

Contents

Dedication	v
Contents in brief	vii
List of authors	xx
Preface	xxii
About the book	xxiii

PART ONE: NATURE AND BASIS OF CONTRACT

CHAPTER 1: THE NATURE AND BASIS OF CONTRACT – DALE HUTCHISON	3
1.1 The notion of contract	3
1.1.1 Contract as an agreement intended to create enforceable obligations	4
1.1.2 Legally binding agreements that are not contracts	4
1.1.3 Legally binding agreements that are more than just contracts	5
1.1.4 Definition of contract	6
1.2 Requirements for a valid contract	6
1.3 The nature of contract	6
1.4 Contract and the law of obligations	7
1.4.1 The concept of obligation	7
1.4.2 Contract and delict	8
1.4.3 Contract and enrichment	9
1.5 Contract and the law of property	10
1.6 The development of the modern notion of contract	11
1.6.1 Roman law	11
1.6.2 Roman-Dutch law	12
1.6.3 <i>Causa</i> and consideration: a celebrated dispute	12
1.7 The basis of contract	13
1.7.1 Introduction	13
1.7.2 Actual subjective agreement (consensus)	14
1.7.3 Apparent or objective agreement	14
1.7.4 Theories of contract	15
1.7.5 Approach to contract: subjective or objective?	17
1.7.6 Dual basis of contract in modern law	20
1.7.7 Proving the existence of a contract	20
1.8 Cornerstones of contract	21
1.8.1 The goals of contract law	22
1.8.2 Competing values in the law of contract	22
1.8.3 Freedom and sanctity of contract	23
1.8.4 Good faith and equity in contract	27
1.9 The Consumer Protection Act 68 of 2008	32
1.10 The impact of the Constitution	35

PART TWO: FORMATION OF CONTRACT

CHAPTER 2: OFFER AND ACCEPTANCE – LUANDA HAWTHORNE AND DALE HUTCHISON

2.1	Introduction	45
2.2	The offer	46
2.2.1	Legal effect of an offer	47
2.2.2	Requirements for a valid offer	47
2.2.2.1	The offer must be firm	48
2.2.2.2	The offer must be complete	48
2.2.2.3	The offer must be clear and certain	48
2.2.2.4	The Consumer Protection Act	49
2.2.3	Offers to the public	50
2.2.3.1	Advertisements	50
2.2.3.2	Promises of reward	52
2.2.3.3	Calls for tenders	52
2.2.3.4	Auctions	52
2.2.4	Termination of an offer	54
2.2.4.1	Rejection of the offer	54
2.2.4.2	Death of either party	54
2.2.4.3	Effluxion of the prescribed time, or of a reasonable time	54
2.2.4.4	Revocation of the offer	54
2.3.	The acceptance	55
2.3.1	Requirements for a valid acceptance	55
2.3.1.1	The acceptance must be unqualified	55
2.3.1.2	The acceptance must be by the person to whom the offer was made	55
2.3.1.3	The acceptance must be a conscious response to the offer	56
2.3.1.4	The acceptance must be in the form prescribed by the offeror (if any)	56
2.3.2	When and where acceptance takes effect	56
2.3.2.1	The information theory as the general rule in our law	57
2.3.2.2	The expedition theory applies to postal contracts	58
2.3.2.3	The scope of the exception	59
2.3.2.4	Criticism of the expedition theory	60
2.3.2.5	Revocation or neutralisation of the posted acceptance	60
2.4.	Breaking off negotiations	61
2.5.	<i>Pacta de contrahendo</i>	62
2.5.1	Options	62
2.5.1.1	Juristic nature of an option	62
2.5.1.2	Earlier views on the nature of an option	63
2.5.1.3	Unilateral declaration that the offer is irrevocable	65
2.5.1.4	Legal effect of an option	66
2.5.1.5	Duration of the option	66
2.5.1.6	Transferability of an option	66
2.5.1.7	Formalities: options to buy or sell land	67
2.5.1.8	Remedies for breach of an option	67
2.5.2	Preference contracts	69
2.5.2.1	Right of pre-emption	70
2.5.2.2	Right of pre-emption compared with an option	70
2.5.2.3	The obligations of the grantor	71

