

# COMMERCIAL LAW 201: PAPER 1

## THE LAW OF SALE, CARRIAGE & LEASE

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Acknowledgment:

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## **1. INTRODUCTION**

Welcome to Commercial Law 201, Paper 1 in 2012. This handout supplements your general information handout for Commercial Law 2. It contains general information regarding Paper 1 and includes the three modules for this course, namely:

- (a) The Law of Sale;
- (b) The Law of Lease; and
- (c) The Law of Carriage.

### **1.1 Overview**

The law of sale, lease and carriage is one of two Commercial Law courses offered in the first semester to second year level students registered in the Faculty of Commerce (COL 201, paper 1 and COL 202, paper 2). Approximately 70% of the course is dedicated to the law of sale and lease in equal measure, with carriage taking up the remainder of course. The purpose and outcomes of the course follow and expand upon the South African Institute for Chartered Accountants' (SAICA) recommendations for law courses.

In general, the course aims to provide insight into the nature and function of the law of sale, lease and carriage in South Africa. In particular, the course aims to ensure that students have insight into the principles governing trading transactions and the rights and responsibilities of parties to a contract of purchase and sale, letting and hiring and carriage. In addition, the purpose of the course is to introduce students to the relevant legislation relating to each topic and to give them an understanding of some of the more common legal situations which can arise in a sale, carriage or lease relationship and how situations are dealt with by the law.

### **1.2 Credit Value**

7.5 Credits.

### **1.3 Assumptions of Prior Learning**

In order successfully to complete this course, students need to be able to:

- Be capable of writing and communicating in coherent English.
- Have a basic working knowledge of the South African legal system, legal terminology and the general principles of contract learnt and applied in Commercial Law 101.
- Know how and where to access resources such as textbooks, law reports and statutes in the Law Library and on the intranet.
- Be capable of independent learning.

## **2. OUTCOMES**

### **2.1 Critical Outcomes**

Students will be able to:

- identify and solve practical legal problems.
- organise and manage themselves and their work load.
- communicate effectively in class debate and class assessments.
- use technology in legal research.
- analyse and evaluate information.

## **2.2 Intended Specific Outcomes**

The course is designed so that students successfully completing this course should be able to achieve the following outcomes:

- To understand and explain the essential elements of a valid contract of sale, lease and carriage.
- To understand and explain some of the key legal consequences of entering into a contract of sale, lease and carriage.
- To understand and explain the legal duties that are imposed upon parties, and the consequences that flow if these duties are breached.
- Apply the knowledge acquired during the course to solve practical problems with regard to specific contracts.
- To recognise and explain the features of special contracts, particularly those regulated by statutes.

## **3. TEACHING METHODS**

Commercial Law 201 Paper 1 consists of three different sections, namely, the law of sale, the law of lease and the law of carriage – taught in the first semester by **Ms Vicky Heideman**. Separate modules (attached) are provided for each section of the course. These modules set out the basic structure of the topics to be covered in each section. Students are expected to read ahead in the module for the next lecture in order to acquire a basic familiarity with the relevant topic. Lectures will be presented by means of *viva voce* lectures and PowerPoint presentations will be utilised where appropriate. It is important that students note that the modules provided are not comprehensive. Some topics require responses to questions posed in the module, while some topics will be covered orally in class only. Students are therefore expected to take their own notes in lectures to supplement each module. Occasionally, students will be expected to explain case law and consider practical questions in class.

## **4. ASSESSMENT**

There will be two formal tests for Commercial Law 201: Paper 1 which will make up the course's class work component. The test will be combined with Commercial Law 201: Paper 2. For the paper 1 component, the test usually consists of 10 multiple choice questions (MCQs) and one long question in problem form. Please refer to the general information handout for information regarding dates and venues.

Students will be presented with typical examination questions during lectures from time to time. These questions will cover material already lectured upon and students will be guided through the process of answering these questions. This exercise will enable students to have instant feedback on how well they have assimilated knowledge.

The content of this course will be examined in June 2012. The paper will contain three questions of which students are required to answer two. One question will take the form of a multiple choice question paper to which negative marking will be applied, and the remaining two questions will be theory / problem type questions.

<b>Specific outcomes</b>	<b>Assessment criteria</b>	<b>Assessment tasks</b>
To understand and explain the essential elements of a valid contract of sale, lease and carriage.	<ul style="list-style-type: none"> <li>• Define and explain the essential elements of the specific contracts studied in the course.</li> <li>• Apply any relevant statutory and common law principles to specific contracts.</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and questioning.</li> <li>• MCQ's in tests and examinations.</li> <li>• Problem and theory questions in tests and examinations.</li> </ul>
To understand and explain the legal obligations that are imposed upon parties to specific contracts, and the consequences that flow if these duties are breached.	<ul style="list-style-type: none"> <li>• Define and explain the various legal duties of parties to specific contracts.</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and questioning.</li> <li>• MCQ's in tests and examinations.</li> <li>• Problem and theory questions in tests and examinations.</li> </ul>
Apply the knowledge acquired during the course to solve practical problems with regard to specific contracts.	<ul style="list-style-type: none"> <li>• Identify and discuss the relevant legal problem or issue.</li> <li>• Apply the applicable law to the legal problem or issue.</li> <li>• Conclude with reference to remedies available, if appropriate.</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and questioning.</li> <li>• MCQ's in tests and examinations.</li> <li>• Problem and theory questions in tests and examinations.</li> </ul>
To recognise and explain the features of special contracts, particularly those regulated by statute.	<ul style="list-style-type: none"> <li>• Discuss the important or unique features of special contracts.</li> <li>• Discuss the legal requirements that attach to certain contracts regulated by statutory enactments.</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussion and questioning.</li> <li>• MCQ's in tests and examinations.</li> </ul> <p>Problem and theory questions in tests and examinations.</p>

## 5. RESOURCES

Students will be provided with a module for each section of the course which will in turn include a list of recommended texts. Please note that there are **no** prescribed texts for this course. However, there are several general Commercial Law textbooks which are very useful, as well as the relevant volumes of LAWSA (the Law of South Africa) which you will be able to find in the reference section of the Law Library (see some examples listed below). You will also need to consult legislation from time to time (specifically in reference to the law of carriage). Legislation can be accessed on the internet via the Rhodes library webpage. Click on the Netlaw database on the electronic information resources library site.

J Scott (ed)	<i>The Law of Commerce in South Africa</i> (2009) OUP: Cape Town.
D Collier-Reed and K Lehmann (ed)	<i>Basic Principles of Business Law</i> (2006) LexisNexis: South Africa.
Govindjee <i>et al</i>	<i>Commercial Law 2: Fresh Perspectives</i> (2007) Pearson: South Africa.
Govindjee <i>et al</i>	<i>Commercial Law 1: Fresh Perspectives</i> (2006) Pearson: South Africa.
Nagel <i>et al</i>	<i>Commercial Law</i> (2006) 3 ed Lexisnexis Butterworths: Durban.
Visser <i>et al</i>	<i>Gibson: South African Mercantile and Company Law</i> (2000) 8 ed Juta: Cape Town.

## COURSE CONTENT

### LAW OF SALE

- Section 1 - The definition and essentials of the contract**
- Section 2 - The legal effect of the contract: ownership, risk and benefit**
- Section 3 - Seller's Duties and Buyer's Remedies**
- Section 4 - Buyer's Duties and Seller's Remedies**
- Section 5 - Sales regulated by Statute**

### LAW OF LEASE

- Section 1 - Introduction: Definition, Essentials and Formalities of a contract of lease**
- Section 2 - The lessor's obligations and the lessee's remedies**
- Section 3 - The lessee's obligations and the lessor's remedies**
- Section 4 - The legal position of the lessee: subletting, cession, assignment, *Huur gaat voor koop***
- Section 5 - Termination of a lease agreement**
- Section 6 - Renewal of a lease**

### LAW OF CARRIAGE

- Section 1 - Introduction: Purpose and importance of the law of carriage**
- Section 2 - The Common Law Contract of Carriage: Definition, Parties and the Praetor's Edict**
- Section 3 - The obligations of the consignor and the carrier**
- Section 4 - Commencement, termination and limitation of liability and remedies**
- Section 5 - Carriage by Road and Rail**
- Section 6 - Carriage by Sea**
- Section 7 - Carriage by Air**

# THE LAW OF SALE

## 1. COURSE INFORMATION

As set out above, Commercial Law 201 Paper 1 consists of three different sections, namely, the law of sale, the law of lease and the law of carriage. This module contains information on the first section of the course, namely, the law of sale. The law of sale will be taught over approximately the first 9/10 lectures in the first semester.

## 2. MODULE INFORMATION

This module sets out the basic structure of the topics to be covered in the law of sale. Students are expected to read ahead in the module for the next lecture in order to acquire a basic familiarity with the relevant topic. It is important that students note that the module is **not** comprehensive. Some topics require responses to questions posed in the module, while some topics will be covered orally in class only. Students are therefore expected to take their own notes in lectures to supplement the module. Occasionally, students will be expected to explain case law and consider practical questions in class.

## 3. RECOMMENDED TEXTBOOKS

Please note that there are **no** prescribed texts for this course. However, you have been referred to several general Commercial Law textbooks above which you may want to consult. Should you wish to have a more in-depth knowledge of the law of lease, please consult Professor A J Kerr's *The Law of Sale and Lease* (2004) 3 ed Butterworths: Durban and R H Zulman *Norman's Law of Purchase and Sale in South Africa* (2005) 3 ed LexisNexis: Durban.

## COURSE OUTLINE

### 1. Introduction to the Law of Sale

- 1.1 Definition
- 1.2 Essentials of a Contract of Sale

### 2. The legal effects of the contract

- 2.1 Passing of Ownership
- 2.2 Risk and Benefit

### 3. The seller's obligations and the buyer's remedies

Introduction – relations between the parties to a sale

- 3.1 The seller's obligations
  - 3.1.1 Care of the Thing Sold
  - 3.1.2 Making the Thing Sold Available (the duty to deliver)
  - 3.1.3 Warranty against Eviction
  - 3.1.4 Duty to Deliver the *res* free from Defects

(The buyer's remedy for a breach of the obligation follows each subsection)

### 4. The buyer's obligations and the seller's remedies

- 4.1 Introduction
  - (a) Payment of the Purchase Price
  - (b) To remove the *res*, or if it is brought to him, to receive it.
  - (c) Reimbursement of the Seller's Necessary Expenses
- 4.2 The seller's remedies

### 5. Sales regulated by Statute

- 6.1 Alienation of Land Act 68 of 1981
- 6.2 National Credit Act 34 of 2005
- 6.3 Electronic Communications and Transactions Act 25 of 2002
- 6.4 The Consumer Protection Act 68 of 2008



# THE LAW OF SALE

## Part 1

### Introduction

While sale is a species of contract, it has special rules governing its use and is therefore dealt with separately from the law of contract. It is important to know these special rules in the commercial world as the contract of sale is probably the most common or prevalent contract found in practice.

The contract of sale as it is known today, derives its origins from the Roman consensual contract of *emptio venditio* as accepted by Roman-Dutch lawyers. It is different to English law where a sale is distinct from an agreement to sell.

#### 1.1 Definition

According to Kerr (*Law of South Africa* vol 24 at 3), a contract of sale is formed when parties who have the requisite intention agree together or appear to agree that the one, called the seller or the vendor, will make something, called the thing sold or the *res vendita* or *merx*, available to the other, called the buyer or the purchaser, in return for the payment of a price the contract is a sale.

This definition takes its roots, and has remained virtually the same, from *Treasurer-General v Lippert* (1883) 2 SC 172, where the full board of the Judicial Committee of the Privy Council cited with approval De Villier's J statement that:

'A sale is a contract in which one person (the seller or the vendor) promises to deliver a thing to another (the buyer or *emptor*), the latter agreeing to pay a certain price.'

#### 1.2 Essentials of a Contract of Sale

From the definitions set out above, it is clear there must be agreement on certain essential elements for a contract of sale to be valid. However, do not forget about the general elements of a contract that you learnt about in your first year which would still need to be complied with.

What are the general elements of a contract?

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What are the essential elements of a contract of sale? Mackeurtan (*Sale of Goods in South Africa* at 1) states that:

'The 3 essentials of the contract of sale are agreement (*consensus ad idem*); a thing sold (*merx*); and a price (*pretium*), with a view to exchanging the thing for the price. If these exist, there is a sale. Neither delivery nor payment is necessary to the creation of the contract, for they both fall within the category of its performance.'

Before discussing the essentials of the contract of sale in detail, it is useful to consider the latter part of Mackeurtan's statement. Given that '[n]either delivery or payment is necessary for the creation of the contract', it can be said that it is the *agreement alone* that constitutes the sale. Legal rights and duties flow immediately upon agreement and not from delivery or at another juncture. In this regard, see *Nimmo v Klinkenberg Estates Co Ltd* 1904 TH 310 at 314:

'[T]he word 'sale' is used with various meanings. To lawyers discussing it from an academic point of view it means the time when the parties have arrived at a valid and binding agreement, apart from any question whether the purchase price has been paid or whether there has been delivery of the article sold.'

Consider the following questions and write your answer in the space provided.

(a) Is delivery or payment necessary to the creation of a contract of sale?

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(b) Define the following words: *emptio venditio*, *consensus ad idem*, *merx*, *res vendita*, *pretium*.

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Let us now consider the three essential elements of a contract in greater detail.

### 1.1.1 Agreement

The general principles that you learnt in your course on contract (Commercial Law 101) apply here, *inter alia*, the agreement must not be tainted by mistake, misrepresentation, duress or undue influence and the parties must act with the intention of contracting a sale.

For a contract to 'qualify' as a contract of sale, the law requires that two key features exist in the contract. These are (a) agreement as to the thing sold and (b) agreement as to the price to be paid for the thing.

Thus, in the paragraphs that follow, we look at:

- (A) the subject matter of the sale and its essential characteristics ('the thing sold'); and
- (B) the price to be paid ('*pretium*').

## **A The thing sold**

The thing sold is also known as the *res vendita* or the *merx*. Generally, nearly anything may be sold. The thing to be sold may be movable or immovable, corporeal or incorporeal, provided that the thing sold is capable of being sold in commerce (ie. *intra commercium*). An example of an incorporeal *merx* that can be subject to a valid contract of sale is a servitude or a patent. In *Theron Ltd (in liquidation) v Gross* 1929 CPD 345, the liquidators of a company were able to sell the outstanding book debts of a company.

The general requirement is that the thing sold must be:

- definite or ascertainable and not vague at the time of the conclusion of the contract; and
- existing at the time of the contract, or having potential existence.

It is best to tackle the intricacies of this particular section by dealing with certain words in the general requirements set out above:

### **A1 When is the *merx* 'definite'?**

It can be said that the *merx* is definite:

- when it is mentioned by name in the agreement, for example, 'erf 1390, Somerset Heights, Grahamstown' or 'the horse, Morning Star'
- When it is clear that the parties were in agreement about the thing being sold.

### **A2 When is the *merx* 'ascertainable'?**

This question usually arises in the case of a generic sale (a sale of a quantity of a particular type of thing). In these circumstances *merx* is not definite, but ascertainable, since the number, weight and measure is mentioned together with the type of thing, for example, 'ten thousand bricks', 'one thousand kilograms of horse manure' or 'three thousand litres of petrol'.

### **A3 What does 'potential existence' mean in the context of the thing sold?**

The general requirement is that the thing sold must exist at the time of the contract or have a potential existence. Most things that are sold are in existence at the time of the sale. However, goods which do not exist at the time of the sale may also be the subject of a valid sale if the sale takes one of two forms:

#### **A3 (1) *Emptio Rei Speratae***

Here, the parties know that the thing is not in existence but they expect it to come into existence. In these circumstances, they contract on the condition that it does come into existence. For example, A may agree to purchase B's next crop of Lucerne at R20 per bag. The sale is subject to a suspensive condition, viz if B's crop is destroyed or does not materialise for some reason, there is no sale.

### **A3 (2) *Emptio Spei***

It is possible to purchase the expectation or a hope that something might come into existence, regardless of whether it does or does not come into existence in future.

What is sold here is the hope or expectation of a thing, not the thing itself. The hope (or '*spes*') exists at the time of the sale and it makes no difference to the obligations of the parties whether the thing comes into existence or not. Thus, the buyer runs the risk of making a loss in that he must pay if nothing comes into existence, but may benefit in that he may receive greater value than his capital outlay.

The jurist Pomponius provides us a good illustration of this kind of sale in *Digest* 18.1.8.1. Write down the example from the relevant lecture:

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From what has been said above regarding the thing sold, it is clear that future goods may be sold. There are some interesting issues that arise about things that can be sold. We have seen that future goods in the form of *emptio rei speratae* and *emptio spei* can be sold. In addition our courts have held that the following may be sold:

- a thing which is the object of litigation (although the purchaser will be bound by the decision of the court);
- a right to an inheritance (although not before the testator has died);
- a thing which is owned by a third party.

Things which cannot be sold in our law include the following:

- *res extra commercium*
- things which cannot exist
- things which have ceased to exist at the time of sale.

An example of a 'non-existent *merx*' can be found in the case of *Scrutton v Ehrlich & Co* 1908 TS 300. In this matter, prospecting rights were sold by S to E on the assumption that such rights existed at the time of sale. Both parties did not know that the original grant of the prospecting rights to S was in fact invalid. The court held that the sale was void on the basis that there were no prospecting rights in existence at the time of the sale.

Finally, we deal with the question of whether things owned by a buyer can be subject to a valid sale that is, the sale of *res sua*. Generally, a person cannot enter into a valid contract of sale, involving the purchase of a thing which is (unknown to him) his own property already. However, it is possible for the purchaser to buy rights (in his own property) which he does not hold. We will discuss the following cases in this regard:

*Cawcutt v Teperson and Sacks* 1916 CPD 406.

*Hilton Quarries Social and Athletic Club v CIR* 1956 (3) SA 108 (N).

Before we move on to the next section, identify whether the following things can be sold:

- a human being \_\_\_\_\_
- narcotics \_\_\_\_\_
- a hippocentaur \_\_\_\_\_
- the promise of a harvest of wine \_\_\_\_\_
- the hope or expectation of a catch of fish. \_\_\_\_\_
- a stolen vehicle \_\_\_\_\_
- human tissue \_\_\_\_\_
- intoxicating liquor \_\_\_\_\_

## **B The Price**

The general rule on agreement to price can be found in the statement by Corbett JA in *Westinghouse Brake & Equipment v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 at 574B-C:

'It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree on some external standard by the application whereof it will be possible to determine the price without further reference to them.'

Agreement as to price of the thing sold is thus an essential requirement for a contract of sale to be valid. Mackeurtan (at 14) identifies the following essentials in connection with price. The price must be:

- Serious;
- Fixed, or capable of ascertainment; and
- Must sound in current money.

Let us look at each of these essentials in more detail:

### **B1 'Serious'**

The requirement that the price is *serious* means that the price must not be nominal or illusory but bear appreciable relation to the value of the article. This does not mean that buyer or seller cannot make the best bargain he or she can, but simply means that it should be a real price which the seller must intend to exact, and the buyer intends to pay. Importantly, the transaction must not be a donation disguised as a sale, or be disguised to avoid or reduce the payment of VAT.

Although it is a question of fact, courts have held that a price is not *serious* or real where it bears absolutely no relation to the thing sold. Consider the case of *CIR v Saner* 1927 TPD 162 as a good example of circumstances where the seller had no intention of exacting the so-called price.

### **B2 'fixed, or capable of ascertainment'**

The requirement that the price be *fixed or capable of ascertainment* means that the parties have to agree on an amount, stipulate a price per unit or determine a method by which the purchase price can be determined without reference to the parties themselves. If the parties decide on a certain method of calculation, it must be possible to ascertain the price by the method agreed upon. This can be done in several ways:

- They may agree that a specified third person will determine the price (but not that one or both of them will do so);

- They may refer to independent circumstances (e.g. ‘the cost price plus 10%’ or ‘the price which my neighbour paid’); and
- They may also tacitly agree on a usual or current market price. In *R v Kramer* 1948 (3) SA 48 (N) at 52 the court stated:

‘*Consensus ad idem* is essential to every contract and price is essential to every contract of sale. When a housewife, who is a regular customer, telephones an order to her butcher, which he accepts, and nothing is said about price – and this happens thousands of times every day with butchers, grocers and other tradesmen – the normal result is that a contract immediately comes into existence and the common law settles the price. I do not think that it has yet been authoritatively decided exactly how the price is determined. The method has been stated in several different ways. My own view is that the price is the tradesman’s usual price because that is what both parties intends and it does not matter whether the tradesman’s competitors in the same street charge a little more or a little less for the same commodity. It is the tradesman’s usual price that carries the day.’

What do you think would happen if the named party fixes a price that is out of all proportion to the value of the merx?

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The question whether a sale at a *reasonable price* is valid has been the subject of debate. Kerr (*The Law of Sale and Lease* at 35 and 259ff) says here that, as in the case of lease, the best approach seems to be to consider what the parties meant by the words they used and then to consider whether evidence is available to establish the amount of money in the circumstances in the case in question. We will discuss this approach in the relevant lecture. Although there is weighty case law to the effect that agreement on a reasonable price cannot give rise to a valid contract of sale, an *obita dicta* in the Supreme Court of Appeal regarding a lease case (*Genac Properties JHB (Pty) Ltd v NBS Administrators* CC 1002 1 SA 566 (A)) has raised the possibility that the courts may well find a contract of sale at a reasonable price valid. Nicholas AJA said in this regard (at 577G-578D):

‘It is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid ... There is authority in this court for the view that, where there is an agreement to do work for remuneration and the amount thereof is specified, the law itself provides that it should be reasonable ... In other jurisdictions it is not considered that a contract of sale for a reasonable price is too vague to be enforced.’

### **B3 ‘must sound in current money’**

The requirement that the price must sound in current money means that the price must consist in valid currency. If the sale is not in money, there will be no contract of sale, but possibly a contract of exchange. Where the price consists partly of money and partly of goods, the nature of the contract will depend on the intention of the parties. If the intention of the parties is uncertain, the contract will be regarded as one of sale if the monetary price is the main consideration. If the sale of the monetary price is the same as that of the other consideration, it is assumed that the contract is one of sale.

## Part 2

### The Legal Effects of the Contract

In this section, we consider the legal effects of the contract of sale.

#### 2.1 Passing of Ownership

In most contracts of sale, the purchaser acquires ownership of the *merx* upon execution of the contract of sale. However, it is important to remember that the seller's ownership of the *merx* is **not** a requisite of a contract of sale. Thus, the sale of a thing not owned by the buyer **can** be the subject of a valid contract of sale. In this case, the seller does not undertake to make the buyer the owner of the article but undertakes to give him vacant possession.

The issue of ownership, however, is an important incidence of a sale even though a contract of sale does not automatically result in ownership being transferred to the buyer. This is due to the fact that ownership does in fact pass in most contracts of sale.

