



## DEPARTMENT OF MERCANTILE LAW

### COMMERCIAL LAW 1A (CLA101S)

#### TUTORIAL LETTER 201/3/2010

#### FIRST AND SECOND SEMESTER

Dear Student

This tutorial letter contains the memorandums and commentaries on the two assignments.

The aim of this discussion is to draw your attention to certain important aspects of the questions which you may have overlooked. Read the comments carefully to make sure that you understand both why the particular answer is correct and why the distractors (the incorrect options) are incorrect. If you are still not sure after reading the commentary, go back to the original source in your prescribed textbook.

**NOTE:** All references in brackets refer to your prescribed textbook, Havenga M et al *General Principles of Commercial Law* 6 ed (2007).

#### COMMENTARY ON COMPULSORY ASSIGNMENT 01

##### QUESTION 1

##### (Chapter 1: The South African Legal System)

5 is the **CORRECT** answer. Foreign Law is **NOT** an authoritative source of South African Law. It has persuasive authority only.

1 is an **INCORRECT** answer. Statute law is an authoritative source of South African Law. It is the most important source of law today.

2 is an **INCORRECT** answer. Customary law is an authoritative source of law, although certain requirements must be met before a customary rule will be recognised as a legal rule.

3 is an **INCORRECT** answer. The works of the old jurists of Holland are still authoritative in the courts today. Their works are collectively known as the common law.

4 is an **INCORRECT** answer. Judgments of South African courts are known as case law. Case law is an important source of law.

**QUESTION 2**  
**(Chapter 1: The South African Legal System)**

4 is the **CORRECT** answer. It is **NOT** a requirement that a customary rule must have been reduced to writing for it to be recognised as a legal rule.

1,2 and 3 are **INCORRECT** answers. They list the requirements that need to be met before a customary rule will be recognised as a legal rule, as was decided in *Van Breda v Jacobs* 1921 AD 330.

**QUESTION 3**  
**(Chapter 2: Introduction to Science of Law)**

1 is the **CORRECT** answer. Bheki has been granted the right to use the cattle in his personal capacity. The cattle are movable. Solomon remains the owner.

2 is an **INCORRECT** answer. The holder of a praedial servitude is usually the owner of property who enjoys a limited right to the adjacent property of another.

3 is an **INCORRECT** answer. Pledge relates to moveable property and is given as security for a debt. The cattle were not transferred to Bheki as a form of security for a debt owed to him by Solomon.

4 is an **INCORRECT** answer. Mortgage relates to immoveable property and is given as security for a debt. The cattle were not transferred to Bheki as a form of security for a debt owed by Solomon. Secondly, a herd of cattle is not immovable property, but moveable.

5 is an **INCORRECT** answer. Bheki has not had the cattle for an uninterrupted period of thirty years.

**QUESTION 4**  
**(Chapter 2: Introduction to Science of Law)**

1 is the **CORRECT** answer. Necessity exists when a person is through external forces placed in such a position that the person's legitimate interests can only be protected through a reasonable infringement of the rights of another. Here, Freddie protected his interest (his sick child) by violating the law.

2 is an **INCORRECT** answer. Provocation exists where a person is provoked or incited by another's words or actions to cause harm to that other person. Although Freddie might have been provoked at the pub, his exceeding the speed limit does not meet the requirements for provocation as ground of justification: his conduct (exceeding the speed limit) does not constitute immediate and reasonable retaliation against the body of the provoker. The position would be different if he is charged with assaulting the other person in the bar.

3 is an **INCORRECT** answer. In cases of self-defence a person defends himself or herself against an actual imminent unlawful attack by another to defend his or her own or another's legally acknowledged right. Freddie was not under any threat or unlawful attack when he exceeded the speed limit.

4 is an **INCORRECT** answer. Where a person legally capable of expressing his or her will gives consent to injury or harm, the causing of such harm will be lawful. Here, Freddie did not give consent to anyone.

**QUESTION 5**  
**(Chapter 4: Consensus)**

3 is the **CORRECT** answer. When Johnny agreed to keep the offer open for one week, an option came into being. Johnny may therefore neither offer the house to Masedi nor accept Masedi's offer in respect of the house for the duration of the option.

1 is an **INCORRECT** answer. Johnny accepted the offer that the substantive offer (the offer to let the house to Robert) would remain open for a period of one week, which constitutes an option contract. Johnny is therefore bound in terms of the option contract to keep the substantive offer open for the duration of the option.