2.5.2.4	The trigger event in a pre-emption agreement	72
2.5.2.5	The offer must be a <i>bona fide</i> one	72
2.5.2.6	Duration of the offer	72
2.5.2.7	Remedies for breach	73

CHAPTER 3: MISTAKE / ABSENCE OF CONSENSUS – CHRIS PRETORIUS

3.1	Introduction	81
3.2	Classification of mistake	82
3.2.1	Unilateral, mutual and common mistake	82
3.2.2	Irrelevant and relevant mistake	83
3.2.3	Material and non-material mistake	83
3.2.3.1	Material mistake	85
3.2.3.2	Non-material mistake	87
3.2.4	Traditional classification of material and non-material mistake	87
3.2.5	Mistake of law and mistake of fact	89
3.3	Limitations of the will theory	90
3.4	Reliance-based correctives	91
3.5	The subjective approach as qualified by estoppel and quasi-mutual assent	92
3.5.1	The doctrine of estoppel	93
3.5.2	The doctrine of quasi-mutual assent or (direct) reliance theory	95
3.6	The objective approach as qualified by the <i>iustus error</i> doctrine	97
3.6.1	The declaration theory in case law	98
3.6.2	The <i>iustus error</i> doctrine	99
3.7	Reconciliation of the subjective and objective approaches	103
3.7.1	<i>Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis</i>	103
3.7.2	Direct or indirect reliance?	105
3.8	Common mistake	108
3.9	Rectification	109

CHAPTER 4: IMPROPERLY OBTAINED CONSENSUS – DALE HUTCHISON

4.1	Introduction	113
4.1.1	<i>Restitutio in integrum</i>	114
4.1.2	Delictual damages	114
4.1.3	A general ground for rescission?	115
4.2	Misrepresentation	116
4.2.1	Misrepresentation distinguished from other pre-contractual misstatements	117
4.2.1.1	Warranties or contractual terms	117
4.2.1.2	Opinions, statements as to the future and statements of law	118
4.2.1.3	Puffs (<i>simplex commendatio</i>)	119
4.2.1.4	<i>Dicta et promissa</i>	119
4.2.2	Misrepresentation and mistake	120
4.2.3	Remedies for misrepresentation	122
4.2.3.1	Rescission and restitution	122
4.2.3.2	Misrepresentation as a defence	125
4.2.3.3	Damages	125
4.2.4	Misrepresentation by silence: non-disclosure	134
4.3	Duress	136
4.3.1	The nature of coercion	137
4.3.2	The reasonableness of the fear	138

4.3.3	The object of the threat	138
4.3.4	The imminence of the harm	139
4.3.5	The unlawfulness of the threat	139
4.3.6	Damage	140
4.3.7	Duress by a third party	140
4.4	Undue influence	141
4.4.1	Origins of the doctrine	141
4.4.2	Requirements	141
4.4.3	Abuse of circumstances	142
4.5	Commercial bribery	143
4.6	The road ahead: further grounds for rescission?	143
4.7	Consumer's right to fair and honest dealing under Consumer Protection Act	144