To transfer ownership, certain formalities are required, depending on whether the thing is movable or immovable. These formalities are dealt with in the law of property course in COL 202 and we will only look at some of the most important aspects of the passing of ownership. Usually, in order to transfer ownership of a thing, it is not only necessary that it is physically delivered by the owner, but also that the owner has the intention of transferring the right of ownership to the buyer and the buyer has the intention of becoming the owner of the thing in question. When the passing of ownership occurs in relation to a thing which is the subject of a contract of sale, the following rules should be remembered:

##### (a) *Immovable property*

In the case of immovable property, delivery is not possible. Immovables are transferred by way of registration in a Deeds Office (the position is regulated by the Deeds Registries Act 47 of 1937). In other words, registration constitutes delivery in the case of immovables, and ownership passes whether the price has been paid or not.

##### (b) *Incorporeals*

Ownership in incorporeals (things without a physical existence; eg debts) is transferred by means of cession, in the case of movables (Cession is a special form of contract whereby personal rights in intangible things are transferred by means of agreement). Where the incorporeal constitute immovable property (eg bonds or servitudes), they must be registered in the relevant deeds office.

##### (c) *Movable property*

Ownership in movable property is transferred

(1) upon delivery of the *res*, coupled with

(2) either payment of the purchase price, the provision of security, or the giving of credit.

Let us now discuss (1) and (2) respectively.

(c)(1) *Forms of delivery*

In respect of movable property, delivery may occur in two ways. Delivery can be actual or constructive:

- Actual delivery (*traditio vera*). This occurs where the *res vendita* is physically handed over by one person to another *de manu in manum* (from hand to hand).
- Constructive delivery (or fictitious delivery). Constructive delivery is a process which the law recognises as being equivalent to actual delivery, although no physical handing over of the *res vendita* takes place. There are five methods of constructive delivery –
  - *traditio longa manu* (for example, the pointing out of cattle by one party to another);
  - *traditio brevi manu* (for example, where goods that have been pledged are taken over by the pledgee);
  - symbolic delivery (for example, delivery of goods in a warehouse by handing over of the key to the warehouse);
  - *constitutum possessorium* (for example, where a seller sells its goods to a buyer but simultaneously concludes an agreement for the lease of the goods, delivery can take place through this method; and
  - attornment (for example, where a owner leases a vehicle to a lessee and sells the vehicle to a third party, the delivery can be effected by attornment. The parties need to notify the lessee of the change in ownership, but do not need the lessee's co-operation).

Since this is not a course in the law of property, you need only know one example to explain each method. However make sure you know the answer to the following example given by Gibson (at 122). Fill in the method and name the method of constructive delivery used:

'A pawns his golf-clubs with pawnbroker B and B, to give effect to the pledge, takes them into his custody. A and B subsequently agree on a sale of the clubs. It is not necessary for B to hand the clubs to A and for A then to deliver them solemnly to B. ...., takes place when A and B agree that B is in the future to hold the clubs, not as pledge, but on his own behalf.'

(c)(2) *Payment of the purchase price, the provision of security, or the giving of credit.*

In respect of movable property, ownership in movable property is transferred upon delivery of the *res* (see the various forms of delivery set out above), coupled with either:

- payment of the purchase price,
- the provision of security, or
- the giving of credit.

The question whether ownership passes upon delivery or at a later stage usually, although not necessarily, depends upon whether the sale is for *cash* or on *credit*. Ownership will pass on delivery only if cash is paid, or credit has been allowed.

In *Laing v SA Milling Co Ltd* 1921 AD 387 at 398 Juta JA said

'On a sale of movables followed by delivery the property does not pass until the purchaser has paid the money or secured the seller for the same, or unless the sale is on credit.'



It is important to distinguish between how ownership passes in cash and credit sales respectively.

- In a *cash sale*, ownership passes once there has been due payment of the purchase price and delivery.
- In a *sale on credit*, the fact that credit has been given is an indication that ownership passes on delivery. Thus in an ordinary credit sale, the seller cannot claim that he did not intend ownership to pass until the full price had been paid. However, there is an exception to this rule which is where the sale is one subject to a *pactum reservati dominii*. Explain this concept in the space provided below.

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In the absence of agreement (express or implied) that credit has been granted, it is presumed that every sale is a cash sale. The point is well illustrated in *Daniels v Cooper* (1880) 1 EDC 174.

The presumption of a cash sale is not an absolute one and can be rebutted by adducing evidence of an express or an implied agreement to give credit. If the rebuttal succeeds, ownership will pass on delivery. If credit has not been granted, then ownership will not pass until the price has been paid even if delivery has in the meantime taken place. An agreement to give credit must be clear and specific. For example there is *no* presumption that credit has been given if delivery occurs before payment.

Mackeurtan (at 28) sets out some examples of where ownership passes on delivery despite it being a cash sale. These include:

- where the seller fixes a date for payment which is after the date of delivery, or allows a postponement of the time for payment until after delivery.
- where the course of previous dealings between the buyer and seller had been on credit terms.
- where the seller knew the goods were intended for resale in the ordinary course of business (*Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A)).

The first example is well illustrated in the case of *International Harvester (SA) (Pty) Ltd v AA Cook and Associates (Pty) (Ltd)* 1973 (4) SA 47 (W). Set out the details of the case in the space provided below:

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NB: Payment by cheque is regarded as a cash sale but ownership will not pass (notwithstanding the delivery of the *res vendita*) unless the cheque is honoured when presented for payment.

## 2.2 Risk and Benefit

The conclusion of a contract of sale and the passing of ownership by delivery of the *merx* generally occurs at the same time. In these circumstances the loss or damage to a thing can be said to fall upon its owner. However, what happens when there is a delay between the time when the contract is concluded and the time when delivery to the purchaser eventually occurs? The issue that is raised here is: who bears the risk of damage occurring to the property during the window period, and similarly, who gains the advantage of any benefits accruing to the *res* in this window period?

### 2.2.1 Risk

The general rule is that the risk passes to the buyer as soon as the agreement of sale is concluded, and **before** delivery or payment of the price. This rule was repeated by Nugent AJA in *Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd* 2001 (3) (SCA) 1278 at paragraph 13 as follows:

‘Generally, when property is sold the risk that the property might be damaged passes to the purchaser once the sale is perfected even though delivery has **not** yet taken place, but that does not mean that all risk passes to the purchaser irrespective of how it is caused. The risk that passes upon sale is the risk of damage through no fault of the seller. In other words, it is only the risk of damage by *vis major* or *casus fortuitus* or damage caused by third parties through no fault of the seller that passes to the purchaser.’

When can one say that a contract is perfected (*‘perfecta’* in Latin)? This can be said to occur when:

- The buyer and seller have the intention of buying and selling;
- The thing to be sold is definite or determined
  - in the case of *emptio rei speratae* the thing sold is definite after being measured or weighed.
  - in the case of *emptio spei* the thing sold is definite as soon as the contract is concluded.
  - in the case of a generic sale, the thing sold is determined after individualisation.
- The purchase price is certain.
- The contract is not subject to a suspensive condition.

The important consequence of the rules related to risk is that the full price has to be paid by the buyer to the seller even though the thing sold is damaged or destroyed before being handed over. This follows from the fundamental premise of our law ‘are the concepts that owning something and possessing it are two very different things, and that risk in the thing can transfer before possession does.’ (see J Scott (ed) *The Law of Commerce in South Africa* (2009) 132).

For example, if A buys a cow from B and B is struck by lightning and killed before delivery, A must pay the agreed price. Other examples given by Roman-Dutch writers include losses suffered by earthquakes, shipwrecks, mustiness, souring or leakage in, for example, a case of wine and spoiling, going bad and perishing of things.

It is important to note that the *merx* must not be damaged or destroyed through the fault or breach of contract of the seller. The risk that is passed is therefore the risk of ‘accidental’ loss such as *vis maior*, *casus fortuitus*, general deterioration over time and even theft. Mackeurtan (at 179) defines risk in this context as follows:

'By risk is meant the loss resulting from damage to, or destruction of, the thing sold, or any other disadvantage accruing to, or affecting it, arising through any agency other than the breach of contract or wrongful act or default of the seller.'

Can you define the following words in the context of risk?

*Perfecta* \_\_\_\_\_

*Vis maior* \_\_\_\_\_

*Casus fortuitus* \_\_\_\_\_

The general rule that risk passes to the buyer once the sale is *perfecta* does NOT apply in certain circumstances. These include:

- Where the parties have agreed to the contrary, either expressly or impliedly.
- Where specific goods still have to be weighed, measured or counted in order to fix the purchase price or to appropriate them to the contract.
- Unascertained goods.
- Where there is a statutory provision to the contrary.
- Where there is default by either party.

These circumstances are considered separately:

**(a) Where the parties have agreed to the contrary, either expressly or impliedly.**

The parties may vary the normal rules regarding risk by express agreement in their contract. While it is possible that agreement to vary the rule may be implied from the facts, it is important to keep in mind that the courts are slow to imply such a term.

**(b) Where specific goods still have to be weighed, measured or counted in order to fix the purchase price or to appropriate them to the contract.**

Before considering this exception, it is customary to draw a distinction between sales *ad quantitatem* and sales *per aversionem*.

Sales *ad quantitatem* require counting, weighing or measuring in order to fix the price, whereas sales *ad aversionem* require counting, weighing or measuring in order to separate the material bought from a greater quantity of the same material in the seller's possession.

What is the significance of the distinction between the two kinds of sales?

- Where the sale is *ad quantitatem*, the risk does **not** pass in this case until the price has been ascertained by counting the flock.
- Where the sale is *per aversionem* the sale is in 'bulk' or 'in the gross' and the price is a lump sum for the ascertained goods, even if the *res vendita* is of a type which is normally weighed, measured or counted – such as the sale of 'all my cattle on my farm for R300 000.' In a sale *per aversionem*, the sale is *perfecta* from the instant of the contract and from that time these goods are at the risk of the buyer.

### (c) Unascertained goods

The situation where the sale is of unascertained goods is rather different to sales *ad quantitatem* and sales *per aversionem*. Here, particular articles have not yet been appropriated to the sale, and as such, there is nothing to which the perils associated with risk can attach even if a price has been ascertained eg. 200 bags of maize at R80 per bag from a warehouse containing 80 000 bags. When the sale is of unascertained goods, the risk *will not* pass until goods answering the contract description have been appropriated to the contract. This is so whether the goods are entirely unascertained, or are described as a portion of a specified bulk. Thus if A sells B 'one of A's 3 horses', by law the selection lies with A. He may select which one he chooses and until he makes that selection no risk passes to the purchaser.

For appropriation to occur, there must be some overt act by the seller, such as a setting aside or marking of the relevant goods. See *Marais v Deare and Dietz* 1878 Buch 169; *Poppe, Schunhoff and Guttery v Mosenthal and Co* 1879 Buch 91, and *Taylor v Mackie, Dunn and Co* 1879 Buch 166.

In the case of *Poppe*, the plaintiffs sold a quantity of brandy to the defendants. Before delivery, and before the plaintiffs had done anything to appropriate any particular brandy in their possession for the defendants, the legislature imposed an excise duty on stocks of brandy in hand. The plaintiffs, having paid this duty, sought to recover the amount thereof from the defendants. The court gave judgment for the defendants. The facts in *Taylor* also involved the sale of brandy. After a quantity of brandy had been sold and the seller had measured it off, reduced it to the strength specified in the contract, and placed it in casks which he marked with the purchaser's name, the legislature imposed an excise duty on stocks of brandy in hand. The court held that the seller, who had paid the duty, was entitled to recover the amount thereof from the purchaser.

Thus it can be seen that where there has been no appropriation, measuring or setting apart (as in *Poppe supra*) risk will not pass. Risk will however pass where goods have been appropriated to the contract (as in *Taylor supra*). Write down the facts and the principle of *Marais v Deare and Dietz* 1878 Buch 169 in the space provided below:

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**NB:** Section 59 of the Customs and Excise Act 91 of 1964 slightly amends this common law rule. We will discuss how in the relevant lecture.

### (d) Where there is default by either party

The ordinary rules of risk are varied when there is fault or default of either the seller or the purchaser. This fault or default includes fraud, hampering performance by the other party, *mora* in making or taking delivery of the *merx*, and a party's preventing the fulfillment of a condition that would shift the risk on to him or her. It is not necessary to elaborate on these instances as it is clear that they are based on the inequity of allowing a person to benefit from his own

wrongdoing. The rule here is that the presence of one of these factors relieves the injured party of the incidence of risk, save insofar as any damage of the thing may be due to his own misconduct or gross negligence.

### 2.2.2 Benefit

Kerr *Sale and Lease* (at 214) defines benefit as 'any natural or civil fruits and other similar advantages, gains or profits.'

The general rule is that the benefit in the *res vendita* follows the risk – ie. any benefits will pass on to the buyer once the sale is *perfecta*. Note, however, that this does not include fortuitous gains. The benefit must be directly connected with and actually produced by the property which has been sold. If the profits were purely accidental, and would not have been in the contemplation of the parties at the conclusion of the sale, the buyer cannot claim such benefit.

If the contract is *perfecta* and a benefit accrues to a thing sold before transfer of ownership, is the buyer or seller entitled to the benefit?

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We will discuss the case of *Nel v Bornman* 1968 (1) SA 498 (T) in lectures. It clearly illustrates how the rules of risk and benefit apply. Write the facts in the space below.

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## Part 3

### The seller's obligations and the buyer's remedies

#### 3.1 Introduction – Relations between the parties to a sale

Each party to a contract of sale is bound by those obligations which he or she has expressly or impliedly undertaken. Apart from these obligations, the law may also impose certain obligations on the parties to a contract of sale. These obligations apply to any contract of sale unless the parties have expressly or impliedly excluded them from the contract. Part three herein discusses the duties or obligations imposed on the seller and part four discusses the duties or obligations imposed on the buyer.

#### 3.2 The seller's obligations

##### 3.2.1 The seller is obliged to take care of the *res vendita* until the thing is made available.

Even though the buyer bears the risk of accidental loss once sale is *perfecta*, the seller still has a responsibility for the thing sold. The general rule is that the seller must take care of the *res vendita* from the date of completion of the sale until it is made available to the buyer or delivery is affected. This means that seller will be liable for any damage caused by his fraud or negligence, but not for accidental damage caused independently of any negligence on his/her part.

In *Frumer v Maitland* 1954 (3) SA 840 (A) at 845, Schreiner JA stated:

'[I]t will be convenient to consider first the obligations of the vendor who has not yet delivered the property sold. It is his duty to look after it as would a *bonus paterfamilias* and if he fails in that duty the purchaser would be entitled to claim damages, or, if, but only if, the result of the vendor's neglect is that the thing sold is materially different from the thing tendered, to repudiate the contract and to refuse to take delivery.'

It is important to note that *mora* (delay) can alter the duty of care. If the **buyer** is in *mora* in taking delivery, the seller will only be liable for consequences of gross negligence or intentional failure to take care of the *merx*. The seller will then not be liable for ordinary negligence. If the **seller** is in *mora* in making the thing sold available, the seller becomes liable for all loss, no matter how it comes about. Finally, the measure of care can also be varied by agreement.

### **The buyer's remedy where the seller has failed to take care of the thing sold**

Where the seller has not taken due care, the remedies available depend on whether the goods are specified or unascertained.

Specific goods: In the case of specific goods, where the damage is material, the buyer is entitled to refuse to accept delivery of the goods and to repudiate the contract, claim damages, and a refund of the price if paid. In other words, he is entitled to treat the situation as he would non-delivery of the thing. Where the damage is not material, the buyer must accept the delivery of the goods, and then claim damages. See the quote from *Fruer's* case above.

Unascertained goods: Where the sale is of unascertained goods, the buyer may reject the goods and once again treat the seller as if there had been no delivery at all (whether the breach is major or not), provided the damage is not trifling. But where the purchaser accepts the *res vendita*, but claims damages, the damages will be estimated on the basis of the difference between the value of the sound goods and the value of the damaged good delivered. The buyer may also claim any wasted necessary expenditure.

### **3.2.2 Making the thing sold available (the duty to deliver)**

The conclusion of a valid contract of sale casts on the seller the obligation to make the thing sold available to the purchaser. In terms of this duty, the seller is obliged to put the *merx* at the disposal of the purchaser, to enable the purchaser, in appropriate circumstances, to take it away without lawful let or hindrance. If no time and/or place is agreed, one must then look at *circumstances*. Some of the elements of this duty are set out below:

(a) *To make the thing available at the agreed time and place*

The general rule is that the *merx* must be made available immediately if performance is possible at the conclusion of the sale.

Time: If there must necessarily be some lapse of time, it must be made available within a reasonable time. A seller who fails to make the thing sold available at the appropriate time is *in mora*. A good example of this is the case of *Concrete Products Co (Pty) Ltd v Natal Leather Industries* 1946 NPD 377 where no date was set for the delivery of 200 000 suitcase corners. The seller sent medium size corners despite knowing that the buyer requiring 10 000 small suitcase corners urgently. Three weeks later, the buyer cancelled contract. The court held that the buyer was entitled to do so.

The seller is not entitled to deliver by instalments if the contract was not to that effect. See *Moosa v Robert Shaw & Co Ltd* 1948(4) SA 914 (T). But where periods are stated for delivery by instalments, the seller is bound to deliver as agreed upon.

Place: If no place is agreed in the contract, then seller must make *merx* available the place where it is at the time of sale; if it is still to be manufactured, it must be made available at the place of manufacture, in the absence of any agreement to the contrary. De Villiers CJ stated in *Goldblatt v Merwe* (1902) 19 SC 373:

'The rule in our law is that in the absence of an agreement as to the place of delivery, they must be delivered at the place where they were at the time of the sale. If goods are ordered to be manufactured, they must be delivered at the place of manufacture. If the local custom is relied upon as taking a case out of the general rule, there must be clear proof of such a custom.'

(b) *The thing must be made available in the condition that it was at the time of sale*

The purchaser is entitled to delivery of the thing (when the thing is made available) in the condition it was at the date of sale. This obligation stands subject to any agreement to the contrary.

(c) *The seller may not make available more or less than the amount stated in the contract, nor the contract goods mixed with others of a different description.*

For this course, we will not only look at one aspect of this element as set out in *Cedarmount Store v Webster & Co* 1922 TPD 106. In this matter, A bought 400 bags of grade 2 white hickory maize from B at 16s 11d per bag. On delivery, A examined 100 of the bags, found that 10 bags were unsound and rejected the whole consignment. In an action by B against A for the difference between the contract price and the price realised upon resale after the rejection, the court held that A had been entitled to reject the whole consignment as not being a substantial performance of the contract.

(d) *The thing must be made available with all its accessories, appurtenances and fruits*

MackKeurtan (at 60) defines accessories, appurtenances and fruits as follows:

Accessories: \_\_\_\_\_

Appurtenances: \_\_\_\_\_

Fruits: \_\_\_\_\_

Write down the facts of the *De Kock and Another v Fincham* (1902) 19 SC 136 below as an example of civil fruits:

\_\_\_\_\_  
\_\_\_\_\_

(e) *The seller must at his own expense do whatever is necessary to make the thing sold available to the buyer.*

This obligation can be subdivided into a number of duties. The seller must:

- ascertain the things sold (appropriate them), if unascertained.
- if not in a deliverable state, put them in a deliverable state at his own expense.
- allow the buyer to examine the goods sold before acceptance if the buyer requires this.
- give notice to seller that thing is now appropriated to the contract. This happens if the buyer cannot reasonably be expected to appropriate the thing, without such notice.

Write down the issue and finding in *Hoofar Investments (Pty) Ltd v Moodley* 2009 (6) SA 556 (KZP) insofar as it relates to the seller's duty to effect delivery:



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### **The buyer's remedy where the seller has failed to make the thing sold available**

If the seller fails to make the thing sold available in any of the senses described above, these are clearly breaches of contract for which the buyer's remedies are contractual. We do not have time to investigate the intricacies of the remedies in such a short course. Therefore, a brief summary will be given here, and which really constitutes revision of Commercial Law 101: Contractual Remedies.

- Specific performance. The buyer has a right to demand the thing sold to him (subject, of course, to the court's discretion to refuse it). The remedy is available to a buyer who rejects the tender of goods as being *inappropriate*. As we have seen, a buyer who has received less than what he contracted to receive, may prefer to accept what was tendered, but sue for the balance to be produced. See *Cedarmount* case above.
- Cancellation of the contract. Failure to make the goods available in a contract of sale is a major breach, and entitles the buyer to cancel the contract.
- If the seller fails to make the goods available, damages may be awarded (with or without cancellation, depending on the circumstances and type of breach) according to the general principles of contract.

### **3.2.3 The seller's duty to transfer ownership if he has it , or can obtain it, failing which, to warrant the buyer against eviction**

We know now that it is possible in our law for one person to sell property of which he is not the owner. However, in most circumstances, the seller is the owner and is therefore obliged to transfer ownership. If the seller does not have ownership, this duty means that the seller must ensure that:

- the right of possession is not in contest when made available or delivered. In other words, the seller must ensure that the buyer has free and undisturbed possession.
- The *merx* must be made available in such a way that no-one will *in future* be able to establish a superior legal right to the thing against the buyer. It is in these circumstances that the buyer is protected by the warranty against eviction which will be dealt with below when discussing the buyer's remedy where there is a breach of this duty.

## **The buyer's remedy where the seller has failed to provide undisturbed possession of the thing sold: The Warranty against Eviction**

As seen above, the seller is not required to transfer ownership of the *merx* to the buyer - his duty, *inter alia*, is to make the *merx* available, and to give the buyer free and undisturbed possession. However, what happens in the situation where someone *bona fide* believes he is the owner of the thing he is selling, but in fact is not the owner? The short answer to this is that the sale is **valid**. But where the purchaser is disturbed in his or her possession and enjoyment of the *merx* by someone claiming better legal title to it (usually the owner), it is the seller's duty to come to the purchaser's assistance and protect his possession of the *merx* after being notified by the purchaser. Failure to protect the purchaser's possession will render the seller liable in such circumstances out of what is known as the warranty against eviction. This warranty provides that, in effect, the seller must undertake 'that no party will rightfully force possession out of the hands of the purchaser' (*ABSA Bank Ltd v Myburgh* 2001 (2) SA 462 (W) at 467). The seller must do whatever is legally possible to protect the buyer in his possession of the *merx*. An inability to do so renders the seller liable under this warranty.

The most common form of eviction takes place in the following sequence: The seller, when concluding the sale, *bona fide* believes him or herself to be the owner of the *merx* but is not in fact its owner. The true owner then deprives the purchaser of his possession of the *merx* (eviction) whereupon the purchaser must notify his seller and/or put up a determined defence.

Three requirements for warranty to come into effect, namely, eviction, notice and *virilis defensio*. These are dealt with in more detail below

### **Requirements:**

#### **(a) Eviction**

The purchaser must have been evicted or his *vacuo possessio* threatened. This means any *lawful interference* with the *vacuo possessio* by a third party. Eviction now includes all cases where the purchaser, owing to the seller's fault, is properly and in fact deprived of, or cannot obtain the possession and enjoyment of, his purchase, in whole or in part. In Norman's Purchase and Sale (at 288) it is said:

'Eviction thus includes a demand on the part of a third person to hand over the property sold to him if the purchaser is unable to resist such a claim; the refusal of the person in possession of the property to relinquish it to the purchaser; the demand for payment of a sum of money by the purchaser in order to retain the whole or portion of the *res vendita*; and conceivably the existence of a concealed servitude over the property which interferes with the use and possession of the property. In short anything which weakens the purchaser's right to the whole or a portion of the thing sold, or which constitutes a menace to his right of having free and undisturbed possession.'

