the doctrine of frustration can be applied by the courts.⁷² The consequence of applying it is that the entire contract is terminated.⁷³ The principle of frustration therefore applied a default rule, which would be implied in the text.⁷⁴

The doctrine of frustration has an effect on the entire contract, whereas *force majeure* only suspends the obligations of the parties, thereby having a limited effect.⁷⁵ Furthermore, it appears that the courts have been reluctant to employ the doctrine of frustration and as such, the inclusion of a *force majeure* provision in contracts has become prevalent.⁷⁶

The common law system does not have a precise definition of *force majeure*, which results in *force majeure* clauses in common law contracts being expansive in defining the term.⁷⁷ One of the reasons is that the consequence of frustration is the termination of the contract, which may

⁷⁰ Pejovic 824.

⁷¹ *Ibid.*

⁷² Cartwright 257.

⁷³ Cartwright 257. As there is no fault on either party's side in a situation of frustration, neither party would have the ability to claim damages from the other. The Law Reform (Frustrated Contracts) Act 1943 gives courts power to adjust the financial position of the parties should they be found to be frustrated.

⁷⁴ Ambrose "Force Majeure in International Contracts - The English Law Perspective" *Bus L Int'l* (2003) 234, 237.

⁷⁵ Mckendrick *Force Majeure and Frustration of Contracts* (1991) 3.

⁷⁶ For example *British Movietonews Ltd v London and District Cinemas* [1950] 2 All ER 390; *Tsakiroglou & Co Ltd v Noblee Thorl-GmbH* [1962] AC 93; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724.

⁷⁷ Pejovic 824

not be the intention of the parties.⁷⁸ By including the *force majeure* terms, the consequence of termination is avoided. Another reason is that the *force majeure* provision provides more certainty to the parties than that of applying the doctrine of frustration.⁷⁹

The civil codes include the concept of *force majeure*. Take for instance article 1135 of the French Civil Code which makes specific reference to *force majeure*. In civil law, *force majeure* applies where the performance of a contract is substantially impossible.⁸⁰ It relates to the specific obligations of the party and not to the entire contract.⁸¹ It also operates independently from the contract and therefore a *force majeure* clause is not necessary in civil law contracts.⁸²

4.4.4 PENALTY PROVISIONS AND LIQUIDATED DAMAGES

Common law does not generally recognise penalty provisions in contracts. The reason for this is that common law systems would allow for compensation for a breach, but is reluctant to allow the imposition of punitive damages in addition to compensatory damages.⁸³ It appears that, should punitive damages be allowed, it may affect the predictability of commercial transactions.⁸⁴ It appears that any agreed amounts contained in the contract that is more than the

⁷⁸ Cartwright 241.

⁷⁹ Cartwright 260.

⁸⁰ Pejovic 824.

⁸¹ Pejovic 824; Powell & Michell 400.

⁸² Pejovic 824.

⁸³ Garcia “Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to be Solved by the Contracting Parties” *European Journal of Legal Studies* (2012) 82.

⁸⁴ Hatzis “Having the Cake and Eating it Too: Efficient Penalty Clauses in Common and Civil Contract Law” *International Review of Law and Economics* (2003) 386.

actual loss of a party, will likely not be enforced.⁸⁵ Liquidated damages may be enforceable provided that they are compensatory in nature and not punitive.⁸⁶

Civil law countries generally accept penalty and liquidated damages provisions, as this was accepted as early as during Roman times.⁸⁷ The courts would, however, have the power to reduce a grossly excessive stipulated amount.⁸⁸ The requirement of good faith counterbalances any excessive penalty provisions in the civil law countries.

The different approaches relating to the enforcement of contracts, as shown in an example of penalty clauses, may also influence the style and manner in which contracts are drafted in common and civil law countries.

4.4.5 IMPLIED TERMS

It is apparent that it is virtually impossible for every single eventuality to be expressed in words in a contract. When an agreement is reduced to writing not all terms will necessarily be recorded in the document.⁸⁹ The unforeseen circumstances for which parties did not cater would be dealt with through default rules which are also known as implied terms.⁹⁰ The courts would imply

⁸⁵ Garcia 82.

⁸⁶ Hatzis 387.

⁸⁷ See for example the s1152 of the French Civil Code and sections 343, 340 and 341(2) of the German Civil Code. Note that the equitable approach referred to in the German Civil Code does not apply between businessmen as set out in s348 of the German Commercial Code. Also liquidated damages clauses are not permitted in standard form contracts in German law in terms of s11 and s18(d) 5 of the German Standard Contract Terms Act.

⁸⁸ Garcia 82.

⁸⁹ Cartwright 180, 187.

⁹⁰ Cartwright 180, 187; Cornelius 295.

certain terms so as to complete the document or deal with the unforeseen circumstances.⁹¹ Implied terms could be general or *ex lege*, which are general default rules applicable to all contracts or all contracts of that particular type.⁹² Implied terms could also derive on an *ad hoc* basis which functions as a gap-filler to obtain the objective meaning of the contract or the intention of the parties.⁹³

In civil law countries the courts may also infer terms where the parties have not expressed their intentions in sufficient detail, but the courts would do so under the overarching principle of good faith and would not be able to make a material alteration to the agreement.⁹⁴ This is less of a concern when contracts are drafted in civil law countries, as the courts would have more involvement not only in the enforcement of the contract, but in the enforcement of the good faith principle between the parties.

Common law contracts would rather rely on express terms than implied terms.⁹⁵ There is a view that there is a risk in leaving gaps in the contract, as it would result in the courts applying their discretion to the implied terms and thereby creating uncertainty.⁹⁶ As a result, common law contracts will include more detail to ensure that all terms are expressed, whereas civil law contracts will be shorter because the code will fill in the so-called gaps.⁹⁷

⁹¹ Cartwright 180, 194, 197, mentions that when a contract is reduced to writing, all the express terms are recorded in writing in the document and should something not have been recorded, it would be left to the law to fill in the gaps. Therefore, express terms are often supplemented by implied terms.

⁹² Cornelius 296; see ch 14.

⁹³ Cornelius 296, says that implied terms could derive from law, usage, custom and facts; Cartwright 180, 187, states that these are so-called “gap-fillers” where express terms did not make the provision; see ch 14.

⁹⁴ Cornelius 299.

⁹⁵ Cartwright 192.

⁹⁶ Cartwright 193.

⁹⁷ *Ibid.*

4.5 SOUTH AFRICA AS A MIXED LEGAL SYSTEM

In the previous section, two different contract drafting methods were identified. The one is influenced by the civil law legal tradition, while the other is influenced by the common law legal tradition. It is apparent that both methods have different approaches. South African law is not classified as either civil law or common law, but rather a hybrid or mixed legal system.⁹⁸

At first glance one would think that the civil law drafting method is employed in South Africa, as South African private law and law of contracts are predominantly Roman-Dutch. This is not the case and South Africa employs the common law drafting technique.

One reason for the adoption of the common law drafting method is South Africa's uncodified private law. The uncodified system in South Africa removes the contract drafter's ability to rely on the codes as a backdrop to contracts.

As contracts are drafted generally with two things in mind, being the recordal of the agreement of the parties and secondly the enforcement of the contract, the law of procedure and the judicial system has a significant impact on the manner in which contracts are drafted. As the law of procedure and the judicial system in South Africa have strongly been influenced by English law, it may be a second reason why South Africa has adopted the common law drafting method.⁹⁹

⁹⁸ Baxter 84, states that the South African Roman-Dutch law is in fact a blend of institutions, procedures, concepts, doctrines and rules inherited from both Holland and England and developed locally; Sanders 332, says the South African legal system is a hybrid system of civilian and common law methods of problem solving; Van den Bergh "The Remarkable Survival of Roman Dutch Law in the Nineteenth Century South Africa" *Fundamina* (2012) 90, mentions that South African law is the merger of Roman-Dutch and English law which was forced to co-exist and eventually harmonised into a hybrid system.

⁹⁹ See ch 3.

4.6 CONCLUSION

One could argue that there are irreconcilable differences between the civil and common law systems. On the face of it, this statement appears to be accurate, but on another level it could be argued that it is merely two different approaches to the law, which would lead on to the same result.¹⁰⁰ It is reasonable then to conclude that the two systems have two different ways of approaching the law and there is a difference in the approach, methods, techniques and style applied.¹⁰¹ So too, the two contract drafting methods therefore have different techniques, interpretations and approaches when it comes to contract drafting.¹⁰²

A civil draftsman works within the framework of the civil code, which consists of general rules but also particular rules for specific contracts. A civil draftsman would start from the knowledge that certain provisions are already catered for in the codes and that the contract should only deal with those particular points that are a concern to the parties.¹⁰³ Most of the provisions of the civil codes are default rules and non-mandatory, which means that those specific areas that require a change from the default position would be dealt with in the contract.¹⁰⁴ A common law draftsman drafts afresh with each contract and includes all the provisions that could possibly be relevant.¹⁰⁵

¹⁰⁰ Sanders 207.

¹⁰¹ *Ibid.*

¹⁰² Moss 1, 4.

¹⁰³ Nicholas 55.

¹⁰⁴ Hatzis 1.

¹⁰⁵ Nicholas 55.

When it comes to the drafting of contracts, South Africa follows the common law drafting method. It would then be of little assistance to use civil law systems in comparative research in this study.

CHAPTER 5

THE BASIS OF THE WRITTEN CONTRACT

5.1	INTRODUCTION.....	82
5.2	OBLIGATIONS	86
5.3	THE BASIS OF CONTRACTS.....	88
5.3.1	DEFINITION.....	88
5.3.2	REQUIREMENTS OF CONTRACTS	91
5.3.3	THEORIES	93
5.4	CONCLUSION.....	94

5.1 INTRODUCTION

The previous chapter showed that South Africa follows the common law drafting method when it comes to written contracts.¹ Even with the adoption of the common law method South Africa has not, save for certain instances,² inherited the strict formalities seen under English law of contract.³ In this regard, South Africa does not recognise a blanket distinction between simple and formal contracts.⁴ South Africa also does not follow the principle of consideration, but rather the Roman-Dutch concept of *causa*.⁵ *Causa*, simplistically put, is considered to be the serious

¹ See ch 4.

² See ch 8.

³ See ch 3 relating to the history of English contract law. See also ch 8, discussing the formalities that exist in South African law which are either formalities detailed by legislation or formalities created by the parties themselves.

⁴ Grotius *The Introduction to Dutch Jurisprudence* (1985) 3 5 2, describes a *literarum obligatio* as containing everything that a verbal obligation would have contained; See ch 3, explaining that a simple contract requires consideration to be valid – in other words, a level of reciprocity.

⁵ Cartwright *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (2014), states that English law primarily looks at consideration to determine whether a contract is formed and not whether parties have the serious intention to be bound. See for example *Chappel & Co Ltd v Nestle Co Ltd* [1960] AC 87, in which the return of wrappers was an attempt to establish consideration; *Conradie v Rassouw* 1919 AD 279, confirmed that contracts are not based on consideration, but rather *causa*. The court, however, did not state exactly what *causa* would entail; Hutchinson *The Law of Contract in South*

intention of the parties to be legally bound by agreement,⁶ which forms the starting point for considering the basis of a written contract.

The *animus contrahendi* is the element that distinguishes an agreement (where the parties do not intend to be legally bound) from a contract (in which parties have the serious intention to be bound). In the case of a written contract, the written instrument embodies the *animus contrahendi* of the parties.⁷ The mere fact that an agreement was reduced to writing and signed by the parties is an indication that the parties had the serious intention to be legally bound.⁸ This results in the creation of personal rights between the parties.⁹

In general there are three categories of written contracts. The first is where the parties have a verbal agreement, but wish to record the agreement in writing for evidentiary purposes.¹⁰ In such a case the written contract does not become a precondition for the enforceability of the agreement, but merely serves as proof of the verbal agreement.¹¹ The fact that the agreement is not reduced to writing would not affect the enforceability of the contract, as a contract had already been concluded verbally.

Africa (2012) 13, says that *causa* has become to be treated as a person's serious intention. This serious intention seems to mean that a person intends to be legally bound and have the contract enforceable by the law.

⁶ Also known as *animus contrahendi*.

⁷ Hutchinson 4.

⁸ Hutchinson 4; Sharrock *Business Transactions Law* (2011) 1, describes a written contract as being a juristic act in which parties act in such a manner that they intend for such an act to have legal consequences. This is supported by the principle of *caveat subscriptor*, which is discussed in ch 6.

⁹ Van der Linden *Institutes of the Laws of Holland* (1806) 1 6 1.

¹⁰ Sharrock 86-87, states that when parties place their agreement in writing, it is presumed to be done for a record of the transaction or for the purpose of proof. It is not considered that, unless it can be shown to be the intent of the parties, a written contract is to be concluded as a precondition for enforceability.

¹¹ See for example *De Bruin v Brink* 1925 OPD 68.

The second category of written contracts is where the parties do not wish to bound until the agreement has been recorded in writing.¹² In such an instance, the parties have set a precondition for the enforceability of the agreement and that is that the agreement must be in writing before any obligations are created.¹³ The fact that the contract has not been reduced to writing would prevent enforceability of the agreement as the parties would only be bound once the agreement was in writing.

The third category is where legislation prescribes certain requirements for a contract.¹⁴ These can include having the contract reduced to writing, signed, witnessed, notarised or registered.¹⁵ The common law position is that there are no specific formalities required for the conclusion of a contract. As such, any specific requirement set out by legislation only changes the common law position as far as the legislation may state it to be changed.¹⁶ Sometimes legislation only requires a contract to be in writing to facilitate proof of the agreement, while other times legislation requires the agreement to be in writing for its validity.¹⁷

It would appear that, save for the exceptions, which are the formalities required by either the parties or the law,¹⁸ there are no special or separate sets of rules for written contracts as opposed to those rules of verbal contracts. Both the written and verbal contract have the same basis for enforceability, however, the manner in which the contract is presented or recorded is different

¹² Sharrock 86, says parties will not be liable for the agreement unless it has been reduced to writing and signed by the parties. See ch 8.

¹³ For example *Goldblatt v Fremantle* 1920 AD 123.

¹⁴ See ch 8.

¹⁵ Fouché *Legal Principles of Contracts and Commercial Law* (2015) 9; Hutchinson 159.

¹⁶ Cornelius “Handtekening as Vereiste vir die Geldigheid van ’n Kontrak” *De Jure* (2012) 379.

¹⁷ See ch 8.

¹⁸ *Ibid.*

from one another. The reason for the written contract as opposed to a verbal contract has been and continues to remain the same throughout history that is, the written instrument evidences the agreement and facilitates as proof of the agreement.¹⁹

It can then be said that a written contract serves two purposes. The first is to serve as evidence of the agreement between the parties and thereby create certainty as to what was agreed on.²⁰ The second, like with verbal contracts, is to enable the agreement to be recognised and enforced in law.²¹

There is no distinction between written and verbal contracts other than the evidentiary differences between the two. Verbal contracts can only be evidenced through witnesses who rely on their memories. Written contracts, on the other hand, record the agreement in writing which is better evidence of the agreement and is not reliant on the whims of a person's memory. The legal basis is the same for valid enforceable verbal and written contracts.

¹⁹ See ch 3.

²⁰ *Ibid.*

²¹ An agreement, whether verbal or in writing, should be enforceable by the law. If this is not done the purpose of the contract falls away. See ch 2. The difference, however, between verbal and written contracts is the ability to prove the content of the agreement. A verbal contract is proven through the use of witnesses and is often unreliable because they rely on their memory. A written contract is proven through the written instrument.

5.2 OBLIGATIONS

Contracts form part of the law of obligations and are one of the sources of obligations.²²

Therefore the product of entering into a contract is the creation of one or more obligations.²³ To understand the basis of contracts, a general overview of obligations is considered first.

Obligations arise out of certain juristic actions which result in legal consequences.²⁴ A contract is a juristic act in itself.²⁵

An obligation creates a legal bond between persons in relation to the law,²⁶ and consists of both a right and a corresponding duty.²⁷ The rights that are created out of contracts are personal rights,²⁸ which mean that enforcement of such rights can only be obtained between the parties to the contract. The creditor of the obligation has the right to enforce performance against the debtor and the debtor has the duty to fulfil the performance for the benefit of the creditor.²⁹ A debtor

²² Van der Linden 1 14 2.

²³ Van der Merwe *et al. Contract General Principles* (2012) 7.

²⁴ Van der Merwe *et al. 5*, mention that these actions are also referred to as legal facts. Other examples of juristic actions are wills, waivers of rights, dereliction of ownership, cancellation of contracts and then marriages.

²⁵ Gaius *Gai Institutiones* (1904) 3 8; Nagel *Commercial Law* (2011) 24-25, says other sources of obligations are delict, unjustified enrichment, unauthorised agency or administration, statute, family relationship; Van der Merwe *et al. 5*, also include *negotiorum gestio*.

²⁶ Van der Linden 1 14 2, states that the person who has contracted is bound to a person either to give or to do something; J Inst 3 8; Van der Merwe *et al. 2*, state that obligations mean “to tie” or “to bind together or “a bond that binds together people”. Pothier *A Treatise on the Law of Obligations, or Contracts* (Vol. 1) (1806) 2 1 1 173, refers to this legal tie as a *vinculum juris*, which gives the person whom it favours the right to enforce his rights judicially.

²⁷ Hutchinson 7.

²⁸ Van der Linden 1 6 1.

²⁹ Van der Merwe *et al. 2-3*, say the performance under an agreement is interpreted in its widest sense and includes to give something (*dare*), to do something (*facere*) and not to do something (*non facere*).

must, dependent on the obligation, give something, do something, or refrain from giving or doing something.³⁰

A contract therefore consists of obligations, usually multiple, that create rights and duties between the parties.³¹ The contractual provisions in a written document create obligations, but not all provisions do this. There may be some provisions that are statements of fact rather than provisions creating obligations.³²

The obligations described to this point are referred to as civil obligations, which are obligations that are enforceable in law.³³ In other words, a person can be compelled by the law to fulfil civil obligations.³⁴ The ultimately the purpose of a contract is that it must be enforceable in law.

There are those obligations which are considered to be imperfect which relate to things such as love or gratitude and which belong in the realm of morals and ethics.³⁵ These types of obligations are considered to be natural obligations and stem from simple contracts or pacts in Roman law.³⁶ Natural obligations create a moral obligation, which obliges a person to perform because of his conscience,³⁷ but these types of obligations are not enforceable in law.³⁸ It does,

³⁰ Van der Linden 1 14 2.

³¹ Hutchinson 7.

³² See ch 14, setting out the difference between terms, conditions and declarations.

³³ Van der Merwe *et al.* 4, say that a civil obligation is enforceable whereas a natural obligation does not allow for direct enforcement by way of legal action; Hutchinson 8, states that the natural obligation is likened to a moral obligation.

³⁴ Van der Linden 1 14 1, states that these types of obligations are considered to be perfect obligations. Pothier *A Treatise on the Law of Obligations, or Contracts Introduction* 1, refers to a perfect obligation as one that creates a legal tie that binds the parties and which a party may demand performance from the other; Grotius 3 1 1, states that it is also known as *jus in personam*, which is a particular right one man has against another to compel him.

³⁵ Van der Linden 1 14 1, says imperfect obligations are things like love and gratitude.

³⁶ See ch 3, these agreements did not fulfil the requirements in Roman law.

³⁷ Pothier 2 1 1 173.

however, have consequences. For example, where a person under a natural obligation has made payment it cannot be recovered as this is considered to have a good and valid cause for having made such a payment.³⁹

Obligations created by contract generally consist of both civil and natural obligations,⁴⁰ but there may be instances where an obligation only has one of these obligations present.

5.3 THE BASIS OF CONTRACTS

5.3.1 DEFINITION

There does not appear to be a one generally accepted definition of a contract. There are a number of definitions, which all have some elements in common, while some are more complex than others. The starting point, however, is that a contract is a particular kind of agreement, being an agreement to which two or more parties intend to be legally bound.⁴¹ Most of the definitions appear to be based on these principles, being that there is more than one party and that the parties intend to have their promises legally binding.

³⁸ Van der Linden 1 14 9, mentions that a natural obligation gives no right of action insofar as a party under natural obligation has made a voluntary payment he cannot recover such a payment through a court process.

³⁹ Van der Linden 1 14 9; Pothier 2 2 1 191.

⁴⁰ Pothier 2 1 1 174.

⁴¹ Pothier 1 1 1 1 3.

In some definitions, the performance element of obligations is included in the definition, such as “[a contract is] an agreement binding in law between persons in which they promise to do something, not do something, or deliver something.”⁴²

In other definitions a contract is “an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations and which is recognised by the law as being binding between the parties”,⁴³ or is “an agreement (arising from either true or *quasi*-mutual assent) which is, or is intended to be, enforceable in law.”⁴⁴

In one definition an attempt is made to include all the requirements of a contract into the definition as well by describing a contract as “an agreement (based on consensus between legal subjects who have contractual capacity to do so, and which is lawful, physically possible and complies with the prescribed formalities) reached with the intention of creating a legal obligation with resulting rights and obligations.”⁴⁵

Simpler definitions of contracts exist, which describe a contract as “an agreement that gives rise to legal obligations”,⁴⁶ or “a promise or set of promises which the law will enforce”,⁴⁷ or that

⁴² Scott *The Law of Commerce in South Africa* (2009) 57; Fouché 35, here *dare, facere, non facere*, which create the performance element of an obligation, have been included in the definition; Van der Linden 1 14 2, similarly describes a contract as “an agreement whereby both parties, or only one of them, covenants and binds himself to another, either to give him something, or to do or refrain from some particular act.”; Domat *The Civil Law in its Natural Order* (1850) 147, describes the type of agreements as (i) to give something to one another reciprocally (for example a sale of exchange), (ii) do one thing for another, (iii) the one party does something and the other party gives something, and (iv) one party either does or gives something and the other party does not give or do something to the other (in other words a unilateral obligation).

⁴³ Hutchinson 6.

⁴⁴ Christie & Bradfield *The Law of Contract in South Africa* (2011) 2.

⁴⁵ Nagel 41.

⁴⁶ Nagel 41; Somerset Bell *South African Legal Dictionary* (1910) 141, defines a contract as “an agreement which creates, or is intended to create, a legal obligation between the parties to it.”

⁴⁷ Christie & Bradfield 2.

contracts are a form of *ad hoc* law,⁴⁸ or even that contracts are obligatory agreements.⁴⁹ Pothier describes a contract as “a concurrence of intention between the parties. The one promises and the other accepts.”⁵⁰

The first common thread that runs through all of these definitions is that a contract is described as legal obligations that are enforceable in law. The definition of contracts sets out the intention of the parties to create a legally enforceable obligation.⁵¹ It describes what a contract is and does not describe the legal requirements for a valid contract. The definition does not, in itself, create obligations. The only way to create an obligation would be to have a contract meet the requirements of a contract.⁵² If the definition of a contract is to describe what a contract is, then it is not necessary to place the requirements of a contract in the definition of a contract.

The second common thread relates to the involvement of two or more persons in a contract. As seen, a contract creates legal obligations, and an obligation has a right and corresponding duty. On this basis for an obligation to exist there must, logically, be at least two persons. It then seems unnecessary to spell this out in the definition of a contract.

All of the definitions considered relate to the intent of the parties to create legal obligations, but this seems to not fully convey what a contract is. Firstly, the foundation of a contract is the consensus between the parties. This is a fundamental building block to contracts, because

⁴⁸ Cornelius “The Complexity of Legal Drafting” *TSAR* (2004) 692; Domat 140, describes contracts as engagements made by mutual consent by two or more persons that creates law between themselves and binds themselves to perform their promises to one another.

⁴⁹ Van der Merwe *et al.* 2-3.

⁵⁰ Pothier 1 1 1 1 4; Grotius 3 6 2, describes a contract, “which is otherwise termed Covenant, or Agreement, is the concurrence of will of two or more persons for the benefit of both”.

⁵¹ Van der Merwe *et al.* 7.

⁵² *Ibid.*

without consensus there is no contract.⁵³ Most of the definitions have failed to mention this element.⁵⁴ The second element that all the definitions have failed to mention is the relationship that contracts create between the parties. Contracts do not only create legally binding obligations. Rather it relates to managing and regulating of the future relationship between the parties, which ultimately results in legally enforceable obligations.

A contract can therefore be described as an agreement founded on consensus, with the intention of being legally bound, resulting in a legal relationship and valid, enforceable obligations between the parties.

5.3.2 REQUIREMENTS OF CONTRACTS

As mentioned, the definition of a contract details the intention of the parties to create obligations that are enforceable in law, but meeting the requirements of a contract creates the obligation.⁵⁵ Although the definition of a contract states what a contract is and what the parties intend to do, the requirements for a contract must be fulfilled for a valid contract to exist. If one of the requirements is absent, it will result in the contract being flawed and would not be enforceable.⁵⁶

⁵³ See ch 6.

⁵⁴ Nagel 41, refers to consensus but only as a list of the requirements of a valid contract which was incorporated into the definition. As mentioned, it is not necessary to include all the requirements into the definition of a contract as the requirements cover the enforceability of the contract and do not necessarily describe what a contract is.

⁵⁵ Van der Merwe *et al.* 7.

⁵⁶ The document would only be considered to be an agreement and not a contract.

These requirements are: (i) consensus, being the meeting of the minds between the parties to the contract,⁵⁷ (ii) contractual capacity, being the parties to a contract must have the necessary capacity to contract,⁵⁸ (iii) formalities, being compliance with formalities set out by the law and by the parties themselves in the contract,⁵⁹ (iv) legality or lawfulness, in that the contract must be legal and lawful,⁶⁰ and (v) possibility and certainty,⁶¹ in that the obligations that are created must be ascertainable, determinable and capable of being performed.⁶² In some instances the requirement of possibility and certainty has split into a sixth requirement, however, as result of their synergy and similarities they can be considered as one requirement. As drafters deal with possibility and certainty differently, they are considered separately in this study.⁶³

Each of these requirements will be considered in this study to ascertain how contract drafters attempt to include these requirements in the written contract and how these requirements influence the contract drafting process.

⁵⁷ See ch 6.

⁵⁸ See ch 7.

⁵⁹ See ch 8.

⁶⁰ See ch 9.

⁶¹ Nagel 42, calls this requirement physically possible; Hutchinson 6, splits the requirement of possibility and certainty into two separate requirements thus stating that there are six requirements for a valid contract and not the traditional five requirements.

⁶² See ch 10 & 11.

⁶³ *Ibid.*

5.3.3 THEORIES

The final element of the basis of contracts is to consider when a contract will come about. Currently the law has a two-pronged approach, being consensus and the reasonable reliance of the parties, for the basis of contract. This reliance theory is a combination of two theories.⁶⁴

The first is the wills theory, which is an inherently subjective test relating to whether the parties were *ad idem* or not.⁶⁵ If consensus is not found, or there was a mistake, then the contract was never formed.⁶⁶ It goes without saying that applying the wills theory without qualification may result in unfair and uneconomical situations.⁶⁷

On the other side of the spectrum is the second theory, called the declaration theory. This entails an objective test, where a person's acts or speech will determine whether a contract has been formed or not.⁶⁸ The actual consensus of the parties is irrelevant as a person's actions are the symbolic extension of a party's intentions.⁶⁹ The unqualified application of the declaration theory would also lead to undesired results.⁷⁰

The reliance theory is the combination of the wills theory and declaration theory. Firstly it is considered whether there is consensus between the parties. If consensus is found then a valid

⁶⁴ Van der Merwe *et al.* 17.

⁶⁵ Hutchinson 15; Van der Merwe *et al.* 19, describe three requirements for consensus being: (i) the parties must agree to the consequences, (ii) the parties must have intended to be legally bound and (iii) the parties must be aware of their agreement. See also *Sonap Petroleum (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A).

⁶⁶ Hutchinson 15.

⁶⁷ Nagel 66.

⁶⁸ Hutchinson 15. See also *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704, 715-716.

⁶⁹ Hutchinson 15.

⁷⁰ *Ibid.*

contract is formed.⁷¹ However, should no consensus be found then a second test is applied and that is whether the words and actions of a person have created the reasonable impression that consensus was present.⁷² If this is found to be the case, then a contract was concluded.

With respect to the written contract, the written instrument itself provides a reasonable reliance of proof of consensus as the document is the evidence of the agreement.⁷³ Signing the document creates the reasonable belief that the party that has signed it has agreed to the content of the document.⁷⁴ Drafters often include provisions into a contract to avoid any argument that there was no intention to be bound or consensus. These include, for example, that the contract is fair, the parties have read and understood the content of the document and the parties intend to be fully bound to the content of the contract or similar types of provisions.⁷⁵

5.4 CONCLUSION

It seems clear that there are no special or separate sets of rules for a written contract as opposed to that of a verbal contract. The basis for a written contract and the basis for a verbal contract is the same. Both must equally meet the requirements of a contract to be valid and enforceable.⁷⁶

The difference between the written contract and verbal contract is that of evidentiary value. A verbal contract is solely reliant on the potentially flawed memories of witnesses, which affect the

⁷¹ Hutchinson 16; Van der Merwe *et al.* 33.

⁷² *Ibid.*

⁷³ Hutchinson 20.

⁷⁴ Nagel 67.

⁷⁵ See ch 6.

⁷⁶ See ch 1.

certainty of the agreement. The written contract is placed in writing, which removes the uncertainty that witnesses bring to disputes, but raises a whole new set of rules relating to the interpretation of the written text. The interpretation of the written text of a contract has already been considered and falls outside the scope of this study.⁷⁷ This study, however, will consider how a written instrument deals with the requirements of a contract. In other words, how do those requirements influence the drafting of the contract and how does drafting encapsulate such requirements in the written document.

⁷⁷ See ch 1.

CHAPTER 6

CONSENSUS

6.1	INTRODUCTION.....	96
6.2	CONSENSUS.....	99
6.2.1	OFFER AND ACCEPTANCE.....	99
6.2.2	DATE AND TIME OF ACCEPTANCE	104
6.2.3	MEETING OF THE MINDS.....	113
6.2.4	COUNTERPART PROVISION	113
6.2.5	TESTIMONIUM PROVISION	114
6.3	DEFECTIVE CONSENSUS	115
6.3.1	MISTAKE	116
6.3.2	MISREPRESENTATION	119
6.3.3	DURESS AND UNDUE INFLUENCE.....	121
6.4	RECTIFICATION	123
6.5	CONCLUSION.....	124

6.1 INTRODUCTION

Consensus is one of the requirements for a valid contract.¹ It forms the starting point for a contract and has been described as the foundation of a contract.² Consensus has also been called (i) an agreement by consent, (ii) the meeting of the minds, (iii) a true agreement, (iv) coincidence of wills, or (v) consensus *ad idem*.³ Consensus permeates throughout all the requirements of a contract. A contract is formed, provided that all other requirements have been fulfilled, when the

¹ Van der Linden *Institutes of the Laws of Holland* (1806) 1 14 2, states that all contracts derive their validity from the mutual consent of the contracting parties.

² Christie & Bradfield *The Law of Contract in South Africa* (2011) 24; Hutchinson *The Law of Contract in South Africa* (2012) 46, confirms the primary base for a contract as consensus.

³ Christie & Bradfield 24.

parties have reached consensus on all the material terms of the agreement.⁴ This so-called meeting of the minds is what drafters attempt to capture when drafting a contract. Sometimes parties intend to create non-binding agreements. These are known as agreements-to-agree,⁵ heads of agreement,⁶ letters of intent,⁷ commitment letters or memorandums of understanding.⁸ The intent of these documents is non-binding in nature because the consensus element has not yet been reached on all the material terms. In other words, these documents often include the principles of what the parties agreed to, but the parties must still negotiate and ultimately agree to the terms of the agreement.⁹ The other form these preliminary agreements can take is that all the material terms have been agreed to, but the parties wish to flesh them out.¹⁰ Drafters use these types of agreements to avoid a binding agreement being formed as the element of consensus has not yet been reached.

⁴ Hutchinson 46; Kerr *The Principles of the Law of Contract* (2002) 241, states that if there is dissensus, then no contract is formed.

⁵ Van der Merwe *et al. Contract General Principles* (2012) 66, say they are alternatively called agreements in principle.

⁶ Van der Merwe *et al.* 66; *Walford v Miles* [1992] 1 All ER 453, confirms an agreement to agree is unenforceable. See also *Courtney and Fairbairn Ltd v Tolani Brothers (Hotels) Ltd* [1975] 1 WLR 297; *May and Butcher v R* [1934] 2 KB 17.

⁷ Van der Merwe *et al.* 66.

⁸ Van der Merwe *et al.* 66; *Teachers Insurance and Annuity Association of America v Tribune Company* US District Court SD. NY 670 F.Supp. 491 (1987) [497], indicates that these types of preliminary agreements can take many forms and what they are called often indicates what the parties intend.

⁹ *Teachers Insurance and Annuity Association of America v Tribune Company* [497]-[478], indicates that the mere participation in negotiations does not, in itself, create a binding contract. These types of preliminary agreements can take two forms. The first is where the parties have reached agreement on all issues required for negotiation, but the agreement is in preliminary form and must still be elaborated on. The elaboration is not necessary, but is preferred. The second type is where the parties express a commitment to major terms, but there are still outstanding terms that need to be negotiated. In this instance there is an incomplete agreement which needs to be negotiated.

¹⁰ *Teachers Insurance and Annuity Association of America v Tribune Company* [497]-[478]; See also *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* 1991 24 NSWLR 1.

The requirement of consensus is directly linked to the requirement of certainty.¹¹ Without certainty as to what has been agreed on, it is impossible to achieve consensus between the parties. The document must then reflect what has been agreed on by the parties, for the written contract to meet the requirement of consensus.

As a starting point, consensus must occur between two or more parties.¹² The first mechanism that drafters use to show consensus is, therefore, describing the parties.¹³ The parties can be shown either on the front cover of the contract immediately under the contract heading, in a separate provision, within the definitions section of the document, within the signature blocks or through a combination of these. By indicating who the parties are to the agreement, the drafter indicates who has reached consensus in terms of a particular agreement.¹⁴

Consensus can take on two forms being, (i) real consensus,¹⁵ which is reached by the conduct of the parties, and (ii) presumed consensus,¹⁶ which is presumed in instances such as tacit terms and ticket cases. Presumed consensus can occur in the so-called “battle of the forms” that happens when parties exchange their standard terms.¹⁷ Real consensus is recorded through the draft of the contract, which details the agreement in writing and which the parties sign. The written document can be described as the manifestation of the consensus of the parties. Consensus is,

¹¹ See ch 10.

¹² Hutchinson 397, says any party who has rights or duties under the agreement should be drafted as a party to the agreement.

¹³ See ch 7 for a discussion on parties in a contract; Hutchinson 396.

¹⁴ The capacity of contracting parties and third parties are discussed in ch 7.

¹⁵ Nagel *Commercial Law* (2011) 61.

¹⁶ Nagel 62-63, states that the operation of law and trade usage can also create consensus.

¹⁷ *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* [2002] 3 All SA 369 (A), in this case a form incorporated the terms of the seller, but the terms were never presented to the buyer. As such the buyer was not bound by such terms. Similar facts are found in, *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* [2003] 3 All SA 496 (SCA).

however, not achieved by merely identifying the parties, drafting correct and accurate provisions and placing it on a document. Consensus is also evidenced by the parties' signature to the document. To determine whether consensus has been reached the tool of offer and acceptance is used.¹⁸

6.2 CONSENSUS

6.2.1 OFFER AND ACCEPTANCE

To determine whether consensus has been reached by the parties, one party would make an offer while the other party would accept such an offer.¹⁹ Once acceptance occurs it indicates that consensus has been reached by the parties.²⁰

An offer is a proposal to contract or a declaration of intent.²¹ It indicates on which terms the offeror is willing to contract.²² An offer must have enough detail and be sufficiently precise as to what the proposed contract is.²³ When it comes to the written contract the document contains all

¹⁸ Hutchinson 46; Kerr 61, states that a contract comes into being when one party accepts the offer made by the other party.

¹⁹ See for example *Watermeyer v Murray* 1911 AD 61, 70; *Reid Brothers (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232, 241.

²⁰ *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A) 532E, indicating that consensus would normally be evidenced through offer and acceptance.

²¹ Hutchinson 47.

²² *Ibid.*

²³ Kerr 64; *Bishop & Baxter Ltd v Anglo Eastern Trading and Industrial Co Ltd* [1943] 2 All ER 598, where reference was made to the "usual terms". This was too vague and as a result consensus could not be formed.

the material terms of the offer.²⁴ In other words, the draft document would constitute the offer once signed by the offeror.

The requirements of an offer are that the offer must be firm,²⁵ complete,²⁶ clear and certain.²⁷ An offer can be made to an individual or the public.²⁸ Once the offer is accepted it is converted into a contract, provided that all the other requirements of a contract are met.²⁹ If this is the case, then the written contract, once drafted and signed by the offeror, becomes the offer and the intended contract between the parties. It appears that the written document must be signed by the offeror for it to constitute an offer. An unsigned document would be a mere proposal and cannot be considered a formal offer. The party who signs the contract first will be the offeror, irrespective of whether the terms of the contract state it differently.

There are also ways in which an offer can be terminated namely: (i) rejection of the offer,³⁰ (ii) death,³¹ (iii) time,³² (iv) revocation,³³ (v) capacity³⁴ and acceptance.³⁵ A counter-offer is an

²⁴ See ch 8, which details the formalities of writing and that a written contract must embody all the material terms of the contract.

²⁵ Hutchinson 47, states that the offer cannot be a tentative one.

²⁶ Hutchinson 48, says that the offer must contain all the material terms of the agreement and cannot still have aspects that must be negotiated. In other words, Nagel 52, it must contain all provisions, conditions, terms and qualifications.

²⁷ Hutchinson 48, states that the offer must be clear and certain; Nagel 52. This requirement is linked to ch 10 which deals with the requirement of certainty in contracts. See also *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) 633D.

²⁸ Such as offers of reward, advertisement and auction sales. It is also necessary that the offer was intended to be an offer. See *Bird v Sumerville* 1960 (4) SA 395 (N) 408-409. Furthermore, the prescribed formalities of the acceptance of the offer must be adhered to. See also *Laws v Rutherford* 1924 AD 261; *Carlil v Carbolic Smoke Balls Co* [1983] 1 QB 256.

²⁹ Hutchinson 50.

³⁰ Hutchinson 54; Nagel 54, states that this rejection can occur expressly or be implied, or even in the form of a counter-offer.

³¹ Hutchinson 54; Nagel 54, says that an offer does not constitute a legal obligation and as such cannot be passed onto a person's estate. The exception of this is where there is an option or other type of pre-emption right in place in which case that may pass onto the estate of the deceased party.

additional way in which an offer is terminated, as a counter-offer amount to rejecting the offer and proposing a new offer.³⁶ This often occurs where one party proposes an agreement or trading terms to another party, who then returns the document with hand-written changes and amendments. This would be considered a rejection of the first offer and a proposal of a new offer altogether. It is then up to the first party to decide whether the new offer is to be accepted or not. This type of counter-offer situation occurs often with the so-called “battle of the forms” where parties exchange their standard terms when doing business.³⁷

The acceptance of an offer is a declaration in which all terms of the offer are agreed to.³⁸ Acceptance can be done expressly or tacitly,³⁹ but acceptance must be: (i) unqualified,⁴⁰ (ii) to

³² Hutchinson 54; Nagel 54, mentions that if the offer is not accepted in the prescribed time, the offer will lapse. Where no prescribed time is specified, the offer will lapse within a reasonable time. In the USA, UCC 2-206(1), an offer is considered an invitation, which can be accepted by any reasonable medium under the circumstances. The Civil Code of Louisiana, art 1928, indicates that of an offer has specified a specific time for acceptance, the offer is irrevocable during that period. Similar provisions are contained in art 1380 of the Civil Code of Quebec, art 16(1) CISG; art 2.1.4 UNIDROIT.

³³ Hutchinson 54, states that an offer can be withdrawn at any time before acceptance. Such a withdrawal only takes effect once communicated to the other party.

³⁴ Hutchinson 54; Nagel 54, where a party’s capacity is lost the offer is terminated.

³⁵ Hutchinson 55, where an offer is accepted as required in the offer a contract is formed.

³⁶ *Hyde v Wrench* (1840) 49 ER 132, a counter-offer amounts to a rejection of the original offer. See also *Balmoral Group Ltd v Borgalis (UK) Ltd* [2006] 2 CLC 220.

³⁷ Eiselen & Bergenthal “The Battle of the Forms: A Comparative Analysis” *CILSA* (2006) 214, state that this occurs when one party attempts to impose their standard terms on another in some opportunistic way. See also *Ideal Fasteners Coran CC v Book Vision (Pty) Ltd t/a Colour Graphic* [2002] 1 All SA 321 (D), as an example of the battle of the forms.

³⁸ Hutchinson 55, states that acceptance must be clear and unambiguous. *Bleron Baraliu v Vinya Capital LP and Michael Desa* 765 F.Supp 2d. 289 (2011) 299, the acceptance must comply with the terms of the offer. See also *Agricultural Ins Co v Matthews* 301 AD.2d. (2002) 749 NYS 2d. 533 535.

³⁹ Hutchinson 55, says that silence is not normally viewed as acceptance. An example of this is s74(1) of the National Credit Act 34 of 2005, which relates to negative option marketing.

⁴⁰ Hutchinson 55, indicates that the acceptance must agree to all terms, where there is a qualification the original offer is rejected and a new offer is made.

the person who made the offer,⁴¹ (iii) a conscious response,⁴² and (iv) in the prescribed form as required by the offeror.⁴³ Acceptance therefore signifies agreement to the terms of the offer.

In terms of the written contract, the signature to the document signifies the offeree's acceptance to the offer.⁴⁴ There is some authority that suggests, irrespective of what is said in the contract document, that the party who signs the document first will be considered to be the offeror.⁴⁵ Often a drafter will include who the offeror and the offeree is in the preamble. This would serve little purpose as the offeror and the offeree is determined by the sequence of signing, irrespective of what is contained in the contract.⁴⁶ Consequently, the person who signs the document first will be the offeror and the person who signs last will be the offeree.⁴⁷ It would seem that such wording in the preamble serves no purpose at all, as the contract provisions cannot change the fact as to who signs first and who signs last.⁴⁸ The signatures of the parties to the contract are considered to be the symbol of the offer and acceptance and, therefore, become the second manner in which consensus is represented in a written contract.

⁴¹ Hutchinson 55.

⁴² Hutchinson 56, the offeree must be aware of the offer to which he is responding. See for example *Bloom v American Swiss Watch Company* 1915 AD 100, in which a party was not aware of a reward for information, when he provided the information.

⁴³ Hutchinson 56; Nagel 55, the offeror can prescribe the form that acceptance must take. See UCC 2-206(1); art 1928 Civil Code of Louisiana; art 1380 of the Civil Code of Quebec, art 16(1) CISG; art 2.1.4 UNIDROIT.

⁴⁴ Kerr 100, 115, in other words the signature is the manifestation of acceptance.

⁴⁵ Kerr 111.

⁴⁶ See for example *Driftwood Properties (Pty) Ltd v McLean* [1971] 3 SA 558 (A), where a document did not constitute an offer until signed. Christie & Bradfield 30, have a different view in that the intent that the document is an offer is enough.

⁴⁷ Kerr 101.

⁴⁸ See ch 14, which argues that the wording in the preamble assists in the interpretation of the agreement.

There is one more aspect relating to offer and acceptance which is not part of the discussion, but will be mentioned briefly, this is *pacta de contrahendo*.⁴⁹ Although this does not directly deal with consensus, it does deal with different types of offers and acceptances.⁵⁰ There are two types of *pacta de contrahendo* that are recognised, the first being an option in which an offer is kept open for a period of time.⁵¹ An option to buy can be called a put-option or a call-option and is traditionally found in shareholders' agreements.⁵² The normal rules of offer and acceptance apply to options. The second type is the preference contract in which one party gives preference to another, should they decide to conclude another agreement to an existing contract.⁵³ The preference contract is not an offer, but is an undertaking to make an offer should certain trigger events occur.⁵⁴ Once the offer is made, the normal rules for offer and acceptance would apply.⁵⁵

⁴⁹ This includes situations where a party cannot revoke an offer. See *Chubb Fire Security (Pty) Ltd v Greaves* 1993 (4) SA 358 (W); *Investec Bank Ltd and Another v Lefkowitz* 1997 (3) SA 1 (A). Naudé "The Rights and Remedies of the Holder of a Right of First Refusal or Preferential Right to Contract" *SALJ* (2004) 636, points out that there is some controversy in South African case law in the application of preferential rights. Naudé suggests that the way to overcome such difficulties is through clear drafting. In this regard, the drafter must clearly describe the remedies the holder of such a right would have and when they may be exercised. The principle of drafting clearly and describing a party's rights is not limited to preferential rights, but is a principle for drafting in all areas of an agreement.

⁵⁰ *Hirschowitz v Moolman and Others* 1985 (3) SA 739 (A) 765, indicates that agreements about agreements are those agreements in the future; *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) [75].

⁵¹ Hutchinson 63; Nagel 59-60; *Hirschowitz v Moolman and Others*.

⁵² Hutchinson 63; Nagel 59-60. Naudé "Rights of First Refusal or Preferential Rights to Contracts: A Historical Perspective on a Controversial Legal Figure" *Stell LR* (2004) 66, states that preferential opportunities in contracts can be found in company statutes, partnership contracts, mineral contracts, supply and distribution contracts, franchise contracts, publication and employment contracts. In truth, although Naudé provides certain examples, preferential opportunities can be found in any type of contracts depending on what may have been agreed between the parties.

⁵³ Hutchinson 62, where the main agreement is called a sale agreement then it is called a right of pre-emption, for any other contract is called a right of first refusal.

⁵⁴ *Breytenbach v Steward* 1985 (1) SA 167 (T) 176; Hutchinson 69.

⁵⁵ Hutchinson 70.

6.2.2 DATE AND TIME OF ACCEPTANCE

Once the offer has been accepted a contract is formed. The date and place of the offer and acceptance will indicate when the contract is formed. The question that follows is how an offer can be accepted. There are two possible scenarios. The first is where the offer and acceptance occur simultaneously in which case there would be no time lag between the offer and the acceptance. In this instance, the date and time of signature do not play a role. The second scenario is where the offer and acceptance do not occur simultaneously, in which case there would be time difference or distance between the parties. This would result in some form of time lag between the offer and the acceptance.⁵⁶

There have been various reasons put forward as to why the time and place for the offer and acceptance is important to be recorded in a written contract. These reasons include: (i) it determines when prescription starts running, (ii) it indicates the jurisdiction of the court applicable in the event of a dispute, and (iii) it shows whether acceptance was done in time in instances where the offer requires the acceptance within a specific time period.⁵⁷ These reasons are not satisfactory. Prescription does not relate to when the contract comes into being, but is rather determined upon the due date of the debt.⁵⁸ In terms of the jurisdiction of a court, it is correct that the jurisdiction of the court may sometimes be determined by the place where acceptance occurs. This is, however, not the only way to determine a court's jurisdiction. For example, where the parties have agreed to a jurisdiction, the date and time of acceptance would not influence the jurisdiction of the court and various other factors may influence the

⁵⁶ Hutchinson 57.

⁵⁷ *Ibid.*

⁵⁸ Ss3, 11 of the Prescription Act 68 of 1969.

determination of jurisdiction.⁵⁹ Although all of these reasons are factors for determining the date of offer and acceptance, the essence of placing a date at the signature is to determine when the contract has come into being.⁶⁰ It therefore determines the date that the *locus contractus* occurs, which is that last step required for the completion of a contract.⁶¹

There are a number of theories to determine the place and time for the acceptance of an offer. Offer and acceptance signifies the time and place consensus was reached and consequently when and where the agreement came into effect. The general rule, called the information theory, is that the offeror must have learnt of the acceptance of the offer.⁶² If the parties agree, another method can apply.⁶³ The other theories are: (i) the declaration theory, where the contract comes into being where the acceptance is voiced or written,⁶⁴ (ii) expedition theory, where a contract is concluded where and when the acceptance is dispatched,⁶⁵ and (iii) the reception theory, where a contract is formed when the offeror receives the acceptance.⁶⁶

The information theory is then the starting point. However, it does not mean that the information theory is always applicable in written contracts. Where the parties have chosen another theory to

⁵⁹ See ch 13.

⁶⁰ *Driftwood Properties v McLean* 562, the signature would turn the document into a binding document.

⁶¹ LAWSA (Vol. 9) 308, the *locus contractus* can be the place where notification of acceptance reaches the offeror or where the offeror manifests his acceptance. The *locus contractus* establishes both the where and the when of the conclusion of a contract.

⁶² Hutchinson 57; Nagel 58, says the information theory is the generally accepted theory.

⁶³ *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* [2001] 3 All SA 133 (A); Pretorius & Ismail “Notification of Acceptance and the Conclusion of a Contract: Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd 2009 (2) SA 504 (SCA)” *Obiter* (2010) 177, state that the information theory is derived from the wills theory and requires the expression and knowledge of acceptance. This may be dispensed with if another method is indicated.

⁶⁴ Nagel 56-57.

⁶⁵ Nagel 57, this is usually used in postal contracts.

⁶⁶ Nagel, 57-58, this theory applies to electronic contracts under the Electronic Communication and Transactions Act 25 of 2002.

apply, such an alternative theory would apply.⁶⁷ Generally, the written contract does not contain provisions which relate to the receipt of acceptance of the contract, but rather contains the date of the actual acceptance of the offer. As the written document is the recordal of the agreement, it seems strange that, should the information theory apply, the date of receipt by the offeror would not be recorded in the written document in some way, shape or form.⁶⁸

In considering the manner in which the applicable theory is chosen, the general principles are summarised as follows: (i) where an obligation relates to the obligations on both parties the offeror would normally expect acceptance to be communicated by him,⁶⁹ (ii) the offeror can waive such acceptance,⁷⁰ and (iii) if the contract contains a provision that comes into operation on the date of signature, communication of acceptance is waived.⁷¹ In such an instance the declaration theory would apply.⁷² This is not strictly correct as the requirements for notification of acceptance cannot be waived where the declaration theory has been chosen. Where there is any uncertainty as to whether the information theory or the declaration theory should be applied, the courts will apply the information theory.

There appears to be two possible scenarios with respect to written contracts for when a contract come into force. It is either, the date and time on which the offeree signs the document (which is

⁶⁷ *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman*.

⁶⁸ *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 (3) SA 134 (C) 137D-G, as the written document is intended to be the recordal of the agreement and intended to create certainty, it is unlikely that the parties of a contract would intend that the time and place of the conclusion of a contract cannot be determined from the document itself.

⁶⁹ Kerr 112.

⁷⁰ Kerr 112; *Driftwood Properties (Pty) Ltd v McLean* 137, the offeror (the person who signs first) may have made use of a particular method of acceptance, a condition or has authorised another method, or has even waived communication.

⁷¹ Kerr 112.

⁷² *Ibid*.

the application of the declaration theory) or is it at the time that the offeror is notified of the offeree's signature of the document (which is the application of the information theory). Some authorities state that, when the information theory is not applied, the offeror has waived the requirements of the being notified as required by the information theory.⁷³ It is correct that the offeror can expressly or tacitly dispense with the notification of acceptance,⁷⁴ but when the parties have indicated that another method would apply, it cannot be considered to be a waiver of the information theory as another theory has been selected.⁷⁵ Starting from the point that not all written contracts require notification of acceptance and some only require the offeree to sign the contract, there must be a manner in which this is expressed other than stating that it is a waiver of the requirements of the information theory. The answer as to which of the theories applies must be found in the manner in which the contract is drafted, as this is the recordal of the agreement between the parties. These indicators are found in the date of the agreement, the testimonium provision⁷⁶ and the signature block.⁷⁷

The first indicator for determining which theory applies is the terminology used in the testimonium provision. The testimonium provision will state that either the agreement will become effective on signing or on execution. The use of the words is significant as the signing of the agreement excludes the requirement to deliver the agreement to the offeror. This means that

⁷³ *Ibid.*

⁷⁴ LAWSA (Vol. 9) 307.

⁷⁵ *Driftwood Properties (Pty) Ltd v Mclean* 137, where the court found that the following provision was a deviation of the information theory, "That this offer is open and binding upon both parties until signature by both parties on or before the 17th May, 1969, failing which it shall lapse if only signed by one party." The court said that had the parties intended the information theory, or the common law theory to apply, the document should have read to say that the offer would be open to the 17th May, 1969.

⁷⁶ Also known as the concluding paragraph and is found immediately above the signature block. Sometimes it is also referred to as the attestation provision.

⁷⁷ This is the space prepared for the signature of the parties, which is usually found at the end of the contract. It can, however, also be found at the beginning of the document.

the offeree would not need to notify the offeror of his acceptance, but must merely sign the document. The use of the term execution seems to extend the requirements of signing to that of delivery of the agreement as well.⁷⁸ The use of the term execution then appears to have a wider meaning than signing.⁷⁹ In other instances, the term signing is used which implies that the delivery of the contract is not required, but only the signature is needed. Different words are used to express the parties' intent as to whether the information theory or the declaration theory applies. The term execute is wider than just signature and points to the application of the information theory, whereas the use of signing in the testimonium provision points towards the application of the declaration theory.⁸⁰

The second indicator as to which theory applies is the manner in which the signature block is drafted.⁸¹ Signature blocks are, however, linked to the date of the agreement. This is also referred to as the "execution date". For the purposes of this section the "date of the agreement" is used. The date of the agreement is the date when offer and acceptance occurs.⁸² This can occur

⁷⁸ Stark *Drafting Contracts: How and Why do Lawyers Do What They Do* (2007) 188; Adams *A Manual of Style for Contract Drafting* (2008) 97.

⁷⁹ Stark (2007) 188; Adams 97, argues that delivery is not required in order for an informal contract to be formed and the agreement would accordingly become effective once all the parties have signed the agreement.

⁸⁰ Hutchinson 401, alludes to the fact that express stipulations of time and place exclude the need for the use of theories in the law. This is strictly speaking not correct as it does not remove the application of the theories, but would rather change the generally accepted information theory to that of the declaration theory in some instances.

⁸¹ Kuney *Elements of Contract Drafting with Questions and Clauses for Consideration* (2011) 168, states that signature blocks have three purposes namely: (i) to show where and when the contract was signed, (ii) to indicate the mutual assent to the contract, and (iii) to show the identity and capacity of the parties to the contract. Stark (2007) 188, shows that delivery is not a requirement in the USA, save in instances of specific contracts.

⁸² Hutchinson 401, advises that the reason for dating the agreement is for: (i) a practical reason so that the agreement may be referred to at a later stage, (ii) the date gives clarity regarding statutes, rules and regulations that were to operate at the time of the conclusion, as well as to determine the contractual capacity of the parties at the date, (iii) dates may refer to the date of the agreement, such as the anniversary date of the agreement, (iv) where there are a number of agreements with the same subject matter it may be necessary to distinguish them and (v) express stipulations on the exact time and place of the conclusion of the contract to exclude the need to apply the theories in our law to determine time and place.

simultaneously or it can occur separately where the offeror and the offeree sign in different places or at different times. The date of the agreement determines when acceptance has been made. An agreement can be dated in one of two ways, namely: (i) it can be in the introductory provision,⁸³ or (ii) have the parties date their signatures either in the testimonium provision or in the signature block. The date included in the introductory paragraph is presumed to be the date that the parties have signed the agreement and can be viewed as the execution date.⁸⁴ Sometimes drafters include dates both in the introductory provision and in the signature block. If this is done, all is well provided that all the dates are the same. Once the dates differ it becomes apparent that the reason to include a date in the introductory provision *versus* those dates at the signature space is different.

The date in the introductory provision is also called the date of the agreement. Having different dates in the signature space and the introductory provision, may create ambiguity and confusion. It, however, is likely that should the date of the agreement be included in the introductory provision, parties need not date their signatures. Many agreements have signature blocks which do not include the date or place of signing. For example:⁸⁵

Hastings Waste Management Inc.

By: _____

Name:

Title:

⁸³ An introductory provision is usually found at the beginning of a contract and identifies the parties and type of contract that is being entered into. An introductory provision may also include a date on which the contract is entered into.

⁸⁴ This will obviously not be the case where the “date of the agreement” is referenced in the introductory provision. See a further example in Fosbrook & Laing *The A-Z of Contract Clauses* (2014) 1469.

⁸⁵ Adams 95.

In these instances, the use of the date in the introductory provisions precludes the need to have the parties date their signatures. This is usually the case where the parties sign the agreement simultaneously, which would then remove the need to date their signatures. Even if no date is included anywhere in the document it would not affect the validity of the contract, but external evidence, outside the four corners of the contract, would have to be used to determine the date of the agreement.

Where agreements do not have the date in the introductory provision the dates would normally appear either in the signature block or in the testimonium provision. As the party signing last is considered to be the offeree, the date of the party signing last would become the date of the agreement. An example of date in the signature block is provided below.⁸⁶

Each party is signing this agreement on the date stated opposite that party's signature.

Date: _____ By: _____

Benjamin Green
 Chief Executive Officer

Date: _____ By: _____

Laura Black
 President

⁸⁶ Adams 100; See another example in Fosbrook & Laing 1469.

An example of dates in the testimonium provision would be as seen below.⁸⁷

THUS DONE AND SIGNED AT on the day of
20..... in the presence of the undersigned witnesses:

WITNESSES:

1.

 on behalf of XXX

2.

WITNESSES:

1.

 on behalf of the Client

2.

The date of the agreement is not the same as the effective date or commencement date of the agreement. The effective date and commencement date relate to the start of the performance of the agreement and do not refer to when the contract is formed through offer and acceptance.⁸⁸

Although these two dates may coincide, if they do not the drafter would have to indicate when the commencement of the performance would occur.⁸⁹ Examples of this would be conditions and time provisions which are not linked to the date of the agreement and therefore the date of the agreement would not correlate with the performance dates in such provisions.⁹⁰

If the date of the agreement is found at the introductory provision, there is no need to include dates at the signature block as the parties have indicated when the contract is to be executed. This usually occurs where the parties are signing simultaneously and in each other's presence. In fact, when the date appears in the introductory provision, no dates should be included in the signature

⁸⁷ Hutchinson 420; See example Fosbrook & Laing 1469.

⁸⁸ Fox *Working with Contracts: What Law School Doesn't Teach You* (2008) 162; see ch 12.

⁸⁹ Anderson & Warner *A-Z to Boilerplate and Commercial Clauses* (2012) 241.

⁹⁰ See ch 14.

block as it defeats the object of including the date in the introductory provision altogether. This is relevant to the application of the information theory. If the date is not found in the introductory provision, then it must be found either in the testimonium provision or signature block. The reason for including the date of signature in the signature block is to ensure that the date of acceptance of the offer, in other words, the date of the agreement, is recorded. In this instance contractual indicators would show which theory the parties have chosen to apply.

It can then be argued that the determination as to whether the information theory or the declaration theory applies in written contracts is crucial in determining when the contract was formed and when consensus was reached.⁹¹ The blanket use of the information theory is not correct in written contracts. There are various mechanisms in which a drafter can amend the application of the two theories through the use of the introductory provision, testimonium provision and signature blocks. These indicators are not waivers of the information theory, but are a conscious choice to apply an alternative theory, being the declaration theory. The manner in which these provisions are drafted would indicate which theory the parties intended to apply.

The application of the information theory, being the default theory in written contracts, has changed to that of the declaration theory. In instances where the contract is in written form and signed by the offeror, the declaration theory is applicable in the absence of any other

⁹¹ *Dietrichsen v Dietrichsen* 1911 TS 486 494, "... I may make an offer in two ways. I can either make an offer and say that the contract will be established by your mere acceptance; or I can make an offer and say that the contract will be completed when I come to hear of your acceptance. And if there is a doubt upon the matter, we must presume that the second was the case..."

indication.⁹² Irrespective of this change, the indicators set out above still provide a base as to whether the information theory or the declaration theory has been chosen.

6.2.3 MEETING OF THE MINDS

The description of the parties and the manner in which offer and acceptance is made are meaningless without the parties having reached consensus. This forms the basis for drafting the contract in clear language and physically stating the agreement in words. This recordal of the agreement in the document in clear language is so that, when reading the contract, it is clear on what the parties have reached consensus. The parties can thus only reach consensus if the parties know what they have reached consensus on.⁹³

6.2.4 COUNTERPART PROVISION

An alternative indicator of the date of the agreement is the inclusion of a counterpart provision. A counterpart provision's most obvious function is to facilitate distance contracting and to overcome the so-called best-evidence rule in the law of evidence. It has another less obvious function. It allows for parties to each sign one copy of the document and then exchanging it for

⁹² *Withok Small Farms and Others (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* [2009] 2 All SA 65 (SCA) [11], "Where, however, the offer takes the form of a written contract signed by the offeror, the inference will more readily arise in the absence of any indication to the contrary that the mode of acceptance required is no more than the offeree's signature. This is particularly so where provision is made in the written contract for the offeree to specify the date on which he or she signs the contract."