2 is an **INCORRECT** answer. An option exists between Johnny and Robert. Johnny is therefore bound to keep the substantive offer open for the agreed period until Robert has rejected the offer and communicated his rejection to Johnny. Johnny cannot assume that Robert will reject the offer until the period of the option has lapsed.

4 is an **INCORRECT** answer. An option exists between Johnny and Robert in terms of which Johnny will keep the substantive offer open for a period of one week, to enable Robert to decide whether he wishes to accept the substantive offer or not. Therefore, Johnny may neither offer to let the house to Masedi nor may he accept Masedi's offer in respect of the house, until the period of one week has lapsed or Robert has rejected the substantive offer. After one week he may let the house to Masedi, and need not wait for an answer from Robert.

**QUESTION 6**  
**(Chapter 4: Consensus)**

3 is the **CORRECT** answer. A valid contract came into existence because all the requirements for a valid contract were met even though consensus was obtained in an improper manner. The innocent party may elect to uphold or rescind it.

1 is an **INCORRECT** answer. Misrepresentation makes a contract voidable, not void, because the parties did reach consensus.

2 is an **INCORRECT** answer. Although a contract came into existence, consensus was obtained in an improper manner - Richard can therefore rescind the contract.

4 is an **INCORRECT** answer. Misrepresentation per se does not exclude consensus.

**QUESTION 7**  
**(Chapter 5: Capacity to Perform Juristic Acts)**

3 is the **CORRECT** answer. Pepe will **NOT** be able to contract because he is still a minor and has limited capacity to act. He will require the assistance of his guardian until he reaches the age of majority after which he will have full capacity to act.

1 is an **INCORRECT** answer. Arthur does have full capacity to act, as no information to the contrary is provided. Being a citizen of another country has no effect on a person's capacity to contract in South Africa. Neither does the fact that a person is not domiciled or resident here.

2 is an **INCORRECT** answer. Mabel does have the capacity to contract independently. The fact that Mabel is a widow has no effect on her capacity to contract.

4 is an **INCORRECT** answer. Pedro does have the capacity to contract independently. Mere prodigal tendencies have no effect on a person's capacity to act. Only when the court declares a person a prodigal and appoints a curator, will that person be forbidden to perform juristic acts without the consent of his or her curator.

**QUESTION 8**  
**(Chapter 5: Capacity to Perform Juristic Acts)**

3 is the **CORRECT** answer. Spouses married out of community of property are obliged to make pro rata contributions in respect of necessities for the common household. They are also jointly and severally liable to third parties for all debts incurred by either spouse for necessities for the common household.

1 is an **INCORRECT** answer. In marriages *in* community of property there is a joint estate which acquires the profits which arise during the marriage. In marriages *out* of community of property each party retains his or her own estate and if such a marriage was concluded after 1 December 1984 it is subject to the accrual system unless expressly excluded by the antenuptial contract.

2 is an **INCORRECT** answer. Parties retain their capacity to act in respect of their own estates.

4 is an **INCORRECT** answer. In a marriage out of community of property each of the spouses retains his or her separate estate and has full capacity to act in respect of his or her own estate. Tahira does not have to give her consent to the sale of a farm belonging to Vic because it forms part of Vic's estate in respect of which he has full capacity to act.

**QUESTION 9**  
**(Chapter 6: The Agreement must be Possible)**

2 is the **CORRECT** answer. An agreement to commit a crime is contrary to public policy and therefore legally unenforceable. Mr Assassin will therefore not be entitled to payment because the agreement between him and Tim is contrary to public policy.

1 is an **INCORRECT** answer. Mr Assassin is not entitled to payment. This is not because performance became impossible, but rather because the agreement between him and Tim was contrary to public policy.

3 is an **INCORRECT** answer. Even if Paul had not died of natural causes and performance had not become impossible due to this fact, Mr Assassin would still not be entitled to payment because the agreement between him and Tim was contrary to public policy.

4 is an **INCORRECT** answer. Mr Assassin is not entitled to payment. This is not because the performance was subject to this implied term, but because the agreement between him and Tim was contrary to public policy.

**QUESTION 10**  
**(Chapter 6: The Agreement must be Possible)**

4 is the **CORRECT** answer. The National Gambling Act 33 of 1996 provides that any gambling debt which is lawfully incurred in the course of any gambling activity regulated by any law and which is not in any respect in conflict with that law, is enforceable, notwithstanding the provisions of the common law or any other law. Victor has an enforceable right against Derick since the debt was incurred in the course of a regulated and lawful gambling activity. Such a debt is valid and enforceable.