Note that the seller is not liable for any *unlawful* interference with the buyer's possession. The liability will only arise if the interference is the result of a *flaw in the seller's title* existing at the time of sale, or if it arose subsequently to the sale due to the seller's own act. Therefore eviction does not include situations where the sale is set aside by the court, or if the property is attached by the seller's creditors before ownership is passed.

Note also that eviction is said to occur as soon as the buyer's *vacuo possessio* is threatened.

**(b) Notice**

As soon as eviction threatened, the purchaser must give adequate notice to the seller of the third party's claim to possession of the thing, calling on the seller for assistance in defending the case. The duties of the seller are somewhat unclear, but it seems that he is expected to intervene in the action, and take up the defence against the other party claiming title. It is the seller's duty under the warranty to relieve the purchaser of the risks and costs of court action.

In these circumstances, the seller can, for example:

- take cession of the buyer's rights and intervene
- assist buyer and furnish necessary proof of title
- be joined as a party to the lawsuit
- do nothing.

If the buyer fails to give the necessary notice he will have no recourse against the seller unless he can prove the third party's right is incontestable, or it is the seller's fault the notice did not reach him in time. The purchaser will be relieved of giving notice in certain circumstances:

- the third party's title is legally unassailable
- there was agreement between the parties that notice would not be required
- the seller deliberately avoided the notice.

**(c) The purchaser is required to conduct a *virilis defensio* against the claim of the third party *unless* purchaser can establish the claimant's title is unassailable**

This requirement effectively means that the purchaser must attempt to conduct a proper defence of the matter. The buyer, when faced with eviction, is required in most circumstances to put up a determined defence of his possession, unless he can prove that the claimant's title was legally unassailable. This must be done where the seller has failed to assist the buyer, either because he cannot be found, or because he refused to assist. We will discuss the case of *Gobels Franchises CC v Kadwa and another* 2007 (5) SA 456 (C) in relation to the meaning of *virilis defensio*. Write down the facts and some of the points made by the Court regarding this requirement in the space provided below:

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**Relief / Remedies** (wherefore the plaintiff claims...)

The buyer has a remedy whether he or she is evicted from the whole or only part of the thing bought. The action is a contractual one, which is sued for by means of the *actio empti*.

A purchaser claiming performance of the warranty against eviction is entitled to repayment of the price (or whatever portion he has paid) and, if loss over and above the amount of the price can be shown, compensation for such loss, provided that the amount does not exceed what 'was contemplated or foreseeable by the parties at the time of conclusion of the agreement.' Being a *bona fide* possessor, the buyer could also claim for any unnecessary or useful improvements made to the property, this from the true owner.

NB: If the purchaser is deprived of his / her possession where the seller is not at fault and the cause of the deprivation happened after the sale, the warranty will not apply. This was held in *Rood's Trustees v Scott & De Villiers* 1910 TS 47. In this matter A sold B a piece of land. After the sale (but before transfer), the State confiscated a portion of the land by legislative enactment. The warranty could not be called upon and the loss fell upon the buyer.

### **Successive Sales**

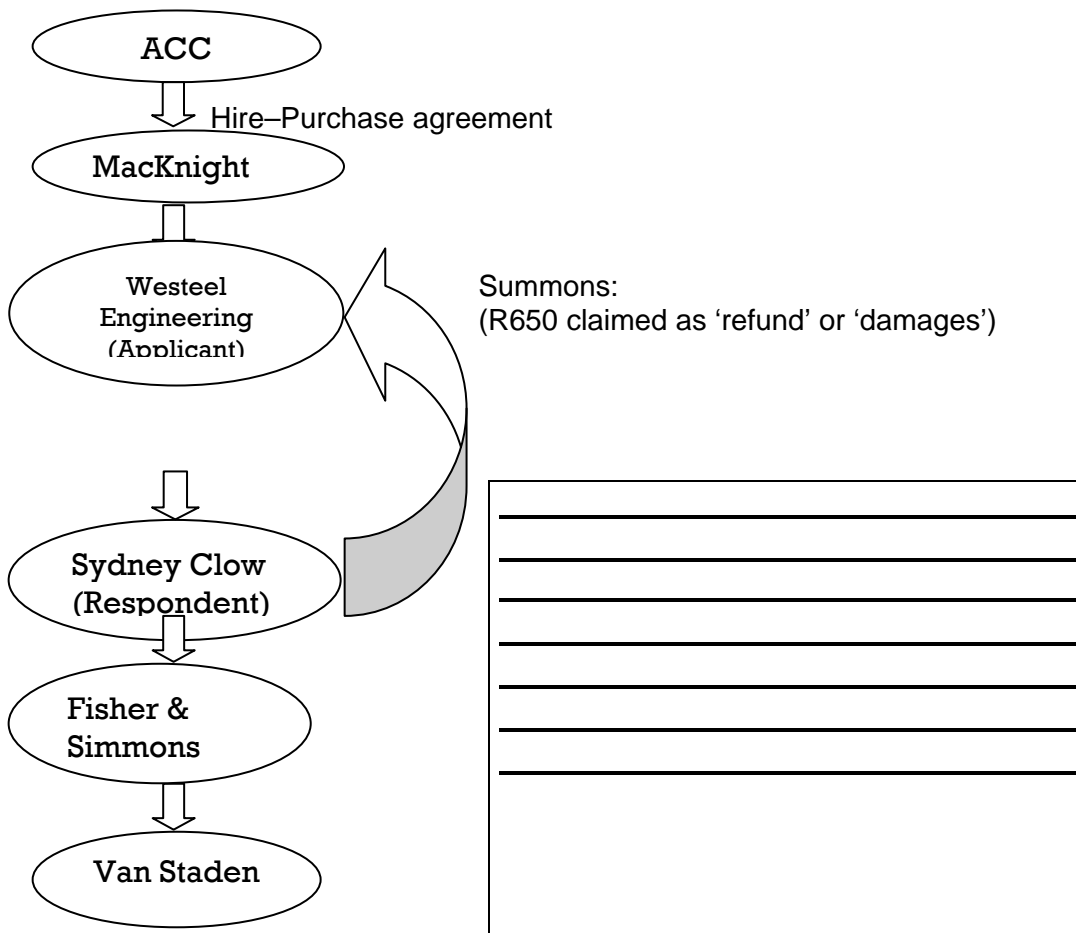
Before concluding on the issue of warranty of eviction, it is necessary to consider the application of the warranty in successive sales. In successive sales, the warranty binds the seller to the purchaser to whom he sold and not to anyone else. It follows then that the purchaser in each case must sue his seller. A subsequent purchaser cannot sue the original (or an earlier) seller, for his remedy is against his own seller. The seller is restricted to this method unless he obtains cession of action against the earlier seller. The repayment of the purchase price to the purchaser who has been evicted is equated in that situation with the seller's own eviction and serves as such when the seller looks next to the one from whom he himself bought.

#### An example of the warranty against eviction in action:

The facts of the *Westeel Engineering (Pty) Ltd v. Sydney Clow & Co Ltd* 1968 3 SA 458 (T) case will be discussed in detail in the relevant lecture. Kerr (*The Law of Sale and Lease* at 194) describes this case (as well as three other cases not covered here) as an example of cases which show that

'it is not uncommon for A to sell to B and B to C (possession being transferred in both cases) before the true owner makes his claim. These decisions hold that once a claim has been made against C and he has surrendered the thing sold, whether after judgment or because he can show that the claimant has an unassailable right, he may claim compensation from B and B may claim from A. C may not, in the absence of cession, claim direct from A.'

Make sure you know the sequence of events in this case as well as the relevant principles. Write down the facts and decision of the case next to diagram below:



### 3.2.4 The duty to make the *res vendita* available free from defects

The seller has a duty to deliver the *res vendita* free from defects. In any defect case, one needs to consider two critical things: first, the nature of the defect (whether it is a patent or latent defect), and, second, the nature of the remedy. In certain circumstances the buyer's remedy is clearly contractual (enforceable in terms of the *actio empti*). In other circumstances, the remedies are not contractual, but find their roots in the aedilician remedies of Roman Law. The extent of relief available will differ, depending upon which remedy is available. Historically, contractual actions entitle the buyer to consequential damages, while the aedilician remedies do not. Please note that while some decisions do not specify which remedy is being referred to, the differences in the nature of the remedies remain important.

Let us now look at the nature of the defect. The law distinguishes between two kinds of defect, namely, patent defects and latent defects.

## **Patent Defects**

Patent defects are those defects which are obvious to the naked eye. If the defect is 'patent' (viz. easily discernable by the buyer at the time the *merx* is delivered), the buyer may sue for breach of contract by defective performance. Where the buyer has inspected the *res vendita* at (or before) the time of sale, and the inspection ought to have disclosed a defect, and the buyer accepts the goods without objection, the seller is not liable provided he has not warranted (expressly or impliedly) the absence of the defect, nor has he fraudulently concealed it. The reasoning behind this rule is that the buyer is deemed to have waived his remedies and to have bought the goods subject to the defect which, but for the lack of attention, he would have discovered, or which he did discover and considered of no consequence.

A good illustration of this point is the case of *Muller v Hobbs* (1904) 21 SC 669. Write a short summary of the facts and principles of the case in the space provided below:

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Examples of patent defects are mouldy, weevily and smelly monkey nuts and measles in pigs. Note that since the remedies are contractual, consequential damages may be claimed.

## **Latent Defects**

If the defect is 'latent' (not visible or discoverable on an inspection of the *merx*) then special remedies unique to the law of sale are available to the buyer. Before discussing these remedies, it is useful to examine what the courts mean by a 'latent defect' in these circumstances.

In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 683, Corbett JA defined a latent defect as follows:

'Broadly speaking in this context a latent defect may be described as an *abnormal quality* or *attribute* which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it was sold or for which it is commonly used.... Such a defect is latent when it is one which is *not visible* or *discoverable* upon an inspection of the *res vendita*.'

It should be noted that a defect is latent if it is not apparent to the ordinary man, even if apparent to the expert. Where the seller makes the thing sold available, and it is discovered that the thing has a latent defect, the seller will be liable to the buyer in four circumstances. It is important to note that the first three categories allow an aggrieved party a **contractual remedy** (ie. an ***actio empti*** which includes a claim for consequential loss). The fourth category provides for **aedilician relief**, the details of which we will examine below.

The four categories are:

(a) *Where the seller has acted fraudulently, or mala fide*

Regarding *mala fides* on the part of the seller see *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A). Write the facts and findings of the decision in the space below:

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(b) *Where the seller has warranted the absence of a latent defect*

Where the seller has given an express or implied warranty against the existence of the defect or has warranted the fitness of the *res vendita* for the purpose for which it is bought, the seller will be liable. See *Minister van Landbou-Techniese Dienste v Scholtz* 1971 (3) SA 188 (A). The action is contractual. The case provides a useful distinction between contractual and aedilician remedies for latent defects.

(c) *Where the seller is a manufacturer or dealer professing attributes of skill and expert knowledge in relation to the thing*

In *Kroonstad Westelike Boere Ko-operatiewe Vereeniging v Botha and Another* 1964 (3) SA 561 (A), it was clearly indicated that liability attaches to a merchant seller who publicly professes to have attributes of skill and expert knowledge regarding the *res vendita* even if he was unaware of the defect, and that the liability in question is by nature contractual, not aedilician. Thus only where he has contracted out of such liability (expressly or by implication) will he be protected.

A good factual example is the *Holmdene Brickworks* case *supra*.

(d) *Where the aedilician actions are available*

IN situations other than the three above, a seller is also liable for latent defects in the *merx* in terms of the *aedilician* remedies. The *curules aediles* were the Roman magistrates in charge of markets and public works. They had the power to issue edicts. Their most famous edict concerned a seller's liability for latent defects. Their most famous edict concerned a seller's liability for latent defects. These actions (and their corresponding remedies) still exist in our law today.

The aedilician remedies impose upon all sellers the duty to disclose any latent defects in the item which they are selling. In Roman times, the action applied initially to sales of slaves and beasts of burden, but nowadays, they cover every item which may be sold. The motive behind this principle of law was (and still is) to ensure that a buyer of goods gets what he is paying for, and not some defective item. It is important to note that although you can technically claim an aedilician remedy where someone fraudulently conceals a defect from you, the aedilician remedy does not allow you to claim consequential loss. We have seen that an *actio empti* would be more appropriate for cases of fraud. Therefore, the aedilician remedies are most commonly employed today where the seller was *ignorant* of the defect. Even where the seller was totally ignorant of the fact that the *merx* had a latent defect, he or she will be liable in terms of the aedilician remedies if a defect is subsequently discovered.

**Note:** The seller's obligations and the buyer's rights in terms of the aedilician remedies arise *ex lege* (by operation of the law), and not with reference to the contract itself. One must not refer to an implied warranty against defects being present.

## **The buyer's remedies where the seller fails to make the *res vendita* available free from defects**

As we saw above, the seller has a remedy in the *actio empti* in the three circumstances set out above. No more will be said about this remedy. We will now go on to discuss the circumstances in which the aedilician remedies can be claimed. These are the *actio redibitoria* and the *actio quanti minoris*, both of which are available in our law

### ***Actio Redhibitoria***

This remedy is an action for the cancellation of the contract and restitution. It involves the restoration of the parties (buyer and seller) to their original positions, as far as this is possible. One is *not* entitled to a claim for any further damages (known as consequential loss) in terms of this remedy.

The action is available if:

- (a) at the time of the sale the thing suffers from a disease or defect; and
- (b) if it was sold 'in contravention of the edict' (ie. there has been non-disclosure of the defect or disease).

#### *(a) Defects and diseases*

As far as defects are concerned, Corbett JA's words in the *Holmdene Bricks* case still apply. A disease is defined as 'an unnatural physical condition which renders the body unhealthy.' There are two important points to note about both a disease and a defect. First, it must render the *merx* unfit for the purpose for which it was bought. Second, the remedies lie only if the disease or defect existed at the time of sale. See *Sebeko v Soll* 1949 (3) SA 337 (T). Kerr comments (at 95-96 of *Sale and Lease*):

'Aedilician actions do not lie if the thing sold was sound at the time of the sale although it had suffered previously from a disease or defect. It is important that it should be wholly sound, not merely a defective part that should have been repaired or replaced.... Just as the actions do not lie if the thing, having previously been diseased or defective is sound at the time of sale, so also they do not lie if the thing was sound at the time of sale but became diseased and defective thereafter.'

The existence of the disease or defect at the time of sale is a question of fact which the buyer must prove on the balance of probabilities. An inference that the disease or defect existed at the time of sale may be drawn from the fact that the disease/defect manifests itself shortly after the sale.

Obviously the buyer does not have to prove that the defect was *apparent* at the time of sale. Where the subject matter of the sale is a class of goods (eg. Bags of maize, pockets of oranges) the aedilician remedies apply.

#### *(b) Sold in contravention of the edict*

The seller must sell the property in contravention of the edict - in other words, the seller must defy the requirements of the edict by failing to disclose the existence of the defect. As stated before, it does not matter that the seller does not know about the defect.



The test to determine whether the buyer is entitled to redhibition is objective. In *Reid Brothers v Bosch* 1914 TPD 578 the test was expressed in two ways:

- A buyer is entitled to rescission of the contract if the defect is of such a nature as to render the article completely unfit for the purpose for which it was bought (for everyone, not just the specific buyer); and
- That a reasonable buyer would not have bought it at all had he known of the defect.

In other words, the defect must be material to justify redhibition. Thus, whether the buyer is entitled to redhibitory relief depends on the seriousness of the defect. The defect cannot be merely trifling. It must hinder or prevent the usefulness or serviceability of the thing to justify complete redhibition.

If redhibition is applicable, the buyer will be entitled to a refund of the purchase price, plus interest, and of course reimbursement for useful or necessary improvements made to the *res* (if applicable). But the buyer is obliged to inform the seller of the defect, and to tender a return of the thing (plus accessories, appurtenances and fruits).

Please note however, that where the article has been destroyed as a result of the defect itself, or in the course of normal use, or accidentally, then the buyer is still entitled to redhibitory relief. See *Hall Thermostank Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D) and *Marks Ltd v Laughton* 1920 AD 12.

Also note that the buyer's right to redhibitory relief can be terminated in the following circumstances:

- Where he uses the article in such a way as to make it impossible to return it to the seller.
- Where it has been destroyed or damaged materially due to the buyer's negligence.
- Where the buyer fails to discover the defect and to return the thing within a reasonable time after the discovery of the defect (or the time when the defect should reasonably have been discovered).
- Where the buyer knowing of the defect exercises rights of ownership over the article (eg. where he arranges to have it repaired).

### ***Actio Quanti Minoris***

The *actio quanti minoris* (also known as the *actio aestimatoria*) is an action for the return of a portion of the purchase price. The *actio quanti minoris* may be sought as a remedy in **two** circumstances. In the first instance, the basic requirements for an *actio redhibitoria* are the same as those which give rise to the *actio quanti minoris*. Thus wherever such circumstances are present which justify complete redhibition, the buyer has an **election** to choose whichever of the two actions he prefers. He does not have to claim redhibition though – he may (if he wishes to keep the property) simply claim a reduction of the purchase price. So, if he has this choice, he may:

- restore the thing and claim the price paid, or
- retain the thing and reclaim part of the purchase price.

The *actio quanti minoris* may also be sought in a second set of circumstances. Where the defect is of such a character that it is not material enough to give rise to a redhibitory action it may nevertheless give rise to an *actio quanti minoris*. A buyer may therefore claim a reduction in the purchase price if (despite the defect) he would still have entered into the contract, but at a lower price.

A buyer may sue for a redhibitory action, claiming *quanti minoris* damages in the alternative.

When the *actio quanti minoris* is utilised the buyer, if successful, is entitled to the return of a portion of the purchase price. The actual amount is calculated on the basis of the difference between the purchase price and the actual value of the thing sold.

In lectures we will discuss the case of *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) 344 (A) in respect of a claim based on *actio quanti minoris*. Write the material facts and findings of the case in the space below:

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Where the aedilician remedies can be used as defences:

Circumstances entitling the buyer to redhibition, or a reduction of the purchase price, will entitle him to defend on the basis of these facts, actions for payment of the purchase price, or any other action arising out of the contract. So, when the buyer is sued by the seller, he is entitled to deny liability and claim redhibitory relief as a defence if the defect is material. The same rules apply as above. This is known as the *exceptio redhibitoria*.

The circumstances which give cause for an *actio quanti minoris* may also be used as a defence to an action for the price by the seller. This is called the *exceptio quanti minoris*.

The voetstoets clause:

There are a number of circumstances where a seller will not be liable for defects in the thing sold. We will look at only one of these circumstances in this course. This is where the seller has contracted out of his obligation by using the **voetstoets clause**.

It is competent for the parties to agree that the seller shall not be liable for the presence of diseases or defects. The most famous example is the voetstoets clause. Where the thing is sold voetstoets, it is sold 'with all its faults' or 'as it stands' or 'as it is'. The term *must* expressly form part of the contract, and cannot be implied.

The effect of such a sale is that the seller is not liable for defects in the *res vendita*. Where there is an inspection of the thing by an expert, this does not necessarily make the sale one voetstoets. Note, however, that the voetstoets clause affects the presence of latent diseases and defects *only*. It does not cover the situation where a misrepresentation of any kind is made.

There is one big exception which attaches to the voetstoets clause. A voetstoets clause will *not* relieve the seller of responsibility for a defective *res vendita* when the seller has acted fraudulently, since (as you should have learnt in your general principles course) no-one can contract out of fraud.

We shall discuss the law on this issue, specifically, (1) *Van der Merwe v Meades* 1991 (2) SA 1 (A) (the leading case) and (2) *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) (the latest SCA case) in the relevant lecture. Write down the relevant facts and findings in these cases in the space set out below:

(1) \_\_\_\_\_

(2) \_\_\_\_\_

**NB:** Section 90(2)(g) of the National Credit Act 34 of 2005 excludes the possibility of a valid voetstoots clause in any sale that is subject to that Act.

### 3.2.5 The duty not to misrepresent the attributes of the thing sold

The aedilician remedies do not only apply in cases where there are defects present. The Romans also recognised that where a seller made a statement amounting to a *dictum et promissum* and the *res vendita* did not measure up to that statement, the buyer was entitled to aedilician relief. A *dictum et promissum* can be said to be ‘a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation.’

The leading case here is *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A). In such cases there is no latent defect *per se*; the problem comes in that the concept of the thing created in the buyer’s mind by the seller’s *dictum et promissum* is different to the true character of the thing. Or, to use the terminology which you would be familiar with from your COL 101 contract course last year, we are talking about a situation where a misrepresentation has been made – where the seller makes a representation about the quality or an attribute of the *merx*, and it turns out that the *merx* does not have the quality or attribute at all!

Thus, not only can one claim a remedy for misrepresentation (in terms of the general principles of contract), you can also *in the alternative* have a claim for an aedilician remedy if your contract happens to be a sale. This can be problematic: you will remember from the contract course last year that there are three forms of misrepresentation – fraudulent, innocent and negligent. Our law says that for the fraudulent misrepresentation, you are entitled to claim (a) rescission and restitution (ie. call the contract off completely, and get anything you have performed back); or (b) damages, if you have suffered any; or (c) *both* rescission *and* damages. The remedies are exactly the same for cases of negligent misrepresentation. For innocent misrepresentation, you can claim rescission and restitution only.

Now, why would one want to claim an aedilician remedy for a misrepresentation inducing a sale if the remedies above (set out in general principles of contract) are just the same, and often are *better* than the *actio redhibitoria* and the *actio quanti minoris*? The answer is the following: it is pointless to claim aedilician remedies in cases where the misrepresentation is fraudulent or negligent. However, the aedilician remedies provide an aggrieved buyer *in a contract of sale* with greater options than the general law of contract where the misrepresentation is innocent – ie. where no fault can be attributed to the seller. Here, the buyer can claim either redhibition OR a reduction in the purchase price because of the innocent misrepresentation. It is thus in the realm of innocent misrepresentation where the aedilician remedies are useful in the law of sale.

## Part 4

### The buyer's obligations and the seller's remedies

#### 4.1 Introduction

The buyer also has certain duties imposed on him or her in law. These duties are (a) to pay the purchase price (b) to remove the thing or, if it is brought to him, to receive it, and (c) to reimburse the seller's necessary expenses.

##### (a) Payment of the purchase price

Manner of payment: The most important duty of any purchaser is to pay the purchase price. In most cases, the manner, time and place of payment is agreed upon in the contract. Where there is nothing in the contract regarding the manner of payment, then the obligation must be established in terms of the previous course of dealings between the parties, or by relevant trade usage. If this cannot be ascertained, the purchaser must pay in legal tender (see s17 of the SA Reserve Bank Act 90 of 1989). Payment may be made by cheque, depending upon its being honoured. Performance other than what is due (called substituted performance, or *datio in solutum*) may be rendered if the creditor consents, and if he does not consent, and the payment is so rendered, the obligation is validly discharged.

