

Commercial Law 2014 Test Revision Notes

Note: These notes have been compiled to assist you in preparing for your test. You should not rely only on these notes but study using your own notes, study guide & prescribed textbook. You should ensure you know all the learning outcomes as set out in your study guide.

Law of Contract

- Define a contract. [3]

A contract is an agreement (1) between two or more people (1) intended to create legally enforceable obligations (1)

- List the requirements for a legally enforceable contract. [5]

Consensus

Contractual capacity

Lawful or legally possible to perform

Physical possibility of performance

Formalities (if any) complied with

- List any two requirements that must be present for contracting parties to reach consensus.[2]

Each party has intention to contract

Common intention

Communication of intention

- Briefly explain the "expedition theory" relating to the time and place when a contract is formed. [5]

The expedition theory applies to contracts concluded through the postal system (2) The contract arises at the time (1) and at the place (1) where the letter of acceptance is posted (1) by the offeree.

- Explain the difference between contracts that are "valid", "void" and "voidable". [10]

A valid contract is a contract that is 100% correct in all respects (2). All the requirements for a valid contract have been met (1) and the parties must perform (1). A contract that is void means that the contract actually never really came into existence. (2) It is said that the contract is void *ab initio* (from the beginning) (1) A voidable contract is valid (1) but because of some defect it can be set aside at the request of one of the parties (2)

- List the three different forms of misrepresentation that can occur. [3]

Intentional misrepresentation (1)

Negligent misrepresentation (1)

Innocent misrepresentation (1)

- List the three requirements to be met before a mistake will render a contract void. [3]

The mistake relates to a fact, legal rule or principle (1)

The fact, rule or principle is material (1)

The mistake is reasonable (1)

- Explain the *ex turpi causa* rule [3]

It means "from a shameful cause no action arises". In other words one cannot sue to enforce an unlawful contract

- Explain the difference between the "essentialia", "naturalia" and "incidentalia" of a contract. [6]

The essentialia are those terms that are essential, in other words they are those terms that must be present to have a contract of a particular type. For example, in a contract of sale there must be agreement on the thing sold and the price; these are the essentialia.

The Naturalia are those terms that would normally apply and be present automatically but which the parties can change by agreement. For example, in a contract of sale risk passes once the sale is perfecta but the parties can agree to delay the passing of risk until delivery.

The incidentalia are those incidental terms that the parties agree to add to their contract, for example, they may agree that delivery can only take place between 12:00 and 16:00.

- Discuss the requirements and remedies for undue influence. [5]

Undue influence occurs when a contracting party is influenced by a special relationship to enter into a contract to their detriment. They must enter into the contract because of the influence exercised over them and the contract must be to their detriment. In other words there can be no undue influence where the person would have contracted anyway or where the contract is actually to their benefit. The contract is voidable and the injured party will be able to claim damages.

- List the five forms of breach of contract. [5]

Mora debitoris (breach by debtor)

Mora creditoris (breach by creditor)

Positive malperformance Repudiation

Prevention of performance

- Name five ways contracts can be concluded

Post, telegram, telephone, fax, telex, electronically, face to face

- Briefly explain the “parol evidence rule”. [4]

Once an agreement has been reduced to writing (1) the written document is the only record of the agreement (1) and the document has to be interpreted to determine the intention of the parties (1) and generally speaking no other evidence is allowed except in certain specific circumstances (2)

- Explain the requirements that must be met before a contract will be voidable on the grounds of duress. [5]

Actual physical violence or threat of violence (1)

Threat must be imminent (1)

Threat of harm must be unlawful (1)

Duress must be exercised by (or on behalf of) one contracting party against another (1)

The threat must cause the party to enter into the contract (1)

- Referring to case law discuss whether one can accept an offer of which you were not aware at the time. [6]

One cannot accept an offer of which you were not aware of. In *Bloom vs American Swiss Watch Co 1915 AD 100*, the Court held that American Swiss did not have to pay Bloom a reward as he was unaware of the offer of a reward when he gave the information leading to the arrest of the thieves.

- Explain what is meant by supervening impossibility and specifically discuss the issue of objective impossibility [6]

Supervening impossibility of performance is where the contract becomes impossible to perform after it has been entered into (as opposed to being impossible at the time of contracting – this is known as initial impossibility of performance). An example of supervening impossibility would be where A agrees to sell and deliver a painting to B next week and A’s house burns down tonight destroying the painting – the painting existed when A and B reached agreement but no longer exists when A has to deliver it.

Supervening impossibility will only make the contract void if it is objectively impossible to perform; in other words if nobody can perform. For example, if I agree to sell a pocket of cement to B and the pocket of cement in my garage is stolen it is not objectively impossible to perform as there are other pockets of cement around. I will not be released from my obligation to perform. If however I agree to sell my camera with serial number AVS832 to B and my camera is stolen then it is objectively impossible to perform as there is only one camera with that serial number.