1 is an **INCORRECT** answer. In terms of the provisions of the National Gambling Act Victor has an enforceable right against Derick for his winnings since Derick's debt was incurred in the course of a regulated and lawful gambling activity. This gambling debt is enforceable notwithstanding the provisions of the common law or any other law.

2 is an **INCORRECT** answer. An agreement will be contrary to the good morals of the community if the act itself, or the rights and duties agreed upon, are contrary to the community's perception of what is proper and decent and in accordance with the conscience of the community, for example, contracts aimed at promoting sexual misconduct. The agreement between Victor and Derick is a lawful contract and it is not against good morals.

3 is an INCORRECT answer. Although Victor has an enforceable claim against Derick, this claim is not based on unjustified enrichment, but on the gambling contract between Derick and Victor.

## COMMENTARY ON COMPULSORY ASSIGNMENT 02

### QUESTION 1

#### (Chapter 7: Formalities)

1 is the **CORRECT** answer. In terms of the General Law Amendment Act 50 of 1956, a contract of donation need only be reduced to writing where performance is due in the future. In the present instance no performance is due in the future. The contract between aunt Martha and Liz is valid because performance has taken place. Liz is therefore the rightful owner of the watch.

2 is an INCORRECT answer. In terms of the General Law Amendment Act 50 of 1956 a contract of donation need only be reduced to writing where performance is due in the future. In the present instance no performance is due in the future. Therefore the contract does not have to be reduced to writing and is therefore valid.

3 is an INCORRECT answer. In terms of the General Law Amendment Act 50 of 1956 a valid contract of donation was concluded. Liz has not been unjustifiably enriched.

4 is an INCORRECT answer. In terms of the General Law Amendment Act 50 of 1956 a valid contract of donation was concluded. Liz is the owner of the watch. She is not obliged to return the watch to aunt Martha.

### QUESTION 2

#### (Chapter 7: Formalities)

3 is the **CORRECT** answer. In terms of the Electronic Communications and Transactions Act 25 of 2002, a scanned handwritten signature qualifies as an electronic signature.

1 is an INCORRECT answer. In terms of the Electronic Communications and Transactions Act 25 of 2002, an electronic signature does not always legally fulfil the same function as a handwritten signature. It only does so in certain circumstances.

2 is an INCORRECT answer. In terms of the Electronic Communications and Transactions Act 25 of 2002, where a signature is required by law, only the use of an *advanced electronic signature* will comply. The typing of a name at the end of the document will therefore not comply.

4 is an INCORRECT answer. In terms of the Electronic Communications and Transactions Act 25 of 2002, an *advanced electronic signature* is defined as a signature which results from an accredited process allowing the recipient to verify the source of the communication. A signature which results from an accredited process but only allows the recipient to verify the date and time it was sent is not an *advanced electronic signature*.

### QUESTION 3 (Chapter 8: Terms of the Contract)

1 is the **CORRECT** answer. This is an example of a resolutive condition. A condition is a contractual term which renders the operation and consequences of the contract dependent on the occurrence or non-occurrence of a specified *uncertain* future event, whereas a time clause is subject to a specified *certain* future event, either determined or ascertainable. Because it is uncertain whether Rose will ever buy a house, the contract between Rose and Sandra is dependent on the occurrence of a specified *uncertain* future event. The term is therefore a condition. A time clause or condition is resolutive if the obligations flowing from the contract will only have effect until the future event occurs: an uncertain event in the case of a condition; and a certain event in the case of a time clause. Because the contract of lease will only have effect until Rose buys her own house (if she ever does), and will terminate if she does, the condition is resolutive.

2 is an **INCORRECT** answer. Although the contract between Rose and Sandra is subject to a condition, the condition is resolutive and not suspensive. A suspensive condition is a contractual term which suspends the operation of the contractual obligations until the condition has been fulfilled. The operation of the contract between Rose and Sandra is not suspended until a condition is fulfilled, but becomes operative immediately. It will however terminate when the condition is fulfilled and is therefore a resolutive condition.