PART THREE: REQUIREMENTS OF A VALID CONTRACT

CHAPTER 5: CONTRACTUAL CAPACITY – BIRGIT KUSCHKE	149	
5.1	Legal capacity	149
5.2	Contractual capacity	149
5.3	Natural persons	150
5.3.1	Persons without contractual capacity	150
5.3.2	Persons with limited contractual capacity	151
5.3.2.1	Minors	151
5.3.2.2	Married persons	152
5.3.2.3	Insolvent persons	153
5.3.2.4	Prodigals	153
5.3.3	Persons with full contractual capacity	154
5.4	Juristic persons	154
5.5	The State	155
CHAPTER 6: FORMALITIES – TOMAS FLOYD	157	
6.1	Introduction	157
6.2	Formalities prescribed by law	158
6.2.1	Prescribed formalities required for validity	159
6.2.1.1	Alienation of land	159
6.2.1.2	Suretyship	160
6.2.1.3	Donation	160
6.2.2	Prescribed formalities required for enforcement against third parties	161
6.2.2.1	Antenuptial contracts	161
6.2.2.2	Long leases of land	161
6.2.3	Formalities in electronic contracts	161
6.3	Formalities stipulated by the parties	162
6.3.1	Creation of the contract	162
6.3.2	Variation of the contract: non-variation clauses and the <i>Shifren</i> principle	163
6.3.3	Cancellation of the contract: non-cancellation clauses	164
6.3.4	Limiting the <i>Shifren</i> principle	165
6.3.4.1	Restrictive interpretation	165
6.3.4.2	Where enforcement would be against public policy	167
6.3.4.3	Where a party is estopped from enforcing a non-variation clause	168
6.3.5	Non-waiver clause	168

CHAPTER 7: LEGALITY – TOMAS FLOYD	173	
7.1	Introduction	173
7.2	Illegal contracts that are void	174
7.2.1	Public interest	174
7.2.2	The conclusion, performance and object of the contract must be lawful	177
7.2.3	Specific examples of illegal contracts that are void	178
7.2.3.1	Contracts against good morals	178
7.2.3.2	Statutory illegality	179
7.2.3.3	<i>Pacta de quota litis</i> , champerty and maintenance	181
7.2.3.4	Unfair contracts	182
7.2.3.5	Unfair enforcement of a contract	185
7.2.4	The consequences of a contract that is void for illegality	187
7.2.4.1	Contract cannot be enforced (<i>ex turpi</i> rule)	187
7.2.4.2	Severing the illegal part of a contract	187
7.2.4.3	Reclaiming performance that has been made in terms of an illegal contract (the <i>par delictum</i> rule)	188
7.3	Illegal contracts that are valid but unenforceable	190
7.3.1	Wagering and gambling contracts	191
7.3.1.1	The common law	191
7.3.1.2	The National Gambling Act 7 of 2004	192
7.3.2	Agreements in restraint of trade	193

CHAPTER 8: POSSIBILITY AND CERTAINTY – JACQUES DU PLESSIS	203	
8.1	Possibility	203
8.1.1	The general rule: impossibility of performance prevents the creation of obligations	203
8.1.2	Different types of impossibility	204
8.1.2.1	Subjective and objective impossibility	204
8.1.2.2	Factual and practical impossibility	205
8.1.2.3	Legal impossibility	205
8.1.2.4	Initial impossibility, supervening impossibility and making performance impossible	205
8.1.3	Exceptional cases: liability despite impossibility	206
8.1.3.1	Contemplation of impossibility and the assumption of risk	206
8.1.3.2	Warranty: guaranteeing performance	207
8.1.4	The consequences of impossibility	207
8.2	Certainty	208
8.2.1	The general rule: uncertainty about what has to be performed prevents the creation of obligations	208
8.2.2	The application of the certainty requirement: some practical examples	209
8.2.2.1	The contract aimed at creating another contract: the <i>pactum de contrahendo</i> or 'agreement to agree'	209
8.2.2.2	Vague language and gaps	210
8.2.2.3	Contracts of indefinite duration	211
8.2.2.4	Contracts containing a mechanism whereby certainty can be obtained	211
8.2.3	The consequences of not meeting the certainty requirement	213