- Differentiate between unilateral, common and mutual mistake. [5]

Unilateral mistake – one of the parties misunderstands a specific aspect of the contract while the other party is aware of the true facts

Common mistake – both parties misunderstand the same term, fact or aspect of the contract

Mutual mistake – both parties misunderstand different terms or aspects of the contract

- List and briefly explain the requirements for the formation of a valid contract [10]

Consensus – there must be a “meeting of the minds” as to what is being agreed upon

Contractual capacity – the parties must have contractual capacity to enter into the contract

Lawfulness – the contract must be lawful – an agreement to commit a crime cannot be a valid contract

Physical possibility of performance – it must be physically possible to perform the contract

Formalities – any prescribed formalities need to be complied with

- Explain what is meant by mora debitoris and the two forms it can take. [10]

This form of breach is default by the debtor (1)

There are two requirements; firstly that performance must be delayed (1) and secondly that the delay is due to the default of the debtor (1)

If the contract stipulated a time for performance, then the debtor will be in default if they have not delivered by the stipulated time (1). This is called *mora ex re* (1) and the debtor will automatically be in default when they have not performed by the specified time (2)

If no time for performance is stipulated, then the debtor is required to perform in a reasonable time (1). If the debtor fails to perform within a reasonable time the creditor can then stipulate a time for performance

(1) (eg by next Monday). If the debtor still does not perform by the stipulated time they will be in default (2). This type of default is called *mora ex persona* (1).

- Differentiate between intentional misrepresentation, negligent misrepresentation and innocent misrepresentation [10]

Intentional representation – false statement of a material fact with the intention of inducing a party to enter into a contract. Party making statement knows it to be false but makes statement so that other party will contract

Negligent misrepresentation – false statement of a material fact with the intention of inducing party to enter into a contract – the person making the statement assumes the statement to be true but they do not bother to check if it is true or not even though a reasonable person would take steps to check if the statement they made was true

Innocent misrepresentation – false statement of a material fact with the intention of inducing the party to enter into a contract – statement made innocently and without negligence.

- Discuss the rules relating to offer and acceptance in contract. [10]

An offer may be made to a specific person, a group of persons or the whole world (2)

The offer must be communicated to the offeree before it can be accepted (2)

The offer must have seriously been intended to create a binding agreement between the parties (2)

The acceptance must be absolute or unconditional (2) / must correspond with the offer (2)

The offer and acceptance must result in certain and definite terms (2)

Only the person to whom the offer is made may accept it (2)

Acceptance must be communicated to the offeror (2)

Acceptance must be made in the manner prescribed by the offeror(2)

A failure to respond/silence is not acceptance (2)

An offer ends on rejection/revocation (2)

- Discuss the duties of the buyer and seller in a contract of sale

The buyers duties (and therefore the sellers rights) are:

- to pay the purchase price
- to pay the seller's necessary expenses in looking after the goods until delivery
- to accept delivery from the seller

The **sellers** duties (buyers rights) are:

- to deliver the goods to the buyer (this means make available, not necessarily actual delivery)
- to look after the goods from the time of sale until they are delivered to the buyer
- to protect the purchaser against eviction – the seller must ensure nobody has better title to the goods than the buyer
- to warrant against latent defects – the buyer can claim from the seller if there was a latent defect in the goods

- Discuss the remedies available to a buyer in the case of a latent defect

The Aedilitian Remedies are available – these are

Actio redhibitoria

Available if latent defect renders goods useless or if purchaser would not have purchased the goods if aware of defect

Purchaser tenders return of merx & claims purchase price plus interest & costs of maintaining merx and cost of any improvement to merx

No compensation payable by Seller

Actio quanti minoris

If defect not so material as to render goods useless or if purchaser would still have purchased goods (but maybe at lesser price)

Buyer sues for reduction in purchase price

No compensation payable by Seller

Actio ex empti

Allows buyer to claim compensation in certain cases: If seller fraudulent

If Seller a manufacturer, expert or professes skill If

Seller has given an express warrant

- Explain the concept of “huur gaat voor koop” [10]

This means “hire takes preference over sale” If an owner sells immovable property while there is a lease in place the new owner will simply become the new landlord of the tenant and the lease continues. The new owner will have all the rights and duties of the old owner (landlord). The new owner has to observe the lease and cannot terminate the lease or evict the tenant simply because ownership has changed This only applies to immovable property and not to movables

- Distinguish between “suspensive” and “resolutive” conditions and give an example of each [10]

A suspensive condition is one that halts or suspends the operation of the contract until and unless the condition is met. If the conditions is not met then the contract simply falls away and the parties have no rights or duties against each other.