Time of payment: In cash sales where there is nothing in the contract regarding the time of payment, both parties are obliged to perform as soon as the contract is entered into. Therefore the buyer must tender payment when the seller is bound to make the thing sold available. In credit sales, a particular day may be agreed upon for payment, or, if not, payment must be made within a reasonable time. Examples of this might be – the last day of the month or a specified date.

Place of payment: Where there is nothing in the contract regarding place of payment, the buyer is required to ensure that payment reaches the creditor on or before the due date. When payment is to be made against delivery, it must probably be made at the place of delivery.

##### (b) To remove the thing or, if it is brought to him, to receive it

The classic statement of this duty is that of the Roman jurist Pomponius in *Digest* 19.1.9: 'If a man buys a stone on an estate and refuses to remove it, an action on sale may be brought to enforce removal.'

The buyer has a duty to remove the thing when it is made available by the seller or to receive it if it is brought to him. Where a buyer fails to remove or receive the thing timeously (i.e. reasonably) he is in *mora*. Where the buyer fails to receive the thing sold, this has implications for the burden of risk (see above) and the seller may be entitled to reimbursement for necessary expenditure in the upkeep and storage of the *res vendita*.

**(c) To reimburse the seller's necessary expenses**

The buyer is required to reimburse the seller for all reasonable costs and charges which he / she has necessarily incurred in caring for the *res vendita* between the date of sale and making the thing available. This duty corresponds with the seller's duty to take care of the thing until the *res vendita* is made available. Mackeurtan (at 207) offers the following examples of this type of expenses: warehousing, repairs, taxes, maintenance and keep. This would, Mackeurtan submits, include monies spent for medical attendance on an animal.

**The seller's remedies for failure to fulfil the above duties**

Given time constraints, we will not deal with the seller's remedies where the buyer is in default of the obligations set out above. See Gibson at 146-149 if you wish to study this on your own, although you will not be examined on these remedies.

Of course, the three main contractual remedies for specific performance, cancellation and damages are available to the aggrieved seller, but you need not worry about the specialised rules and principles concerning their availability and applicability.

## Part 5

### Sales regulated by Statute

#### a. Introduction

Up until now, we have studied the common law of sale. However, there are various statutes (pieces of legislation passed by Parliament) that regulate aspects of the law of sale.

Three of the most important instruments in this regard are:

- (a) The Alienation of Land Act 68 of 1981;
- (b) The National Credit Act 34 of 2005;
- (c) The Electronic Communications and Transactions Act of 2002 (ECTA); and
- (d) The Consumer Protection Act 68 of 2008 (only in force 31 March 2011).

These pieces of legislation relate not only to particular types of sale, but also represent Parliament's attempts to protect consumer interests. We will discuss the most important aspects of these statutes, especially as they relate to the law of sale.

Please note that Parliament has recently passed the Second-hand Goods Act 6 of 2009 which will further change the law of sale. However, this Act is *not yet in force* and you are simply required to know of its existence.

#### (A) The Alienation of Land Act 68 of 1981

Parliament has enacted special rules to try to overcome uncertainty, dispute and possible fraud in connection with contracts relating to the sale of land. The most important rules concern the fact that the parties are required to have the provisions of their contract reduced to writing, so that they might have evidence of the content of the sale.

#### Section 2(1)

Section 2(1) of the Act lays down that apart from sales of land by public auction:

'No alienation of land after the commencement of this section shall, subject to the provisions of s28, 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 upon their written authority.'

- 'alienate' means sell, exchange or donate, irrespective of whether such sale, donation or exchange is subject to a suspensive or resolutive condition (s1).
- 'deed of alienation' refers to a document or documents under which land is alienated (s1). It is acceptable for the seller to sign one document, and the buyer another to constitute a valid sale, provided the required elements and (where necessary, terms) are contained therein. It is not necessary to have one single document.

- 'land' The word 'land' has certain complexities of definition that need to be understood.

In its ordinary sense, 'land' is defined to include '(i) any unit; (ii) any right to claim transfer of land; (iii) any undivided share in land; including ... any interest in land, other than a right or interest registered or capable of being registered in terms of the Mining Titles Act, 1967' (s1).

However, in Chapter 11 of the Act 'land' is given a specialised meaning. It deals with sale of land on instalments, and refers only to 'land used or intended to be used mainly for residential purposes' (s 1). This would refer to your ordinary sale of a house in a city or town. Certain types of land are excluded by definition in s1 from the term 'residential land'. This includes agricultural land. Over and above the formalities required by s2 of the Act, there are certain additional formalities that attach to these sorts' of sales of residential land on instalments.

Where a sale of land concerns land to be used for residential purposes, and payment is to be in more than two instalments over a period exceeding one year, the purchaser is entitled first to choose the official language in which the contract shall be drawn up (s5).

Secondly, s6 of the Act contains a whole host of things that have to appear in the contract. These include: the names of the purchaser and seller and their residential or business address; the description and extent of the land which is the subject of the contract; the amount of the purchase price; the rate of interest to be paid in terms of the purchase price; the amount of each instalment to be paid under the contract, and so forth. The list is tremendously long, and I would not expect you to know any more than those illustrations above.

Please note also that in the case of instalment sales of residential land the Act in s15 lays down that certain provisions MAY NOT be included in such a contract, and will have no force or effect if they are included.

Insofar as other sales of land are concerned (ie those not falling under the definition of sales of residential property in instalments - eg the sale of agricultural land) *only* the formalities set out in s2 apply. Thus, if the parties are happy only to agree upon the subject matter of the contract and the price, and reduce these to writing, but are happy to leave all other matters to be regulated by residual provisions in the law if sale, this is perfectly valid, since s2 does not require these to be reduced to writing. Obviously, however, they are fully entitled to insert into their written deed of alienation any additional terms of interest to the parties.

- In *Just Name Properties 11 CC v Fourie* 2007(3) SA 1 (W), the court had to consider whether an agreement to sell immovable property between several parties was invalid due to non-compliance with the Alienation of Land Act. At the conclusion of the contract, the parties had not yet agreed on the terms relating to the payment of occupational interest. To make provision for this, the sellers signed two blank pages and agreed that the plaintiff buyer's representative would later insert the terms agreed upon, which he did. Write down the decision of the court in the space provided below:

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## The legal position when the requirements relating to the formalities are not met

When the formalities laid down in the Act are not complied with, s2 says quite clearly that the agreement is 'of no force or effect'. This means that the agreement is not a contract, and no action can be maintained upon it. This position is slightly ameliorated by s28 of the Act, which states that both parties can recover any performance which they have made in terms of the agreement.

### **(B) The National Credit Act 34 of 2005**

The National Credit Act is a relatively new piece of legislation. The Act replaces a number of statutes: for example, the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968. The Act is vast, extremely detailed, complex, and covers far more areas than those that are (from a legal perspective) sale-related. The National Credit Act was first tabled as a Bill in Parliament on 8 June 2005 and, after many negotiations between various organisations, the Act was passed by Parliament in December 2006. It came into full force on 1 June 2007.

The Act has 173 sections, various schedules and a set of voluminous regulations. Our purpose cannot and is not to try cover all of these sections! Rather, our purpose is to extract some of the key aspects of the Act which relate to the law of sale. In looking at the various types of credit agreements, it is important to note that credit agreements entail different types of contracts: moneylending contracts, the sale and lease of goods, and the rendering of services.

Before we look at the Act, it is important that we consider the background to the Act.

#### **Background to the National Credit Act**

The Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980 previously regulated consumer credit in South Africa for more than a quarter of a century. Various factors gave rise to the need to pass one piece of legislation which would deal comprehensively with consumer credit, including:

- Fragmented and outdated previous legislation;
- Ineffective consumer protection as far as credit agreements were concerned (particularly amongst low-income groups);
- Limited access to credit;
- The high cost of credit;
- Rising levels of over-indebtedness;
- Reckless behaviour by credit providers;
- Exploitation by micro-lenders and debt collectors.

#### **The aim of the National Credit Act**

Section 3 of the Act states that the aim of the legislation is (*inter alia*) to: improve transparency; prohibit unfair contractual terms and practices; prohibit anti-competitive practices; curb reckless credit extension; and provide means to assist over-indebted consumers.

#### **The application of the Act (s 4)**

Unlike the previous Credit Agreements Act, which applied to limited forms of credit agreement only, the new Act applies to virtually every credit agreement entered into in South Africa. An agreement constitutes a credit agreement in the Act if it is a credit facility, or a credit transaction, or a credit guarantee, or any combination of the former three transactions (s8(1)).



We are concerned with credit transactions such as discount transactions, incidental credit agreements and instalment agreements.

### **Definition of consumer and credit provider under the Act**

For the purposes of the law of sale, it is important to note that a consumer is defined in the Act as, amongst other things, as the party to whom goods and services are sold under a discount, incidental credit or instalment agreement. A credit provider is defined as the party who supplies goods or services under a discount, incidental credit or instalment agreement.

### **The rights and duties of the credit provider**

The most obvious right of the credit provider is to enforce the contract and to receive payment of the credit that he has extended, or to cancel the agreement and claim return of the goods (for example, under an instalment sale) in the case of breach of contract.

This right comes with a whole lot of duties, some of which are summarised below. The credit provider must:

1. register to be a credit provider;
2. make a credit assessment of the consumer;
3. furnish the consumer with a pre-agreement statement and quotation prior to the conclusion of an agreement;
4. furnish the consumer with a copy of the agreement;
5. provide the consumer with periodic statements of account;
6. provide (free of charge) a statement of the amount required to settle the account if requested to do so by the consumer; and
7. must report the details of a credit agreement that he has entered into to the national credit register, or to a credit bureau.

One of the most important duties of the credit provider introduced by the Act is to place the onus upon a credit provider to undertake an inquiry into the credit status of the proposed customer. Section 81 requires that the credit provider has to take reasonable steps to assess a proposed consumer's:

- (a) general understanding and appreciation of the risks and costs of the proposed credit, and of consumer's rights and obligations under the agreement;
- (b) the consumer's debt re-payment history under credit agreements;
- (c) existing financial means, prospects and obligations;
- (d) if the consumer has a commercial purpose for applying for credit, whether there is a reasonable basis to conclude that such purpose may prove to be successful.

A credit agreement will be considered 'reckless' if the credit provider failed to conduct the required assessment, or entered into the agreement despite the fact that the balance of information available to the credit provider indicated that the consumer did not appreciate the nature of the obligations, or that entering into the agreement would make render the consumer 'over-indebted'. (s 80)

A consumer will be classed as over-indebted if he or she will not be able to satisfy, in a timely manner, all the obligations under the credit agreement. One must have regard to the consumer's financial means, prospects and obligations, and credit history. (s 79)

In any court proceedings where a credit agreement is being considered, the court may declare the credit agreement 'reckless'. If it does so, the court may make an order setting aside all or part of the consumer's obligations under the agreement, or suspending the force and effect of the agreement for a period of time. It can also fine the credit provider, and order the credit provider to alter its business practices. (s 83) (The Act also provides for the consumer to apply for a debt review to a debt counsellor, and for debt re-structuring, but this goes beyond the scope of the law of sale.)

### **The rights and duties of the consumer**

The Act sets out numerous rights of the consumer, some of which are:

1. A right to apply to a credit provider for credit and non-discrimination.
2. A right to be given reasons for credit being refused or continued.
3. A right to information relating to the agreement, and disclosure and account statements in a plain and understandable official language.
4. A right to confidential treatment of information pertaining to the consumer.
5. A right to be protected against marketing practices.
6. A right to cooling-off (this right is limited to leases and instalment agreements only, where such agreements are entered into at a location other than the registered business premises of the credit provider).
7. A right to early settlements and prepayments.
8. A right to the surrender of goods.

These rights are balanced by the duties of the consumer, which are mainly determined by the provisions of the agreement and the rules of the common law. However, one particular statutory duty deserves mentioning. Section 97 of the National Credit Act applies to credit agreements concerning goods of which the consumer has not as yet become the owner, or where the credit provider has a right to repossession. In these circumstances, the consumer has a duty to notify the credit provider of any change concerning:

1. the consumer's business or residential address;
2. the premises where the goods are ordinarily kept; and
3. the name and address of any person to whom possession of the goods has been transferred.

### **Unlawful credit provisions**

Consumers are frequently confronted with unfamiliar and technical language, and information that they do not understand. In addition, consumer rights are also frequently limited by complicated and compromising contractual clauses. The Act, in s 90, provides for a number of contractual provisions that have commonly formed part of contracts for sale on credit in the past, but which, from June 2007, are UNLAWFUL. Examples of such unlawful clauses include:

- clauses aimed at deceiving the consumer or defeating the purpose of the Act.
- clauses exempting the credit provider from liability for its employees or agents.
- clauses exempting the credit provider from liability for implied guarantees (for eg, agreements may not include a *voetstoots* clause or clause exempting the seller from liability for latent defects or the warranty against eviction).

In class we will discuss the case of *Absa Bank Ltd v Myburgh* 2009 (3) SA 340 (T) which considered how s 90(2)(k)(vi)(aa) works in practice. Discuss the court's decision in the space provided below:

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**(C) Electronic Communications and Transactions Act 25 of 2002**

The private law aspects of the Act are based on the United Nations Commission on International Trade Law's Model Law on Electronic Commerce (Dec 1996). We will only deal with the relevant private law sections in the Act which will be explained in the relevant lecture. Again, you are not expected to learn every detail in the Act, but make sure you understand the implications of the various sections for the law of sale, and your interaction with e-commerce, either as consumers or as businessmen and businesswomen of the future.

Validity of agreement

s22(1) An agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.

Offer and Acceptance

s22(2) An agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror.

s23(b) A data message must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee;

(c) and must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

Therefore, the reception theory applies. (See Col 101.)

Formalities

*Writing*

s12. A requirement in law that a document or information must be in writing is met if the document or information is

- a. in the form of a data message; and
- b. accessible in a manner usable for subsequent reference.

The only exception in the law of sale is agreements for the Alienation of Land, which have to be 'on paper'.

### *Signature*

The 'electronic signature'

s13(2) Subject to subsection 1, an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if

- a. a method is used to identify the person and to indicate the person's approval of the information communicated; and
- b. having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

The 'advanced electronic signature' or 'digital signature'

s13(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

### Consumer protection

## **CHAPTER VII**

### **CONSUMER PROTECTION**

#### **Scope of application**

s42. (1) This Chapter applies only to electronic transactions.

(2) Section 44 does not apply to an electronic transaction -

- a. for financial services, including but not limited to, investment services, insurance and reinsurance operations, banking services and operations relating to dealings in securities;
- b. by way of an auction;
- c. for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer;
- d. for services which began with the consumer's consent before the end of the seven-day period referred to in section 44(1);
- e. where the price for the supply of goods or services is dependent on fluctuations in the financial markets and which cannot be controlled by the supplier;
- f. where the goods
  - i. are made to the consumer's specifications;
  - ii. are clearly personalised;
  - iii. by reason of their nature cannot be returned; or
  - iv. are likely to deteriorate or expire rapidly;
- g. where audio or video recordings or computer software were unsealed by the consumer;

- h. for the sale of newspapers, periodicals, magazines and books;
- i. for the provision of gaming and lottery services; or
- j. for the provision of accommodation, transport, catering or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.

(3) This Chapter does not apply to a regulatory authority established in terms of a law if that law prescribes consumer protection provisions in respect of electronic transactions.

### **Information to be provided**

s43 (1) A supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make the following information available to consumers on the web site where such goods or services are offered:

- a. Its full name and legal status;
- b. its physical address and telephone number;
- c. its web site address and e-mail address;
- d. membership of any self-regulatory or accreditation bodies to which that supplier belongs or subscribes and the contact details of that body;
- e. any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;
- f. in the case of a legal person, its registration number, the names of its office bearers and its place of registration;
- g. the physical address where that supplier will receive legal service of documents;
- h. a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
- i. the full price of the goods or services, including transport costs, taxes and any other fees or costs;
- j. the manner of payment;
- k. any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;
- l. the time within which the goods will be dispatched or delivered or within which the services will be rendered;
- m. the manner and period within which consumers can access and maintain a full record of the transaction;
- n. the return, exchange and refund policy of that supplier;
- o. any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;
- p. the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information;
- q. where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently; and
- r. the rights of consumers in terms of section 44, where applicable.

- (2) The supplier must provide a consumer with an opportunity-
- a. to review the entire electronic transaction;
  - b. to correct any mistakes; and
  - c. to withdraw from the transaction, before finally placing any order.
- (3) If a supplier fails to comply with the provisions of subsection (1) or (2), the consumer may cancel the transaction within 14 days of receiving the goods or services under the transaction.
- (4) If a transaction is cancelled in terms of subsection (3)-
- a. the consumer must return the performance of the supplier or, where applicable, cease using the services performed; and
  - b. the supplier must refund all payments made by the consumer minus the direct cost of returning the goods.
- (5) The supplier must utilise a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned.
- (6) The supplier is liable for any damage suffered by a consumer due to a failure by the supplier to comply with subsection (5).

### **Cooling-off period**

s44 (1) A consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply-

- a. of goods within seven days after the date of the receipt of the goods; or
  - b. of services within seven days after the date of the conclusion of the agreement.
- (2) The only charge that may be levied on the consumer is the direct cost of returning the goods.
- (3) If payment for the goods or services has been effected prior to a consumer exercising a right referred to in subsection (1), the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.
- (4) This section must not be construed as prejudicing the rights of a consumer provided for in any other law.

### **Unsolicited goods, services or communications**

s45 (1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer-

- a. with the option to cancel his or her subscription to the mailing list of that person; and
- b. with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer.

- (2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication.
- (3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).
- (4) Any person who sends unsolicited commercial communications to a person who has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

## **Performance**

S46 (1) The supplier must execute the order within 30 days after the day on which the supplier received the order, unless the parties have agreed otherwise.

- (2) Where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement with seven days' written notice.
- (3) If a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.

<b>(D) CONSUMER PROTECTION ACT 68 OF 2008</b>
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The Consumer Protection Act 68 of 2008 is set to significantly change the law of sale when it comes into force on 31 March 2011. The Act is the result of the recognised need to control unfair contract terms in South Africa. We will only consider a few of the most significant changes to the law of sale.

### Purpose and Structure

Section 3 of the Act sets out that its purpose is to promote fair business practices and to protect consumers from themselves as well as from unfair or exploitative business practices. The Act applies to every transaction occurring within South Africa involving the provision of goods or services.

Chapter 2 of the Act (Fundamental Consumer Rights) is divided into eight parts (A to H). In each part, specific rights and obligations are created under general categories such as the right to equality in the consumer market, and the right to disclosure and information. We will only consider the rights that relate to:

- Fair and honest dealing;
- Fair, just and reasonable terms and conditions; and
- Fair value, good quality and safety.

## Fair and honest dealing (chapter 2, part F)

Chapter 2 of the Act is primarily concerned with fair and honest dealing. As such, it imposes many specific duties on retailers and suppliers of goods. These duties include the following:

- Section 40: the identification of conduct that will be considered to be unconscionable in the negotiation or performance of a transaction.
- Sections 41-42: General rules prohibiting consumers from being misled.

## Fair, just and reasonable terms and conditions (chapter 2, part G)

This part of the Act sets out what will be considered unfair, unreasonable or unjust contractual terms. It also prevents sellers from excluding various consumer rights in terms of the contract.

Section 48(2) sets out two guidelines for determining what is unfair. A transaction, agreement, term or condition qualifies as unfair if:

- (a) it is excessively one-sided in favour of any person other than the consumer (or other person to whom goods or services are to be supplied);
- (b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable.

Section 51(1) provides a list of specific terms or conditions ('provisions') that are prohibited. This type of list is often labelled a 'black list'. A supplier must not make a transaction or agreement subject to a prohibited provision or directly or indirectly require or induce a consumer to enter into a supplementary agreement, or to sign any document, that contains such a provision.

The following provisions are prohibited:

- A provision that is intended to, or has the effect of, defeating the purposes and policy of the Act.
- A provision that misleads or deceives the consumer, or subjects the consumer to fraudulent conduct.
- A provision that directly or indirectly purports to
  - (i) waive, or deprive a consumer of, a right in terms of the Act;
  - (ii) avoid a supplier's obligation or duty in terms of the Act;
  - (iii) set aside or override the effect of any provision of the Act; or
  - (iv) authorise the supplier to do anything that is unlawful in terms of the Act or fail to do anything that is required in terms of the Act.
- A provision that
  - (i) purports to exclude or limit the liability of a supplier of goods or services for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for, or controlled by, the supplier;
  - (ii) constitutes an assumption of risk or liability by the consumer for a loss contemplated in (i).

In the light of the above prohibitions, suppliers may well find that provisions in their standardised terms are prohibited because they conflict with rights or obligations flowing from the Act and which, in terms of the Act, cannot be limited or excluded by agreement. Examples of such non-alterable rights and obligations include:

- the right of the consumer to cancel a fixed-term consumer agreement at any time by giving the supplier 20 days' notice (s 14(2)(b)(bb));
- the right of a consumer to rescind a transaction resulting from direct marketing within five days after conclusion of the agreement or delivery of the goods (s 16(3));
- the right of a consumer who has rescinded a consumer agreement in terms of s 16(3) to return the goods and receive a full refund of any consideration paid (s 20(2)(a));



- the right of the consumer to assume that a supplier of goods has the legal right, or the authority of the owner, to supply the goods (s 44(1)(a));
- the right of the consumer to receive goods that will be useable and durable for a reasonable period of time (s 55(2)(c));
- the liability of the supplier for death, personal injury, illness or physical damage caused by unsafe goods, product failure, defective or hazardous goods, or inadequate instructions or warnings (s 61(1));
- the obligation of the supplier to exercise reasonable care and skill when handling, safeguarding or utilising the consumer's property (s 65(2)).

Fair value, good quality and safety (chapter 2, part H)

This part of the act provides legislative rules and remedies pertaining to defective goods. For the most part, the legislative rules codify the common law. One significant change is the operation of the Pothier rule (viz. the *spondet peritiam artis* rule). Under the common law, consequential damages resulting from a defect could only be claimed where the seller fell under the rule. In terms of the Act, now *all* suppliers and retailers will be susceptible to such a claim (section 61).

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## THE LAW OF LEASE: GENERAL INFORMATION

### 1. COURSE INFORMATION

Commercial Law 201 Paper 1 consists of three different sections, namely, the law of sale, the law of carriage and the law of lease. This module contains information on the last section of the course, namely, the law of lease. The law of lease will be taught over approximately 8/9 lectures.

### 2. MODULE INFORMATION

This module sets out the basic structure of the topics to be covered in the law of lease. Students are expected to read ahead in the module for the next lecture in order to acquire a basic familiarity with the relevant topic. It is important that students note that the module is **not** comprehensive. Some topics require responses to questions posed in the module, while some topics will be covered orally in class only. Students are therefore expected to take their own notes in lectures to supplement the module. Occasionally, students will be expected to explain case law and consider practical questions in class.

