The law of contract forms part of the law of obligations.

**Obligation** - is a juristic bond in terms of which one party or parties on one side have a right to a performance & one party or parties on the other side have a duty to render a performance.

**Sources of obligations**

1. **Contract**: e.g. buyers right to delivery of thing bought & corresponding duty of seller to deliver the thing; arises from conclusion of a valid contract of sale between parties.
2. **Delict**: e.g. X commits defamation against Y; Y has a claim for payment of a sum of money by X in satisfaction for injury to his reputation.
3. (a) **Undue enrichment**: There is no valid legal ground for one's obtaining a benefit at the expense of another.
   (b) **Family relationships**: child's claim for maintenance against a parent.
   (c) **Negotiorum gestio**: where A in an emergency incurs expense without B's consent in order to manage B's affairs to B's advantage. A has a claim against B for the expenses so incurred.
4. **Exercising of administrative authority**: When a municipality levies assessment rates, it acquires a claim against property owners concerned for payment of taxes.
DEFINITIONS

Contract: is an agreement entered into with an intention of creating an obligation or obligations.

"Legal facts:" is a fact or set of facts to which the law attaches consequences. Obligations arise from legal facts, e.g., the birth of a child (legal fact) creates obligations on the parents to support it.

"Juristic acts:" is a lawful act of a legal subject which has at least some of the consequences of a legal subject intended to bring about, e.g., making of a will.

"Creditors & Debtors:" A person who is entitled to claim performance is a creditor; a person who is obliged to perform is called a debtor.

"Personal rights:" performance may be claimed from a particular person, namely the debtor. A personal right is an object of which is a performance is a right of any 3rd party who culpably infringes or commits a delict.

"Performance:" is human conduct which may consist in someone's doing something or not doing something, (delivering something)
Civil obligations may be enforced directly by recourse to a court of law.

Natural obligation may not. A natural obligation has some legal effect as opposed to merely moral relationship. It can be validly discharged eg an obligation which requires payment of a gambling debt.

"Void & Voidable contracts e'1 passing of ownership"

* Impossibility of performance at 1 time 1 contract is entered into prevents 1 creation of a valid contract because one of 1 basic req is lacking.

* Supervening imp of performance can only prevent 1 continued existence of an existing contract. Since all 1 basic req were met at 1 time of conclusion of 1 contract.

* Material mistake will render a contract Void i.e. No CONTRACT COMES INTO EXISTENCE!

it excludes 1 basic req for 1 existence of a contract i.e consent.

* Misrepresentation, duress /undue influence can only render a contract voidable

- contract comes into existence but it may be terminated because in such a case there is consensus so i.e. contract cannot be void but consent has been obtained in an improper manner.
Different Types of Agreements

Agreements creating obligations (contracts) contract denotes an agreement which creates obligations.

Agreement extinguishing a debt is one in terms of which an obligation is terminated e.g.: release/discharge - Discharge is achieved by 1 debtor performing what he has undertaken to perform with consequences 1 obligation is terminated.

Real Agreement - is an agreement whereby a right is transferred. Real rights e.g. ownership are transferred by delivery (movable prop) or registration (immovable prop)
Personal rights by cession

Overlapping

D walks into a cafe puts his Rs 5 on 1 counter a points to a packet of sweets 1 owner takes 1 money & hands over 1 sweets In giving D 1 sweets 1 owner

(1) Accepts D's tacit offer to buy 1 sweets (Agreement Creating Obligations)
(2) Performs by delivering sweets to D (Agreement extinguishing a debt)
(3) Transfers ownership of sweets to D (Real Agreement)
Requirements for a valid contract:
- There must be consensus or ostensible agreement between parties.
- Parties must have capacity to act.
- Performance must be possible at the time of contract entered into.
- Conclusion of the contract, performance & object of the contracting parties must be lawful.
- Constitutive formalities must be complied with.
- Contents/consequences of a contract must be ascertained or be readily ascertained.

Study unit 2. **CONSENSUS**

Consensus or ostensible consensus is one of the requirements for the conclusion of a valid contract.

Actual agreement of intention of the contracting parties. *"Consensus is generally accepted as the primary basis of contractual liability."* Saambou-Neisonale Bauwening v. Friedman

Where actual agreement does not exist, but one of the parties has a reasonable reliance on it, it does exist. In such a case, there is ostensible consensus.

The Will Theory requires actual or conscious consensus between contractants, a contract will not arise where consensus has been excluded by a material mistake. (A mistake excludes one or more of the elements of consensus.)
The Reliance Theory is an expression of the secondary basis of contractual liability. In a minority of contracts, one of the parties fails to express his intention correctly. In the latter instance, the problem is solved by holding the erring party bound to his expressed intention because of the fact that he has created a reasonable reliance in the mind of the other party that they have reached consensus. This is the secondary basis of contractual liability.

**Elements of Consensus**

(a) Agreement regarding the consequences parties wish to create:

- The contracting parties must agree that this person shall owe this performance to that person.