The most common example of a suspensive condition is where someone buys a house subject to the suspensive condition that the bank agrees (within a certain time) to loan them the money against registration of a mortgage bond – if the bank refuses to grant the loan the contract of sale falls away but if it grants the loan the sale goes ahead

A resolutive condition is the opposite of a suspensive condition in the the contract proceeds until and unless it is terminated by the happening of something (the resolutive condition). For example I agree to buy 100 000 milk cartons a week from a supplier subject to the condition that I may terminate the contract if my agreement to supply milk to Woolworths is terminated for any reason.

- Explain the concept of *stare decisis* [12]

In terms of the Stare Decisis doctrine our courts are bound to follow the previous decisions of courts of higher authority on points of law.

When a matter is before a court it will have to make a decision on a question of fact (eg: was the contract a contract of sale or of lease) and/or a question of law (eg: what remedy is appropriate for that particular breach of the contract of sale). The question of law is about the legal rule that pertains to the facts. When deciding on this question of law the court will look to see if another court of higher authority has previously decided on the question of law. If so, generally speaking, the court will be bound to follow that decision. The idea behind this approach is to get uniformity and consistency which ultimately leads to fairness.

The stare decisis doctrine is necessary because of judicial precedent – our court decisions are a binding source of law and there must be a consistent approach. All courts are bound by the SCA and High Courts and Magistrates Courts are bound by High Court decisions of the division (area) they fall under

Credit Agreements

- In terms of the National Credit Act, list five parties who fall under the definition of a consumer [5]

The party to whom credit is granted under a credit facility

The lessee under a lease

The party who receives money or credit under a pawn transaction

The party to whom goods or services are sold under a credit agreement

The borrower under a secured loan

- List five examples of credit providers in terms of the Act [5]

The lessor under a lease

The lender under a secured loan

The party who extends credit under a credit facility

The party advancing money or credit under a pawn transaction

The party selling goods or services under a credit agreement

- List any four rights of a consumer [4]

Right to apply for credit

Right to be given reasons if credit refused

Right to information in an official language

Right to plain & understandable language

Right to receive documents

Right to confidentiality

- List and explain the three types of credit agreement [10]

Small credit agreement – a pawn transaction or a credit facility or credit transaction under R10 000

Intermediate credit agreement – a credit facility or transaction between R10 000 and R250 000

Large credit agreement – a mortgage agreement, credit transaction or facility over R250 000

Law of Sale

- List and briefly explain the different forms of delivery with regard to movable property [10]

Actual delivery – physically handing over the goods

Symbolic delivery – handing over a symbol that enables buyer to have control; eg: the key to a car

Delivery with the long hand – where it is difficult to physically deliver the thing to the buyer the seller points it out; eg: pointing out a herd of cattle grazing on a farm

Delivery with the short hand – where the buyer is already in possession; eg: where I borrow and TV set and then buy it

Constitutum possessorium – where the seller retains control of the goods but now on behalf of the buyer; eg: a art gallery sells a painting but keeps it on behalf of the buyer

- List and briefly explain three duties of a seller in the contract of sale [6]

The duty to take care of the thing sold until it is delivered

The duty to deliver the thing sold to the buyer

The duty to ensure that the buyer has undisturbed possession (warranty against eviction)

- Adel just realised that she had bought a car with latent defects from Carmen. Advise her on the requirements of latent defects and of the remedies available [15]

Requirements for latent defects:

Defect must have existed at time of sale

Buyer must have been unaware of the defect

Goods must not have been sold voetstoots

Buyer claim must not have prescribed

See the discussion on remedies above

Law of Lease

- List the ways in which a lease can be terminated [5]

On expiry of the lease period

By cancellation

By notice

By agreement

By death

Insolvency of the tenant

- Discuss the contract of lease and briefly explain the rights and duties of the lessee and the lessor [18]

Lease is an agreement whereby one party (Landlord or Lessor) temporarily makes the use and enjoyment of something available to another person (Tenant or Lessee) for a period of time in exchange for a specified payment (rent)

Duties of the lessor:

Deliver possession of the property to the tenant at the agreed time

Maintain the property**Protect the tenant against interference in their use of the property****To pay the taxes****Duties of the tenant:****To pay the rent****To use the property only for the purpose for which it was let****To return the property undamaged at the end of the lease (fair wear and tear excepted)****Law of Agency**

- List two duties of an agent towards his principal [4]

Duty to account (financially & report) to client**To perform in accordance with the principals instructions |****To act honestly and in good faith****Display care, skill and diligence****Introduction to the SA legal system**

- List the sources of SA law indicating if they are authoritative or persuasive [12]

Legislation ((also called Acts or Statutes) - authoritative**Common law – authoritative****Old Authorities – authoritative****Judicial precedent – authoritative****Foreign law – persuasive****Text books and journal articles – persuasive**

- Draw a diagram to illustrate the hierarchy of the South African courts [15]

Constitutional Court**Supreme Court of Appeal****High Court & special Courts with same status as High Court****Magistrates Court****Regional****District****Small Claims Court****Court of Chiefs & Headmen**