⁹³ See ch 10.

signature.⁹⁴ Alternatively, it allows the two separate signed documents be considered to be one document. This makes it impossible to determine who the offeror and who the offeree is as one can (i) not practically determine who has signed the document first or last, and (ii) the exchange of separately signed documents makes it impossible to determine who was the offeror and the offeree. As such, a counterpart's provision simulates signing the document in each other's presence as offer and acceptance occurs simultaneously.⁹⁵ As it would be impossible to determine who the offeror and offeree is, it appears likely that the information theory would apply as at least one of the parties must be notified of the acceptance of the other for a valid contract to have been formed.⁹⁶

6.2.5 TESTIMONIUM PROVISION⁹⁷

Above the signature block, there is introductory language which can establish the signing date of the agreement.⁹⁸ There are three possible ways in doing this, the first is to show the specific date that the agreement was executed on,⁹⁹ the second is to make a general statement that the parties

⁹⁴ Stark *Negotiating and Drafting Contract Boilerplate* (2003) 584, provides the following example: "The parties may execute this agreement in counterparts, each of which is deemed an original and all of which constitute any one agreement."

⁹⁵ Also known as the concluding provision; Stark (2003) 581.

⁹⁶ Cartwright *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (2014) 108-109, states that acceptance typically occurs when the parties have signed the written agreement.

⁹⁷ Stark (2007) 187, also known as the concluding provision and is found immediately above the signature block.

⁹⁸ Kuney 167.

⁹⁹ Kuney 167, for example: "To show that they have agreed to the terms of this agreement, the Parties have executed this Agreement below on [the date stated on page 1 or the date(s) indicated below]".

agree to the terms of the agreement¹⁰⁰ and finally it could be simply stated that the parties agree.¹⁰¹

The concluding provisions intend to remind the parties that they have intentionally bound themselves to the agreement.¹⁰² It is not necessary to include these provisions in a contract, but has probably been included due to the reliance placed by one party on the other party's action of signing the agreement. The concluding provisions therefore are an attempt to reinforce the application of the reliance theory.¹⁰³ As the reliance theory would apply to written documents in any case, the inclusion of the concluding provision is, in general, not necessary.

6.3 DEFECTIVE CONSENSUS

There are a number of instances where it appears that the requirement of consensus has been achieved, but such consensus is defective. These include misrepresentation, duress and undue influence. A mistake can also be considered to be defective consensus, as consensus may not have been achieved because of some form of *error*.¹⁰⁴

¹⁰⁰ Kuney 167, for example “The Parties agree to the terms of this Agreement above”.

¹⁰¹ Kuney 167, for example “AGREED”.

¹⁰² Stark (2007) 190, an example “To evidence the parties’ agreement to this Agreement, they have executed and delivered it on the date set forth in the preamble”. A simpler provision is to use the word “signed” in the concluding paragraph instead of executed and delivered.

¹⁰³ See ch 5.

¹⁰⁴ Domat *The Civil Law in its Natural Order* (1850) 161, says mistakes can result in an agreement being void, but it will not always result in defective consensus.

6.3.1 MISTAKE

A party may argue that he was mistaken about something or matter relating to the contract, and as a result the contract should not be enforced.¹⁰⁵ Dependent on the type of mistake it could result in the contract either being void or voidable.¹⁰⁶ The guiding principle as to whether mistake affects consensus is whether the mistake was material or not.¹⁰⁷

A mistake can take different forms, namely: (i) *error in corpore*, which relates to a mistake of the subject matter or performance of the contract; this type of mistake is considered material;¹⁰⁸ (ii) *error in negotio*, which relates to the true nature of the contract; this type of mistake is considered material;¹⁰⁹ (iii) *error in persona*, which relates to the identity of the other party; this type of mistake is considered material;¹¹⁰ (iv) *error in substantia*,¹¹¹ which relates to the attributes and characteristics of the subject matter of the contract. This type of mistake is generally considered immaterial unless it can be found to be reasonable and material;¹¹² (v) *error in motive*, which relates to the reason why a person enters into the contract; this type of

¹⁰⁵ Domat 161. See for example *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* [1998] 4 All SA 465 (A) 465.

¹⁰⁶ Nagel 55; Pretorius “The Basis of Common Error” *Obiter* (2011) 651-652, distinguishes between a unilateral mistake and a mutual mistake. A unilateral mistake occurs when one party is mistaken and the other party is aware of such a mistake. A mutual mistake occurs where both parties are mistaken about each other’s intention and are at cross purposes. In both instances it would affect consensus.

¹⁰⁷ Nagel 64, defines an *error* or mistake as a misunderstanding or misconception by a party regarding certain facts, events or circumstances regarding the reason for contracting, the contract itself or the person contracting with. Such an error can either be material or immaterial.

¹⁰⁸ Van der Linden 1 14 2 1; Hutchinson 87, an example is where there is a sale of property, but the parties have a different property in mind. There appears to be an almost artificial distinction between *error in corpore* and *error in substantia*. In this regard see *Van Reenen Steel v Smith* 2002 (4) SA 264 (SCA).

¹⁰⁹ Hutchinson 88; Nagel 65.

¹¹⁰ Hutchinson 88.

¹¹¹ Also known as *error in qualitate*.

¹¹² Nagel 65, also known as *iustus error*. See also *Van Reenen Steel v Smith* 2002 [17], that pointed out that “[i]f the *error in substantia* excludes consensus, it is operative or material; if it does not do so, it is inoperative or immaterial. In other words by enquiring whether the error is on relating to substance, one is merely reformulating the primary question and making it more difficult to answer.”

mistake is considered immaterial,¹¹³ and (v) *error iuris*, which relates to the law of the transaction and is considered material, provided that it does not relate to the motive of the parties.¹¹⁴

A mistake must then be both reasonable and material for it to affect consensus, the so-called *iustus error*.¹¹⁵ The mistake must be material enough to influence consensus and must be a reasonable error to have been made.¹¹⁶ There are a number of theories that cover the conclusion of a contract,¹¹⁷ and if the will theory is applied consistently, every mistake would influence consensus, even those mistakes which are considered to be immaterial.¹¹⁸ This obviously cannot be the case. The reliance theory is generally applied to written contracts. This theory makes it difficult for the signatory to escape liability under the contract on the basis of consensus. By signing a document the reasonable impression is created that the party who signs, agrees to the terms of the contract.¹¹⁹ This is often reflected in the testimonium provision. It is on that basis that a party cannot escape liability on the basis that a party has not read the agreement.¹²⁰ This embodies the *caveat subscriptor* rule in which the signatory runs the risk when signing the

¹¹³ Hutchinson 90; Nagel 64, the reason why a party entered into a contract is irrelevant. Consensus is achieved through the contract itself and not the motives of the parties. This, however, does not mean that motives cannot be influenced through a misrepresentation, but a misrepresentation is not a mistake.

¹¹⁴ Hutchinson 90.

¹¹⁵ *African Information Technology Bridge 1 v The MEC for Infrastructure Development Gauteng Province* (134/2014) [2015] ZASCA 104 [23], if a mistake is fundamental and an *iustus error*, it would result in the contract being void *ab initio*.

¹¹⁶ *Dauids en Andere v ABSA Bank Bpk* [2005] 1 All SA 583 (C), illustrates that not every error in the mind of a party will result in the right to rescind the contract. In order for a party to have the right to rescind, the mistake must have played a material role in the decision to enter into the agreement.

¹¹⁷ See ch 5.

¹¹⁸ Nagel 65-66.

¹¹⁹ Nagel 66-67; Sharrock 75, also known as *quasi*-mutual assent.

¹²⁰ *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd and Another* [1979] 4 All SA 321 (T) 324, shows that if a person chooses not to read the contract they do so at their own risk.

document.¹²¹ The signature itself signifies not only acceptance of the terms, but also signifies that the parties have reached consensus. Should a party allege a mistake, then they must prove it. There may be provisions included in the contract in which parties confirm that they are not contracting under a mistake, but such terms do not add anything more to the reliance theory or the *caveat subscriptor* rule. Furthermore, if there is a material mistake which influenced or caused defective consensus it does not matter what term has been included in the contract as consensus had not been reached and such a provision would not create an obligation between the parties.

A contract is then upheld by the reliance theory, however, *iustus error* is used should a party to the contract show that consensus has not been achieved.¹²² The reliance is based on a party's conduct by signing the document.¹²³ Drafters attempt to encapsulate this principle through the use of the testimonium provision. Through the use of a testimonium provision, a party confirms that it has agreed to the contract. This is an attempt to reinforce both the reliance theory and the principles of *caveat subscriptor*. It is questionable whether this is in fact necessary. The effect of the reliance theory and *caveat subscriptor* will apply regardless of whether a testimonium provision is included or not. As the question of mistake is a factual one, there is little a drafter

¹²¹ Sharrock 76-77; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) 427, states that "When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature."; *Aetiology Today CC t/a Somerset Schools v van Aswegen and Another* [1992] 3 All SA 400 (W) 404, indicates that a person is bound by the document he signs unless there are unexpected terms that should have been brought to his attention; *ABSA Bank Ltd v TI Vermaak Trust & Others* [2006] JOL 18772 (E), for example the party that signed the document would be bound by it even if he had not read it. See also *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd and Another*; *Brink v Humphries & Jewell (Pty) Ltd* [2005] 2 All SA 343 (SCA).

¹²² For example *Accesso CC v Allforms (Pty) Ltd and Another* [1998] 4 All SA 655 (T); *Brink v Humphries & Jewell (Pty) Ltd*.

¹²³ *Sonap Petroleum SA (Pty) Ltd v Pappadogianis* [1992] 2 All SA 114 (A); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) 172, shows that generally an objective test is applied, but this is not the only approach that can be applied. See also *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA); *Irvin and Johnston (SA) Ltd v Kaplan* 1940 CPD 647, 651.

can do to overcome a mistake through the provisions in a contract. It is however difficult to escape liability on the basis of consensus once a contract has been signed.

6.3.2 MISREPRESENTATION

Misrepresentation is another way in which consensus can be defective. Misrepresentation is a false statement made by one party relating to the contract on which the other party relied to enter into the contract.¹²⁴ There are three types of misrepresentations and the category in which a representation falls is dependent on the state of mind of the person making the representation at the time.¹²⁵ The first type is a fraudulent misrepresentation, in which a representation is made knowingly, without the belief that it is true. This type of misrepresentation is usually done in some reckless manner.¹²⁶ Negligent misrepresentation, on the other hand, is that a party honestly believes in the truth of the representation, but still makes the representation carelessly.¹²⁷ An innocent misrepresentation is one that is not fraudulent or negligent.¹²⁸

A representation is made to induce a person into entering into a contract. It will naturally impact on consensus where the representation is found to be untrue.¹²⁹ Representations do not

¹²⁴ Hutchinson 116.

¹²⁵ Hutchinson 117; Kerr 280.

¹²⁶ Hutchinson 117, states that it is reckless when a party does not care whether the representation is true or false. The person must not have had the honest belief that the representation is true; Kerr 285, says that the materiality of the misrepresentation will determine whether the contract is voidable or not.

¹²⁷ Hutchinson 117, Kerr 280.

¹²⁸ Hutchinson 117; Kerr 285, also known as simple misrepresentation; *Brink v Humphries & Jewell (Pty) Ltd; Dutch Reformed Church Council v Crocker* [1953] 4 All SA 96 (C), which states that reputation of the contract is also possible in instances of innocent misrepresentation. In the UK, the possibility exists to claim damages under the s2 of the Misrepresentation Act 1967.

¹²⁹ Kerr 267; Hutchinson 122, the test for inducement is a subjective one.

necessarily form part of a contract, unless it was intended to form part of the contract.¹³⁰ If it does not form part of the contract it is not binding. In essence, the person will not assume responsibility for the statement unless he warrants or guarantees the correctness of the statement.¹³¹ When representations are included in the written document, it is clear that the parties intended to have those representations form part of the contract.

Misrepresentation can, provided that it has influenced the reason for entering into the contract, result in the contract being rescindable. This is not the case where an opinion,¹³² forecast or puffery¹³³ has occurred. For a misrepresentation to have a remedy it must have influenced a party's consensus or the reason for having entered into the contract.¹³⁴ A misrepresentation will not amount to the right to rescind unless it has induced someone to enter into the contract.¹³⁵ In this regard, the withholding of relevant information can, on occasion, also be considered to be a misrepresentation as it is a misrepresentation of silence.¹³⁶

¹³⁰ Du Plessis "Pre-Contractual Misrepresentation, Contractual Terms, and the Measure of Damages when the Contract is Upheld" *SALJ* (2008) 418; Hutchinson 117, says the question is whether it is a representation, warranty or statement.

¹³¹ Hutchinson 117; Van der Merwe *et al.* 89.

¹³² Van der Merwe *et al.* 94, state that a representation expressing an opinion is not readily regarded as actionable as it is not something someone would have relied on for entering into a contract.

¹³³ Van der Merwe *et al.* 94, state that a representation made to persuade someone from entering into a contract is considered to be "puffing" or "praising".

¹³⁴ Kerr 272.

¹³⁵ Van der Merwe *et al.* 89; Hutchinson 124, says the right to rescind a contract where a party was induced by a misrepresentation exists irrespective of the type of misrepresentation. Rescission is the most common remedy for misrepresentation, but in the UK the Misrepresentation Act allows for a claim of damages for instances of misrepresentation.

¹³⁶ Cupido *Misrepresentation by Non-Disclosure in South African Law* LLM (2013); Kerr 267; Hutchinson 134, states that a duty to speak includes: (i) contracts of insurance, agency and partnership, (ii) where there is a fiduciary relationship, (iii) where statute imposes such a duty to disclose, (iv) where the seller knows there is a latent defect in the goods he is selling, (v) where the applicant for credit is an unrehabilitated insolvent, and (vi) where the parties' prior conduct or statement would result in the silence being misleading. *Organ v Stead and Another* [1978] 2 All SA 659 (W), indicated that silence will give rise to action based on non-disclosure where there is concealment, half-truths or silence which follows a positive act or statement that would be misleading

In the written contract there are a number of manners in which to either include or exclude representations. Certain facts may be represented in the document, but other than to rescind the contract there are few additional remedies available to the party that relied on the representation. As such, the drafter would include a double-barrel provision in which a party would warrant and represent a certain fact. This is to ensure that the party who relied on the representation has the maximum number of remedies available. These representations are exit provisions, in which a misrepresentation would allow the party who relied on it to rescind the contract. In addition, drafters can exclude representations by including a provision to state that there are no other representations or warranties other than those contained in the contract.¹³⁷

6.3.3 DURESS AND UNDUE INFLUENCE

Duress and undue influence can also create defective consensus.¹³⁸ Duress causes a party to do something they would not normally do.¹³⁹ The party would under such circumstances be compelled to enter into the contract. Duress can occur through direct application of actual physical force,¹⁴⁰ or indirectly where there is a threat of harm or damage.¹⁴¹ Duress must: (i) be

without being corrected. See also ss5 95 of the National Credit Act, which requires a credit provider to make a certain disclosure.

¹³⁷ For example: *Allen v Sixteen Stirling Investments (Pty) Ltd* [1974] 4 All SA 271 (D) 273, which states “The parties hereto acknowledge that this agreement constitutes the entire contract between them and that no other conditions, stipulations, warranties or representations whatsoever have been made by either party or their agents other than such as may be included herein and signed by the parties hereto.” Where a mistake causes the contract to be void *ab initio*, this type of provision would also be without force or effect. See also *Wells v South African Alumenite Company* 1927 AD 69; S51(g) of the Consumer Protection Act prohibits a provision that excludes warranties and representations made prior to the entering of the agreement.

¹³⁸ Van der Linden 1 14 22-23.

¹³⁹ Nagel 69. Duress need not only be limited to individuals. *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833 is an example where a business was placed under duress.

¹⁴⁰ Known as *vis absoluta*; Van der Merwe *et al.* 99, states that this type of duress influences contractual capacity.

caused by the other party, (ii) have caused the conclusion of the contract, (iii) consist of the wrongful threat of damage or harm, (iv) be prejudicial against the party under duress, and (v) contain a threat that is an imminent or inevitable evil.¹⁴²

Undue influence is where undue or improper pressure is placed on a party which erodes a person's ability to exercise their judgment.¹⁴³ This must (i) be where one party has obtained an influence over the other party, (ii) have weakened the party's resistance and opened his mind to manipulation, (iii) be done in an unconscionable manner, (iv) be to the person's detriment, and (v) result in consensus, which would not have occurred if it had not been for the undue influence.¹⁴⁴

Both duress and undue influence are instances where there was improper consensus. If the requirements are fulfilled, then no contract would have come into being and as a result no obligation would have been formed. Often drafters include a provision that the parties have entered into the contract have done so of their own free will and have not entered into the contract under any duress or undue influence. These types of provisions are often found embedded in the testimonium provision. These statements are meaningless. If duress or undue influence is present, there would have been defective consensus and as a result no obligation would have been formed. Therefore, the parties would not be able to rely on such a provision and the inclusion thereof would be meaningless.

¹⁴¹ Known as *vis compulsiva*; Van der Merwe *et al.* 99, states that this type of duress does not influence contractual capacity, but results in the consensus being flawed. An example of a physical threat can be found in *Barton v Armstrong* [1976] AC 104.

¹⁴² Nagel 69. See *Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 Bk 199* (1) SA 780 (T); *BOE Bank Bpk v van Zyl* 1999 (3) SA 813 (C).

¹⁴³ Hutchinson 141; *Preller and Others v Jordaan* 1956 (1) SA 483 (A).

¹⁴⁴ Nagel 70.

6.4 RECTIFICATION

When an agreement is reduced to writing there is always the possibility that the agreement has in some way, shape or form been incorrectly recorded in the document.¹⁴⁵ In such an instance there was no mistake between the parties as to what the agreement is, but rather that the document unintentionally failed to reflect the agreement accurately.¹⁴⁶ In such a case the parties may request a court to rectify the document to align it with the intention of the parties.¹⁴⁷ Rectification may include grammatical corrections, correction of a substantive fact in the document and even the inclusion of an entire provision.¹⁴⁸ In an attempt to create and maintain certainty, which is why the contract is recorded in a document in the first place, drafters may attempt to exclude the application of rectification. This is, however, not possible.¹⁴⁹

To correct a document must always be possible.¹⁵⁰ An incorrect document does not reflect the consensus reached between the parties. To force parties to accept a document which does not reflect the true consensus or agreement of the parties, would in itself be flawed as the requirements of a contract had not been met. As such, rectification must always be possible. A provision included in the agreement, which removes the ability of the parties to rectify the document, would be ineffective and would serve no purpose in the contract whatsoever.¹⁵¹

¹⁴⁵ Hutchinson 109. See for example *Headermans (Vryburg) (Pty) Ltd v Ping Bai* [1997] 2 All SA 371 (A), where a contract was rectified by substituting the description of the property. This rectification was to show the true intention of the parties. See also *Shopleft Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* [2002] 2 All SA 588 (C); *Meyer v Merchants Trust Ltd* 1942 AD 244 253.

¹⁴⁶ Hutchinson 109, indicates that rectification relates to the document itself and not to the juristic act.

¹⁴⁷ For a court to rectify a contract the underlying agreement must be valid and correct.

¹⁴⁸ Kerr 153.

¹⁴⁹ *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA) 1328.

¹⁵⁰ *Van Aswegen v Fourie* 1964 (3) SA 94 (O).

¹⁵¹ Kerr 154.

6.5 CONCLUSION

The requirement of consensus forms the basis of an agreement. A drafter must ensure that the agreement reached between the parties is accurately reflected in the written document. The requirement of consensus is closely linked to the requirement of certainty and possibility. Failure to have certainty in relation to a party's performance, would undoubtedly affect consensus. As a result, a drafter's tool to record consensus is to accurately record the agreement in writing so as to achieve certainty.

To indicate who reached consensus, the drafter would record the identity of the parties. This recordal is purely for the purpose of identifying who reached consensus and does not, necessarily, deal with the capacity of the parties.¹⁵² However, in practice these two elements do overlap. The manner in which parties are identified is discussed in Chapter 7.

Once the agreement is accurately recorded and the parties have been identified, the parties would sign the document. The signature of a party signifies that the parties have reached consensus. The signature is not in itself consensus, but is only achieved where offer and acceptance have occurred. There is no question as to where and when consensus is achieved when the parties sign the document simultaneously. The question as to the date of the agreement is when the signing thereof occurs in different places and at different times. Various indicators in the contract will show whether the parties intended the contract to come into being upon signature or upon the offeror coming to know of the acceptance of the offer.

¹⁵² See ch 7.

Finally, drafters would include representations in a contract which would allow the party who relied on a representation to rescind the contract as such a misrepresentation would naturally have affected consensus.

It then appears that drafters, in an attempt to reflect consensus in the agreement, include mechanisms and provisions in the document such as: (i) description of the parties, (ii) introductory provisions, (iii) counterparts provisions, (iv) signature blocks, (v) testimonium provisions, and (vi) representations. These mechanisms are included to portray the requirement of consensus in the written document in some way, shape or form. The substantive law, therefore, is the reason for these types of provisions being included in the agreement.

CHAPTER 7

CONTRACTUAL CAPACITY

7.1	INTRODUCTION.....	126
7.2	PARTIES	127
7.2.1	MULTIPLE PARTIES.....	128
7.2.2	THIRD PARTIES	130
7.2.3	SUBSTITUTION OF PARTIES	133
7.3	CONTRACTUAL CAPACITY	135
7.3.1	NO CAPACITY	136
7.3.2	LIMITED CAPACITY	138
7.3.3	AGENTS AND JURISTIC PERSONS.....	139
7.4	ANALYSIS IN RELATION TO THE DRAFTING OF CONTRACTS	142
7.4.1	DESCRIPTION OF THE PARTIES	143
7.4.2	WARRANTIES AND REPRESENTATIONS	144
7.4.3	REPRESENTATIVE CAPACITY	145
7.5	CONCLUSION.....	147

7.1 INTRODUCTION

One of the requirements for a contract is that the parties to the contract must have contractual capacity.¹ Contractual capacity can be described as the ability to perform a juristic act and thereby includes the ability to create duties and receive rights.² A party's ability to create duties and to receive rights is influenced by a person's attributes³ and circumstances.⁴

¹ See ch 5.

² Voet *The Selective Voet: Being the Commentary on the Pandects* (1829) 27 10 3; Hutchinson *The Law of Contract in South Africa* (2012) 149, states that the process of contracting is a juristic act and therefore a party must have the ability to perform such a juristic act to contract; Fouché *Legal Principles of Contracts and Commercial Law* (2015) 63; Nagel *Commercial Law* (2011) 75, says that capacity is based on the ability to form a will and then to act with sound judgment in accordance with one's will. A person must therefore be able

In the drafting of contracts it is often found that the drafter attempts to establish the contractual capacity of a party in the written document. This is done through the use of various mechanisms, such as, the manner in which parties are described, the use of warranties and representations in relation to a party's capacity and qualifications made at the testimonium provision or signature block or elsewhere in the contract to establish representative capacity of an agent. Before considering the capacity of parties, the parties themselves are considered.

7.2 PARTIES

There must, at least, be two parties to a contract.⁵ The law does not recognise unilateral promises or declarations. A party cannot contract with himself. It would make little sense to do so, as it would be impossible to enforce the contract against oneself. The only exception to this is where it is possible to act in different representative capacities and different drafting mechanisms would be employed to show the representative capacity of the person in relation to both the parties. The manner in which a contract identifies a party is also intended to show which parties have achieved consensus.⁶ For the purpose of the operation of a contract multiple parties, privity of a contract and the changing of parties to a contract are considered.

to appreciate the consequences of his actions; Wessels *The Law of Contract in South Africa* (Vol. 1) (1951) 226, describes the essence of a contract, the ability of a person to give his consent to bind himself to the contract and if a person is deprived of reason a person is not able to consent and would thus not be able to contract.

³ Hutchinson 150, for example age.

⁴ Hutchinson 150, for example circumstances such as insolvency.

⁵ J Inst 3 16 1, indicates that there may be multiple parties on either side of a stipulation; Hutchinson 219; Van der Merwe *et al. Contract General Principles* (2012) 213, state that the juristic bond created through a contract must always have two or more parties; see ch 5.

⁶ See ch 6.

7.2.1 MULTIPLE PARTIES⁷

Not all contracts fit neatly into the pattern of one creditor and one debtor.⁸ There are no limits as to the number of parties that can be a party to a contract. There may be more than one creditor or debtor for a specific obligation. In such instances, the divisibility of the performance must be determined.⁹ This will be determined by the nature of the performance, for example, whether it is physically possible to do so¹⁰ and whether the parties intended divisibility of the performance.¹¹ Where there is more than one debtor it is presumed that performance is divided equally. Where there is more than one creditor it is presumed that they will be entitled to performance equally.¹² It is also presumed that multiple debtors will be liable for performance on a joint basis, in which they are liable for their specific share of the performance.¹³ This is the default rule and will apply, unless the parties specify differently.¹⁴ If the parties wish to apply a different proportion,

⁷ Christie & Bradfield *The Law of Contract in South Africa* (2011) 260, indicate that contracts with multiple parties are called multipartite agreements. Such contracts that have three parties are often called tripartite agreements.

⁸ Christie & Bradfield 260; Van der Linden *Institutes of the Laws of Holland* (1806) 1 14 9 8, indicates that when an obligation is divisible, debtors will be answerable proportionately. In instances where an obligation is indivisible, each debtor is liable for the whole, even if they had not bound themselves *in solidum*.

⁹ Hutchinson 220.

¹⁰ Nagel 112, for example mentions a motor vehicle is indivisible whereas bags of peanuts are divisible by their physical nature.

¹¹ Hutchinson 220; Nagel 112, for example mentions a lounge suite is physically divisible, but the parties intended that it should not be divisible. The intentions of the parties must be determined by the facts of each case to determine whether performance was intended to be divisible or not.

¹² Van der Linden 1 14 9 7, states that when persons are jointly bound to one another, each of those persons would be liable or entitled proportionately; Van der Merwe *et al.* 213, say that this relationship can be called a “simply joint relationship”, “co-debtorship” or “co-creditorship.”

¹³ Hutchinson 220; Nagel 112, indicates that parties are only liable for their proportionate share of the liability or entitlement.

¹⁴ Domat *The Civil Law in its Natural Order* (1850) 1830, states that unless the parties specify otherwise, debtors will only be liable for their portion of the debt.

such as having the performance *in solidum*¹⁵ or jointly and collectively,¹⁶ then the contract would have to expressly specify this.¹⁷

In drafting a contract with more than two parties, the divisibility of the performance must be considered and determined. The default position of the parties being jointly liable would apply,¹⁸ unless the contract specifically sets out another type of performance. It is, for example, the reason why it is specifically stated in contracts such as contracts of surety that the surety would be jointly liable and *in solidum* with the principle debtor.

Multiple parties are identified in the document in the same way as it would have been done to identify only two parties, namely:¹⁹

- (i) naming and identifying the parties on the front page of the document;
- (ii) specifying the parties in a separately numbered provision in the contract;
- (iii) including a reference to the parties in the definition provision;
- (iv) placing the name of the parties in the signature block; or
- (v) using a combination of these methods.

¹⁵ Domat 1892, this obliges each debtor to be liable for the whole debt; Nagel 113, indicates that it is also known as joint and severable liability or entitlement and that the entire debt could be claimed from one of the multiple debtors. The so-called joint and severable liability means that the co-debtor would be liable for the entire amount and would have a right to recover the overpaid portion from the other debtors; Van der Merwe *et al.* 215-217, in other words state that the person is individually, but also jointly liable for the performance. The completion of the performance would be for all the co-debtors and if one is absolved then all are absolved.

¹⁶ Where the co-debtors are liable to make performance jointly and collectively there cannot be a claim for performance from an individual debtor; Hutchinson 221.

¹⁷ Van der Linden 1 14 9 7, for parties to be liable *in solidum*, they must expressly state this.

¹⁸ Van der Linden 1 14 9 7.

¹⁹ Anderson & Warner *A-Z Guide to Boilerplate and Commercial Clauses* (2012) 455, each contract should identify the parties.

The same principles of consensus and contractual capacity will apply to multiple parties as it would have with one debtor and one creditor.²⁰

7.2.2 THIRD PARTIES

A contract creates legal obligations between the parties to the contract.²¹ The principle of privity of contract applies in that the private transaction between parties cannot give rise to a contractual obligation for a party not part of such a transaction.²² The party that is not party to the transaction is referred to as a “third party”, which could be misleading in instances where there are multiple contracting parties. Parties to a contract were once divided in parts and classes and were described as such in written contracts.²³ The creditor would be described as a party of the first part and the debtor as a party of the second part.²⁴ This later morphed into dropping “the first” and “the second” and the term “party” was used to describe someone that was part of the agreement.²⁵ Remnants of this drafting can still be seen in some contracts, for example:²⁶

“MEMORANDUM OF AGREEMENT made this [---] day of [---] 20[---]
BETWEEN:
[Name of Authors] [address] (hereinafter called ‘The Authors’) of the first part [and
shall include [the Authors] executors, personal representatives, administrators and
assignees]

²⁰ See ch 6.

²¹ Hutchinson 222; See *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, confirmed the general principle that only parties to the contract can sue each other.

²² Van der Linden 1 14 3; Grotius *The Introduction to Dutch Jurisprudence* (1985) 3 1 28; Christie & Bradfield 269, state that the parties are bound to the contract that they have entered into. Strangers cannot be sued on the basis of a contract that they are not party to.

²³ Adams *A Manual of Style for Contract Drafting* (2008) 305.

²⁴ Adams 305.

²⁵ Adams 306.

²⁶ Fosbrook & Laing *A-Z Contract Clauses* (2014) 1215.

and

[Name of Company] [address] (hereinafter called ‘The Publishers’ of the other part) for themselves, and their respective executors, administrators and assigns or successors in business as the case may be.”

Anyone who was not part of the contract was referred to as a “third party”.²⁷ Although the term “third party” is sometimes defined in a contract, it is commonly understood to mean a party that is not a party to the contract and therefore, need not be defined. To this, third party can also be referred to as an “other party”.

A contract cannot bind a third party in that it cannot create an obligation on a third party without the third party accepting it.²⁸ Should the third party accept such an obligation, it stands to reason that such a third party would become part of the agreement and thus be considered to be a party to the contract.

There are, however, certain instances where parties can confer a benefit on a third party contractually.²⁹ This must be distinguished from giving a third party an enforceable right and that of providing performance to a third party.³⁰ Providing performance to a third party is not the same as creating an enforceable right. For such a third party to have an enforceable right, he will have to accept the benefit.³¹ Conferring a right on a third party is sometimes known as a

²⁷ Adams 116.

²⁸ Van der Linden 1 14 3, states that a covenant or undertaking for a third person is of no effect unless such a third party consents thereto; Christie & Bradfield 270.

²⁹ Van der Merwe *et al.* 229.

³⁰ Nagel 109.

³¹ *Brown’s Executrix v McAdams* 1914 AD 231 *Masterpiece Gold Mining Co Ltd v Brown’s Executrix* 1914 AD 231, indicates that a third party, who was originally a stranger to the contract, can enforce the right against the *promissor* after having notified the *promissor* of his acceptance. In this regard, acceptance of the benefit functions as a type of condition precedent for enforcing such a third party right in the contract.

stipulatio alteri.³² There is no obligation on a third party to accept the benefit, but to create such an enforceable right, the third party must not only accept the benefit, but must also notify the other party of his acceptance.³³ There are a number of approaches as to how the acceptance of a third party functions. For the purposes of drafting, the information theory would apply to the acceptance of the right, unless indicated otherwise in the contract.³⁴ The offer may, or may not, be irrevocable and the functioning of the provision will be dependent on the manner in which it is drafted. A third party may either be a party to the contract, in which case he would no longer be a third party, or he can be a third party obtaining a benefit or right from the contract (but not duties).³⁵

The opposite is also true. Drafters often attempt to avoid confusion in relation to performance towards a third party and a benefit to such a third party. Therefore drafters may include a provision that there is no *stipulatio alteri* present in the contract.³⁶ Whether the inclusion of such a provision in a contract is necessary is questionable. However, it is understandable in countries such as the United Kingdom, where third parties can enforce benefits placed in contracts unless specifically excluded by the contract.³⁷

³² Christie & Bradfield 270, it is also known as third party benefits and *ius quaesitum tertio*.

³³ Hutchinson (2012) 226; *Brown's Executrix v McAdams* 1914 AD 231 *Masterpiece Gold Mining Co Ltd v Brown's Executrix* 231.

³⁴ Christie & Bradfield 276, as with an offer, the communication of acceptance is usually necessary.

³⁵ Christie & Bradfield 270.

³⁶ Stark *Negotiating and Drafting Contract Boilerplate* (2003) 102; for example "This agreement does not and is not intended to confer any rights or remedies upon any Person other than the parties."

³⁷ This is regulated by the Contracts (Rights of Third Parties) Act 1999. There are further interventions in the UK to mitigate the effect of privity such as Third Party (Right Against Insurers) Act 1930; Carriage of Goods by Sea Act 1924.

7.2.3 SUBSTITUTION OF PARTIES

There may be times when contracting parties are replaced or changed. Take for instance a situation of a merger or acquisition of a company where one party no longer exists or where business needs require parties to change. Instead of terminating the contract and entering into a new contract, a party can be substituted with another in relation to their rights or duties (or both) under the contract.³⁸

Contractual rights can be transferred from one party to another through cession.³⁹ The internal operation of cession agreements falls outside the scope of this discussion, other than to note how drafters deal with potential cession in contracts which are not cession agreements themselves. Cession entails the substitution of creditors.⁴⁰ It requires consent from the existing creditor and the new creditor,⁴¹ but need not have consent from the debtor to do so.⁴² It is for this reason that contracts often include a prohibition against cession unless there is consent from the other party.

Contractual duties can be transferred through delegation.⁴³ This entails the substitution of debtors.⁴⁴ It requires consent of all the parties concerned, being the creditor, the existing debtor

³⁸ Nagel 111, indicates the cessionary steps of the cedent. The cedent cannot cede more rights than what he originally started with.

³⁹ Nagel 111, states that the transfer of rights through cession are limited in instances where (i) it is prohibited by legislation, (ii) the parties have included a *pactum de non cedendo* (being a provision which prohibits cession), (iii) personal rights cannot, generally, be transferred as they may be prejudicial to the debtor, or (iv) a particular relationship exists between the parties, such as an employment relationship.

⁴⁰ Hutchinson 230.

⁴¹ Known as a cessionary.

⁴² Nagel 110, says the debtor does not even have to know about the cession.

⁴³ Grotius 3 44 2, says that delegation is where there is a replacement of debtors; Reg 44(3)(t) of the Consumer Protection Act 68 of 2008 regulates where the supplier transfers its obligations. In such instances the consumer's consent would be required; *Froman v Robertson* 1971 (1) SA 115 (A) 122, illustrates that an obligation cannot be transferred from a debtor to a third party without the creditor's consent. As such, delegation is an agreement of three parties.

⁴⁴ Hutchinson 230.

and the new debtor. Arguably, no prohibition is required in a contract because the consent of the creditor is already required, irrespective of whether such a prohibition is included in the contract or not.⁴⁵

Finally the entire agreement, being the parties' obligations (which exist of both rights and duties) may be transferred through assignment.⁴⁶ Assignment is the substitution of either the creditor or debtor in the situation and requires the consent of all the parties. This is usually done through a tripartite agreement, where all the parties agree thereto.⁴⁷ In light of this, it is unnecessary to prohibit assignment in a contract, as it would require the consent of the parties irrespective of whether such a prohibition is included in the contract, or not.

To avoid a situation where there is a cession of rights, a clause is often included in a contract to prevent cession occurring without the other party's consent.⁴⁸ Sometimes drafters extend the *pactum de non cedendo* to restrict delegation and assignment. For example:⁴⁹

“No rights may be ceded, no duties delegated and no portion of the contract or the whole of it assigned to any third party, without the prior written permission of the other party to this Agreement.”

In light of the above, it is odd that consent of all the parties is required in instances of delegation and assignment as the consent of all the parties would be required in such circumstances regardless of whether it is required in the contract or not. Drafters assert that the extension of the

⁴⁵ Lubbe & Murray *Farlam & Hathway Contract Cases, Material, Commentary* (1988) 207, indicate that delegation is a form of novation and usually results in a tripartite agreement.

⁴⁶ *Simon NO v Air Operations of Europe AB and Others* [1998] 4 All SA 573 (A) 581, illustrates that the word “assignment” denotes the transfer of both rights and duties. Sometimes the word assignment is used incorrectly and the intent of the parties must be established to understand the meaning in the context of the agreement; Nagel 111.

⁴⁷ Hutchinson 230; Nagel 111.

⁴⁸ Also known as *pactum de non cedendo* in respect of agreements to prohibit cession; See also Sunkel *The Pactum De Non Cedendo: A Re-Evaluation* LLM (2009).

⁴⁹ Hutchinson 410.

pactum de non cedendo is to ensure certainty that the principle is recorded in the contract. This argument is without merit. If certainty is required for the concepts of delegation and assignment, why then are other common law principles not also contained in a contract for the sake of certainty? It makes little sense to do so, other than for instance to change the operation of the common law principle. For example, to change the requirements of consent of delegation and assignment, so that no such consent is required.⁵⁰

7.3 CONTRACTUAL CAPACITY

There exists a rebuttable presumption that parties to a contract have the necessary contractual capacity.⁵¹ This presumption places the burden of proof on the person who alleges a deficiency in capacity to prove it. The starting point in South African law is that it is presumed the contracting parties have the necessary contractual capacity.⁵²

The three categories of capacity, being full contractual capacity, limited contractual capacity and no contractual capacity whatsoever, influences how drafting practices have developed.⁵³ No statement needs to be included in the written contract where parties act with full contractual

⁵⁰ See for example *Unilever South Africa Ice Cream (Pty) Ltd (known as Ola South Africa (Pty) Ltd) v Jepson* 2008 (2) SA 456 (C), in which the provision read that “The franchisor may cede, assign, transfer or make over this agreement or all or any of its rights hereunder whether as security for debt or any other cause to any person at any time, as it may in its discretion think fit.”

⁵¹ Voet 4 4 12; Domat 160; Van der Linden 1 14 3; Christie & Bradfield 235; Cornelius *The Principles of Interpretation of Contracts in South Africa* (2007) 122; Wessels 225, states that if a document contains all the elements of a binding contract and is enforceable, the law will presume that the parties are capable of contracting.

⁵² Wessels 225, indicates that capacity of a person is therefore presumed and incapacity to contract is treated as an exception which must be proven by the party that alleges such an exception.

⁵³ Hutchinson 150; Fouché 64, categorises the contractual capacity loosely into no contractual capacity, limited contractual capacity and full contractual capacity.

capacity as there is a presumption that the parties to the contract have contractual capacity. Should a person fall within the categories of limited or no contractual capacity, then he who has alleged this must prove it. The question when drafting a contract is whether the written document can serve any purpose in establishing, confirming or founding contractual capacity of a party. The question is therefore whether the written document can establish, prove or disprove the contractual capacity of the parties.

A final category that will also be considered is representative capacity of an agent, in particular in relation to representation of a juristic person, and the mechanisms used for establishing, proving or disproving contractual and representative capacity.

7.3.1 NO CAPACITY

The category of no capacity applies to people who are mentally ill and who have been deprived of reason, or do not have the ability to appreciate the consequences of their actions.⁵⁴ Whether a person is mentally ill or not is a question of fact.⁵⁵

In instances where a person is under the influence of drugs or alcohol to such an extent that they cannot appreciate the consequences of their actions there would be no contractual capacity.⁵⁶ As

⁵⁴ S59 of the Mental Health Care Act 17 of 2002; Hutchinson 150; Fouché 82, indicates that a mentally ill person cannot contract where it creates a duty, but nothing stops him from receiving a rights, such as a donation; S39(a) of the Consumer Protection Act, however this section amends the common law position slightly. Where under normal principles a court need not declare that a person is mentally unfit for the contract to be void due to the person's lack of contractual capacity, the Consumer Protection Act requires that the court must declare the person mentally unfit and the supplier ought to have known this for the agreement for goods and services to be void. See also D 44 7 1 12; Gaius *Gai Institutiones* (1904) 3 106; J Inst 3 16 8.

⁵⁵ Voet 27 10 3; Wessels 227, where such a person has a lucid moment and he understands the consequences of his actions, in such a moment a valid contract can be formed.

the contract is concluded without any contractual capacity there is no contract formed when the person sobers up and cannot ratify the contract after the fact.

The last in this category are minors under the age of seven years who have no contractual capacity whatsoever.⁵⁷

In all three instances the contract would be void. Some argue that a person under the influence of alcohol and drugs, where it would appear that such a person could potentially ratify the contract after the fact, save for such ratification, the agreement would be void.⁵⁸ This cannot be correct as the contract was concluded without the necessary contractual capacity at the start and would therefore be void. As the contract never came into existence it cannot be ratified after the fact.

In order to accommodate these situations, the contract drafter on occasion includes statements either within the body of the document or at the testimonium provision that the person signing is “of sound mind” and “fully understands and comprehends the contents” of the document. As will be discussed below, such statements have no meaning in the context of a written contract. As the person signing the document has no contractual capacity whatsoever, they can neither confirm their capacity to contract nor can they create any duties.

⁵⁶ Voet 18 1 4, serious drunkenness avoids a contract; Grotius 3 14 5, states that if a person loses their reasoning powers through drunkenness, such a person would not be competent to bind themselves contractually; Wessels 229, mentions that where a person is so drunk he is incapable of consenting, the contract must be set aside; Van der Linden 1 14 3, says that those in the state of drunkenness have lost their ability to reason and are, therefore, incapable of contracting; Hutchinson 150.

⁵⁷ Hutchinson 150; Fouché 65, mentions that in such an instance a guardian must act on behalf of the minor. See also Grotius 3 1 29; Gaius 3 109; Domat 228.

⁵⁸ Wessels 229, argues that a party would have the ability at a later stage to ratify the contract and therefore would make the contract voidable and not void.

7.3.2 LIMITED CAPACITY

Generally, persons with limited contractual capacity can contract with the consent of another person.⁵⁹ In these instances a contract would not be void, but voidable as the person who must ratify the contractual act can either ratify (which would result in the agreement being enforceable), alternatively not ratify the contract (in which case the agreement would be void).

Save for certain exceptions,⁶⁰ minors between the ages of seven and eighteen require the consent of their guardian to contract.⁶¹ Without the required consent the contract cannot be enforced against the minor.⁶² Such consent can be provided either by co-signing a written document or by tacit or express consent by the minor's guardian.⁶³ The Consumer Protection Act provides that a contract would be void if (i) it is made with an unemancipated minor, (ii) it is made without the consent of the guardian and (iii) the agreement was either not ratified by the guardian or the minor upon reaching the age of majority.⁶⁴ It appears that the Consumer Protection Act has not added to the common law position, but rather confirms it. The risk of placing such provisions in the Act is that it may, depending on how the courts interpret the provision, alter the common law position. On the face of the provision, it appears that it adds nothing further to the discussion of the contractual capacity of minors.

⁵⁹ Hutchinson 151.

⁶⁰ S87 of the Banks Act 94 of 1990; s88 of the Mutual Banks Act 124 of 1993; ss129, 130 of the Children's Act 38 of 2005. An emancipated minor and married minor would generally be able to contract without assistance.

⁶¹ S17 of the Children's Act; Hutchinson 153; Fouché 69, indicates that if a minor acts without the assistance of his guardian, the minor would not incur any contractual liability, which in itself would only create a natural obligation and not a civil obligation; See ch 5; Watt *Consequences of Contracts Concluded by Unassisted Minors: A Comparative Evaluation* LLM (2012).

⁶² See also s39(b) of the Consumer Protection Act.

⁶³ Fouché 69.

⁶⁴ S39(b).

Similarly, people married in community of property may require the consent of the other spouse for certain contractual transactions.⁶⁵ Although the joint estate of the parties would still be liable, regardless of whether such consent is obtained, the spouse who did not provide such consent may upon death or divorce claim against the joint estate.⁶⁶

Finally, if a person is sequestrated an insolvent person would have limited capacity to contract and would require the consent of the trustees.⁶⁷ Similarly, a prodigal would have the same contractual capacity as that of a minor between the ages of seven and eighteen.⁶⁸

Most written contracts, which have a party with limited contractual capacity, include an additional signature space to accommodate the required additional consent. The signature of the person consenting may include qualifying words such as “full and unqualified” or “irrevocable consent” or something similar.

7.3.3 AGENTS AND JURISTIC PERSONS

A person can personally enter into a contract or on behalf of someone else, whilst acting as an agent.⁶⁹ An agent is then a person who represents another person in juristic acts, which includes

⁶⁵ S29 of the General Law Amendment Act 132 of 1993 abolished matrimonial power so that a wife had the capacity to contract. S15 of the Matrimonial Property Act 88 of 1984 details the categories of when a spouse would require the consent of the other to contract.

⁶⁶ S15 of the Matrimonial Property Act.

⁶⁷ S23(2) of the Insolvency Act 24 of 1936; *WL Carrol v Ray Hall Motors (Pty) Ltd* [1972] 4 All SA 550 (T), 554, indicates that where an insolvent enters into a contract the contract is voidable; Hutchinson 154.

⁶⁸ Voet 41 8 6; Domat 229; Hutchinson 155; Fouché 84, states that a prodigal must contract with the permission of the curator and without such consent the contract is void; Wessels 230, however, argues that this type of situation would be voidable and not void.

⁶⁹ Silke *The Law of Agency in South Africa* (1981) 1.

contracts with third parties.⁷⁰ There are generally two categories where a person would act in a representative capacity. The first is where it would be required by law. This can be considered as a type of condition precedent⁷¹ before a valid contract comes into being. The second is purely for a matter of convenience.

The first category includes contracts with juristic persons. Juristic persons can only be contracted through the representation of a natural person⁷² and can be regulated through statute or powers bestowed upon a person by the juristic person. Any person acting on behalf of a juristic person can only do so by the powers and authority conferred through the relevant legislation or by means of the authority provided to such a person by the juristic person itself.⁷³ A person such as a director of a company or a member of a close corporation, that is given authority by legislation, acts as an organ of the juristic person and need not have written authority to do so.⁷⁴ A person that is given authority by a director or member would, however, require written authority to act as an agent of the juristic person and therefore acts as an agent.⁷⁵

⁷⁰ Silke 1; Gaius 3 163, says obligations can be acquired by the parties themselves, but can also be obtained through persons who act on behalf of such parties.

⁷¹ Silke 1. It is questionable whether the term “condition precedent” is the correct terminology. If a representative capacity is required by law it is a requirement which likely affects enforceability. A condition precedent does not relate to the requirements of a contract, but rather something unrelated to the requirements of a contract, as the requirements of a contract must be fulfilled and the enforceability of the contract, the moment that obligations are created, is dependent on another event, which is not related to the requirements of a contract. See ch 14.

⁷² Hutchinson 155, note joint ventures, trusts and partnerships are not considered to be legal entities.

⁷³ Wessels 274.

⁷⁴ *Northview Shopping Centre Johannesburg CC v Revelas Properties* 2010 (3) SA 630 (SCA) [22].

⁷⁵ *Ibid.*

An agent acts on behalf of the principal within the authority provided.⁷⁶ The analysis of how the law of agency operates is outside the scope of this study, but certain principles are necessary to discuss the reason why certain qualifications have been included in the written contract. These principles include (i) where an agent acts, within his authority and on behalf of a principal and the third party contracts with the agent in good faith, the actions of the agent would bind the principal;⁷⁷ (ii) where an agent acts with limited authority and this is not disclosed to a third party, the principal cannot rely on the limited authority of the agent,⁷⁸ and (iii) generally a third person can only pursue the principal and not the agent.⁷⁹ In this regard many signatures, especially in relation to juristic persons, are qualified with words such as “for and on behalf of” or something similar to indicate that the signatory is acting in a representative capacity.

There are instances where the agent may be held personally liable, those include: (i) where he expressly takes on such personal liability, (ii) where he created the belief that he acted as a principal and not an agent, and (iii) when he has implied that he had the necessary authority when in fact, he did not have such authority. Personal liability would attract on points (i) and (ii) on the basis of contract and would bind both the agent and the principal.⁸⁰ Liability on point (iii) is not strictly based on contract, but based on the warranty given by the agent and in such an instance only the agent would be liable. In contract drafting this personal liability for proper authority is often found in the signature block with the words “who warrants that he is duly

⁷⁶ In the case of a juristic person the agent will act within the power given to him by both the principal and the applicable legislation.

⁷⁷ Silke 438.

⁷⁸ Silke 439.

⁷⁹ Silke 558.

⁸⁰ Silke 558, liability would not always fall on the principal in relation to point (i), however, Silke argues that in most cases it does.

authorised hereto”, thereby attracting personal liability should the person who signs not have the requisite authority to act on behalf of the principal.

7.4 ANALYSIS IN RELATION TO THE DRAFTING OF CONTRACTS

The element of contractual capacity in the written contract revolves firstly around the rebuttable presumption that parties to a contract have the requisite capacity to contract.⁸¹ The parties to the contract are presumed to have the required capacity, but whether a person has the necessary capacity is a question of fact. A party either has the required capacity or he does not. Often contracts include a mechanism to confirm or establish the contractual capacity of parties within the written document. This is presumably done to show, in the written document, that the parties either have contractual capacity or not. By including words such as “in full sound mind” or statements like “fully comprehend the content”⁸² serves no purpose to establish contractual capacity. If such words are included in a written contract and the person who signs it has no contractual capacity, then the inclusions of such words become meaningless as a person with no contractual capacity cannot create duties.

⁸¹ *Supra* (n 51).

⁸² This is not always used in the context of contractual capacity, but rather in relation to consensus; see ch 6.

7.4.1 DESCRIPTION OF THE PARTIES

Another method used to indicate a person's capacity is the manner in which parties are described in a contract. Such a description can be found on the front page of the contract, definition sections and sometimes, albeit rarely, in the signature space.

A party is described, if it is a natural person, by using their full name, identity or passport number, stating whether they are a minor or a major, their marital status and physical address. A juristic person is described by its full names, registration number, registered address and the person representing the juristic person with their full details.

This method is often similar to the drafting style used in pleadings in civil procedure. The Uniform Rules of Court and the Magistrate Court Rules require a specific method of citation to identify a party as well as their capacity.⁸³ It seems then that some, if not all, elements have been adopted from drafting civil pleadings. The most obvious example is that of a juristic person, which seems almost identical in contracts to how a juristic person would be cited in a summons.⁸⁴

⁸³ For example a person is a minor or major; R17(4) of the Uniform Rules of Court require that every summons must include the name, residence or place of business, occupation, any representative capacity, the sex of a person and if the person is a female, what their marital status is. A similar rule exists in R5(4) of the Magistrate Court Rules. Harms *Amler's Precedence of Pleadings* (2015) 78-79, describes in civil pleadings (i) a natural person as "The plaintiff [defendant] is Mary Smith, an adult female bookkeeper, residing at [address] OR having her business at [address] OR employed at [address]." or "The plaintiff [defendant] is Mary Smith, an adult female bookkeeper, residing at [address] OR having her business at [address] OR employed at [address], who institutes this action [who is sued] in her capacity as mother and sole guardian of her minor son, John Smith", (ii) in relation to a close corporation "The plaintiff [defendant] is J Smith CC, a close corporation, incorporated in terms of the Close Corporations Act 69 of 1984, with its registered office at [address] OR with its principal place of business within the jurisdiction of this court at [address]", and (iii) a company as "The plaintiff [defendant] is J Smith & Co (Pty) Ltd, a company with limited liability, incorporated in terms of the Companies Act 61 of 1973, with its registered office at [address] OR with its principal place of business within the jurisdiction of this court at [address]". Similar examples can be found in Van Blerk *Legal Drafting Civil Proceedings* (2014) 12.

⁸⁴ Van Blerk 12.

The same requirements for pleadings are not necessary for contracts. The purpose of describing a party in a contract is to identify the parties, and although the document is used for evidentiary purposes in litigation, it need not (and cannot) confirm the capacity of a person. The only requirement in contracts when describing the parties is that they are described with sufficient detail so that such a party can be identified or is identifiable.

7.4.2 WARRANTIES AND REPRESENTATIONS

On occasion a written contract may include warranties or representations stating that a party has the requisite authority to enter into the contract. In the case of a natural person who has no contractual capacity, such warranties and representations are meaningless as a person with no contractual capacity does not have the ability to enter into a juristic act and would attract no contractual liability. In the case of a natural person with limited capacity where the contract has not been ratified, the same principle would apply with no capacity until the contract has been ratified. In the event that a natural person has full contractual capacity, the inclusion of such warranties and representations continue to remain meaningless as the person has full contractual capacity and such a warranty and representation does not add to the fact that the person has the requisite capacity to contract.

The content of the document serves no purpose in establishing, confirming or imposing contractual capacity on a person who does not have such contractual capacity and adds nothing to the contractual capacity of a person that has such capacity to start with. The written document does nothing to change the factual situation of the parties.

The one purpose the inclusion of warranties and representations for contractual capacity does serve, and which is discussed in more detail below, is that by including them could potentially bind an agent personally, should an agent warrant his authority to act on behalf of a juristic person and did in fact not have the requisite authority to do so.

7.4.3 REPRESENTATIVE CAPACITY

Finally, in the case of agency, a person acting as an agent often qualifies his signature through the words “for and on behalf of”. The law of agency requires that it must be plain to a third party that the agent is acting in a representative capacity to avoid personal liability for the agent.⁸⁵ This is often done through the words “for”, “on behalf of”, “pp”, or “qq” appearing at the signature of the agent.⁸⁶ This is to indicate that a person is not acting in his personal capacity.⁸⁷

The importance of including some level of qualification in the signature space is usually to indicate that the agent is not intending to be personally bound. However, it need not necessarily be included at the signature block, but can be included anywhere in the contract.⁸⁸ Therefore, any statement that indicates that a person is acting as an agent would be *prima facie* proof that the agent did not intend to be bound personally. Should a person provide a warranty that he had the necessary authority and did in fact not have the authority to act, then personal liability would attract to the agent. This type of warranty is usually found with the words “who warrants that he

⁸⁵ Sharrock *Business Transactions Law* (2011) 151.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Silke 564, says words such as “an agent” or “on account of”, or “on behalf of” will indicate on a *prima facie* basis that the person acted as an agent and not in his personal capacity. If it can be proven otherwise, such statements would be meaningless.

is duly authorised hereto” above the signature space, alternatively it can be found in a representation or warranty included in the body of the contract.

The use of “for and on behalf of” is often used next to the signature of a representative for the juristic person. This seems superfluous when considering section 20(7) of the Companies Act,⁸⁹ which includes a type of modernised version of the *Turquant* rule. In terms of this section a person who contracts with a company in good faith can rely on the fact that all internal formalities of the company have been complied with. Obviously, should a person have knowledge to contradict this assumption or there has been fraudulent misrepresentation, they will not be able to rely on this section. Therefore, an outside party can assume that a particular representative is authorised to act on behalf of the company and that the representative has their authority to act on the company’s behalf.⁹⁰

Further to this, section 54 of the Close Corporations Act⁹¹ states that a member of the close corporation is an agent which binds the close corporation. Again, should a person that contracts with the close corporation have knowledge that contradicts this, the person would not be able to rely on this section.

Therefore, the inclusion of the popular phrase “warrants that he is duly authorised hereto” next to the signature of the representative of the juristic person is not to confirm authority to act on behalf of the juristic person, but rather to attract personal liability to the person who signs should it be found later that such a person did not act with the requisite authority. Personal liability will only be as good as the person has the financial ability to settle such a claim. It should, however,

⁸⁹ Companies Act 71 of 2008.

⁹⁰ Sharrock 154.

⁹¹ Close Corporation Act 69 of 1984.

be clarified if a person signs such a document with the phrase and the person has no legal capacity, personal liability (based on the contract) cannot attract to the person as the contract is void and therefore any provision contained in the contract would therefore also be void. This does not necessarily mean that the person cannot attract delictual or criminal liability under such circumstances. However, in instances of where the individual has no legal capacity it seems unlikely that delictual or criminal liability will attract to that person in any event.

7.5 CONCLUSION

If one considers the current literature on contract drafting in South Africa, there is a trend that a person's status or capacity must be included in a written contract.⁹² This argument is used by Hutchinson in that the inclusion of a person's status, amongst other things, creates legal certainty.⁹³ Although it is advisable to include details of the parties in a contract, it is neither necessary nor required, save to the extent that enough information must be included to identify the parties to the contract, or make such parties identifiable.⁹⁴ Furthermore, the inclusion of such information does not create legal certainty as Hutchinson states, but rather factual certainty.⁹⁵

Hutchinson also states that, when drafting a contract, a natural person must have his status included and uses the following example for describing a natural person:⁹⁶

⁹² See ch 1.

⁹³ Hutchinson 398, argues that as much information of the parties must be included in the written contract as such information creates legal certainty.

⁹⁴ See ch 6.

⁹⁵ A person's capacity is a question of fact.

⁹⁶ Hutchinson 399.

James ZZ
 Identity Number
 Unmarried
 (Hereinafter referred to as the ‘Seller’)
 Address: 151 King Street Durban.

In relation to a juristic person Hutchinson advises that the contract must include who would be representing the company and uses the following example to describe a juristic person:⁹⁷

X (Pty) Ltd
 A public company established in terms of the Companies Act 71 of 2008
 With registration number ...
 Hereinafter represented by ...
 duly authorised thereto by a resolution
 (Hereinafter referred to as ‘X’)
 Address: 112 Park Street, Willow Glen, Pretoria

These are hardly requirements for a valid enforceable contract. As seen in this chapter, the inclusion of a person’s status is likely either a remnant borrowed from the drafting of civil pleadings or an attempt to establish capacity which has been shown cannot be done through the drafting of a contract. Further to this, if one considers the law of agency, it is not necessary to include the details of the agent. The provisions of the Companies Act⁹⁸ and Close Corporation Act⁹⁹ further illustrate this. It may be advisable to include some statement or details that a person is acting as an agent in order to avoid personal liability, but it is hardly a requirement for a valid contract.

As such, no reference to a person’s status needs to be made in a written contract at all. Such a statement does not achieve anything more, nor can it change the actual facts. A person who signs

⁹⁷ *Ibid.*

⁹⁸ S26(7) Companies Act.

⁹⁹ S54 Close Corporation Act.

a contract with no contractual capacity would result in the contract being void. It follows naturally that if the contract is void, any provisions contained in the contract would also be void.

In this instance drafters attempt to create certainty by including statements of fact in the contract. If the statement recorded in the document is wrong, then having recorded the incorrect statement into the contract will not change the factual reality. The attempt to create or confirm contractual capacity and repeating existing law will only create ambiguity and confusion. In doing this, superfluous elements are included in the contract. Drafters must draft the agreement in line with substantive law. Where mechanisms that fall outside the scope of substantive law are included in the document, it will only create confusion and uncertainty. The substantive law, therefore, forms the base of the drafting of contracts.

CHAPTER 8

FORMALITIES

8.1	INTRODUCTION.....	150
8.2	FORMALITIES REQUIRED BY THE PARTIES	151
8.2.1	WRITING AND SIGNATURES	153
8.2.2	WITNESSING	157
8.2.3	VARIATION AND WAIVERS	160
8.3	FORMALITIES REQUIRED BY LAW.....	163
8.3.1	WRITING AND SIGNATURES	164
8.3.2	WITNESSING	166
8.3.3	NOTARISING AND REGISTRATION	167
8.3.4	PERMISSIONS	169
8.3.5	SPECIFIC REQUIREMENTS	171
8.4	CONCLUSION.....	173

8.1 INTRODUCTION

Historically contracts needed some form of outward manifestation to signify an agreement. This outward expression of the agreement was done through a formalistic set of words or specific forms of writing, failing which the contract was unenforceable.¹ South African law does not require this in a contract.² As a general rule there are no formalities required for a valid enforceable contract.³ This, however, does not mean that there are no formalities for contracts.

¹ Van der Merwe *et al. General Contract Principles* (2012) 129; Fouché *Legal Principles of Contracts and Commercial Law* (2015) 91. See ch 3.