Should one contractant or one contractant be mistaken as to (1) persons between whom obligations as legal ties are to be created, or (2) performance to be rendered, there is no consensus but dissensus.

(b) Agreement regarding the creation of juristic consequences

- Social agreements: A & B agree to take turns to give each other lifts to work. Parties do not intend to create juristic consequences; an agreement without an intention to create liability.
Intention to be legally bound

- Contractants must reach unanimity regarding the fact that they wish to be legally bound.
- Intention to bind oneself juristically is a basis of contractual liability.

- Causa Contractus (reason for contract) Causa obligationis (reason for obligation)
- Parties must have a serious & deliberate intention to bind themselves juristically.

- Justa Causa Contractus
- Parties should have had not only a serious intention to enter into a contract, but also a lawful object in entering into an contract.

Consensus is absent: Vasco Dry Cleaners vs Twyross

1) Simulated agreements - when neither party have an intention to be bound although they created an impression outwardly that they do.
2) A sells his goods to B to evade tax.
2) Where only one of + parties did not have an intention to be bound - A makes an offer as a joke, no consensus of an auction without an intention to buy.

(c) Awareness Regarding Unanimity.
- Lack of awareness of unanimity excludes consensus.
- Knowledge of & acceptance of 1 offer on 1 hand & knowledge of 1 acceptance on 1 - other hand is required.
STUDY UNIT 3 / FORMATION OF A CONTRACT

THE OFFER

The Requirements For a valid offer

1. An offer must be definite and complete

2. An offer must embody or contain sufficient information to enable a person to whom it is addressed to form a clear idea of exactly what the offeror has in mind.

3. An offer must contemplate acceptance and a resultant obligation

4. An offer must be a firm offer

An advertisement is merely an invitation to do business, does not generally constitute an offer.

CRAWLEY vs AEX

Promise of reward is a form of advertisement does constitute an offer.

Bloom v American Swiss

5. An offer must come to the attention of the offeree (addressee). The offeree must have knowledge of the offer and to be able to react to it.

Mckenzie Farmers v Bloom vs A.S.W.C.

6. An offer must as a rule be directed at a definite person or persons, although it may also be directed at undefined persons.

B. An offer directed at defined persons where offer addressed to unascertained persons, it may be accepted by any one of them, but where addressed to specific
4.2 An offer directed at undefined persons (e.g. promise of reward, and auctions).

Simple auction: 1 bidder makes an offer which 1 auctioneer then considers and either accepts or rejects. If 1 auctioneer implies, by 1 consideration of a new bid, 1 he does not accept / 1 previous bid falls away.

Auction subject to conditions: is different.
1 conditions may relate to many things: to 1 manner & time of payment, to 1 passing of ownership, to 1 auctioneer's remuneration. Conditions relate to contents of 1 contracts of sale which are envisaged.

Legal consequences of an offer - an obligation will not arise where an offer has been made but not accepted. NO OBLIGATION WILL ARISE.

LAPSE OF AN OFFER
- after 1 expiry or lapse of 1 prescribed time,
- or of a reasonable time
- Upon 1 death of either 1 offerer or 1 offeree
- Upon being rejected
- Upon revocation.
Requirements for valid acceptance:

1. Acceptance must be unconditional & unequivocal.
   Consent is possible only where whole offer is accepted.
   When acceptance contains conditions, it is a counter offer which original offeror may accept or reject.
   An ambiguous acceptance does not constitute a valid acceptance.

2. Offer must be accepted by the person to whom it was addressed.
   Offer cannot be accepted by anyone but the person to whom it is made (Bird vs Summerville).
   Except offer of reward — public offer anyone in public may adopt it.

3. Acceptance must be a reaction to the offer.
   Bloom vs American Swiss: Court held that he could not recover reward because until plaintiff knew of the offer, he could not accept it.
   Until he accepted it, there could be no contract.
   For a contract requires there should be consensus of two minds, and if one did not know what the other was proposing, two minds never came together.

4. Acceptance must comply with any formalities set by law or by the offeror (Brand vs Spies).
I. Information Theory & its consequences: Rest on primary basis for contractual liability is actual conscious agreement between contractants.

- Offeror must be informed of acceptance of his offer before actual consensus has been reached & contract arises. Then can be no consensus unless offeror knows his offer has been accepted.

Contracts concluded by way of letter / Telegram: DRI

- Declaration Theory: Agreement is concluded once offeree has expressed his acceptance, i.e. when he has written his letter (WRIENED)

- Reception Theory: Agreement comes into being when offeror receives offeree's letter of acceptance.

- Information Theory: Agreement is concluded only when offeror has been informed of acceptance i.e. when A has read B's letter (READS) offeror, reads offeree's letter.