PART FOUR: CONTENTS AND OPERATION OF A CONTRACT

CHAPTER 9: PARTIES TO CONTRACTS – BIRGIT KUSCHKE AND DALE HUTCHISON	217
9.1 Number of parties	217
9.2 Multiplicity of parties	218
9.2.1 Divisibility of the performance	218
9.2.2 Simple joint liability and entitlement	218
9.2.3 Joint and several (<i>in solidum</i>) liability or entitlement	219
9.2.4 Collective joint liability and entitlement	220
9.3 Contracts and third parties	220
9.3.1 Privity of contract	220
9.3.2 Representation: contracting through an agent	221
9.3.2.1 Relationship between principal and agent	222
9.3.2.2 Relationship between principal and third party	223
9.3.2.3 Relationship between agent and third party	224
9.3.3 The contract for the benefit of a third party (<i>stipulatio alteri</i>)	224
9.3.4 Transfer of rights and duties to a third party	228
9.3.5 Performance by a third party	228
9.3.6 Performance made to a third party	229
CHAPTER 10: OBLIGATIONS AND TERMS – CATHERINE MAXWELL	231
10.1 Introduction	231
10.2 Obligations	232
10.2.1 Classification of obligations	232
10.2.2 Civil, natural and moral obligations	232
10.2.3 Reciprocal obligations	232
10.2.4 Simple, alternative, generic or facultative obligations	233
10.2.5 Divisible or indivisible performances and contracts	234
10.3 Terms	234
10.3.1 <i>Essentialia, naturalia, incidentalialia</i>	235
10.3.2 Express terms	236
10.3.2.1 Signed contracts: the <i>caveat subscriptor</i> rule	237
10.3.2.2 Standard-form contracts	237
10.3.2.3 Unsigned documents	237
10.3.2.4 Ticket cases	238
10.3.2.5 Notices	238
10.3.2.6 The Consumer Protection Act	239
10.3.2.7 Terms prohibited by law	240
10.3.2.8 Tacit contracts	240
10.3.3 Implied terms	242
10.3.3.1 Terms implied <i>ex lege</i>	242
10.3.3.2 Tacit terms	245
10.3.4 Material terms	246
10.3.5 Conditions and their effect on the contract	247
10.3.5.1 Positive and negative conditions	247
10.3.5.2 Suspensive and resolutive conditions	247
10.3.5.3 Potestative, casual and mixed conditions	248
10.3.5.4 Interference in the fulfilment of conditions	249

10.3.6 Time clauses	249
10.3.7 Other common contractual terms	249
10.3.7.1 Suppositions	250
10.3.7.2 Modal clauses	250
10.3.7.3 Exemption clauses	250
10.3.7.4 Non-variation clauses	250

CHAPTER 11: INTERPRETATION OF CONTRACTS – CATHERINE MAXWELL	253
11.1 Introduction and general principles	253
11.1.1 The intention of the parties	253
11.1.2 The ordinary or grammatical meaning of the words used by the parties	254
11.1.3 The textual context	254
11.1.4 The broader context	255
11.2 The parol evidence rule	255
11.2.1 The integration aspect of the parol evidence rule	255
11.2.2 The interpretation aspect of the parol evidence rule	257
11.2.3 Background circumstances	258
11.2.4 Surrounding circumstances	258
11.2.5 Circumventing the parol evidence rule	262
11.2.5.1 Alleging a tacit term	262
11.2.5.2 Applying for rectification	263
11.3 Canons of construction	264
11.3.1 Secondary rules of interpretation	264
11.3.2 Tertiary rules of interpretation	265
11.3.3 When all the rules of interpretation have been exhausted	266
11.4 Interpretation of disclaimers, indemnities and exemption clauses: a special category?	267
11.5 A subjective or objective approach to interpretation of contracts?	268

PART FIVE: BREACH OF CONTRACT

CHAPTER 12: FORMS OF BREACH – DALE HUTCHISON	275
12.1 Introduction	276
12.2 <i>Mora debitoris</i>	278
12.2.1 Distinguished from other forms of breach	278
12.2.2 Requirements	279
12.2.2.1 Debt due and enforceable	279
12.2.2.2 Failure to perform timeously	280
12.2.2.3 Fault	282
12.2.3 Consequences	283
12.2.3.1 <i>Perpetuatio obligationis</i>	283
12.2.3.2 Damages	283
12.2.3.3 Rescission	284
12.3 <i>Mora creditoris</i>	286
12.3.1 Requirements	288
12.3.1.1 Obligation to make performance	288
12.3.1.2 Cooperation	288
12.3.1.3 Tender of performance	288
12.3.1.4 Delay	289