² See ch 3.

³ *Conradie v Rossouw* 1919 AD 279 288, indicates that an agreement between two or more persons entered into seriously and deliberately is enforceable by action; Hutchinson *The Law of Contracts in South Africa* (2012) 159.

Formalities exist either in law or as required by the parties themselves.⁴ Insofar as formalities are required, they must be complied with. Formalities, in this context, are those required for the conclusion of a contract. They can take the form of formalities that facilitate proof of the agreement (which in itself does not affect the validity of the agreement) and those formalities which are required for the validity of a contract.

8.2 FORMALITIES REQUIRED BY THE PARTIES

Formalities required by the parties are the internal requirements set out in a contract, which the parties have prescribed. Parties may have one of two intentions in mind when entering into a written contract.

The parties may intend to have a written record of their verbal agreement,⁵ in which case an agreement already exists prior to the document. The courts will view this as the default position, unless proven otherwise.⁶ In other words, the document only provides proof of the agreement and does not affect the validity of the contract.⁷

The parties may also intend that there will be no agreement until the parties have reduced the agreement to writing and have signed it.⁸ In which case the internal formalities require the

⁴ Hutchinson (2012) 157. Take for example *Lepogo Construction (Pty) Ltd v the Govan Mbeki Municipality* (623/13) [2014] ZASCA 154 (29 September 2014) [20], where a clause stated that an agreement would only come into effect on the date that the tenderer receives a fully completed version of the contract document. This clause stipulates the procedure for the conclusion of the contract and advises when the contract would be binding.

⁵ Cornelius “Handtekening as Vereiste vir die Geldigheid van ‘n Kontrak” *De Jure* (2012) 383.

⁶ Hutchinson (2012) 162; *Goldblatt v Fremantle* 1920 AD 123.

⁷ Cornelius (2012) 383; *Avtjoglou v First National Bank of Southern Africa Ltd* [2002] 2 All SA 1 (C) [23].

⁸ *Goldblatt v Fremantle* 124.

agreement to be written and signed to become valid. In this instance the written contract does not only provide proof of the agreement, but is a requirement for the validity of the contract.

The intentions of the parties are established in the document.⁹ Typically, the parties' intentions are specified in the preamble, although this can also be found in other provisions of the document. Typical wording includes that the parties have agreed on certain terms which they have reduced to writing. This usually indicates that a verbal agreement has been concluded prior to the written agreement. In such a case the parties have put their agreement in writing to facilitate proof of an agreement that existed prior to the signing of the document. If the parties do not sign the document, there will still be a valid contract, albeit not a written one. Therefore, placing the contract in writing and having it signed by the parties does not affect the validity of the contract, but is intended to facilitate proof of the agreement.

In other preambles typical wording can include that the provisions in the document will not be valid or enforceable until the parties have signed or executed the document.¹⁰ In this instance no verbal agreement exists before the parties enter into the written agreement. For the contract to be valid the parties require the external manifestation of their agreement. This external manifestation is achieved by having the contract in writing and signed or executed by the parties, together with any other formalities the parties may require. The consequence is that an unexecuted or unsigned document will not fulfil the required formalities and would, therefore, render the agreement invalid.

⁹ Christie & Bradfield *The Law of Contracts in South Africa* (2011) 112, indicate that there are in fact three categories: (i) a memorandum which facilitates proof of an oral agreement, (ii) writing which embodies the agreement of the parties, but is not signed, and (iii) a written document which is to be the agreement between the parties and which has been signed by the parties.

¹⁰ Kerr *The Principles of the Law of Contract* (2002) 139, similar wording includes that "there will be no binding obligations until the terms have been reduced to writing and signed."

8.2.1 WRITING AND SIGNATURES

The parties may require a contract to be in writing and signed as an internal formality. In such circumstances the parties intend the agreement to be, at the very least, in writing. Traditionally the written contract would either be written or typed with ink or be in some or other written form.¹¹ The written document also includes any form of data message, unless the parties have specifically excluded its application.¹² Data messages include any data in an electronic form and have been found to include emails.¹³ Whether the contract is contained on paper or in some electronic manner, the principles of drafting a contract remain the same when parties require the contract to be in writing. Some of these general principles include:

- (i) The material terms of the agreement should be in writing, and non-essential terms need not be incorporated in writing.¹⁴ This is linked to the requirement of consensus, as the written document should include the terms on which the parties are willing to contract.
- (ii) All the terms of the agreement need not be embodied in one document, but can be incorporated by reference.¹⁵ This means that an agreement need not be in one document and allows annexures and schedules to be incorporated into the contract.

¹¹ Sharrock *Business Transactions Law* (2011) 116, indicates that writing includes typing, printing or any other mode or reproducing of words in a visible form.

¹² S4 of the Electronic Communications and Transactions Act 25 of 2002 specifically excludes instances of alienation of land or long-term lease of impossible property; *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* [2015] JOL 32555 (SCA), contained a so-called standard non-variation and non-cancellation provision which stated that the contract could not be varied or cancelled without it being reduced to writing and signed by the parties. It was found that emails exchanged between the parties constituted a valid variation of the contract as the email constituted writing and the names found at the bottom of the emails constituted signatures in terms of s13(3) of the Electronic Communications and Transactions Act.

¹³ *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*.

¹⁴ *Johnson v Leal* 1980 (3) SA 927 (A) 937-938; Sharrock 116-117.

¹⁵ *Johnston v Leal* 938; *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) 18; s1 of the Alienation of Land Act 68 of 1981.

- This can be done in various ways and but the mere referral to such a document would be sufficient.¹⁶
- (iii) Generally, the variation to material terms of the contract must be in writing to be effective¹⁷
 - (iv) The written document must be sufficiently detailed and precise for a party to determine the provisions.¹⁸ This echoes the requirements of offer and acceptance as the offer must be of sufficient detail to determine what is being offered.¹⁹

Contracts need not be in writing or signed unless the parties require such formalities. As seen, formalities have one of two effects, writing and signature either function as proof of the agreement, or they impact on the validity of the agreement. It has become customary for written contracts to include signatures.²⁰ Signatures are the outward manifestation of the parties' acceptance to the agreement and symbolises that the document is the record of the agreement reached by the parties. It therefore is the symbol of the consensus of the parties.²¹

When parties require a contract to be in writing, it naturally means that that the parties also require the contract to be signed. Signing starts with the physical act of signing a document.²² A contract can be signed by making a mark, initialling, through a cross or even thumb print. The

¹⁶ Sometimes the words “specifically incorporated” are used to signify the incorporation of such documents.

¹⁷ *Neethling v Klopper* 1967 (4) SA 459 (A) 465; *Ferreira and Another v SAPDC (Trading) Ltd* 1983 (1) SA 235 (A).

¹⁸ This appears to have a closer link to the requirements of possibility and certainty as well as consensus, rather than the requirements of formalities.

¹⁹ See ch 6 & 10.

²⁰ See ch 6.

²¹ *Ibid.*

²² Friend *Signatures in Banking Law* LLM (2014) 16; The Collins dictionary defines the term “signature” as the name of a person or a mark or sign. It is the act of signing one’s own name and comes from the Medieval Latin term *signatura* or the Latin *signāra* (<http://www.collinsdictionary.com/dictionary/english> accessed 1 August 2015).

courts have taken a pragmatic view in terms of signing a contract.²³ It has even been found that the names appearing at the end of an email would constitute a signature.²⁴ Unless the parties require a signature to be present it is not strictly necessary for the validity of the agreement. Whether this is a symbol or a requirement will also depend on the type of agreement the parties have entered into.

It is not necessary for a signature block to be placed at the end of a document or that each page needs to be signed.²⁵ If an agreement has a dedicated space for signature, the parties should sign at that space. The reason for this is that the parties have required that the signature must be placed in a certain space provided for in the document. If it is placed anywhere else it may appear that they did not have the required intention to enter into the agreement.²⁶ The parties are therefore required to sign in the signature block as provided in the document. Signature blocks can be simplistic by just having a space for the party to sign. For example:²⁷

Hastings Waste Management Inc.

By: _____

Name:

Title:

²³ *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*; Friend 4, indicates that the form and function of a signature will differ depending on the document being signed. The process of signing starts with a physical act of appending one's signature.

²⁴ *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*.

²⁵ Sharrock 119.

²⁶ Sharrock 119; *D'Arcy v Blackburn Jeffereys and Thorp Estate Agency* [1985] 3 All SA 289 (E).

²⁷ Adams *A Manual of Style for Contract Drafting* (2008) 95.

Signature blocks can also take more complicated forms, so as to include the date of the signature.

For an example:²⁸

Date: _____	By: _____
	Benjamin Green
	Chief Executive Officer
Date: _____	By: _____
	Laura Black
	President

Signature blocks can have other variations to include the place of signing as well. There is no pre-set formula that the form and style of the signature block should take, other than it should be a place for the parties to sign the agreement.²⁹ Whichever form it takes, the signature block's purpose is to indicate the party's assent to the agreement.

It has also become customary to initial each page at the bottom right hand corner of an agreement. This is not necessary unless it is required by the parties. This practice likely came from the signing of affidavits and documents in the litigation process. It is, however, a useful tool to signify acceptance of each page and to prevent fraud by switching pages in the agreement post-signing. Initialling, however, is not generally required for the validity of the contract.

The principles discussed around the formalities required by the parties for writing and signature are similar to the formalities provided by law for writing and signature.

²⁸ Adams 100.

²⁹ Cartwright *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (2014) 119, mentions that there is a practice in France to sometimes write “*Bon Pour Accord*” or “*Lu et Approuve*” before signing a document. Since 1980 this is no longer a requirement, but seems to have remained in many documents as drafting practice.

8.2.2 WITNESSING

There is a preconceived notion that a written contract requires witnesses to be valid and written agreements seem to include a space for witness signatures, almost as a standard. This is called an attestation provision.³⁰ Save for those required by formalities of the parties, witnesses need not sign the document. Witnessing is one of the rituals that developed with the written contract.³¹ There are instances where witnesses would be required by the parties and would indicate such a requirement on the document. Whether witnesses are required for validity of the contract is obviously linked to the intentions of the parties. Everything that is included in a contract has a specific purpose and indicators of the intention of the parties in relation to witnessing are found in the attestation provision and the signature block.

Where the document is proof of an existing agreement, a witness signature will not affect the validity of the agreement.³² In instances where the written contract must be signed or executed for the validity of the agreement, three possible scenarios exist.

The first is where the witness space has been included in the signature block without mentioning witnessing in the attestation provision. For example:³³

³⁰ Cartwright 124.

³¹ Cornelius (2012) 387.

³² Cartwright 124, this is also the case with simple contracts in English law, however, deeds would require witnessing.

³³ Adapted from Hutchinson (2012) 420.

THUS DONE AND SIGNED AT on the day of
20.....:

WITNESSES:

1.

 on behalf of XXX

2.

WITNESSES:

1.

 on behalf of the Client

2.

In such a case, it is arguable that the parties did not require witnessing. Therefore, if a witness does not sign, it would not impact on the validity of the contract.

The second is where a witness space has been included in the signature block and the attestation provision mentions witnessing.³⁴ This is usually indicated by words such as, “signed and witnessed” or “as witnessed hereunder” or some variation thereof. For example:³⁵

THUS DONE AND SIGNED AT on the day of
20..... in the presence of the undersigned witnesses:

WITNESSES:

1.

 on behalf of XXX

2.

³⁴ Adams 393, for example: “IN WITNESS WHEREOF, the undersigned have duly executed this Unanimous Written Consent on the 3rd day of May, 2008”.

³⁵ Adapted from Hutchinson (2012) 420.

WITNESSES:

1.

 on behalf of the Client
2.

These types of descriptions in the attestation provision and the witness space in the signature block indicate that the parties require witnesses to sign as a formality to the contract. Should the witnesses not sign in the witness space, it would possibly result in the contract not complying with the internal formalities and consequently would affect the validity of the contract.

The third possibility is where the attestation provision refers to witnessing, but no witness space is included in the signature block. For example:³⁶

THUS SIGNED AND WITNESSED AT on the day of
20.....:

.....
 on behalf of the Client

.....
 on behalf of XXX

This indicates that the agreement needs to be witnessed, but that the witnesses need not sign the agreement as proof of their witnessing. Therefore, the failure of witnesses signing the document will not impact on the validity of the agreement.

A witness can be anyone that is competent to testify in court. The function of a witness is to witness the signature of a party when signing the agreement. The purpose is to ensure that the party signing the agreement cannot, at a later stage, dispute his signature or allege that he had not

³⁶ Adapted from Hutchinson (2012) 420.

signed the document. Witnesses, therefore, provide proof that a party had in fact signed the agreement.

8.2.3 VARIATION AND WAIVERS

The parties may include provisions that require formalities for the amendment, change and waivers to the provisions of the agreement.³⁷ In such instances the formalities must be adhered to. The general rule is that parties are free to amend the contract provided that all the requirements of the contract are complied with.³⁸ It is possible to place limitations on variations to a contract, thereby including specific formalities in the contract.³⁹ This is done by including a non-variation provision.⁴⁰ The purpose of the provision is that the parties cannot vary or amend a contract without reducing such a variation or amendment to writing and having this signed by the

³⁷ Cartwright, indicates that the term “variation” in this context means the contractual modification of one or more of the terms of a contract. Fosbrook & Laing *A-Z Contract Clauses* (2014) A.688, provide an example of such a variation provision, “Any amendment or alteration to this Agreement must be in writing and signed by an authorised signatory of each of the parties.”

³⁸ Also known as an entrenchment clause. Hutchinson (2012) 165, provides an example of a standard non-variation provision reading “No variation to this agreement shall be of any force or effect unless reduced to writing and signed by the parties to this agreement.”; *Garlick Ltd v Phillips* [1949] 1 All SA 273 (A), through the landlord’s conduct he varied the terms of the agreement and agreed to the late payment of the rental; *Clemans v Russon Brothers (Pty) Ltd* [1970] 4 All SA 161 (E) 165, where there is no statutory or express contractual provision that requires varying of a contractual term to be in writing, the provision may be varied verbally, provided that all other requirements of the contract have been complied with.

³⁹ Christie & Bradfield 463; *Israel v Chabra* 12 NY.3d 158 (2009) 163, refers to these types of provisions as “no oral modification” provisions. This changes the common law position of the USA which is summed up and quotes *Beatty v Guggenheim Exploration Co* 225 NY 380 (1919) 387-388, “Those who make a contract, may unmake it. The clause which forbids a change may be changed like any other. The prohibition of oral waiver may itself be waived. Every such agreement is ended by the new one which contradicts it ... What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation, self-imposed can destroy their power.” This seems to echo the sentiments of SA *Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).

⁴⁰ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) 1, confirmed the validity of a non-variation provision.

parties. As the purpose of a written contract is to facilitate proof, it seems natural that a variation to the contract should also be in writing to also facilitate proof of such variations.⁴¹

As such, the purpose of a non-variation provision is to prevent disputes and problems of proof between the parties.⁴² By including such a provision in the contract, the parties limit their own right to vary the terms of a contract and create additional formalities.⁴³ It has been found that a non-variation provision should protect itself from verbal variation as well.⁴⁴ A non-variation provision must be interpreted restrictively because it limits a party's freedom to contract and will not be enforced if it is against public policy.⁴⁵ This usually forms part of the so-called boilerplate provisions.

A waiver is sometimes used to overcome a non-variation provision, as a waiver can sometimes constitute a variation to the agreement, although the two concepts are different. A variation relates to a change in the agreement by some form of consensus between the two parties, whereas a waiver is an abandonment of a legal right by a party who holds such a right.⁴⁶ Waivers are not limited to the operation and application of the non-variation provision, but the principles discussed are applicable to other waivers found in the agreement.⁴⁷

⁴¹ McLennan "The Demise of the 'Non Variation' Clause in Contract?" *SALJ* (2001) 118, which mentions that the purpose of a non-variation provision is to protect against disputes and to overcome the difficulties of proof that are found in verbal agreements.

⁴² Hutchinson (2012) 163.

⁴³ *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren*, confirmed that these types of provisions are valid, however, to prevent the non-variation provision itself from being amended orally, the requirements of the non-variation provision must also apply to itself; *Brisley v Drotsky*, confirmed the position of *Shifren*.

⁴⁴ *SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren*.

⁴⁵ Hutchinson (2012) 167.

⁴⁶ Hutchinson (2012) 166; *Sasfin v Beukes* 1989 (1) SA 1 (A); *Sadar Investments (Pty) Ltd v Caldeira* 1971 (1) SA 193 (O).

⁴⁷ See ch 14.

After having obtained rights under an agreement it seems unlikely that parties would willingly lose such rights.⁴⁸ As a result there is a presumption against waiver. If a party has waived their rights, they must clearly know what the rights are that they are waiving.⁴⁹ A delay in enforcing a right is not necessarily a waiver, but can be an indication of it.

It seems that the above is one of the reasons why a boilerplate has found its way into contracts.⁵⁰ By limiting a waiver and requiring it to be in writing, the parties will be bound by such requirements.⁵¹ The inclusion of such a boilerplate seems odd with respect to the presumption against a waiver and that a party must know exactly what right he has waived before it becomes valid, but is likely to facilitate proof of such actions. It is also likely that such a non-waiver is to create further certainty and bolster the non-variation provision.

Finally, parties may agree to terminate the contract at any time.⁵² To ensure certainty, parties can prescribe formalities regarding how and when a contract may be terminated.⁵³ These provisions are interpreted restrictively and only apply to consensual terminations and to contracts

⁴⁸ Christie & Bradfield 457.

⁴⁹ Christie & Bradfield 458.

⁵⁰ Hutchinson (2012) 171, describes a non-waiver provision in which “no latitude or indulgence shown or extension of time granted by the creditor or any partial performance or occasion should be construed as a waiver of his or her rights to insist upon strict compliance with the terms of the contract or his or her remedies in respect of any prior or subsequent breach of the contract.” In Hutchinson “Non Variation Clauses in Contract: Any Escape from the Shifren Straitjacket?” *SALJ* (2001) 723, a waiver is explained as a deliberate abandonment, renunciation or surrender of an existing right.

⁵¹ Hutchinson (2001) 723, explains as follows: (i) a waiver of accrued rights out of a breach of contract, (ii) a discharge of an obligation, such as payment, and (iii) an agreement to suspend the capacity to enforce a right accruing (*pactum de non potendo*), does not constitute a waiver; *De Villiers and Another NNO v BOE Bank Ltd* [2004] 2 All SA 457 (SCA), required a waiver of a suspensive condition to be in writing; *Academy of Learning (Pty) Ltd v Hancock and Others* 2001 (1) SA 941 (C) [35], contains for example: “This agreement constitutes the entire agreement between the parties and no interpretation, change, termination or waiver of the provision of this agreement nor any indulgences granted under this agreement will be binding upon the parties unless in writing and signed by both the franchisee and the franchisor.”

⁵² Hutchinson (2012) 164.

⁵³ This is sometimes called a non-cancellation provision.

terminated due to breach.⁵⁴ To ensure that the termination occurs in writing it must be linked to a non-variation clause.⁵⁵

8.3 FORMALITIES REQUIRED BY LAW

As with internal formalities, formalities required by law can have two purposes. Either the formalities are there to be a record of proof of the agreement or it may be intended to be a requirement for the validity of the contract.⁵⁶ To establish which one applies, the provision of the legislature must be considered. Generally, no formalities are required for a contract. As such, where law requires formalities, the legislative requirements will only deviate from the common law position insofar as the legislature expressly states so. Statute may require any number of formalities which includes: (i) writing,⁵⁷ (ii) signature, (iii) notarising, (iv) registration, (v) witnessing, (vi) permissions, (vii) specific requirements of contractual provisions to be either included or excluded, or (viii) a combination of these requirements. Depending on the wording of the legislation, these formalities can be viewed as symbols used to prove the agreement or requirements which affect the validity of the agreement.

⁵⁴ Hutchinson (2012) 165.

⁵⁵ Hutchinson (2012) 167, provides the following example: “No variation or consensual cancellation of this contract shall be of any force or effect unless reduced to writing and signed by the parties.”; *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* [1975] 3 All SA 282 (T). See also *Academy of Learning (Pty) Ltd v Hancock and Others*.

⁵⁶ *Estate Du Toit v Coronation Syndicate Ltd and Others* 1929 AD 219, indicates that the formality of a written contract is to have certainty, a written document provides such certainty and avoids future disputes about what was really agreed between the parties.

⁵⁷ *Visser v Theodore Sasson & Son (Pty) Ltd* [1982] 1 All SA 362 (C) 364, indicates that a material term which the law requires to be in writing can only be varied in writing.

8.3.1 WRITING AND SIGNATURES

In most contracts relating to the alienation of land or some form of interest in immovable property it appears writing and signatures are required for the contract to be valid. For example:⁵⁸

(i) the alienation of land under the Alienation of Land Act,⁵⁹ (ii) any acquisition of share or agreement under the Share Blocks Control Act,⁶⁰ (iii) the alienation of time-share interest under the Property Time-Sharing Control Act,⁶¹ (iv) the alienation of housing interest under the Housing and Development Schemes for Retired Persons Act,⁶² and (v) agreements of surety under the General Law Amendment Act.⁶³

In these examples the legislature expressly requires the agreement to be in writing and signed by the parties, failing which the validity of the agreement would be impacted. When drafting contracts for these types of agreements, the drafter would ensure that there are signature blocks

⁵⁸ *Wilken v Kohler* 1913 AD 135 142, indicates that contracts for the sale of fixed property are generally of considerable value and complex. The legislature requires such contracts to be reduced to writing to avoid litigation as well as perjury or fraud. See also *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* [1948] 2 All SA 45 (A).

⁵⁹ S2(1) of the Alienation of Land Act 68 of 1981 states that “No alienation of land after the commencement of this section shall ... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”; *Philmatt (Pty) Ltd v Mosselbank Development CC* 1996 (2) SA 15 (A) 25; *Gowar Investments v Section 3, Dolphin Coast Medical Centre* 2007 (3) SA 100 (SCA); *Hoeksma and Another v Hoeksma* 1990 (2) SA 893 (A); *Kay v Kay* 1961 (4) SA 257 (A).

⁶⁰ S16 of the Share Blocks Control Act 59 of 1980 states that “A contract for the acquisition of a share and a use agreement entered into, and any amendment or cession of any such contract or agreement, after the commencement of this Act, shall be reduced to writing and signed by the parties thereto or by their representatives acting on their written authority, failing which the contract, agreement, amendment or cession, as the case may be, shall, ... be of no force or effect.”

⁶¹ S2(1) of the Property Time-Sharing Control Act 75 of 1983 states that “No alienation of a time-sharing interest shall ... be of any force or effect unless it is contained in a contract signed by the parties thereto or by their agents, acting on their written authority.”

⁶² S2(1) of the Housing Development Schemes for Retired Persons Act 65 of 1988 states that “No alienation of a housing interest to a retired person shall ... be of any force or effect, unless it is contained in a contract signed by the parties thereto or by their agents acting on their written authority.”

⁶³ S6 of the General Law Amendment Act 50 of 1956, states that “No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety...”; *Creutzburg and Another v Commercial Bank of Namibia Ltd* [2006] 4 All SA 327 (SCA).

in the agreement, and sometimes would also make reference to the specific section of the relevant legislation in the testimonium provision to show compliance to it.

There are some instances where the legislature requires an agreement to be in writing and signed by the parties, but does not influence the validity of the contract. These instances facilitate proof of the contract. For example: (i) agreements for construction and sale of a house under the Housing Consumers Protection Measures Act,⁶⁴ and (ii) surrogate motherhood agreements under the Children's Act.⁶⁵

In the above instance of surrogate motherhood agreements the legislature is silent on the impact of validity, should the formalities not be complied with. This indicates that writing and signature are only included for the sake of proof of the agreement. In the case of construction and sale of a house under the Housing Consumers Protection Measures Act, the failure to comply with certain of the formalities will not render the contract invalid.⁶⁶ Similarly, when drafting, the document would contain a signature block for both parties to sign and may include reference to the specific section in the testimonium provision or elsewhere in the document.

⁶⁴ S13(1) of the Housing Consumers Protection Measures Act 95 of 1998 states that "A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder - (a) shall be in writing and signed by the parties; (b) shall set out all material terms, including the financial obligations of the housing consumer; and (c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body." Further to this s(7)(a) states that the homebuilder may not "demand or receive from a housing consumer any deposit for the construction or sale of a home unless an agreement between the home builder and the housing consumer has been concluded in terms of subsections (1) and (2)".

⁶⁵ S292(1)(a) of the Children's Act .

⁶⁶ S3(3) states that "The failure to comply with a provision of subsection 1(a) and (c) shall not render an agreement referred to in that subsection invalid."

It makes little difference when drafting, as to whether the requirement facilitates proof or impacts the validity of the contract, as the manner in which the requirements are addressed is the same and will follow similar signature block structures as set out in the internal formalities.

8.3.2 WITNESSING

Certain formalities require that the signatures of parties are witnessed.⁶⁷ In these instances the document would need to be in writing and also signed by the parties for it to be witnessed.⁶⁸ For example: executory donations under the General Law Amendment Act,⁶⁹ must be in writing and signed by the donor in the presence of two witnesses.⁷⁰ The donor only needs to sign in the presence of two witnesses and it does not expressly require that the witnesses need to sign the document themselves.⁷¹ It is not, in this case, required for the witness to sign the agreement, but as drafters favour certainty, a space for the witness signature would likely be included in the written document. It will take a similar form as witnessing takes with the internal formalities of a contract.

⁶⁷ Cartwright 124, says witnessing is the process of providing independent verification of the transaction or a confirmation that such transaction took place.

⁶⁸ *Shah v Shah* [2001] 4 All ER 138, illustrates that the law required the agreement to be attested by witnesses, but the witnesses were not present when one of the parties signed. The court found that the party was estopped from relying on the fact that the witnesses were not present as the other party had reasonably believed, and the impression was created that the parties signed in front of a witness; *Briggs and Others v Gleeds (Head Office) (A Firm) and Others* [2014] EWHC 1178 (Ch) (15 April 2014), indicates that the law required the agreement to be attested by witnesses and the parties had failed to do so. The law was designed to achieve certainty and could not be overcome by the parties not having known of this requirement.

⁶⁹ General Law Amendment Act 50 of 1956.

⁷⁰ S5 states that “No donation concluded after the commencement of this Act shall be invalid merely by reason of the fact that it is not registered or notarially executed: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or by a person acting on his written authority granted by him in the presence of two witnesses.”

⁷¹ The word “attesting” or “attestation” would indicate that a witness needs to sign.

8.3.3 NOTARISING AND REGISTRATION

The legislature may also require certain transactions to be notarised.⁷² This is usually to give effect to the agreement in relation to third parties and would not normally impact on the validity of the agreement *inter partes*. Should notarising be required, the agreement must be recorded in writing and signed by both parties. Sometimes the legislature will also require registration of the contract after it has been notarised. For example:

- (i) Antenuptial agreements should be in writing, signed by both parties and notarised. The antenuptial agreement must then be registered within three months for it to be effective against third parties.⁷³ An oral antenuptial agreement is valid between the parties who entered into such a verbal agreement, but for it to be effective against third parties it must be registered.⁷⁴
- (ii) Leases, in general, are not regulated by legislation, but where a lease runs for a period longer than ten years, the Formalities in Respect of Leases of Land Act⁷⁵ requires that the lease be registered for it to be effective against third party creditors.⁷⁶ Where such a lease has not been registered it would still be considered valid between the parties.

⁷² Cartwright 125, says if the document requires authentication, this would be done by a notary. This creates a higher degree of proof and the use thereof is typically found in civil law countries.

⁷³ S87 (1) of the Deeds Registries Act 47 of 1937 states that “An antenuptial contract executed in the Union shall not be registered unless it has been attested by a notary public and unless it has been tendered for registration in the Deeds Registry within two months after the date of execution ...”.

⁷⁴ *Ex Parte Spinazze and Another NNO* [1985] 2 All SA 305 (A) 308, the common law does not require an antenuptial agreement to be in writing or even registered. If the parties do not follow the formalities the antenuptial agreement is still valid *inter partes*, but if it is not validly registered it is of no force or effect against a party that is not a party thereto.

⁷⁵ Formalities in Respect of Leases of Land Act 18 of 1969.

⁷⁶ S1(2) states that “No lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than ten years, shall, if such lease be entered into after the commencement of this Act, be valid against a creditor or successor under onerous title of the lessor for a period longer than ten years after having been

- (iii) Parenting plan agreements under the Children’s Act⁷⁷ must be in writing and signed by both the parties.⁷⁸ It can either be registered or made an order of court, but this appears to be optional.⁷⁹ It then appears that, should the contract not be registered or made an order of court, it would not affect the validity of the contract.
- (iv) Learnership agreements under the Skills Development Act⁸⁰ must not only be in the prescribed format, but must also be registered with the relevant SETA.⁸¹ Such registration does not affect validity other than the enforceability with third parties.
- (v) Parental responsibility agreements under the Children’s Act⁸² must be in the prescribed form with the prescribed particulars included.⁸³ A parental responsibility agreement only takes effect once registered, in which the validity of the agreement is dependent on its registration.⁸⁴
- (vi) Mineral rights and leases are regulated under the Mining Titles Registration Act⁸⁵ and require that agreements relating to leasing such rights must be in writing and notarised, as well as registered.⁸⁶

entered into, unless - (a) it has been registered against the title deeds of the leased land; or (b) the aforesaid creditor or successor at the time of the giving of credit or the entry into the transaction by which he obtained the leased land or a portion thereof or obtained a real right in respect thereof, as the case may be, knew of the lease.”.

⁷⁷ Children’s Act.

⁷⁸ S34 (1)(a) states that the agreement “must be in writing and signed by the parties to the agreement”.

⁷⁹ S34 (1)(b) states that the agreement “... may be registered with a family advocate or made an order of court.”

⁸⁰ Skills Development Act 97 of 1998.

⁸¹ S17(3) states that a “a learnership agreement must be in the prescribed form and registered with a SETA in the prescribed manner.”

⁸² Children’s Act.

⁸³ S22(3) states that “a parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars.”

⁸⁴ S22(4).

⁸⁵ Mining Titles Registration Act 16 of 1967.

- (vii) Articles of clerkship under the Attorneys Act⁸⁷ requires the agreement of articles to be registered and lodged with the relevant law society within two months of the date the agreement.⁸⁸
- (viii) Other contracts that require registration are mortgages,⁸⁹ special notarial bonds⁹⁰ and assignment of patents.⁹¹

In relation to notarising, a separate signature space will be provided for the notary. However, when it comes to registration there may be a declaration made in the document indicating the registration must occur, or even an obligation on the parties to ensure that such a registration happens. Where registration is a symbol for the agreement, such obligations would be actionable between the parties. However, where the formalities are a requirement for the validity of the agreement, such a provision would not be enforceable where the contract is invalid due to non-compliance with such registration.

8.3.4 PERMISSIONS

The Matrimonial Property Act details the various requirements for one spouse to provide his or her consent in relation to specific transactions. The Act distinguishes between such consents that

⁸⁶ S16(1) states that “every deed executed or attested by the Director-General, or attested by a notary public and required to be registered in the Mineral and Petroleum Titles Registration Office, and made by or on behalf of or in favour of any person, shall state the full name and identity number or registration number of the holder.”

⁸⁷ Act 53 of 1979.

⁸⁸ s5(1) states that “The original of any articles of clerkship or contract of service shall within two months of the date thereof be lodged by the principal concerned with the secretary of the society of the province in which service under such articles or contract of service is performed.”

⁸⁹ S3 of Act 47 of 1937.

⁹⁰ S1(1) of Security by means of Movable Property Act 57 of 1993.

⁹¹ S60 (1) of Patent Act 57 of 1978.

are required in writing⁹² and those that need not be in writing.⁹³ When drafting, the consent will be recorded in the document in a separate signature space with introductory wording to signify the consent and would be used irrespective of whether the legislation requires the consent to be in writing or not. Some consent can be ratified after the fact,⁹⁴ while others must be given for each occurrence.⁹⁵

Another example is where permission is required from the Reserve Bank to export money across border under the Exchange Control Regulations.⁹⁶ This type of permission is different to that detailed in the Matrimonial Property Act because the permission required is not from those who are party to the agreement. In this case, the permission is required from a third party where it is unlikely that such a third party will sign the document. For this reason drafters would include some form of condition to influence the operation of the obligation,⁹⁷ which would be dependent on the permissions received from the third party. Similarly the Administration of Estate Act

⁹² S15(2) for example: (i) alienate, mortgage, burden with a servitude or transfer any real right in any immovable property; (ii) alienate, cede or pledge any shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits, or similar assets of an investment nature, (iii) alienate or pledge any jewellery, coins stamps, paintings or other assets which are used for interments, (iv) withdraw monies from a bank account, (v) enter into a consumer credit agreement, (v) enter into a contract under the Alienation of Land Act, (vi) bind himself as surety.

⁹³ S15(3) for example: (i) alienate, pledge or otherwise burden any furniture, or other effects of the common household, (ii) receive money in relation to remuneration, earnings, bonus, allowance, royalty, gratuity by virtue of his profession, business or services and may also not suffer loss or damage to such income, and (iii) donate to any other person.

⁹⁴ S15(4) consent can be ratified in instances of s15(2)(b), (c)-(g) and s15(2)(3).

⁹⁵ S15(5) requires consent for each occurrence in instances of s15(2) (a), (b), (f)-(h).

⁹⁶ Reg 10(1)(c) of the Exchange Control Regulation states that “No person shall, except with permission granted by the Treasury and in accordance with such conditions as Treasury may impose ... enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic.” *Pratt v First Rand Bank* [2009] 1 All SA 158 (SCA).

⁹⁷ This would usually be a suspensive condition in which the operation of the obligations would be suspended until the permission of the Reserve Bank has been obtained.

requires the consent of the Court or the Master in instances where a tutor or curator wishes to alienate or mortgage immovable property of a minor.⁹⁸

8.3.5 SPECIFIC REQUIREMENTS

The legislature may also require that a specific type of contract has specific provisions included or excluded. For example:

- (i) Housing and Development Schemes for Retired Persons Act details requirements for the content of the contract.⁹⁹
- (ii) National Credit Act¹⁰⁰ prescribes a set form that all small¹⁰¹ and intermediate¹⁰² credit agreements must take. As the legislature dictates what form such credit agreements would take it would invalidate the agreement if such a requirement is not followed.
- (iii) Franchise agreements are regulated under the Consumer Protection Act,¹⁰³ which requires franchise agreements to be written and signed by the franchisee. In this case the legislature does not require both parties to sign the document, but only the

⁹⁸ S80 of the Administration of Estates Act 66 of 1965.

⁹⁹ S3(1).

¹⁰⁰ National Credit Act 34 of 2005.

¹⁰¹ S93(2) states that “a document that records a small credit agreement must be in the prescribed form.”

¹⁰² S93(3) states that “a document that records an intermediate or large agreement - (a) must be in the prescribed form, if any, for the category or type of credit agreement concerned; or (b) if there is no applicable prescribed form, it may be in any form that (i) is determined by the credit provider; and (ii) complies with any prescribed requirements for the category or type of credit agreement concerned.”

¹⁰³ Consumer Protection Act 68 of 2008.

- franchisee. All franchise agreements must also adhere to the requirements of plain language.¹⁰⁴
- (iv) Consumer Protection Act includes specific prohibitions of certain provisions in consumer contracts.¹⁰⁵ To include such a provision in a contract would not only fall foul of the requirement of formality, but could also not meet the requirement of legality and lawfulness.
- (v) Contingency fee agreements have a prescribed format in terms of the Contingency Fees Act¹⁰⁶ which must be signed by the client.¹⁰⁷ The Contingency Fees Act also prescribes certain minimum information that must be included in such an agreement.¹⁰⁸ Once again a prescribed format with minimum information must be used, but it is only required to be signed by one of the parties.

¹⁰⁴ S7(1) states that “a franchise agreement must - (a) be in writing and signed by or on behalf of the franchisee; (b) include any prescribed information, or address any prescribed categories of information; and (c) comply with the requirements of section 22.”

¹⁰⁵ S48(1) states that “(a) offer to supply, supply, or enter into an agreement to supply, any goods or services - (i) at a price that is unfair, unreasonable or unjust; or (ii) on terms that are unfair, unreasonable or unjust; (b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or (c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer - (i) to waive any rights; (ii) assume any obligation; or (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.” Furthermore 51(1)(a)(i) and 51(1)(b), prohibit terms to defeat the purpose of the Act or to waive any rights a consumer may have been granted under the Act.

¹⁰⁶ Contingency Fees Act 66 of 1997.

¹⁰⁷ S(1)(a) states that “a contingency fees agreement shall be in writing and in the form prescribed by the Minister of Justice, which shall be published in the Gazette, after consultation with the advocates’ and attorneys’ professions”; S(2) states that “a contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement.”

¹⁰⁸ S3(3).

- (vi) Housing Consumers Protection Measures Act details additional protections in terms of what would be implied in the contract.¹⁰⁹

There are no special mechanisms drafters use to deal with these requirements other than to comply with them. A drafter will ensure that the specific requirements are included in the agreement and will ensure that the specific requirements are excluded that are required to be excluded.

8.4 CONCLUSION

Formalities are those requirements that the law or the parties require for the conclusion of the contract. Sometimes parties may include additional requirements for the amendment or termination of the contract. Formalities can either be required for proof of the agreement or it could be included as a requirement for the validity of the agreement. There is not much difference on how drafters approach either of these requirements. The reason for this is that, irrespective of whether the formalities are a requirement or a symbol, they must be recorded in the agreement to provide the necessary level of certainty that is intended by placing a contract in writing.

The mechanisms used by the drafter to record formalities in written contracts include elements such as (i) the testimonium provision, (ii) the attestation provision, and (iii) the signature block. These mechanisms attempt to incorporate the requirement of formalities into the agreement. The

¹⁰⁹ S13(2).

manner in which these mechanisms are used indicates that substantive law forms the foundation for these mechanisms in written agreements.

CHAPTER 9

LEGALITY AND LAWFULNESS

9.1	INTRODUCTION.....	175
9.2	LAWFULNESS AND LEGALITY	177
9.2.1	CONTRACTS CONTRA STATUTE	180
9.2.2	CONTRACTS CONTRA COMMON LAW	183
9.2.3	CONSEQUENCES OF UNLAWFUL OR ILLEGAL CONTRACTS.....	186
9.3	ANALYSIS IN RELATION TO THE DRAFTING OF CONTRACTS	187
9.3.1	STATEMENTS, WARRANTIES AND REPRESENTATIONS	188
9.3.2	SEVERABILITY PROVISIONS	190
9.4	CONCLUSION.....	191

9.1 INTRODUCTION

One of the requirements for a contract is that it must be lawful and legal.¹ This requirement relates to the compliance of the contract and the parties with the requirements set down in law. A drafter must consider these legal requirements before and while drafting a contract. In essence, drafters have to consider the law to ensure that all provisions in the contract comply with the requirements of the law. The lawfulness of a contract can, therefore, be described as a factual and legal question in which the contract is either lawful or not. For the purpose of this chapter no distinction is made between the concept of lawfulness and legality, other than to note that legality is compliance with the form and letter of the law, while lawfulness is compliance with

¹ See ch 5; Voet *The Selective Voet: Being the Commentary on the Pandects* (1829) 2 14 6; Domat *The Civil Law in its Natural Order* (1850) 160.

the spirit or substance of the law. The one relates to an objective view while the other has subjective elements included.²

Illegality in a contract may result in the contract being found to be either void or unenforceable.³ There does not appear to be a general rule set down as to which contracts would be considered void and which would be considered unenforceable. Each contract would have to be considered based on the surrounding facts and the circumstances to determine whether the contract is either void or unenforceable. This presents a particular challenge to drafters as they must attempt to draft a contract to ensure that the contract is both valid and enforceable.

Drafters attempt to include provisions in a contract to avoid the effects of illegality. This is done by including undertakings, warranties or representations that: (i) the parties do not intend to, or will not, circumvent the law; (ii) the parties have complied, or will in the future, comply with the law; or (iii) the performance under the contract is, or will be, lawful. The difficulty with the inclusion of these types of provisions is that, where a contract is found to be void, such provisions themselves would also be void.⁴ To avoid this, drafters would include severability provisions to enable an unlawful provision to be severed from the contract and have the remaining provisions continue to be enforced. The inclusion of a severability provision is not the determining factor as to whether a provision will be severed or not.⁵

² In this chapter the term “lawfulness” and “legality” are used interchangeably.

³ *Yannakou v Apollo Club* [1974] 2 All SA 129 (A), provides an example where the court had to decide whether the transaction was illegal or merely unenforceable.

⁴ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] 3 All SA 291 (SCA), indicates that if the contract is found to be void, all the provisions contained in the contract would naturally be void.

⁵ *Bhengu v Alexander* [1947] 4 All SA 73 (N) 79, indicates that the severance of a provision from a contract is an act of the court and not an act of the parties.

This chapter will consider the manner in which these warranty and severability mechanisms are used to avoid falling foul of the requirement of legality and the effectiveness thereof in relation to the drafting of contracts.

9.2 **LAWFULNESS AND LEGALITY**

The requirement for lawfulness can operate at four levels in contracts, namely: (i) the lawfulness of the contract itself;⁶ (ii) the underlying reason or intent of the parties for entering into the contract;⁷ (iii) the performance of a party,⁸ and (iv) the outcome of a contract.⁹ These levels of lawfulness will apply whether it relates to statute or common law.

There are a number of presumptions that apply to the legality of contracts. The first is that a person who concludes a contract does so within the ambit of existing law.¹⁰ The second pertinent presumption is that the parties to the contract intend to conclude a legally valid contract.¹¹ As such, and as a starting point, the person who alleges illegality must prove it.

⁶ Hutchinson *The Law of Contracts in South Africa* (2012) 176; where this relates to the contract itself and any provision contained in the contract being unlawful.

⁷ Sharrock *Business Transactions Law* (2011) 103, indicates that regardless of whether the contract complies with all legal requirements, if both parties have an illegal purpose in mind, the contract will fail on the requirement of legality and lawfulness.

⁸ Hutchinson 176, shows that the contract itself may be legal, but the performance is illegal. An example of this is the sale of drugs. The agreement of sale is legal, but the performance being the actual sale of drugs is unlawful.

⁹ In this instance the agreement, intent and performance of the contract may be legal, but some specific outcome may be illegal. An example of this would be where the drafter included a provision where a certificate compiled by the creditor would be conclusive proof. The outcome of this provision would be illegal. See *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A).

¹⁰ Cornelius *The Principles of the Interpretation of Contracts* (2007) 125; D 2 14 48; D 45 1 80.

¹¹ Cornelius 125, this flows from the presumption that every person is law abiding and innocent of wrongdoing unless it has been proven otherwise; Sharrock 103.

The difference with illegality as opposed to the other requirements of a contract is that a court may take notice of the lawfulness of the contract without the parties raising it themselves.¹² The courts have the freedom to note unlawfulness should it be prevalent in the circumstances, or where the contract, on the face of it, is illegal.¹³ This seems to be unique to this requirement of a contract.

The court's discretion in this regard influences contract drafting. As a drafter attempts to control and regulate future events through the inclusion of certain provisions in a contract, such provisions will not always be in line with the requirement of legality. As such, a drafter has limited mechanisms at hand to control the situation of illegality. The question of illegality is a factual and legal question which cannot be amended by the provisions of a contract. The drafter must draft the contract in terms of the law, but even then it may not be enough to save the contract from the effects of illegality.¹⁴ Illegality is therefore a question of both fact and law, and the court can take notice of this fact, whether the parties raise it in the dispute or not. In taking notice and considering the requirement of lawfulness, the courts must also balance it with the freedom to contract. This underlying principle of *pacta sunt servanta* should, in general, be enforced but must also be balanced so that constitutional values are not circumvented through the freedom to contract.¹⁵ The courts, however, favour valid contracts and will attempt to give effect to the arrangements of the parties.

¹² *F&I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Africa Bpk* [1998] 4 All SA 480 (A).

¹³ *F&I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Africa Bpk*.

¹⁴ For example, the provisions of a contract will have no impact on illegal performance or where the parties' intent was illegal.

¹⁵ *Hutchinson 175; Brisley v Drotosky* 2002 (4) SA 1 (SCA) 95, indicates that "The Constitution requires that its values be employed to achieve a careful balance between an unacceptable excess of contractual 'freedom' and

Two additional presumptions that are applicable flow from this approach. Firstly, where there is a required formality to conclude a contract, it is presumed to have been met.¹⁶ Although this presumption influences the requirement of lawfulness, it plays a more prominent role in the requirement of formalities.¹⁷ Secondly, where a provision can be interpreted in two ways, the one lawful and the other unlawful, it is presumed that the parties intended the performance to be concluded in a lawful manner.¹⁸ In this way the courts attempt to give effect to the parties' agreement.

Notwithstanding this, the courts can only operate within the ambit of the law. The courts, therefore, cannot enforce agreements that fall outside the legal parameters. The court would therefore not uphold contracts that fall foul of the law. As such, a contract which falls within the different levels of illegality would fall foul of the requirement of legality and can either be void or unenforceable, depending on the type and seriousness of illegality and whether such unlawfulness goes to the root of the contract.¹⁹

Unlawfulness can for the purposes of this chapter be loosely divided between the categories of common law and statute. The levels of unlawfulness will operate equally under each type of unlawfulness.

securing a framework within which the ability to contract enhances rather than diminishes our self respect and dignity.”

¹⁶ Cornelius 126; Sharrock 103.

¹⁷ See ch 8.

¹⁸ Cornelius 126; Hutchinson 180.

¹⁹ *Sasfin (Pty) Ltd v Beukes* 8, states that “Agreements which are clearly inimical to the interest of the community, whether they are contrary to law or morality, or run counter to social or economic expedience will accordingly, on the grounds of public policy not be enforced.”

9.2.1 CONTRACTS CONTRA STATUTE

Any number of statutory provisions may influence any of the levels of illegality in that it may set requirements for: (i) the type of contract allowed, (ii) the manner in which a contract must be concluded, (iii) what may, must and must not be done in terms of a contract, (iv) the conclusion of a contract, and (v) also the performance of a contract.

Depending on the type of illegality, a contract can either be found to be void or unenforceable.²⁰ The intentions of the parties have little effect in terms of the non-compliance with statute.²¹ Non-compliance is a factual (and legal) question and cannot be amended by the inclusion of contractual provisions that are contrary to the actual facts. Such provisions would have little effect on the factual position. A party or the contract has either contravened legislation or not, and the parties' intent has nothing to do with whether it is or is not illegal.²² It thus seems odd to include provisions in a contract which refer to compliance with the law. Where the contract is found to be illegal it follows that all the provisions in the contract are also illegal. The inclusion of provisions cannot in themselves ensure that the contract complies with the law or even prevent the consequence of illegality. If such a provision is capable of severance then, at best, it could function as the basis of damages for the breach of such a provision.

To determine whether a contract is void or merely unenforceable in terms of statute, one would have to consider the intent of the legislature. In instances where legislation declares an act to be without force or effect, the contract would be void. The following are examples where legislation

²⁰ Van der Merwe *et al. Contract General Principles* (2012) 170, this relates not only to the contract as a whole, but also to any particular provision within the contract; *Schierhout v Minister of Justice* 1926 AD 99 109. Take for instance *Yannako v Apollo Club* where the transaction was found to be unenforceable.

²¹ Hutchinson 181.

²² *Metro Western Cape (Pty) Ltd v Ross* [1986] 2 All SA 288 (A) 291; *JF Venter Estates (Pty) Ltd v Schoombie* [1992] 1 All SA 348 (N) 354, indicates that illegality can either be express or implied.

has declared a contract to be without force or effect and therefore void: (i) the sale and distribution of alcohol,²³ (ii) drugs,²⁴ (iii) weapons,²⁵ (iv) precious stones,²⁶ (v) consumer contracts,²⁷ (vi) certain credit agreements²⁸ and (vii) other prohibitions and requirements in relation to competition.²⁹ An example of an unenforceable contract is that of gambling.³⁰

In instances where the statute does not expressly state that a contract would be without force or effect, the intention of the legislature must be determined to establish whether the legislature has implied that non-compliance would render a contract void or unenforceable.³¹ To determine this the following guidelines are used: (i) if the validity of a contract brings harm to the purpose of the statute, the contract will be considered to be void,³² (ii) if the statute imposes a criminal sanction it is an indication that the contract would be considered void,³³ (iii) if the statute includes a sanction to protect the revenue of the State, it indicates that the contract would be valid,³⁴ (iv) if the protection afforded in the statute was intended for the public, and not just an

²³ Liquor Act 59 of 2003; Van der Merwe *et al.* 170-171.

²⁴ Drugs and Drug Trafficking Act 140 of 1992; Van der Merwe *et al.* 170-171.

²⁵ Dangerous Weapons Act 71 of 1968; Van der Merwe *et al.* 170-171.

²⁶ Diamonds Act 56 of 1986; Van der Merwe *et al.* 170-171.

²⁷ Consumer Protection Act 68 of 2008, see in particular s51; Van der Merwe *et al.* 170-171.

²⁸ National Credit Act 34 of 2005, see in particular s90.

²⁹ Competition Act 89 of 1998; s90 of National Credit Act; s51 of Consumer Protection Act.

³⁰ S6(1) of the Gambling Act 51 of 1965.

³¹ See for example *Swart v Smuts* [1971] 2 All SA 153 (A); *Pottie v Kotze* [1954] 4 All SA 77 (A), where non-compliance with a particular statute did not render the contract null and void. *Pottie v Kotze*, 82 states that “The usual reason for holding a prohibited action to be invalid is not the intention of the legislature to impose different penalty to which it has not expressly provided, but the fact that recognition of the act by the court will bring about or give legal sanction to the very situation which the legislature wishes to prevent” *Metro Western Cape (Pty) Ltd v Ross* 291; *Hutchinson* 181; *Johnston v Leal* 1980 (3) SA 927 (A) 939.

³² *Hutchinson* 177; *JF Venter Estates (Pty) Ltd v Schoombie* 354.

³³ *Hutchinson* 177; *Metro Western Cape (Pty) Ltd v Ross* 291; *JF Venter Estates (Pty) Ltd v Schoombie* 354.

³⁴ *Hutchinson* 177.

individual, the contract would be considered to be void,³⁵ and finally, (v) if a statute only imposes penalties, it would indicate that the contract was not void but actually valid.

It often happens that drafters include provisions that a party warrants that a party will comply with the requirements of some legislation. It seems strange that, should the above principles be applied, a warranty would serve any purpose to achieve compliance with the law. It follows that if a party has complied with the law, such a warranty in a contract is meaningless, but if a party does not comply with the requirements of such a law the outcome could be one of three possibilities.

Firstly, the non-compliance could result in the contract being found void, in which case such a warranty becomes meaningless as the warranty itself would also be void.³⁶ The exception to this is where the warranty is severed from the contract. In such a case it would not affect the validity of the contract, but rather relate to the ability to claim damages on the strength of the severed warranty. Secondly, the contract could be found unenforceable, even though there are some remedies available for contracts being unenforceable such as set-off.³⁷ The effect of an unenforceable contract is that a claim cannot be brought on the strength of an unenforceable contract. Finally, such a contract could be found valid in which case a warranty to comply with the law would be valid. None of the warranties would have the effect of ensuring that the contract is found to be legal or lawful.

³⁵ *Ibid.*

³⁶ The exception to this would be where the illegal clause has been severed from the contract making the remainder of the provisions valid and enforceable. In this case, there would be no illegality and therefore the protections sought under the warranty would have no impact as the illegality had been cured through severability of the offending clause.

³⁷ See ch 5.

9.2.2 CONTRACTS CONTRA COMMON LAW

Common law illegality can be described as contracts against public policy or good morals.³⁸

These concepts are more fluid than those prescribed by statute. Public policy has no fixed meaning as it represents the opinion of the public at a particular time. As such, the concept and application of public policy would vary, depending on when it is considered.³⁹

The distinction between public policy⁴⁰ and good morals⁴¹ is not always clear and is often used interchangeably.⁴² Public policy can be described as an expression of society's goals. Good morals on the other hand are an expression of values and norms that are realised when public policy is considered.⁴³ The distinction is often blurred as both public policy and good morals influence and shape each other.⁴⁴ For the purpose of this chapter the use of the term public policy encompasses both the terms public policy and good morals.

Once again, as with statutory illegality, the court favours the freedom of contract, but in situations where a contract is so unfair, harsh or oppressive and can be held to be against public

³⁸ *Sasfin (Pty) Ltd v Beukes* 349; *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) [23]. In the USA there is the concept of unconscionable provisions. An example of this can be seen in *Maribel Baltazar v Forever 21 Inc* 212 Cal. App. 4th 221 (2012) 231, where it was confirmed that unconscionability has a procedural and substantive element. The procedural element arises from unequal bargaining power and the substantive element arises from an overly harsh or one-sided provision. See also *Bruni v Didion* (2008) 160 Cal.App. 4th 1272 (73 Cal. Rptr.3d 395) 1288-1289.

³⁹ *Hutchinson* 177; *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* [24].

⁴⁰ Also known as the *boni mores*.

⁴¹ Also known as public morals or public interest.

⁴² *Van der Merwe et al.* 167. *Hutchinson* 176, states that the distinction between good morals and public interest is not clear and often overlaps, but in both instances it revolves around society's view on morality; *Sasfin (Pty) Ltd v Beukes* 350.

⁴³ *Van der Merwe et al.* 167.

⁴⁴ *Ibid.*

policy it would be declared to be void.⁴⁵ Drafters run this risk of falling foul of the requirement of lawfulness and legality when a contract is so one-sided that it would be considered to be unfair, harsh or oppressive. A party's relative bargaining power would also influence the extent a provision would be considered to be unfair, harsh or oppressive.

Voiding a contract for the sake of public policy is applied restrictively.⁴⁶ The courts must take into account what is necessary for justice and would only void a contract for public policy reasons sparingly.⁴⁷ A contract can be found to be against public policy when the contract: (i) clearly goes against the interest of the community, (ii) is contrary to the law or morality, (iii) runs against social and economic expedience, (iv) is plainly improper or unconscionable, or (v) is unduly harsh or oppressive.⁴⁸ South Africa's public policy and values are now enshrined in the Bill of Rights and the Constitution and, generally, where a contract is found to be contrary to such values it would be struck down.⁴⁹

⁴⁵ Sharrock 102; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [92].

⁴⁶ Hutchinson 176-177, argues that the application of voiding a contract strains against the principle of freedom to contract; Lubbe & Murray *Farlam & Hathaway Contract Cases, Material, Commentary* (1988) 238, point out that despite the principle of freedom to contract, certain interests take precedence over that freedom. These interests are set out in the common law and statutory provisions.

⁴⁷ Van der Merwe *et al.* 167; Hutchinson 176-177.

⁴⁸ Van der Merwe *et al.* 167; Hutchinson 177, contends that the court cannot strike down a contract just because it offends the court's individual sense of fairness; Lubbe & Murray 239, state that the maintenance of sexual morality in the community, sanctity of marriage and the family are principles that public policy generally protects.

⁴⁹ *Brisley v Drotsky* 2002 [91], states that "In this modern guise, public policy is now rooted in our constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism"; Hutchinson 168, 176-177 includes known public interests as follows: (i) voluntarily concluding contracts that state that it should be complied with and enforced and for the sanctity of contracts to be preserved, (ii) simple justice between individuals that should be enforced, (iii) as far as possible parties should have equal bargaining power, (iv) administration of justice should not be defeated, obstructed or perverted, (vii) safety of the state should be preserved, (viii) public service should function properly, and (xi) the full exercise of a person's legal rights should not be interfered with; *Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* [24].

Contracts that are contrary to the common law include, for example: (i) contracts that attempt to oust the jurisdiction of the courts or undermine the administration of justice,⁵⁰ (ii) contracts that deprive a party from the opportunity to properly defend themselves,⁵¹ (iii) agreements with enemy subjects,⁵² (iv) *pacta successoria*,⁵³ (v) bribery and corruption,⁵⁴ (vi) some marriage brokering agreements,⁵⁵ (vii) contracts that undermine public order by encouraging criminal or wrongful acts are illegal and include: (a) compounding a crime, (b) agreements not to report a crime and (c) sanctioning self-help. *Parate executie*⁵⁶ contracts would also generally be considered to be illegal.⁵⁷

⁵⁰ Van der Merwe *et al.* 170-171; Hutchinson 179; Nagel 93, for example to commit a crime or delict, the buying of public office and promoting self-help.

⁵¹ Van der Merwe *et al.* 170-171; Sharrock 99; *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D).

⁵² Van der Merwe *et al.* 170-171; Hutchinson 179.

⁵³ *Ibid.*

⁵⁴ Christie & Bradfield *The Law of Contract in South Africa* (2011) 364; Van Leeuwen *Commentaries on Roman-Dutch Law* (1886) 4 14 6; *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* [1998] 4 All SA 465 (A) 465, points to an agreement which was induced by bribery is regarded as immoral and is therefore void.

⁵⁵ Van der Merwe *et al.* 170-171; Sharrock 99, states that the following examples were previously against public policy, but have now been accepted that it is no longer the case, these include: (i) marriage brokerage agreements where marriage partners are arranged for a fee but must still include the element of choice to be valid, (ii) agreements to finance other lawsuits in return for a portion of the proceeds (this has been changed due to the right to access court through the Constitution). See also *Price Waterhouse Coopers v National Potato Co-Operative Ltd*, (iii) contingency fee agreements which must still be in compliance with the Contingency Fees Act 66 of 1997, (iv) restraint of trades, which is no longer *prima facie* against public policy; and (v) champertous contracts. See also *Bock and Others v Duburoro Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA).

⁵⁶ Immediate execution.

⁵⁷ *Bock and Others v Duburoro Investments (Pty) Ltd* [8], illustrates that a contract where a person keeps the security if the other party defaults is void, but where the creditor can keep the security or pledged goods on the debtors default at a fair price that would be determined, it would be valid as it would be similar to a conditional sale.

9.2.3 CONSEQUENCES OF UNLAWFUL OR ILLEGAL CONTRACTS

There are two possible outcomes when a contract is found to be illegal, these are that the contract is either found to be invalid and therefore void, or valid but unenforceable.⁵⁸

Firstly, where a contract is found to be invalid and therefore void, it cannot create legal obligations.⁵⁹ If a contract is void from the outset, all the provisions in the contract would naturally also be void.⁶⁰ In some instances an illegal contract will constitute a contract and will not be void, but will be unenforceable.⁶¹ Where a contract is unenforceable, a party cannot bring a claim on the strength of the contract, but there are certain limited remedies to the parties such as set-off.

Where a contract is void⁶² it would mean that no claim for performance could be made between parties.⁶³ This *ex turpi* rule is in place to deter the illegal conduct of the parties. This rule is inflexible and cannot be relaxed by the courts.⁶⁴ Where an illegal contract is found to be void there is no contract and therefore no obligations were created. As a result no claim for damages can be brought. The rule applies even where the parties are not aware of the illegality.⁶⁵

⁵⁸ Hutchinson 176.

⁵⁹ Van der Merwe *et al.* 165; Hutchinson 176.

⁶⁰ *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd.*

⁶¹ *Reeves v Marfield Insurance Brokers CC* 1966 (3) SA 766 (A); Van der Merwe *et al.* 174, state that there is no single measure for distinguishing between void and unenforceable contracts.

⁶² *Van der Spuy and Another v Malpage* [2005] 2 All SA 635 (N), indicates that if both parties intended to circumvent the law, the contract would be void and unenforceable; *Extel Instruction (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 466.

⁶³ Also known as *ex turpi causa non oritur action*; *Lion Match Co Ltd v Wessels* 1946 CPD 376.

⁶⁴ *Bobrow v Meyerowitz* [1947] 3 All SA 14 (T) 20; Van der Merwe 173; *Jajbhay v Cassim* 1939 AD 537, 542; *Essop v Abdullah* 1986 (4) SA 11 (C) 16.

⁶⁵ Van der Merwe *et al.* 173.