### 3. RECOMMENDED TEXTBOOKS

There are **no** prescribed texts for this course. However, as stated previously, I have referred you to several general Commercial Law textbooks which are very useful in your general information handout on Paper 1. Should you wish to have a more in-depth knowledge of the law of lease, please consult Professor A J Kerr's *The Law of Sale and Lease* (2004) 3 ed Butterworths: Durban.

## THE LAW OF LEASE: COURSE OUTLINE

### **Section 1 - Introduction**

- 1.1 Definition
- 1.2 Essentials of a contract of lease
- 1.3 Formalities and the parties

### **Section 2 - The obligations of the lessor and remedies available**

- 2.1 Introduction
- 2.2 The obligation to deliver the thing let to the lessee free from impediments and in a fit condition for the purpose leased.
- 2.3 The obligation to ensure the lessee's undisturbed use and enjoyment of the thing let.
- 2.4 The obligation to pay the rates and taxes.

### **Section 3 - The obligations of the lessee and remedies available**

- 3.1 Introduction
- 3.2 The obligation to pay rent
- 3.3 The obligation to take proper care of the property and use it only for the purpose for which it was let.
- 3.4 The obligation to restore the property on termination of the lease in the same good order and condition as it was when it was received.

### **Section 4 - The legal position of the lessee**

- 4.1 Introduction
- 4.2 Subletting
- 4.3 Cession
- 4.4 Assignment
- 4.5 *Huur gaat voor koop*

### **Section 5 - Termination of a lease agreement**

- 5.1 Introduction
- 5.2 Termination by effluxion of time
- 5.3 Termination by notice
- 5.4 Termination by death
- 5.5 Termination by insolvency
- 5.6 Lessee's right to compensation for improvements

### **Section 6 - Renewal of a lease**

- 6.1 Introduction
- 6.2 Express renewal
- 6.3 Tacit renewal

## Section 1 Introduction

South African law recognizes three forms of contract of letting and hiring: the letting and hiring of a thing, movable or immovable; the letting and hiring of services; and the letting and hiring of work to be done. This course will only deal with the letting and hiring of property. As an introduction to the law of lease, it is important to consider the definition of a contract of this nature. By so doing, you will be able to identify its essential characteristics.

### 1.1 Definition

You may find varying definitions in your textbooks and case law that will assist you in determining the nature of a lease agreement. For the purposes of this course, we will use the definition given by Kahn *et al.*

Kahn *et al* define a contract of lease as follows:

‘A contract of letting and hiring of a thing (or a lease) is a reciprocal agreement between the lessor and the lessee, in terms of which the lessor binds him- or herself to give the lessee the temporary use and enjoyment of a thing, wholly or in part, and the lessee binds him- or herself to pay a sum of money as compensation for that use and enjoyment.’

From this definition, it is clear that there are two essentials of a contract of lease. These can be summarised as follows:

- ✓ An undertaking by the lessor (the person who lets) to give the lessee (the person who hires) temporary use and enjoyment of a thing;
- ✓ An undertaking by the lessee to pay a sum of money in return for the use and enjoyment which he or she will receive (i.e. an undertaking to pay rent).

If a contract is a lease then the common law rules that regulate lease contracts will apply to it as will any statute that applies to a ‘lease’. Keep in mind that if the above essentials are not met, one may still have a valid contract, but it will not be one of lease. It could for example, be a partnership or loan agreement. Note that if the contract is not one of lease, the lessee cannot insist on protection in terms of the ‘huur gaat voor koop’ rule. These essentials are discussed in more detail below.

## 1.2 Essentials of a Contract of Lease

### 1.2.1 An undertaking by the lessor (the person who lets) to give the lessee (the person who hires) temporary use and enjoyment of a thing

*'by the lessor'*

The lessor need not necessarily be the owner. He or she could for example be leasing the property from the owner and sub-leasing to another. The lessee therefore cannot attack the contract on the basis of the lessor's lack of title if the latter has delivered and continues to deliver the use and enjoyment of the property. In *Sby G.M.CO v Klipriviersberg Estate & G.M. Co* 1893 Kotze CJ commented on this principle as follows:

'By the law of this country any person can let to another something which belongs to a third party, and it is not open to the lessee to raise the defence that he has discovered that the lessor had no right to enter into a contract of lease with him, or that the property leased belongs to another person, where, for instance, he is, during the currency of the lease, sued for the payment of the stipulated rent.'

In a later case, *Clarke v Nourse Mines Ltd* 1901 TS 512 at 520-521, Solomon J followed this approach on the basis that one must pay for what one has contracted for and received and that it is against good faith to attempt to use the law to avoid payment in such circumstances.

Thus, while the lessor does not need to be the owner of the thing let, he or she must guarantee that the lessee will have undisturbed use and enjoyment of the property. If the lessor is unable to do so, then he or she may be in breach of contract and may be liable for damages.

*'temporary'*

It is a requirement of a contract of lease that the lessee's use and enjoyment of the thing let is to be temporary. This does not mean that a contract in which one grants the use and enjoyment of a thing to another in perpetuity (i.e. forever) is invalid, but it is not a contract of lease.

This requirement is fulfilled if the contract of lease is entered into for an indefinite period or until the occurrence of an event that is bound to occur, although the time for its occurrence is unknown.

Can the parties agree that the lease runs from month to month, with a clause allowing termination by either party on due notice? Write your answer in the space provided below.

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*'Use and enjoyment'*

If a contract is to qualify as a contract of lease, it must confer on the lessee a power to *use and enjoy* the thing that is let. The requirement that the lessee grant use and enjoyment of a thing does not mean that he or she cannot grant partial use and enjoyment of a thing. This may happen where the lessor rents out one room of his or her house, or where the lessee lets the surface of one wall for advertising.

The *use and enjoyment* of a thing comprises the right to use the property (*ius utendi*) and the right to collect and use up its fruits (*ius fruendi*). The *ius utendi* and the *ius fruendi* are only two incidents of the bundle of rights that an owner has in relation to the property he or she owns.

If the lessor grants greater powers on the lessee than that of use and enjoyment; for example, the power to diminish or consume or alienate the thing, the contract cannot be classified as a lease.

The concept of *ius abutendi* will be discussed in class. See *Bozzone v Secretary for Inland Revenue* 1975 (4) SA 579 (A). Set out the facts of the case and the decision of the court in the space available below:

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*'of a thing'*

The thing that is to be used and enjoyed must be identified or readily identifiable. A good example of this requirement in action is set out in Collier-Reed and Lehmann (ed) *Basic Principles of Business Law* (2006) Lexisnexis Butterworths: Durban at 171:

'Party A and Party B conclude an agreement in terms of which Party A is entitled to occupy a parking bay in a parking lot owned by B against payment of a monthly fee. If a specific parking bay is allocated to A, this would be classified as a lease, as the property being let, the specific bay is identifiable. However, if no parking bay is specifically allocated to A, this would not be a lease, as the property being let is not identified or specifically identifiable.'

Should the thing let not be identifiable, the contract will be void for vagueness. See *Ellerines Furnishers (Venda) (Pty) Ltd v Rambuda* 1989 (2) SA 874 (V) for class discussion. Set out the circumstance of the case regarding 'the leased thing' in the space provided below. Was the thing 'identifiable' in these circumstances?

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## 1.2.2 An undertaking by the lessee to pay a sum of money in return for the use and enjoyment which he or she will receive (i.e. an undertaking to pay rent)

### 'Sum of money'

An essential term of the contract of lease is an undertaking by the lessee to pay a sum of money i.e. an undertaking to pay rent. In *Neebe v Registrar of Mining Rights* 1902 TS 65 at 86 Wessels J defined 'rental' as 'the "*quid pro quo*" promised by the lessee for the use of the article let.' There cannot be a valid lease unless the parties agree on rent. The rule here is that the rent must consist of an agreed amount of money. In *Jordaan NO and Another v Verwey* 2002 (1) SA 643 (E), the court considered whether our law still required that rent had to be in the form of money. The court held that this requirement is still part of our law and is one of the factors that distinguish a lease agreement from other agreements.

There is one exception to this rule, namely; the rent in a lease of agricultural land. In terms of this exception, the rent may be a definite quantity or an agreed proportion of the leased property.

It is necessary to consider the following questions in relation to the undertaking to pay rent.

### *The value of rent to be paid?*

The amount does not have to equate to the market rental value and even a nominal amount may result in the formation of a valid lease. Kerr (*The Law of Sale and Lease* at 262) uses the example of a city council who may wish to benefit a religious body or charity, or it may be prepared to let to an organization willing to erect old people's homes and so forth. The true nature of the transaction must therefore be determined after considering all the circumstances of a particular case and particularly the intention of the parties. Thus, the *quid pro quo* component of rental may include reasons other than a purely market related approach.

### *Certainty regarding amount of rent?*

It follows from general contractual principles that for a contract of lease to be valid, there must be *certainty* about the amount of rent that is payable. The certainty that is required of the rent in a contract of lease is similar to the certainty required of price in the law of sale. If the rent can be rendered certain (ie. is it ascertainable?), this requirement is fulfilled. This means that while parties normally agree on the amount of money to be paid as rent, they can also create a valid lease by agreeing to a method or formula by which the amount of rent is to be determined (for example, 'what the previous lessee paid plus 10%'). They may even agree that the rent is to be determined by a specified third person. We will discuss the case of *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) in this regard. Write down the facts and findings in the SCA below:

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Do the following examples give rise to a valid lease agreement? Consider them carefully and write your answer in the spaces provided below:

*An agreement whereby one of the parties has the sole right to determine the rent and impose it on the other.*

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*An agreement whereby the parties agree that the rent will be 'between R3000 and R5000 a month'.*

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*An agreement whereby the parties agree that the lessee is entitled to 'vary rental if he concludes on reasonable grounds that the complex environment in which the lease is concluded has changed to the extent that continued performance of his obligations might be rendered uneconomical' (see *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 (2) SA 170 (W))*

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The question whether a lease at a *reasonable amount* or a *fair and reasonable amount* is valid has been the subject of debate. Kerr (*The Law of Sale and Lease* at 35 and 259ff) says here that the best approach seems to be to consider what the parties meant by the words they used and then to consider whether evidence is available to establish the amount of money in the circumstances in the case in question. We will discuss this approach in the relevant lecture. See *Genac Properties JHB (Pty) Ltd v NBS Administrators CC* 1992 1 SA 566 (A) at 576I-578D and write down the relevant points to come out of the discussion of this case vis-à-vis a *reasonable rent*.

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### **1.3 Formalities**

Unlike the sale of immovable property (which was dealt with in your module on the law of sale), there are no formal requirements for a contract of lease. The general rule is that the contract can be concluded informally (and therefore verbally).

However, some situations warrant special mention:

- ✓ Where a contract of lease falls under the National Credit Act 34 of 2005.
- ✓ While registration is not a necessary requirement for validity in respect of leases of land, it may affect the enforceability of the contract against third parties. See subsection 1(2) of the Formalities in respect of Leases of Land Act 18 of 1969.



- ✓ In terms of section 5(2) of the Rental Housing Act 50 of 1999, a lessor must reduce the agreement to writing if so requested by the lessee. Where this happens, subsections (6) to (8) of the Act require certain information to be recorded in and/or attached to the agreement. The lessor is charged with this responsibility and it is a criminal offence to fail to include this information.

## **Section 2**

### **The lessor's obligations in a contract of lease and remedies available**

#### **2.1 Introduction**

Before setting out the obligations of each party in turn, it should be noted that the obligations of either party can be (1) expressly set out in the contract of lease, (2) can implied from its contents or (3) can form part of the residual obligations of a contract of lease. 'Residual obligations' are those obligations that are imposed by law. The term 'residual obligation' was first coined by Professor Kerr and we will use this term when discussing these obligations. They automatically apply to a contract of lease unless the parties remove or alter them.

There are three main residual obligations of the lessor to a contract of lease. These are:

- ✓ The obligation to deliver the thing let to the lessee on the due date free from impediments and in a fit condition for the purpose leased.
- ✓ The obligation to ensure the lessee's undisturbed use and enjoyment of the thing let.
- ✓ The obligation to pay the rates and taxes.

These obligations are dealt with separately below. After a discussion of each obligation, some of the more common remedies that flow from a breach of the obligations under discussion are set out.

#### **2.2 The duty to deliver the thing let to the lessee on the due date free from impediments and in a fit condition for the purpose leased.**

##### *'The duty to deliver'*

Since the lessor's main duty is to give the lessee the use and enjoyment of the thing let, it follows then that his or her first duty is to deliver the thing to the lessee. This means that the lessor must place the thing at the disposal of the lessee in such a manner that he or she is able to enjoy undisturbed occupation of it.

If the property is movable, this means that the lessor would have to deliver the thing physically to the lessee. If the property is immovable, delivery could be effected by, for example, arranging that a previous tenant is not in occupation and by handing over the keys to the premises.

In the case of a long-term lease, the lessor's duty to deliver includes the duty to co-operate in registration of the lease should the lessee desire registration.

##### *'The thing let'*

The thing that the lessor must deliver to the lessee is the thing they agreed upon. This statement may seem self-evident but parties often dispute the subject-matter of the lease, particularly as regards to what 'additional' things or facilities are necessary for the proper

enjoyment of the property. The question arises as to what 'additional' things or facilities are necessary for proper enjoyment of the thing let. Voet (at 19.2.14) tells us that the lessor is bound to make available 'all those things without which one cannot have convenient use'. We will discuss some practical situations in class.

Is furniture and fixtures a necessary facility when renting a property? Write down your answer in the space provided below.

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*'On the due date'*

Usually the parties will agree the commencement date of the lease either expressly or impliedly. If the thing let is not available on that date, the lessee will need to put the lessor to terms by demanding delivery. If the lessor fails to do so, the lessee can cancel the contract.

Consider the case of *Levy v Rose* (1903) 20 SC 189 where the defendant agreed to give plaintiff a five-year lease without specifying the commencement date. At the time of the agreement on the 3rd January the premises were not complete and it was agreed that the plaintiff would be given occupation at the end of January. The house was still not ready at the end of January and so the plaintiff agreed to an extension until the 1st March. On the 1st March the plaintiff was given occupation but almost immediately he was told to vacate again for a period of about 10 days in order for the defendant to acquire an occupation license, the necessity for which he had overlooked. The plaintiff alleged a breach of the contract, vacated the premises and claimed cancellation and damages. Was the plaintiff entitled to cancel the lease in these circumstances? Write down your answer in the space provided below:

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*'Free from impediments'*

The lessor is obliged to give peaceful and undisturbed possession of the property to the lessee. This means that any previous lessees or trespassers must be evicted from the property. In addition, the lessor must remove any goods that may interfere with the lessee's use and enjoyment. In the case of *Bourbon-Leftley v Turner* 1963 (2) SA 104 (C), it was held that a large Aga Cooker left in the kitchen was something that was 'likely to interfere materially with the enjoyment of occupation'.

*'In a fit condition for the purpose leased'*

The lessor must deliver the thing in a condition that will enable the lessee to use and enjoy the thing let. The parties usually agree upon the kind of condition, but in the absence of agreement, the lessor must place the leased property in a condition reasonably fit for the purpose for which it was let. This means that when something is let for a specific purpose, the lessor is deemed to have given a tacit undertaking that it will be reasonably fit for that purpose; for example, a shop, hotel or factory. This is often the condition in which it was at the time of contracting.

We will discuss the cases of *Poynton v Cran* 1910 AD 205 and *Harlin Properties (Pty) Ltd and Another v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 in the relevant lecture. These cases have relevance to both the obligation to deliver the thing in a particular condition but to maintain it in that way. Write the facts of both cases in the space provided below:

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*'Thing must be maintained in a fit condition'*

The lessor is not only bound to deliver the thing in a particular condition, but he or she is also required to maintain it in that condition during the full term of the lease. This aspect has often been described as the obligation of the lessor to give the lessee *commodus usus* of the property (undisturbed use / quiet enjoyment). The duty to deliver the thing in a fit condition (set out above) can thus be said to be a continuing one.

Maintaining the thing let can give rise to disagreement (as many in student digs situations would have found out!) and therefore who must maintain what is usually stipulated in a contract of lease. There is nothing preventing the lessee from assuming the whole or part of the duty to maintain the thing in a proper condition.

However, where nothing is stipulated in the contract, it is generally the case that the day-to-day issues that require regular attention throughout the lease period are the responsibility of the lessee, with the bigger maintenance problems being the responsibility of the lessor. This would mean that, in the absence of agreement, it is the lessee who would, for example, weed and cut the lawn of a hired residence, clear the farmlands of noxious plants and clean the gutters when they block up with leaves and the drains when they become blocked as the result of constant use. In the absence of a clause in the lease dealing with the matter, write down whether you think the lessor or lessee will be responsible for the following maintenance problems in a lease of a student digs:

Changing a light bulb	_____
Repairing a geyser	_____
Maintaining a pool	_____

The lessee will have to repair at his own cost any damage caused negligently or deliberately by him- or herself or those for whom he or she is responsible.

### 2.2.1 Remedies

Should the lessor fail to deliver or maintain the thing as set out above, the lessee is entitled to the normal remedies for breach of contract. These normal remedies can be summarized as follows:

- ✓ A claim for specific performance;
- ✓ Cancellation / Rescission of the contract; and
- ✓ Damages

In addition, the lessee can

- ✓ Claim a reduction in rent
- ✓ Repair the property him/herself and charge the lessor

Certain aspects of the application of these remedies in a contract of lease situation deserve mention and are dealt with below.

### **2.2.1.1 Specific Performance**

This remedy requires the defaulting party to perform in terms of the contract either in a specific form or by payment of a sum of money as a substitute for specific performance. While courts have been loath to order a lessee to place or maintain the leased thing in a proper condition (ie. specific performance), Satchwell J criticized this view in *Mpange v Sithole* 2007 (6) SA 378 (W). Write the facts and findings of the Court in the space below:

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It should be noted that specific performance can be made or ordered indirectly by the lessee making the required repairs him or herself and recovering the cost from the lessor (this should be done only after demand and notice to the lessor).

### **2.2.1.2 Rescission / Cancellation.**

Should the lessee wish to resile from the contract of lease, the breach would have to be major, or material to entitle the lessee to cancel outright. If not, the lessee would have had to have put the lessor to terms and failing compliance with these terms, the lessee would be entitled to. The usual grounds of cancellation are:

- ✓ Where there has been a major breach, for example, where delivery becomes impossible whether through the fault or otherwise of the lessor.
- ✓ Where the lessor refuses to deliver at all or substantially this would amount to repudiation giving the lessee an election whether or not to cancel.
- ✓ Where delivery is late and time is or is made or has become of the essence, for example *Levy v Rose supra* above.
- ✓ Where the property is substantially unfit for the purpose leased and the lessor cannot or will not rectify within a reasonable time.

In the cases of *Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 (2) SA 738 A and *Shapiro v Yutar* 1930 CPD 92 the Courts seems to have answered the question 'Is there a substantial breach of the lease contract?' by examining the question of whether or not an opportunity was afforded to the lessor to repair and, if so, what his reaction was and how soon, if at all, the repair could be effected. Both cases point to the conclusion that the inconvenience occasioned by the unfit condition of the premises must be substantial.

### **2.2.1.3 Claim a reduction in rent**

If the breach is not substantial enough to justify cancellation of the contract of lease, for example, a delay in delivery or the condition of the property, the lessee is entitled to a reduction in rent in proportion to his / her reduced use and enjoyment of the property. See *Ntshiqqa v Andreas Supermarket* 1997 (1) SA 184 (K) as an example of this type of remedy.

#### **2.2.1.4 Repair and charge lessor (possible reduction in rent)**

If the lessor, having been called upon to remedy an unfit condition in the property, refuses, the lessee may carry out the necessary repairs and deduct the cost from the rental. Where the cost can be set off against the rent, the lessee will be safe in unilaterally remitting the rent. He would have to be sure that the repairs were necessary and the cost would have had to be incurred. But where the lessor may cancel in the event of non-payment of rent and the lessee does not want that to happen it is always advisable to seek the intervention of the Court before unilaterally remitting the rent. See *Mpange supra*.

#### **2.2.1.5 Damages**

Alternatively, or in addition to another remedy, the lessee may claim damages for any foreseeable loss arising from the breach based upon the contractual standard; that is, the lessor must place the lessee as far as it is possible to do this by a payment of money, in the position she would have been in had performance been properly made (the reasonable foreseeability rule of the general law of contract.).

But where the lessee seeks damages arising from an unfit condition in the property the Courts might well require him to prove that the lessor knew or ought to have known of the need for the repair and had a reasonable opportunity to repair.

#### **2.3 The obligation to ensure the lessee's undisturbed use and enjoyment of the thing let**

There are two aspects of this obligation that will be discussed separately: a negative obligation (the lessor disturbing the lease) and a positive obligation (third party with superior title disturbing the lease).

##### *The lessor disturbing the lessee (negative obligation)*

A lessor undertakes to ensure that the lessee will have the undisturbed use and enjoyment of a thing for the duration of the lease. The lessor may be in breach if such disturbance takes place. Examples of such disturbance by the lessor include:

- ✓ Entering the premises without authority (see *Soffiantini v Mould* 1956 (4) SA 150 E)
- ✓ Depriving the lessee of his use and enjoyment of the thing by cutting off or interfering with access / services, or unlawfully ejecting him
- ✓ Taking the fruits of the thing leased
- ✓ Evicting the lessee for the purpose of effecting repairs or improvements, unless:
  - the repairs are urgently necessary and cannot be properly made while the tenant remains in occupation of the premises; and
  - the tenant has been given reasonable notice.

What is reasonable would depend *inter alia* on the urgency of the need for repair. There may be circumstances where the lessor may require that the lessee vacate the premises. This may happen where the lessee needs to effect repairs or improvements that cannot be made if the lessee is in occupation. In this situation, the lessor can only carry out repairs or improvements if it can be shown that they are urgently necessary and reasonable notice has been given. What is 'urgent' and 'necessary' in this context?

- *Urgent*

In *Mackay v Theron* 1947 (1) SA 42 N it was found that the repairs were: 'not so urgent that the landlord could not wait until the expiration of the lease'.

- *Necessary*

Repairs are not necessary if the tenant's promised use and enjoyment can continue without them. The test is usually whether the dilapidations and flaws in the thing let would unreasonably interfere with the use of property for the contemplated purpose.

*Third party with superior title disturbing the lessee (Warranty against eviction) (positive obligation)*

As the lessor is bound to protect the lessee's use and enjoyment, it follows that he or she must shield the lessee from being evicted from the use and enjoyment of the whole or part of the property by a third party who claims to have superior title.

The principles applied here are analogous to the situation in the law of sale where the purchaser is evicted (see your module on the law of sale). Thus it can be said that the lessor warrants against eviction of the lessee's use and enjoyment by a third party with better title than him or her. The warranty will not apply where (1) the disturbance is other than through the superior title to a leased thing or (2) where the lessee had knowledge of the lessor's lack of or limited title at the time of the lease.

Please note that the lessor is not obliged to protect the lessee against unlawful disturbances by third parties. Where a third party who has no legal right to the property creates a nuisance, or where eviction is a result of *vis maior*, the lessee cannot call on the warranty to protect his / her use and enjoyment. In addition, the warranty is only available in cases where such superior title existed at the inception of the lease or arose during the course of the lease as a result of the act of the lessor.