12.3.1.5	Fault	289
12.3.2	Consequences	289
12.3.2.1	Cancellation	290
12.3.2.2	Damages	290
12.3.2.3	Specific performance	290
12.3.2.4	Counter-performance	290
12.3.2.5	Care of article and supervening impossibility of performance	291
12.3.2.6	Effect on security	291
12.3.2.7	Discharge of debt	291
12.4	Positive malperformance	292
12.4.1	Fault	292
12.4.2	Remedies	293
12.4.2.1	Rescission	293
12.4.2.2	Remedies aimed at fulfilment of the contract	294
12.5	Repudiation	295
12.5.1	Origins of repudiation as a form of breach	296
12.5.2	Conflicting approaches to repudiation in modern law	297
12.5.3	Effect of repudiation	297
12.5.3.1	Rescission of the contract (acceptance of the repudiation)	298
12.5.3.2	Affirmation of the contract (rejection of the repudiation)	299
12.6	Prevention of performance	301
12.6.1	Fault	302
12.6.2	Remedies	302
12.6.3	Partial impossibility	303
12.6.4	Temporary impossibility	303
CHAPTER 13: REMEDIES FOR BREACH – SIEG EISELEN		307
13.1	Introduction	308
13.2	Choices, alternatives and concurrence of remedies	309
13.2.1	Different types of remedy	310
13.2.2	Enforcement and cancellation mutually exclusive	310
13.2.3	Damages and interest cumulative to other remedies	310
13.2.4	Contract or delict	312
13.3	Remedies aimed at keeping the contract alive	313
13.3.1	<i>Exceptio non adimpleti contractus</i>	314
13.3.1.1	Requirements for the <i>exceptio non adimpleti contractus</i>	315
13.3.1.2	Factors affecting the application of the <i>exceptio</i>	317
13.3.1.3	Courts' equitable discretion: reduced contract price	317
13.3.1.4	Scope of the <i>exceptio</i>	318
13.3.2	Specific performance	319
13.3.2.1	Scope	319
13.3.2.2	Requirements for specific performance	320
13.3.2.3	Discretion of the courts	321
13.3.2.4	Execution of orders for specific performance	322
13.4	Cancellation	322
13.4.1	Materiality of the breach	323
13.4.2	Cancellation clause (<i>lex commissoria</i>)	323

13.4.3	The act of cancellation	323
13.4.4	Loss of the right to cancel: elections and waiver	324
13.4.5	The legal effects of cancellation	325
13.4.6	Restitution	325
13.5	Damages	327
13.5.1	The nature and purpose of contractual damages	328
13.5.2	Requirements for a damages claim	332
13.5.2.1	Financial loss	332
13.5.2.2	Causation	334
13.5.2.3	The mitigation rule	338
13.5.3	Penalty clauses	339
13.5.3.1	The Conventional Penalties Act 15 of 1962	340
13.5.3.2	Scope of the Act	341
13.5.3.3	Reduction of the penalty	341
13.5.3.4	Specific performance and penalty clauses	342
13.5.3.5	Penalty clause excludes claim for damages	342
13.5.3.6	Penalties in respect of defects or delay	342
13.6	Interest	343
13.7	Other remedies	344
13.7.1	Interdict	344
13.7.2	Declaration of rights	345

PART SIX: TRANSFER AND TERMINATION OF RIGHTS AND OBLIGATIONS

CHAPTER 14: CESSION – TOMAS FLOYD		351
14.1	Introduction	351
14.2	Nature of cession	352
14.3	Subject matter of cession	355
14.4	The requirements for a valid cession	355
14.4.1	A valid <i>causa</i> ?	356
14.4.2	The cedent must be entitled to dispose of the personal right	356
14.4.3	The personal right must be capable of cession	356
14.4.3.1	Contingent rights	356
14.4.3.2	Future rights	357
14.4.3.3	Rights too personal to be ceded	358
14.4.3.4	<i>Delectus personae</i>	358
14.4.3.5	<i>Pactum de non cedendo</i>	359
14.4.4	Transfer agreement	360
14.4.5	Formalities	360
14.4.6	Legality	361
14.4.7	Cession should not prejudice the debtor	362
14.4.7.1	Splitting of claims	362
14.4.7.2	<i>Mala fide</i> cession	363
14.5	The consequences of cession	363
14.5.1	Cedent is divested of right	363
14.5.2	Right vests in the cessionary	364
14.5.3	Cessionary is substitute creditor	364