Secondly, if one person performed under an illegal contract, he will not be able to claim performance or unjust enrichment where both parties acted wrongfully.⁶⁶ The *par delictum* rule applies where both parties are equally guilty and they cannot claim from each other for performance or enrichment, but where one party is innocent he would be able to claim from the guilty party. This rule can be relaxed, to an extent, where it relates to justice between the parties. Performance made under such a contract would be able to be reclaimed. Where ownership did not pass it can be claimed by the *rei vindicatio* and where ownership did pass the claim would be based on unjust enrichment.⁶⁷ The same would apply if the contract is void or unenforceable.⁶⁸ This is qualified for illegal contracts as a person who acted wrongfully would be barred from reclaiming performance.⁶⁹ The principle is that the courts will not help a person with so-called unclean hands.⁷⁰

9.3 ANALYSIS IN RELATION TO THE DRAFTING OF CONTRACTS

It has been stated that the party who wishes to rely on unlawfulness must prove it.⁷¹ Where a contract is found to be illegal and therefore either void or unenforceable, all the provisions of a contract would either be void or unenforceable as well. An exception would apply where illegal provisions are severed from the contract to enable the rest of the provisions in the contract to

⁶⁶ Also known as *in pari delicto portior est conditio possidentis*. Both parties must have acted illegally for this rule to apply; *Van Staden v Prinsloo* 1947 (4) SA 842 (T); *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA).

⁶⁷ *Van der Merwe et al.* 176.

⁶⁸ *Ibid.*

⁶⁹ *Van der Merwe et al.* 176-177.

⁷⁰ This applies to the party who was in *dilecto*.

⁷¹ *Hutchinson* 179.

remain intact. If a contract is void as a result of illegality, then no contract or provision would create legal obligations. In light of this and the presumptions applicable, it appears odd to include provisions in a contract relating to the legality of the contract.

A drafter must ensure that the contract complies with the requirements of the law. This includes considering the requirements covered in statute and the common law as well as the different levels of legality. The drafter will have to draft the contract in such a way as to comply with the requirements set out in law. There is no special technique or method to accomplish this, other than answering a factual question as to whether the contract is legal or not. The drafter would, however, include provisions such as the severability provision to try to keep the contract intact where unlawfulness occurs. The other mechanism is to include warranties to enable the innocent party to recover damages that he may have incurred as a result of the unlawful actions of the other party.

9.3.1 STATEMENTS, WARRANTIES AND REPRESENTATIONS

Drafters often include provisions to either confirm the intention of the parties to act legally or that the contract does not intend to contravene any laws. No amount of contractual confirmations will change the fact that a contract is either legal or illegal and, should the contract be found void, the contractual provisions confirming legality would equally be void. These undertakings will not in itself change the fact as to whether a contract is legal or illegal as this is a factual question that must be determined by the courts.

The same principle applies to warranties and representations. These warranties and representations often include that the parties are to act within the law and that the parties know of nothing that would prevent the contract or the implementation thereof. The same argument is raised, as the warranties and representations cannot change factual realities. The only possible reason for including such undertakings, warranties and representations would be to ensure that where a party breaches a legal obligation, the other party would have some form of damages claim against the other. This again is determined by which level of illegality is at play.

It seems unlikely that such a damages claim would succeed in instances where the contract itself is unlawful, in which case any undertaking, warranty or representation with respect to the lawfulness of the contract itself becomes meaningless. Where the underlying reason for a contract is illegal, it does not matter which undertakings, warranties or representations have been included in the contract. The recovery of damages would in any event be linked to the *ex turpi* and *par delictum* rules. So too, the outcome of a contract cannot be influenced through undertakings, warranties and representations. It would thus appear that the only level of illegality in which such undertakings, warranties and representations would serve any purpose would be under illegal performance and only to such an extent that the illegal provisions are capable of being severed from the rest of the contract. To ensure that such warranties, representations and statements are enforceable, they must be specifically severed from the rest of the contract. This can be done by the inclusion of a severance provision.

9.3.2 SEVERABILITY PROVISIONS

The courts may sever an illegal provision from the rest of the contract to allow the rest of the contract to continue. Whether a provision is severed or not rests on whether the parties intended for such a provision to be severed.⁷² A severability provision is often included in a contract to illustrate such an intention of the parties.⁷³ This does not mean that without the severability provision the illegal provision cannot be severed if it can be shown that the parties would have intended it to be severed. This intent is shown in the written document by the inclusion of a severability provision. The fact that such a provision has been included in the contract does not, in itself, guarantee that the court will enforce such a severance.

Regardless of whether the severability provision is included in a contract or not, a court will only sever a provision from a contract if: (i) the illegal part of the contract is distinct from the rest of the agreement,⁷⁴ (ii) the illegal part is subsidiary to the main purpose of the contract,⁷⁵ and (iii) the parties would have entered into the contract without the illegal provision.⁷⁶ The courts will not reconstruct a contract or the sake of severability or create a new contract because of an illegal

⁷² Hutchinson 190.

⁷³ For example “The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect.” (<http://www.contractstandards.com/clauses/severability> accessed 23 June 2015).

⁷⁴ Hutchinson 190, contends that the courts will not sever a provision if it means that the deletion thereof would have the effect of the whole contract being rewritten; *Cameron v Bray Gibb & Co (Pvt) Ltd* 1996 (3) SA 675 (R) 676-677, shows that in general, the legal portions of the contract will be enforced where the substantial character of the contract will remain unchanged, should the illegal portions have been severed.

⁷⁵ Hutchinson 190, states that the courts will not sever a provision if it means that the substantive character of the contract will be changed. The severance of a clause thus cannot change the nature of the contract; *Cameron v Bray Gibb & Co (Pvt) Ltd* 676-677.

⁷⁶ Hutchinson 190.

provision. The question is whether the legal parts of the contract can be separated from the illegal parts.⁷⁷

The inclusion of a severance provision is not the decisive factor as to whether a provision would be severed or not. The court will determine the hypothetical intention of the parties to ascertain whether a provision is severed or not.⁷⁸ The courts will thus sever the illegal provision when the parties indicate their intent for the court to do so. The severability provision in the contract does not confer such a right or an obligation on the court, but merely confirms the parties' intention to have such a severance apply. As such, the inclusion of a severability provision is necessary for the parties to show their intent.

9.4 CONCLUSION

Illegality and unlawfulness in a contract is a question of fact and legality. The contract is either unlawful or it is not. As seen, the inclusion of warranties in the contract will not change the fact that the contract is in fact illegal. It is part of the drafter's function to consider the legality of a contract at all levels. At best, warranties will provide potential damages, but this is not the case in all circumstances. At worst, the inclusion of warranties would be meaningless. Severability provisions are included to show the intent of the parties to sever illegal provisions, but applying

⁷⁷ *JF Venter Estates (Pty) Ltd v Schoombie* 357, indicates that severability cannot occur where there is an interdependence between the legal and illegal portions of the contract or in instances where they are interlocked.

⁷⁸ Hutchinson 190-191.

the severability provisions would be in the hands of the court. The severance of provisions is, therefore, an act of the court and not an act of the parties.⁷⁹

It appears that other than including the warranties and severability provisions, a drafter can do little to ensure that the contract complies with the law.

The requirement of lawfulness and legality permeates the document and the conduct of the contracting parties. Although this requirement is, to an extent, a question of fact, the drafter must still ensure that he drafts the contract in compliance with the laws and ensures that provisions do not fall within the scrutiny of public policy. The ability to draft the contract in this manner means that the drafter must do so against the backdrop of substantive law.

⁷⁹ *Bhengu v Alexander* 79.

CHAPTER 10

CERTAINTY

10.1	INTRODUCTION.....	193
10.2	SOURCES OF UNCERTAINTY	194
10.2.1	AMBIGUITY	197
10.2.2	UNDUE GENERALITY	201
10.2.3	INCONSISTENT USE OF WORDS	203
10.2.4	REDUNDANCY AND GAPS	204
10.2.5	VAGUENESS.....	205
10.2.6	DISCRETION OF A PARTY	206
10.3	ANALYSIS OF CONTRACT DRAFTING MECHANISMS.....	207
10.3.1	DEFINITIONS.....	208
10.3.2	TYPOGRAPHICAL READABILITY.....	209
10.3.3	LINGUISTIC READABILITY	212
10.3.4	SUBSTANTIVE MECHANISMS	212
10.4	CONCLUSION.....	215

10.1 INTRODUCTION

The requirement for performance to be certain and possible has traditionally been dealt with as one requirement for a valid contract.¹ Although the concepts of certainty and possibility are linked, drafters deal with these requirements differently in contracts. For this reason, the concepts of certainty and possibility are discussed separately.

¹ See ch 5.

The requirement of certainty is the area of contract drafting most focused on in literature² and, seemingly, one of the greatest sources of litigation in contracts.³ Certainty overlaps into two other areas of influence in contract drafting, being the interpretational dimension and the linguistic context.⁴ The linguistic construction of a provision and the interpretation thereof are closely linked to each other.

Discussing certainty in this chapter will touch on the interpretational dimension and linguistic context, but it is not intended to consider these elements in any level of detail other than to illustrate the substantive provisions of certainty and how drafters deal with the requirement of certainty in contracts.⁵

10.2 SOURCES OF UNCERTAINTY

Uncertainty is often thought to stem from ambiguous language, being words or phrases that have two or more conceivable meanings.⁶ This is true, to an extent, but uncertainty is not limited to

² Stark *Drafting Contracts: How and Why Lawyers Do What They Do* (2007); Fox *Working With Contracts: What Law School Doesn't Teach You* (2008); Paris *Drafting for Corporate Finance* (2007); Espenshied *Contract Drafting: Powerful Prose in Transactional Practice* (2010); Armstrong & Terrell *Thinking Like a Writer: A Lawyers Guide to Effective Writing and Editing* (2009); Haggard & Kuney *Legal Drafting in a Nutshell* (2007); Lewis "The Contract Drafting Process: Integrating Contract Drafting in a Simulated Law Practice" *Clinical L Rev* (2005) 241; Hutchinson *The Law of Contract in South Africa* (2012).

³ Haggard & Kuney 242.

⁴ See ch 1.

⁵ There has been research in this area, for example in terms of the linguistic context (see *supra* 2) and the interpretational dimension. See Cornelius *The Interpretation of Contracts in South African Law* LLD (1999), who discusses the interpretational dimension in depth; Louw *Plain Language Movement and Legal Reform in the South African Law of Contract* LLM (2010).

⁶ Adams *A Manual of Style for Contract Drafting* (2008) 127.

ambiguity only and can also be linked to other factors.⁷ These sources of uncertainty include:⁸ (i) ambiguity,⁹ (ii) undue generality,¹⁰ (iii) inconsistency of words,¹¹ (iv) redundancy and gaps,¹² (v) vagueness,¹³ and (vi) the discretion of a party to the contract.¹⁴

It is necessary to briefly mention the process of interpretation, as this will ultimately influence not only the certainty element of a contract, but also the drafting of the contract.

In the interpretation of contracts there are four stages or processes that an interpreter must go through to interpret a contract. Each one of these stages contains a different element of various sources of uncertainty. Interpretation is the first step to drafting, but what this actually means is that a drafter must understand how a court will interpret a document and its provisions before attempting to draft a contract. Certainty can only be achieved if the drafter understands how uncertainty will be dealt with and how the courts will interpret such uncertainty.

⁷ *Standard Building Society v Cartoulis* 1939 AD 510, indicates that the difficulty in interpreting a document does not necessarily imply ambiguity; *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 318, shows that a contract is not ambiguous just because it can have two meanings. Difficulty in the construction of a document and grammatical difficulty is not enough to create ambiguity.

⁸ *Levenstein v Levenstein* [1955] 4 All SA 107 (SR), identifies four categories of uncertainty namely: (i) *nulla promissio potest consistere quae ex voluntate promittentis statum capit*, which are unlimited offers which are uncertain as it is not clear whether the party would ever accept such an offer, (ii) vague and ambiguous language which justifies that the parties were never *ad idem*, the uncertainty is created as it is not clear whether it was ever acknowledged as an obligation, (iii) there is no concluded contract which was broken off *in meto*, which creates uncertainty regarding the subject matter, and (iv) unspecified details of a contract, which are determinable by evidence.

⁹ Adams 127; Sharrock *Business Transactions Law* (2011) 89.

¹⁰ Adams 127; Sharrock 89.

¹¹ Adams 127.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Sharrock 89, indicates that unfettered discretion of a party to the contract can create uncertainty. Unfettered choice may in itself also fall within the boundaries of unlawfulness that is against public policy. See ch 9.

The first stage of interpretation is classification,¹⁵ in which the legal nature of the instrument is determined. For the scope of this discussion, this means determining whether the document is, in fact, a contract. In this case, evidence will be allowed to see whether the document is a contract or not.¹⁶ In this regard the sources of uncertainty do not feature at this stage of interpretation, but rather compliance with the requirements of a contract.¹⁷

The second stage of interpretation is concretisation,¹⁸ which examines the extent of the text contained in the contract. This will often include whether there are written or unwritten terms.¹⁹

The integration rule²⁰ plays a part at this stage of the interpretation process. As all the terms of the agreement are integrated into a single document, no extrinsic evidence is allowed to be added or supplement a document as the document is the complete recordal of the agreement between the parties.²¹ Insofar as a document is not complete, extrinsic evidence may be allowed to supplement the terms, but cannot vary or detract from the terms.²² The sources of uncertainty, being redundancy and gaps, are influenced and addressed at this stage of interpretation.

¹⁵ Cornelius *The Principles of Interpretation of Contracts in South Africa* (2007) 139; Cornelius “Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2013 (6) SA 520 (SCA): Redefining the Rules for Admissibility of Evidence in the Interpretation of Contracts” *De Jure* (2014) 367.

¹⁶ Cornelius (2014) 367; *ABSA Technology Finance Solutions (Pty) Ltd v Michael’s Bid a House CC* [2013] JOL 30956 (SCA) [20].

¹⁷ See ch 5.

¹⁸ Cornelius (2014) 367; Cornelius (2007) 151.

¹⁹ Also known as express and tacit terms.

²⁰ Also known as the *parol* evidence rule. Cornelius (2014) 367, states that the integration rule excludes any statements, negotiations, mental reservations from being presented to the court; *Johnston v Leal* 1980 (3) SA 927 (A).

²¹ Cornelius (2014) 367; *Johnston v Leal*.

²² Cornelius (2014) 367.

The third stage is the interpretation stage being “interpreting” or “meaning of terms”,²³ in which the meaning of words, expressions, sentences and terms, in essence the text of the contract, is determined.²⁴ This stage of the interpretation process attempts to understand what the contractual provision means. There are different meanings which are influenced by the context and the courts must choose the correct meaning.²⁵ Extrinsic evidence is used sparingly in these instances, as external evidence cannot contradict or modify a contract’s meaning where the document is the sole recordal of the agreement between the parties.²⁶ This is the stage of interpretation where ambiguity and vagueness of words are addressed.

Finally, the application stage²⁷ determines the meaning of the text in the actual facts of a case. The contract itself and extrinsic evidence can assist in this determination.²⁸ Undue generality is the usual source of uncertainty at this stage of interpretation.

It is against this backdrop that understanding the sources of uncertainty must be considered.

10.2.1 AMBIGUITY

A provision can be considered ambiguous if it is capable of being interpreted in two or more ways.²⁹ Linguistic constructions are usually the cause of ambiguity. In general, one finds two

²³ Cornelius (2014) 367; Cornelius (2007) 173.

²⁴ Cornelius (2014) 367.

²⁵ Cornelius (2014) 367; *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* [1974] All 2 SA 159 (A).

²⁶ *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A); *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] JOL 23268 (SCA); *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* [2014] 1 All SA 375 (SCA).

²⁷ Cornelius (2014) 367; Cornelius (2007)195.

²⁸ Cornelius (2014) 367; *Van Wyk v Rottcher’s Saw Mills (Pty) Ltd.* [1948] 2All SA 4 (SA).

types of ambiguity namely latent and patent ambiguity.³⁰ Latent ambiguity is where the contract, seemingly unambiguous, becomes ambiguous at the application stage of interpretation.³¹ Patent ambiguity has more of an intrinsic nature where, on the face value of the contract, it is ambiguous.³² This distinction influences not only the stage of interpretation, but also the manner in which contracts should be drafted.

Ambiguity can take three forms namely:³³ (i) contextual ambiguity, (ii) semantic ambiguity and (iii) syntactic ambiguity.

Contextual ambiguity exists when one provision is inconsistent with another provision.³⁴ This can further be divided into two types of ambiguity, internal and external contextual ambiguity. Internal contextual ambiguity exists where ambiguity and inconsistency occur within the same document.³⁵ External contextual ambiguity is found where the ambiguity and inconsistency occur between the provisions of two or more different documents.³⁶

There are various mechanisms that a contract drafter employs to overcome contextual ambiguity. These mechanisms are the so-called “trumping provisions”.³⁷

²⁹ Adams 127; Haggard & Kuney 241, indicate that a term can either have one meaning or another meaning, but it cannot, at the same time, have two meanings; Stark 235.

³⁰ Tobert “A Study of the Risks of Contract Ambiguity” *PKU Transnational Law Review* (2014) 9.

³¹ Cornelius (2007) 197, mentions that the terms of the contract appear to be perfectly clear, but when applied to the facts it becomes apparent that there is ambiguity. Latent ambiguity is raised by extrinsic factors and not the document itself.

³² Cornelius (2007) 197, states that the ambiguity stems from the language of the document.

³³ Tobert 9.

³⁴ Haggard & Kuney 243; Stark 236.

³⁵ Haggard & Kuney 244. See for example: *Mittermeier v Skema Engineering (Pty) Ltd* [1984] 1 All SA 252 (A), in which there was uncertainty as a result of conflicting provisions.

³⁶ Haggard & Kuney 246.

³⁷ Fox 97.

The first trumping provision is a proviso which is only used if the ambiguity and inconsistency occur within the same provision of a document. A proviso creates an exception to the general rule and can be found at the start of a provision or in the middle of a provision with words such as “provided” or “provided, however”.³⁸

The second trumping provision includes the words “notwithstanding anything to the contrary”, which acts as a signal that whatever follows will be inconsistent with another provision of the document. It has the effect that the provision which contains the second trumping provision will take precedence over and control of any other inconsistent provision. This trumping provision can be used for any inconsistencies found in a document.³⁹

The third trumping provision includes the words “except as otherwise provided”, which signals that the provision in which this trumping provision is found will be trumped and overruled by another provision in the document.⁴⁰ This trumping provision indicates that a general statement will be overruled by a more specific statement.⁴¹

The fourth trumping provision includes the words “without limiting the generality of the foregoing”, which is used when a general principle is followed by a specific application of that general principle. This is used to ensure that the general principle will not be ignored.⁴²

³⁸ *Ibid.*

³⁹ Fox 98.

⁴⁰ Fox 99.

⁴¹ *Ibid.*

⁴² Fox 100.

The first four trumping provisions relate to ambiguity and inconsistencies found in the provisions of the same document and are therefore used specifically to mitigate uncertainty inherent in internal contextual ambiguity.

There are two ways in which external contextual ambiguity can occur. Firstly, where a specific provision is inconsistent within the various documents, the second trumping provision can be used to address this by the using some variation of “notwithstanding the contrary”.⁴³ Secondly, where there are multiple potential conflicts in the various documents, a general trumping provision can be used to show which document will control the other.⁴⁴ This is often called a “priority of terms” provision and is the fifth trumping provision.⁴⁵ A priority of terms provision would not be limited to direct and obvious conflict, but can also be used in instances where terms read together would create some doubt as to the meaning of the provision.⁴⁶

Semantic ambiguity arises from words and phrases that have multiple meanings.⁴⁷ These can include homonyms.⁴⁸ The most common examples of this type of ambiguity can be found in contracts determining what a day is versus a business day. As the use of a day could mean either, not addressing such an ambiguity could result in uncertainty in the provisions. Whether such

⁴³ Fox 100-101.

⁴⁴ *Ibid.*

⁴⁵ Anderson & Warner *A-Z Guide to Boilerplate and Commercial Clauses* (2012) 470, 472, where the example used for a priority of terms provision is: “In the event of any conflict between the provision of this agreement and the provisions of [the Articles] the provisions of this agreement shall prevail.”

⁴⁶ Anderson & Warner 470, mention that a priority of terms provision indicates: (i) what part of the agreement, (ii) which agreement, or (iii) which provision to the agreement will take precedence of or control the other. The authors attempt to consolidate both internal and external contextual ambiguity into one type of provision. The priority of terms provision is usually only used for external contextual ambiguity when two or more documents are used, for all other aspects the first four trumping provisions resolve conflicts between the provisions of the same document.

⁴⁷ Stark 255.

⁴⁸ Haggard & Kuney 247.

certainty would be fatal to the contract must be determined from case to case, taking into account the facts of the matter and the rules of interpretation.

The final type of ambiguity is syntactic ambiguity, which arises from the word order and the punctuation of a sentence.⁴⁹ This clearly refers to the clear and correct use of grammar and punctuation in a contract.⁵⁰

Semantic and syntactic ambiguities are popular areas on which to focus when drafting contracts. This sometimes includes the use of legalese or technical words and has been one of the main areas of focus when it comes to the use of plain language in contracts. As it will be seen, semantic and syntactic ambiguity are not the only areas that create uncertainty.

Ambiguity, generally, goes unnoticed during the drafting process and only comes to light after the fact.⁵¹ When this happens, the rules of interpretation assist to find meaning to the uncertainty created by ambiguity.

10.2.2 UNDUE GENERALITY

Undue generality creates uncertainty as there is insufficient detail to be certain of the performance required.⁵² In this case the contract language does not have alternative meanings.

⁴⁹ Haggard & Kuney 272; Adams 127; Tobert 9, states that syntactic ambiguity is one of the most common sources of ambiguity and results in errors in writing and the wrong placing of words.

⁵⁰ Haggard & Kuney 289.

⁵¹ Adams 128; Torbert 12.

⁵² Adams 129. For example *Nicolene Ltd v Simmonds* [1953] 1 All ER 822, reference was made to incorporating the “usual conditions”. This amounted to being a meaningless clause.

The courts must be able to discern the parties' intentions with reasonable certainty. This, however, does not mean that every provision needs to be determined. It can be that performance can be determinable by some mechanism, in which case there would be sufficient certainty in the contract.⁵³ The principle of *id certum est quod certum reddi potest* would apply.⁵⁴

Examples of contracts that are not determinable are an agreement to agree to do something in the future.⁵⁵ This type of an agreement is not enforceable because it does not have enough detail as to what is to be agreed. It can also be said that an agreement to agree does not meet the requirement of consensus, as there would be no consensus on the subject matter of the future.⁵⁶ In such an instance obligations cannot be created. There are, however, at least two exceptions to this. The first is that, where an agreement to agree includes an obligation on the parties to negotiate certain matters, the obligation to negotiate is certain and that portion would be enforceable as there would be sufficient particularity to the point of negotiation.⁵⁷ The second exception is where there are option provisions. These provisions are not uncertain, as all the areas of the option have already been agreed to and therefore would hold up to the scrutiny of the requirement of certainty.

Another example is an indefinite period contract.⁵⁸ These types of contracts usually have a mechanism for termination. However, it would be problematic where contracts are designed for a

⁵³ Sharrok 92.

⁵⁴ Something is certain if it is rendered certain.

⁵⁵ An agreement to agree is also known as *pactum de contrahendo*. Hutchinson 210, states that it does not apply to options because all the terms of the option have already been agreed to.

⁵⁶ It would then fall short of the requirement of both certainty and consensus.

⁵⁷ Sharrock 92.

⁵⁸ Hutchinson 210.

specific duration and the contract is drafted for an indefinite period.⁵⁹ The courts have also inferred an implied term of reasonable notice for the termination of indefinite contracts, where such a term was absent.⁶⁰

10.2.3 INCONSISTENT USE OF WORDS

Inconsistency occurs within a contract when a word or phrase conveys two different meanings or where two or more words convey the same meaning.⁶¹ Inconsistency differs from inconsistency found under ambiguity. Ambiguity relates to different provisions being inconsistent, whether that is within the same document or whether it is in different documents, whereas this category relates to inconsistency of the words found in the contract.⁶²

Drafters attempt to resolve this type of uncertainty by including defined terms in the contract. This, however, if done poorly, has the opposite effect and could result in ambiguity.⁶³

There is also a presumption that words will hold their ordinary and normal meanings⁶⁴ that the same word would have a similar meaning and different words would have different meanings. This plays an important role.⁶⁵

⁵⁹ *Ibid.*

⁶⁰ *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* [2014] JOL 32251 (SCA).

⁶¹ Adams 129.

⁶² Beck “‘Void for Vagueness’: The Layman’s Contract in Court” *SALJ* (1985) 661, indicates that there can also be clauses with no ascertainable meaning in which case the parties have not paid sufficient attention to the words of their contract. The consequence is that the clause could become meaningless and incomplete.

⁶³ See par 10.3 below.

⁶⁴ Cornelius (2007) 118.

⁶⁵ Cornelius (2007) 121.

10.2.4 REDUNDANCY AND GAPS

At one end of the spectrum, redundancy occurs when words or phrases in one provision are also found in another provision.⁶⁶ This is not limited to words, but also to provisions. It often happens that one provision refers to a specific event and another provision refers to a similar event. This is slightly different to the inconsistencies found in the category of ambiguity. Ambiguity refers to two or more conflicting provisions. Redundancy relates to the same (or very similar) provision found in two places. This could result in ambiguity or result in the two provisions being mutually destructive.

Redundancy can be resolved by the use of trumping provisions, but this is a messy solution. Redundancy is the result a draftsman's lack of attention to detail and should not occur within the context of a contract.

At the other end of the spectrum, missing words and provisions or incomplete sentences are so-called gaps in the contract. These gaps create uncertainty in the contract and can only be resolved by the drafter's attention to detail when drafting the document.

⁶⁶ Adams 129.

10.2.5 VAGUENESS

Vagueness is not the same as ambiguity, as when a word or phrase that is vague, its meaning varies based on the context.⁶⁷ An objective test will ascertain whether something is vague or not.⁶⁸

Vagueness can occur intentionally or unintentionally.⁶⁹ Typically, vagueness includes terms such as best or reasonable efforts,⁷⁰ material, material adverse effects, promptly, immediately, reasonably, substantially, satisfactory.⁷¹ Drafters invoke vagueness when future circumstances are insufficiently certain to render precise standards unworkable.⁷² In South African law vagueness appears to be an all-encompassing term used, taking into account all other factors of uncertainty under the umbrella of vagueness.⁷³ The courts, however, have distinguished between

⁶⁷ Stark 236; *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* [1994] 1 All SA 191 (A), indicates that vagueness does not automatically flow from ambiguity, but it may very well give rise to it; Beck 660, states that the sources of vagueness are traditionally considered to be: (i) where an obligation solely depends on the will of the promisee, (ii) where the parties are not *ad idem* and (iii) where negotiations have broken off. A fourth can be described as where the courts could not ascribe a meaning to the words. See for example *Lee-Parker and Another v Izzet and Others* (1972) 2 All ER 803, in which the conditions were found void for vagueness.

⁶⁸ *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 191.

⁶⁹ Adams 130.

⁷⁰ Fosbrook & Laing *A-Z of Contract Clauses* (2014) 482, provide an example of how a vague term can be introduced, “The [Company] undertakes, that it shall use its best endeavours to advertise, publicise and promote the [Work] and that on all occasions that the agreed credit and copyright notice to the [Author] shall be used.”

⁷¹ Adams 130, indicates that the use of vague language, in particular in relation to effort standards, is a source of great debate. The meaning of “best efforts” and distinguishing this from “reasonable efforts” is prevalent in these discussions. See for example: *CKB & Associates, Inc v Moore McCormack Petroleum Inc* 809 SW.2d 577 (1991) 581, describing best efforts as a “nebulous standard”. This type of language is used when the parties are uncertain of what can be adhered to and links back to the quality of the effort. In *Thomas M. Macksey v William R. Egan* 36 Mass. App. Ct. 463 (1994) 472, best efforts were described as a requirement “that the party puts its muscle to work to perform with full energy and fairness the relevant express promises and reasonable implications therefrom.” Also in *Hermann Holdings Ltd v Lucent Technologies Inc* 302 F.3d 552 (2002) 557, 561, reasonable best efforts were described as “prompt, substantial and persistent efforts as a prudent Person desirous of achieving a result would use in similar circumstances.” This would mean the party would have to act “as promptly as practicable” and “in the most expeditious manner practical”.

⁷² Adams 130.

⁷³ *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* [1964] 1 All SA 110 (W) 112, where no price had been included in the contract and therefore the contract was void for vagueness; *Dawidowitz v van*

vagueness and ambiguity⁷⁴ as well as vagueness and implied terms.⁷⁵ It has been seen that vagueness is but one source of uncertainty in contracts.

If the language is so vague and obscure (or lacks substance or detail) that the court cannot describe the contractual intention, the contract may be declared void for vagueness.⁷⁶ This is not done lightly and would only be done where the all possible interpretations of the contract had been exhausted.

10.2.6 DISCRETION OF A PARTY

Contract provisions often include the discretion of a party in relation to some obligation.⁷⁷ These discretionary clauses cannot be enforceable when a party must exercise its discretion for its own performance.⁷⁸ Where a party must exercise such discretion against some standards or criteria, it

Drimmelen 1913 TPD 672, determined that an agreement to repay when the party had capacity to do so was void for vagueness; *Roberts v Forsyth* [1948] 3 All SA 484 (N), the verbal agreement where a party would repay the money when they could was found to be void for vagueness.

⁷⁴ *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd*.

⁷⁵ *Angath v Muckunlal's Estate* [1954] 4 All SA 279 (N), indicated that when a contract is silent on the matter then the omission is not vagueness and the law can imply the necessary to enforce the unexpressed terms.

⁷⁶ *Sharrock* 89; *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 206, states that where a contract can be interpreted in two or more ways, it would not, in itself, give rise to the contract being void for vagueness as the correct meaning could be determined through extrinsic evidence and interpretation. It is when a contract is incapable of any effective meaning in the two circumstances that it would result in the contract being too vague to be enforced. *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 112, showed that the required performance must either be expressed in the contract or must be determinable, which is usually done by third parties. See also *Treadwell and Another v Roberts* 1913 WLD 54; *Tuckers Land and Development Corporation (Pty) Ltd v Kruger* [1973] 4 All SA 504 (A), where the contract was found void for vagueness; *Baretta v Baretta* 1924 TPD 60, where the term “pays off a substantial sum every year” was found to be void for vagueness.

⁷⁷ This can overlap with the requirement of legality and lawfulness. See ch 9; *Davidowitz v van Drimmelen* 1913 TPD 672.

⁷⁸ See for example *Murray v Murray and Another NO* [1959] 2 All SA 291 (W), in which a donation was at a party's discretion and at that party's convenience. The court found that the provisions of the clause were so vague that it rendered the claim unenforceable.

could likely be enforceable,⁷⁹ but must at all times be exercised reasonably.⁸⁰ Mechanisms for certainty must be independent of the parties and contain a level of objectivity. Discretion to determine one's own performance or only when one wishes to perform is invalid, but one can have a level of discretion as to when the other party will perform.⁸¹

These mechanisms can include determination by experts, arbitrators, steering committees, third parties, auditors and the like.⁸² These types of third parties can be used for the determination of disputes or a specific element in the contract.

10.3 ANALYSIS OF CONTRACT DRAFTING MECHANISMS

The other side of the spectrum of certainty is to ensure that sufficient clarity is created for the party's performance in the document.⁸³ To ensure certainty in contracts, drafters also employ certain mechanisms, which include: (i) the use of a definition section, (ii) typographical readability,⁸⁴ (iii) linguistic readability, and (iv) substantive mechanisms.⁸⁵

⁷⁹ Sharrock 92.

⁸⁰ *Ibid.*

⁸¹ Hutchinson 214; *Williams and Taylor v Hitchcock* 1915 WLD 51, indicates that if a contract depends entirely on the will of one of the parties for its fulfilment, the contract will be void.

⁸² See ch 13.

⁸³ Cartwright *Formation and Variation of Contracts: The Agreement, Formalities, Consideration and Promissory Estoppel* (2014) 54, states that parties must have come to an agreement on the terms of the agreement. An incomplete agreement, or in this case, an agreement that is insufficiently clear and precise, may result in uncertainty.

⁸⁴ Newman "The Influence of Plain Language and Structure on the Readability of Contracts" *Obiter* (2010) 738.

⁸⁵ Newman 739.

10.3.1 DEFINITIONS

A mechanism for clarity is the inclusion of a section which defines terms used in the contract.⁸⁶

The use of definitions also functions in line with current presumptions in a contract, being that the same words have the same meaning and different words have different meanings.

Definitions are used in a number of instances, namely that definitions may:⁸⁷ (i) expand or limit the dictionary meaning of the word; (ii) clarify the meaning of a word or phrase; (iii) resolve the meaning of a word that is ambiguous; (iv) explain the meaning of a technical word or phrase; (v) express a concept that is specific to the transaction; (vi) list all the things that the definition refers to; (vii) explain the meaning of a word by listing its significant characteristics; and (viii) include extraordinary meanings which are not what is normally accepted.⁸⁸

Definitions can be used to define terms in different ways. A definition provision can be found at the beginning of the contract in a separate section dealing with definitions.⁸⁹ This is the most common approach and all terms are easily accessible and easy to find.⁹⁰

Another way to employ a definition is to have an embedded definition which appears within the paragraph, where it is used for the first time.⁹¹ This could lead to ambiguity as it is often unclear whether such an embedded definition is to be used for the rest of the document, or just for the

⁸⁶ Haggard & Kuney 351, state that definitions are not only there to provide clarity, but also to clarify things within a lexical meaning.

⁸⁷ Stark 73-73; Haggard & Kuney 354.

⁸⁸ Haggard & Kuney 355.

⁸⁹ Stark 76. Also known as “full definition” or “stipulative definition”.

⁹⁰ Stark 77.

⁹¹ Stark 76.

paragraph in which it was. Ambiguity is also created by questioning how many of the preceding words form part of the definition.

Finally, definitions can also be found at the end of the document, or could be included in a stand-alone document.⁹² This is particularly useful when there are multiple documents using the same definition provisions.⁹³

Definitions affect the whole contract and can create uncertainty by either being too wide or too narrow.⁹⁴ Making use of definitions is consistent with the interpretational principle that the same words in a contract have the same meaning.

10.3.2 TYPOGRAPHICAL READABILITY⁹⁵

One of the easiest ways to bring clarity to the document is through clear and precise layout of the document. The manner in which the text is formatted and arranged has an impact on how easy the contract is read.⁹⁶ The Consumer Protection Act⁹⁷ and the National Credit Act⁹⁸ indicate that the plain language use in a document is influenced by the organisation, form, style of the document and the use of headings.

⁹² Stark 77,

⁹³ *Ibid.*

⁹⁴ Haggard & Kuney 351.

⁹⁵ Adapted from Newman 738.

⁹⁶ Adams 75.

⁹⁷ S22(2)(b) & (d) of Act 68 of 2008.

⁹⁸ S64(2)(b) & (d) of Act 34 of 2005.

Subdividing the text makes it easier to cross-reference and also allows easier navigation of the contract by the reader.⁹⁹ Often, if not always, headings are included in contracts.¹⁰⁰ These headings divide and guide the reader to where, or about what, sections in the contract are. Headings have been described as organisational tools,¹⁰¹ rough indicators,¹⁰² abbreviations,¹⁰³ and even preambles to those sections to follow the heading.¹⁰⁴ The use of headings is often nullified by the provision stating that the headings of the contract will not aid in the interpretation of the contract.¹⁰⁵ The effect of this is that one might as well not have any headings in the contract at all, because if headings do not affect the interpretation of the contract, then the headings may not be taken into account when reading the contract.¹⁰⁶ This is surely not what is intended when drafting them.

⁹⁹ Adams 75.

¹⁰⁰ *Brink v Humphries & Jewell (Pty) Ltd* [2005] 2 All SA 343 (SCA), where the document was titled “credit application” but contained a personal suretyship which the party was not informed of. The form was considered to be a “trap of the unwary”. In this instance there was some argument that the inconsistency of the heading with the content of the contract could have created *iustus error*. A similar example can be found in *Keens Group Co (Pty) Ltd v Lotter* [1989] 1 All SA 49 (C).

¹⁰¹ *McEwan v Mountain Land Support Corporation* 116 P.3d 955 (2005) UT App. 240 [25].

¹⁰² *Rex v Associated Trade Suppliers Ltd* 1945 AD 611 616.

¹⁰³ *Sentinel Mining Industry Retirement Fund v Waz Props (Pty) Ltd* 2013 (3) SA 132 (SCA).

¹⁰⁴ *Rex v Associated Trade Suppliers Ltd* 615. Describing a heading as a preamble, implies that the heading has no substantive force. The heading does therefore not, in itself, create obligations. It does, however, like with a preamble of an agreement, influence interpretation by providing interpretative guidance to the provisions that follow.

¹⁰⁵ There does not seem to be any clear reason for the inclusion of such a provision. The two possible reasons are a concern that the heading and the provisions below the heading are inconsistent and therefore could create interpretational constraints. See for example *Corbin Bernsen v Innovative Legal Marketing LLC* 2012 US Dist. Lexis 115325, in which the clause caption was not aligned with the content of the clause. In this case the court rejected the argument that the clause caption extended the meaning of the clause. The other possibility is that the heading is so far removed from the content that there could be an argument for *iustus error* as seen in *Brink v Humphries & Jewell (Pty) Ltd* and *Keens Group Co (Pty) Ltd v Lotter*.

¹⁰⁶ See for example *Sunoco Inc (R&M) v Toledo Edison Co* 129 Ohio St.3d 397 (2011) Ohio 2720 72, where the headings clause functioned as a type of waiver in which the parties could not rely on the headings in interpreting the agreement; *The Home Gas Corporation v Strafford Fuel Inc and Edward C. Dupont Jr.* 130 NH 74 (1984), in which the headings were ignored in the interpretation of the section because headings were to be ignored in the interpretation provisions of the agreement.

One of the reasons for the inclusion of such a provision could be to prevent a party from relying on an error in the contract.¹⁰⁷ This argument is remote as it must be weighed against the principle of *caveat subscriptor*.¹⁰⁸ This seems to occur when the heading is so far removed from the content of the provision that there was either something missing in the heading or in the provision. The second reason for such a provision, and probably the more likely reason, is to deal with any inconsistencies found between the headings and the body of the text. If this is the case, the correct mechanism is not to exclude headings from interpretation, but rather to include a general trumping provision to deal with any inconsistencies between the headings and the text. The conflict, however, should be resolved where possible by reading the heading and the text below it together.¹⁰⁹

The other potential layout mechanism is tabulation.¹¹⁰ This, in essence, means that there are sub-clauses or embedded numbers within a clause. The more blocked in and condensed the text is, the more intimidating and difficult it becomes to read.¹¹¹ American contracts are notorious for exactly this. Combine blocked in, condensed writing with long sentences and poor punctuation and it provides the potential for uncertainty within the document.

¹⁰⁷ Bacher “Headings will be taken Seriously” *Financial Institutions Legal Snapshot* (2015) (<http://www.financialinstitutionslegalsnapshop.com/2015/06/headings=will-be-taken-seriously/> accessed 13 September 2015). See for example *Cott UK Ltd v Barber Ltd* [1997] 3 All ER 540.

¹⁰⁸ See ch 6; *Royal Canin South Africa (Pty) Ltd v Cooper & Another* [2009] JOL 22720 (SE); *Stiff v Q Data Distribution (Pty) Ltd* [2002] JOL 9568 (A); *Roomer v Wedge Steel (Pty) Ltd* [1997] JOL 1345 (N), where the argument of *iustus error* did not succeed; Norje “Of Reliance, Self-Reliance and *Caveat Subscriptor*” *SALJ* (2012) 132, indicates that the inclusion of unexpected terms in a contract can result in a lack of reasonable reliance or result in misrepresentation.

¹⁰⁹ *Killburn v Tuning Fork (Pty) Ltd* [2015] ZASCA 53 (2011/2014) (27 March 2015) [14]-[17].

¹¹⁰ Adams 78.

¹¹¹ *Diners Club SA (Pty) Ltd v Livingstone and Another* [1995] 4 All SA 334 (W), is an example where a contract’s typographical readability was poor and the conditions were such that the print was so small that it was designed to be readable through magnifying equipment. Take for example *Park 2000 v Page* (905/2010) ZASCA 208 (29 November 2010) [10], where no headings had been included in the contract.

10.3.3 LINGUISTIC READABILITY¹¹²

Linguistic readability revolves around the syntactic formulation of a contract, which includes verb usage, grammatical formulation, syntactic formulation such as the use of personal pronouns, sentence length and legal terminology.¹¹³ Finally, clarity is created through consistency, correct grammar, short sentences, ordinary words *et cetera*. It is this particular section on which the plain language movement usually focuses on, but as can be seen, this is rather limiting.

10.3.4 SUBSTANTIVE MECHANISMS

In order to achieve certainty in the drafting of contracts, the drafter must clearly explain the obligations of the parties. Including loosely drafted provisions does not meet the requirement of certainty. For example, to draft a provision that states that the purchase price must be paid is not clear enough and falls short of the requirement of certainty. Elements such as from whom to whom must the purchase price be paid and when such a payment must be made should be included to ensure certainty is achieved. One of the easiest mechanisms for clarity is to describe the required performance fully and spell out what is required from a party for the complete performance of a contract. The obligations of parties should be drafted separately and different concepts should not overlap in the drafting. The date, time and place of performance should be specified to achieve certainty. This may not always be possible because of the duration of the

¹¹² Adapted from Newman 738.

¹¹³ Newman 742.

nature of the contract. In such instances, substantive mechanisms are included in the contract to achieve certainty.¹¹⁴

The principle surrounding this drafting mechanism is that something is certain if it is rendered to be certain.¹¹⁵ This would function independently from the intention of the parties.¹¹⁶

A drafter can include a reference to a mechanism in a contract to render the provision certain.¹¹⁷

An example of this type of mechanism would be an escalation clause, where price increases are determined annually by a pre-set formula which the parties have agreed to.¹¹⁸ This ensures that the parties need not renegotiate the terms of the agreement after the completion of every year. This mechanism will only be certain if the mechanism itself is drafted in a clear and certain fashion. The use of ambiguous and vague language, such as the use of reasonable, may render the mechanism unclear and uncertain.¹¹⁹

Certainty can be achieved through an objectively determinable external standard or mechanism.¹²⁰ An external standard makes the performance determinable. An example is where a price would be fixed with reference to another document other than the contract itself.¹²¹

¹¹⁴ *De Beer v Keyser* 2002 (1) SA 827 (SCA); Van der Merwe *et al. Contract General Principles* (2012) 193.

¹¹⁵ *Id certum est quod certum reddi potest*; Hutchinson 214.

¹¹⁶ Hutchinson 214.

¹¹⁷ *Ibid.*

¹¹⁸ Hutchinson 214; *Rustenburg Platinum Mines Ltd v Breedts* 1997 (2) SA 337 (A).

¹¹⁹ *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 (1) SA 566 (A); *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A); Van der Merwe *et al.* 199, indicates that the term *reasonable price* invalid in terms of sale and lease agreements, but not in agreements relating to services; *Erasmus v Arcade Electric* 1962 (3) SA 384 (T); *Inkin v Borehole Drillers* 1949 (2) SA 366 (A); *Middleton v Carr* [1949] 2 All SA 400 (A); *Burroughes Machines v Chenille Corporation South Africa* 1964 (1) SA 669 (W); *Altech Data (Pty) Ltd v MB Technologies* 1998 (3) SA 748 (W).

¹²⁰ Hutchinson 214.

Certainty can also be attained through the determination of a third party.¹²² This can only be done if the third party is identifiable and uses his discretion objectively and reasonably.¹²³ Examples of these types of third parties are arbitrators, experts or any other appropriate third party or organisation, which usually includes industry specific organisations.¹²⁴

Certainty can be obtained through the discretion or determination of one of the contracting parties.¹²⁵ As seen earlier, the use of discretion in a provision can also be a source of uncertainty, however, if used correctly this can be avoided. This particular mechanism links closely to the requirement and element of legality and lawfulness.¹²⁶ It seems that the general rule is that discretion regarding a party's own performance is invalid, but it is possible to have the discretion to determine another party's obligations to a point.¹²⁷ Drafters attempt to overcome these difficulties by still including a determination of price or time by one of the parties, but allowing the other party to exit the agreement should such discretion be used.¹²⁸

¹²¹ Van der Merwe *et al.* 198; *Shell (SA) (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C), where the term "latest price lists ruling at the time" was accepted as being certain.

¹²² Hutchinson 214.

¹²³ Hutchinson 214; *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A); *Southernport Developments v Transnet* [2005] 2 All SA 16 (SCA).

¹²⁴ See ch 13.

¹²⁵ Hutchinson 214.

¹²⁶ See ch 9; *NBS Boland Ltd v One Berg River Drive CC*; *Deeb v ABSA Bank Ltd*; *Friedman v Standard Bank SA Ltd* 1999 (4) SA 928 (SCA).

¹²⁷ Hutchinson 215; *NBS Boland Ltd v One Berg River Drive CC*; *Deeb v ABSA Bank Ltd*; *Friedman v Standard Bank SA Ltd*.

¹²⁸ So called "sale subject to confirmation" provisions; *Steens v J Brockhouse (SA) Ltd* 1950 1 PH A4 (C); *Moosa v Roberts & Co* 1948 (4) SA 914 (O); *Hawkes & Co Ltd v Cohen* 1929 SWA 77.

The possibility exists to include minimum and maximum thresholds to achieve certainty as well. These mechanisms must in essence be clear themselves, the facts for their applicability established and the consequences thereof ascertainable.¹²⁹

10.4 CONCLUSION

The requirement for certainty in contract drafting is closely linked to the linguistic dimension and interpretational context.¹³⁰ This requirement is probably the most focused on requirement for contract drafting as it is closely linked to the drafter's ability as a wordsmith and stringing provisions together which are clear and readable. The focus is on the language of the contract and how sentences are strung together.

It is understandable that the focus is placed on this requirement of contract drafting as it appears to be one of the most common sources of litigation.¹³¹ However, as mentioned earlier, the purpose of this study is not to consider the correct use of grammar or to ensure a sentence is drafted in the clearest and most certain manner. There are enough sources dealing with this aspect of contract drafting.¹³²

Ambiguity can result in clauses becoming meaningless. In such instances, the courts will have to interpret the provision to establish whether the provision itself becomes meaningless or whether

¹²⁹ Van der Merwe *et al.* 198; *Namibian Minerals Corporation v Benguela Concessions* [1994] 1 All SA 191 (A); *Vermeulen v Goose Valley Investments* 2001 (3) SA 986 (SCA); *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd*. Performance can also be described as minimum performance, maximum performance and alternative performance in an attempt to clarify performance.

¹³⁰ See ch 1.

¹³¹ Haggard & Kuney 242.

¹³² *Supra* (n 2).

the provision is so material to the contract, that the entire contract will fall short on the requirement of certainty.¹³³

What has been seen is that the drafter employs specific mechanisms in constructing a contract to ensure that certainty is present in the written contract.¹³⁴ Some of these mechanisms are used more often, such as definitions, while others are found less often.

The second portion of this requirement is possibility, which is closely linked to the requirement of certainty. As will be seen, these two requirements are inseparable and must be considered together. For the sake of presentation, the requirement of possibility is discussed in the next chapter.

¹³³ *Nicolene Ltd v Simmons* [1953] 1 All ER 822 825, there is a distinction between a meaningless provision and a provision that is still to be agreed on. A meaningless clause can sometimes be ignored, but where there is no provision agreed on, it would mean that consensus has not been reached on that matter yet. In this case the term “the usual terms and conditions of acceptance apply” was used. These terms were not yet agreed on as there was no such thing described.

¹³⁴ Sometimes drafters will attempt to remove the *contra proferentum* rule, in which any ambiguity will be interpreted against the party who drafted the contract. See for example *Mastrobuono et al. v Shearson Lehman Hutton Inc et al.* US Supreme Court 514 US 52 (1995) [62].

CHAPTER 11

POSSIBILITY

11.1	INTRODUCTION.....	217
11.2	SUPERVENING IMPOSSIBILITY.....	221
11.3	ANALYSIS IN RELATION TO CONTRACT DRAFTING.....	223
11.3.1	<i>FORCE MAJEURE</i>	224
11.3.2	HARDSHIP AND INTERVENER PROVISIONS.....	226
11.3.3	AMIABLE COMPOSTER.....	227
11.3.4	WARRANTIES.....	227
11.4	CONCLUSION.....	228

11.1 INTRODUCTION

Performance contemplated under the contract must be possible.¹ Insofar as an obligation is impossible, there can be no claim for performance.² Where partial impossibility is divisible, the remainder of the contract may still remain intact, but if it is not divisible the entire contract will be invalid.³ One way to ensure that the agreement complies with the requirement of possibility is to ensure that the obligations of the parties are drafted clearly and carefully. Performance must thus be determined or determinable from the manner in which the obligations were drafted in the contract. Even if the performance is determinable from the manner in which the contract is drafted, there may be other reasons which make performance impossible.

¹ Grotius *The Introduction to Dutch Jurisprudence* (1985) 3 1 42; D 44 7 1 11; Gaius *Gai Institutiones* (1904) 3 98, an impossible condition would make the stipulation void.

² Hutchinson *The Law of Contract in South Africa* (2012) 210.

³ Hutchinson (2012) 210; *Stansfeld v Kuhn* 1940 NPD 238, is an example of divisibility in relation to partial impossibility.

It seems reasonable that a person cannot be held liable to do the impossible, but at the same time, a person will not be excused from doing the impossible if it was caused by his own actions.⁴

There are number of mechanisms that a drafter would include to maintain liability in impossible situations, such as including warranties for the provision of services. A drafter may also include provisions to exclude liability under impossible situations, such as including *force majeure* provisions, hardship and intervener provisions and meditation provisions.⁵ These types of provisions are mechanisms a drafter uses to either ensure or excuse performance. In doing so, drafters often include foreign concepts such as *force majeure* in the contract which conflict with supervening impossibility as this recognises concepts such as *vis maior* and *casus fortuitus*.

Performance must be possible to perform.⁶ In situations where impossibility exists it would in some, but not all, instances prevent the creation of obligations.⁷ To determine whether impossibility exists, it must be determined objectively, in the manner in which a reasonable person would have found it impossible to perform under similar circumstances.⁸

The main categories of impossibilities include: (i) practical or factual impossibility,⁹ (ii) relative or subjective impossibility,¹⁰ (iii) initial impossibility,¹¹ (iv) legal impossibility,¹² and (v) supervening impossibility.¹³

⁴ Also called self-imposed impossibility.

⁵ Christie & Bradfield *The Law of Contracts in South Africa* (2011) 490, describe such provisions as an arbitrator having the power of an amiable composter.

⁶ See ch 5.

⁷ When it is impossible to render services, the obligation is extinguished. See Grotius 3 47 1; Voet *The Selective Voet: Being the Commentary on the Pandects* (1829) 45 1 24.

⁸ Fouché *Legal Principles of Contracts and Commercial Law* (2015) 96.

⁹ Nagel *Commercial Law* (2011) 98; Hutchinson (2012) 205.

¹⁰ Hutchinson (2012) 205, relates it to an individual's control over his performance.

Practical or factual impossibility relates to situations where the performance can be made, but to do so would not be economically feasible.¹⁴ In such a case a party would be excused from his obligations, unless the contract has included some form of warranty for performance. This would result in a situation where the party would be liable for the performance of his obligations under the contract, regardless of the practical or factual impossibility, because such a party had warranted such performance.¹⁵

Relative and subjective impossibility usually relate to performance being impossible as a result of the conduct of the contracting a party who must perform. The impossibility here is caused by a party or something within the control of the party. This does not limit the creation of obligations, but rather places the party in breach of the contract.¹⁶ This category of impossibility does not prevent a party from being liable for his obligations under a contract and does not excuse his performance.

Initial impossibility relates to instances where such impossibility existed at the time that the parties entered into the contract.¹⁷ The performance of a party's obligations was impossible at the

¹¹ Nagel 98. See for example *Merril Lynch SA (Pty) Ltd v Moosa* [2003] 2 All SA 431 (C).

¹² Van der Merwe *et al. Contract General Principles* (2012) 162, state that in such an instance it can be either be argued that the contract falls short of possibility, thereby creating illegal impossibility, or can fall short of the requirement of legality. See ch 9.

¹³ Nagel 98.

¹⁴ Hutchinson (2012) 205, uses the example where goods have been washed over the side of a vessel in a storm and the salvage costs to recover the goods would make it uneconomical to proceed to recover the goods.

¹⁵ Hutchinson (2012) 209; Van der Merwe *et al.* 163; Fouché 97; Sharrock *Business Transactions Law* (2011) 114.

¹⁶ Nagel 98; *Grobberlaar NO v Bosch* [1964] 1 All SA 191 (E), states that a party cannot be discharged from the contract through the loss of the subject matter where he, either deliberately or negligently, was responsible for such a loss.

¹⁷ For example a building that is being rented collapsed prior to the execution of the contract; *Merril Lynch SA (Pty) Ltd v Moosa*, where the selling of securities on the JSE was not possible and as a result the contract was found to be void.

start of the contract and as a result no legal obligations could be formed.¹⁸ As a result, the parties would not be liable for breach of contract and would not be obliged to perform the obligations contained in the contract.¹⁹

It is unclear whether a warranty for performance would be sufficient to overcome initial impossibility. It seems that if performance is warranted at the execution of the contract, the party that warranted performance would be liable for performance, regardless of such an initial impossibility. However, should initial impossibility prevent the creation of obligations, which would occur prior to and at the execution, then no obligations would have been created. This would mean that the warranty provided could not have come into force as no obligations would have come into force at the execution of the contract. The inclusion of such warranties would then become meaningless to overcome situations of initial impossibility.

Legal impossibility relates to instances where some legal requirement prevents a party from performing his obligations under the contract. This can occur either at the conclusion of the contract or during the term of the contract, in which case, it would fall within in the realms of supervening impossibility. It can also be argued that in this instance: (i) a contract falls short of the requirement of possibility, thereby creating illegal impossibility, or (ii) a contract can fall short of the requirement of legality.²⁰

¹⁸ *Wilson v Smith and Another* [1956] 1 All SA 114 (W), indicates a general rule is that impossibility of performance at the time that the contract is entered into would avoid the contract. This rule, however, will not apply where the parties contemplated impossibility while entering into the contract and failed to properly address it in a contractually. A party would not, in such circumstance, be able to escape liability.

¹⁹ Nagel 98.

²⁰ See ch 9; Van der Merwe *et al.* 162, argue that such an occurrence should be dealt with under the requirement of legality and in particular the contravention of public policy.

Generally, should a warranty for performance have been included in the contract, a party would be excused from the performance of his obligations.²¹ A party's performance would unlikely be excused if there was a legal impossibility at the execution of the contract.²² Such a warranty for performance under legal impossibility would only relate to the performance requirement of a contract. Should the legal impossibility be determined to not fulfil the requirement of lawfulness and legality of a contract, such a warranty would likely not provide the continued fulfilment of a party's obligations. The reason is that the requirement of legality would not be fulfilled and such a contract would result in being void. If the contract is void no legal obligations would have been created and no warranty can come to be in existence. It is therefore questionable whether a warranty for performance under a legal impossibility would stand up against the requirements of legality and whether it has any purpose in the contract.

11.2 SUPERVENING IMPOSSIBILITY²³

Supervening impossibility deals with situations where something occurred during the contract that makes the performance of a party's obligations impossible.²⁴ This can be a legal or physical

²¹ Hutchinson (2012) 20; Van der Merwe *et al.* 163; Fouché 97; Sharrock 114; *William Hunt & Co (Natal) (Pty) Ltd v Christie* 1935 NPD 453, where the purchaser specifically agreed to be liable for any loss "resulting in the said goods being stolen, lost, destroyed, or damaged in any circumstances whatever including, accident, the Act of God, or force majeure". In this regard, this functions as waiving any rights a person may have under supervening impossibility.

²² See discussion at initial impossibility above at par 11.1.

²³ Hutchinson "The Doctrine of Frustration: A Solution to the Problem of Changed Circumstances in South African Contract Law" *SALJ* (2010) 95 (hereinafter referred to as Hutchinson (2010a)), defines supervening impossibility as a situation where impossibility results from an unforeseen or uncontrollable event or even a change in circumstances.

²⁴ Ramsden *Supervening Impossibility of Performance in the South African Law of Contract* LLM (1983) 89; Fouché 96, indicates for example that the thing does not exist; Hutchinson (2012) 208, states for example that the building for a rental agreement collapses during the term of the agreement; *Witwatersrand Township Estate*

event. The contract was for example validly concluded, but during the course of the contract it became impossible to perform the contractual obligations. Supervening impossibility will generally be brought on by either *vis maior*²⁵ or *casus fortuitus*.²⁶ Performance will not be excused where such a supervening impossibility has been caused by a party or where the parties have foreseen the impossibility beforehand and still continue with the contract.²⁷

The consequence of supervening impossibility is that a party may be excused from performing his obligations and the contract is cancelled.²⁸ The contract would be void *ab initio* and such performance that has already been made must be returned.²⁹ The question of supervening of impossibility relates to an absolute impossibility and does not deal with instances where the contract becomes burdensome or uneconomical on a party.³⁰

and Finance Corporation (Pty) Ltd v Rand Water Board 1907 TS 231, where the parties did not foresee the impossibility.

²⁵ Usually an act of God or a natural disaster; Hutchinson (2010a) 95, describes *vis maior* as a direct act of nature, the violence of which could not reasonably have been foreseen or guarded against.

²⁶ It is an offshoot of *vis maior* and usually relates to some unavoidable accident. Hutchinson (2010a) 95, describes *casus fortuitus* as an event that has occurred by chance and is a species of *vis maior*. Ramsden 90, describes *casus fortuitus* as being similar to *vis maior*, but wider as it includes acts of man over whom the parties have no control; *Viterbo v Friedlander* 120 US 707 (1887) 727, states that it can be described as an unforeseen event, unforeseen accident or chance.

²⁷ *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* [1997] 1 All SA 11 (A) 13, the general rule is that *vis maior* or *casus fortuitus* relieves a party of their obligations, but this will not be the case where the parties had actual or reasonable foresight of the event. *King Sabata Dalindyebo Municipality v Landmark Mithatha (Pty) Ltd and Another* [2013] 3 All SA 251 (SCA); *Transnet Ltd t/a National Port Authority v Owner of MV Snow Crystal* [2008] 3 All SA 255 (SCA); *SA Forestry Co Ltd v York Timber Ltd* [2004] 4 All SA 168 (SCA); *Wilson v Smith and Another* 117, in instances where there is no provision included in the contract and the parties did contemplate the occurrence of such an event, they would not be relieved of the performance of their contractual obligations.

²⁸ Hutchinson (2010a) 97.

²⁹ Hutchinson (2012) 208; Hutchinson (2010a) 97.

³⁰ Hutchinson (2010a) 84.

If there is a possibility of divisibility of performance, a court can hold that only that portion that can be performed must be performed with the appropriate adjustment.³¹

11.3 ANALYSIS IN RELATION TO CONTRACT DRAFTING

In long term contractual relationships there is a possibility that events may occur that neither party has contemplated or made arrangements for. In instances where possibility becomes impossible, it seems reasonable that a party should be excused from its contractual obligation.³² This is not always the case and competes with certainty in contracts.³³ Prolonged *vis maior* or *casus fortuitus* can trigger an option to cancel the contract. It may not be in the parties' best interest or intention to have the contract terminated or even have the uncertainty of the application of supervening impossibility.³⁴ There is nothing stopping parties from including special provisions to excuse non-performance.³⁵ These provisions are often seen in contracts to include *force majeure*,³⁶ hardship provisions,³⁷ intervenor provisions³⁸ and allowing an arbitrator

³¹ Hutchinson (2012) 209.

³² This is usually when something is outside the control of a party, or there is a change in circumstances, or there is a change in the dynamics of the parties to the contract. Sometimes a party's economic hardship would also feature in certain contract terms to excuse performance of his obligations under a contract.

³³ Hutchinson (2010a) 84.

³⁴ Ramsden 91-99, states that *vis major* and *casus fortuitus* would include earthquakes, fire lightning, shipwreck, storms, flooding which is ordinary to current weather patterns, pestilence, locusts, mice, worms, plant diseases (such as blight), exceptional heat waves, draught, heavy snowfalls that is not what is usually expected, death or severe illness or injury to man or animal, act of man such as war, unavoidable theft, riot, strikes, acts of third parties of a shipper, acts of State (such as legislation, executive decision such as expropriation, declaration of war etc. See also *Touche Ross & Co v Manufacturers Hanover Trust Company et al* 107 Misc.2d 438 (1980) 441, in which it was said that revolution and political upheaval are generally accepted in international practice to be *force majeure* events.