3 is an **INCORRECT** answer. This contract is not subject to a time clause, but to a condition. A time clause is a contractual term which renders the operation and consequences of the contract dependent on the occurrence of a *certain* future event, either determined or ascertainable, whereas a condition is subject to the occurrence or non-occurrence of a specified *uncertain* future event. Because it is uncertain whether Rose will ever buy a house, the contract between Rose and Sandra is dependent on the occurrence of a specified *uncertain* future event. The term is therefore a condition. A time clause or condition is resolutive if the obligations flowing from the contract will only have effect until the future event occurs: an uncertain event in the case of a condition; and a certain event in the case of a time clause. Because the contract of lease will only have effect until Rose buys her own house (if she ever does), and will terminate if she does, the condition is resolutive.

4 is an **INCORRECT** answer. This contract is not subject to a time clause, but to a condition. A time clause is a contractual term which renders the operation and consequences of the contract dependent on the occurrence of a *certain* future event, either determined or ascertainable, whereas a condition is subject to the occurrence or non-occurrence of a specified *uncertain* future event. Because it is uncertain whether Rose will ever buy a house, the contract between Rose and Sandra is dependent on the occurrence of a specified *uncertain* future event. The term is therefore a condition. Furthermore, the condition in this case is resolutive and not suspensive. A time clause or condition is suspensive if the performance in terms of the contract is only claimable when the future event occurs: an uncertain event in the case of a condition; and a certain event in the case of a time clause. A time clause or condition is resolutive if the obligations flowing from the contract will only have effect until the future event occurs, an uncertain event in the case of a condition, and a certain event in the case of a time clause. Because the contract of lease will only have effect until Rose buys her own house (if she ever does), and will terminate if she does, the condition is resolutive.

**QUESTION 4**  
**(Chapter 8: Terms of the Contract)**

4 is the **CORRECT** answer. This is a supposition because the existence of the contract is dependent on a state of affairs which exists at the time that the contract is concluded, although neither party is certain what the state of affairs is at the time of the conclusion of the contract.

1 is an **INCORRECT** answer. In law a warranty is a contractual term whereby the party accepts absolute responsibility. June did not give a warranty or guarantee that the beach was visible from the stand.

2 is an **INCORRECT** answer. A condition is a contractual term which renders the operation and consequences of the contract dependent on the occurrence, or non-occurrence, of a specified uncertain future event. To constitute a condition a contract must contain a reference to a specified event which may or may not take place in the future. Whether the beach is visible from the stand or not, is a fact which already exists, and the term is therefore a supposition.

3 is an **INCORRECT** answer. A modus is a contractual term which obliges a contracting party to do something or to refrain from doing something. Neither Clarence nor June is obliged to do or refrain from doing anything.

**QUESTION 5**  
**(Chapter 9: Interpretation of the Contract)**

4 is the **CORRECT** answer. In terms of the integration rule (parol evidence rule), the written document is the only record of the agreement. The document containing the parties' agreement stands as the only evidence of the terms of their contract. The effect of this rule is that once a contract has been recorded in writing, a contracting party will not be allowed to submit evidence that the real agreement was different from what was recorded in writing. Therefore Tshepo may not rely on the oral agreement between herself and Thabo, and she is obliged to perform in accordance with the written document. Tshepo is obliged to repay the loan immediately.

1 is an **INCORRECT** answer. Sometimes a written document does not reflect the true intention of the parties because an error, such as a typing error, slipped in when the agreement was reduced to writing. In these circumstances, the written document may be rectified in order to record the parties' true intention. In the instance, Tshepo may not apply for the rectification of the written document, because no error slipped in when the agreement was reduced to writing.

2 is an **INCORRECT** answer. Thabo did not commit breach of contract when he called up the loan, because he acted in accordance with the written contract that existed between himself and Tshepo.

3 is an **INCORRECT** answer. Tshepo cannot rely on the oral agreement between herself and Thabo because of the operation of the parol evidence rule.

**QUESTION 6**  
**(Chapter 9: Interpretation of the Contract)**

3 is the **CORRECT** answer. Rectification will be granted if Hugh can prove that because of an error the written document does not reflect their true intention.

1 is an **INCORRECT** answer. It was never the intention of the parties that a four piece suite should be involved.

2 is an **INCORRECT** answer. The parol evidence rule does not prevent rectification of an error in a written contract.

4 is an **INCORRECT** answer. There is consensus on all material terms, but the document does not reflect this correctly.