14.5.4	<i>Nemo plus iuris ad alium transferre potest quam ipse habet</i>	364
14.5.5	Performance by the debtor must be made to the cessionary	365
14.6	Security cession (<i>cession in securitatem debiti</i>)	366
14.6.1	Fiduciary security cession (out-and-out security cession)	367
14.6.2	Pledge	368
CHAPTER 15: TERMINATION OF OBLIGATIONS – TJAKIE NAUDÉ		373
15.1	Introduction	373
15.2	Termination by performance	374
15.2.1	Required performance	374
15.2.2	Performance by a third party	374
15.2.3	The person to whom performance must be made	375
15.2.4	Place of performance	375
15.2.5	Time of performance	375
15.2.6	Performance as a bilateral act	375
15.3	Termination by agreement	376
15.3.1	Release and waiver	376
15.3.2	Novation	377
15.3.3	Compromise	377
15.3.4	Effluxion of time	379
15.3.5	Notice	379
15.4	Termination by operation of law	380
15.4.1	Set-off	380
15.4.2	Merger	381
15.4.3	Supervening impossibility of performance	381
15.4.3.1	Requirements for supervening impossibility of performance	381
15.4.3.2	Effect of supervening impossibility of performance	383
15.4.4	Prescription	385
15.4.4.1	Prescription periods	385
15.4.4.2	Commencement of prescription	385
15.4.4.3	Interruption of prescription	386
15.4.4.4	Delay of completion of prescription	386
15.4.4.5	Effect of prescription	387
15.4.5	Insolvency	387
15.4.6	Death	388
PART SEVEN: DRAFTING		
CHAPTER 16: DRAFTING OF CONTRACTS – LUANDA HAWTHORNE AND BIRGIT KUSCHKE		393
16.1	Introduction	394
16.2	Parties to the contract	394
16.2.1	Identity of the parties	394
16.2.2	Describing the parties	395
16.3	Nature of contract and heading	396
16.4	Recitals and preambles	397
16.5	Date of agreement	397
16.6	Sequence of clauses	399

16.6.1	Definitions and interpretation	399
16.6.2	Documents attached or incorporated by reference	400
16.6.3	Essential elements	401
16.6.4	Additional provisions	402
16.7	Specific clauses	402
16.7.1	Suspensive or resolutive conditions and time periods	402
16.7.2	Clauses on breach of contract	403
16.7.2.1	Right to cancel (<i>lex commissoria</i>)	403
16.7.2.2	Penalty clause	404
16.7.2.3	Forfeiture	405
16.7.2.4	Limitation of damages	405
16.7.2.5	Liability, indemnity and exemption clauses	405
16.7.2.6	Performance guarantees and warranties	406
16.8	General clauses	406
16.8.1	Amendment	406
16.8.2	Entire agreement	407
16.8.3	Cession, delegation and assignment	407
16.8.4	Waiver/relaxation of terms	407
16.8.5	Communications, notices and addresses for service / <i>domicilia citandi et executandi</i>	408
16.8.6	<i>Force majeure</i>	409
16.8.7	Applicable law	410
16.8.8	Jurisdiction of the magistrates' courts	410
16.8.9	Alternative dispute resolution procedures	411
16.8.10	Costs	412
16.8.11	Confidentiality	412
16.9	Structure and language	413
16.9.1	Language	414
16.9.2	Sentence structure and length	415
16.9.3	Active and passive voice	416
16.9.4	Indicative and subjunctive	416
16.10	Signatures	417
16.11	Other requirements	417
16.12	Example of a contract: lease agreement incorporating the requirements of the Rental Housing Act 50 of 1999	417

Principal works	427
Table of cases	428
Table of legislation	443
Glossary	446
Index	459