³⁵ Christie & Bradfield *The Law of Contract in South Africa* (2011) 493; See for example *General Electric Company v Metals Resources Group Limited* 293 AD.2d 417 (2002) 741 NYS.2d 218 418, in which the contract did not include a *force majeure* provision and therefore there was no basis for the defence of *force majeure*.

³⁶ Christie & Bradfield 491.

to have the power of *amiable compositeur*,³⁹ which appears to function like a mediation provision.

11.3.1 *FORCE MAJEURE*

Strictly speaking there is no need for a supervening impossibility, *vis maior*, *casus fortuitus* or *force majeure* provision to be included in a contract. Supervening impossibility is part of the common law and caters for such an occurrence regardless of whether the provision is included in the contract or not. The reason why such provisions are included is to avoid the contract from being cancelled and also to avoid the uncertainty of the application of supervening impossibility.

To align with South African common law, the correct terminology for such a provision would be supervening impossibility, *vis maior* or *casus fortuitus*. More often the terminology of *force majeure* is used. It seems odd that South African contracts would include a term which finds no place in South African law. The term *force majeure* stems from the French law and does not appear to have any legal grounds in South Africa.⁴⁰ Yet, Hutchinson seems to advocate the use of a *force majeure* provision in drafting contracts.⁴¹ By using the term *force majeure* a special provision is included in the contract which in essence is an additional requirement included by

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Christie & Bradfield 491-492.

⁴⁰ Hutchinson *Fundamental Change in Circumstances in Contract Law* DPhil (2010) 104 (hereinafter referred as Hutchinson (2010b)), states that *force majeure* is a French term that refers to an event beyond the control of the parties. *Viterbo v Friedlander* 120 US 707 (1887) 728, indicates that *force majeure* can mean a superior force, unforeseen events, overpowering event or an irresistible force.

⁴¹ Hutchinson (2012) 412, uses the following example “In the event of force majeure, the contract will be suspended for the entire period during which the force majeure occurrence continues. Should the occurrence exceed 6 (six) months, either party becomes entitled to terminate the contract by giving written notice of termination to the other party.”

the parties.⁴² The courts would, in such an instance, only have recourse to consider the application of the *force majeure* provision in the four corners of the contract,⁴³ as it would not find further assistance in the law, which does not strictly recognise the *force majeure* concept.⁴⁴

Hutchinson then further advises that one should refrain from describing or giving a list of *force majeure* events and risk leaving out a specific event. Hutchinson recommends that *force majeure* should rather be described as an event that is beyond the control or fault of a party and which cannot be avoided.⁴⁵ This would have been acceptable if the interpretation was not limited to the contract itself. As a foreign concept is being introduced into the contract the only basis on which a court would be able to adjudicate is on the terms which the parties include in the document. As such, examples of a *force majeure* have been included in the definition of the term and attempts to include broader concepts such as Hutchinson's recommendation.⁴⁶

⁴² It could be argued that the inclusion of a *force majeure* clause is a formality or internal arrangement set by the parties to the contract. In *Phibro Energy Inc v Empresa De Polimeros De Sines Sarl* 720 F.Supp 312 (1989) 318, the purpose of a *force majeure* clause is to relieve a party from its contractual duties when performance has been prevented by a force beyond its reasonable control, or where the contract has been frustrated. See also *United Equities Company v First National City Bank* 52 AD.2d 154 (1976) 157, which describes that the purpose of a *force majeure* provision is to limit damages in unforeseen circumstances or where the performance of the contract has been frustrated.

⁴³ For example *Tweedie & Another v Park Travel Agency (Pty) Ltd t/a Park Tours* [1998] 3 All SA 57 (W), where the language in the clause was too vague and far removed from the actual facts. It could therefore not be relied upon. In *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 1 ER 981, quoting *Lebeaupin v R Crispin & Co* [1920] 2 KB 720, it was indicated that a *force majeure* provision must be determined in accordance with the words that surround it. The effect of the clause may be different depending on the words used in the provision.

⁴⁴ Hutchinson (2010b) 105, explains that a *force majeure* provision attempts to regulate unforeseen events and to allocate risk between the parties in a situation where there is a change in circumstances.

⁴⁵ Hutchinson (2012) 412.

⁴⁶ See *Eiusdem Generis* interpretation rules Cornelius *Principles of the Interpretation of Contracts in South Africa* (2007) 186.

11.3.2 HARDSHIP AND INTERVENER PROVISIONS

Hardship provisions are included in a long-term contract to avoid situations where it becomes uneconomical to continue with the contract.⁴⁷ Unlike other jurisdictions, South African law does not excuse a party from performing because it becomes uneconomical to do so.⁴⁸ To protect a party's economical position, a hardship or intervener provision would be included to excuse a party from performance of his obligations in certain circumstances.

A hardship provision usually includes an element of renegotiation of price and, should the parties not come to an agreement, there is usually some sort of mechanism for the termination of the contract. The intervener provision seems to be to what a hardship provision morphs into once it has been triggered. These provisions do not take into account situations of supervening impossibility, but rather consider the economic feasibility of a party to continue with the contract after an event has occurred.⁴⁹

A hardship and intervener provision is an internal arrangement between the parties. These provisions will function strictly in accordance with the requirements detailed in the contract.

⁴⁷ Hutchinson (2010b) 105, states that hardship provisions are triggered by a change in circumstances and are usually aimed to renegotiate the contract.

⁴⁸ UCC 6-15.

⁴⁹ In the USA there is the concept of having an unconscionable contract. See for example *Gillman v Chase Manhattan Bank NA* 73 NY2d 1 (1988) 10, which states that an unconscionable contract "is so grossly unreasonable or unconscionable in light of the business practices of the time and place to be unenforceable according to its literal meaning." This concept is sensitive to the bargaining process and to be unconscionable it must be shown to be procedurally and substantively unconscionable.

11.3.3 AMIABLE COMPOSTER

The mediation provision or alternatively an arbitration provision, which allows the arbitrator to have the power of amiable composter, stems from international law. It includes situations where a matter is referred to an independent third party to resolve a dispute in a fair and equitable manner. These provisions are included to preclude situations where a contract is terminated, cancelled or a party is placed in financial ruin for the sake a supervening impossibility or an event that shifted the equilibrium of the contract. These requirements are often seen in mediation provisions of the parties.

Mediation provisions in these circumstances are not included for a dispute of the contract as described in Chapter 13. They only relate to specific provision relating to performance in the contract. These mediation provisions function similarly to an *amiable composter* provision.

11.3.4 WARRANTIES

Force majeure, hardship, intervener and mediation provisions all have the intention of alleviating a party's obligation to perform his obligations in situations of impossibility or where it becomes uneconomical to do so. Drafters can also include mechanisms to hold a party accountable for performance regardless of whether a supervening impossibility or economic hardship has occurred or not.

This occurs when a party warrants or guarantees performance of its obligations.⁵⁰ Such a warranty or guarantee would hold a party accountable even if performance becomes impossible for that party at a later stage.⁵¹ By including such warranties, the application of supervening impossibility is replaced with strict liability of a party even under impossible circumstances.⁵²

11.4 CONCLUSION

This chapter focused on impossibility in terms of practical or factual impossibility, relative or subjective impossibility, initial impossibility, legal impossibility and supervening impossibility which avoid liability for a contract under such circumstances. The other side of impossibility which was discussed was the inclusion of warranties to ensure contractual liability remains intact regardless of impossibility occurring.

Another element is the clear and certain terms in which the provisions are drafted to ensure that the contractual provision is possible. The requirement for a contract to be possible is closely linked to the requirement of certainty, which refers to interpretational and linguistic elements of a contract.⁵³ Simply put, without an obligation being certain it is impossible to perform such an obligation. As such, for the element of possibility to be fulfilled the element of certainty must also be fulfilled.

⁵⁰ *Thomas & Co Ltd v Whyte & Co Ltd* (1923) 44 NPD 413, was limited to an express warranty. The case seems to indicate that implied warranties could also be used to ensure a party's liability under the contract.

⁵¹ Hutchinson (2012) 209; Van der Merwe *et al.* 163; Fouché 97, refer to this situation as the passing of risk where parties accept such risk in which case the situation of supervening impossibility will not apply; Sharrock 114.

⁵² See discussion under initial impossibility and legal impossibility discussed earlier.

⁵³ See ch 1.

It is for this reason that the requirements of possibility and certainty cannot truly be separated when it comes to the drafting of contracts. Both refer to how clear the words are presented, the manner in which sentences are structured, the way in which paragraphs are presented and finally how the entire contract flows to ensure that the obligations contained within the document are clear, certain and possible.

For a drafter, the requirements of possibility and certainty are closely linked to his command of language and the manner in which the contract is presented. It is at this requirement that the practical ability to present concepts, draft clearly and use the appropriate words to convey a message overlaps with the requirement that a contract must be certain and possible. Although the manner in which the contract is presented may appear to be practical, such practicality is still couched in substantive law and forms the reason why drafters draft agreements in the manner they do.

CHAPTER 12

END-GAME PROVISIONS

12.1	INTRODUCTION.....	230
12.2	FRIENDLY TERMINATION PROVISIONS	232
12.2.1	FULFILMENT OF OBLIGATIONS.....	233
12.2.2	EFFLUXION OF TIME.....	234
12.2.3	AGREED TERMINATION AND TERMINATION BY NOTICE.....	236
12.2.4	NOVATION	237
12.3	TERMINATION THROUGH OPERATION OF LAW	238
12.3.1	SET-OFF.....	239
12.3.2	PRESCRIPTION	240
12.4	OTHER TERMINATION PROVISIONS.....	241
12.5	BREACH.....	242
12.5.1	REMEDIES THAT KEEP THE CONTRACT ALIVE	247
12.5.2	REMEDIES THAT BRING THE CONTRACT TO AN END	252
12.6	CONCLUSION.....	255

12.1 INTRODUCTION

In the previous chapters, the focus was on how an agreement is drafted to ensure that it complies with the requirements of a contract.¹ This chapter focuses on how a written contract comes to an end, whether through breach or otherwise² and its consequences. The purpose of reducing an agreement to writing is to create certainty. Such certainty stems from the need to ensure that the

¹ See ch 5-11.

² Anderson & Warner *A-Z Guide to Boilerplate and Commercial Clauses* (2012) 108, where “break” is sometimes used instead of “breach”.

parties can enforce the agreement.³ Enforcement of the agreement goes to the heart of the reason why drafters deal with breach in the contract.

A contract can come to an end either by the fulfilment of the required performance,⁴ a mutual agreement to terminate,⁵ the effluxion of time, operation of law,⁶ or even breach (although breach does not always result in the termination of a contract).⁷ These provisions have collectively been referred to as the “end-game provisions” which is an all-encompassing term used for all types of ways in which a contract can be come to an end.⁸

Some distinguish the types of termination as either being friendly terminations or unfriendly terminations.⁹ A friendly termination relates to the natural end of the contract. This natural end can occur by the expiry of the contract through the effluxion of time, the parties agreeing to terminate the agreement or even when the performance of the parties has been completed. These so-called friendly terminations relate to situations where the parties are not in breach of the agreement, but the contract has come to some natural end. Unfriendly termination, on the other hand is the consequence of breaching a contract.¹⁰

³ *Home Builders & Loan Association v Blaisdell et al.* 290 Supreme Court of the US 398 (1934) [430], states that nothing is more material than the enforcement of an obligation.

⁴ Hutchinson *The Law of Contract in South Africa* (2012) 375, states that obligations can be terminated by performance; Kerr *The Principles of the Law of Contract* (2002) 519, contends that only once all the obligations towards both parties are terminated, the contract comes to an end due to performance.

⁵ Van der Merwe *et al. Contract General Principles* (2012) 439, in other words through a juristic act.

⁶ Van der Merwe *et al.* 440, state that this can occur through supervening impossibility, extinctive prescription, merger and set-off.

⁷ Anderson & Warner 108.

⁸ Stark *Drafting Contracts: How and Why Lawyers Do What They Do* (2007) 157.

⁹ Stark (2007) 157.

¹⁰ Stark (2007) 159, argues that dispute resolution procedures also fall within the category of unfriendly termination. This cannot be the case because not all disputes under dispute resolution procedures end up in termination and secondly not all dispute resolution procedures are acrimonious. Take for instance mediation or

Distinguishing between friendly and unfriendly termination is helpful from a practical perspective, but fails to take into account one other potential way in which a contract can come to an end, that is, through the operation of law, which can include supervening impossibility, extinctive prescription, merger and set-off.¹¹ The operation of law does not fit into the category of friendly termination and therefore is viewed as a category of its own.

Dealing with the creation of obligations in the previous chapters, parties will naturally have the need to deal with when such obligations come to an end.

12.2 FRIENDLY TERMINATION PROVISIONS

Friendly termination provisions occur when: (i) the parties have fulfilled their obligations, (ii) the contract has expired through the effluxion of time, (iii) the parties have agreed to terminate the agreement, or (iv) one party is given the unilateral right to terminate the agreement with, or without a reason.¹²

an agreed settlement between the parties. In such an instance, a termination of the relationship would not strictly be unfriendly. As alternative dispute resolution casts a wider net than merely termination it is discussed separately.

¹¹ Van der Merwe *et al.* 440.

¹² Also referred to as termination for convenience or termination without cause.

12.2.1 FULFILMENT OF OBLIGATIONS

A contract will come to a natural end when all the obligations of both parties have been fulfilled.¹³ In this instance there is no continuous performance, but a once-off or limited performance required by the contract.¹⁴ The performance that discharges the obligation is the performance as captured in the contract,¹⁵ and must be complete and without defects.¹⁶ If the contract is silent on the performance then the default rules will apply.¹⁷ For example, (i) in relation to timing of the performance and where timing is not specified in the contract, the performance is immediate,¹⁸ (ii) in relation to money obligations and where the tender is not specified, payment must be made by legal tender,¹⁹ (iii) in relation to the manner in which the obligations are fulfilled and if not set out in the contract, performance must be made in terms of custom or trade,²⁰ and (iv) if a creditor accepts performance other than what has been agreed, the

¹³ Van der Merwe *et al.* 440, state that the performance must be fulfilled, but the parties must also intend for the obligations to be extinguished. Nagel *Commercial Law* (2011) 145, contends that most contracts will come to an end where the parties have completed their performance. In other words where both parties have completed their performance the contract is automatically terminated. See *B&H Engineering v First National Bank* 1995 (2) SA 279 (A); Gaius *Gai Institutiones* (1904) 3 168; J Inst 3 24 1.

¹⁴ This can also include indivisible performance.

¹⁵ Kerr 523; Nagel 147-148, states that performance must be done at the time and place described or as required in the contract.

¹⁶ Nagel 146, mentions that part performance and defective performance will not apply to fulfilment.

¹⁷ Kerr 534, states that time for performance features in all contracts and where it is not considered by the parties, the default rules will apply. For example in *Zietsman v Allied Building Society* [1989] 4 All SA 111 (O) 122, neither the creditor nor the debtor indicated where monies had to be allocated and as such the common law rules for the allocation of payment would apply.

¹⁸ Hutchinson 523; Van der Merwe *et al.* 443, state that the immediate but reasonable time for performance must occur. See *Krige v Wallace and Others* 1990 (3) SA 724 (C); Van der Merwe *et al.* 443, in instances where the timing of performance is not specified in the contract, it can be determined by, for example, trade usage; *Venter v Venter* 1949 (1) SA 768 (A).

¹⁹ Kerr 523; Van der Merwe *et al.* 442, mention that money obligations must be discharged by the payment of money (being legal tender). The risk in change in value of currency falls onto the debtor and if this is something that the debtor wants to protect himself from, he must do so contractually. See ss14, 16, 17 of the South African Reserve Bank Act 95 of 1997; *Aktiebolaget Tratalja v Evelyn Haddon & Co* 1933 CPD 156; *Standard Chartered Bank of Canada v Nedpern Bank* 1994 (4) SA 747 (A).

²⁰ Van der Merwe *et al.* 443, state that the manner in which performance must take place is determined by the contract or otherwise by trade usage or general principles of law.

creditor may rely on the original performance or proceed on the defective partial performance.²¹ These types of agreements are indivisible and take the form of a once-off event.

It is not strictly necessary to include an effective date or commencement date in these types of agreements as the date required for performance will usually coincide with the commencement of the agreement. As these agreements are a once-off event, it will also explain why a duration provision would not be required.

12.2.2 EFFLUXION OF TIME

Contracts that contemplate continuous performance and not a once-off event, usually include a duration provision.²² Different dates are used for different reasons. The execution date or date of the agreement relates to the offer and acceptance of the agreement and does not address the duration or performance of the agreement.²³ The effective date or commencement date would be included in the document to signify the start of performance.²⁴ The occurrence of an event can also signify the start of the performance of the agreement.²⁵ This will usually be accompanied by an expiration or termination date. To signify the end of the performance either “expiry” or

²¹ Van der Merwe *et al.* 441, 446, state that certain other default rules relate to the allocation of payments as the interest on a debt is extinguished before the capital and an enforceable debt over an unenforceable debt. The more onerous debt is extinguished first. Debts on an equal footing are settled in chronological order and where none of these rules apply, the debts are settled proportionately.

²² *SA Yster en Staal Industriële Korporasie Bpk v Koschade* [1983] 4 All SA 217 (T) 217, states for example “This contract is entered into for a period of 12 months commencing on either the date of signature hereof by the Corporation or on the date on which the prospective licence(s) is issued, whichever is the latest and furthermore subject to four renewal periods of 12 months each following upon the original period of 12 months”.

²³ See ch 6.

²⁴ This can also be described as divisible performance as it contemplates a period of time that performance must be provided.

²⁵ See *SA Yster en Staal Industriële Korporasie Bpk v Koschade* in which the granting of licence(s) would trigger the commencement of the agreement.

“termination” can be used. The use of the term “expiry” has a limited application as it refers to the end of the duration of the agreement, whereas the term “termination” is an all-encompassing term which is used for any type of end to the agreement.

The date a contract will terminate is the expiry date due to the effluxion of time. However, there may be instances where the contract does not specify the duration or expiry date of the contract. This could be interpreted that the contract will run for an indefinite period. Two possible situations can occur under such circumstances. The first is where the parties did not intend for the contract to run for an indefinite period of time. In such an instance the courts have imputed a tacit term in which a party can terminate the agreement through reasonable notice.²⁶ The second is where the contract runs for an indefinite period of time, but the parties intended for the contract to run into perpetuity. In such an instance the court cannot impute such a tacit term into the contract.²⁷

The type of performance contemplated by the agreement will determine how the duration of the agreement will be drafted. In the case of continuous performance there must be a start and end date to the required performance. In these instances a drafter will include a provision dealing with the duration of the agreement.

²⁶ See *Amalgamated Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA); *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA); *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A); *Eileen Louwet Real Estate v AFC Property Development* 1989 (3) SA 26 (A); *Juglal v Shopright Checkers t/a OK Franchise Division* 2004 (5) SA 348 (SCA).

²⁷ See *Golden Lions Rugby Union and Another v First National Bank of South Africa* 1999 (3) SA 576 (SCA); *Mun Publishing v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 (ZS).

12.2.3 AGREED TERMINATION AND TERMINATION BY NOTICE

A contract can be terminated by agreement between the parties. This is also known as a release, voluntary termination or waiver.²⁸ Sometimes this is also called a mutual cancellation. The term cancellation has a narrower meaning than termination. In circumstances where restitution is not contemplated, it is more accurate to use the word “termination” than “cancellation”.²⁹ This type of termination can occur verbally or in writing.³⁰ To prevent verbal terminations the drafter will include non-variation and non-termination provisions.³¹ By doing so, the parties agree that only written terminations agreed to by both parties will be effective. A release can relate to the whole contract or part of it and is a bilateral act requiring the cooperation of both parties.³²

A waiver, however, is a unilateral act in which one party may waive the benefit of a right that accrues to him.³³ Waivers can be done outside the four corners of the contract document. Drafters often include non-waiver provisions to prevent verbal or tacit waivers from occurring.³⁴ This is, once again, an attempt to create certainty and to control the actions of the contracting parties.

²⁸ Nagel 148, refers to this as a bilateral act of both parties or a voluntary termination. This can take the form of a waiver, settlement or compromise; Hutchinson 379, says a settlement and compromise will destroy the previous obligation, but will create new obligations in their place. As such, all the normal requirements for a contract will apply to settlement and compromise.

²⁹ *Steward Wrightson (Pty) Ltd v Thorpe* [1977] 3 All SA 267 (A) 276, states that the word “termination” is more neutral than “rescind”. The word “rescind” ordinarily conveys the effect of *ab initio* or *in futuro*.

³⁰ Kerr 540.

³¹ See ch 8.

³² Van der Merwe *et al.* 452.

³³ See ch 8; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 323, refers to the person who is waiving his right, but is aware of the right he is waiving; According to *Union Free State Mining and Finance Corporation Ltd v Union Free State Gold and Diamond Corporation Ltd* 1960 (4) SA 547 (W) 549, a waiver, release or abandonment is perfected by acceptance of the other party and it does not matter whether the acceptance is provided in an express fashion or in a tacit manner; Van der Merwe *et al.* 452.

³⁴ See ch 8.

The provisions of an agreement may give a party the unilateral right to terminate the contract.³⁵ This is where the parties include a notice to terminate.³⁶ Termination in these instances does not include an element of wrongdoing and is not linked to the breach of any of the provisions of a contract. A termination provision allows a party to terminate with or without notice to the other party. Termination in this context means that the obligations have been terminated by the parties. As there is no breach to the contract, there are normally no remedies available to the parties if the contract is terminated by notice. Therefore, this type of termination merely puts an end to the obligation as would similarly have been the case in a contract that expired through the effluxion of time. This is not an automatic right and a provision of this nature would have to be included in the agreement.

12.2.4 NOVATION

Finally, a contract can be replaced by a second contract in which the parties intend to novate, terminate or substitute the first contract with the second contract.³⁷ This results in the termination of the old obligation and the replacement by a new one.³⁸

³⁵ Van der Merwe *et al.* 439; Adams *A Manual of Style for Contract Drafting* (2008) 302, 304, indicates that a unilateral right to terminate is also known as termination without cause or termination for convenience. For example “Acme may terminate this agreement [at any time][for any reason][or for no reason] by giving the Vendor at least 30 days prior notice”.

³⁶ Also known as termination for convenience or termination without cause; Hutchinson 381; *PBL Management (Pty) Ltd and Another v Telkom SA Ltd and Another* 2001 (2) SA 313 (T) 317, for example says “Telkom reserves the right to terminate this contract at any time by giving 120 days prior written notice to the other parties of Telkom’s intention to do so”.

³⁷ Grotius *The Introduction to Dutch Jurisprudence* (1985) 3 4 3, indicates that novation is where one obligation is substituted by another; Nagel 149; *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A). *Zygos Corporation v Salen Rederierna AB* [1984] 4 All SA 525 (C) 534, shows that novation is the process where an existing obligation is substituted for another. A novation can occur voluntarily, known as *novatio voluntaria*, or by way

Drafters usually address novation in one of two ways. Firstly, a provision can be included in which the contract replaces all previous agreements of the same matter. In this way the drafter attempts to deal with any previous agreements that are in existence. It is questionable whether such a provision is strictly necessary as the new would automatically replace the old. The second way is to include the concept of novation in the non-variation provision. Therefore no novation would be possible unless reduced to writing and signed by both parties. In this way drafters attempt to avoid a situation where another agreement could potentially replace the existing contract. If such a new agreement is in writing, the protection provided by such a provision is nullified.

12.3 TERMINATION THROUGH OPERATION OF LAW

The termination through operation of law can be done through set-off,³⁹ merger,⁴⁰ supervening impossibility⁴¹ and prescription.⁴² Merger occurs where the same person becomes the debtor and

of operation of law, known as *novatio necessaria*. See also *Weltmans Custom Office Furniture (Pty) Ltd (in Liquidation) v Whistlers CC* [1997] 3 All SA 467 (C) 472.

³⁸ *Zygos Corporation v Salen Rederierna AB* 534; Nagel 149; Hutchinson 379.

³⁹ Nagel 150, where the debt of one party is set off against the debt of another party; Fouché *Legal Principles of Contracts and Commercial Law* (2015) 126; Hutchinson 382, says debt must be of the same nature, due and payable, a liquidated amount and must be between the persons with capacity.

⁴⁰ Nagel 151, says a merger happens where the same person becomes the creditor as well as the debtor.

⁴¹ See ch 10.

⁴² Nagel 151-152, indicates that extinctive prescription is where obligations are discharged over a period of time. See s4 of the Prescription Act 68 of 1969.

creditor of the same debt.⁴³ Supervening impossibility can cause the termination of an obligation.⁴⁴

12.3.1 SET-OFF

Set-off is where the debt of one party is set-off against the debt of another,⁴⁵ and can function as a partial or complete discharge of obligations.⁴⁶ Set-off occurs automatically when all the requirements are met,⁴⁷ being the debt must be: (i) of the same nature, (ii) due, payable and enforceable, (iii) a liquidated amount, and (iv) between the same persons with capacity.⁴⁸

To avoid situations where obligations are paid without knowledge of the parties, drafters attempt to include further controls in relation to set-off. These provisions can take various forms. Often provisions are included which provide a party with the right to set-off. As set-off occurs automatically, a provision to allow set-off is superfluous and merely states the existing position. An express right to set-off is, therefore, meaningless.

⁴³ Nagel 151; *Trust Bank of Africa Ltd v Imperial Garage and Filling Station* 1963 (1) SA 123 (A).

⁴⁴ See ch 11.

⁴⁵ *Schierhout v Union Government* 1926 AD 286 289, unlike English law where set-off is regulated by statute, set-off is a common law principle where one debt extinguishes the other as effectively as if payment was made; Nagel 150.

⁴⁶ *Siltek v Business Connexion* (081/2008) [2008] SASCA 136 (26 November 2008) [6], shows that set-off takes place if two parties owe each other a liquidated debt which is payable. It therefore functions as a form of payment which discharges the obligation; Nagel 150.

⁴⁷ Hutchinson 382.

⁴⁸ Nagel 150; Fouché 126.

Provisions may also be included stating that a debt is a liquidated debt. One of the reasons to do that is to allow set-off to function against such a debt. Whether a debt is liquid or not is a question of fact.

Alternatively, the parties can exclude the operation of set-off. This changes the default position. In this manner the parties attempt to exert further control over the performance of a party's obligations.⁴⁹ The exclusion of the operation of set-off is usually found with the provisions dealing with payment.

12.3.2 PRESCRIPTION

Extinctive prescription discharges obligations through the lapse of time.⁵⁰ Prescription regulates the time limits within which a claim can be brought against another party. The time that prescription applies is regulated by statute,⁵¹ but the parties may attempt to regulate the operation of prescription further in the contract. This is done through the inclusion of a time limitation provision.⁵² This type of provision prevents a party from instituting action if it has not done so within the time limits contained in the provision.

Typically these provisions can take two forms. The first relates to notifying one party of a claim and the other relating to bringing the actual claim against the other party within a specific period

⁴⁹ *Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd* 1998 (3) SA 748 (W) 756, states that “the purchaser shall pay the seller the purchase price ... without deduction or set-off...”

⁵⁰ S11 of the Prescription Act, setting out the years that must pass before prescription will become effective.

⁵¹ See the Prescription Act.

⁵² *Barkhuizen v Napier* [2008] JOL 19614 (CC) [1]. See for example *Nea Agrex SA v Baltic Shipping Co Ltd and Another* [1976] 2 All ER 842; *Port Jackson Steve Doring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd “The New York Star”* [1980] 3 All ER 257.

of time. If the timeline for the execution of a claim is too limited this type of provision runs the risk of being contrary to public policy.⁵³

12.4 OTHER TERMINATION PROVISIONS

There are provisions included in a contract in which a party has the right to terminate the contract in instances of insolvency, business rescue and even death. This is often an attempt to limit the powers the trustee, business rescuer or executor would normally have. At insolvency the trustee is tasked with winding up the insolvent estate and generally has the right to terminate or continue with the contract.⁵⁴ Similarly, the executor of a deceased estate may enforce contractual rights and duties.⁵⁵ A business rescuer has a different function and that is to streamline and restructure the business in an attempt to rescue the business from financial distress and ruin. This can result in the termination of contracts or upholding the contract in less favourable circumstances. In all these instances the parties attempt to avoid the consequences of having a trustee, executor or business rescuer from deciding to continue with the contract or not. To avoid such risks, parties include provisions to allow the termination of the agreement under such circumstances. This will allow the party to decide whether to continue with the contract or not. Drafters will usually introduce such a provision under the termination section of the agreement.

⁵³ *Barkhuizen v Napier* [60], shows that an example of a time limitation clause so unfair would be in instances where notice must be given within twenty four hours.

⁵⁴ Hutchinson 389, certain termination rights are given to a trustee. See the Insolvency Act 24 of 1936.

⁵⁵ Hutchinson 390, states that a contract is normally not terminated because of death, but Fouché 26, contends that contracts of a personal nature such as marriage or employment could terminate automatically upon death.

12.5 BREACH⁵⁶

A breach is when the obligations of a contract are not performed at all, are performed late, or performed in the wrong way.⁵⁷ To determine whether the contract is in breach a two staged approach is followed. Firstly, it must be determined whether the obligation has been fulfilled or not.⁵⁸ Secondly, the actions of the parties and the terms of the contract are prepared to determine whether a breach has occurred.⁵⁹

Breach provisions, therefore, attempt to regulate what will happen if a party does not fulfil, or partially fulfil, their obligations.⁶⁰ There are various remedies available which would allow the contract to remain in force and also those that would bring the contract to an end.

Breach can take different forms namely: (i) *mora debitoris*, (ii) *mora creditoris*, (iii) positive malperformance, (iv) repudiation⁶¹ and (v) prevention of performance⁶².

Mora debitoris is an unjustified failure of the debtor to make the proper performance of a positive obligation.⁶³ The requirements are that (i) a debt must be due and enforceable,⁶⁴ (ii) the time for the debtor's performance must be fixed either in the contract or through a subsequent

⁵⁶ Also known as "break".

⁵⁷ Christie & Bradfield *The Law of Contract in South Africa* (2011) 515.

⁵⁸ Christie & Bradfield 516.

⁵⁹ *Ibid.*

⁶⁰ Venter *An Assessment of the South African Law Governing Breach of Contract: A Consideration of the Relationship between the Classification of Breach and the Resultant Remedies* LLM (2004) 8, indicates that a contract is an attempt to control the result of what the dealings of the parties would be.

⁶¹ Also referred to as cancellation and can also be referred to as an anticipatory breach as the breach can occur before performance occurs.

⁶² Also referred to as an anticipatory breach.

⁶³ Hutchinson 280.

⁶⁴ Hutchinson 280, indicates that the debtor's performance cannot be dependent on the actions of the creditor.

demand,⁶⁵ and (iii) the failure to perform is without legal justification, in other words it must be as a result of the debtor's fault and the debtor must still be able to perform.⁶⁶

Mora creditoris can occur when the creditor fails to provide positive cooperation.⁶⁷ A creditor's position is to receive performance rather than to give performance. In some instances the cooperation of the creditor is necessary for the debtor to perform.⁶⁸ In this instance, for *mora creditoris* to apply: (i) the debtor must be under an obligation to perform, but this need not be enforceable, (ii) the cooperation of the creditor is necessary for the proper performance of the debtor, (iii) the debtor must tender performance, and (iv) it must be the creditor's fault.⁶⁹ *Mora creditoris* shifts the responsibility of non-performance from the debtor onto the creditor.⁷⁰

Positive malperformance relates to the quality of content of the performance.⁷¹ It relates to the positive duty to do something, but the performance is incomplete or defective.⁷² It is unclear whether fault is required for this type of remedy.⁷³

⁶⁵ Hutchinson 280, *mora ex re* exists if there is a timeframe in the contract that the debtor did not meet, the debtor is automatically in *mora*. *Mora ex persona* is if there is no time for performance in the contract and the creditor must then place the debtor in *mora* by demanding performance, which is usually done through a letter of demand. *Mokala Beleggings (Pty) Ltd & Another v Minister of Rural Development and Land Reform and Others* (276/11) [2012] ZASCA 21 (23 March 2012) [6]-[8], where a contract fixes time there is no need to demand performance from the debtor to place the debtor in *mora*. Where the contract does not include a provision dealing with the time of performance, demand must be given to debtor in the form of *mora ex persona*.

⁶⁶ Hutchinson 280, where a valid legal justification could be supervening impossibility.

⁶⁷ Hutchinson 289; Christie & Bradfield 533, this can occur in a lapse of time or demand, but the debtor must still perform before the creditor can be placed in *mora*.

⁶⁸ Hutchinson 289.

⁶⁹ Hutchinson 290-291; Nagel 126.

⁷⁰ Christie & Bradfield 534.

⁷¹ Hutchinson 294.

⁷² *Ibid.*

⁷³ *Ibid.*

Reputation is where a person no longer has the intent to be bound by the contract.⁷⁴ This can be done through the words or conduct of a party.⁷⁵ This is done without a lawful excuse and in effect means that one of the parties no longer has the intent of being bound by the contract.⁷⁶ Examples of reputation include: (i) denial of the existence of the contract, (ii) refusal to perform or accept performance, (iii) notification of inability to perform, and (iv) offer of incomplete or defective performance. The test for repudiation is an objective one and need not follow the process set out in the contract for breach.⁷⁷ Where repudiation occurs, any performance that has already been done must be restored and there is a right to claim damages.⁷⁸

The final type of breach is prevention of breach and this is where, after the conclusion of the contract, a party causes the contract to be impossible.⁷⁹ There must be an element of fault on the part of the party.⁸⁰ In such an instance all remedies except for specific performance is allowed.⁸¹

No matter the type of breach, drafters deal with breach in the same way. This is by including a breach provision in the agreement. For breach under a contract, the concept of *mora*⁸² is determined when a party can be placed in breach, which can occur (i) *ex lege*,⁸³ (ii) *ex re*, or (iii)

⁷⁴ Hutchinson 294; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A), indicating that repudiation occurs when there is an act of repudiation. An act of repudiation is an act evidencing the deliberate and unequivocal intention to no longer be bound by the contract.

⁷⁵ Hutchinson 297.

⁷⁶ Hutchinson 297, states it is an unjustified attempt to cancel the contract.

⁷⁷ Hutchinson 300.

⁷⁸ *Ibid.*

⁷⁹ Hutchinson 303.

⁸⁰ Hutchinson 300; Nagel 130.

⁸¹ Hutchinson 304.

⁸² *Mokala Beleggings (Pty) Ltd & Another v Minister of Rural Development and Land Reform and Others* [6], *mora* means a default or delay.

⁸³ Christie & Bradfield 519, *mora ex lege* is where performance is due by operation of law. This is not usually part of the categories of *mora*.

ex persona. *Mora ex re* is where performance is due in terms of the contract. In this instance, the contract fixes a time for performance.⁸⁴ *Mora* arises when performance is not made in terms of the time set out in the contract.⁸⁵ In such a situation no notice is required because the time is indicated in the contract itself.⁸⁶ *Mora ex persona* occurs where no time limits have been included in the contract.⁸⁷ In such a case the debtor must be placed in *mora* by giving him notice.⁸⁸

To avoid determining when notice is required and when it is not required, contracts would normally include a breach provision.⁸⁹ A breach provision would usually force a party to give notice to place the other party in breach. Should the breach not be corrected within the specified period of time, the non-breaching party would be able to cancel the contract or claim the remedies set out in the breach provision.⁹⁰ If a contract is cancelled through the breach provision, the natural remedy that follows is restitution.⁹¹ Cancellation is considered to be an extraordinary

⁸⁴ Christie & Bradfield 519; *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) [27].

⁸⁵ *Ibid.*

⁸⁶ Christie & Bradfield 519; *Laws v Rutherford* 1924 AD 261.

⁸⁷ Christie & Bradfield 524.

⁸⁸ Also known as *interpellatio*.

⁸⁹ Christie & Bradfield 527, also known as a forfeiture clause in leases or a *lex commissoria* in sale contracts, however, they can be used interchangeably.

⁹⁰ *Mine Workers Union v Prinsloo* 1948 (3) SA 831; *Venter v Venter*; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) 678, for example “In the event of either party breaching a material term of this agreement and failing to remedy such a breach within 30 days of being called upon in writing by the other party to do so, such other party shall be entitled by notice in writing to the party in breach, forthwith to cancel this agreement, without prejudice to any claim for damages or other relief to which it may be entitled”. See also *Gilliland v Springs Town Council* 1948 (1) SA 328 (T) 330; *FHP Management (Pty) Ltd v Theron NO and Another* 2004 (3) SA 392 (C) 404E-F; *Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd and Others* 1996 (3) SA 134 (N).

⁹¹ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) [50], where the lawful cancellation of a contract places a mutual obligation to restore the respective performance of the parties; *Van der Merwe v Brink* 1974 (3) SA 331 (T); *Alfred Mcalpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 346.

remedy, where the time of performance is of the essence.⁹² Time of the essence can be achieved in one of three ways, namely: (i) where the parties have agreed that the creditor may cancel the contract in the event of a breach (this is achieved through the inclusion of a breach provision), (ii) through a tacit breach provision, and (iii) where the creditor made time of the essence by sending a notice.⁹³ It can be said that the inclusion of the breach provision allows for time to become of the essence and it is on this basis that a breach clause would trigger cancellation even if the word “termination” is used in the drafting of the provision.⁹⁴

In the event of no breach provision, cancellation can only occur where the breach is serious and material.⁹⁵ A material breach will depend on the type of breach and the circumstances.⁹⁶ Breach provisions are regulated by the way the contract is drafted. A breach provision can be so wide that it expands the common law position to allow termination for minor breaches.⁹⁷ A breach provision can also be more limiting than the common law position making it even more difficult

⁹² Nagel 137, where a breach clause has not been included to determine whether cancellation is allowed one will have to look at the materiality of the clause. See for example *Distinct Investments (Pty) Ltd v Arhay CC; Blom v Das Neves and Another* [1997] 2 All SA 513 (W).

⁹³ *Microuscicos and Another v Swart* 1949 (3) SA 715 (A).

⁹⁴ *PBL Management (Pty) Ltd and Another v Telkom SA Ltd and Another* 319, termination in this case was indistinguishable from cancellation by a party following a breach of the agreement.

⁹⁵ Hutchinson 324; *Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 (SCA), in this case there was no *lex commissoriat* provision. To cancel the agreement the breach would have to be serious enough to expect that the creditor would not reasonably continue with the contract.

⁹⁶ Hutchinson 324; *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T) 4F-G, various expressions are used, “goes to the root of the contract”, it affects “a vital part of the obligations”, or means that there is no “substantial performance”.

⁹⁷ Hutchinson 325. For example “If the lessee fails to comply in any manner whatsoever with any of its obligations contained in Clauses 3 to 5, the lessor shall be entitled to cancel the contract by written notice to the lessee’s address stipulated below. The lessor shall not cancel the contract unless it has given the lessee seven days written notice of the breach and the lessee has failed to rectify the breach within the seven day period”.

to terminate the agreement in instances of breach.⁹⁸ In this way the manner in which a contract can be cancelled and a party placed in breach, is regulated by the breach provision.

12.5.1 REMEDIES THAT KEEP THE CONTRACT ALIVE

Dependent on how the breach provision is drafted, the common law remedies may remain unchanged or may be restricted. There are various common law remedies available to a party where the other party is in breach. The remedies that are intended to keep the contract alive are used to avoid terminating the contract as a result of breach.⁹⁹ These generally include specific performance, interdict, declaration of rights and damages.¹⁰⁰

Specific performance is where a party is held to what he has promised to do in the contract. It can take three forms, being the claim for payment, the claim for a positive act¹⁰¹ or the claim for a negative act¹⁰² (which is also known as an interdict).¹⁰³ Specific performance is usually coupled with a claim for damages and is at the discretion of the court to grant it.¹⁰⁴ If specific performance is claimed, which is a remedy to keep the contract alive, the cancellation of the

⁹⁸ *Masterspice (Pty) Ltd v Broszeit Investments CC* 2006 (6) SA 1 (SCA) [4], for example: "... [p]rovided that no party shall be entitled to cancel this agreement of sale as a consequence of any breach of any provision hereof unless the breach is a material breach going to the root of this agreement and is incapable of being remedied by the payment in money or, if capable of being so remedied, the defaulting party fails to make such payment within 14 (fourteen) days after [the] amount thereof has finally been determined".

⁹⁹ Hutchinson 312.

¹⁰⁰ The remedy *exceptio non adimpleti contractus* is also available in reciprocal contracts in which a party refuses performance until the other party has fulfilled their obligations.

¹⁰¹ *Ad pacuniam solvendam*.

¹⁰² *Ad factum praestandum*.

¹⁰³ Nagel 142, the innocent party has a duty to mitigate.

¹⁰⁴ *Santos Professional Football Club (Pty) Ltd v Igesund & Another* [2002] JOL 10021 (C) 7.

contract cannot also be claimed. As such, specific performance and cancellation are not cumulative remedies, but are rather elective.¹⁰⁵

Damages are also a remedy in which the contract can be kept alive.¹⁰⁶ It is usually linked to a claim for specific performance or cancellation. The purpose of damages is to place a party in the position they would have been in, should the breach not have occurred.¹⁰⁷ General damages are directly due to the breach.¹⁰⁸ Special damages are indirect and so remote and indirect it would not normally be considered as damages, unless the parties have contemplated such special damages when entering into the contract. Damages are usually claimed on positive interest, which is placing the person in the position they would have been in, should the breach not have occurred.¹⁰⁹ Negative interest places the party in the position he would have been in if the contract was never concluded.¹¹⁰ As the written contract attempts to create certainty in contracts,

¹⁰⁵ *Santos Professional Football Club (Pty) Ltd v Igesund & Another 2*, illustrates the choice between the two remedies in the following example “Should the head coach commit any breach of this agreement and fail to remedy such breach within 14 days after registered post of notice from the club or its attorneys requiring the head coach to do so, the club shall have the right to cancel forthwith, or take action against the head coach for specific performance of his obligations under this agreement”.

¹⁰⁶ Hutchinson “Back to Basics: Reliance Damages for Breach of Contract Revisited” *SALJ* (2004) 52, states that the aim of damages is to place the innocent party in the position he would have occupied had the contract been properly performed. This is done as far as possible with payment of money and without causing undue hardship on the defaulting party. There are two theories in terms of damages. The first is where he is placed in his fulfilled position which would amount to positive interest, and the other where damages can be determined by comparing a party’s present position and that he would have been in should the contract have been fulfilled.

¹⁰⁷ Nagel 142, indicates that the type of formula applied will depend on what the party wants to recoup. For example (i) expectation interest, which is positive interest and a party’s position is compared with the position he would have been in if he had received proper performance, (ii) restitutionary interest, which is negative interest and where the contract is cancelled and complete restitution is required (which includes consequential and special damages), and (iii) reliance interest, where the position a party would have been in had he not incurred expenses and the position he is in due to the breach.

¹⁰⁸ Nagel 128, also known as general damages; *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [28], general damages flow naturally and generally from the breach and the parties are presumed to have contemplated the type of breach. Special damages are caused by breach, but are too remote to be recovered unless the parties have contemplated such damages for breach.

¹⁰⁹ Nagel 143; Hutchinson 331, positive interest is the looking forward to place a party in the position should the performance have been done properly.

¹¹⁰ Nagel 143-144; Hutchinson 331, negative interest is looking backwards which places the person in the position he would have been in should no contract have been entered into at all.

provisions are often included to regulate the uncertainty of damages. There are two extremes. At the one end of the spectrum parties may wish to limit their exposure, in which case exemption provisions would be included. On the other end of the spectrum parties may wish to avoid the uncertainty in calculating damages and would then include penalty provisions.¹¹¹

Exemption provisions can exclude specific types or categories of damages or can limit the quantum of damages that can be claimed.¹¹² The parties thus agree to limit a party's financial exposure in the case of breach.¹¹³ An exemption provision is interpreted restrictively and the enforceability of such a provision is often questioned.¹¹⁴ The inclusion of an exemption provision in a commercial agreement is an attempt to equalise the risk-reward ratio of the parties. The aim of exemption provisions is mitigate a party's risk against the financial benefit received under the agreement.

In instances where parties want certainty regarding what can be recovered due to breach, penalties may be included.¹¹⁵ This is done to avoid the complexity of trying to determine

¹¹¹ Van der Linden *Institutes of the Laws of Holland* (1806) 1 14 9, recognises penalty provisions.

¹¹² Stoop "The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract" *SA Merc LR* (2008) 496, defines an exemption clause as a contractual term that excludes, alters or limits liability that would normally flow from contractual relations. These terms are either called exemption clauses or disclaimers. *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A), indicates that a fundamental breach will not impact on the functioning of an exemption clause. The only time a fundamental breach will impact thereon is when cancellation is allowed for such a breach or not.

¹¹³ Hutchinson 408, for example "The Client may never, in aggregate, claim more than 75% (seventy-five per cent) of the total contract value from the Contractor as damages for any breach of contract by the Contractor". See also *Jacobs v Imperial Group* (639/2008) [2009] ZASCA 167 (1 December 2009) [2], [10], where the disclaimer reading "vehicles are left at the owner's risk" was sufficient to protect against liability.

¹¹⁴ Legislation may exclude the use of exemption provisions, for example s15(1)(b), (c) of the Alienation of Land Act 68 of 1981; s90(2)(g), (h) of the National Credit Act 34 of 2005; s49 of the Consumer Protection Act 68 of 2008.

¹¹⁵ Hutchinson 407, for example "Where the Contractor fails to deliver performance in time, and thus fails to comply with the performance milestones as agreed upon, he shall pay the Client R5 000.00 (five thousand rand) per day of delay. The Client may choose/elect to claim the agreed penalty, or to claim common-law damages.

damages.¹¹⁶ As such, penalties are intended to take the place of damages unless the parties express another intention.¹¹⁷ Penalties are regulated by Conventional Penalties Act,¹¹⁸ in terms of which a court may adjust the penalty contained in the penalty provision where it appears to be out of proportion to the injury suffered.¹¹⁹ The intention is to regulate penalties so that they do not cause unjustifiable harm to the breaching party. Obviously, when drafting penalty provisions these factors should be taken into consideration to prevent the court from adjusting the penalty.

In addition to this, there are two other mechanisms which are linked to damages. The first is interest. There are, in essence, two types of interest, *mora* interest which is a form of damage and contractual interest which is an express term in the contract.¹²⁰ The contractual interest can take the form of compound or simple interest.¹²¹ Usually the parties will include a term that if any amounts are not paid on the due date, interest would be payable on such amounts. This type of interest is not considered to be a form of damages. *Mora* interest, on the other hand, is a natural form of damage that will flow from a breach and is regulated by the Prescribed Rate of Interest

The Client may retain any performance already delivered to him by the contractor, continue with the Agreement and claim the agreed penalty.”

¹¹⁶ LAWSA (Vol. 9) 429.

¹¹⁷ Hutchinson 344.

¹¹⁸ Conventional Penalties Act 15 of 1962 regulates penalties. S1 defines a penalty as “a stipulation ... whereby it is provided that any person ... be liable to pay a sum of money or performance anything for the benefit of the other ... either by way of a penalty or as liquidated damages ...”

¹¹⁹ S1(3).

¹²⁰ *The Land and Agriculture Development Bank of South Africa v Ryton Estate (Pty) Ltd* (460/12) [2015] ZASCA 105 [12].

¹²¹ *The Land and Agriculture Development Bank of South Africa v Ryton Estate (Pty) Ltd* [11], indicating that contractual interest can be compounded or simple. If compound interest is not provided for in the agreement, then only simple interest on the capital will be payable. *Euro Blitz 21 (Pty) Ltd v Secunda Aircraft Investments CC* (102/14) [2015] ZASCA 21 (19 March 2015) [9]-[10] shows that compounded interest can only be claimed where the parties agree to compounded interest or where custom in industry is to charge compounded interest.

Act.¹²² Mora interest can further be limited by the legislature.¹²³ This is a remedy that is available to the parties irrespective of whether it has expressly been stated in the agreement and would be in addition to the contractual damages.¹²⁴ Nothing stops the parties from excluding such remedy or from amending its application.

The second relates to instalment-type of agreements in which performance is spread over a period of time.¹²⁵ The risk with these types of agreements is that each instalment is a separate cause of action and as such, a breach of one payment will not result in the breach of the other payments as the other payments have not yet become due. An acceleration provision is used to ensure that any outstanding debt immediately becomes due and payable, thus avoiding the situation where the creditor must claim for each and every instalment individually.¹²⁶ This is a mechanism used by drafters to allow for claiming damages over the entire period of the contract.

The parties can dictate which remedies the parties would be entitled to. This is usually done in the breach provision.¹²⁷ Parties can exclude the application of some of the remedies or can create a provision which does not limit any of the remedies that a party would have in law. For example, sometimes cancellation is not an appropriate remedy for the nature of the contract and the parties may expressly exclude the application of such a remedy. Remedies can be made *via*

¹²² Act 55 of 1975; *Christie & Bradfield* 532. See also *Cookes Brothers Ltd v Regional Land Claims Commission for Province of Mpumalanga & Others* (590/2011) [2012] ZASCA 128 (21 Sept 2012) [15].

¹²³ See for example s103 of the National Credit Act.

¹²⁴ *The Land and Agriculture Development Bank of South Africa v Ryton Estate (Pty) Ltd* [11].

¹²⁵ *Christie & Bradfield* 40.

¹²⁶ *Hutchinson* 311; *Western Bank Ltd v Adams* [1975] 4 All SA 497 (C) 499, for example “Provided that should any of such instalments not be paid on due date, the full amount or balance then outstanding in terms of this promissory note shall forthwith become due and payable by me/us”.

¹²⁷ *Academy of Learning (Pty) Ltd v Hancock and Others* 2001 (1) SA 941 (C) [6], for example: “The franchisor will have the right, in addition to all other remedies it may have, to terminate the franchise granted under this agreement upon 15 days’ notice in writing to the franchisee at its designated address if the franchisee fails to comply with any of the provisions of this agreement ...”

election or cumulatively, however, some remedies cannot co-exist such as specific performance and cancellation.¹²⁸ Cumulative remedies are all encompassing and drafters will usually include a provision stating that a remedy is elective or cumulative.¹²⁹

12.5.2 REMEDIES THAT BRING THE CONTRACT TO AN END

The remedy to cancel the agreement is sometimes referred to as termination of the agreement. The word “termination” is often used when in fact “cancellation” is meant or *vice versa*.¹³⁰ The two words have different meanings and intend different consequences.

Termination is usually used when speaking of friendly terminations or termination by operation of law. In that context it means that there is an end to the obligations and there are no remedies that flow from such a termination.¹³¹ In the case of cancellation due to breach, there are remedies

¹²⁸ Stark *Negotiating and Drafting Contract Boilerplate* (2003) 207, 216, for example “Any and all remedies expressly conferred upon a party by this agreement are cumulative and non exclusive of any other remedy conferred by this agreement, or by law on the parties and the exercise of any remedy”; *Xenopoulos and Another v Standard Bank Ltd and Another* [2002] 2 All SA 494 (W) 507, shows that election is a choice of a remedy or right which cannot be exercised without forfeiting or losing another remedy. In instances of breach there are options for remedy, such as cancellation. If cancellation is not elected, such a remedy has been waived.

¹²⁹ Anderson & Warner *A-Z Guide to Boilerplate and Commercial Clauses* (2012) 228; *Microuscos and Another v Swart* 1949 (3) SA 715 (A) 719, for example “... without prejudice to any other rights which they might have at law ...” means that there are no additional rights given to the parties, but it also does not limit the rights the parties already have in law.

¹³⁰ *Steward Wrightson (Pty) Ltd v Thorpe* 276, indicates that the word “terminate” is more neutral than that of “rescind”; *PBL Management (Pty) Ltd and Another v Telkom SA Ltd and Another* 319, termination in this case was indistinguishable from cancellation by a party following a breach of the agreement. In *Academy of Learning (Pty) Ltd v Hancock and Others*, the court read the word “termination” to mean “cancellation” and the consequences that flow from it.

¹³¹ Adams 299, states that the default position is that a party’s rights and duties only last for as long as the contract lasts. In some instances a provision must survive the termination of the contract. Anderson & Warner 166, state that the terms that continue after termination are called “surviving terms”. These terms can survive for a period of time or indefinitely. In this instance contract drafters attempt to regulate which provisions survive by including a “consequence of termination clause”.

that flow from the cancellation.¹³² If the contract is cancelled, the parties must return the performance, in other words, restitution. The particular way restitution is applied is dependent on whether the contract is divisible or indivisible.

In instances where the contract is cancelled *ex tunc*, parties must restore the performance it has received since the inception of the contract.¹³³ This will be in relation to indivisible contracts.¹³⁴

In instances where the contract is cancelled *ex nunc*,¹³⁵ the cancellation only relates to future performance and that which has already been performed will be retained. This is usually where performance is divisible and it contemplates continuous performance over a period of time.¹³⁶

The nature of the contract, being either divisible or indivisible, will indicate which portion of the performance must be returned.

The term cancellation is sometimes only associated with cancellation *ex tunc*. As such, breach clauses are often changed to simulate cancellation of the agreement *ex nunc*. This is done in one of two ways. The first is the use of the word “termination”. Changing the words in the breach provision from “cancellation” to “termination” makes no difference in the consequences of

¹³² *Nedcor Bank Ltd trading inter alia as Nedbank v Mooipan Voer & Graanverspreiders CC* [2002] 3 All SA 477 (T) 480, shows that cancellation is a remedy for a major breach of contract and in such instances the innocent party can cancel and claim for rescission.

¹³³ LAWSA (Vol. 9) 426; meaning “as a whole”. This can also mean that restitution would occur *ab initio* and applies to indivisible contracts.

¹³⁴ Take for example the purchase of a motor vehicle. If the contract is cancelled, the motor vehicle would have to be returned and the payment of monies refunded. Hutchinson 327, states that if a contract is indivisible, it is extinguished in its entirety.

¹³⁵ LAWSA (Vol. 9) 426; meaning in respect of the executionary portion. This can also mean that restitution only applies *in futuro* and applies to divisible contracts.

¹³⁶ Take for example a lease agreement. If the contract is cancelled it would be unjust to have all the rentals paid before cancellation returned. Further to this, the lessee who has enjoyed the use of the property will not be able to return such use to the lessor. Hutchinson 327, indicates that in instances where the contract is divisible, the performance before the cancellation can still be enforced and the cancellation only applies to the future.

cancellation in terms of breach. The provision will be interpreted in accordance with its nature. In instances of breach a contract will come to an end through cancellation and not termination.

The second mechanism used to simulate cancellation of the agreement *ex nunc*, and relates to the inclusion of a forfeiture provision.¹³⁷ Forfeiture provisions allow the innocent party to keep any payment or performance made prior to cancellation. By imbedding a forfeiture provision in breach provisions has two possible consequences.¹³⁸ With respect to divisible contracts, the forfeiture provision reinforces the natural consequence that is implied by the *lex commissoria*, being that all performance prior to the date of cancellation is retained and the contract is cancelled in respect to any future performance. As such, the forfeiture provision does not add anything more to the existing application of the *lex commissoria*. The forfeiture provision in this context cannot function as a penalty provision.¹³⁹ The inclusion of a forfeiture provision in relation to divisible performance only reiterates the normal application of restitution in such circumstances.

In respect to indivisible contracts, a forfeiture provision changes the natural application of the *lex commissoria* as restitution is not made for any performance *ex tunc*. In such cases the forfeiture provision changes the normal operation of the *lex commissoria*. It is possible that the forfeiture provision could, under these circumstances, be construed as a penalty.

¹³⁷ Huschinson 408, for example “Where a party to the contract cancels the contract due to the breach of contract by the other party, the latter shall forfeit (restitution of) any performance already delivered to the former”.

¹³⁸ A forfeiture provision is not the same as a *lex commissoria*, although the two are closely linked.

¹³⁹ It is on this basis that it can be viewed that a forfeiture provision is the exception to penalties. See LAWSA (Vol. 9) 429.

Drafting a breach provision that embeds a forfeiture provision will be influenced by the divisibility of the performance, which will indicate whether such a forfeiture provision will function as a penalty or not.

12.6 CONCLUSION

There are various ways in which a contract can come to an end. Friendly termination, termination by operation of law and other termination provisions all relate to putting an end to the obligation. There are no remedies that flow from these terminations as the parties were not in breach. When it comes to breach, the parties can dictate which remedies will apply or not, whether the remedies they have chosen are cumulative or not and generally agree with the consequences of termination.

In drafting a contract the drafter attempts to ensure that the agreement is valid and enforceable by incorporating the requirements of an agreement into the document through the use of various mechanisms. The first question that the drafter must attempt to deal with is when obligations end. The various termination provisions are ways to deal with the termination of an obligation or the contract as a whole. These include friendly termination, termination by operation of law and other types of termination that the parties may agree to. The second question that the drafter must answer is what happens during breach of the contract and what remedies will be available to the party that wants to enforce the contract. In this regard, a breach provision is included as well as provisions such as (i) exemption provisions, (ii) penalty provisions, (iii) acceleration provisions and (iv) interest provisions. The drafter can also change the common law remedies in the manner

in which he drafts the breach provision. Regardless of this, the manner in which these provisions are included is supported by and is based on substantive law.

CHAPTER 13

DISPUTE RESOLUTION

13.1	INTRODUCTION.....	257
13.2	LITIGATION	260
13.2.1	CONTRACT WITH AN INTERNATIONAL ELEMENT.....	261
13.2.2	CONTRACT WITHOUT AN INTERNATIONAL ELEMENT	263
13.2.3	EXCLUSIVITY OF JURISDICTION PROVISION	264
13.2.4	COSTS	265
13.3	ALTERNATIVE DISPUTE RESOLUTION	267
13.3.1	INFORMAL MECHANISMS	268
13.3.2	FORMAL MECHANISMS	269
13.3.2.1	EXPERT DETERMINATION	270
13.3.2.2	MEDIATION	271
13.3.2.3	ARBITRATION	273
13.3.2.4	FORMAL HYBRID MECHANISMS	278
13.4	CONCLUSION.....	279

13.1 INTRODUCTION

The previous chapters considered how drafters ensure that the written contract is recognised and enforceable in law.¹ The preceding chapter considered how drafters deal with termination and breach of a written contract.² Another element that drafters often include in contracts is the manner in which disputes are resolved.

Dispute resolution provisions are mechanisms included in a contract to regulate the manner in which disputes are addressed and resolved between the parties. Dispute resolution provisions are

¹ See ch 5-11.

² See ch 12.

not part of the end-game provisions.³ Where disputes are acrimonious it can lead to termination, but this is not always the case. Dispute resolution provisions are therefore mechanisms that the parties agree will resolve any contractual dispute that may arise from that particular contract.

Dispute resolution is an all-encompassing term which includes: (i) the default position of the dispute being resolved by a court through litigation, and (ii) alternative dispute resolution mechanisms, which divert the dispute from litigation to some other mechanism which has been agreed to by the parties.⁴ The contract and the manner in which it is drafted will indicate which of these routes must be followed.

Alternative dispute resolution provisions avoid the dispute being heard in court by diverting it to some other agreed mechanism.⁵ There are various reasons for avoiding litigation and the most obvious is the perceived reduction in costs that alternative dispute resolution provisions bring, certainty and expertise of the adjudicator in resolving the dispute.⁶ Parties can thus regulate the manner in which they wish to resolve the dispute. In some instances the lack of confidence in the court system may also cause parties to choose alternative dispute resolution mechanisms. The type of dispute resolution mechanism used is often linked to the type of relationship the parties have and their relative bargaining power. Each of those factors should be considered against the

³ See ch 12.

⁴ Wells “Alternative Dispute Resolution – What is it? Where is it now?” *SIU Law Journal* (2003-2004) 651-652, shows that alternative dispute resolution is normally associated with negotiation, mediation and arbitration, but this is not always the case. Alternative dispute resolution is a large umbrella that encompasses a number of alternatives to litigation. *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* [2015] 1 All SA 513 (GJ) [50], states that “When parties, exercising their contractual autonomy, make provisions as, in the present dispute, for the private resolution of their disputes, the courts are enjoined to respect the parties’ choice of method for resolving the dispute”.

⁵ Readey “A Primer for Drafting ADR Contract Clauses” *Ohio Lawyer* (1992) 14, indicates that these alternative mechanisms are an attempt to resolve disputes outside the normal court system.

⁶ Mills & Brewer “ADR Drafting Tips” *Disp Resol Mag* (2002) 23; Gattuso “Drafting Arbitration Provisions for LLC Agreements” *Business Law Today* (2009) 53, states that poorly drafted clauses can result in unnecessary litigation which can result in diminishing any cost saving anticipated by including such a mechanism.

requirements of the parties in order to choose the most appropriate mechanism as they will influence the choice of the mechanism. The detailed analysis of the positive and negative considerations for choosing a particular dispute resolution mechanism falls outside the scope of this study.⁷ This, however, does not mean that a drafter should not consider these factors when drafting the contract.