Application of expedition theory

Cape Explosive works Ltd v South African Oil & Fat Industries; Cape Explosive works Ltd v S. Lever Brothers = agreements entered into by letter: arise at place where & at moment when letter of acceptance is mailed. This judgment was approved by 1 appellate division in Kerguelen Sealing & Whaling Co v. Co. for Inland revenue.

Criticism of expedition theory:

- Offeror who uses 1 post to convey his offer thereby tacitly prescribes 1 post as 1 mode of acceptance.
Van der Mewe refer to authorities who criticise this theory as unconvincing and entailing affiction.
- Creates risk liability.

Expedition theory applies to letter and telegram.

**Consequences of Expedition Theory**
- If courts have adopted the posting of a letter of acceptance determines when the agreement is formed, and also where the agreement is concluded.
- Once a letter of acceptance has been posted, the offeror may no longer revoke his offer & the offeree may no longer revoke his acceptance.
- Revocation of an acceptance will result in breach of contract.
- Suggested application of info theory in case of revocation of an acceptance.
- Suppose that a letter of acceptance is delayed or lost in the post, in terms of expedition theory, the contract has already arisen at the time when the letter of acceptance was posted. Which party is at fault?
  - If delay or loss is due to the offeror’s fault, he should bear the risk & the offeree should be able to rely on the existence of the contract.
  - If offeree is at fault, then the offeree should be able to dispute the existence of the contract even though the offeree has posted the letter of acceptance.
Agreements concluded by telephone, telex, telefax/email
Information theory applies to agreements concluded by telephone. (S v. Hend(ke)r) telex, telefax & email

* Place of formation of a contract agreement is concluded at the place where last act necessary to constitute agreement is performed. Written agreements are concluded at the place where last signature affixed.

* Entering into negotiation creates a certain relationship between parties which is governed by good faith & objective reasonableness which requires each party to have due regard for legitimate expectations & interests of the other. In certain circumstances law could impose a duty to inform or to exercise due care, an obligation to pay compensation for loss arising out of frustration of reasonable expectation or a duty to continue negotiating in good faith.
OPTION CONTRACTS

DESCRIPTION & REQUIREMENTS
- Contracting parties may enter into an agreement in terms of which 1 offeror undertakes not to revoke his offer. One party grants to other an option; parties agree 1 offeror will not revoke its offer, either expressly or by implication e.g. by offering the same thing to a third party.

DEFINITION OPTION
An offer (substantive offer) reinforced by an agreement (option contract) in terms of which 1 offeror (grantor) undertakes against 1 offeree (grantee) to keep open his offer (usually for a specific period) to 1 offeree, or to put it differently, in terms of which 1 offeree acquires 1 power to consider & accept 1 offer (usually within a specified time period).

CONSEQUENCES OF AN OPTION

"" REVOCA TION

De wet & Van Wyk - an offer is made irrevocable by agreement (conclusion of option contract). An attempted revocation of a substantive offer would have no legal effect.

According to SA law an offer can be protected against revocation only by agreement. An option contract is the only way to render an offer...
irrevocable. A unilateral declaration by an offerer is irrevocable, accordingly, has no effect in our law.

Our courts regard an offer by a pactum de contrahendo as irrevocable. There is 1 view that an option does not render 1 substantive offer irrevocable, but 1 revocation of 1 substantive offer will constitute breach of contract, which should give rise to 1 normal remedies available in 1 case of breach of contract.

An attempted revocation of 1 substantive offer does not prevent 1 exercise of 1 option. 1 option holder may enforce 1 contract specifically by means of an interdict against 1 grantor of an option. 1 option holder may also claim damages if suffered to place him in 1 position he would have been in if 1 option had been exercised.

Jurisdictional Nature: S.N.
Termination of Options: S.N.
Formalities & Cession: S.N.
RIGHTS OF PREFERENCE

- another type of pactum de contrahendo
  one of prospective contractants is granted a preferential
  right to conclude a contract with 1 other prospective
  contractant.

- A right of pre-emption occurs when a prospective seller
  undertakes as against a prospective purchaser to give
  him (1 purchaser) preference if he (should decide to sell).

Legal nature & consequences of a right of pre-emption
- A contract of pre-emption does not place a duty on 1
  grantor to sell 1 subject matter of 1 right; 1 grantee
  merely acquires 1 preferential right to buy. Should 1
  grantor decide to sell, 1 prospective seller's capacity
  to alienate 1 thing in question is thus restricted.

- 1 prospective purchaser also acquires a right, but
  whereas 1 performance to which 1 grantor of an option
  is bound is 1 maintenance of an offer, 1 obligation
  in 1 case of 1 right of pre-emption is a neg one.
  1 is 1 thing may not be alienated to 3rd party
  except under 1 conditions prescribed in 1 agreement
  creating 1 right. (Owstannick case).

 Formalities concerning rights of pre-emption.
 If object of sale is land, both offer to buy (sell &
 acceptance must be in writing. Contract from
 which right of pre-emption arises also in writing.
 (Hirschowitz v Woolman)