As in the law of sale, three requirements must be met, namely: (1) eviction, (2) notice and (3) determined defence. The application of the warranty can be summarized as follows: If the lessee is threatened with eviction, he or she must inform the lessor of the threat to enable the lessor to defend the lessee or to assist him or her in the defence. Should the lessor fail to assist the lessee, the lessee must put up a strong defence, if there is one (see *Loubser v Vorster & Vorster* 1944 CPD 380). A lessee who has failed to inform the lessor of a threatened eviction, or to put up a strong defence, may still bring an action against the lessor if he or she can prove that the third party's claim was indefensible.

### **2.3.1 Remedies**

The remedies available to the lessee depend on the nature of the breach.

#### *Interference by lessor*

In respect of interference by the lessor, the normal contractual remedies are available for breach of contract (i.e. specific performance, cancel the contract (if breach is substantial) and damages). An order for specific performance would most likely include an interdict to restrain the lessor from interfering with the lessee's use and enjoyment (see *Soffiantini v Mould supra*).

### *Interference by party with better title*

The lessee's breach is constituted by actual disturbance of or prejudice to the lessee's use and enjoyment and the normal remedies for breach of contract will be available. However, it is important to note that a mere threat of disturbance is not sufficient. Whether or not the contract of lease is upheld or cancelled, the lessee may claim for damages, just like sale, provided all the obligations imposed upon the lessee (eviction, notice, determined defence) have been satisfied.

May the lessee claim damages where he or she was aware of the defect in the lessor's title when the lease was entered into? Write your answer in the space provided below.

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## **2.4 The lessor (if owner) is obliged to pay the rates and taxes**

The lessor is obliged to pay all rates and taxes levied on the property. This duty can be varied by agreement with the parties. The obligation is based on the principle that municipal rates and taxes attach to the property, rather than the occupant, and go hand-in-hand with ownership.

It is important to note the potential pitfalls if the lease agreement provides that the lessee is liable for all or any of the municipal service fees, surcharges or property rates. Section 118(1) of the Local Government Municipal Systems Act 32 of 2000 provides that a property may not be transferred UNLESS a certificate is produced from the relevant municipality stating that all amounts due in connection with that property during the two years preceding the certificate have been fully paid. This effectively means that if the lessee has failed to pay the rates and taxes in breach of the lease agreement, the lessor will have to pay these charges to the municipality if he wants to transfer his property. The lessor would then need to bring a separate action for recovery of that money from the lessee. See *Mkontwna v Nelson Mandela Municipality and Another* 2005 (1) SA 530 (CC).

## **Section 3 Obligations of the lessee and remedies available**

### **3.1 Introduction**

The obligations of the lessee are

- ✓ To pay rent;
- ✓ To take proper care of the property and use it only for the purpose for which it was let; and
- ✓ To restore the property on termination of the lease in the same good order and condition as it was when it was received.

In addition, the lessee will be bound by all those obligations expressly or impliedly binding him in the contract; for example, to maintain the leased premises, to put up fences, to renovate, to carry on a particular trade or to refrain from doing so.

It is important to note at this stage that it is incorrect to refer to the lessee's obligations as 'residual obligations' or 'obligations imposed by law'. This is because the obligations of the lessee involve the essential aspects of a contract of lease (see definition and essentials above).

Should parties attempt to remove these obligations, the contract made would not be recognized in law as a contract of lease.

### 3.2 The obligation to pay the rent

The lessee's primary duty is to pay the rent agreed upon for the use of the thing. In most instances there will be agreement on particulars of payment, for example, agree that the rent must be paid on a fixed date, or that it must be paid 'monthly, in advance'. If, however, there is no agreement as to method, time, and place of payment, the following applies:

#### *Method*

Rent is payable in money (unless the lease falls within the exception of the hiring of agricultural land). A lessor is entitled to insist on being paid in South African currency. As far as payment of rent by cheque is concerned, courts will usually accept that this method of payment, in the absence of anything signifying the contrary, is acceptable. However, a cheque payment is only a conditional discharge of a debtor's liability as the cheque must still be honoured. If it is not, the lessee will be in default if the cheque was presented for payment after expiration of the due day.

#### *Place*

Watermeyer CJ in *Venter v Venter* 1949 (1) SA 768 (A) noted that where the agreement does not stipulate a place for payment, the lessee should pay 'at any convenient place where he may lawfully perform his contract'. For example, the lessee could credit the lessor's bank account, or he could visit the lessor at his home and pay him. In the former example, the lessee runs the risk of the bank making a mistake, and technically, the bank's mistake would count as a breach by the lessee.

In the space provided below, write down the facts and principles of *Venter v Venter* 1949 (1) SA 768 (A)

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#### *Time*

A lessee must make all reasonable efforts to effect payment of rent by the due date. In *Brown v Moosa* 1917 WLD 22, the contract required the rent to be paid at a specified place and day. The lessee called during the morning of the due date to find that there was no one present with authority to accept payment of the rent. The court held that the lessee should have called again in the afternoon.

Where no date for payment (in full or periodically) has been agreed in the lease, the general rule is that the rent only becomes payable on the expiration of the lease, or in the case of a periodic lease, on the expiration of a particular period. The reason for this rule is simple: the rent is due only *after* the lessor has performed *viz.* after the lessee has had his full use and enjoyment of the thing let.



What happens in situations where the final day for payment is stipulated, but not the final hour? What is the latest hour the lessee can effect payment? Write your answer in the space provided below.

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Where payment must be made to a place of business this implies that payment must be made during business hours and if the business is closed on the final day by which payment is due then payment may be made on the next business day which follows. In *National Bank of SA, Ltd v Leon Levson Studios Ltd* 1913 AD 213 it was held that where payment may only be made at a place of business,

‘there is an implied intimation to the lessee that he is called upon to pay on a business day and during business hours.’

From this case, it appears that if payment is to be made at a place of business (for example, a bank), this implies that payment must be made during office hours. If the business is closed on the final date (for example, because it is a Sunday) then payment must be made on the first business day that follows.

What happens in situations where the due date falls on a public holiday or a Sunday? Write your answer in the space provided below.

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### 3.2.1 Remedies

Where the lessee does not pay the rent as set out above, the lessor is entitled to the normal contractual remedies of specific performance, cancellation / repudiation, and damages. In addition, the lessor of immovable property has a tacit hypothec for rent. Some aspects of the general contractual remedies will be discussed before dealing with the landlord's hypothec for rent separately.

It is important to note here that many contracts of lease contain a cancellation clause that gives the lessor the power to cancel where the lessee is in default. In terms of this clause, the lessor usually has an election once the lessee is in default. He or she may abide by the contract and sue for specific performance and damages or he may cancel and claim damages and any unpaid rental. The lessor must communicate his/her election. Once communicated to the lessee, the lessor cannot go back on his/her election. There are, however, certain circumstances when the lessor will not be entitled to invoke a cancellation clause. This may be, *inter alia*, where the lessor has waived his/her right to cancel (for example, if the lessor accepts rent in arrears several months after it has become due).

Damages can be claimed where foreseeable financial loss has been suffered as a result of the breach. For example, if the lessee is aware that it is essential that rent is paid so that the lessor can make his bond repayments, a default might mean that the lessor has to borrow the money to pay his bond at a high rate of interest, and he could claim this from the lessee. If the contract is cancelled, and it takes time (some months) to find a replacement, that loss might also be claimed from the defaulting lessee.

*The landlord's hypothec for rent*

In the absence of an agreement to the contrary, a lessor of immovable property has a tacit hypothec over movables brought onto the property leased and over fruits and crops yielded by the property as security for rent. The nature of the hypothec is such that it can be described as a quasi-real right over the lessee's property as security for arrear rental.

There are two stages to the maturing of a hypothec, since it is a potential, or contingent, right only. Innes J in *Webster v Ellison* 1911 AD 73 at 86 stated '[t]hough it springs directly and immediately from the relationship of landlord and tenant, it is operative only when and so long as rent is in arrears.' Thus, the first requirement is that the lessee must be in arrears with his rental. The lessor can enjoy no right over the lessee's property until the hypothec comes into operation.

As soon as this first step is satisfied, the lessor may take steps to perfect his hypothec. He or she does this by attachment in terms of a (provisional) order of attachment or by an interdict prohibiting the removal of the goods from the leased premises, as well as by attachment in execution of a judgment for payment of arrear rent. A cheaper way of perfecting the hypothec is by utilizing section 31 (automatic rent interdict) and section 32 (attachment order) of the Magistrates' Courts Act 32 of 1944.

Section 31 provides that a lessor who issues summons in a magistrate's court for payment of rent may include in the summons a notice prohibiting any person from removing any furniture or other effects subject to the hypothec until an order has been given on the claim for rent. This notice is known as an automatic rent interdict.

Section 32 allows a lessor to make application to the magistrate's court for an attachment order. The section requires that an affidavit accompany the application making certain allegations. Study this affidavit and write down in the space provided below the allegations that need to be made in this affidavit:

- (i) \_\_\_\_\_
- (ii) \_\_\_\_\_
- (iii) \_\_\_\_\_
- (iv) \_\_\_\_\_

Once these goods are attached, the lessor has the right to have them sold off in execution, and the money then goes to paying off the rent that it owed. Should the lessee settle the claim, the goods will be released by the sheriff.

The hypothec operates over all categories of property. Usually it is defined to operate over moveable corporeal property brought onto the premises (*invecta et illata*) but can also include the fruits and crops yielded by the property.

Property owned by the lessee is naturally covered. Property belonging to the sub-lessee can only be attached to the extent that the sub-lessee is in arrears to the lessee.

Assets belonging to third parties can only be attached under the landlord's hypothec if:

- (i) The lessor does not know that the assets do not belong to the lessee. The lessor will usually find out that the assets do not belong to the lessee, for example,
  - a. by notice from the true owner;
  - b. by receipt of a copy of an agreement between the lessee and a third party where that third party reserves ownership, despite the fact that goods are in the possession of the lessee (see NB point below)
- (ii) A third party brings the assets onto the leased property in the knowledge that the impression could be created that the lessee is the owner of those assets – and that third party fails to correct this impression.
- (iii) The assets were brought onto the premises for use by the lessee and not by a visitor.
- (iv) The assets were brought onto the premises with the intention to keep them there permanently.

NB: The Security by Means of Movable Property Act 57 of 1993 places the seller's rights in property sold under an instalment agreement (as defined in the National Credit Act 34 of 2005) before those of a landlord in respect of that property. It also ranks a bond entered into in terms of the Act before the landlord's hypothec unless the hypothec had been perfected before the bond was registered. See s2 of the SMMP Act.

#### *Hot pursuit*

The lessee may naturally avoid the operation of the hypothec by removing his or her property from the leased premises before he falls into arrears. But there are circumstances where a lessor will be entitled to a 'hot pursuit' and recover the property through a court order for the arrest and attachment of property while it is being moved. This will only apply

- if the lessee is already in arrears when he tries to move the property, and
- if the property is apprehended by court order in transit, and has not yet reached its ultimate destination.

In the *Webster supra* case the sheep which were removed from the leased land were taken to another farm. This was their final destination for the purposes of the removal. They arrived there before any interdict or attachment order had been communicated to the lessee. It was held that the doctrine of quick pursuit did not permit the lessor to follow up goods which had been upon the leased property at the time the lessee was in arrears unless a court order had been granted in favour of the lessor's hypothec over the goods and such order had been brought to the notice of the lessee before the goods arrived at their final destination. It was held in this case that the goods could not be recovered.

### **3.3 The lessee's obligation to take proper care of the property and to use it only for the purpose for which it was let**

#### *'To take proper care of the property'*

The lessee is required to make sure that he does not use the property let unreasonably or improperly. This means that the lessee must use the leased thing in a reasonable manner i.e. with that degree of care with which a *bonus paterfamilias* would use his or her own property.

This obligation can be divided into positive and negative duties. Positive duties may include the regular attendance of maintenance of a garden, keeping a farm free of weeds, cleaning gutters and drains of debris and keeping buildings clean. Negative duties would include the obligation not to misuse or damage the property. These duties may include using a garage as a stable, driving nails into a wall and damaging the plaster and paintwork and painting wood finishes

What about the acts and/or omissions of members of the household or guests? A lessee is liable for anything done by the members of his or her household. In respect of guests, the common law used to exclude guests (unless the tenant was negligent in admitting them). However, s4(5) of the Rental Housing Act extends the liability of the tenant to damage caused by the tenant's visitors.

*'To use the property only for the purpose for which it was let'*

The lessee may also only use the property for the purpose for which it was let. If there is no express or implied agreement on the purpose, the property may be used for the purpose for which it was previously used or for which it was manufactured or created.

Does living an immoral life constitute misuse of the premises? Write your answer in the space below:

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### **3.3.1 Remedies**

The lessor has the normal remedies for breach of contract available to him in the event of a breach of this duty. This may include an interdict for a threatened or continuing breach, specific performance for neglecting a positive duty (e.g. to repair), damages and cancellation for a major breach.

In respect of the remedy of cancellation, the breach would have to be really significant to justify cancellation. If the misuse of the property is not material, the lessor is confined to an action for damages, if any. In *Spies v Lombard* 1950 (3) SA 469 AD at 489 an action for cancellation was not granted and nor were damages. In this case the plaintiff lessor sued for cancellation and damages. The defendant had broken windowpanes and some of the doors of the outbuildings were removed from their hinges. The court held that

'...since the law does not demarcate the dividing line between venial misuse and such misuse as would justify cancellation, the matter is left to judicial discretion to decide whether such misuse should be curbed by ejectment, by damages, or whether it should be overlooked entirely on the grounds of its insignificance..... In deciding what order would be equitable in the circumstances, a court would obviously give due weight to considerations, *inter alia*, such as how serious is the damage done, whether it is progressive; whether the lessor is threatened with irreparable loss.' (at 488)

### **3.4 To restore the property on termination of the lease in the same good order and condition as it was when it was received.**

Since the contract is of a temporary nature, the lessee has a duty to restore the thing to the lessor on the termination of the lease. Restoration means complete restoration of the use and enjoyment initially received less fair wear and tear. Certain aspects of this duty are discussed below:

### *The lessee must restore on time*

Where the lessee does not vacate and restore on the due date, he/she is *in mora* and is said to be holding over.

### *Vacant possession*

The lessee must restore vacant possession back to the lessor. This means that the lessee must remove all his goods, as well as the goods of any other person that are on the premises.

### *Without alteration*

The obligation technically requires the premises to be restored unaltered. Any improvements or changes would therefore technically have to be removed. However, pragmatically speaking, the lessor may be happy with the alterations, and may be prepared to compensate the lessee for putting these in.

### *In full and undamaged condition*

The lessee must repair and replace anything that is damaged, or compensate the lessor for any damaged that has been done to the property. He is also responsible for any damage caused by anyone else for whom he is responsible.

The lessee is not responsible for any loss caused by fair wear and tear. For example, peeling paintwork, weathered doors, corroded hot-water pipes, or any damage caused by *vis maior* (e.g. hail / lightning).

The lessee is also not responsible for destruction or theft of the thing let as long as these acts cannot be attributed to his negligence.

## **3.4.1 Remedies**

If the lessee returns the leased thing in a damaged condition, the lessor has a claim in damages to remedy the condition of the property and / or loss occasioned by the person refusing to vacate the premises (lost rent etc). The lessor is also entitled to eject a lessee who refuses to give up occupation. Particular aspects of these remedies require further discussion.

### *Specific performance in the form of ejectment*

The lessor has a claim for the lessee's ejectment. The claim will be based on the contractual obligation of the lessee to restore possession. The Supreme Court of Appeal (the SCA) decided in 2003 that lessees whose leases have been lawfully terminated fall within the scope of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE). See *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA). This means that a lessor who wishes to eject a lessee who is 'holding over' needs to apply to court for such ejectment using the procedures set out in PIE.

NB: Note that the SCA indicated that PIE would **not** be applicable in respect of leases of commercial properties.

### *To compensate the lessor for the lessee failing to restore the thing let at the proper time*

In these circumstances, the lessor may recover the following in damages:

- ✓ The value of the use and enjoyment of the leased property for the period, if any, between the date on which the lease terminated and the date on which the lessee actually left the leased property;
- ✓ What the lessor has had to disburse; and
- ✓ His loss of profit.

#### *Claiming rent*

There is considerable controversy on the issue of whether or not “rent” in lieu of damages may be claimed for the period held over. Applying ordinary contractual principles the rental is an agreed *quid pro quo* for the use and enjoyment contracted for and cannot be claimed for a period held over for which there was necessarily no contract. We will discuss this controversy in the relevant lecture. Write down relevant points from the lecture in the space provided below.

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### **Section 4**

#### **The legal position of the lessee**

#### **4.1 Introduction**

The content of the lessee’s right can be derived largely from the obligations of the lessee and the lessor as stated above. However, it is important to touch on some other important aspects of the lessee’s rights that are not apparent from these duties. These are discussed separately under the headings of subletting, cession and assignment respectively.

#### **4.2 Subletting**

If there is no provision in the contract of lease dealing with subletting, a lessee is entitled to sublet (i.e. re-let) any thing that has been let. In this way, a second lease is formed. The lessee does not require the lessor’s consent, provided that the proposed sublessee is not a person to whom the original lessor could reasonably object.

If the property is sublet, a contract arises between the original lessee and the sublessee. There is no contractual relationship between the original lessor and the sublessee. Therefore, the sublessee will have to give up occupation of the thing let when the original contract of lease comes to an end.

What is the situation where the lessee sublets the thing let in contravention of an agreement prohibiting it? Write your answer in the space provided below.

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### 4.3 Cession

Cession by a lessee of his rights under a lease means a transfer of those rights to a third person. If there is no provision in a contract of lease prohibiting cession, a lessee may cede his or her rights to a third person like any other creditor. The effect of a cession is that the lessee ceases to be the creditor of the lessor and that the cessionary takes the lessee's place as a creditor of the lessor. The cessionary then becomes entitled to exercise such rights as are ceded to him under the lease. However, it is important to note that the cessionary does not undertake the obligations of the cedent (the lessee) who, though no longer creditor, still remains a debtor under the lease. Thus, the rights, and not the obligations, of the lessee are ceded.

### 4.4 Assignment

The assignment of a lease (a term taken from English law) means the entire substitution of a new lessee for the old one. As assignment encompasses not only the cession of the lessee's rights but also the delegation of his or her duties, a tripartite contract is required between the original creditor (lessor), old debtor (original lessee) and new debtor (new lessee). The lessor can give his consent in advance (for example, a lease with the lessee or his assignees, assigns) or tacitly, through conduct, such as acknowledging a third person as the new lessee.

### 4.5 Lessee's position as against third persons: the rule '*Huur gaat voor koop*'

When the lessor sells the thing let before the expiry of the lease, the general rule is that the buyer is bound by the lease. This is in accordance with the doctrine of '*huur gaat voor koop*' ('hire takes precedence over sale'). The law effectively substitutes the buyer for the seller as lessor and, as long as the lessee fulfils his / her obligations, the seller cannot evict the lessee. No new lease comes into existence between the new lessor and the lessee and there is no need for a cession of rights, or an assignment of obligations. See *Genna-Wae (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* [1995] 2 All SA 410 (A).

'*Huur gaat voor koop*' only applies where the property is alienated (for example, sold, exchanged or donated) and not, for example, where the owner's rights are transferred as a consequence of expropriation. It therefore only applies if there has been a succession of rights.

The doctrine is subject to certain important qualifications:

- (a) The Formalities in Respect of Leases of Land Act 18 of 1969 provides that certain leases of immovable property (commonly referred to as long leases) shall not be binding on a creditor or successor under onerous title (that is, someone who has given value for the property) of the lessor for longer than 10 years, unless the creditor or successor had knowledge of such contract of sale.
- (b) In respect of leases for shorter periods, the lease does not bind the buyer of the leased property unless he had notice of it at the time of the sale. But such notice is presumed where the tenant is in occupation of the property at the time of the sale - if the prospective buyer had inquired, he would have ascertained that there was a tenant in occupation.

## Section 5 Termination of the lease agreement

### 5.1 Introduction

It is important to note that a lease agreement must, by its very nature, eventually come to an end. Termination of a lease can take place in any of the ways in which obligations are normally terminated, for instance by performance, agreement, prescription and rescission after a breach of contract. There are also other ways of termination that are peculiar to contracts of lease – some of these ways are dealt with in more detail below.

### 5.2 Termination by effluxion of time

If a lease is for a fixed period or until the occurrence of a specified event, the obligations arising from it automatically come to an end when the period ends or the event occurs. Since termination is automatic, no notice of termination is required.

In *Davy v W Walker & Sons* 1902 TH 114 at 128, the parties agreed that the lease would run 'until the end of the war'. Wessels J held that this event happened on 'May 31<sup>st</sup> 1902 when the peace was formally signed between the Republican leaders and the British Government.'

### 5.3 Termination by notice

In indefinite leases with periodic payments of rent (i.e. weekly, monthly, yearly), the obligations can be terminated by notice given by the lessor or the lessee. If there is no agreement regarding period of such notice, reasonable notice must be given.

What constitutes reasonable notice depends on the circumstances of each case. However, certain guidelines have emerged from case law. Generally, the notice must expire at the end of the period for which rent is payable and must afford the lessor a reasonable time in which to re-let the premises or the lessee a reasonable time to find other premises. It has been held by our courts that notice in a monthly lease for example, cannot be given mid-month to expire in the middle of the following month. Thus, one cannot give notice on 12 December to terminate on 12 January when the rental is payable on the first day of every month.

After discussion in the relevant lecture, write down the time periods that have been accepted by our courts in the case of:

- (i) a weekly lease \_\_\_\_\_
- (ii) a monthly lease \_\_\_\_\_
- (iii) a yearly lease \_\_\_\_\_

Where the contract of lease provides for termination at the will of any of the parties to it (known as a tenancy at will), he or she may terminate it at any time by giving notice.

It should be kept in mind that a notice of termination is effective only if it comes to the actual knowledge of the other party. Practically speaking, this means that many terminations are effected by registered mail or hand delivered notices.



## 5.4 Termination by Death

Generally, the death of a lessor or lessee has no effect on the continued existence of a contract of lease – the rights and duties of a deceased lessor or lessee pass on to his or her heirs on his or her death. However, a contract of lease may provide for the termination of the lease in the event of the death of either party. Furthermore, the lease will be terminated where it is at the will of the party who subsequently dies.

## 5.5 Termination by insolvency

### *Insolvency of the lessor*

In the event of the insolvency of the lessor, the Insolvency Act 24 of 1936 governs the situation. S 37(5) of the Act states that a 'stipulation in a lease that the lease shall terminated or be varied upon the sequestration of the estate of either party shall be null and void.' Thus it is clear that such event does *not* cause the termination of the lease. However, the situation is different where there is another real right over the property, which would normally be that of a mortgagee. If the real right of the mortgagee is prior in time then – unless the mortgagee does not want to take advantage of his or her security – it could happen that the trustee of the insolvent estate will have to sell the property free of the lease in order to satisfy the preferent claim of the mortgagee. First, the property will have to be put up for sale subject to the lease. If the proceeds of the sale cover what is owing under the bond, the lease remains. If the proceeds are insufficient, then, at the instance of the mortgagee, the property is sold free of the lease. In these circumstances, the trustee may even before such a second sale cancel the lease and require the lessee to vacate the property. A lessee who has to suffer the termination of his or her lease in these circumstances will have a concurrent claim for damages against the insolvent estate of the lessor for such loss as he or she sustained.