Alternative dispute resolution provisions can include informal mechanisms such as regulated negotiation between the parties, as well as formal mechanisms, which can include the traditional approaches of mediation and arbitration. The form that a dispute resolution mechanism can take is limitless and has in the past for example included counselling, conciliation, facilitation, mediation, arbitration and hybrids of these mechanisms.⁸ In the absence of alternative dispute resolution mechanisms being included in a contract, the parties indicate that they have elected to proceed with litigation to resolve a dispute. Therefore, the rights the parties have to resolve a dispute are not only determined by which provisions have been included in a contract, but also by which provisions have been omitted.⁹ Against this backdrop, a drafter should anticipate disputes between the parties and should address how such disputes would be adjudicated in terms of the contract.¹⁰

⁷ Mokhele *Alternative Dispute Resolution: A New Tool under the Companies Act 71 of 2008* LLM (2014) 7, states that there are various factors to consider when choosing an alternative dispute resolution mechanism. Some of these factors include (i) the power relations between the parties, (ii) the level of trust between the parties, (iii) the value placed on the future relationship of the parties, (iv) the need for cooperation in implementing the solution, (v) the need to control the outcome, (vi) setting of precedence for future disputes, (vii) cost, (viii) the need for privacy, (ix) the speed in which the dispute would be resolved, and (x) the time available to resolve the dispute.

⁸ Readey 15.

⁹ Holland "Drafting a Dispute Resolution Provision in International Commercial Contracts" *TULSA J Comp & Int'l L* (1999-2000) 451.

¹⁰ Stark *Negotiating and Drafting Contract Boilerplate* (2003) 111.

13.2 LITIGATION

The enforcement of a contract is one of the reasons why a contract is entered into in the first place and this role has traditionally been fulfilled by the courts. The first way and an automatic manner in resolving disputes between the parties, is to have the dispute determined by a court. This can be described as a natural or default manner to resolve disputes as it is available to the parties without specifically stating so in the contract. There may be various reasons for wanting a matter to be resolved by the court. Some agreements are just not appropriate to be resolved by alternative dispute resolution. Take for instance a guarantee, suretyship or an acknowledgment of debt. It would make little sense to take such agreements to arbitration or mediation when such agreements, by their very nature, should be enforced immediately.

On occasion, parties will also include provisions relating to the jurisdiction of the court who would adjudicate any dispute under the contract, as well as which party would pay costs in such instances.¹¹ This is to provide some level of certainty in the litigation process.¹²

In litigating, other than the prospects of success of the claim or defence, parties would normally want as much certainty possible regarding the process. This includes the jurisdiction of the court hearing the matter and to what extent a party can recover costs. These are ancillary matters that drafters attempt to control by including express provisions dealing with them in a contract.

¹¹ Stark (2003) 111, states that an indicator that the dispute will be resolved by the courts is the inclusion of a forum selection and governing law provision; Kok *The Location of Breach of Contract in the Context of Jurisdiction - A Comparative Study of English and South African Law with Specific Reference to the INCOTERMS of the International Chamber of Commerce* LLM (2014) 6, mentions that connecting factors to determine jurisdiction of a court are: (i) the parties' domicile, (ii) residence of the parties, (iii) creation of the contract, (iv) place of performance of the contract and (v) potentially the breach of contract, although this has not yet been recognised.

¹² Stark (2003) 111, argues that it maximises the predictability of dispute adjudication; *Southernport Developments (Pty) Ltd v Transnet Ltd* [205] 2 All SA 16 (SCA) [10], quoting *Coopers and Lybrandt and Others v Bryant* 1995 (3) SA 761 (A), the term "dispute" must be interpreted in its contextual setting.

13.2.1 CONTRACT WITH AN INTERNATIONAL ELEMENT

The first element to consider is whether there is an international element to the contract. An international element can occur where: (i) the parties are incorporated, registered or operate in different countries, or (ii) there is an international element to the contract in relation to services or goods or even payment. Instead of relying on the default rules in determining which court would have jurisdiction over the dispute, the parties submit themselves to the jurisdiction of a court chosen in the contract.¹³ It is in these instances where a jurisdiction provision is normally included in a contract. This is done by including a provision in which the parties expressly submit to the jurisdiction of a specific court.

The second issue is the law applicable to the agreement. The law will indicate what exactly is possible and forms the substantive base of the contract.¹⁴ It is also, as has been seen, the basis on which the drafting relies. As such, the drafter must be proficient in the law that regulates the contract in order to ensure that the provisions included are valid and enforceable in law. The drafting of a contract would have one effect if regulated by South African law, but where the

¹³ Stark (2003) 120, an example of a jurisdiction provision is “The laws of the State of Vermont govern this Agreement”, alternatively a more complex example is “The laws of the State of Vermont [(without giving effect to its conflict of law principle)] govern all matters arising out of or relating to this Agreement and all of the transactions it contemplates, including without limitation its [validity], interpretation, construction, performance, and enforcement.”

¹⁴ Stark *Drafting Contracts: How and Why Lawyers Do What They Do* (2007) 171, states that by choosing this up front may prevent disputes relating to which law would apply later on; LAWSA (Vol. 2) 329, states that a clause stipulating the specific law governing a contract is valid. Take for example *Armadora Occidental SA v Horace Mann Insurance Company* [1978] 1 All ER 407. See also *Lloyds and Others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) which indicates that such governing law provisions are not always binding.

contract is regulated by another law, it could have a different effect. The same contract may have different consequences depending on the law that regulates it.¹⁵

The concept of applicable law and jurisdiction are two different concepts. Jurisdiction relates to who will hear the dispute, while the applicable law relates to the foundation on which the contract rests and the rules that regulate it. The inclusion of these provisions is presumably aimed at creating some level of certainty between the parties,¹⁶ failing which the default rules apply.¹⁷

If the jurisdiction provision or the applicable law provision is not included in an international contract, the default rules would apply.¹⁸

¹⁵ For example *Creutzburg and Another v Commercial Bank of Namibia Ltd* [2006] 4 All SA 327 (SCA) 327, in this case if South African law applied, the contract of suretyship would have been invalid due to non-compliance with formalities. However, if Namibian law applies the contract of suretyship would be valid. Another example is *Citi-March Ltd and Another v Neptune Orient Lines Ltd and Others* [1996] 2 All ER 545, 547, that included this provision in a contract, “Insofar as anything has not been dealt with by the terms and conditions of this Bill of Lading, Singapore law shall apply. Singapore law shall in any event apply in interpreting the terms and conditions hereof.”

¹⁶ *Creutzburg and Another v Commercial Bank of Namibia Ltd* 330, where limited certainty was created in the following provision “This surety shall in all respects be governed by and construed in accordance with the law of the Republic of South Africa and/or the Republic of Namibia, and all disputes, actions and other matters in connection therewith shall be determined in accordance with such law ...”

¹⁷ *Creutzburg and Another v Commercial Bank of Namibia Ltd* [2006] 4 All SA 327 (SCA) 327, where the general principle of *lex loci contractus* applies (which is the law of the place where the contract is entered into). See also *American Home Assurance Company v Merck & Co Inc* 329 F.Supp.2d 436 (2004) 443, where five factors were identified in determining which law applies between states, namely (i) the place of contracting, (ii) the place where negotiations took place, (iii) the place of performance, (iv) the location of the subject matter of the contract, and (v) the *domicile* or place of business of the contracting parties. The greatest weight in New York is the performance of the contract.

¹⁸ Stark (2007) 171, provides the following example of a governing law provision: “Governing law. This Agreement is to be governed by and continued in accordance with the laws of Arkansas, without regard to its conflict of law principles.” The underlined portion of the example is to prevent a *renvoi* (return or send back) situation between different states in the USA. This seems to only apply to American contracts and, therefore, would not have any application in the South African context. Hutchinson *The Law of Contract in South Africa* (2012) 413 provides an example which is specifically applicable to South Africa “The validity, construction and performance of this Agreement shall be governed by South African law. The parties agree that any dispute arising under or in connection with this Agreement shall be subject to the jurisdiction of the South African courts.” This specific example will only be relevant where there is some international element to the contract. If there is no international element to the contract, the inclusion of such a provision would be meaningless.

13.2.2 CONTRACT WITHOUT AN INTERNATIONAL ELEMENT

There is no need to include the jurisdiction provision or applicable law provision where the contract is South Africa specific. The established court rules will regulate the court with the applicable jurisdiction. Drafters, however, still attempt to control and create certainty in such instances. This is done by determining which court in South Africa will adjudicate the dispute. The choice of the jurisdiction of the court is subject to the rules of court.

There are two ways drafters can regulate the jurisdiction of the court. The first relates to whether the High Court or the Magistrate's Court will adjudicate the matter.¹⁹ The Magistrate's Court will regulate matters up to a certain monetary limit. As it is often thought to be quicker and cheaper to litigate in the Magistrate's Court, parties could submit themselves to the jurisdiction of the Magistrate's Court irrespective of the monetary value of the claim.²⁰ This submission to the jurisdiction of the Magistrate's Court is done through applying section 45 of the Magistrates' Court Act. The application of section 45 circumvents the normal jurisdictional application of section 29.²¹ Drafters would often include an express provision submitting either one or both parties to have their dispute adjudicated by the Magistrate's Court.

The second way is to express which High Court or Magistrate's Court would hear the dispute. In choosing a specific court the rules of court will take preference over any contractual arrangement. The parties cannot agree to a specific Magistrate's Court as the jurisdictional provisions of section 28 of the Magistrates' Court Act cannot be circumvented through

¹⁹ Sharrock *Business Transactions Law* (2011) 246.

²⁰ S45 of the Magistrates' Court Act 32 of 1944; Hutchinson 413 provides an example of such a provision "The parties consent to the jurisdiction of the Magistrates' Court Act 32 of 1944 in respect of any legal proceedings pursuant to this Agreement."

²¹ Pete *et al. Civil Procedure A Practical Guide* (2005) 50.

agreement.²² The High Court does, however, not have a similar provision. The parties may submit themselves to a specific High Court's jurisdiction. As such, when drafting a jurisdiction provision for the High Court, drafters would often name the specific court which would have jurisdiction over the dispute.

13.2.3 EXCLUSIVITY OF JURISDICTION PROVISION

Irrespective of whether a jurisdiction provision relates to international or local agreements, drafters sometimes indicate that the jurisdiction of a court is exclusive or non-exclusive.²³

A non-exclusive submission²⁴ means that there is still scope to use another court should the rules of court allow it. Therefore, the parties are not bound to the court elected in the contract.²⁵ It seems almost meaningless that such a provision would be included in a contract, as it neither binds the parties nor provides any level of certainty as to which court would hear the dispute. In essence, a non-exclusive submission does not add anything to the agreement as the parties are free to choose whichever court the rules of court would allow. It is unclear why a drafter would

²² Pete *et al.* 50.

²³ Melamu *The Role of Express Submission to Jurisdiction under the Brussels I Regulation, Brussels I (Recast) and the Hague Convention of Choice of Court Agreements* LLM (2015) 5, the non-exclusive jurisdiction clause "designates jurisdiction to the chosen court but it does not prevent the parties from bringing the dispute to other courts which are otherwise competent".

²⁴ Stark (2003) 137, also known as permissive forum designation.

²⁵ Stark (2003) 138, for example "(a) Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement or the transactions it contemplates may bring the legal action or proceeding in the United States District Court for the [Northern] District of [Illinois] or in any court of the State of [Illinois] sitting in [Chicago] (b) Each party to this Agreement submits to the non exclusive jurisdiction of (i) the United States District Court for the [Northern] District of [Illinois] and its appellate courts; and (ii) any court of the State of [Illinois] sitting in [Chicago] and its appellate courts for the purpose of all legal actions and proceedings arising out of or relating to this Agreement".

expressly note a non-exclusive submission other than to avoid an argument of jurisdiction should the dispute be referred to the chosen court.

To exclusively submit to a specific court seemingly creates certainty.²⁶ Drafters attempt to oblige the parties to only proceed with the chosen court to resolve a dispute. An exclusive jurisdiction provision is an attempt to overrule the jurisdictional rules that any other court may have. Irrespective of whether a contract attempts to include exclusivity of a court, the court will have the last say in such matters. Furthermore, the inclusion of an exclusive jurisdiction does not add more than what the submission to a specific court would achieve. Therefore, this manner in establishing jurisdiction through exclusive or non-exclusive submission does not add anything to the contract.

13.2.4 COSTS

In litigating parties will incur costs. These costs are legal costs and the successful party would attempt to recover its costs from the unsuccessful party. The court will normally order the losing party to pay the winning party's legal costs.²⁷ Legal costs can be incurred and recovered on different scales. This award is usually done on a party-and-party scale. Party-and-party scale is linked to the Magistrate and High Court tariff rates. These rates are limited to those costs that the taxing master deems necessary for the matter.²⁸ Party-and-party scale for costs will not sufficiently cover the costs of the successful party. As such, parties may agree to a higher cost

²⁶ Stark (2003) 137, also known as an exclusive forum provision. *Supra* (n 25) a similar example can be used by changing the word "non-exclusive" to the word "exclusive".

²⁷ Sharrock 247.

²⁸ Pete *et al.* 314.

scale in the event that a dispute is taken to court. By including such a provision the drafter attempts secure payments of the costs when litigating.

It may be agreed that the costs would be on an attorney-and-client scale, which allows more recovery than those found in the party-and-party scale, but still does not provide a full recovery of expended costs.²⁹ The parties may also agree to costs on an attorney-and-own-client scale, in which case even further additional costs will be awarded which is not typically allowed under the Magistrate's Court or High Court tariffs.³⁰ Attorney-and-own-client costs are usually awarded as a penalty towards one party in a court procedure or if the parties have agreed to such cost scale in writing.³¹ Despite this, the award of costs will always be at the court's discretion.³²

The parties would like some security in litigating and this security will include the recovery of legal costs. In this regard drafters would include provisions consenting that the losing party will pay the other party's costs on a scale that has been agreed on. This scale would normally be at an attorney-and-own-client basis to ensure that the successful party recovers all costs and expenses. Parties may sometimes go so far as to say that the recovery of costs includes advocate fees, tracing fees and disbursements outlaid in the litigation process.

²⁹ *Pete et al.* 315.

³⁰ *Pete et al.* 316.

³¹ *Pete et al.* 317.

³² *Sharrock* 247.

13.3 ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution provisions are used when the parties do not intend using the courts to resolve their disputes.³³ The parties contractually consent to alternative mechanisms to resolve any dispute that may arise from the contract. In doing so, the parties are obliged to follow the agreed process. The court will not easily interfere in such a process. In agreeing to alternative dispute resolution mechanisms the power relationship between the parties once again influences the manner in which the provision is drafted and what the parties ultimately agree to.³⁴

In drafting an alternative dispute resolution provision, the parties anticipate the possibility of a future dispute and attempt to control the manner in which such a dispute is to be resolved.³⁵ Alternative dispute resolution mechanisms are the manner in which the dispute must be addressed and resolved.³⁶ The parties are bound to the mechanisms placed in the contract and cannot deviate from the agreed process.

The alternative dispute resolution provision is different from any other provision found in a contract.³⁷ It does not deal with rights or duties of the parties, nor does it create or influence obligations. They indicate a process alternative to litigation. The risk is that a process can be too loose, which can result in an alternative dispute resolution provision becoming ineffective. The

³³ *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* [50], this can also include a situation where the courts would be authorised to entertain appeals from arbitration provisions. *Lufuno Mahapuli and Associates (Pty) Ltd v Andrews and Another* [2008] 1 All SA 32 (SCA) [14], where, through the terms of an arbitration agreement, the parties were precluded from appealing the decision and as such waived their right to have the matter re-litigated.

³⁴ See ch 2.

³⁵ Readey 14.

³⁶ *Ibid.*

³⁷ *Ibid.*

provision can also be too complex, which can create ambiguity and uncertainty. In both instances the provision, if poorly drafted, could create more disputes rather than resolving them.

13.3.1 INFORMAL MECHANISMS³⁸

Alternative dispute resolution can occur informally in which case the parties attempt to resolve the dispute through negotiation and internal escalation within their organisations.³⁹ This is the most common mechanism, non-binding on the parties and is relatively unstructured.⁴⁰ Typical provisions would include steering committees or the so-called CEO determination provisions.⁴¹ It can also include a “multi-step” or “multi-tier” in which the negotiations starts at one level of management and if those negotiations fail the dispute is escalated to a higher level of management.⁴²

These informal mechanisms are created through contractual provisions and are formalities that the parties agree to for the resolution of disputes. If such a provision is included in the contract, the parties are obliged to follow the process before the matter can be referred for formal dispute resolution. Although this informal resolution is classified as an alternate dispute resolution

³⁸ Also referred to as internal mechanisms.

³⁹ Holland 453; Readey 14, these types of mechanisms are usually non-binding.

⁴⁰ Holland 453.

⁴¹ Stark (2007) 199, gives the following example “The parties shall attempt in good faith to resolve promptly any disputes arising out of or in relation to this Agreement by negotiation between executives who have authority to settle the dispute. The executives must be at a higher level of management than the person which directs responsibility for administration of this Agreement.”

⁴² Stark (2007) 199; Holland 453, mentions that this type of provision can have as many levels as the parties may require. *Watt v Sea Plant Products Ltd and Others* [1998] 4 All SA 109 (C) 115, the agreement used the term “expert” specifically to avoid arbitration.

mechanism, strictly speaking it can be used in conjunction with any dispute resolution procedure, whether it is formal dispute resolution or litigation.

As this is less costly it is often the desired approach. In drafting these provisions care must be taken to ensure that the process is clearly defined. This relates specifically to the timing between escalation and the transition between informal and formal dispute resolution. Failure to do so can result in unwanted disputes because of poor drafting.

13.3.2 FORMAL MECHANISMS⁴³

Formal alternative dispute resolution provisions are mechanisms placed in a contract, in which an independent third party is appointed to resolve the dispute in some way, shape or form. This type of formal alternative dispute resolution includes expert determination, mediation, arbitration or a combination of these. Formal dispute resolutions are typically more structured than informal dispute resolution mechanisms. Depending on what the possible dispute is and the manner in which the parties wish to resolve the matter, a drafter would include the appropriate formal dispute resolution provision. Expert determination focuses on resolving a technical or factual dispute, adjudication is typically used in building, construction and engineering contracts which is a combination between expert determination and arbitration, mediation attempts to force the parties resolve the dispute between themselves, and arbitration is the ultimate alternative to litigation as it simulates the litigation process to some extent. The choice of including these mechanisms should be based on the type of dispute and the most appropriate way of resolving the dispute under the circumstances.

⁴³ Also referred to as external mechanisms.

13.3.2.1 EXPERT DETERMINATION

Expert determination is where a person or association considers the facts and makes a factual determination.⁴⁴ An expert decides the questions put to him by using his knowledge and experience.⁴⁵ The determination is usually final and does not include an appeal, however, this should be stated in the provision if that is intended. Expert determination is unique in that it does not allow parties to put forward their case, but rather just to provide facts and information to the expert.⁴⁶ The expert must answer the case put before him and nothing more than that.

In instances where there is a factual or technical dispute, this would be a preferred manner to resolve such a dispute. The costs are lower and the process less onerous. This mechanism is thus used for technical matters and to have a quick solution for disputes.⁴⁷ Drafters would usually include such a provision where there is an accounting dispute, in which case an auditor can be appointed as an expert. Another example is where goods or property needs to be valued and the appropriate expert would be tasked to do that. Sometimes parties may agree to use multiple experts and then the drafter would have to include a mechanism to determine which expert's determination will be followed.

⁴⁴ *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) 628D, states that “A valuer can go in search of information, and apply his expert knowledge to it, but a Court is not expected to do the former, and is not qualified to do the latter”; Fosbrook & Laing *The A-Z of Contract Clauses* (2014) 157, provides the following example “The [Expert’s] decision shall be final and binding on the parties and both parties agree to be bound by and carry out the decision. The party who has been found by the [Expert] to be at fault shall within [seven days] of receipt of the [Expert’s] decision pay the other party the amount due together with interest at [number per cent] from the date on which such sums according to the decision of the [Expert] should have been paid”.

⁴⁵ Anderson & Warner *A-Z Guide to Boilerplate and Commercial Clauses* (2012) 58; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA), indicates that a valuer does not perform a quasi-judicial function.

⁴⁶ *Watt v Sea Plant Products Ltd and Others* 115, states that the interpretation of the agreement, disputes regarding the binding effect of the agreement and whether the agreement has terminated or not are issues best suited to be interpreted by a court and not an expert; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*; *Perdikis v Jamieson* [2002] 4 All SA 560 (W).

⁴⁷ Goss “An introduction to alternative dispute resolution” *Alta L Rev* (1995) 28, mentions that in scientific, complex and technical matters the conclusions of experts are often required.

As expert determination uses a unique manner to resolve disputes, parties may use express terms or words to indicate this. Often the word “expert” is used to indicate expert determination. In some instances an arbitration provision would state that the arbitrator must act as an arbitrator and not an expert. This seems obvious, but it is likely that such language was included from previous poor drafting of arbitration provisions.

13.3.2.2 MEDIATION

Mediation⁴⁸ is an attempt to resolve the dispute between parties through an independent third party.⁴⁹ This mechanism is used in an attempt to retain the relationship between the parties and requires an independent third party to facilitate communications between the parties.⁵⁰ The drafter will include a provision to allow either party to refer the matter to mediation within a specific time frame. Usually the provision will indicate: (i) who the mediator is, (ii) the place of the mediation, (iii) how any objections would be lodged relating to the chosen mediator, and (iv) the period of time that the mediation will continue. The duration of the mediation process is crucial as it will indicate how long the parties are obliged to continue with the mediation process. The mediator makes no determination on the dispute and has no authority to bind the parties.⁵¹ Mediation is similar to the internal dispute resolution mechanism but, instead of internal parties trying to resolve the dispute, a third party runs the mediation.

⁴⁸ Conciliation seems to be a form of mediation and need not be discussed in this section in detail.

⁴⁹ Holland 454, is one of the oldest forms of dispute resolution; Feehily “The Role of the Commercial Mediator in the Mediation Process: A Critical Analysis of the Legal and Regulatory Issues” *SALJ* (2015) 375, states that it is an attempt to finding different possibilities of settlement.

⁵⁰ Stark (2003) 200.

⁵¹ *Ibid.*

Mediation is considered to be informal, confidential, voluntary and non-binding.⁵² Both mediation and internal mechanisms are an attempt to maintain the relationship between the parties.⁵³ Mediation has four approaches namely:⁵⁴ (i) settlement mediation in which the objective is to reach a compromise, (ii) facilitative mediation in which the objective is to promote or negotiate the terms underlying the needs and interests of the parties rather than legal rights or obligations, (iii) therapeutic or transformative mediation in which underlying causes of behaviour is considered, and (iv) evaluative mediation in which the legal rights and entitlements of the parties and the possibilities of outcomes serve as a guide in reaching a settlement.

A drafter would normally include mediation where the parties' relationship must be maintained. The use of mediation does, however, not guarantee the successful resolution of the dispute, which can then be referred to another mechanism for resolution. It is often seen in litigation and even arbitration that one party will always win and the other will always lose in the process. Mediation is an attempt to avoid such a situation.

Sometimes there will be a requirement for conciliation, which is different to mediation in that an independent third party drives the negotiation to resolution by proactively making suggestions to resolve the dispute. The difference is that a mediator will at all times keep his neutrality and only facilitate discussion.

⁵² Holland 454; Stark (2003) 200, provides the example "The parties shall firstly in good faith attempt to settle by mediation any dispute arising out of or relating to this Agreement or its breach. The mediation is to be administered by _____. If the mediation is unsuccessful, the parties may then resort to arbitration, litigation or any other dispute resolution procedure."

⁵³ Holland 454; Stark (2003) 200, mentions that mediation is useful in situations where the parties (i) want to maintain their relationship, (ii) have difficulty in communicating, (iii) are hesitant to disclose their positions, (iv) need a quick way to resolve the dispute and (v) require the matter to remain confidential.

⁵⁴ Feehily 374-375.

A mediation provision would normally be included as the only alternative dispute resolution, failing which the parties would proceed with litigation. Alternatively, the mediation provision can be combined with an arbitration provision, in which case any breakdown in mediation will result the parties in proceeding with arbitration.

13.3.2.3 ARBITRATION

Arbitration⁵⁵ is one of the most common alternative dispute resolution mechanisms in which the parties voluntarily submit themselves to the determination of the arbitrator in terms of a dispute.⁵⁶ Arbitration allows for privacy and also provides some level of control over the arbitrator adjudicating a dispute.⁵⁷ Arbitration is the alternative to litigation as it can be made binding and final between the parties, should they agree to it.⁵⁸ An arbitrator, therefore, performs a judicial function.⁵⁹

An arbitrator receives his authority from the written agreement between the parties and can only function in terms of what has been agreed between the parties.⁶⁰ Arbitration agreements can be

⁵⁵ Regulated under the Arbitration Act 42 of 1965.

⁵⁶ Stark (2003) 171; *Van Deventer and Another v Biggs and Others* [2014] JOL 32147 (ECP) 10, where only the parties have agreed to arbitration; they cannot after the fact withdraw from it; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* (687/12) [2014] 1 All SA 375 (SCA), indicates a growing popularity in arbitration worldwide. See also *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL* [2014] 4 All SA 617 (SCA); *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* [1977] 4 All SA 733 (C).

⁵⁷ Holland 455.

⁵⁸ Wells 653; *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* [50].

⁵⁹ Vos “Expert Determination as Alternative to Arbitration” *Without Prejudice* (2009) 32; Anderson & Warner 58; *Watt v Sea Plant Products Ltd and Others* 115, shows that arbitration proceedings mimic court proceedings in all characteristics except for the person presiding over the dispute.

⁶⁰ Stark (2003) 171; Anderson & Warner 57; *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* [52], indicates that parties can approach the court to show good cause as to why the matter should not go to

separate from the main agreement or can be found embedded in the agreement itself.⁶¹ The challenge with embedded arbitration agreements is that they are linked with the validity of the rest of the agreement. It is for this reason that drafters often include a severability provision applicable to the arbitration provision, to allow the arbitration provision to remain effective regardless of the validity of the remainder of the contract.⁶²

There are two types of arbitration mechanisms, the first relates to *ad hoc* arbitration and the other to institutional arbitration.⁶³ Institutional arbitration is where the rules of an established arbitration organisation are used for the arbitration provision.⁶⁴ *Ad hoc* arbitration provisions are where the rules are determined by the parties and are included in the agreement itself. Such *ad hoc* arbitration provisions will therefore be longer and more detailed.⁶⁵ It is also possible that, should a drafter not consider all relevant aspects in the *ad hoc* arbitration provision, such a provision could be flawed and lead to litigation itself.

arbitration; *Levin and Co v Berg River Flour Mills* 1921 AD 78, 79 shows that every submission to arbitration depends on the consent of all the parties, even the arbitration association. Where the arbitration association refuses to act, the arbitration may fail. See also Pyles “Drafting Arbitration Agreements” *ADEL LR* (1993) 5. See also *Pittalis and Others v Sherefettin* [1986] 2 All ER 227, indicated that an arbitration provision can give one party to the contract the right to refer the matter to arbitration.

⁶¹ *Rent-A-Center West Inc v Antonio Jackson* 130 Supreme Court of US SCt 2772 (2010) [11], where an arbitration agreement is embedded in the contract itself, any challenge to the contract becomes a challenge of the arbitration provision. It is for this reason that drafters likely sever an arbitration provision from the rest of the contract, so that the arbitration agreement does not have the errors of the contract in which it is embedded.

⁶² *Supra* (n 61).

⁶³ Pyles 6.

⁶⁴ Pyles 6; take for example parties that “opt-into” the use of the UNIDROIT or the ICC’s rules for arbitration and dispute resolution.

⁶⁵ *Ibid.*

The first aspect that must be considered with an arbitration provision is exactly what types of disputes will be regulated by the arbitration clause.⁶⁶ This consideration forms the basis of referring a matter to arbitration, as only those matters that the parties agree to arbitrate will fall under the umbrella of the arbitration provision. An arbitration provision can thus either be broad or narrow.⁶⁷ In an attempt to make the application of the arbitration provision broad, drafters will often include terminology such as “all disputes” into the provision in an attempt to make the application of arbitration as wide as possible.⁶⁸ Other terminology that can be used is disputes “under this agreement”, “arising out of this agreement”,⁶⁹ “in respect of this agreement” or “in connection with this agreement”.⁷⁰ Sometimes drafters will use the terminology of “differences” in the arbitration provision, it being suggested that this has an even wider application than that of “disputes”.⁷¹ If the dispute falls within the ambit of the arbitration provision, the matter must be referred to arbitration instead of the courts for resolution.⁷² If, however, the matter does not fall within the matters detailed in the arbitration provision, the courts may intervene.⁷³ An arbitration provision will often exclude urgent matters from the scope of its application and allow for an

⁶⁶ Readey 26; *Harbour Assurance Co (UK) Ltd v KANSA General International Assurance Co Ltd and Others* [1993] 3 All ER 897, indicated that initial illegality of the contract can be referred to arbitration provided that the arbitration provision is not illegal.

⁶⁷ Gattuso 53.

⁶⁸ Mills & Brewer 24; Pyles 8, quoting *Roose Industries Ltd v Ready Mix Concrete Ltd* [1974] 2 NZLR 246 in which the arbitration provision reads “Any dispute which may arise between the parties to this agreement shall be settled by arbitration in accordance with the Arbitration Act 1908 and any subsequent amendments.” In this case, should the clause be reviewed literally, it could mean that the dispute need not relate to the business transaction that the agreement contemplated.

⁶⁹ Take for instance *Parfi Holding AB v Mirror Image Internet Inc* 817 A.2d 149 (Del. 2002), quoted by Gattuso 54, to have included that all disputes “arising out of or in connection with” the agreement will be referred to arbitration.

⁷⁰ Pyles 9.

⁷¹ Pyles 18.

⁷² *Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* 522.

⁷³ *Fabian McCarthy v Sundowns Football Club & Others* [2002] JOL 10381 (LC) 11.

interim urgent matter to be referred to court. In other instances an arbitration provision would have the parties waive their rights to have the matter appealed.⁷⁴

The second aspect to consider is exactly what the authority of the arbitrator would be.⁷⁵ To what extent can the arbitrator award damages, special damages and even costs? As the arbitration process is included in a contract to resolve disputes, the manner in which the arbitrator can resolve disputes should be clearly formulated in the agreement. The aim of arbitration is on the one hand to resolve the dispute and on the other to attempt to enforce the agreement. To achieve this, the authority of the arbitrator must be clear and unambiguous.

Other factors that a drafter should consider when drafting an arbitration provision are the following:

- (i) The arbitration institution and procedure applicable.⁷⁶ This can be incorporated from existing organisations which will result in a less complicated provision,⁷⁷ or it could be rules and procedures that the parties themselves agree to.⁷⁸
- (ii) The choice of forum and location.⁷⁹ Generally, the location will determine the law applicable and procedures applicable.⁸⁰ In such instances, if another law is to be applied, this should be specified.

⁷⁴ *Telordia Technologies v Telkom SA Ltd* [2007] 2 All SA 243 (SCA).

⁷⁵ Readey 26.

⁷⁶ Holland 462; Stark (2003) 171; *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) 673, states that arbitration is the exercise of private power and not that of public power.

⁷⁷ This will be an institutional arbitration provision.

⁷⁸ This will be an *ad hoc* arbitration provision.

⁷⁹ Holland 465; Stark (2003) 181.

⁸⁰ Pryles 9.

- (iii) The choice of law.⁸¹ The arbitration provision may be severed from the rest of the agreement. Should a severability provision be included, the arbitration provision should clearly state which law would be applicable.
- (iv) The choice of arbitrator and his powers.⁸²
- (v) The choice of language.⁸³
- (vi) Confidentiality of the proceedings.⁸⁴
- (vii) The award provided as well as how prescription of a claim will be dealt with.⁸⁵
- (viii) The enforcement of an arbitral award.⁸⁶ Often parties will allow an arbitration award to be made an order of court. In the United States of America these provisions are called an “Entry of Judgments Clause”, which would normally read “any award may be entered in any Court having jurisdiction”.⁸⁷ Apparently, this is to indicate that the parties intend the award to be enforceable.⁸⁸ As the parties have submitted to arbitration this would, in itself, indicate that they intended it to be enforceable. However, such a provision may be intended to allow the award to be executed through the court processes. This can also include the exclusion or inclusion of the process of appealing the award.

⁸¹ Holland 469; see above as the same principles for jurisdiction would apply; Dillenz “Drafting International Commercial Arbitration Clauses” *Suffolk Transnat’l L Rev* (1998) 241.

⁸² Holland 470; Stark (2003) 181.

⁸³ Holland 471.

⁸⁴ Dillenz 244.

⁸⁵ Holland 472.

⁸⁶ Holland 473.

⁸⁷ Pryles 9.

⁸⁸ *Ibid.*

- (ix) The discretionary or mandatory application of the arbitration provision.⁸⁹ It should indicate whether the provision is discretionary, therefore whether the parties have a choice to arbitration or not, or whether it is a required process to be followed.⁹⁰ Often drafters will include that the parties irrevocably consent to arbitration. It should be recalled that such an agreement is in writing and any variation or cancellation of such an agreement must be with the consent of the other party. As such, including an irrevocable consent does not add to the current position.

There are various factors to consider when drafting an arbitration provision and it is not as simple as merely copying and pasting such a provision into a contract. It needs to be integrated with the rest of the agreement and must create a coherent whole in order to function effectively. It is up to the drafter to ensure that this is captured correctly.

13.3.2.4 FORMAL HYBRID MECHANISMS

There are also hybrid mechanisms between mediation and arbitration. These are referred to as (i) “med-arb” in which a failure or break down in mediation automatically leads into arbitration proceedings, or (ii) “arb-med” in which the arbitration award is kept confidential and a mediation process follows in an attempt to resolve the matter.

⁸⁹ *Ibid.*

⁹⁰ There has been ambiguity in these types of provisions in the past. Take for instance *Segal v Silberstein* 67 Cal. Rptr.3d 426 (Cal. App. Ct. 2007), as quoted by Gattuso 54, “[the] exclusive dispute resolution process in the State of California, but arbitration shall be a nonexclusive process elsewhere”.

These hybrid mechanisms often lack clarity in the transition between the two forms of dispute resolution.⁹¹ It is, therefore, necessary to include progressive stages and specific references to time frames in these types of hybrid mechanisms.⁹²

There are two ways to draft a hybrid mechanism. The first type is a so-called blended method in which mediation and arbitration are contained in one single proceeding.⁹³ The second type is a conjoined method in which arbitration follows mediation should mediation fail after a fixed period of time.⁹⁴ Which type of method is used would be dependent on the manner in which the provision is drafted.

The hybrid mechanism allows the flexibility for the parties to integrate various types of mechanisms into one that is unique to their requirements. The result of poor drafting in these types of provisions is often confusion and costs to litigate.

13.4 CONCLUSION

There are strengths and weaknesses to each type of dispute resolution mechanism. Parties should choose the manner in which disputes should be resolved, however, more often than not the

⁹¹ Hutchinson 414, provides an example of a hybrid mechanism “Where a dispute arises between the parties in respect of this Agreement, the aggrieved party shall notify the other of the existence of the dispute within 7 (seven) days of the matter arising. Thereafter the parties shall negotiate in good faith to settle the dispute as expeditiously as possible, but in any event within a period of ... days of the matter being referred to them. (i) Should the parties be unsuccessful, the parties may agree that the matter be solved through a process of arbitration in accordance with the rules and procedures of AFSA (The Arbitration Foundation of South Africa) (ii) The decision is final, (iii) The decision may, upon application by any party to a court of competent jurisdiction, be made an order of court, (iv) this clause is severable from the rest of the agreement and shall remain in effect should the rest of this agreement be terminated or cancelled for any reason.”

⁹² Mills & Brewer 24.

⁹³ Holland 456.

⁹⁴ Holland 457; it may be that in some provisions arbitration may also be followed by mediation which forces the parties to attempt to resolve any dispute before the arbitration award is given.

drafter makes the determination by either including or excluding certain provisions from the contract. There is no right or wrong mechanism to place into a contract to resolve disputes.⁹⁵ The correct dispute resolution provision to be placed in the contract is dependent on the circumstances and requirements of the parties.⁹⁶

Complicated alternative dispute resolution mechanisms could be time-consuming and confusing and may, in itself, trigger litigation which is what the clause attempts to prevent.⁹⁷ As these mechanisms are alternatives to the normal process allowed for in litigation, caution should be applied when drafting them. The right balance should be struck to avoid confusion.

The danger lies in the copying and pasting of dispute resolution provisions. These types of provisions must coherently integrate with the rest of the agreement.⁹⁸ Where this is not achieved, there is possibility that such sloppy drafting could create confusion and litigation.

In drafting these provisions the drafter modifies the default resolution route of litigation, or even circumvents it completely by including an alternative dispute resolution mechanism. What is ultimately included in or omitted from the agreement will determine the manner in which the parties are entitled to enforce the agreement.

⁹⁵ Holland 452.

⁹⁶ *Ibid.*

⁹⁷ Readey 15; Gattuso 53.

⁹⁸ Take for instance *Green v Short* 2007 WL 2570821 NC Super. Ct. (2007), as quoted by Gattuso 54, in which an agreement included a broad arbitration provision, but in a separate clause referred to a general remedy of judicial dissolution. This led to a dispute as to whether a claim for judicial dissolution could be brought in court. The court in this instance relied on the arbitration provision because of the broad manner in which it was drafted. Gattuso 54, refers to *Terex Corp v STV US Inc* 2005 2810717 Del. Ch. (2005), which came to a similar conclusion.

CHAPTER 14

OPERATION OF A CONTRACT

14.1	INTRODUCTION.....	281
14.2	PROVISIONS OF A CONTRACT	282
14.2.1	TERMS	283
14.2.2	DECLARATIONS.....	287
14.2.3	CONDITIONS.....	288
14.2.4	THE PHRASE “TERMS AND CONDITIONS”	290
14.2.5	BUILDING BLOCKS.....	292
14.3	INTERPRETATION	297
14.4	NOTICES.....	299
14.5	CONCLUSION.....	302

14.1 INTRODUCTION

The preceding chapters set the requirements for the creation and termination of a contract. This chapter focuses on the internal operation of a contract and the various ways a drafter goes about putting the contract together. The first element of the operation of a contract is the manner in which the document is drafted and compiled. This entails different contractual provisions, each of which has a different function and purpose within the document. Therefore, contractual provisions are tools that the drafter has at his disposal to record the agreement of the parties in writing. The second element of the operation of a contract is how the document attempts to control the manner in which a contract is drafted and interpreted. Finally, the manner in which notices under a contract are given is discussed. The notice provision is linked to any other provision which requires a party to give notice to the other.

14.2 PROVISIONS OF A CONTRACT

A provision, for the purposes of drafting, can be described as the written parts that form the content of the written document.¹ It is incorrect to assume that all provisions create obligations.²

There are different types of provisions, each of which have a function and are used for different reasons, such as the apportionment between and liability of the parties. There are provisions in the contract that create obligations between the parties,³ those that affect the operation of a term,⁴ and finally those that are statements either for clarification or background purposes.⁵ There are various types of provisions that form part of the different categories, which are considered to be the building blocks of drafting. In order to record the agreement between the parties, drafters would use different types of provisions to achieve their purpose, these include: (i) warranties, (ii) representations, (iii) obligations (also known as covenants) and (iv) declarations. These building blocks are the tools available to drafters to record the agreement between the parties.

The building blocks fall within the different categories of provisions in a contract, namely: (i) those that create obligations, commonly referred to as terms,⁶ (ii) those that are statements, clarifications and explanations, commonly referred to as declarations, and (iii) those that influence the operation of an obligation, commonly referred to as conditions.

¹ Also sometimes referred to as a clause or when dealing with international agreements referred to as an article.

² Christie & Bradfield *The Law of Contract in South Africa* (2011) 159; *ABSA Bank Ltd v Swanepoel* 2004 (6) SA 178 (SCA).

³ Referred to as terms.

⁴ Referred to as conditions.

⁵ Christie & Bradfield 161; referred to as declarations and according to Cornelius *Interpretation of Contracts in South Africa* (2007) 182, can also be referred to as an internal interpretation aid in a contract; *ABSA Bank Ltd v Swanepoel*.

⁶ *Design Planning Services v Kruger* 1974 (1) SA 689 (T) 695B-F, where the term of a contract imposes a contractual obligation on the parties. This is to act or not to act in a particular manner.

14.2.1 TERMS

A contract has three basic categories of terms. The first is the *essentialia*, which are those distinctive terms that classify a contract as one of those recognised in the common law.⁷ These terms are used for the classification of a contract and are not required for the validity of the contract.⁸ The *essentialia* will indicate what type of contract one is dealing with.⁹ Classification assists with identifying the type of contract, its interpretation and whether specific requirements must be met.¹⁰ Drafters tend to name contracts by including a title.¹¹ These titles are usually placed at the top centre of the first page of the document. It describes the type of agreement that has been recorded.¹² The headings are also used to assist in classifying contracts.¹³ The manner in which the contract is named will not have an impact on the substance of the agreement.¹⁴ The type of contract will be determined by its *essentialia* and not by how the parties themselves attempt to classify it through the use of headings.

The second is the *naturalia*, which are terms that the law automatically includes in the specific category of contract.¹⁵ Some authorities indicate that, when drafting a contract the *naturalia* must

⁷ Van der Merwe *et al. Contract General Principles* (2012) 245. For example agreements of purchase and sale, lease agreements and partnerships.

⁸ Van der Merwe *et al.* 245.

⁹ Naudé “The Preconditions for Recognition of a Specific type or sub-type of contract - the *Essentialia* - *Naturalia* Approach to the Typological Method” *TSAR* (2003), 412.

¹⁰ It also indicates the relevant *naturalia*.

¹¹ Adams *A Manual of Style for Contract Drafting* (2008) 1.

¹² *Ibid.*

¹³ Adams 1, for example “Agreement of Purchase and Sale”; Cornelius (2007) 148-150, mentions examples such as: (i) letting and hiring, (ii) employment, (iii) agency, (iv) partnership, (v) insurance, and (vi) purchase and sale. Cornelius (2007) 140, states that the heading of a contract is one factor that will indicate the intention of the parties.

¹⁴ Cornelius (2007) 182, says that just because parties use language normally found in a particular kind of contract does not necessarily mean that the parties intended to conclude such a type of contract.

¹⁵ Van der Merwe *et al.* 246; Fouché *Legal Principles of Contracts and Commercial Law* (2015) 106.

be included, unless the parties have specifically excluded the operation thereof.¹⁶ This is impossible. A written contract cannot record the *naturalia*. The *naturalia* can be included in a contract by operation of law.¹⁷ A drafter can exclude the operation of the *naturalia*, but *naturalia* cannot, by its nature, be an express term.¹⁸ The *naturalia* are so-called implied terms. As contracts are intended to facilitate proof and certainty, drafters are inherently reluctant to have implied terms in a contract. Implied terms create the perception of uncertainty. Sometimes contracts include provisions that specifically exclude the application of tacit and implied terms, thereby limiting the agreement to its express terms only.¹⁹

The final category is the *incidentalia*²⁰ which are all terms that do not fall within the categories of the *essentialia* or *naturalia*,²¹ but by their nature still create obligations on the parties. These additional terms are those that are agreed to by the parties.²² All the terms expressed in a written contract would either be *essentialia* or *incidentalia*. A written contract cannot express a *naturalia* and if it does so, it would by its nature become an *incidentalia*.

Flowing from this, there are specific types of terms in a contract such as express, implied and tacit terms. Express terms are the terms specifically agreed to by the parties.²³ These express

¹⁶ Hutchinson *The Law of Contract in South Africa* (2012) 401.

¹⁷ Van der Merwe *et al.* 246; Fouché 106.

¹⁸ By including a *naturalia* in a written contract, the nature changes from an implied to an express term.

¹⁹ *Botha v Swanepoel* 2002 (4) SA 577 (T), which states that the exclusion of *naturalia* must occur by consensus which can be done expressly or tacitly.

²⁰ Also known as the *accidentalia*.

²¹ Hutchinson 238; Van der Merwe *et al.* 247.

²² *Ibid.*

²³ Hutchinson 238; Cornelius “The Unexpressed Terms of a Contract” *International Journal of Private Law* (2012) 503, state that express terms are those expressed in writing or in speech. See also Cornelius “The Unexpressed Terms of a Contract” *Stell LR* (2006), 494

terms are all the terms that are found in the written document.²⁴ These are the terms that parties negotiate and which are drafted and placed in the written document.²⁵

Implied terms are not explicitly agreed to by the parties, but are implied because the parties failed to provide differently in the contract.²⁶ Although they are not expressly written, they do form part of the agreement. Implied terms can be found *ex lege* which are incorporated into the contract by operation of law.²⁷ This is usually the case where the contract is silent on certain aspects and the implied terms would regulate those aspects in the contract.²⁸ Certain categories of contracts, which are determined by the contract's *essentialia*, will import terms known as *naturalia*.²⁹ Drafters are inherently against any level of uncertainty and for this reason the application of implied terms are often excluded from the operation of a contract.

Tacit terms are those terms which are not specifically agreed to by the parties, but are expected to form part of the contract.³⁰ To determine whether these terms form part of a contract, the officious bystander test is applied in which it is determined whether a party expected such terms to be part of the contract.³¹ Drafters, who favour certainty, usually attempt to exclude the application of tacit and implied terms as they are perceived to create uncertainty in relation to the

²⁴ Cornelius (2007) 154.

²⁵ Cornelius (2007) 155, describes an express term as any words written in a contract that impose an obligation.

²⁶ Cornelius (2007) 162; Cornelius (2012) 503, says that implied terms are found where the parties did not consider the matter, but would have agreed on the term if they had thought about the matter. These types of terms are inferred by the *naturalia* of a contract. See for example *Orman v Saville Sportswear Ltd* [1960] 3 All ER 105, in which payment of sickness was implied in an employment contract.

²⁷ Cornelius (2007) 162.

²⁸ Hutchinson 244.

²⁹ Hutchinson 247; Van der Merwe *et al.* 243.

³⁰ Hutchinson 247; Van der Merwe *et al.* 243; Cornelius (2007) 156, 157, states that this is based on the common intention of the parties and can also occur whether the parties had a common expectation regarding a matter, but failed to expressly deal with it in the contract. See also *Wilkens NO v Voges* [1994] 2 All SA 349 (A) 359.

³¹ Cornelius (2007) 159.

agreement reached. It is for this reason that terms are usually included to exclude the application of tacit and implied terms.³² This is perceived to increase the certainty and predictability of the contract.

Different terms have different weightings attached to them. The weighting of a term is determined by establishing if the term is material or immaterial. Those that are of vital importance to the performance are considered to be material terms.³³ If there is a breach of a material term it gives the non-breaching party the right to cancel the contract.³⁴ Where a non-material term is breached, the non-breaching party may claim damages, but cannot normally cancel the agreement.³⁵ Despite this, the inclusion of a breach provision³⁶ may allow a party to terminate the contract, even for an immaterial breach.³⁷

The terms become the foundation of drafting contracts. The purpose of a term is to create obligations which the parties can enforce. Terms can take on the form of a duty, warranty and sometimes indemnities, which are discussed later.

³² Cornelius (2007) 158, states that parties can agree to only be bound to express terms in which instance no tacit terms would be implied.

³³ Hutchinson 248.

³⁴ See ch 12; Hutchinson 248.

³⁵ *Ibid.*

³⁶ Also known as a forfeiture clause or *lex commissoria*.

³⁷ See ch 12.

14.2.2 DECLARATIONS³⁸

Declarations are those provisions that neither create obligations nor influence the operation of an obligation. Declarations are statements of fact which are intended to explain or clarify certain aspects of the contract.³⁹ Declarations do not create obligations, but they influence the interpretation of the contract. As the parol evidence rule applies, drafters may on occasion include factual information in the body of the contract to place the contract and obligations in context. Naturally such provisions would influence the interpretation of a contract. These types of declarations can be found as loose-standing provisions in the contract, but are generally found in the preamble.⁴⁰ Preambles are regarded as subordinate to the contract and help to establish the intent of the parties.⁴¹

Generally, there are three types of preambles, namely: (i) context preambles, which describe the circumstances that lead to the parties entering into the agreement,⁴² (ii) purpose preambles, which broadly describe what the parties intend to achieve by entering into the agreement,⁴³ and (iii) simultaneous-transaction preambles, which are used to describe a broader transaction which

³⁸ Stark *Negotiating and Drafting Contract Boilerplate* (2003) 13.

³⁹ *ABSA Bank Ltd v Swanepoel*, shows that statements found in contracts are there to clarify or explain. These statements influence the interpretation of the contract, but do not create obligations; Cornelius (2007) 182, says this can be considered to be an internal interpretation aid.

⁴⁰ Also known as a recital; *Woodburn Mansions (Pty) Ltd v Dowell* [1961] 2 All SA 522 (N) 528, illustrates that recitals are subordinate to the operative parts of the contract. Where the operative part is clear and unambiguous it is taken to express the intentions of the parties and prevails over any contrary intention found in the preamble. However, where the operative portion is doubtful, the recital can be used to explain the meaning.

⁴¹ Adams 19; *Agricultural Supply Association v Olivier* 1952 (2) SA 661 (T), shows that recitals are subordinate to the operative part of the contract. In any conflict between the recital and the operative part, the operative part will take preference. See also Cornelius (2007) 182.

⁴² Adams 18.

⁴³ *Ibid.*

the agreement forms part of.⁴⁴ This is used when a transaction comprises multiple contracts and the recital puts the agreement into context in relation to rest of the transaction.

The purposes of declarations are then to provide clarity, explain and place aspects of the agreement in context. Declarations, therefore, cannot be enforced as they do not create obligations.⁴⁵ A declaration can also take the form of a representation, which may have consequences such as repudiation, but does not necessarily create an obligation between the parties.

14.2.3 CONDITIONS

A condition is not the same as a term. Conditions are mechanisms in which obligations are qualified in relation to an uncertain future event.⁴⁶ The first type of condition is a positive condition. This is where an obligation will occur or not, when something uncertain happens in the future.⁴⁷ The second is a negative condition. In this instance an obligation will occur or not, when something uncertain does not happen in the future.⁴⁸

⁴⁴ *Ibid.*

⁴⁵ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* 2005 (6) SA 1 (SCA), indicates that a recital can be drafted in such a way as to create an obligation. In such case the declaration was supposed to be an obligation. It does, however, not function as a declaration, but rather as a term.

⁴⁶ Van der Linden *Institutes of the Laws of Holland* (1806) 1 14 9 2; J Inst 3 15 4; Hutchinson 249, explains “a term which qualifies a contractual obligation where it is conditional as to whether a future event will happen or not”.

⁴⁷ Hutchinson 249.

⁴⁸ *Ibid.*

There are various categories of conditions, which include a suspensive and resolutive condition.⁴⁹ These relate to the operation of the obligation. In instances where the parties agree that obligations will be unenforceable until an uncertain future event occurs, such a condition is called a suspensive condition.⁵⁰ If the parties agree that the obligations will operate in full, but will come to an end if an uncertain future event does or does not happen, the condition is referred to as a resolutive condition.⁵¹ Once a suspensive condition has lapsed the parties cannot revive such obligations.⁵²

Another type of condition is a potestative condition, which depends on a potential creditor doing or not doing something that is within the creditor's control.⁵³ The fulfilment is entirely dependent on one party and is void.⁵⁴ A causal condition is where something is outside or beyond the parties' control.⁵⁵ A mixed condition is where something is partly within the control of a creditor

⁴⁹ *Design Planning Services v Kruger*, indicates that a suspensive condition suspends the operation of obligations on the occurrence or non-occurrence of an event.

⁵⁰ Hutchinson 249, also known as a condition precedent which has a retroactive effect once fulfilled; Nagel *Commercial Law* (2011) 114, says the duty to perform is suspended or postponed pending the occurrence of an uncertain future event; *Red Dunes of Africa v Masingita Property Investment Holdings* (159/2014) ZASCA 99 (1 June 2015) [11], states that a suspensive condition must either be fulfilled or waived. If it is not fulfilled a party cannot enforce the rights arising from the agreement. The manner in which the provision is drafted can influence whether the provision is interpreted as a condition precedent. Take for instance *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, 328 where "The Lessee shall on or before the signing hereof pay ten per centem of the premium £70,000 due on the said Underlease as deposit to the Lessor" was interpreted as a condition precedent.

⁵¹ Hutchinson 250, also known as a condition subsequent; Nagel 114, the continued existence of the contract is dependent of an uncertain future event.

⁵² *Fairoaks Investment Holdings (Pty) Ltd and Another v Olivier and Others* 2008 (4) SA 302 (SCA) [28]; *Africast (Pty) Ltd v Pangbourne Properties Ltd* [2013] 2 All SA 574 (GSJ).

⁵³ Hutchinson 250.

⁵⁴ *Withok Small Farms and Others (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* [2009] 2 All SA 65 (SCA).

⁵⁵ Hutchinson 251.

and partly outside the control of both parties.⁵⁶ In all these instances conditions relate to uncertain future events.

A condition must be distinguished from time clauses⁵⁷ and assumptions. A time clause relates to a certain future event.⁵⁸ A suspensive time clause is when it postpones performance and a resolutive time clause relates to an obligation which will only affect it up to a certain day.⁵⁹ Assumptions, on the other hand, relate to an event that has already occurred or a situation that is already in existence. Depending on the correctness of assumption, the obligation will or will not occur.⁶⁰ Assumptions are used where a party wants to bind himself only if a particular state of affairs exists, past, present or future, but the parties may not know whether the state of affairs exists.⁶¹

A condition then influences the operation of an obligation, but does not create an obligation in itself.

14.2.4 THE PHRASE “TERMS AND CONDITIONS”

People often speak of conditions when they actually refer to terms.⁶² A condition is sometimes used in a wider sense to mean a term of a contract.⁶³ This is often seen in credit applications or a

⁵⁶ *Ibid.*

⁵⁷ Also known as *dies*.

⁵⁸ Christie & Bradfield 139, a time clause is for the benefit of the debtor.

⁵⁹ Fouché 108.

⁶⁰ Nagel 116.

⁶¹ Van der Merwe *et al.* 247; Nagel 116, also known as suppositions.

⁶² Nagel 114.

party's standard terms and conditions. The use of the word "condition" in these circumstances is not technically correct as the word "condition" in such circumstances means "term".⁶⁴

A similar use of conditions has been incorporated into the law, namely: (i) condition precedent has been used to describe when an insured must do something under an insurance policy,⁶⁵ (ii) in relation to negotiable instruments where a promise to pay is conditional,⁶⁶ and (iii) the terms of a contract of sale are often referred to as a condition of sale, which has been inherited from English law.⁶⁷ The use of "conditions" in these circumstances does not assist in the distinction between the two concepts.

The nature of a condition is not to create obligations. A "term" is being confused with a provision of a contract. A provision is a description which encompasses all types of provisions, whether they are terms, conditions or declarations. In practice, however, words such as terms, articles, provisions, clauses and stipulations are used interchangeably.⁶⁸

In essence, a term is used to create obligations while a condition is used to impact on the operation of such obligations.⁶⁹ The parties can enforce a term, but cannot enforce a condition.⁷⁰

⁶³ *R v Katz* 1959 (3) SA 408 (C) 417; *Christie & Bradfield* 141.

⁶⁴ *R v Katz* 417, in these instances the normal terms are incorporated in a contract, take for instance the use of a "conditions of sale", which should actually have read "terms of sale".

⁶⁵ *Christie & Bradfield* 142.

⁶⁶ *Ibid.*

⁶⁷ *Christie & Bradfield* 143.

⁶⁸ *Park 2000 v Page* (905/2010) [2011] ZASCA 208 [10], whether a specific clause contains a term or a condition depends on the wording of the clause.

⁶⁹ *Southern Era Resources Ltd v Farnell NO* 2010 (4) SA 200 (SCA), a term is an enforceable contractual obligation while a condition makes the operation of an obligation dependent on an uncertain future event.

⁷⁰ *Design Planning Services v Kruger*, a term of a contract imposes a contractual obligation to do or not to do something in a particular manner. A contractual obligation can be enforced, but the parties cannot compel a condition. Therefore the main difference between a term and a condition is the consequences attached to them. *L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39, 44 that indicate the word "condition" can

The correct use of the type of provision will prevent confusion. When referring to the content of the contract the words provisions, articles, sections or clauses, which are neutral words, are used not imply term, condition or declaration specifically.

14.2.5 BUILDING BLOCKS⁷¹

The building blocks of a contract can be described as the foundation of a contract.⁷² It is the manner in which drafters compile and assemble the provisions of a contract to record the agreement of the parties.⁷³ These building blocks are the tools drafters use to translate the agreement of the parties into a written document.⁷⁴ They establish different types of consequences, should the provision be breached and functions to allocate the risk between the parties.⁷⁵ The building blocks are derived from the categories of provisions, being terms, declarations and conditions. The category the building block falls into will determine the consequences the drafter attempts to achieve. The types of building blocks include: (i) obligations,⁷⁶ (ii) warranties,⁷⁷ (iii) indemnification,⁷⁸ (iv) representations,⁷⁹ and (v) conditions.

take many forms. It can be used as a term in the agreement such as, “condition of sale” or “for conditions see back”. It can also mean a pre-condition, in that something must happen before something else.

⁷¹ Stark 9; Fox *Working with Contracts* (2008) 8.

⁷² Stark 9.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Petit v Abramson (II)* 1946 NPD 673, 679; Also known as covenants. Adams 272, says the term “covenant” is synonymous to the term “obligation”. The two words are often used synonymously; Fox 16, describes covenants as on-going promises; Stark 9; Anderson & Warner 224, state that the traditional meaning of the word covenant is a promise made by deed and a second meaning is any promise or stipulation, whether under seal or not. Other than for the use of covenant under real rights, a covenant is nothing more than a contractual undertaking and used to place a contractual undertaking on another party.

The first tool that drafters use is a simple obligation. An obligation is a term of a contract in which a party must either do something or refrain from doing something.⁸⁰ As an obligation is a term, it is enforceable between the parties in the way an obligation is presented by the language used in the contract. The language of an obligation indicates that a party has a duty to perform in some way. This is achieved through words such as: “shall”,⁸¹ “must”, “undertake”, “covenant”,⁸² “is responsible for”, “is obliged”⁸³ or “is required to”.⁸⁴ The word “will” is sometimes used to indicate an obligation, but this implies a future obligation and is more likely to be found in conjunction with conditions.⁸⁵ The other way of indicating an obligation is to indicate a right of a party.⁸⁶ This naturally means that the other party will have to perform to ensure that such a right

⁷⁷ *Petit v Abramson (II)* 679, statements made by the parties can take the form of obligations which give rise to a contractual obligation. Warranties can take the form of an obligation.

⁷⁸ *Jonnes v Anglo-African Shipping Co Ltd* 1972 (2) SA 827 (A) 835H-836A, making reference to the Oxford Dictionary described (i) the verb “indemnify” as an act to preserve, protect and keep free from, secure against (any hurt, harm or loss), to secure against legal responsibility for past or future actions or events, and (ii) the noun “indemnity” as a security or protection against contingent hurt, damage or loss or compensation for loss or damage incurred.

⁷⁹ *Petit v Abramson (II)* 679, statements made by the parties can take the form of representations.

⁸⁰ See ch 5; *ABSA Bank Ltd v Swanepoel* 181.

⁸¹ Adams 32, the word “shall” is synonymous to the phrase “has a duty to”.

⁸² Sometimes the word “covenant” is used. This creates no additional duties or special rights. It has the same effect in that it creates an obligation and is considered to be a term in the contract. Domat *The Civil Law in its Natural Order* (1850) 144, indicates that the word “covenant” is a general name which includes all manners of contracts, treaties and pacts; Grotius *The Introduction to Dutch Jurisprudence* (1985) 3 6 2, says the term covenant is synonymous with agreement or contract.

⁸³ *Alenson v AB Brickworks (Pty) Ltd* 1993 (1) SA 62 (A), where the term “is obliged to pay” was used.