**QUESTION 7**  
**(Chapter 10: Breach of Contract)**

2 is the **CORRECT** answer. Mora creditoris occurs where the creditor causes the debtor's performance to be delayed. Leon was the creditor in respect of the delivery of the fish. The creditor, Leon's, co-operation was required for Seasong Fisheries (the debtor) to render performance. Because Leon wasn't present when Seasong Fisheries wanted to deliver the fish, he caused Seasong Fisheries's performance to be delayed and committed breach of contract in the form of mora creditoris.

1 is an **INCORRECT** answer. Mora debitoris is committed when the debtor does not perform on the agreed time, and the delay is due to his or her own fault. Leon did not commit breach of contract in the form of mora debitoris because Seasong Fisheries, and not Leon, was the debtor. Leon was the creditor in respect of the delivery of the fish.

3 is an **INCORRECT** answer. Repudiation as a form of breach of contract is any behaviour by a party to a contract indicating that he or she does not intend to honour his or her obligations. The basic question is whether the person alleged to have repudiated his or her obligation has behaved in such way as to lead a reasonable person to conclude that he or she does not intend to fulfil his or her part of the contract. Mere failure to perform on the part of the debtor will therefore not constitute repudiation. Leon did not commit breach of contract in the form of repudiation of the contract, because he didn't indicate or create the impression that he did not want to fulfil his obligations - he merely caused Seasong Fisheries's performance to be delayed.

4 is an **INCORRECT** answer. Leon was the creditor in respect of the delivery of the fish - he therefore didn't commit prevention of performance by the debtor. In addition, performance was still possible; it merely delayed.

5 is an **INCORRECT** answer. Even though Leon was the creditor in respect of the delivery of the fish, he did not commit breach of contract in the form of prevention of performance by the creditor because he did not culpably render the debtor's (Seasong Fisheries's) performance impossible. Seasong Fisheries's performance was still possible, but it was only delayed.

**QUESTION 8**  
**(Chapter 10: Breach of Contract)**

2 is the **CORRECT** answer. As this is a reciprocal agreement, the debtor remains entitled to the performance due to him even though the creditor refuses to accept performance. However, the obligation towards the creditor is not, as a result of mora creditoris, automatically regarded as having been fulfilled.

1 is an **INCORRECT** answer. It is enough if the debtor, Conrad in this case, tenders performance. This he has done by offering to pay the balance of the purchase price in the letter of demand.

3 is an **INCORRECT** answer. It is Leonard who is in mora and not Conrad. Conrad (the debtor) will therefore be released from his obligation to perform should the performance become impossible other than through intention or gross negligence while Leonard (the creditor) is in mora.

4 is an **INCORRECT** answer. Leonard is in mora and not Conrad. The debtor's duty of care is diminished if the creditor is in mora; he or she is responsible only for intentional loss and loss occasioned by gross negligence.



**QUESTION 9****(Chapter 11: Remedies for Breach of Contract)**

1 is the **CORRECT** answer. The innocent parties, Brian and Chris may claim specific performance, which is delivery of the car and the books.

2 is an **INCORRECT** answer. The innocent party has the choice between claiming specific performance or to give the guilty party notice of intention to cancel the contract.

3 is an **INCORRECT** answer. Alex committed breach of contract by not delivering the books and Chris cannot cancel the contract immediately. Chris can demand performance by a certain date.

4 is an **INCORRECT** answer. The innocent party may apply for a prohibitory interdict against to the guilty party to prohibit him or her from disposing of the property to anyone else.

**QUESTION 10****(Chapter 12: Transfer and Termination of Personal Rights)**

2 is the **CORRECT** answer. Cession is an agreement between the holder of a right (Connie in our case) and a third party (Barry) to the effect that the third party shall henceforth be the holder of the right. In other words, it is an agreement by which a personal right (the free car wash) is transferred to Barry.

1 is an **INCORRECT** answer. Cession is the agreement between Connie and Barry. No new obligation arises between Barry and Shine Car Fixtures. The original obligation continues to exist. The debtor (Shine Car Fixtures) merely has to perform to a new creditor (Barry).

3 is an **INCORRECT** answer. Cession is indeed the agreement between Connie and Barry. No new obligation is, however, created. The original obligation continues to exist.

4 is an **INCORRECT** answer. Cession is the agreement between Connie and Barry, and no new obligation is created. The debtor (Shine Car Fixtures) merely has to perform to a new creditor (Barry).

5 is an **INCORRECT** answer. Cession is the agreement between Connie and Barry in terms of which Barry becomes entitled to Shine Car Fixtures' performance.

**THE LECTURERS**  
**UNISA**