### *Insolvency of the lessee*

The Insolvency Act also applies here. Section 37(1) provides that the sequestration of the estate of the lessee does not cause the termination of the lease, but the trustee of his or her insolvent estate may terminate it by notice in writing to the lessor.

## 5.6 The lessee's right to compensation for improvements

In general, a lessee who has effected useful improvements on a property is entitled to compensation for those improvements on termination of the lease. However, note that legislation (*placaeten*) from Holland has been accepted into South African law which restricts the lessee's right of compensation for improvements on rural properties. See *Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA) and write the relevant principles from this case, and from the lecture in the space provided below:

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**Section 6  
Renewal of a lease**

**6.1 Introduction**

Parties to a contract of lease may agree expressly or impliedly that immediately upon the expiration of their lease, a new lease of the same thing let will commence between them.

The term 'renewal' used in the part is slightly misleading in that it may create the impression that the old lease is being continued. Note that, upon an agreement to re-institute or revive a lease by agreement, a new lease comes into existence, but which may incorporate the old terms of the original agreement.

**6.2 Express renewal (conventional relocation)**

Express renewal is effected by express agreement by the parties during the contract of lease or upon its expiration. It is commonly effected by the exercise of an option to renew that was provided for in the contract of lease or by separate contract entered into during the currency of the lease.

The time and manner of exercising such a right is usually prescribed in the contract. Where the option is included in the contract but with no time prescribed, the option must be exercised before the lease expires as the option expires with the lease.

The offer to renew contained in the option should be complete. This means that the terms of the lease must be so certain and definite that its acceptance will bring the contract into existence. The new lease may introduce / alter terms in the contract. Where the parties agree to renew their lease without setting out the new terms for the new lease, the courts have held that, in the absence of an express stipulation to the contrary in the renewal agreement, any collateral pacts in the lease must be taken to have been renewed.

**6.3 Tacit renewal**

Where there is nothing in the contract regarding renewal but the lessee remains in occupation of the leased thing and continues to pay the rent while the lessor permits him to remain in occupation after the termination of the lease and continues to accept the rent, renewal can be inferred. It is noted that it is not just the fact that the lessee remains in occupation of the leased property but also that the lessor continues to accept the rent. Thus it is the fact that both parties are content to carry on as before

If renewal of the lease is tacit, how do the parties know what the new terms of the lease are, especially regarded the duration of the new lease? Write your answer in the space provided below.

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## THE LAW OF CARRIAGE: GENERAL INFORMATION

### 1. COURSE INFORMATION

Commercial Law 201 Paper 1 consists of three different sections, namely, the law of sale, the law of lease and the law of carriage. This module contains information on the second section of the course, namely, the law of carriage. The law of carriage will be taught over approximately 5-6 lectures in the second term after the law of lease section of the course.

### 2. MODULE INFORMATION

This module sets out the basic structure of the topics to be covered in the law of carriage. Students are expected to read ahead in the module for the next lecture in order to acquire a basic familiarity with the relevant topic. Lectures will be presented by means of *viva voce* lectures and PowerPoint presentations will be utilised where appropriate. It is important that students note that the module is **not** comprehensive. Some topics require responses to questions posed in the module, while some topics will be covered orally in class only. Students are therefore expected to take their own notes in lectures to supplement the module. Occasionally, students will be expected to explain case law and consider practical questions in class.

### 3. RECOMMENDED TEXTBOOKS

Please note that there are no prescribed texts for this course. However, there are several general Commercial Law textbooks which are very useful, as well as the relevant volume of LAWSA (the Law of South Africa) which you will be able to find in the reference section of the Law Library. These texts will help you familiarise yourself with the topic under discussion and will assist you when supplementing your class notes. Some general Commercial Law textbooks have chapters on the law of carriage.

These are set out below. PLEASE NOTE that the information is some of these texts is outdated:

Nagel (ed)	<i>Commercial Law</i> (2006) 3ed Lexisnexis Butterworths: Durban.
Govindjee <i>et al</i>	<i>Commercial Law 2: Fresh Perspectives</i> (2007) Pearson: South Africa.
Collier-Reid and Lehmann (ed)	<i>Basic Principles of Business Law</i> (2006) LexisNexis: Butterworths: South Africa.
F du Bois (ed)	Wille's Principles of South African Law 9 <sup>th</sup> ed (2009) Juta: Cape Town.

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<b>Part 1</b> <b>Introduction</b>
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## **1.1 Purpose and scope of the course**

The purpose of this course is to set out the most important features of the law governing contracts that deal with the movement of goods and people by land, sea and air. This course will provide an understanding of the definition of carriage, the parties to a contract of carriage and the requirements of such a contract. We will examine who is liable for loss or damage to goods or human life during carriage and in what circumstances. Finally, we will explore how legislation has replaced some aspects of the common law of carriage.

Basically, you will be dealing with the legal relationship between a carrier of goods and the person for whom those goods are carried (including the legal relationship between a carrier and a passenger). While statutory enactments such as the Carriage by Air Act 17 of 1946 and Carriage of Goods by Sea Act 1 of 1986 have largely superseded the common law of carriage in South Africa, the common law is important

'both in itself and as a background for the interpretation of statutes and contracts which define and/or limit a carrier's rights and liabilities' (*Law of South Africa*, para 77).

Many of the principles of carriage come from contract, delict, property and agency which you would have dealt with in Commercial Law 1 and 2. The basis of this subject is the law of contract. Why, then, do we deal with carriage as a distinct subject? Dockray, a writer commenting on the English law on carriage of goods by sea (Cases and Material on the Carriage of Goods by Sea at 1), suggests that a distinction must be made because of a few notable features. These features (summarised below) can be applied equally in the South African setting:

- 1) The way in which general legal ideas have been adapted to meet the special features of the sea (and other forms of) trade makes carriage important as a distinct subject. One feature of this business is its international nature, which produces a great desire for uniformity in the law of carriage. (We will see this aspect when we look at the Hague-Visby Rules and other inter-governmental agreements).
- 2) Contracts for the carriage of goods by sea (land and air) fall to be performed in special and often hazardous conditions in which it is practically impossible for one party to supervise the work of the other from day to day. (We will see how this aspect has been instrumental in the development of sea and air carrier's general duties).
- 3) Contracts for the carriage of goods by sea (land and air) are directly dependent on other commercial activities. They are typically entered into in order to sell goods or to give effect to a previous sale. (We will see how this aspect has implications on the liability of carriers and the rights of third parties).

## **1.2 Mediums of Carriage**

This course deals with the three mediums of carriage, namely:

- land (by road and rail);
- sea; and
- air.

### **1.3 Nature of the thing conveyed**

It is important to note at this early stage that there are two broad categories of things that can be conveyed. The first is 'passenger and baggage' carriage, which includes passengers and any hand luggage. The second category is termed the carriage of goods and includes all goods which do not form part of the first category.

**Part 2**  
**The Common Law Contract of Carriage**

**2.1 Definition of a Contract of Carriage**

A common law contract of carriage has been described as an agreement whereby one person (the carrier) undertakes to another to carry or convey certain goods and/or persons from one location to another, either for reward or gratuitously.

**2.2 Parties to a Contract of Carriage**

**2.2.1 The Carrier**

The party who transports the goods and passengers is known as the **carrier**. A **public carrier** is someone who transports goods (or persons) as a business. A **private carrier** only transports goods as an isolated or casual act either for payment or for free. We will look at the types of common law carriers in more detail at para 3.2.1 below.

**2.2.2 The Consignor**

A **consignor** is the party to the contract who arranges for the transportation of the goods.

**2.2.2 The Consignee**

Sometimes there is another party to the contract of carriage known as the **consignee**. The consignee is usually the person nominated by the consignor to take delivery of the goods. The consignee is often an agent of the consignor. The same person can act as both consignor and consignee. In this case, the consignor does not need to nominate a separate person as a consignee.

**2.3 Elements of the Contract of Carriage**

The contract of carriage at common law is complete when the parties have agreed on:

- (i) the goods or persons (or both) to be carried or conveyed,
- (ii) the two points between which the carriage is to take place, and
- (iii) the freight (i.e. the remuneration for goods) or fare to be paid for the service (if the contract is not gratuitous).

Think about the principles you learnt about earlier regarding the requirement that the price (in this case, the freight or fare) in a contract of sale and lease must be ascertainable. Do you think that the contract of carriage will be valid where:

- |  |       |
|--|-------|
| • there is a method of calculation agreed upon               | ..... |
| • a third party is nominated by the parties to set the price | ..... |
| • no price is expressly agreed upon                          | ..... |
| • the parties agree on a reasonable price                    | ..... |



Agreement on the method of carriage (road, rail, ship, or air) is not necessarily an essential element unless expressly or impliedly material to one or other of the parties.

For example, if I undertake merely to transport Fred's goods to East London from Grahamstown by the end of the week I am entitled to choose the method. I might use my own car or a courier. If I choose the latter there would be two carriage contracts, one between Fred and me and the other between me and the courier.

Similarly agreement as to the time for delivery will not always be an essential unless it is material to one of the parties. If delivery appears to the consignor to be unduly slow she has the remedy of placing the carrier *in mora* (see below).

## **2.4 Formalities and special terms**

There are no formalities required for a contract of carriage to be valid at common law and therefore a contract of carriage may be oral. However, it is common practice that these contracts are printed in standard form by transport companies. These standard forms often include special terms. These terms may be expressly set out in the contract or incorporated into the contract by reference to certain regulations of tariff booklets. A passenger or consignor is naturally bound by these regulations or terms if he or she actually consents to them. Consent on the part of the passenger or consignor will be presumed in the following instances:

- Where the passenger or consignor actually signs a contract of carriage which refers to the terms, even if he or she does not know what the terms are, provided he or she had reasonable facilities for acquainting him/herself with the contents of the regulations.
- In the case of a ticket containing a reference to the terms, and the passenger knew, or ought reasonably to have known that the reference related to the terms of the contract.

**Part 3**  
**The obligations of the consignor and the carrier**

### **3.1 The obligations of the consignor**

The obligations set out below are those obligations that follow from the nature of the contract. These are often set out expressly in the contract or can be implied from it. Do not forget that there may be other express or implied contractual obligations, which are particular to a contract, for example, the method of packing and time and place of delivery. The obligations of the consignor can be summarised as follows:

- to deliver the goods to the carrier;
- to accept delivery at destination; and
- to pay the agreed or proper freight.

#### **3.1.1 The obligation to deliver the goods to the carrier**

The consignor is under an obligation to deliver the goods to be conveyed to the carrier. An agreement to the contrary may be implied. Clearly if the goods are such that only the carrier can move them from their location (for example, the contents of a household to be moved from Port Elizabeth to Johannesburg) then the carrier would have to collect the goods from the consignor. If there is no agreement reached between the consignor and the carrier and the consignor is able to transport the goods, the consignor must deliver the goods to the carrier. For example, Transport Shuttle Co. agrees to deliver your suitcase to an address in East London. In the absence of an agreement on this point, you (as consignor) are required to deliver the suitcase to the company.

#### **3.1.2 The obligation to accept delivery at destination**

The consignor is under an obligation to accept delivery of the goods at the specified destination. This duty can be delegated to the consignee. Should a consignor (or his/her agent) fail to accept delivery, the carrier is entitled to exercise a lien over the goods for unpaid freight, unless there has been a contrary agreement between the parties. A lien is the right of the carrier to retain the property of the consignor or consignee until the other party has paid the money owing under the contract of carriage. In these circumstances, the carrier's obligation to take proper care of the goods may be diminished.

#### **3.1.3 The obligation to pay the agreed or proper freight**

The consignor is under an obligation to pay the agreed or proper freight on delivery of the goods. This obligation may be changed by the parties, for example, the parties may agree that the freight will be payable by the consignee. The carrier may refuse to release the goods (in terms of the carrier's lien) where the consignor (or consignee) fails to pay the proper freight. Once the goods leave the carrier's possession he/she loses his lien. In the absence of express agreement as to the freight payable, payment at the carrier's usual rate may be implied, provided the consignor is aware that the carrier has usual rates (*Lombard v Pongola Milling Co Ltd* 1963 (4) SA 860 (A)).

### 3.2 The obligations of the carrier

The carrier is also bound by residual as well as agreed obligations. The duty to deliver at a particular destination and at a particular time would usually be agreed upon. The main residual obligation of the carrier is to carry the goods with due care for their safety and without due delay.

It is important to note that the first of a succession of carriers is liable for the safe carriage in respect of the entire journey unless he limits his liability by contract or unless he is the agent for the second and successive carriers. We shall be examining this duty in relation to the different types of carrier as the nature and degree of liability which the carrier attracts under this obligation is dependant on the *type* of carrier he or she is and what he or she is conveying (see part 4 below). It is important to note that the liability in terms of carriage of *persons* is identical for all carriers, irrespective of which type of carrier they are, as was found in *Jameson's Minors v Central South African Railways* 1908 TS 575.

## Part 4 Commencement, termination and limitation of liability

### 4.1 Scope of liability of carrier when transporting goods

As mentioned in part 3, the nature and extent of liability of the carrier for loss or damage to goods depends on whether the carrier is a private or a public carrier. Importantly, the nature and extent of liability of the carrier also depends on whether the carrier falls under the edict *de nautis, cauponibus et stabulariis*.

#### 4.1.1 Type of Carrier

Public carrier

A *public carrier* is someone who holds himself out as willing to carry for reward for anyone who wants to use his services. In other words, he holds himself out to the public as undertaking the carriage of goods (or persons) as his or her profession. The liability of a public carrier is dependant on whether the public carrier falls under the edict *de nautis, cauponibus et stabulariis* (described at para 4.1.2 below) or whether the public carrier falls under any specific legislation (see part 5 below).

Private carrier

A *private carrier* may undertake the carriage of goods or persons either for remuneration or gratuitously. This has been described in *Prinsloo v Venter* 1964 (3) SA 626 (O) as transporting goods 'as a casual act'.

Where a private carrier is remunerated for his / her services, the private carrier is liable for damage caused to the goods carried in the same way as a depositary is liable in a contract of deposit for reward. Thus, the private carrier must use ordinary diligence and is liable for damage caused by the negligence of himself or his servants. However, there is a reversal in the onus of proof: this means that as long as a private carrier (who is remunerated) can prove that he was not at fault, he will not be liable.

Where a private carrier transports goods for no charge, she is only liable for an intentional act (*dolus*) or gross negligence (*culpa lata*) on her part or on the part of her servants unless the parties agreed otherwise.

#### 4.1.2 Edict *de nautis, cauponibus et stabulariis*

The courts in South Africa have accepted that the edict *de nautis cauponibus et stabulariis* has been part of our law since the middle of the nineteenth century. This edict, enacted by the Roman praetor in the ancient Roman Republic, imposes an **absolute liability** on carriers by water, innkeepers and stablekeepers for all loss of or damage to the goods given into their custody, unless such loss or damage falls within one of the acknowledged exceptions.

Since we are only dealing with the law of carriage, we will study the edict as it applies to the *nautae* or carriers by sea. With this edict, the Praetor wanted to make sure that public carriers by sea should have a greater responsibility than other carriers who did not transport goods as a profession. The Praetor imposed this responsibility because, along with the Roman public at the time, he suspected that public carriers by sea were untrustworthy and often plotted with thieves to arrange the disappearance of goods in their care!

In terms of the edict, a carrier is absolutely liable for the goods in his or her possession. However, there are certain exceptions to this liability:

- *Vis maior*

This means that the occurrence of any event which is unforeseen, unexpected and irresistible and which human foresight cannot guard against, will free the carrier from liability. The origins of such exception come from Roman and Roman-Dutch law, which held that the occurrence of events which could be classified as *casus fortuitus*, *damnum fatale*, and *vis maior* freed the carrier from liability.

The onus lies on the carrier who alleges that damage was caused by the occurrence of an event that can be classified as *vis maior*. Give examples of the kind of events that would fall under this exception:

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- **Negligence of the consignor**

The carrier will not be liable if he or she can show that consignor packed the goods negligently and caused damage thereby. This negligence need not be apparent when the carrier accepts the goods.

- **Inherent vice or latent defect**

The carrier will not be liable if the damage to the goods / animals in transit was caused by the inherent vice of animals or by latent defects in the goods themselves. The carrier who alleges that the damage was occasioned in this way will bear the onus of proof.

#### **4.1.2.1 Debate on application of Praetor's Edict to carriers by land**

For a long time, our courts have recognised that the edict is part of South African law and that it (and its strict liability) applies to professional carriers by sea. However, before 1995, the courts hotly debated whether the Praetor's edict should be applied (or should be extended to apply) to carriage of goods by public carriers by land. This debate was settled by the Appellate Division (now SCA) in the case of *Anderson Shipping (Pty) Ltd v Polysius* 1995 (3) SA 42 (A). The court found that to impose absolute liability in terms of the edict on carriers by land would be anomalous as the liability of private carriers by land is based on ordinary negligence and fraud. As a result, the edict only applies to those *nautae, cauponae et stabularii* who exercise these respective professions. Public carriers by land are liable for damage caused by fraud and ordinary negligence only.

Write down the facts of this very important decision in the space provided below:

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## **4.2 Commencement of Liability**

The liability of the carrier commences as soon as the goods are delivered to him/her or, if the carrier is already in possession of the goods in another capacity, as soon as he holds them in

terms of a carriage contract.<sup>1</sup> It is important to note that the mere conclusion of a contract of carriage does not give rise to liability.

#### **4.3 Termination of Liability**

The liability of a carrier terminates once the goods are brought to the agreed destination and delivered. Delivery in this sense means to give into the hands of the consignee (or his or her agent). Delivery can be actual or constructive.

#### **4.4 Successive Carriers**

Where there is more than one carrier that is conveying the goods, the absolute liability of the various carriers will depend on the form of contract between the consignor and the carriers.

Various scenarios are possible. Consider the following examples taken from the *Law of South Africa* at para 606:

- The first carrier may contract to carry the goods through to the stipulated destination. In such a case, the first carrier remains liable throughout the period of conveyance. The other carriers are seen as agents of the first carrier.
- The first carrier may be an agent of the second carrier. The second carrier will then be liable for the safety of the goods throughout the period of conveyance.
- The first carrier may contract to carry the goods only part of the way. The first carrier will then only be liable for the safe carriage of goods until they are delivered to the next carrier or forwarding agent.

#### **4.5 Avoidance of Liability**

Under the common law, parties to a contract of carriage may modify or avoid the absolute liability. Any such contract and its exclusionary clauses are strictly construed and have to be drawn with care in order to be effective in avoiding liability. Unless liability for negligence is clearly excluded, the carrier will remain liable for damage occasioned by the negligence of himself or his servants (NB – a carrier cannot contract out of liability for gross negligence or *dolus* – for example, a carrier cannot contract out of liability for theft committed by himself).

The clause avoiding liability usually reads along the lines of ‘at owner’s risk’ (for goods) and ‘at own risk’ (for passengers). The onus lies on the carrier to prove that the clause in the agreement excludes the specific loss in respect of which damages are being claimed.

#### **4.6 Remedies**

##### *Remedies of the carrier*

Once the carrier has delivered the goods at the agreed time and place (and performed in accordance with all his or her obligations), the consignor has an obligation to pay the freight unless there has been a contrary agreement between the parties.

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<sup>1</sup> You may recall from your course on the law of sale that delivery to and acceptance of goods may be actual or implied. The carrier may therefore accept the goods by a specific receipt, which will entail an acceptance of immediate or potential future physical control over the goods.

If the freight is not paid, we have seen earlier how the carrier has a lien on the goods carried for the payment of freight on those goods. The following points should be noted regarding the operation of the lien:

- The carrier is only entitled to sell the goods and reimburse himself from the proceeds of such sale where the right to sell is expressly conferred upon the carrier by the consignor. If there is no agreement on this point, the carrier still has a lien but he/she has no right to sell such goods in order to recover any money due to him in respect of the carriage by the consignor. The carrier must institute action against the consignor in the usual way, obtain judgment and attach and sell the goods in execution.
- In order to exercise this lien, the carrier is entitled to rent premises in order to store the goods.
- The lien is dependent on possession, and once the carrier has given up possession, she/he loses the lien.
- The carrier's lien can only be exercised in respect of the freight due on specific goods and cannot be exercised in regard to other amounts that the owner might owe the carrier.
- The right of a lien may be excluded by agreement.
- Where the freight is not paid despite the carrier's readiness to deliver in good order, the carrier is entitled to appropriate the goods at the current market valued in order to obtain payment.

See *MV New Market Taxfield Shipping Ltd v Cargo currently laden on board the MV New Market and others* 2006 (5) SA 114 (C) for an interesting set of facts dealing with the operation of a carrier's possessory lien.

#### *Remedies of the consignor or consignee*

The owner of the goods (consignor or consignee) is entitled to claim specific delivery of the goods. In the case of loss or damage to goods, the ordinary contractual measure of damages applies and the courts will, in so far as possible, place the owner in the same position as if the breach had not occurred.

Where the goods have been sent to the wrong place for delivery, the owner may have the goods delivered to the agreed destination free of charge, or receive damages in the amount of the loss that will be suffered if the goods are not delivered.

Where goods are delayed unreasonably long time before delivery is made, the owner may claim damages in the amount of the loss suffered by reason of the delay in delivery. The owner is entitled to set off the claim for damages against the carrier's claim for freight.

#### *Measure of Damages*

The carrier is liable for the direct and proximate loss resulting from his negligence or breach of contract. Consequential loss of profits or loss of a share in the market is not normally regarded as being within the contemplation of the parties.

It should be noted that the parties may in their contract prescribe a method of calculation of damages in their contract, or limit liability to a certain sum. Where the contract is silent on damages, the following general principles are followed:

- Where the goods are *damaged*, the measure of damages will be the amount in money that reflects the difference in value between the goods before the damage is suffered and the value of the goods thereafter.
- Where the goods are *delivered late*, the measure of damages will be the difference in value between the market price at the time of actual delivery and the time the goods should have been delivered.

- Where the goods have been *totally lost or destroyed*, the owner is entitled to claim the value of the goods from the carrier, which is usually calculated as the actual value of the goods at their place of destination at the time when they should have been delivered, and is not restricted to the cost price at the place of consignment.