⁸⁴ Adams 31-32, caution should be taken with the use of the word “acknowledge” as this would result in a representation in itself. See *Cellport Systems Inc v Peiker Acoustic GmbH & CO KG* 762 F.3d 1016 (2014) 1022, and quote in *Re Schofield's Estate* 101 Colg. 433 73P.2d1381 (1937) 1983, stating that acknowledgements are the best kind of evidence.

⁸⁵ Adams 32, this indicates a future time element.

⁸⁶ This is distinguished from providing a party with a discretionary right. A discretionary right is usually indicated by the word “may”.

is obtained. Using this type of language in a document indicates that an obligation is created between the parties.⁸⁷

Warranties are also tools used for the creation of an obligation; however, their consequences are slightly different. To indicate that a warranty is being created in the document, the term “warrants” is used. Warranties are undertakings that a certain state of affairs exists or does not exist in the past, present or future.⁸⁸ A party thus takes strict and absolute liability for the truth of such a warranty and therefore the warranty is guaranteed.⁸⁹ If a warranty is breached, the party who relied on the warranty must be placed in the position it would have been in, should the warranty not have been breached.⁹⁰ A warranty has the effect of extending liability, and as such, a party cannot rely on impossibility of performance or the absence of fault to escape from the obligation created by a warranty.⁹¹

Depending on the context in which a warranty is found, warranties can take on different meanings.⁹² It can mean an obligation of a contract and not a representation,⁹³ or it could be a

⁸⁷ Obviously, the language use in the document must be considered in context and in line with the rules of interpretation.

⁸⁸ Nagel 117; Van der Merwe *et al.* 256; Sharrock 232; Stark 9, states that a warranty is promise that if a statement is false, the maker of the statement will indemnify the other for any damages suffered as a result of the false statement.

⁸⁹ Nagel 117; Du Plessis “Pre-Contractual Misrepresentation, Contractual Terms, and the Measure of Damages when the Contract is upheld” *SALJ* (2008), 420, indicates that a warranty confers an absolute obligation on a party and thereby excludes the defences of absence of fault or impossibility of performance.

⁹⁰ Nagel 117; Van der Merwe *et al.* 256.

⁹¹ See ch 11; Van der Merwe *et al.* 256; *Wright v Pandell* 1949 (2) SA 279 (C) 286, states that the party who gave the warranty must either make good the statement or pay damages if the warranty is shown to be false. There is no need to prove matters. The question is merely whether the warranty is true or not.

⁹² *Wright v Pandell*.

⁹³ Christie & Bradfield 162; *Lifeguards Africa (Pty) Ltd v Raubenheimer* 2006 (5) SA 364 (D).

collateral warranty in terms of which it was an inducement to enter into a contract.⁹⁴ Regardless of what a provision is called, effect will be given to what it was intended to be.

Indemnification is used in an agreement to shift risk and usually relates to third party claims.⁹⁵ In essence, indemnities indicate that one party will pay the other party for a claim brought against him or damages and losses suffered as a result of certain events.⁹⁶ There are, however, two types of indemnities, the first are those that relate to third party claims and those that function as an exemption clause. The second relates to a party releasing the other from all liability.⁹⁷ There is no obligation to indemnify and as such, indemnifications are interpreted strictly.⁹⁸ There is a specific manner in which indemnifications are drafted. The first part refers to one party indemnifying the other.⁹⁹ The second part is “to hold harmless” the other party.¹⁰⁰ The manner in

⁹⁴ Christie & Bradfield 162; where it appears that warranty can sometimes take on the form of a representation. Christie & Bradfield argue that due to a wrong interpretation it is believed that a *ditcum* (being a representation) and a *promissum* (being a warranty) in sale contracts are meant to be the same. It is possible that that a warranty can take on the form of a representation, but this is not always the case. Furthermore, the consequences of a warranty and a representation are different. The written document will indicate what form the warranty will take. The combined meaning of a warranty can be referred to as *dictum promissum*. See *Hall v Milner* [1959] 2 All SA 421 (O) 429.

⁹⁵ *Queen Villas Homeowners Association v TCB Property Management* 56 Cal. Rptr.3d 528 (2007) 530. See also *Myers Building Industries, Ltd v Interface Technology Inc* (1993) 13 Cal. App. 4th 949 969.

⁹⁶ *Steward and Another v Appleton Fund Managers* [2002] 3 All SA 545 (T) 553, quoting *Joseph Travers & Sons Ltd v Cooper* (1915) 1 KB 673, 101, states that the manner in which an indemnity is drafted will influence the manner in which the risk is allocated in the contract. For example, when speaking of losses in an indemnity provision one considers the types of losses and not the causes thereof. If an indemnification applies to certain causes of action then words such as “howsoever caused” or “under any circumstances” would be used in the indemnity provision.

⁹⁷ *Queen Villas Homeowners Association v TCB Property Management* 531.

⁹⁸ *Drifters Adventure Tours CC v Hircock* [2007] 1 All SA 133 (SCA); *Hooper Associates Ltd v AGS Computers Inc* 74 NY.2d 487 (1989).

⁹⁹ *Queen Villas Homeowners Association v TCB Property Management* 534, to “indemnify” a person is an offensive right, which allows an indemnitee to seek indemnification.

¹⁰⁰ *Queen Villas Homeowners Association v TCB Property Management* 543, to “hold harmless” is a defensive right. It is a right not to be bothered by another party seeking indemnification.

which an indemnity is interpreted will be considered in the context of the agreement and the manner in which it is drafted.¹⁰¹

A representation is a statement that induces a party to enter into the contract.¹⁰² The language indicator of a representation is the use of the word “represents”. A breach of a representation results in repudiation of the contract and, in instances of fraudulent or negligent misrepresentation, can also result in damages.¹⁰³ The party who gives the representation is either satisfied with the correctness thereof or is prepared to take the consequences, being potential repudiation if it is incorrect.¹⁰⁴ A representation can be described as a form of declaration but has a stronger consequence if breached.

Declarations are factual statements and, in addition to being found in the preamble and recitals of a contract, declarations can also be loose-standing provisions. The language indicators for a declaration are, for example, “whereas”, “the parties understand”, “the parties confirm”, “it is recorded that” or “for avoidance of doubt”.

The phrase “subject to” is often the trigger word for a condition,¹⁰⁵ however, this is not always the case. To determine which it is, the rules of interpretation must be applied and the manner in which the condition is drafted must be scrutinised.¹⁰⁶

¹⁰¹ *Taurog and Others NNO v General Accident Insurance Co of SA Ltd* [1978] 3 All SA 543(W).

¹⁰² See ch 6; Stark 9, a representation is a statement of past or present fact to induce another party to act in a moment of time.

¹⁰³ *Christie & Bradfield* 164.

¹⁰⁴ *Wright v Pandell* 286, there is a level of proof required.

¹⁰⁵ *Christie & Bradfield* 145; In *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Limited* [2013] 1 All SA 266 (SCA), it is generally understood that the use of the phrase “subject to” introduces some sort of condition; *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA), in this case the words “subject to” indicated the corresponding obligations that had to occur before the right could be enforced and did not trigger a condition. See also *Pangbourne Properties Ltd v Gill*

The final tools drafters use, are what has been called degrees of obligations.¹⁰⁷ Drafters may attempt to water-down a provision thereby affecting the risk allocated to the provision,¹⁰⁸ or may strengthen the provision which will also impact on the risk allocated to the provision.¹⁰⁹ It depends on what the drafter wants to achieve as to whether the provision will be drafted stronger or weaker. The degrees of obligations also apply to other tools in the building blocks.

Finally drafters can also include waivers of the various provisions. These waivers would entail a party waiving the rights in the provision. Waivers are discussed more fully in Chapter 8.¹¹⁰

14.3 INTERPRETATION¹¹¹

The agreement between the parties is expressed in a language which is contained in the written document.¹¹² The parties to the agreement have the ability to choose their words and expressions to best give effect to their agreement.¹¹³ Interpretation is the starting point of drafting, but the rules of the interpretation of contracts fall outside the scope of this discussion and form part of

and Ramsden (Pty) Ltd 1996 (1) SA 1182 (A), in which two provisions were interpreted differently, the one a condition and the other not, while they were constructed with the same phrase “subject to”. The tenses used in the two terms provided an indication as to whether the term is a condition or a term. See also *Alpenstow Ltd and Another v Regalian Properties PLC* [1985] 2 All ER 545, 552 who indicated that the words “subject to” have a *prima facie* meaning that the provision is conditional.

¹⁰⁶ *Pangbourne Properties Ltd v Gill and Ramsden (Pty) Ltd*. Also described as efforts standards. See ch 11.

¹⁰⁷ Stark 21.

¹⁰⁸ Stark 21; an example of watering down obligations is by including efforts standards such as best efforts, reasonable efforts etc.

¹⁰⁹ Stark 21.

¹¹⁰ See par 14.2.3 above.

¹¹¹ Espenschied *Contract Drafting: Powerful Prose in Transactional Practice* 101, also known as canons of interpretation, canons of construction rules of construction or rules of interpretation.

¹¹² Cornelius (2007) 25.

¹¹³ *Ibid.*

the interpretational dimension of contract drafting.¹¹⁴ There are, however, instances where the parties intend to change the normal application of the rules of interpretation within their agreement. Drafters attempt to control the application of the rules and the manner in which the contract is interpreted. In this way, drafters include an interpretation provision that guides the interpreter as to how to interpret the document. For example:¹¹⁵

In this agreement, unless expressly stated otherwise or where the context indicates otherwise words in the singular shall also mean the plural and *vice versa*, words in the masculine also mean the feminine, and the neuter and *vice versa*, words referring to a natural person shall include a reference to a body corporate and *vice versa*.¹¹⁶

The interpretation provision is sometimes combined with the definitions provision as they are often considered to form part of the interpretation of the document.¹¹⁷ The intention of this provision is to guide the reader on how to go about interpreting the contract. To this, certain rules can be excluded or included to assist the reading of the contract. The interpretation section of the contract should be read with the definitions section.¹¹⁸ By amending the rules of interpretation, drafters create further control in the manner in which a party can read and interpret the contract, which often circumvents and changes the default rules of interpretation.

¹¹⁴ See ch 1.

¹¹⁵ Hutchinson 403.

¹¹⁶ Stark (2003) 593, this type of provision is to assist in interpretation and to overcome the finer points of drafting.

¹¹⁷ See ch 10.

¹¹⁸ *Ibid.*

14.4 NOTICES

Contracts often include a notice or *domicilium* clause where the parties to the contract choose their *domicilium citandi et executandi*, which in turn details the manner in which notices or processes are delivered to the parties to the contract.¹¹⁹

There are two types of notice provisions, the first is intended for service of judicial processes and the second is intended for notices given under the particular contract.¹²⁰ These notice provisions can be dealt with separately or can be bundled into a single provision, which the courts have dubbed a “double provision”.¹²¹

As a starting point, there are two types of *domicilium*.¹²² The first being a *domicile* that is voluntarily chosen and fixed by a person of his own free will, and the second is a *domicile* of necessity determined according to the customs of a person’s day.¹²³ The former type of *domicile* is relevant when it comes to judicial notices under a *domicilium* provision.

The expression “*domicilium citandi et executandi*” has been translated as “a home for the purpose of serving summons and levying execution”.¹²⁴ The Magistrates’ Court Rules¹²⁵ and the

¹¹⁹ *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* [1984] 3 All SA 625 (W) 641, “Obviously the service of process or the giving of notice at a domicile, must be effected as required by the Rules of Court or by the contract, as the case may be”. See also ch 12.

¹²⁰ See also ch 12, dealing with breach, termination and cancellation.

¹²¹ *Loryan v Solarsh Tea and Coffee* 641; *Muller v Mulbarton Gardens (Pty) Ltd* [1972] 1 All SA 190 (W) 197; *SA Wimpy (Pty) Ltd v Tzouras* 1977 (4) SA 244 (W) 247.

¹²² *Muller v Mulbarton Gardens* 197.

¹²³ *Muller v Mulbarton Gardens* 195.

¹²⁴ *Amcoal Collieries Ltd v Truter* [1990] 1 All SA 248 (A) 251.

¹²⁵ R9(3)(d) of the Magistrates’ Court Rules: “All processes shall, subject to the provisions of this rule, be served upon the person affected thereby by delivery of a copy thereof in one of the following manners: ... (d) if the person so to be served has chosen a *domicilium citandi*, by delivery or leaving a copy thereof at the *domicilium* so chosen.”

Uniform Rules of Court¹²⁶ use this type of *domicilium* to levy judicial processes.¹²⁷ Despite these rules, it appears that the parties to the contract are capable to agree to additional formalities to be included in a contract when it comes to judicial notices.¹²⁸

A notice clause creates a mechanism as to the manner in which parties to the contract may give notice to each other, which does not include judicial notices. These contractual notices relate to any notices under the contract and also include instances of breach, cancellation and termination or any other notices required in terms of the contract.¹²⁹

The purpose of a *domicilium* clause is not only to regulate the manner in which notices are given to parties, but also to determine when delivery and receipt of such a notice would be valid. Should the parties fail to include formalities relating to the sending and receiving of notices under a contract, the default position will apply being, that the party sending a notice must physically deliver the notice into the hands of the other party to ensure that it is a valid notice.¹³⁰

The choice of *domicilium* and also the reason for including a *domicilium* provision in a contract is to relieve a party from proving actual receipt of the notice.¹³¹ The result is that, without a

¹²⁶ R4(1)(a)(iv) of the Uniform Rules of Court states that “Service of any process of the court shall be directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or the other of the following manners: ... (iv) if the person so to be served has chosen a *domicilium citandi* by delivery or leaving a copy thereof at the *domicilium* of the chosen.”

¹²⁷ *Loryan v Solarsh Tea and Coffee*.

¹²⁸ *Grete Shephard v Jacqueline Emmerich* South Gauteng High Court (case no. 2009/22609) 2013 (unreported judgment), the *domicilium* clause was specific regarding the person to whom the notice was to be addressed and which floor of the building would be considered as the *domicilium* address. The plaintiff only served the summons on the first floor of the building and was not marked for the attention of D. Janks, as required.

¹²⁹ See ch 11.

¹³⁰ *Loryan v Solarsh Tea and Coffee* 641; *Muller v Mulbarton Gardens* 331-332 and *Gerber v Stoltze and Others* 1951 (2) SA 166 (T) 169G.

¹³¹ *Shephard v Emmerich* (n 128); *Loryan v Solarsh Tea and Coffee* 641; *Lovasz and Another v Estate Rosenberg* 1940 TPD 340 and 345.

domicilium clause, the party sending the notice will have to prove that the other party has actually received a notice for it to be a valid notice.

In the event that a party has chosen a *domicilium* address, notice clauses generally follow the same principles as those of judicial proceedings, which include: (i) that a notice need not be brought to a party's attention other than to comply with the formalities set out in the contract, (ii) the fact that a party may have come to knowledge of notice does not limit the obligation on the other party to strictly follow the requirements of notices under a contract,¹³² (iii) that service of any process may be effected by delivery or leaving a copy thereof at the *domicilium* chosen by a party,¹³³ (iv) that the service would be valid, even if the process was not physically received,¹³⁴ (v) that the *domicilium* presupposed hand delivery with appropriate methods and these include: handing notice to the person; pushing it under the door; or placing it in the mailbox,¹³⁵ (vi) that parties cannot amend the chosen *domicilium* address for delivery because it is inconvenient to serve or deliver the notice thereto,¹³⁶ and (vii) that an incorrect address in the contract cannot preclude a party from serving the notice or process.¹³⁷

¹³² See *First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd* 1998 (4) SA 565 (NC) 568 A-C.

¹³³ *Loryan v Solarsh Tea and Coffee* 641; *Amcoal Collieries Ltd v Truter* 251, states that should a party choose a *domicilium cintandi et executandi*, the service of the process will be good, even if it is a vacant piece of ground, or if the party is known to be a resident abroad, or if it is an abandoned property or if the party cannot be found. *Cohen & Another v Lench & Another* [2007] JOL 19995 (SCA).

¹³⁴ *Loryan v Solarsh Tea and Coffee; Amcoal Collieries Ltd v Truter* 6. Once a party has chosen a *domicilium*, service would still be good even if it didn't come to that party's notice according to *SA Wimpy (Pty) Ltd v Tzauras* 249.

¹³⁵ *Cohen & Another v Lench & Another* [35].

¹³⁶ *Cohen & Another v Lench & Another*, in which the chosen *domicilium* was inside a complex and as the notice was left at the gate outside the complex, it was not served on the chosen *domicilium* of the party.

¹³⁷ *Barrett v New Oceana Transvaal Coal Co Ltd* 1903 TS 431, 441, where the clause was not framed clearly and it would be absurd to think that because of that a party would be prevented from enforcing their rights by delivering a notice to an alternative address.

There are three possible reasons why a *domicilium* clause is included in a contract. The first is to regulate the serving of judicial process. Secondly, it formulates the manner in which contractual notices are provided to a party to a contract. Finally, it functions as amending the common law position which relieves a party from proving that delivery was actually received.

All notice requirements in a contract link back to the notice provisions. As such, this clause must be drafted in light of the entire contract and cannot be considered in isolation.

14.5 CONCLUSION

The foundation of a contract is, broadly speaking, found in the terms, declarations and conditions of a contract. The one creates an obligation, the other influences interpretation and the other impacts the operation of the obligation. To give effect to the agreement between the parties and to record the agreement into the document, a drafter will use various building blocks to do so such as (i) preambles, (ii) declarations, (iii) warranties, (iv) representations, (v) obligations, (vi) indemnities and (vii) different types of conditions. Once the appropriate building block is chosen, a drafter will determine the degree of risk and liability that must be attached to such a provision. This will influence the risk and liability of the parties.

These mechanisms are then the manner in which drafters will construct and formulate the provisions. Each building block has a different purpose, which must be drafted against the backdrop of substantive law. The use of building blocks in the incorrect manner may create uncertainty as to what had actually been meant.

CHAPTER 15

PRACTICAL APPLICATION

15.1	SEQUENCE OF CONTRACTUAL PROVISIONS.....	303
15.2	AGREEMENT ANALYSIS	307
15.3	EXAMPLE AGREEMENT	316
15.4	PROPOSED REDRAFT OF THE EXAMPLE AGREEMENT	320

15.1 SEQUENCE OF CONTRACTUAL PROVISIONS

The study showed that contract drafting is more than merely a practical process. The written agreement also does not necessarily follow the sequence in which this study was presented. As it was noted, the fulfilment of any particular requirement can be found in various places in the written agreement.

The sequence contractual provisions take is not something that is prescribed. In fact, there is no right or wrong way to present an agreement. The manner in which provisions are presented and the sequence thereof in an agreement will impact on the readability of the agreement. Hutchinson, for example, recommends that an agreement should take the sequence of: (i) the definitions clause, (ii) the interpretation clause, (iii) any references to incorporated and attached documents, (iv) *essentialia*, (v) *naturalia* (if not excluded), (vi) *incidentalialia* and (vii) any miscellaneous and general incidental clauses.¹ This sequence is flawed, in that a *naturalia* is an implied term and, therefore, by its very nature cannot be included in a contract. By doing so, the nature of the *naturalia* changes to being an express term and would more likely then be classified

¹ Hutchinson *The Law of Contract in South Africa* (2012) 401.

as an *incidentalia* rather than a *naturalia*.² The second challenge in this sequence is that the *essentialia* are generally used for interpretation of a contract and it is unclear as to how the *essentialia* would be presented if a contract is drafted that does not neatly fit within existing *essentialia*.

Stark proposes a more in-depth sequence, being the: (i) preamble, (ii) recitals, (iii) words of the agreement, (iv) definitions, (v) action sections, (vi) other substantive business provisions (such as representations, warranties, covenants, rights, conditions, discretionary authority and declarations), (vii) end-game provisions, (viii) general provisions and (ix) signature lines.³ This suggested sequence is also not satisfactory, predominantly because of the substantive business provisions. The types of provisions listed as examples can be found in other areas of the contract, and not only in substantive business provisions.⁴ In addition, this sequence does not take into account all the other types of provisions found in a contract.

As a general practice, it is suggested, that the sequence of provisions should follow three broad categories, being: (i) interpretation provisions, (ii) essential business provisions and (iii) non-essential business provisions.⁵ These broad categories can further be described as follows and included in the contract in the sequence they are presented here:

² See ch 14.

³ Stark *Drafting Contracts: How and Why Lawyers Do What They Do* (2007) 37.

⁴ See ch 2, which discusses the difference between essential business provisions and non-essential business provisions.

⁵ Non-essential business provisions can also be described as what is known as the boilerplate provisions. Generally, boilerplate provisions are considered to be standard, but it has been seen in this study that there are no such things as standard provisions that are simply copied and pasted from one agreement to another. It is convenient for the purpose of the sequence to refer to these so-called boilerplate provisions.

- (i) It is unlikely that an agreement will be drafted without a title. The title or heading to the agreement identifies the agreement and forms the basis from which all other provisions flow. Therefore, the heading to the agreement should be the first element to the agreement.
- (ii) Having described what the agreement is about through the inclusion of the heading, the next step would be to identify who is entering into the agreement. As such, the parties to the contract should be identified after the heading.⁶
- (iii) The drafting of an agreement is imbedded in the manner in which the document will be interpreted. In other words, the first step to drafting is to understand how the reader will interpret the document. From this base, it seems natural that the manner in which the agreement is to be interpreted should be included next. This would include the preambles,⁷ the interpretation provisions⁸ and the definition provisions.⁹
- (iv) Depending on the type of performance the agreement contemplates, for example a once-off event or continuous performance, the commencement and duration of the agreement would follow.¹⁰
- (v) The essential business provisions,¹¹ which include the rights and duties of each of the parties, would thereafter be described. This will usually be included in a number of provisions. These are presumably the provisions that Hutchinson referred to as *essentialia* and Stark's action section.

⁶ See ch 6, the parties can be described in the covering page or included in a separate section to the agreement.

⁷ See ch 14.

⁸ See ch 10 & 14.

⁹ See ch 14.

¹⁰ See ch 12.

¹¹ See ch 2.

- (vi) Other types of provisions such as warranties, representations and indemnities¹² can sometimes be included under the essential business provisions. Depending on the type of contract they may be presented separately. In which case, they should generally follow after the essential business provisions.
- (vii) Points (v) and (vi) relate to the parties' performance and it makes sense to include provisions that may influence such performance at this stage. Any supervening impossibility, *force majeure* or hardship provisions would be included.¹³ This suggested sequence would allow the performance to naturally flow into the area where performance would be excused.
- (viii) The end-game provisions should be dealt with next, including termination provisions, breach and their remedies.¹⁴ This part of the sequence is not classified under non-essential business terms, as the end-game provisions do influence the manner in which the performance is fulfilled and, as such, still has a direct bearing on the manner in which the parties perform their obligations.
- (ix) Should the parties have agreed to any alternative dispute resolution procedures or litigation specific provisions such as jurisdiction and cost provisions, it should be included next.¹⁵ This, once again, forms part of the essential business terms as the dispute resolution provisions influence the manner in which the parties will deal with and resolve their disputes. These disputes have a direct bearing on the parties' performance and are integral to the performance.

¹² See ch 14.

¹³ See ch 11.

¹⁴ See ch 12.

¹⁵ See ch 13.

- (x) After the essential business provisions have been dealt with, the non-essential business terms are included. This usually includes provisions such as: the notices,¹⁶ non-variation,¹⁷ waiver¹⁸ and severability.¹⁹ These provisions are generally referred to as the boilerplate provisions.
- (xi) The testimonium provision,²⁰ attestation provision²¹ and signature blocks²² are included at the end of the document.
- (xii) The final step in the sequence is to include the annexures, schedules or addenda that form part of the agreement.²³

By adopting this sequence, the provisions in an agreement flow in a logical order, which assists in reading and understanding the agreement. This also eliminates the provisions appearing randomly in the agreement.

15.2 AGREEMENT ANALYSIS

This study has shown that the drafting of contracts is couched in substantive law. Furthermore, everything that a drafter does can in some shape, manner or form be traced back to substantive

¹⁶ See ch 14.

¹⁷ See ch 8.

¹⁸ See ch 8 & 14.

¹⁹ See ch 9.

²⁰ See ch 6 & 7.

²¹ See ch 8.

²² See ch 6, 7 & 8.

²³ See ch 8, any annexures, schedules or addenda attached to the agreement should also be referenced within the body of the agreement so that they are incorporated by reference.

law. In illustrating this point, an example of a sale of business agreement is considered.²⁴ This example, which is included in full in the next section, is a shorter version of other example agreements available and is used purely to illustrate existing contract practices against that which is presented in this study.

<p style="text-align: center;">AGREEMENT OF SALE²⁵</p> <p style="text-align: center;">between:</p> <p style="text-align: center;">ABC (Pty) Ltd (registration number (<i>insert registration number</i>))²⁶</p> <p style="text-align: center;">herein represented by (<i>insert representative's name and identity number</i>), duly authorised thereto by resolution of the directors of the company, dated (<i>insert date</i>),²⁷</p> <p style="text-align: center;">(<i>the Seller, name and identity number</i>),²⁸</p> <p style="text-align: center;">and</p> <p style="text-align: center;">XYZ (Pty) Ltd (registration number (<i>insert registration number</i>))</p> <p style="text-align: center;">herein represented by (<i>insert representative's name</i>), duly authorised thereto by resolution of the directors of the company, dated (<i>insert date</i>),</p> <p style="text-align: center;">(the Purchaser)²⁹</p>
--

The agreement makes use of a heading which identifies the specific type of agreement. It would probably have been better to describe the agreement as a “Sale of Business Agreement”. This is followed by a description of the parties. The parties’ representatives are identified and their authority is identified by a referenced resolution. This language is used in an attempt to create or confirm contractual capacity. As contractual capacity is a factual question it is superfluous to add this detail. What is of interest when considering the remainder of the agreement, is that no warranty confirming the authority of the signatories has been included. This is probably because

²⁴ Obtained from LexisNexis’ online forms and precedence (accessed 09 October 2015).

²⁵ The use of headings is discussed in ch 10.

²⁶ Identifying the parties to the agreement is one of the ways a drafter shows consensus between the parties. This is discussed in ch 6.

²⁷ The use of this language is not necessary. Contractual capacity cannot be confirmed by including a provision in a contract. Contractual capacity is a factual question. In this instance the *Turquant* rule already deals with company representation and therefore this language is superfluous. See ch 7.

²⁸ As the entity is a company, this appears to be a drafting error.

²⁹ This is an example of an embedded definition. See ch 10.

the drafter considered the resolutions as sufficient evidence of the representative capacity of the signatories.

1. The sale

The Seller hereby³⁰ sells to the Purchaser the liquor store business known as (*insert name of business*) and situated at (*insert address of business*), herein referred to as “the business”.³¹

The drafter has opted to use embedded definitions in this document, rather than a separate definition provision.³² The use of embedded definitions creates the uncertainty as to when these definitions should be used. For example, will the definition of “the business” only be applicable in clause 1 or will it be applicable throughout the agreement? The vagueness is exacerbated by not distinguishing defined words from other words in the agreement. The usual practice is to capitalise the first letter of a defined word in the text of the document.

2. Subject matter of the sale³³

The subject matter of the sale consists of:

- 2.1 the goodwill pertaining to the said business;
- 2.2 the right, title and interest of the Seller in the liquor store licence attached to the business;
- 2.3 the fixtures, fittings, furniture and equipment as listed in Annexure A to this agreement;³⁴
- 2.4 the stock-in-trade of the business as at the effective date³⁵ upon which date stock shall be taken by representatives of both Seller and Purchaser;³⁶
- 2.5 the Seller’s right, title and interest in any agreement in respect of the use of computerised pay points and any cash register system as well as the use of any refrigerators, décor and advertising material.

It is recorded that the items mentioned in this sub-section do not belong to the Seller.³⁷

³⁰ The word “hereby” is superfluous and need not be included in the draft.

³¹ This is an example of an embedded definition. See ch 10.

³² See ch 10.

³³ This heading is drafted a little loosely and could be tightened up.

³⁴ The referenced annexure is incorporated into the agreement by reference. See ch 8.

³⁵ It is not clear whether this term is intended to be the same as the effective date in clause 4. When using embedded definitions the best practice is to define the word the first time it is used in the agreement. Failure to do so will only create uncertainty. See ch 10.

³⁶ The manner in which this provision is drafted creates confusion, as an obligation is embedded in the description of a concept. It is better to separate these provisions to avoid uncertainty.

The Seller indemnifies the Purchaser against any liabilities which may or will exist concerning the items mentioned in this sub-section.³⁸

This entire section is unclear. It would have been better to explain that the items listed are part of the business that is being sold. Furthermore, if the subject matter forms part of the sale, the sentence which states that the items do not belong to the seller does not make sense. The seller cannot sell something that he does not own. This is a classic example of ambiguity created through drafting. The indemnification provision is poorly drafted. There are three elements to drafting an indemnification provision. The first is the use of indemnifying a person and holding him harmless,³⁹ the second is against what a person is indemnified against, and the third results from what causes would trigger the indemnification. In this indemnification it is clear the seller indemnifies the purchaser against liabilities, but the third element is missing. It presumably relates to liability resulting from the items listed. It is not clear what will trigger the indemnification.

4. **The effective date**⁴⁰

The effective date shall be (*insert date*), the date upon which the Purchaser shall take occupation of the premises of the business.

The heading “effective date” is deceptive. The clause refers to a date of occupation and not the effective date of the agreement. As such, the heading and the provision below it do not add up.⁴¹

As this agreement does not have a provision excluding headings from being used in the

³⁷ This statement is confusing. If the subject matter of the sale is part of the sale of business how can the Seller sell it to the Purchaser, if the Seller does not own the subject matter? The inclusion of this provision is not clear at all.

³⁸ See ch 14.

³⁹ See ch 14, which explains that the term “indemnify” is a positive action whilst “harmless” is a defensive action. For full protection both terms should be used when drafting indemnification provisions.

⁴⁰ The heading is contrary to the content of the provision.

⁴¹ See ch 12.

interpretation of the agreement, both the heading and the provisions below it must be considered when interpreting the provision.

6. **Interest**⁴²

The amounts to be paid off in instalments shall not bear interest unless such instalments are in arrears in which event interest at 15,5% per annum shall be payable on any amount in arrears as from due date up to date of payment.⁴³

The interest provision is a contractual interest that has been included in the contract to accommodate late payments. What the agreement lacks is an acceleration provision to allow immediate recovery of all instalments should the Purchaser fail to pay one of the instalment payments. The agreement makes specific reference to instalment payments and an acceleration provision should be considered for inclusion in the agreement.⁴⁴

7. **Suspensive conditions**⁴⁵

This agreement is subject to the following suspensive conditions the non-compliance with which will render this agreement not enforceable and without effect:

- 7.1 that the parties hereto shall jointly, as prescribed by the Liquor Act 27 of 1989, apply successfully for the transfer of the licence to the Purchaser, such transfer to be considered complete upon the issue of a certificate to that effect by the Liquor Board and the relevant licence fee be paid by the Purchaser. The Purchaser shall pay the costs of such application for transfer;⁴⁶
- 7.2 that the purchaser be granted a lease in respect of the premises concerned by the present lessor for a period of (insert number of years) on terms acceptable to the Purchaser (alternatively, that the lessor of the premises agrees to the cession of the existing lease to the Purchaser);
- 7.3 that the agreements concerning the use of computerised pay points and cash registers as well as agreements concerning the use of refrigeration, décor and advertising material be ceded to the Purchaser.

⁴² See ch 12.

⁴³ This is an example of convoluted drafting. This provision can be presented in clearer terms. Interest can only be charged on due dates and the first part of this provision is superfluous.

⁴⁴ See ch 12.

⁴⁵ The sequence of including this provision late in the agreement does not assist in reading the agreement. Ideally any suspensive condition should be at the start of the agreement. See also ch 14.

⁴⁶ This is an example of poor drafting. By including an obligation under the suspensive condition, the drafter is combining a term and a condition in one sentence. This can only lead to confusion.

The agreement's terms are suspended by the inclusion of a suspensive condition.⁴⁷ This provision is flawed as it is not clear by when these suspensive conditions must be fulfilled. Furthermore, there is at least one obligation that becomes effective and that is described in clause 7.1. This obligation's operation cannot be influenced like the rest of the agreement and should become effective immediately.

9. Representations⁴⁸

Apart from the warranties given by the Seller in clause 7 hereof the parties record that no representations as to the turnover or profit of the business have been made by the Seller and that no evidence to the contrary shall be admissible in any legal proceedings.⁴⁹

Positive and negative warranties were included in clause 8. There is a duplication of provisions in relation to no warranties given regarding the turnover or profit and this provision. This could be combined. Clause 9 excludes previous representations made by the parties. As such, the parties cannot rely on any previous representations made and the case for misrepresentation is avoided.⁵⁰ This, however, is not possible. If a misrepresentation has occurred, which creates defective consensus, no agreement would have been formed and the wording of this provision would then become meaningless.

11. Obligations of the Purchaser

11.1 the Purchaser undertakes⁵¹ to apply, jointly with the Seller, for the transfer of the licence immediately and, in this regard, to comply strictly with the provisions of the Liquor Act 27 of 1989 and with the regulations thereunder;

11.2 the Purchaser undertakes not to sell the business or to cede and assign⁵² any of its rights in terms of this agreement to any other party without the prior written consent of the Seller until such time as the purchase price is paid in full.

⁴⁷ See ch 14.

⁴⁸ See ch 6.

⁴⁹ The validity of this clause is questioned in the case of defective consensus occurring as a result of a misrepresentation.

⁵⁰ See ch 6.

⁵¹ This wording indicates that an obligation is created.

11.3 the Purchaser holds the right, in terms of the Consumer Protection Act to cancel this agreement in writing within 30 days.⁵³

The language used in clause 11.3 illustrates poor drafting. This is not an obligation of the Purchaser as the heading suggests, but rather a right to terminate. Such a right to terminate the agreement should rather be included in the end-game provisions.⁵⁴ In addition, if such a right to termination is afforded in legislation, then there is no need to repeat this in the agreement.

12. Breach of contract⁵⁵

In the event of the Purchaser⁵⁶ failing to comply with any of the terms and conditions of this agreement the Seller shall be entitled⁵⁷ to give the Purchaser (*insert number of days*) written notice to comply with the provisions of the agreement failing which the Seller shall be entitled to either:

- 12.1 claim payment of the full balance of the purchase price together with interest on such balance at 15,5% interest per annum from date of demand to date of payment; or
- 12.2 cancel the contract by means of written notice to the Purchaser, to claim transfer of the business together with the licence (excluding any stock belonging to the Purchaser), and to retain all moneys paid in respect of the purchase price as damages.⁵⁸

If, in terms of this clause, the licence is to be retransferred to the Seller, the Purchaser undertakes to apply, jointly with the Seller, for such retransfer and to sign all necessary documents to that effect. Should the Purchaser be unwilling or unable to make such application, it hereby irrevocably appoints any director of the Seller to act on its behalf in order to effect such retransfer and to sign all necessary documents as its agent *in rem suam (in his own interest)*.

A breach provision, which deals with a breach of the Purchaser, has been included in this agreement.⁵⁹ In this instance the Purchaser's breach will be regulated by this provision and the Seller's breach will be regulated by normal common law principles. The breach provision

⁵² Assignment can only occur with the consent of the other party. Therefore this provision serves no purpose. See ch 7.

⁵³ This provision is out of step with the rest of the provisions. This is in conflict with the clause heading.

⁵⁴ See ch 12.

⁵⁵ *Ibid.*

⁵⁶ This is a one-sided breach provision.

⁵⁷ Unnecessary wording has been included.

⁵⁸ A forfeiture provision has been included.

⁵⁹ See ch 12.

includes a forfeiture provision. If the forfeiture provision is interpreted as a penalty, the penalty may be adjusted by the courts.⁶⁰

13. **The whole agreement**⁶¹

It is recorded by the parties that this contract contains the whole agreement between them and that no amendment of or addition to this agreement shall be of any force or effect unless it be in writing and signed by both parties.

A non-variation provision has been included. It does not protect itself from verbal variation, which will allow the non-variation provision to be amended verbally.⁶² As the Electronic Communications and Transactions Act is not excluded in the operation of the non-variation provision, any writing or signature can also take an electronic form.

14. ***Domicilium citandi et executandi***⁶³

The parties hereby choose as *domicilium citandi et executandi* (*The physical address which each party chooses to receive all communication regarding the lease agreement*) the following physical addresses (not post box numbers):

The Seller:

The Purchaser:

The parties may at any later date amend these addresses by means of written notice to each other. All notices in terms of this agreement and all legal proceedings⁶⁴ must be delivered or served, as the case may be, at these addresses.

The *domicilium* provision is a double-barrel provision as it deals with both with judicial notices and contractual notices. All notices under this contract must be served in accordance with this provision. In terms of this agreement, this will be the case with breach notices.

⁶⁰ *Ibid.*

⁶¹ See ch 8.

⁶² *Ibid.*

⁶³ See ch 14.

⁶⁴ The notices provision is a double-barrelled provision dealing with both judicial notices and contractual notices.

15. Waiver⁶⁵

No relaxation on the part of the Seller by not enforcing any of its rights in terms of this agreement shall amount to a waiver by the Seller of such rights.

This clause attempts to exclude the application of waivers and conduct of a person resulting in a waiver. If a party has waived any rights and they have done so knowingly, it seems unlikely that this provision will be of assistance. The provision would have been of some force if it had been embedded into the non-variation provision, forcing waivers to be in writing and signed by the parties.

16. Jurisdiction of the Magistrate's Court⁶⁶

The parties hereby consent to the jurisdiction of the magistrate's court, having territorial jurisdiction, in respect of any dispute which may arise from this agreement.

The parties have chosen litigation as the manner to resolve any disputes resulting from the agreement. The parties have chosen the Magistrate's Court to adjudicate any disputes, but do not refer to costs in relation to the dispute.

Signed at (*place*) on (*day, month, year*)

Witnesses:⁶⁷

1

2

(*Signatures of witnesses*)

(*Signature of Seller*)⁶⁸

Witnesses:

1

2

(*Signatures of witnesses*)

(*Signature of Purchaser*)⁶⁹

⁶⁵ See ch 8.

⁶⁶ See ch 13.

⁶⁷ See ch 8.

⁶⁸ See ch 6, this is another method to indicate that consensus was reached between the parties.

⁶⁹ *Ibid.*

No testimonium provision has been included and the fact that the attestation provision has been included means that witnesses can, but are not obligated to sign.⁷⁰

Generally, this example agreement is poorly drafted with ambiguity and uncertainty permeating throughout the provisions. The lack of a separate definition provisions and the incorrect use of embedded definitions create ambiguity. The lack of consistent numbering found in some of the provisions also impacts the typographical readability of the agreement.⁷¹ The sequence in which the provisions are presented creates the impression that it was a copy-and-paste-job, with little coherence between the different provisions.⁷²

Applying what has been presented throughout this study, the example agreement has been redrafted to reflect the more desired approach and is presented in paragraph 4 below. It is not intended to rewrite the agreement, and as such, new provisions may be suggested when it links to the existing provisions of the agreement.

15.3 **EXAMPLE AGREEMENT**⁷³

AGREEMENT OF SALE

between:

ABC (Pty) Ltd (registration number (*insert registration number*))

herein represented by (*insert representative's name and identity number*), duly authorised thereto by resolution of the directors of the company, dated (*insert date*),

(*the Seller, name and identity number*),

⁷⁰ See ch 8.

⁷¹ See ch 11.

⁷² For example, having the fee and payment provision interrupted by the effective date provision.

⁷³ This example Agreement of Sale (Liquor) Precedent 1 was not amended and any errors found in this annexure are those that were presented on the LexisNexus Forms and Precedence database when extracting the precedent. Those elements in the text in bold indicates corrections to the example agreement.

and

XYZ (Pty) Ltd (registration number (*insert registration number*))

herein represented by (*insert representative's name*), duly authorised thereto by resolution of the directors of the company, dated (*insert date*),

(the Purchaser)

1. **The sale**

The Seller hereby sells to the Purchaser the liquor store business known as (*insert name of business*) and situated at (*insert address of business*), herein referred to as “the business”.

2. **Subject matter of the sale**

The subject matter of the sale consists of:

- 2.1 the goodwill pertaining to the said business;
- 2.2 the right, title and interest of the Seller in the liquor store licence attached to the business;
- 2.3 the fixtures, fittings, furniture and equipment as listed in Annexure A to this agreement;
- 2.4 the stock-in-trade of the business as at the effective date upon which date stock shall be taken by representatives of both Seller and Purchaser;
- 2.5 the Seller’s right, title and interest in any agreement in respect of the use of computerised pay points and any cash register system as well as the use of any refrigerators, décor and advertising material.

It is recorded that the items mentioned in this sub-section do not belong to the Seller.

The Seller indemnifies the Purchaser against any liabilities which may or will exist concerning the items mentioned in this sub-section.

3. **The purchase price**

The purchase price shall be:

- 3.1 the sum of (*insert amount*), together with
- 3.2 the value of the stock-in-trade calculated on the wholesale price thereof as on the effective date.

4. **The effective date**

The effective date shall be (*insert date*), the date upon which the Purchaser shall take occupation of the premises of the business.

5. **Payment**

The purchase price shall be paid as follows:

- 5.1 the amount payable in respect of the stock-in-trade shall be paid on or before the effective date;
- 5.2 the amount referred to in clause 3.1 shall be paid in 24 equal monthly instalments on or before the seventh day of every month, the first payment to be made on or before the seventh day after the effective date;
- 5.3 payment must be made at (*insert address*) or such other address as the Seller may from time to time indicate in writing (alternatively, payment to be made into the Seller’s bank account at (*insert bank name*), (*insert account number*), (*insert bank code number*)).

6. **Interest**

The amounts to be paid off in instalments shall not bear interest unless such instalments are in arrears in which event interest at 15,5% per annum shall be payable on any amount in arrears as from due date up to date of payment.

7. **Suspensive conditions**

This agreement is subject to the following suspensive conditions the non-compliance with which will render this agreement not enforceable and without effect:

- 7.1 that the parties hereto shall jointly, as prescribed by the Liquor Act 27 of 1989, apply successfully for the transfer of the licence to the Purchaser, such transfer to be considered complete upon the issue of a certificate to that effect by the Liquor Board and the relevant licence fee be paid by the Purchaser. The Purchaser shall pay the costs of such application for transfer;
- 7.2 that the purchaser be granted a lease in respect of the premises concerned by the present lessor for a period of (insert number of years) on terms acceptable to the Purchaser (alternatively, that the lessor of the premises agrees to the cession of the existing lease to the Purchaser);
- 7.3 that the agreements concerning the use of computerised pay points and cash registers as well as agreements concerning the use of refrigeration, décor and advertising material be ceded to the Purchaser.

8. **Warranties**

The Seller hereby warrants:

- 8.1 that it is the holder of the liquor licence in the aforesaid business;
- 8.2 that there are no legal proceedings pending against the business and that to the best of its knowledge no legal proceedings are contemplated against the business;
- 8.3 that it has fully complied with all its obligations in terms of the lease of the premises, in particular that no rental is in arrears;
- 8.4 the Seller does not give any warranty whatsoever concerning the turnover or profit of the business. It is recorded that the Purchaser has had access to the audited financial statements of the business for the past three years and that it is fully acquainted with the financial affairs of the business;
- 8.5 the Purchaser warrants that it is not disqualified in terms of the Liquor Act from holding a liquor licence.

9. **Representations**

Apart from the warranties given by the Seller in clause 8 hereof the parties record that no representations as to the turnover or profit of the business have been made by the Seller and that no evidence to the contrary shall be admissible in any legal proceedings.

10. **Obligations of the Seller**

- 10.1 the Seller shall assist the Purchaser to enable it to obtain transfer of the licence and in this regard to sign all necessary documents;
- 10.2 the Seller undertakes not to do anything which may have a negative effect on the goodwill of the business;
- 10.3 the Seller shall not do anything which may prejudice the Purchaser's relationship with suppliers of the business;
- 10.4 the Seller undertakes to give the Purchaser full details of all the suppliers to the business and, upon request by the Purchaser, to introduce the Purchaser's representative to such suppliers.

11. **Obligations of the Purchaser**

- 11.1 the Purchaser undertakes to apply, jointly with the Seller, for the transfer of the licence immediately and, in this regard, to comply strictly with the provisions of the Liquor Act 27 of 1989 and with the regulations thereunder;
- 11.2 the Purchaser undertakes not to sell the business or to cede and assign any of its rights in terms of this agreement to any other party without the prior written consent of the Seller until such time as the purchase price is paid in full.
- 11.3 the Purchaser holds the right, in terms of the Consumer Protection Act to cancel this agreement in writing within 30 days.

12. **Breach of contract**

In the event of the Purchaser failing to comply with any of the terms and conditions of this agreement the Seller shall be entitled to give the Purchaser (*insert number of days*) written notice to comply with the provisions of the agreement failing which the Seller shall be entitled to either:

- 12.1 claim payment of the full balance of the purchase price together with interest on such balance at 15,5% interest per annum from date of demand to date of payment; or
- 12.2 cancel the contract by means of written notice to the Purchaser, to claim transfer of the business together with the licence (excluding any stock belonging to the Purchaser), and to retain all moneys paid in respect of the purchase price as damages.

If, in terms of this clause, the licence is to be retransferred to the Seller, the Purchaser undertakes to apply, jointly with the Seller, for such retransfer and to sign all necessary documents to that effect. Should the Purchaser be unwilling or unable to make such application, it hereby irrevocably appoints any director of the Seller to act on its behalf in order to effect such retransfer and to sign all necessary documents as its agent *in rem suam (in his own interest)*.

13. **The whole agreement**

It is recorded by the parties that this contract contains the whole agreement between them and that no amendment of or addition to this agreement shall be of any force or effect unless it be in writing and signed by both parties.

14. ***Domicilium citandi et executandi***

The parties hereby choose as *domicilium citandi et executandi (The physical address which each party chooses to receive all communication regarding the lease agreement)* the following physical addresses (not post box numbers):

The Seller:

The Purchaser:

The parties may at any later date amend these addresses by means of written notice to each other. All notices in terms of this agreement and all legal proceedings must be delivered or served, as the case may be, at these addresses.

15. **Waiver**

No relaxation on the part of the Seller by not enforcing any of its rights in terms of this agreement shall amount to a waiver by the Seller of such rights.

16. **Jurisdiction of the Magistrate's Court**

The parties hereby consent to the jurisdiction of the magistrate's court, having territorial jurisdiction, in respect of any dispute which may arise from this agreement.

17. **Costs**

The costs for drawing this contract, including consultations, shall be borne by the Purchaser. (Alternatively, by the parties in equal shares, if they so decide).

Signed at (*place*) on (*day, month, year*)

Witnesses:

1

2

(*Signatures of witnesses*)

(*Signature of Seller*)

Witnesses:

1

2

(*Signatures of witnesses*)

(*Signature of Purchaser*)

15.4 PROPOSED REDRAFT OF THE EXAMPLE AGREEMENT

SALE OF BUSINESS AGREEMENT

between

ABC Proprietary Limited
(registration number: [●])
 (“**Seller**”)

and

XYZ Proprietary Limited
(registration number: [●])
 (“**Purchaser**”)

1. DEFINITIONS

Unless the context indicates otherwise, the following words will have the corresponding meanings:

- 1.1 “**Agreement**” means this document and any other annexures, schedules or addenda attached to it;
- 1.2 “**Business**” means the liquor store business known as [●] and situated at [●];
- 1.3 “**Effective Date**” means [●];
- 1.4 “**Lessor**” means the owner of the Premises;
- 1.5 “**Premises**” means [●];
- 1.6 “**Purchase Price**” means the amount payable by the Purchaser to the Seller for the sale of the Business; and
- 1.7 “**Transferring Agreements**” mean agreements concerning the use of computerised pay points and cash registers as well as agreements concerning the use of refrigeration, décor and advertising material.

2. SUSPENSIVE CONDITIONS

- 2.1 This Agreement is subject to the following suspensive conditions:
 - 2.1.1 the successful transfer of the licence from the Seller to the Purchaser;
 - 2.1.2 the Purchaser entering into a lease agreement with the Lessor in respect of the Premises for a period of [●]; and
 - 2.1.3 that the Transferring Agreements be ceded to the Purchaser.
- 2.2 The suspensive conditions in clause 2.1 must be fulfilled by no later than [●] (“**Fulfilment Date**”), failing which this Agreement shall be of no force or effect.
- 2.3 The Parties shall jointly apply for the transfer of licence in clause 2.1 and the Purchaser shall be liable for all costs for the application. The transfer will be considered complete upon:
 - 2.3.1 a certificate being issued by the Liquor Board; and
 - 2.3.2 the Purchaser paying the relevant licence fee to the Liquor Board.

- 2.4 The Parties may agree in writing to suspend or waive the suspensive conditions prior to the Fulfilment Date.

3. SALE OF BUSINESS

3.1 On the Effective Date:

- 3.1.1 the Seller sells the Purchaser the Business; and
3.1.2 the Purchaser will take occupation of the Premises.

3.2 The Business will consist of:

- 3.2.1 the goodwill pertaining to the Business;
3.2.2 the right, title and interest of the Seller in the liquor store licence attached to the business;
3.2.3 the fixtures, fittings, furniture and equipment as listed in Annexure A;
3.2.4 the stock-in-trade of the business as at the Effective Date;
3.2.5 the Seller's right, title and interest in any agreement in respect of Transferring Agreements.

4. PURCHASE PRICE AND PAYMENT

- 4.1 The Purchase Price shall be the sum of [●], together with the value of the stock-in-trade. The stock-in-trade will be calculated on the wholesale price as on the Effective Date.

4.2 The Purchaser shall pay the Seller the Purchase Price as follows:

- 4.2.1 the amount payable in respect of the stock-in-trade shall be paid on or before the Effective Date;
4.2.2 the amount referred to in clause 3.1 shall be paid in 24 (twenty four) equal monthly instalments on or before the seventh day of every month. The first payment instalment must be made on or before the seventh day after the Effective Date; and
4.2.3 payment must be made to the Seller's bank account at [●].

- 4.3 The Purchaser will be liable for interest on amounts not paid on due date at a rate of 15.5% per annum compounded monthly.

- 4.4 The Purchaser will make payment of the Purchase Price without set-off or deduction.

5. OBLIGATIONS OF THE PARTIES

5.1 The Seller shall:

- 5.1.1 assist the Purchaser in obtaining transfer of the licence and shall sign all necessary documents;
5.1.2 not to do anything which may have a negative effect on the goodwill of the Business;
5.1.3 not do anything which may prejudice the Purchaser's relationship with suppliers of the Business; and
5.1.4 give the Purchaser full details of all the suppliers to the business and, upon request by the Purchaser, introduce the Purchaser to the suppliers.

- 5.2 The Purchaser shall not, for the duration of this Agreement, sell the Business without the prior written consent of the Seller.

- 5.3 The Purchaser shall not be entitled to cede any of its rights in terms of this Agreement to any third party, without the consent of the Seller.

- 5.4 The Parties shall, prior to the Effective Date, conduct a stock take which will be recorded in writing and signed by the Parties.

6. REPRESENTATIONS AND WARRANTIES**6.1 The Seller warrants:**

- 6.1.1 it is the holder of the liquor licence in the Business;
 - 6.1.2 that there are no legal proceedings pending against the Business and that to the best of its knowledge no legal proceedings are contemplated against the Business;
 - 6.1.3 that it has fully complied with all its obligations in terms of the lease of the Premises;
- 6.2 The Purchaser warrants that it is not disqualified in terms of the Liquor Act 27 of 1989 from holding a liquor licence.
- 6.3 The Seller has not given any representations and does not give any warranty concerning the turnover or profit of the Business. It is recorded that the Purchaser has had access to the audited financial statements of the Business for the past 3 (three) years and that it is fully acquainted with the financial affairs of the Business.

7. INDEMNIFICATION

- 7.1 The Seller indemnifies and holds the Purchaser harmless against all and any losses incurred or damages suffered by the Purchaser as a result of any breach of the Seller's warranties set out in clause 6.1.
- 7.2 The Purchaser indemnifies and holds the Seller harmless against all and any losses incurred or damages suffered by the Seller as a result of any breach of the Purchaser's warranties set out in clause 6.2.

8. BREACH

- 8.1 In the event of the Purchaser is in breach of this Agreement and fails to rectify its breach within [●] after having received notice to do so, the Seller may either:
- 8.1.1 claim payment of the full balance of the Purchase Price together with interest; or
 - 8.1.2 cancel the Agreement, claim restitution and retain all monies paid by the Purchaser.
- 8.2 Insofar as the licence is to be transferred to the Seller in terms of a breach of this Agreement then the Purchaser shall jointly with the Seller, apply for such transfer and to sign all necessary documents to that effect.
- 8.3 If the Purchaser fails to make payment of any one instalment payment, then the entire Purchase Price will immediately become due and payable.

9. TERMINATION

The Purchaser may terminate this Agreement with written notice to the Seller within 30 (thirty) days from the Effective Date.

10. NOTICES

- 10.1 The Parties hereby choose as *domicilium citandi et executandi* the following physical addresses:
- 10.1.1 The Seller: [●]
 - 10.1.2 The Purchaser: [●]
- 10.2 The Parties may at any time amend the addresses by written notice to each other.
- 10.3 All notices in terms of this agreement and all legal proceedings must be delivered or served, as the case may be, at these addresses.

11. NON-VARIATION

This Agreement is the whole agreement between the Parties and any waivers, amendments or additions to this Agreement, including this provision, must be in writing and signed by the Parties.

12. JURISDICTION

The Parties consent to the jurisdiction of the Magistrate's Court, having territorial jurisdiction, in respect of any dispute which may arise from this Agreement.

13. COSTS

The costs for drawing up this Agreement, including consultations, will be paid by the Purchaser.

SIGNED AT **ON** **2015**

1.

2.

(signature of witnesses)

.....

(Signature of **Seller**)

Who warrants he is duly authorised

SIGNED AT **ON** **2015**

1.

2.

(signature of witnesses)

.....

(Signature of **Purchaser**)

Who warrants he is duly authorised

CHAPTER 16

CONCLUSION

This study started on the premise that the drafting of contracts is more than just a practical process. There had to be a reason why a contract is drafted in the manner that it is and that reason had to be linked back to substantive law. The question why drafters do what they do was the underlying question that had to be answered. This question was considered within the scope of the systemic dimension of contract drafting.¹

Throughout the research it became clear that the written contract is drafted in terms of, and on the basis of, substantive law. The conclusion that can be drawn is that there is a reason for the manner in which contracts are drafted and that reason is firmly rooted in substantive law. It is also clear that there are no right or wrong ways of drafting, but there are better ways of drafting.² This is illustrated by a paragraph on the drafting of contracts circulating the World Wide Web. The urban legend is that this paragraph was drafted by the UK law firm Slaughter and May, although this is unlikely. It was probably used to illustrate the absurdity of what often creeps into contract drafting.³

In this paragraph, the original wording started with “I want to eat burgers with you.” This seemingly inconspicuous sentence is then taken through various iterations, which ultimately results in the following wording:

¹ See ch 1.

² A phrase coined by Prof. SJ Cornelius in his lectures on contract drafting.

³ The word version of this this example draft paragraph was retrieved from <http://www.translatorscafe.com/cafe/MegaBBS/thread-view.asp?threadid=8234&messageid=137573> accessed 25 October 2015, which was used for a plain language exercise. It is likely that the burger paragraph was initially drafted to illustrate how contracting drafting can become ridiculous and was probably done in humour.

1. I want to eat burgers with you (the "**Original Sentence**"). For the avoidance of doubt, the Original Sentence:
 - (a) shall not be construed to mean that I want to eat a burger that has you (or any part of you) in, on or under it; and
 - (b) shall be construed only to mean only that I want you to eat a burger and I want me to eat a burger at the same time and in the same place.
2. For the purposes of the immediately preceding paragraph, with respect to the consumption of one or more burgers (if any) by a person (for the purposes of this paragraph, the "**first person**") and another person (for the purposes of this paragraph, the "**second person**"):
 - (a) "**at the same time**" means the consumption of the first person's burger by the first person at approximately the same time as the consumption of the second person's burger by the second person (provided, for the avoidance of doubt, that the "first person's burger" means the burger (whether made of beef, chicken, lamb or the flesh of any other animal) owned by that person and not a burger made from the flesh of that person and the same shall apply to the "second person's burger" *mutatis mutandis* and provided further that "at approximately the same time" means that (1) the first person commences consumption of the first person's burger within 10 minutes of the commencement of consumption of the second person's burger by the second person and (2) the first person finishes consuming the first person's burger (or notifies the second person, in a notice in writing which is signed by the first person, that the first person has determined that it will not finish the consumption of said first person's burger) within 10 minutes of either (A) the completion of consumption of the second person's burger by the second person or (B) the delivery of a notice in writing (signed by the second person) by the second person which states that that the second person has determined that it will not finish the consumption of said second person's burger); and
 - (b) "**in the same place**" means the first person shall consume the first person's burger whilst seated at a table (the "**Table**") and the second person shall consume the second person's burger whilst seated at the Table.
3. For the avoidance of doubt, nothing in the Original Sentence (or any paragraph referring hereto) shall be construed to refer to the consumption of human flesh by any person or express the desire on the part of any person to do the same.

The manner in which this paragraph was drafted illustrates the general disposition of drafters when drafting contracts. This type of drafting is typical in contracts. It is no wonder that clients (and lawyers alike) do not always understand the contract that they are a party to.

The fact of the matter is that every word in a written contract has an intended effect.⁴ So too, every provision has an intended purpose. The basis of this study had a similar approach, in that contracts must be drafted in a particular way for a reason. These reasons cannot be founded on the intentions of the parties alone or on the whims of a drafter under the guise of a person's particular "style of drafting". There must be concrete reasons why contracts are drafted in the

⁴ *Ditcher v Denison* (1857) 14 ER 718, 723; *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd* 1984 (1) SA 61 (A), 70A-70C.

manner they are. These reasons, as illustrated in this study, are found in substantive law and contract theory.

It is then up to the individual drafter to choose whether he considers and uses the principles laid out in this study, or eats his proverbial burger and continues to follow precedent blindly, blissfully ignorant to the consequences of the pitfalls that await their contract drafts.

BIBLIOGRAPHY

ABBREVIATIONS.....	328
OLD AUTHORITIES.....	330
PRIMARY SOURCES	332
CASE LAW: FOREIGN.....	332
CASE LAW: SOUTH AFRICAN	335
LEGISLATION: FOREIGN.....	344
LEGISLATION: SOUTH AFRICAN	346
SECONDARY SOURCES	348
BOOKS	348
JOURNALS.....	356
OTHER RESEARCH	365
OTHER	367

ABBREVIATIONS

<i>Acad Manage Rev</i>	Academy of Management Review
<i>ADEL LR</i>	Adelaide Law Review
<i>Alta L Rev</i>	Alberta Law Review
<i>Am J Comp L</i>	American Journal for Comparative Law
<i>Bus L Int'l</i>	Business Law International
<i>CADAAD</i>	Critical Approaches to Discourse Analyses Across Disciplines
<i>Cal L Rev</i>	California Law Review
<i>Ch Kent L Rev</i>	Chicago-Kent Law Review
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa
<i>CISG</i>	United Nations Convention on Contracts for International Sale of Goods
<i>Clev St L Rev</i>	Cleveland State Law Review
<i>Clinical L Rev</i>	Clinical Law Review
<i>D</i>	Justinian (Digest)
<i>Del L Rev</i>	Delaware Law Review
<i>Disp Resol Mag</i>	Dispute Resolution Magazine
<i>GATT</i>	General Agreement on Tariffs and Trade
<i>INCOTERMS</i>	International Commercial Terms
<i>Ind LJ</i>	Indiana Law Journal
<i>J Inst</i>	Justinian (Institutes)
<i>La L Rev</i>	Louisiana Law Review
<i>LAWSA</i>	Law of South Africa
<i>Loy U Chi L J</i>	Loyola University Chicago Law Journal
<i>Mich St L Rev</i>	Michigan State Law Review
<i>NYU L Rev</i>	New York University Law Review
<i>Rev dr Unif</i>	Uniform Law Review (<i>Revue De Droit Uniforme</i>)
<i>SA Merc LR</i>	South African Mercantile Law Review
<i>SALJ</i>	South African Law Journal
<i>Stell LR</i>	Stellenbosch Law Review
<i>SIU Law Journal</i>	Southaven Illinois University Law Journal
<i>Suffolk Transnat'l L Rev</i>	Suffolk Transnational Law Review
<i>Tenn J Buss L</i>	Tennessee Journal of Business Law
<i>Tel Aviv U Stud L</i>	Tel Aviv University Studies in Law
<i>TSAR</i>	Tydskrif vir Suid-Afrikaanse Reg
<i>TULSA J Comp & Int'l L</i>	TULSA Journal of Comparative and International Law

<i>UCC</i>	Uniform Commercial Code
<i>U Colo L Rev</i>	University of Colorado Law Review
<i>U III L Rev</i>	University of Illinois Law Review
<i>UNIDROIT</i>	International Institute for the Unification of Private Law
<i>Utah L Rev</i>	Utah Law Review
<i>Va L Rev</i>	Virginia Law Review
<i>Vand J Ent & Tech L</i>	Vanderbilt Journal Enterprise and Technology Law
<i>VUWLR</i>	Victoria University of Wellington Law Review
<i>Wake Forrest L Rev</i>	Wake Forrest Law Review
<i>Wis Int'l LJ</i>	Wisconsin International Law Journal

OLD AUTHORITIES

Blackstone, W

Commentaries of the Laws of England (Vol. I & II)
(1893) JP Lippincott Company, Philadelphia

Domat, J

The Civil Law in its Natural Order
(1850) Boston Chas C Little & James Brown
Translated by: Strahan, W

Gaius

Gai Institutiones or Institutes of Roman Law by Gaius
(1904) Clarendon Press, Oxford
Translated by: Poste, E

Glanville, R

A Translation of Glanville
(1812) AJ Valpy, Took's Court, Chancery Lane, London
Translated by: Beames, J

Grotius, H

The Introduction to Dutch Jurisprudence
(1985) Van Voorst, J & Row, P London
Translated by: Herbert, C

Justinian (Digest)

The Digest of Justinian (Vol. IV)
(1985) University of Pennsylvania Press, United States of America
Translated by: Watson, A

Justinian (Institutes)

The Institutes of Justinian
(1889) 2nd ed. Clarendon Press, Oxford
Translated by: Moyle, DCL

Pothier, M

A Treatise on the Law of Obligations, or Contracts (Vol. 1)
(1806) Straham, A, London
Translated by: Evans, WD

Van der Keesel, DG

Select Theses on the Laws of Holland and Zeeland
(1855) Edward Stanford, 6 Charing Cross, London

Translated by: Lorenz, CA

Van der Linden, J

Institutes of the Laws of Holland

(1806) J & WT Clarke, London

Translated by: Herry, J

Van Leeuwen, S

Simon van Leeuwen's Commentaries on Roman-Dutch Law

(1886) Vol. II Stevens & Haynes Bell Yard, Temple Bar

Translated by: Kotze, JG

Voet, J

The Selective Voet: Being the Commentary on the *Pandects*

(1829) Paris Edition, Butterworths, Durban

Translated by: Gane, P

PRIMARY SOURCES

CASE LAW: FOREIGN

Australia

Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd 1991 24 NSWLR 1

Brussels

Elliot Associates v Peru LP General Docket No 2000/QR/92, Court of Appeals, Brussels, 8th Chamber, 26 September 2000

England

Alpenstow Ltd and Another v Regalian Properties PLC [1985] 2 All ER 545

Armadora Occidental SA v Horace Mann Insurance Company [1978] 1 All ER 407

Atlas Express Ltd v Kafco (Importers and Distributors) Ltd [1989] QB 833

Balmoral Group Ltd v Borgalis (UK) Ltd [2006] 2 CLC 220

Barton v Armstrong [1976] AC 104

Bishop & Baxter Ltd v Anglo Eastern Trading and Industrial Co Ltd [1943] 2 All ER 598

Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd [1952] 1 ER 981

Briggs and Others v Gleeds (Head Office) (A Firm) and Others [2014] EWHC 1178 (Ch) (15 April 2014)

British Movietonews Ltd v London and District Cinemas Ltd [1950] 2 All ER 390

Chappel & Co Ltd v Nestle Co Ltd [1960] AC 87

Carlil v Carbolic Smoke Balls Co [1983] 1 QB 256

Citi-March Ltd and Another v Neptune Orient Lines Ltd and Others [1996] 2 All ER 545

Cott UK Ltd v Barber Ltd [1997] 3 All ER 540

Courtney and Fairbairn Ltd v Tolani Brothers (Hotels) Ltd [1975] 1 WLR 297

Ditcher v Denison (1857) 14 ER 718

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847

Joseph Travers & Sons Ltd v Cooper (1915) 1 KB 673

Harbour Assurance Co (UK) Ltd v KANSA General International Assurance Co Ltd and Others [1993] 3 All ER 897

Hyde v Wrench (1840) 49 ER 132

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1988] 1 All ER 348

L Schuler AG v Wickman Machine Tool Sales Ltd [1973] 2 All ER 39

Lebeaupin v R Crispin & Co [1920] 2 KB 720

Lee-Parker and Another v Izzet and Others (1972) 2 All ER 803

May and Butcher v R [1934] 2 KB 17

Myton Ltd v Schwab-Morris [1974] 1 All ER 326

Nea Agrex SA v Baltic Shipping Co Ltd and Another [1976] 2 All ER 842
Nicolene Ltd v Simmonds [1953] 1 All ER 822
Orman v Saville Sportswear Ltd [1960] 3 All ER 105
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724
Pittalis and Others v Sherefettin [1986] 2 All ER 227
Phillips Electronique, Grand Publique SA v BSB Ltd [1995] EMLR 472
Port Jackson Steve Doring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd "The New York Star" [1980] 3 All ER 257
Shah v Shah [2001] 4 All ER 138
Tsakiroglou & Co Ltd v Noblee Thorl-GmbH [1962] AC 93
Walford v Miles [1992] 1 All ER 453

New Zealand

Roose Industries Ltd v Ready Mix Concrete Ltd [1974] 2 NZLR 246

Rhodesia

Cameron v Bray Gibb & Co (Pvt) Ltd 1996 (3) SA 675 (R)

United States of America

Agricultural Ins Co v Matthews 301 AD.2d. (2002) 749 NYS 2d. 533
American Home Assurance Company v Merck & Co Inc 329 F.Supp.2d 436 (2004)
Beatty v Guggenheim Exploration Co 225 NY 380 (1919)
Bleron Baraliu v Vinya Capital LP and Michael Desa 765 F.Supp 2d. 289 (2011)
Bruni v Didion (2008) 160 Cal.App. 4th 1272 (73 Cal. Rptr.3d 395)
Cellport Systems Inc v Peiker Acoustic GmbH & Co KG 762 F.3d 1016 (2014)
CKB & Associates Inc v Moore McCormack Petroleum Inc 809 SW.2d 577 (1991)
Corbin Bernsen v Innovative Legal Marketing LLC 2012 US Dist. Lexis 115325
General Electric Company v Metals Resources Group Limited 293 AD.2d 417 (2002)
 741 NYS.2d 218
Gillman v Chase Manhattan Bank NA Court of Appeals State of New York 73 NY.2d 1 (1988)
Green v Short 2007 WL 2570821 NC Super. Ct. (2007)
Hermann Holdings Ltd v Lucent Technologies Inc 302 F.3d 552 (2002)
Home Builders & Loan Association v Blaisdell et al. 290 Supreme Court of the US 398 (1934)
Hooper Associates Ltd v AGS Computers Inc 74 NY.2d 487 (1989)
Israel v Chabra 12 NY.3d 158 (2009)
Long Island Water Supply Co v Brooklyn 166 US 685 (1897)
Maribel Baltazar v Forever 21 Inc 212 Cal. App. 4th 221 (2012)

- Mastrobuono et al. v Shearson Lehman Hutton Inc et al.* US Supreme Court 514 US 52 (1995)
- McEwan v Mountain Land Support Corporation* 116 P.3d 955 (2005) UT App. 240
- Myers Building Industries Ltd v Interface Technology Inc* (1993) 13 Cal. App. 4th 949
- Parfi Holding AB v Mirror Image Internet Inc* 817 A.2d 149 Del. (2002)
- Phibro Energy Inc v Empresa De Polimeros De Sines Sarl* 720 F.Supp 312 (1989)
- Queen Villas Homeowners Association v TCB Property Management* 56 Cal. Rptr.3d 528 (2007)
- Re Schofield's Estate* 101 Colg. 433 73 P.2d 1381 (1937)
- Rent-A-Center West Inc v Antonio Jackson* 130 Supreme Court of US S.Ct. 2772 (2010)
- Segal v Silberstein* 67 Cal. Rptr.3d 426 (Cal. App. Ct. 2007)
- Sunoco Inc (R&M) v Toledo Edison Co* 129 Ohio St.3d 397 (2011) Ohio 2720
- Teachers Insurance and Annuity Association of America v Tribune Company* US District Court SD. NY 670 F.Supp. 491 (1987)
- Terex Corp v STV USA Inc* 2005 2810717 Del. Ch. (2005)
- The Home Gas Corporation v Strafford Fuel Inc and Edward C. Dupont Jr.* 130 NH 74 (1984)
- Thomas M. Macksey v William R. Egan* 36 Mass. App. Ct. 463 (1994)
- Touche Ross & Co v Manufacturers Hanover Trust Company et al.* 107 Misc.2d 438 (1980)
- United Equities Company v First National City Bank* 52 AD.2d 154 (1976)
- Viterbo v Friedlander* 120 US 707 (1887)
- Weidman v Tomaselli* Country Court Rockland Country 81 Misc.2d 328 (1975)

Zimbabwe

- Mun Publishing v Zimbabwe Broadcasting Corporation* 1995 (4) SA 675 (ZS)

CASE LAW: SOUTH AFRICAN

A

- ABSA Bank Ltd v Swanepoel* 2004 (6) SA 178 (SCA)
- ABSA Bank Ltd v TI Vermaak Trust & Others* [2006] JOL 18772 (E)
- ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC* [2013] JOL 30956 (SCA)
- Academy of Learning (Pty) Ltd v Hancock and Others* 2001 (1) SA 941 (C)
- Accesso CC v Allforms (Pty) Ltd and Another* [1998] 4 All SA 655 (T)
- Aetiology Today CC t/a Somerset Schools v van Aswegen and Another* [1992] 3 All SA 400 (W)
- Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* [2002] 3 All SA 369 (A)
- African Information Technology Bridge 1 (Pty) Ltd v The MEC for Infrastructure Development Gauteng Province* (134/2014) [2015] ZASCA 104 (2 July 2015)
- Africast (Pty) Ltd v Pangbourne Properties Ltd* [2013] 2 All SA 574 (GSJ)
- Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA)
- Agricultural Supply Association v Olivier* 1952 (2) SA 661 (T)
- Aktiebolaget Tratalja v Evelyn Haddon & Co* 1933 CPD 156
- Alenson v AB Brickworks (Pty) Ltd* 1993 (1) SA 62 (A)
- Alfred Mcalpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 346
- Allen v Sixteen Stirling Investments (Pty) Ltd* [1974] 4 All SA 271 (D)
- Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd and Others* 1996 (3) SA 134 (N)
- Altech Data (Pty) Ltd v MB Technologies* 1998 (3) SA 748 (W)
- Amalgamated Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA)
- Amcoal Collieries Ltd v Truter* [1990] 1 All SA 248 (A)
- Angath v Muckunlal's Estate* [1954] 4 All SA 279 (N)
- Avtjoglou v First National Bank of Southern Africa Ltd* [2002] 2 All SA 1 (C)

B

- B&H Engineering v First National Bank* 1995 (2) SA 279 (A)
- Baretta v Baretta* 1924 TPD 60
- Barrett v New Oceana Transvaal Coal Co Ltd* 1903 TS 431
- Bird v Sumerville* 1960 (4) SA 395 (N)
- Bloom v American Swiss Watch Company* 1915 AD 100
- Bobrow v Meyerowitz* [1947] 3 All SA 14 (T)
- BOE Bank Bpk v van Zyl* 1999 (3) SA 813 (C)
- Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC)
- Botha v Swanepoel* 2002 (4) SA 577 (T)

Breytenbach v Steward 1985 (1) SA 167 (T)
Brown's Executrix v McAdams 1914 AD 231 *Masterpiece Gold Mining Co Ltd v Brown's Executrix* 1914 AD 231
Barkhuizen v Napier [2008] JOL 19614 (CC)
Brink v Humphries & Jewell (Pty) Ltd [2005] 2 All SA 343 (SCA)
Bhengu v Alexander [1947] 4 All SA 73 (N)
Brisley v Drotsky 2002 (4) SA 1 (SCA)
Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd [1964] 1 All SA 110 (W)

C

Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom [2003] 3 All SA 496 (SCA)
Chubb Fire Security (Pty) Ltd v Greaves 1993 (4) SA 358 (W)
Clemans v Russon Brothers (Pty) Ltd [1970] 4 All SA 161 (E)
Cohen & Another v Lench & Another [2007] JOL 19995 (SCA)
Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Limited [2013] 1 All SA 266 (SCA)
Constantia Insurance Co Ltd v Compusource (Pty) Ltd 2005 (4) SA 345 (SCA)
Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another 2005 (6) SA 1 (SCA)
Conradie v Rassouw 1919 AD 279
Cookes Brothers Ltd v Regional Land Claims Commission for Province of Mpumalanga & Others (590/2011) [2012] ZASCA 128 (21 Sept 2012)
Coopers and Lybrandt and Others v Bryant 1995 (3) SA 761 (A)
Creutzburg and Another v Commercial Bank of Namibia Ltd [2006] 4 All SA 327 (SCA)

D

Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd [2001] 1 All SA 581 (A)
D'Arcy v Blackburn Jeffereys and Thorp Estate Agency [1985] 3 All SA 289 (E)
Davids en Andere v ABSA Bank Bpk [2005] 1 All SA 583 (C)
Dawidowitz v van Drimmelen 1913 TPD 672
De Beer v Keyser 2002 (1) SA 827 (SCA)
De Bruin v Brink 1925 OPD 68
De Villiers and Another NNO v BOE Bank Ltd [2004] 2 All SA 457 (SCA)
Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A)
Design Planning Services v Kruger 1974 (1) SA 689 (T)
Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd [2014] 1 All SA 375 (SCA)
Dietrichsen v Dietrichsen 1911 TS 486
Diners Club SA (Pty) Ltd v Livingstone and Another [1995] 4 All SA 334 (W)

Distinct Investments (Pty) Ltd v Arhay CC; Blom v Das Neves and Another [1997] 2 All SA 513 (W)

Drifters Adventure Tours CC v Hircock [2007] 1 All SA 133 (SCA)

Driftwood Properties v McLean [1971] 3 All SA 558 (A)

Dutch Reformed Church Council v Crocker [1953] 4 All SA 96 (C)

E

Eileen Louvet Real Estate v AFC Property Development 1989 (3) SA 26 (A)

Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993 (3) SA 424 (A)

Erasmus v Arcade Electric 1962 (3) SA 384 (T)

Estate Breet v Peri-Urban Areas Health Board 1955 (3) SA 523 (A)

Estate Du Toit v Coronation Syndicate Ltd and Others 1929 AD 219

Essop v Abdullah 1986 (4) SA 11 (C)

Euro Blitz 21 (Pty) Ltd v Secunda Aircraft Investments CC (102/14) [2015] ZASCA 21 (19 March 2015)

Ex Parte Spinazze and Another NNO [1985] 2 All SA 305 (A)

Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd [1998] 4 All SA 465 (A)

F

F&I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Africa Bpk [1998] 4 All SA 480 (A)

Fabian McCarthy v Sundowns Football Club & Others [2002] JOL 10381 (LC)

Fairoaks Investment Holdings (Pty) Ltd and Another v Olivier and Others 2008 (4) SA 302 (SCA)

FHP Management (Pty) Ltd v Theron NO and Another 2004 (3) SA 392 (C)

First National Bank of SA Ltd v Ganyesa Bottle Store (Pty) Ltd 1998 (4) SA 565 (NC)

Ferreira and Another v SAPDC (Trading) Ltd 1983 (1) SA 235 (A)

Froman v Robertson 1971 (1) SA 115 (A)

G

Garlick Ltd v Phillips [1949] 1 All SA 273 (A)

Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd) 1992 (1) SA 566 (A)

George v Fairmead (Pty) Ltd 1958 (2) SA 465 (A)

Gerber v Stoltze and Others 1951 (2) SA 166 (T)

Gilliland v Springs Town Council 1948 (1) SA 328 (T)

Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd and Another [1979] 4 All SA 321 (T)

Goldblatt v Fremantle 1920 AD 123

Golden Lions Rugby Union and Another v First National Bank of South Africa 1999 (3) SA 576 (SCA)

Gowar Investments v Section 3, Dolphin Coast Medical Centre 2007 (3) SA 100 (SCA)
Grete Shephard v Jacqueline Emmerich, South Gauteng High Court, (case no. 2009/22609) by Thompson (AJ)
Grobberlaar NO v Bosch [1964] 1 All SA 191 (E)

H

Hawkes & Co Ltd v Cohen 1929 SWA 77
Headermans (Vryburg) (Pty) Ltd v Ping Bai [1997] 2 All SA 371 (A)
Hirschowitz v Moolman and Others 1985 (3) SA 739 (A)
Hoeksma and Another v Hoeksma 1990 (2) SA 893 (A)

I

Ideal Fasteners Coran CC v Book Vision (Pty) Ltd t/a Colour Graphic [2002] 1 All SA 321 (D)
Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd [1975] 3 All SA 282 (T)
Inkin v Borehole Drillers 1949 (2) SA 366 (A)
Investec Bank Ltd and Another v Lefkowitz 1997 (3) SA 1 (A)
Irvin and Johnston (SA) Ltd v Kaplan 1940 CPD 647

J

Jacobs v Imperial Group (639/2008) [2009] ZASCA 167 (1 December 2009)
Jacobs v Minister of Agriculture 1972 (4) SA 608 (W)
Jajbhay v Cassim 1939 AD 537
JF Venter Estates (Pty) Ltd v Schoombie [1992] 1 All SA 348 (N)
Jonnes v Anglo-African Shipping Co Ltd 1972 (2) SA 827 (A)
Johnston v Leal 1980 (3) SA 927 (A)
Juglal v Shopright Checkers t/a OK Franchise Division 2004 (5) SA 348 (SCA)

K

Kay v Kay 1961 (4) SA 257 (A)
Keens Group Co (Pty) Ltd v Lotter [1989] 1 All SA 49 (C)
Killburn v Tuning Fork (Pty) Ltd [2015] ZASCA 53 (2011/2014) (27 March 2015)
King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd and Another [2013] 3 All SA 251 (SCA)
KPMG Chartered Accountants (SA) v Securefin Ltd [2009] JOL 23268 (SCA)
Krige v Wallace and Others 1990 (3) SA 724 (C)

L

Laws v Rutherford 1924 AD 261
Lepogo Construction (Pty) Ltd v the Govan Mbeki Municipality (623/13) [2014] ZASCA 154 (29 September 2014)

Levenstein v Levenstein [1955] 4 All SA 107 (SR)
Levin and Co v Berg River Flour Mills 1921 AD 78
Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk 1993 (1) SA 768 (A)
Lifeguards Africa (Pty) Ltd v Raubenheimer 2006 (5) SA 364 (D)
Lion Match Co Ltd v Wessels 1946 CPD 376
Lloyds and Others v Classic Sailing Adventures (Pty) Ltd 2010 (5) SA 90 (SCA)
Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd [1984] 3 All SA 625 (W)
Lovasz and Another v Estate Rosenberg 1940 TPD 340
Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2008 (2) SA 448 (SCA)

M

Masterspice (Pty) Ltd v Broszeit Investments CC 2006 (6) SA 1 (SCA)
Merril Lynch SA (Pty) Ltd v Moosa [2003] 2 All SA 431 (C)
Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A)
Metro Western Cape (Pty) Ltd v Ross [1986] 2 All SA 288 (A)
Meyer v Merchants Trust Ltd 1942 AD 244
Microucos and Another v Swart 1949 (3) SA 715 (A)
Middleton v Carr [1949] 2 All SA 400 (A)
Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 2001 (4) SA 1315 (SCA)
Mine Workers Union v Prinsloo 1948 (3) SA 831
Mittermeier v Skema Engineering (Pty) Ltd [1984] 1 All SA 252 (A)
Mokala Beleggings (Pty) Ltd & Another v Minister of Rural Development and Land Reform and Others (276/11) [2012] ZASCA 21 (23 March 2012)
Muller v Mulbarton Gardens (Pty) Ltd [1972] 1 All SA 190 (W)
Murray v Murray and Another, NO [1959] 2 All SA 291 (W)

N

Namibian Minerals Corporation Ltd v Benguela Concessions Ltd [1994] 1 All SA 191 (A)
NBS Boland Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd 1999 (4) SA 928 (SCA)
Nedcor Bank Ltd trading inter alia as Nedbank v Mooipan Voer & Graanverspreiders CC [2002] 3 All SA 477 (T)
Neethling v Klopper 1967 (4) SA 459 (A)
North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] 3 All SA 291 (SCA)
Northview Shopping Centre Johannesburg CC v Revelas Properties 2010 (3) SA 630 (SCA)

- Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* [1997] 1 All SA 11 (A)
- O
- Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A)
- P
- PBL Management (Pty) Ltd and Another v Telkom SA Ltd and Another* 2001 (2) SA 313 (T)
- Pangbourne Properties Ltd v Gill and Ramsden (Pty) Ltd* 1996 (1) SA 1182 (A)
- Park 2000 v Page* (905/2010) ZASCA 208 (29 November 2010)
- Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 (1) SA 488 (SCA)
- Perdikis v Jamieson* [2002] 4 All SA 560 (W)
- Petit v Abramson (II)* 1946 NPD 673
- Philmatt (Pty) Ltd v Mosselbank Development CC* 1996 (2) SA 15 (A)
- Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* [2014] JOL 32251 (SCA)
- Pottie v Kotze* [1954] 4 All SA 77 (A)
- Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd* 1984 (1) SA 61 (A)
- Preller and Others v Jordaan* 1956 (1) SA 483 (A)
- Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA)
- Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A)
- Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A)
- R
- R v Katz* 1959 (3) SA 408 (C)
- Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317
- Red Dunes of Africa v Masingita Property Investment Holdings* (159/2014) ZASCA 99 (1 June 2015)
- Reid Brothers (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232
- Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 (3) SA 134 (C)
- Rex v Associated Trade Suppliers Ltd* 1945 AD 611
- Roberts v Forsyth* [1948] 3 All SA 484 (N)
- Roomer v Wedge Steel (Pty) Ltd* [1997] JOL 1345 (N)
- Royal Canin South Africa (Pty) Ltd v Cooper & Another* [2009] JOL 22720 (SE)
- Rustenburg Platinum Mines Ltd v Breedt* 1997 (2) SA 337 (A)
- S
- Sadar Investments (Pty) Ltd v Caldeira* 1971 (1) SA 193 (O)
- SA Forestry Co Ltd v York Timber Ltd* [2004] 4 All SA 168 (SCA)
- Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A)
- SA Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760

- (A)
- SA Wimpy (Pty) Ltd v Tzouras* 1977 (4) SA 244 (W)
- SA Yster en Staal Industriële Korporasie Bpk v Koschade* [1983] 4 All SA 217 (T)
- Santos Professional Football Club (Pty) Ltd v Igesund & Another* [2002] JOL 10021 (C)
- Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* [1974] 2 All SA 159 (A)
- Schierhout v Minister of Justice* 1926 AD 99
- Schierhout v Union Government* 1926 AD 286
- Steens v J Brockhouse (SA) Ltd* 1950 1 PH A4 (C)
- Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* [2001] 3 All SA 133 (A)
- Sentinel Mining Industry Retirement Fund v Waz Props (Pty) Ltd* 2013 (3) SA 132 (SCA)
- Shell (SA) (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C)
- Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* [2002] 2 All SA 588 (C)
- Siltek v Business Connexion* (081/2008) [2008] SASCA 136 (26 November 2008)
- Simon NO v Air Operations of Europe AB and Others* [1998] 4 All SA 573 (A)
- Singh v McCarthy Retail Ltd t/a McIntosh Motors* 2000 (4) SA 795 (SCA)
- Sonap Petroleum (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A)
- South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704
- Southernport Developments v Transnet* [2005] 2 All SA 16 (SCA)
- Southern Era Resources Ltd v Farndell NO* 2010 (4) SA 200 (SCA)
- Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* [2015] JOL 32555 (SCA)
- Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D)
- Standard Building Society v Cartoulis* 1939 AD 510
- Standard Chartered Bank of Canada v Nedpern Bank* 1994 (4) SA 747 (A)
- Stansfeld v Kuhn* 1940 NPD 238
- Steward and Another v Appleton Fund Managers* [2002] 3 All SA 545 (T)
- Steward Wrightson (Pty) Ltd v Thorpe* [1977] 3 All SA 267 (A)
- Stieler Properties CC v Shaik Prop Holdings (Pty) Ltd and Another* [2015] 1 All SA 513 (GJ)
- Stiff v Q Data Distribution (Pty) Ltd* [2002] JOL 9568 (A)
- Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A)
- Swart v Smuts* [1971] 2 All SA 153 (A)
- Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T)

T

- Taurog and Others NNO v General Accident Insurance Co of SA Ltd* [1978] 3 All SA 543(W)
- The Land and Agriculture Development Bank of South Africa v Ryton Estate (Pty) Ltd* (460/12) [2015] ZASCA 105 (13 September 2013)
- Thomas & Co Ltd v Whyte & Co Ltd* (1923) 44 NPD 413
- Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA)
- Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA)
- Transnet Ltd t/a National Port Authority v Owner of MV Snow Crystal* [2008] 3 All SA 255 (SCA)
- Treadwell and Another v Roberts* 1913 WLD 54
- Trust Bank of Africa Ltd v Imperial Garage and Filling Station* 1963 (1) SA 123 (A)
- Tuckers Land and Development Corporation (Pty) Ltd v Kruger* [1973] 4 All SA 504 (A)
- Tweedie & Another v Park Travel Agency (Pty) Ltd t/a Park Tours* [1998] 3 All SA 57 (W)

U

- Unilever South Africa Ice Cream (Pty) Ltd (known as Ola South Africa (Pty) Ltd) v Jepson* 2008 (2) SA 456 (C)
- Union Free State Mining and Finance Corporation Ltd v Union Free State Gold and Diamond Corporation Ltd* 1960 (4) SA 547 (W)

V

- Van Aswegen v Fourie* 1964 (3) SA 94 (O)
- Van den Berg & Kie Rekenkundige Beampptes v Boomprops 1028 Bk* 1991 (1) SA 780 (T)
- Van der Merwe v Brink* 1974 (3) SA 331 (T)
- Van der Spuy and Another v Malpage* [2005] 2 All SA 635 (N)
- Van Deventer and Another v Biggs and Others* [2014] JOL 32147 (ECP)
- Van Reenen Steel v Smith* 2002 (4) SA 264 (SCA)
- Van Staden v Prinsloo* 1947 (4) SA 842 (T)
- Van Wyk v Rottcher's Saw Mills (Pty) Ltd* [1948] 2 All SA 45 (A)
- Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA)
- Venter v Venter* 1949 (1) SA 768 (A)
- Vermeulen v Goose Valley Investments* 2001 (3) SA 986 (SCA)
- Visser v Theodore Sassen & Son (Pty) Ltd* [1982] 1 All SA 362 (C)

W

- Watt v Sea Plant Products Ltd and Others* [1998] 4 All SA 109 (C)
- Watermeyer v Murray* 1911 AD 61
- Wasmuth v Jacobs* 1987 (3) SA 629 (SWA)

- Wells v South African Alumenite Company* 1927 AD 69
- Weltmans Custom Office Furniture (Pty) Ltd (in Liquidation) v Whistlers CC* [1997] 3 All SA 467 (C)
- Western Bank Ltd v Adams* [1975] 4 All SA 497 (C)
- Wilken v Kohler* 1913 AD 135
- Wilkens NO v Voges* [1994] 2 All SA 349 (A)
- William Hunt & Co (Natal) (Pty) Ltd v Christie* 1935 NPD 453
- Williams and Taylor v Hitchcock* 1915 WLD 51
- Wilson v Smith and Another* [1956] 1 All SA 114 (W)
- Withok Small Farms and Others (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* [2009] 2 All SA 65 (SCA)
- Witwatersrand Township Estate and Finance Corporation (Pty) Ltd v Rand Water Board* 1907 TS 231
- WL Carrol v Ray Hall Motors (Pty) Ltd* [1972] 4 All SA 550 (T)
- Woodburn Mansions (Pty) Ltd v Dowell* [1961] 2 All SA 522 (N)
- Wright v Pandell* 1949 (2) SA 279 (C)
- X
- Xenopoulos and Another v Standard Bank Ltd and Another* [2002] 2 All SA 494 (W)
- Y
- Yannakou v Apollo Club* [1974] 2 All SA 129 (A)
- Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* [1977] 4 All SA 733 (C)
- Z
- Zietsman v Allied Building Society* [1989] 4 All SA 111 (O)
- Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company SARL* [2014] 4 All SA 617 (SCA)
- Zygos Corporation v Salen Rederierna AB* [1984] 4 All SA 525 (C)

LEGISLATION: FOREIGN

Canada

Civil Code of Quebec 1380

European Union

Directive 85/374 -

Directive 86/653 -

Directive 90/314 -

Directive 93/13 -

Directive 1999/44 -

Directive 2000/31 -

Directive 2002/47 -

Directive 2002/65 -

Directive 2005/29 -

Directive 2008/48 (formally Directive 87/102) -

Directive 2008/122 (formally Directive 94/47) -

Directive 2011/7 (formally Directive 2000/35) -

Directive 2011/85 (which replaced Directives 85/577
and 97/7) -

English

Carriage of Goods by Sea Act 1992 -

Contracts (Rights of Third Parties) Act 1999 -

Law of Property Act 1925 -

Law of Property (Miscellaneous Provisions) Act 1989 -

Misrepresentation Act 1974 s2

Provisions of Oxford 1258 -

The Law Reform (Frustrated Contracts) Act 1943 -

Statute of Frauds 1677 -

Third Party (Right Against Insurers) Act 1930 -

Unfair Contract Terms Act 1977 -

Unfair Terms in Consumer Contracts Regulations 1999 -

French

French Civil Code 1804 1121, 1134, 1135, 1152, 1165

German

German Civil Code 1900 157, 242, 241(2), 311, 328, 340,
341(2), 343

German Commercial Code	348
German Standard Contract Terms Act	18(d)(5)
United States of America	
Civil Code of Louisiana	1928
Uniform Commercial Code	1-203, 2-206(1)
Restatement (2d) Contracts	205
Other	
United Nations Convention on Contracts for International Sale of Goods (Vienna, 1980) (CISG)	16(1)
International Institute for the Unification of Private Law (UNIDROIT)	2 1 4
International Commercial Terms (INCOTERMS)	-
General Agreement on Tariffs and Trade (GATT)	-

LEGISLATION: SOUTH AFRICAN

Administration of Estates Act 66 of 1968	s80
Alienation of Land Act 68 of 1981	s1; s2(1); s2(2); s15(1)(b),(c)
Arbitration Act 42 of 1965	-
Attorneys Act 53 of 1979	s5(3)
Banks Act 94 of 1990	s87
Children's Act 38 of 2005	ss17, s22(3); s22(4); s34(1)(a); s34(1)(b); s92(1)(a), s129, s139, S292(1)(a)
Close Corporation Act 69 of 1984	s54
Companies Act 71 of 2008	s20(7)
Competition Act 89 of 1998	1
Constitution of the Republic of South Africa 1996	-
Consumer Protection Act 68 of 2008	Reg. 44(3)(t); s39(a); s39(b); s93(3); s7(1); s48(1); s49; s51; s51(1)(a)(i); s51(1)(b); s51(g)
Contingency Fees Act 66 of 1997	s1(a)
Conventional Penalties Act 15 of 1962	-
Dangerous Weapons Act 71 of 1968	-
Deeds Registries Act 47 of 1937	s3; s87(1)
Diamonds Act 56 of 1986	-
Drugs and Drug Trafficking Act 140 of 1992	-
Electronic Communications and Transactions Act 25 of 2002	-
Exchange Control Regulation	Reg. 10(1)(c)
Formalities in Respect of Leases of Land Act 18 of 1969	s1(1); s1(2)
Formalities in Respect of Sale of Land Act 68 of 1981	s2(2)
Free State Ordinance 12 of 1906	s49
Gambling Act 51 of 1965	s6(1)
General Law Amendment Act 50 of 1956	s5; s6
General Law Amendment Act 68 of 1957	s1(1)
General Law Amendment Act 132 of 1993	s29
Housing Consumers Protection Measures Act 95 of 1998	s13(1); s13(3); s13(7)(a)
Housing Development Schemes for Retired Persons Act 65 of 1988	s3(1)

Insolvency Act 24 of 1936	s23(2)
Law 12 of 1884 (Natal)	-
Liquor Act 59 of 2003	-
Magistrate Court Rules	R5(4)
Magistrate Court Act 32 of 1944	-
Matrimonial Property Act 88 of 1984	s15; s15(2); s15(3); s15(4); s15(5)
Mental Health Care Act 17 of 2002	s59
Mining Titles Registration Act 16 of 1967	s16(1)
Mutual Banks Act 124 of 1993	-
National Credit Act 34 of 2005	s5; s74(1); s90; s92; s93(2); s90(2)(g),(h); s95; s103
Prescribed Rate of Interest Act 55 of 1975	-
Prescription Act 68 of 1969	s4; s11
Property Time-Sharing Control Act 75 of 1983	s2(1)
South African Reserve Bank Act 95 of 1997	s14, s16, s17
Security by Means of Movable Property Act 57 of 1993	s1(1)
Skills Development Act 97 of 1998	s17(3)
Share Blocks Control Act 59 of 1980	s16
Short-Term Insurance Act 53 of 1998	-
Transvaal Proclamation 8 of 1902	s30
Uniform Rules of Court	R.17(4)
Patent Act 57 of 1978	s60

SECONDARY SOURCES**BOOKS**

Adams, KA

A Manual of Style for Contract Drafting
(2008) 2nd ed. American Bar Association, United States of America

Anderson, M & Warner, V

A-Z Guide to Boilerplate and Commercial Clauses
(2012) 3rd ed. Bloomsbury Professional, Great Britain

Armstrong, SV & Terrell, TP

Thinking Like a Writer: A Lawyers Guide to Effective Writing and Editing
(2009) 3rd ed. Practising Law Institute, New York City

Baker, JH

An Introduction to English Legal History
(1990) 3rd ed. Butterworths, Worcester

Barbour, WT

The History of Contracts in Early English Equity
(1914) Vol. 4 No.7-8, Clarendon Press, Oxford

Barkowski, A

Textbook on Roman Law
(1997) 2nd ed. Blackstone Press Ltd, United Kingdom

Buckler, WH

The Origins and History of Contract in Roman Law Down to the End of the
Republican Period
(1895) CJ Clay & Sons, Cambridge University Press Warehouse, London

Cartwright, J

An Introduction to the English Law of Contract for the Civil Lawyer
(2007) Hart Publishing, North America, United States and Canada

Cartwright, J

Formation and Variation of Contracts: The Agreement, Formalities, Consideration
and Promissory Estoppel
(2014) Thomas Reuters (Professional) UK Ltd, United Kingdom

Christie, RH & Bradfield, GB

The Law of Contract in South Africa
(2011) 6th ed. LexisNexis, South Africa

Cornelius, SJ

Principles of the Interpretation of Contracts in South Africa
(2007) 2nd ed. LexisNexis, Durban.

Dannenbergh, R

Roman Private Law
(1980) 10th ed. University of South Africa, Pretoria
Translation of “Römisches Privatrecht” by Kaser, M

Espenschied, LE

Contract drafting: Powerful Prose in Transactional Practice
(2010) American Bar Association, United States of America

Lubbe, G & Murray, C

Farlam & Hathway Contract Cases, Material, Commentary
(1988) 3rd ed. Juta & Co. Ltd, Cape Town

Fosbrook, D & Laing, AC

The A-Z of Contract Clauses
(2014) 6th ed. Bloomsbury Professional, United Kingdom

Foucault, M

The History of Sexuality Volume I: An Introduction
(1978) Pantheon Books, United States of America
Translated by: Hurley, R

Fouché, MA (ed.)

Legal Principles of Contracts and Commercial Law
(2015) 8th ed. LexisNexis, South Africa

Fox, CM

Working with Contracts: What Law School Doesn't Teach You
(2008) 2nd ed. Practising Law Institute, New York

Glendon, MA, Gordon, MW & Osakwe, C

Comparative Legal Traditions
(1994) 2nd ed. West Publishing Company, United States of America

Gordley, J & Von Mehren, AT

An Introduction to the Comparative Study of the Private Law: Reading, Cases,
Materials
(2006) Cambridge University Press, United Kingdom

- Gulati, M & Scott, RE
The Three and a Half Minute Transaction
(2013) The University Chicago Press, United States of America
- Haggard, TR & Kuney GW
Legal Drafting in a Nutshell
(2007) 3rd ed. Thompson West, United States of America
- Hahlo, HR & Kahn, E
The South African Legal System and its Background
(1973) Juta & Co Ltd, Cape Town
- Harms, LTC
Amler's Precedence of Pleadings
(2015) 8th ed. (accessed electronically LexisNexis Butterworths Online), product developer J. Labuschagne
- Harvey, WF
A Brief Digest of the Roman Law of Contracts
(1878) J. Thornton, Oxford
- Holdsworth, WR
Essays in the Law and History
(1946) Clarendon Press, Great Brittan
- Huebner, R
A History of Germanic Private Law
(2000) The Lawbook Exchange Ltd, (Union New Jersey) United States of America
Translated by: Philbrick, FS
- Hutchinson, D (ed.)
The Law of Contract in South Africa
(2012) 2nd ed. Oxford University Press Southern Africa, Cape Town.
- Ibbetson, DJ
A Historical Introduction to the Law of Obligations
(1999) Oxford University Press, New York
- Kempin, FG
Historical Introduction to Anglo-American Law in a Nutshell
(1973) 2nd ed. West Publishing Company, United States of America

Kerr, AJ

The Principles of the Law of Contract
(2002) 6th ed. LexisNexis, South Africa

Kiralfy, AKR

Potter's Outline of English Legal History
(1958) 5th ed. Sweet & Maxwell Ltd, London

Kiralfy AKR

Potter's Historical Introduction to English Law and its Institutions
(1962) 4th ed. Sweet & Maxwell Ltd, London

Klass, G

Contract Law in the USA
(2010) Kluwer Law International, Netherlands

Kuney, GW

Elements of Contract Drafting with Questions and Clauses for Consideration
(2011) West, A Thompson Reuters Business, United States of America

Lee, RW

An Introduction to Roman-Dutch Law
(1946) 4th ed. Clarendon Press, Oxford

Lobingier, CS

The Evolution of the Roman Law from before the Twelve Tables to the *Corpus Juris*
(1923) William S. Hein & Co Inc, United States of America

Mackenzie, S & Alexander, J

Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland
(1991) William Blackwood & Sons, Edinburgh and London

Maine, HS

Ancient Law
(1906) Hendry Holt and Company, New York

Manfred, N

The Common Law of South Africa: A Treatise Based on Voet's Commentaries on the *Pandects*
(1904) Vol. I African Book Company Ltd, Grahamstown, Cape Colony

Manfred, N

The Common Law of South Africa: A Treatise Based on Voet's Commentaries of the *Pandects*

(1904) Vol. II African Book Company Ltd, Grahamstown, Cape Colony

Marsh, PDV

Comparative Contract Law England, France, Germany

(1994) Gower Publishing, Great Brittan

Mckendrick, E

Force Majeure and Frustration of Contracts

(1991) Lloyd's of London Press Ltd, London

Merryman, JH

The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America

(1969) Stanford University Press, California

Milson, SFC

Historical Foundation of the Common Law

(1981) 2nd ed. Butterworths, London

Mitchell, M, Goadby, FM & Holdsworth, WS

The English Legal Traditions, its Sources and History

(1935) Macmillan & Co Ltd, Great Brittan

Nagel, CJ

Commercial Law

(2011) 4th ed. LexisNexis Butterworths, Durban

Nicholas, B

French Law of Contract

(1982) Butterworths, London

Palmer, VV

Mixed Jurisdictions Worldwide: The Third Legal Family

(2012) 2nd ed. Cambridge University Press, New York

Paris, CEC

Drafting for Corporate Finance

(2007) Practicing Law Institute, New York

- Pete , S, Hulme, D, Du Plessis, M & Palmer, R
Civil Procedure: A Practical Guide
(2005) New Africa Books (Pty) Ltd, Republic of South Africa
- Phillimore, JG
Introduction to the Study and History of the Roman Law
(1848) W Benning, London
- Pollock, F & Maitland FW
The History of English Law Before the Time of Edward I
(1989) Vol. II Cambridge University Press, (unknown)
- Sharrock, R
Business Transactions Law
(2011) 8th ed. Juta & Company Ltd, Cape Town
- Schreiner, OD
The Contribution of English Law to South African Law and the Rule of Law in South Africa
(1967) Juta & Company Ltd, South Africa
- Scott, J
Power
(2006) MPG Books Ltd, Bodmin, Cornwall, Great Britain
- Scott, J
The Law of Commerce in South Africa
(2009) Oxford University Press Southern Africa, Cape Town
- Silke, JM
The Law of Agency in South Africa
(1981) 3rd ed. Juta & Co Ltd, Cape Town
- Simpson, AWB
A History of the Common Law of Contract: The Rise of the Action of Assumpsit
(1996) Oxford University Press, United States of America
- Sjostrom, WK (Jr).
An Introduction to Contract Drafting
(2013) 2nd ed. West Academic Publishing, United States of America
- Smits, JM
Contract Law: A Comparative Introduction
(2014) Edward Elgar Publishing Inc, Cheltenham, United Kingdom

- Sommerset Bell, WH
South African Legal Dictionary
(1910) African Book Company Ltd, Grahamstown, Cape Colony
- Stark, TL
Negotiating and Drafting Contract Boilerplate
(2003) ALM Publishers, New York
- Stark, TL
Drafting Contracts: How and Why Lawyers Do What They Do
(2007) Aspen Publishers, United States of America
- Street, TA
The History and Theory of English Contract Law
(1999) Beard Books, United States of America (Reprint)
- Taylor, D (ed.)
Michel Foucault Key Concepts
(2011) Acumen, 4 Saddler Street Durham, United Kingdom
- Teveen, KM
A History of Anglo-American Common Law of Contract
(1990) Greenwood Press, United States of America
- Thomas, J.A.C
Textbook of Roman Law
(1981) Creda Press, Cape Town, South Africa
- Van Blerk, P
Legal Drafting Civil Proceedings
(2014) Juta & Company Ltd, Cape Town
- Van Caenegem, RD
The Birth of the English Common Law
(1988) 2nd ed. Cambridge University Press, Great Brittan
- Van der Merwe, SWJ, Huyssteen, LF, Reineke, MFB & Lubbe, GF
Contract General Principles
(2012) 4th ed. Juta & Co Ltd, Cape Town
- Van Hecke, GA
A Civilian Looks at the Common-Law Lawyer
(1962) International Contracts: Choice of Law and Language, (unknown)

Visser, D (ed.)

The Limits of the Law of Obligations
(1997) Juta & Co, South Africa

Watson, TG

A Historical Introduction in to Modern Civil Law
(1981) Harvard University Press, United States of America

Wessels, JW

History of Roman-Dutch Law
(1908) African Book Company Ltd, Grahamstown, Cape Colony

Wessels, JW

The Law of Contract in South Africa (Vol. I)
(1951) 2nd ed. Butterworths, Durban

Wessels, JW

The Law of Contract in South Africa (Vol. II)
(1951) 2nd ed. Butterworths, Durban

Zimmerman, R

The Law of Obligations Roman Foundations of the Civilian Tradition
(1990) Juta & Co Ltd, South Africa

JOURNALS

Adams, KA

Dysfunctional Contract Drafting: The Causes and the Cure
Tennessee Journal of Business Law (2014) Vol. 15, 317

Ambrose, C

Force Majeure in International Contracts – The English Law Perspective
Business Law International (2003) Iss. 3, 234

Arnow-Richman, R

Cubewrap Contracts and Worker Morality: The Dilution of Employee Bargaining Power *via* Standard Form Noncompetes
Michigan State Law Review (2006), 963

Bacharach, SB & Lawler, EJ

The Perception of Power
Social Forces (September 1976) Vol. 55:1, 123

Barnhizer, DD

Inequality of Bargaining Power
University of Colorado Law Review (2005), 139

Barnhizer, DD

Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions
Wake Forrest Law Review (2010) Vol. 45, 607

Baxter, LG

Pure Comparative Law and Legal Science in a Mixed Legal System
Comparative and International Law Journal of Southern Africa (1983) Vol. 16, 84

Beck, A

‘Void for Vagueness’: The Layman’s Contract in Court
South African Law Journal (1985), 660

Berman, HJ

The Religious Sources of General Contract Law: An Historical Perspective
Journal of Law and Religion (1986) Vol. 4:1, 103

Berry, D

Legislative Drafting: Could our Statutes be Simpler?
Statute Law Review (1987) Vol. 8:2, 92

Bridgeman, C

Misrepresented Intent in the Context of Unequal Bargaining Power
Michigan State Law Review (2006), 993

Clarence Smith, JA

Legislative Drafting: English and Continental
Statute Law Review (1980) Vol. 1:1, 14

Choi, A & Triantis, G

The Effect of Bargaining Power on Contract Design
Virginia Law Review (December 2012) Vol. 98:8, 1665

Cornelius, SJ

The Complexity of Legal Drafting
Tydskrif vir Suid-Afrikaanse Reg (2004) Iss. 4, 692

Cornelius, SJ

The Unexpressed Terms of a Contract
Stellenbosch Law Review (2006) Vol. 17:3, 494

Cornelius, SJ

The Unexpressed Terms of a Contract
International Journal of Private Law (2012) Vol. 5:3, 293

Cornelius, SJ

Handtekening as Vereiste vir die Geldigheid van 'n Kontrak
De Jure (2012) Vol. 45:2, 379

Cornelius, SJ

Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2013 (6) SA 520 (SCA):
Redefining the Rules for Admissibility of Evidence in the Interpretation of Contracts
De Jure (2014) Vol. 47:2, 363

Dainow, J.

The Civil Law and Common Law: Some Points of Comparison
The American Journal of Comparative Law (1966-1967) Vol. 15:3, 419

Deutch, S

Standard Contracts – Methods of Control: The Conceptual Framework of the 1982 Law
Tel Aviv University Studies in Law (1985-1986) Vol. 7, 160

Dick, RC

Comparison in Legal Drafting
Estates and Trusts Quarterly (1977-1979), 195

Digester, P

The Fourth Face of Power

The Journal of Politics (November 1992) Vol. 54:4, 977

Dillenz, O

Drafting International Commercial Arbitration Clauses

Suffolk Transnational Law Review (1998) Vol. 21:2, 221

Doberstyn, GH

A Conceptual Approach to Negotiating Relational Contracts for the Small Business Client

Cleveland State Law Review (1988) Vol. 36, 541

Du Plessis, A

Pre-Contractual Misrepresentation, Contractual Terms, and the Measure of Damages when the Contract is Upheld

South African Law Journal (2008) Vol. 125:2, 413

Eiselen, S & Bergenthal, SK

The Battle of the Forms: A Comparative Analysis

Comparative and International Law Journal of Southern Africa (2006) Vol. 39:2, 214

Feehily, R

The Role of the Commercial Mediator in the Mediation Process: A Critical Analysis of the Legal and Regulatory Issues

South African Law Journal (2015) Vol. 132:2, 372

Friesen, JL

When Common Law Courts Interpret Civil Codes

Wisconsin International Law Journal (1996-1997) Vol. 15:1, 1

Garcia, IM

Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to be Solved by the Contracting Parties

European Journal of Legal Studies (Spring/Summer 2012) Vol. 5:1, 98

Gattuso, DT

Drafting Arbitration Provisions for LLC Agreements

Business Law Today (March/April 2009) Vol. 18:4, 53

Goss, J

An Introduction to Alternative Dispute Resolution

Alberta Law Review (1995-1996) Vol. 34, 1

Hakes, RA

Focusing on the Realities of the Contracting Process – an Essential Step to Achieve Justice in Contract Enforcement

Delaware Law Review (2011) Vol. 12:2, 95

Hart, DK

Contract Formation and the Entrenchment of Power

Loyola University Chicago Law Journal (Fall 2009) Vol. 41:1, 175

Hatzis, AN

The Anti-Theoretical Nature of the Civil Law of Contract Scholaristic and the Need for Economic Theory

Commentaries on Law & Economics (2002) Vol. 2, 1

Hatzis, AN

Having the Cake and Eating it Too: Efficient Penalty Clauses in Common and Civil Contract Law

International Review of Law and Economics (2003) Vol. 22, 381

Hermida, J

Convergence of Civil Law and Common Law of Contracts in the Space Field

Hong Kong Law Journal (2004) Vol. 34:2, 339

Hill, CA

Why are Contracts Written in ‘Legalese’?

Chicago-Kent Law Review (2001), 59

Hill, CA & King, C

How Do German Contracts Do as Much with Fewer Words?

Chicago-Kent Law Review (2004) Vol. 79, 889

Holland, DL

Drafting a Dispute Resolution Provision in International Commercial Contracts

TULSA Journal Comparative and International Law (1999-2000) Vol. 7:2, 451

Hutchinson, D

Non-Variation Clauses in Contracts: Any Escape from the Shifren Straitjacket?

South African Law Journal (2001) Vol. 118:4, 720

Hutchinson, D

Back to Basics: Reliance Damages for Breach of Contract Revisited

South African Law Journal (2004) Vol. 121:1, 51

Hutchinson, A

The Doctrine of Frustration: A Solution to the Problem of Changed Circumstances in South African Law

South African Law Journal (2010) Vol. 127:1, 84

Karlberg, M

The Power of Discourse and the Discourse of Power: Pursuing Peace through Discourse Intervention

International Journal of Peace Studies (Spring/Summer 2005) Vol. 10:1, 1

Kennedy, D

The Stakes of Law, or Hale and Foucault!

Legal Studies Forum (1991) Vol. 15:4, 327

Kim, N.S

Bargaining Power and Background Law

Vanderbilt Journal of Enterprise and Technology Law (2009-2010) Vol. 12:1, 93

Kim, PH, Pinkley, RL & Fragale, AR

Power Dynamics in Negotiations

Academy of Management Review (2005) Vol. 30:4, 799

Klass, G

Three Pictures of Contract: Duty, Power and Compound Rule

New York University Law Review (December 2008) Vol. 83, 1726

Langbein, JH

Comparative Civil Procedure and the Style of Complex Contracts

American Journal of Comparative Law (1987) Vol. 35, 381

Lategan, C

Die Uitleg van Wetgewing in die Hermeneutiese Perspektief

Tydskrif vir Suid-Afrikaanse Reg (1980), 107

Lewis, CC

The Contract Drafting Process Integrating Contract Drafting in a Simulated Law Practice

Clinical Law Review (Spring 2005) Vol. 11, 241

Lundmark, T

Verbose Contracts

American Journal for Comparative Law (2001) Vol. 49:1, 121

McGovern, WM

The Enforcement of Informal Contracts in the Later Middle Ages
California Law Review (1971) Vol. 59:5, 1145

McLennan, JS

The Demise of the 'Non Variation' Clause in Contract?
South African Law Journal (2001) Vol. 118, 574

Mills, LR & Brewer, TJ

ADR Drafting Tips
Dispute Resolution Magazine (Spring 2002) Vol. 8, 23

Morant, BD

The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context
Michigan State Law Review (2006), 925

Moss, GC

International Contracts between Common Law and Civil Law: Is non-state Law to be Preferred? The Difficulty of Interpreting Legal Standards of Good Faith?
Global Jurist Advances (2007) Vol. 7:1, 1

Naudé, T

The Preconditions for Recognition of a Specific Type or Sub-type of Contract – the *Essentialia – Naturalia* Approach to the typological Method
Tydskrif vir Suid-Afrikaanse Reg (2003) Iss. 3, 411

Naudé, T

The Right and Remedies of the Holder of a Right of First Refusal or Preferential Right to Contract
South African Law Journal (2004a) Vol. 121:3, 636

Naudé, T

Rights of First Refusal or Preferential Rights to Contract: A Historical Perspective on a Controversial Legal Figure
Stellenbosch Law Review (2004b) Vol. 15:1, 66

Naudé, T

Unfair Contract Terms Legislation: The Implications of Why We Need it for its Formulation and Application
Stellenbosch Law Review (2006) Vol. 17:3, 361

Newman, S

The Influence of Plain Language and Structure on the Readability of Contracts
Obiter (2010) Vol. 31:3, 735

Norje, M

Of Reliance, Self-Reliance and *Caveat Subscriptor*
South African Law Journal (2012) Vol. 129:1, 132

Oehler, W

Working with a Code: Is there a Difference between Civil Law and Common Law People?
University of Illinois Law Review (1977) No. 3, 711

O'Neill, J

The Disciplinary Society: Weber to Foucault
The British Journal of Sociology (March 1986) Vol. 37:1, 42

Pejovic, C

Civil Law and Common Law: Two Different Paths Leading to the Same Goal
Victoria University of Wellington Law Review (2001) Vol. 32, 817

Piomelli, A

Foucault's Approach to Power, its Allure and Limits for Collaborative Lawyering
Utah Law Review (2004), 395

Powell, EJ & Mitchell, SM

The International Court of Justice and the World's Three Legal Systems
The Journal of Politics (May 2007) Vol. 69:2, 397

Powers, P

The Philosophical Foundation of Foucaultian Discourse Analysis
Critical Approaches to Discourse Analyses Across Disciplines (2004) 1(2), 18
([http://cadaad.net/files/journal/Powers-Philosophical foundations of Foucaultian Discourse.pdf](http://cadaad.net/files/journal/Powers-Philosophical%20foundations%20of%20Foucaultian%20Discourse.pdf) last accessed 27 September 2015)

Pretorius, CJ

The Basis of Common Error
Obiter (2011) Vol. 32:3, 651

Pretorius, CJ & Ismail, R

Notification of Acceptance and the Conclusion of a Contract: Withok Small Farms (Pty) Ltd
v Amber Sunrise Properties 5 (Pty) Ltd 2009 (2) SA 504 (SCA)
Obiter (2010) Vol. 31:1, 177

- Pryles, M
Drafting Arbitration Agreements
Adelaide Law Review (1993) Vol. 15, 5
- Readey, JA
A Primer for Drafting ADR Contract Clauses
Ohio Lawyer (September/October 1992), 14
- Rouse, J
Power/Knowledge
University WesScholar Division I Faculty Publications Arts and Humanities (2005), 1
(<http://wescholar.wesleyan.edu/div1facpubs/34> last accessed 25 October 2015)
- Sanders, AJGM
The Characteristic Features of Southern African Law
Comparative and International Law Journal of Southern Africa (1981) Vol. 14:2, 328
- Scott, J
Empirical Studies Strike Back Against the Force of Contract Theory
UCL Jurisprudence Review (1997), 256
- Slawson, WD
Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form
Michigan State Law Review (2006), 853
- Stoop, PN
The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract
South African Mercantile Law Review (2008) Vol. 20:4, 496
- Tetley, W
Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified) (Part 1)
Uniform Law Review (1999) Vol. 4:4, 591
- Tetley, W
Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified) (Part 2)
Uniform Law Review (1999) Vol. 4:4, 877
- Tobert, PM
A Study of the Risks of Contract Ambiguity
PKU Transnational Law Review (2014) Vol. 2, 1

Turner, JC

Explaining the Nature of Power: A Three-process Theory
European Journal of Social Psychology (2005) Vol. 35:1, 1

Van den Bergh, R

The Remarkable Survival of Roman Dutch Law in Nineteenth Century South Africa
Fundamina (2012) Vol. 18:1, 71

Van der Merwe, V

The Origin and Characteristics of the Mixed Legal System of South Africa and Scotland and their Importance in Globalisation
Fundamina (2012) Vol. 18:1, 91

Van Dijk, TA

Structures of Discourse and Structures of Power
Communication Yearbook (1989) Vol. 12, 18
(http://www.discourses.org/OldArticles/Structures_of_discourse_and_structures_of_power.pdf last accessed 27 September 2015)

Van Niekerk, G

The Convergence of Legal Systems in Southern Africa
Comparative and International Law Journal of Southern Africa (2002) Vol. 35, 308

Von Mehren, A

The French Civil Code and Contract: A Comparative Analysis of Formation and Form
Louisiana Law Review (1955) Vol. 15, 687

Vos, A

Expert Determination as Alternative to Arbitration
Without Prejudice (March 2009) Vol. 9:2, 32

Wells, RE (Jr.)

Alternative Dispute Resolution – What is it? Where is it now?
Southaven Illinois University Law Journal (2003-2004) Vol. 28, 651

Winter, S.L

The “Power” Thing
Virginia Law Review (August 1996) Vol. 82:5, 721

Willis, HE

The Statute of Frauds – A Legal Anachronism
Indiana Law Journal (March 1928) Vol. 3:6, 427

OTHER RESEARCH

Braun, JH

Policing Standard Form Contracts in Germany and South Africa: A Comparison
Master of Laws, University of Cape Town (2014)

Chrysotome, KJ

The Future of Standard Form Contracts in South Africa with Particular Reference to
Recent Developments in the Law
Master of Laws, University of KwaZulu-Natal (2009)

Cornelius, SJ

The Interpretation of Contracts in South African Law
Doctor of Laws, University of Pretoria (1999)

Cupido, RV

Misrepresentation by Non-Disclosure in South African Law
Master of Laws, Stellenbosch University (2013)

Friend, N

Signatures in Banking Law
Master of Laws, University of Johannesburg (2014)

Hutchinson, A

Fundamental Change in Circumstances in Contract Law
Doctor of Philosophy, University of Cape Town (2010)

Kok, R

The Location of Breach of Contract in the Context of Jurisdiction – A Comparative
Study of English and South African Law with Specific Reference to the
INCOTERMS of the International Chamber of Commerce
Master of Laws, University of Johannesburg (2014)

Louw, E

The Plain Language Movement and Legal Reform in the South African Law of
Contract
Master of in Laws, University of Johannesburg (2010)

Melamu, SD

The Role of Express Submission to Jurisdiction under the Brussels I Regulation,
Brussels I (Recast) and the Hague Convention on Choice of Court Agreements
Master of Laws, University of Johannesburg (2015)

Mokhele, TC

Alternative Dispute Resolution: A New Tool under the Companies Act 71 of 2008
Master of Laws, University of Johannesburg (2014)

Myburgh, FE

Statutory Formalities in South African Law
Doctor of Laws, University of Stellenbosch (2013)

Ramsden, WA

Supervening Impossibility of Performance in the South African Law of Contract
Master of Laws, University of Witwatersrand (1983)

Sithole, TP

Beyond Contract Drafting and Enforcement: The Future of Contracting in Emerging Markets
Master of Business Administration, Gordon Institute of Business Science, University of Pretoria (2014)

Sunkel, KD

The Pactum De Non Cedendo: A Re-Evaluation
Master of Laws, University of the Western Cape (2009)

Venter, CM

An Assessment of the South African Law Governing Breach of Contract: A Consideration of the Relationship between the Classification of Breach and the Resultant Remedies
Master of Laws, Stellenbosch University (2004)

Watt, I

The Consequences of Contracts Concluded by Unassisted Minors: A Comparative Evaluation
Master of Laws, Stellenbosch University (2012)

OTHER

Agreement of Sale (Liquor) Precedent 1

LexisNexus Butterworths, Forms and Precedence (Online)
(last accessed 19 July 2015)

Bacher, P

Headings will be taken Seriously
Financial Institutions Legal Snapshot (29 June 2015)
<http://www.financialinstitutionslegalsnapshot.com/2015/06/headings=will-be-taken-seriously/>
(last accessed 13 September 2015)

Collins Dictionary (Online)

<http://www.collinsdictionary.com/dictionary/english>
(last accessed 1 August 2015)

Contract Standards

<http://www.contractstandards.com/clauses/severability>
(last accessed 23 June 2015)

Drafting Paragraph “I want to Eat Burgers with You”

<http://www.translatorscafe.com/cafe/MegaBBS/thread-view.asp?threadid=8234&messageid=137573>
(last accessed 25 October 2015)

Federal Ministry of Justice and Consumer Protection in cooperation with juris GmbH

www.juris.de
(last accessed 03 August 2014)

Law of South Africa Vol. 2 (2nd ed.)

By Edwards, AB (updated by Kahn, E)
LexisNexus Butterworths (Online)
(last accessed 24 October 2015)

Law of South Africa Vol. 9 (3rd ed.)

Van Rensburg, ADJ & van Rhijn, TAR (updated by Sharrock, RD)
LexisNexus Butterworths (Online)
(last accessed 31 August 2015)