<b>Part 5</b> <b>Carriage by Road and Rail</b>
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## **5.1 Carriage by Road**

### **5.1.1 The Road Transportation Act 74 of 1977**

The Road Transportation Act 74 of 1977 governs the carriage of passengers, baggage and goods by road. The Act defines 'road transportation' as the conveyance of persons or goods on a public road by means of a motor vehicle either for reward or in the course of any industry, trade or business, or the conveyance of persons or goods on a public road by means of a hired bus or hired motor vehicle respectively. The main purpose of the act is to regulate and control road transportation and to prevent uneconomical business competition between rival operators of motor vehicles between rival operators of motor vehicles. This Act is primarily of an administrative nature and, as such, the common law governs carriers by road with certain exceptions set out in section 31(1). The Act prohibits transport by a motor vehicle unless a permit authorising road transportation has been issued in respect of a particular motor vehicle, or unless the particular type of road transportation falls within certain enumerated exceptions such as conveyance by educational institutions, lift clubs, conveyance for farming requisites and so forth.

#### **5.1.2 Road Transportation Contracts**

***It is common practice for road transportation contracts to severely limit the common law liability of the carrier and in almost every case a duty to obtain insurance for the goods conveyed is imposed on the owner or consignor of the goods.***

## **5.2 Carriage by Rail**

### **5.2.1 The Legal Succession to The South African Transport Services Act 9 of 1989**

All carriage of goods by rail falls under the above Act which provides for the regulation, control and management of all rail transport services in the Republic. This Act deals largely with the administration of the transport services. It does not set out the terms on which the railways should or should not carry goods or the details of the railway's legal liability for loss of goods in particular contracts of carriage. The previous Act was more specific with regard to operating procedures.

It is noted that this Act creates Transnet (trading as a division called Spoornet) as the body responsible for the carriage of goods by rail. It also creates the South African Commuter Corporation as the body responsible for the provision of passenger trains.

Finally, it should be noted that the National Railway Safety Regulator Act 16 of 2002 created the Railway Safety Regulator which acts as the national competent authority in connection with the transportation of dangerous goods by rail. It has broad-ranging powers as to the issuing and revoking of permits and the control of rail carriage activities.

#### **5.2.2 Standard Form Contract**

In theory then, carriage by rail is a common law contract of carriage for reward. But in practice there is little room for the operation of the common law save for its interpretation of the standard terms in such contracts. The railways offer a typical standard form contract. There is no room for negotiation. The consignor accepts the terms if he wants to use the service. The current

Spoornet conditions limit its liability in the following way:

Exclusion of Liability: - Spoornet carries and otherwise deals with all goods at the sole risk of the owner of the goods and/or other person in whom the risk of loss or damage in the goods lies at any material time and Spoornet shall not be liable for any loss or damage to the goods whatsoever whether due in whole or in part to any degree of negligence or breach of contract. Nor shall Spoornet be liable for any consequential or economic loss whatsoever, including but not limited to loss of production or profit, arising out of such loss or damage.

#### **5.2.4 Contracts of carriage of commuters**

Contracts of carriage for commuters concluded with Metrorail are governed by the relevant provisions of the Legal Succession to the South African Transport Services Act, and subject to such terms and conditions as may be prescribed from time to time in the 'Metrorail Services Book'. It is important to note the Constitutional Court decision of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) in relation to the security of passengers. What did the court decide in this matter? Compare this judgment to that in *Shabalala v Metrorail* 2008 (3) SA 142 (SCA). Write the facts of both cases in the space below. Make sure you can distinguish the cases.

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## Part 6 Carriage by Sea

### 6.1 The Carriage of Goods by Sea Act 1 of 1986

The Carriage of Goods by Sea Act 1 of 1986 came into force on 4 July 1986. This Act repealed chapter VIII of the Merchant Shipping Act 57 of 1951; and gave force of law in South Africa to the Hague Rules of 1924 as amended by the Brussels Protocol of 1968 (otherwise known as the Hague-Visby Rules or the amended Hague Rules). The purpose of the amendment of the original rules was to remedy certain shortcomings that had become apparent over the years.

### 6.2 The Hague-Visby Rules

#### 6.2.1 Background

In 1921, the Maritime Law Committee of the International Law Association drafted a set of rules (known as the Hague Rules) at their meeting held at the The Hague. They were eventually signed by the most important trading nations in 1924 with each State being expected to give the Hague Rules statutory force with regard to all outward bills of lading. A Protocol signed in 1968 repealed the 1924 Act and re-enacted the Hague Rules together with certain amendments that had been made at Visby (on the Swedish island of Gotland) – hence the title: The Hague-Visby Rules.

It is beyond the scope of this course to deal with the rules in detail, suffice to repeat the words Sir John Donaldson MR in *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350, 358 on the nature of the rules:

‘[T]he rules create an intricate blend of responsibilities and liabilities, rights and immunities, limitations of the amount of damage recoverable, time bars, evidential provisions, indemnities and liberties, all in relation to the carriage of goods under the bills of lading.’

#### 6.2.2 Applicability of the Rules as incorporated into the Act

As stated in the introduction, the Carriage of Goods by Sea Act (hereafter ‘COGSA’) applies the Hague-Visby Rules to certain instances in the carriage of goods by sea under a Bill of Lading contract. These are:

- Where the goods are shipped from a South African Port, whether or not the bill of lading incorporates the rules;
- When a bill of lading expressly provides that the Rules shall govern the contract, wherever the port of shipment;
- Where a receipt evidencing a contract of carriage of goods by sea expressly so provides; and / or
- By virtue of the amendment of the rules in the Act, to live animals and any goods carried on the deck unless the Bill of Lading provides otherwise.

### 6.3 Terminology

The Hague-Visby Rules (as incorporated in the Act) define the following important terms:

- “Carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper.
- “Contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

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- “Goods” includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.
- “Ship” means any vessel used for the carriage of goods by sea.
- “Carriage of goods” covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

In addition, the following terms are used throughout the Act and are defined in simple terms below:

- A “contract of affreightment” is simply a carriage contract between the carrier and the shipper usually set out in the Bill of Lading issued by the master of the ship.
- A “charter party” is an agreement by which the owner of a ship makes the ship, or a specified part of it, available, with or without crew to another, called the charterer.
- The freight will be agreed between the parties, but will normally include rates for “lay days” - when the ship is idle, being loaded and unloaded, and “demurrage” a sum for liquidated damages for delays beyond lay days.

### 6.4 The Bill of Lading

As seen under the definition of a “contract of carriage”, the Bill of Lading usually sets out the contract of affreightment which in turn sets out the terms for the carriage of goods by sea.

When the goods are shipped, the master or agent of the carrier, upon demand by the shipper, must issue a Bill of Lading in respect of the goods. This document is in the standard form of the shipping company and generally sets out:

- the name of the shipper;
- the name of the consignee;
- the name of the ship;
- the point of loading; and

- the point of discharge;

In terms of article III(3)(a) of the Hague-Visby Rules, it must also include:

- the leading marks necessary for the identification of the goods if any are clearly shown;
- either the number of packages or the quantity or weight of the goods; and
- the apparent order and condition of the goods.

The Bill of Lading fulfils a number of important functions. These functions were set out by the court in the matter of *Intercontinental Export Co (Pty) Ltd v MV Dien Danielsen* 1983 (4) SA 275 (N) at 276 as follows:

‘[A] bill of lading may have one or more of three basic functions – the first is that of evidencing the terms of the contract of carriage concluded between the shipper and the shipowner, the rights under which may be negotiated to, or, if one likes, assigned to, any subsequent holder of the bill; the second is that of serving as a receipt for the goods acknowledging, where appropriate, their condition, quality and quantity, when they are loaded on board the ship; the third is that of a document of title enabling ownership in the goods to be transferred by symbolic delivery, that is by delivery of the bill of lading.’

These functions set out by the court can be summarised as follows. The Bill of Lading serves as

- a memorandum of the contract of carriage between shipper and shipowner;
- a receipt for the goods on board ship; and
- a document of title to the goods, and is thus akin to a negotiable instrument. The buyer can in this way deal in the goods as soon as he receives the Bill of Lading, even if the goods are at sea.

## **6.5 General Liability of the Carrier by Sea**

### **6.5.1 Introduction and duties of the carrier regarding liability:**

The Hague-Visby Rules regulate the liability of the carrier in terms of COGSA. It is important to note that the difference between the common law position of carrier liability and that of liability under the Rules. Where COGSA is applicable to the carriage contract, there is NO absolute liability on the carrier (see s2 of COGSA).

The duties of the carrier are set out in Art III:

- Article III(1) requires that the carrier exercise due diligence to make the ship seaworthy. Therefore, a carrier will only be in breach where the ship is unseaworthy if the unseaworthiness is caused by a want of due diligence.
- Article III(2) regulates the duties of the carrier towards the actual cargo as opposed to the ship itself. It requires the carrier to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. This duty (unlike the article III(1) duty) is qualified by a list of exceptions to liability contained in Art IV of the Rules.

### **6.5.2 Commencement and termination of liability**

The carrier’s duty to exercise due diligence (Art III(1)) commences before the voyage. Where the voyage takes place in stages, due diligence will have to be exercised at the beginning of each stage to ensure that the vessel is seaworthy and cargo-worthy.

The obligation contained in Art III (ie. to load, handle, stow, carry, keep, care for and discharge the goods carried carefully and properly) exists throughout the voyage until such time as the cargo is discharged.

### 6.5.3 Limitation of liability and remedies

The carrier is entitled to avail itself of the exceptions to liability contained in Art IV of the Rules (eg. where loss is caused by the perils, dangers and accidents of the sea etc) as well as limit its liability in accordance with Art IV(5) of the Rules.

Where the Rules apply as a matter of law, the remedies available to the parties are regulated by the Rules themselves. In this regard, Cupido in *Basic Principles of Business Law* at 459 points out the unqualified due diligence obligation is often viewed differently by writers and courts alike. A question often asked is: what is the relationship between the above duties, the exceptions to liability and limitation of liability. Cupido suggests (correctly) that the best way to approach the issue of liability of the carrier and the availability of the exceptions and limitation to liability is to consider the *actual cause* of damage or loss. For example, where a breach of any of the two duties was the actual cause of loss or damage, the exceptions will not be available because the actual breach of a duty caused the loss, and not one of the excepted causes. Limitation of liability will then be available unless there was actual intent or recklessness on the part of the carrier. Where both a breach of a duty and an excepted cause, together, contributed to the loss or damage then, in the case of the Art III(2) duty, the exceptions will be available because of the duty being subject to Art IV. In the case of the unqualified Art III(1) duty, the breach will be regarded as the prevailing cause.

Now consider the following examples originally thought up by John Haydock (a past senior law lecturer with 19 years of service to Rhodes!) in relation to the carrier's liability under the Rules:

- (i) The carrier negligently equips the ship in port with a faulty compass. This results in a collision and damaged goods.
- (ii) The carrier's navigation officer is a drunkard and the owner knows this before the ship puts to sea but nonetheless leaves him in charge of the ship's navigation. He gets drunk and as a result gives the helmsman a course which results in collision and loss.
- (iii) Whilst at sea the goods are re-packed and the job is done negligently. As a result the goods cascade onto the floor causing damage. Had the supervisor been paying attention to what the stacker was doing he would have corrected the problem.
- (iv) Whilst at sea the helmsman falls asleep at the wheel. He should have been relieved three hours ago but the Captain forgot him. The ship collides with an iceberg causing damage to goods.
- (v) Whilst at sea a crewman who has a record for dishonesty known to the Captain enters a hold which should have been locked and steals goods.

#### 6.5.4 Time Limits for Claims

**Article III(6) requires that notice of loss or damage to goods must be given to the carrier or his agent before or at the time of removal or if not then apparent, within 3 days of the removal of the goods. If this is not done, there is a rebuttable presumption that there was no loss or damage to the goods. It is important to note that the carrier will not be liable in respect of loss or damage unless an action is brought within one year after the delivery of the goods (unless the parties have extended this period by agreement).**

#### 6.5.5 Deviations

**The carrier will not incur liability at all for any loss or damage resulting from a deviation for the purposes of attempting to save life or property at sea.**

#### 6.5.6 Dangerous Goods (NB: Article IV(6))

Where goods of an inflammable, explosive or dangerous nature are shipped without the full knowledge of the carrier or his agent regarding the nature of the goods, no liability arises. Such goods can be offloaded, destroyed or rendered innocuous without any compensation being payable.

#### 6.5.7 Limitation on Amount of Liability

The amount of the carrier's liability is restricted by a formula set out in Article IV(5) which limits liability with reference either to the number of packages or units, or to the weight of goods, whichever imposes the least limitation on the carrier's liability. This restriction does not apply where the shipper expressly declares the nature and value of the goods before shipment and sets this out in the Bill of Lading. The carrier will not be liable at all if the value of the package is deliberately misstated on the Bill of Lading.

#### 6.5.8 Prohibition from contracting out of liability

Any provision in a contract of carriage falling under the COGSA which conflicts with the provisions of the Rules are null and void; that is, of no force or effect. This prevents the carrier from stipulating carriage 'at owners risk', increasing his immunities or passing the onus of proof to the claimant. The carrier may, however, increase his liability. A clause requiring insurance is deemed to be a clause limiting the liability of the carrier.

#### 6.5.9 Liability where the Act does not apply

As mentioned earlier, the Act does not apply to carriage by sea from a foreign port to the Republic unless the Bill of Lading expressly incorporates the Rules. In most cases, however, other countries have adopted the Hague Rules or the later amended rules so they will apply. In cases where the rules do not apply the common law determines the liability of the carrier.

In terms of the common law, the Bill of Lading is not conclusive proof that the goods were undamaged on loading. However, a clause to this effect is more often than not incorporated into the contract of affreightment.

As we saw at the beginning of this course, the common law is subject to the Praetor's Edict where the carrier is in the business of carrying whether or not a fee is charged. Where the Edict applies the carrier will be strictly liable, in the absence of contractual limitation, on proof of damage or loss or short delivery. The consignor does not have to prove negligence. The carrier will only be relieved of liability if he proves one of the recognised defences; that is that the damage or loss resulted from *vis maior*, inherent defect or vice in the goods themselves or the negligence or default of the consignor.

## **6.6 Carrier's Entitlement to Freight**

The general rule is that the carrier must effect complete delivery before he can be entitled to freight. For example, if goods are lost in a shipwreck and therefore not delivered the carrier is not entitled to freight. If the carrier delivers to a destination short of the agreed destination he is not entitled to freight unless the consignee relieves him from his obligation to deliver at the original destination and agrees to pay a reduced freight.

Where the carrier delivers less than goods consigned and delivery is accepted, the carrier is entitled to the freight on a *pro rata* basis. However, where delivery is refused, the rules regarding delivery are not that clear. In these kinds of circumstances, it has been suggested that the carrier could make up the balance of the goods at the point of destination (this would amount to specific performance) or pay damages for the lost or damaged goods calculated to include the *pro rata* cost of their freight on that basis will be entitled to full freight.



## **Part 7 Carriage by Air**

### **7.1 Classes of Carriage**

In South Africa, different rules apply according to whether the carriage is:

- (i) international carriage to which the Carriage by Air Act applies, or
- (ii) international carriage to which that Act does not apply, or
- (iii) purely domestic carriage, that is performed wholly within the borders of the Republic.

In terms of (ii) and (iii) above, that carriage which is not defined as 'international carriage' in terms of international regulations incorporated into our law, will be governed by our common law, except to the extent that the common law rules have been modified by the parties. In reality, most non-international flights will always be subject to a standard form contract limiting the liability of the carrier.

### **7.2 The Carriage by Air Act 17 of 1946**

Just like the carriage of goods by sea, an international set of rules governs the relationships between international carriers themselves and passengers and/or consignors. Until 19 June 2007, South Africa gave effect to the Warsaw Convention, as amended by the Hague Protocol. However, it is important to note that after this date, the Carriage by Air Amendment Act 15 of 2006 applies a Convention formally known as the Convention for the Unification of Certain Rules for International Carriage by Air, and informally known as the Montreal Convention.

Before considering the application of the Act on international carriage, it is useful to consider aspects of the Montreal Convention.

#### **7.2.1 The Montreal Convention**

The purpose of the Convention is to establish a uniform set of rules to govern the relationships between international carriers themselves and passengers, consignees, consignors, and other persons, irrespective of the nationality of the parties, the carrier of the aircraft performing the carriage and regardless of the country in which the contract was concluded or in which the event giving rise to the claim for damages occurred.

The Montreal Convention replaced the Warsaw Convention because of the inadequacy of the 1929 Warsaw Convention. The high mobility of passengers and the globalisation of the air transport industry has been cited as one of the major reasons for the fragmentation of the +-70-year old Warsaw system and the need for a replacement. A major problem with the old Convention was the lack of proper compensation to persons who suffered damage, loss or injury pursuant to international carriage. In this regard, the Warsaw Convention provided low limits of liability and, as a result, people were often unfairly treated.

Article 1(1) of the Convention stipulates that it applies to all international carriage of persons, luggage or goods for reward. It also applies to gratuitous carriage undertaken by a professional air carrier.

As indicated above, the Act only applies to international carriage. This is defined in article 1(2) of the Montreal Convention and is set out in the Schedule to the Act as follows:

'... "international carriage" means any carriage in which, according to the agreement between the parties<sup>2</sup>, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two high contracting parties or within the territory of a single high contracting party if there is an agreed stopping place within the territory of another state, even if that state is not a high contracting party. Carriage between two points within the territory of a single high contracting party without an agreed stopping place -within the territory to another state is not international carriage for the purposes of this Convention.'

Certain aspects of this definition require clarification:

- **High Contracting Parties refer to independent and sovereign states or countries which are signatories to the Convention. In practice you would need to know whether the state at the place of departure or place of destination is a High Contracting Party.**
- **The *place of departure* and *place of destination* refer to places where the carriage begins and ends.**
- The *agreed stopping place* is a place envisaged in the contract of carriage as a place where the aircraft would land in the course of its journey, irrespective of whether the passenger had the right to break his or her journey there. As such, a forced landing could never constitute an agreed stopping place.

A carriage to be performed by successive carriers is deemed to be one undivided carriage for the purposes of the Convention if it can be regarded as a single operation by the parties, irrespective of whether it has been agreed upon under the form of a single contract or series of contracts, Such carriage will not lose its international character because one of the contract or a portion of the series of contracts is to be performed exclusively within the territory of one High Contracting Party.

It is useful at this juncture to consider the following examples set out by E Norman in *The Law of South Africa* at para 600. Determine whether each example is 'international carriage' in terms of the Convention (assume that Mozambique *is* and Lesotho *is not* a party to the Convention):

- (i) Johannesburg to Maputo or vice versa.
- (ii) Johannesburg to Maputo and return to Johannesburg.
- (iii) Johannesburg to Maseru or vice versa.
- (iv) Johannesburg to Maseru and return to Johannesburg.
- (v) Johannesburg to Cape Town with an agreed stop at Maseru.
- (vi) Johannesburg to Cape Town with an agreed stop anywhere in the Republic of South Africa.
- (vii) A non-stop flight from Johannesburg to Cape Town, passing over Mozambique and Lesotho, without an agreed stop in either.
- (viii) Johannesburg to Cape Town via Maputo and Maseru, the stages being – Johannesburg – Maputo, Maputo – Maseru, Maseru – Cape Town.
- (ix) Bloemfontein to Maputo with a break or transshipment at Johannesburg.

It will be evident from these examples that there will be passengers on the same flight whose journeys are international for the purposes of the Convention as well as those whose journeys are considered to be non-Warsaw international or purely domestic, and so will be governed by different rules.

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<sup>2</sup> The agreement envisaged in this Article may be made on behalf of the actual user by some other person, such as a parent or guardian, or an agent. A great number of contracts between the airlines and those flying with or using them are made through travel agents who act as 'brokers'.

## 7.2.2 The Air Waybill / Cargo Receipt

In respect of the carriage of cargo, an air waybill (or any other means which preserves a record of the carriage) shall be delivered. If means other than an air waybill are used (ie. electronic ticketing), then, if the consignor so requests, the carrier must deliver to the consignor a cargo receipt permitting identification of the consignment and access to information contained in the record preserved by such other means. Article 5 of the Montreal Convention stipulates that an air waybill or the cargo receipt shall include:

- (a) an indication of the places of departure and destination;
- (b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
- (c) an indication of the weight of the consignment.

The air waybill or cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and the conditions of carriage mentioned therein. However, it is important to note that the lack of an air waybill will not affect the existence or the validity of the contract of carriage. The contract will still be subject to the liability rules of the Convention.

## 7.2.3 Rights of the consignor and consignee against the Carrier

The consignee is entitled, on arrival of the goods at the destination, to require the carrier to deliver the goods to him on payment of the charges due and complying with the condition of carriage. Unless otherwise agreed, it is the carrier's duty to give notice to the consignee as soon as the goods arrive. Article 13(3) states that if the goods have not arrived, the consignee can enforce his or her rights under the contract of carriage if seven days have lapsed since the date on which the goods were supposed to arrive.

## 7.3 Overview of the liability provisions of the Montreal Convention (as incorporated into the Carriage by Air Act)

Whereas the Warsaw Convention set very low compensation levels for victims of air accidents as well as liability for damage, delay or loss of baggage and cargo in accidents, the Montreal Convention is consumer driven and (as reinforced in the preamble to the Convention) recognises the need for equitable compensation based on the principle of restitution.

### 7.3.1 Personal Injury

The most important improvement to the system in terms of personal injury in the course of international carriage is the imposition of **liability without proof of fault** up to 100 000 SDRs and thereafter a **presumptive liability** for an unlimited amount. In other words, there is a two tier approach to the principle of the air carrier's liability in the event of bodily injury:

- The first tier of strict carrier liability for damages of up to 100 000 SDR's
- In excess of that amount, a second tier of liability based on the presumed fault of the carrier, which the latter may avoid only by proving that it was not at fault (ie. the onus is on the carrier).

Article 17 governs claims by passengers and follows very much the same format as the old article in the Warsaw Convention. Article 17 states that:

'The carrier is liable for damage sustained in the case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

In order for the carrier to be liable under this head, two essential requirements must be met in accordance with this article, namely:

- (a) the damages claimed must have been caused by the death or other bodily injury suffered by, a passenger; and
- (b) the death, wounding or other bodily injury must have been caused by an accident which took place on board of the aircraft or in the course of any of the operations of embarking or disembarking.<sup>3</sup>

The international cases regarding article 17 reveal the diverse nature of the injuries suffered by air passengers. Write down some of these injuries found in case law:

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In order for the carrier to be liable under article 17, the passenger's injury must have been caused by an accident. From international case law, it appears that an accident will be regarded as an event that causes injury that does *not* arise from the usual, normal and expected operation of the aircraft. Examples of 'accidents' in terms of article 17 include:

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*Limitation of carrier's liability in respect of personal injury*

Article 21 deals with compensation for death or injury to passengers. As mentioned above, the carrier is strictly liable up to 100 000 SDRs in respect of damaged (injury – fatal or otherwise) and is presumptively liable for an unlimited amount UNLESS the carrier is in a position to establish that the damage in question was not due to its negligence.

Two additional points need to be made in this section:

- In terms of Article 22(6), a Court may award payment to a claimant for legal costs and interest if the amount of damages awarded exceeds any written offer of the settlement made within six months of the date of the accident or before the litigation has commenced.
- In terms of Article 28, the carrier may be obliged to make advance payments to passengers of their families if required by the carrier's national law. These advanced payments are aimed at meeting 'immediate economic needs.'

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<sup>3</sup> Philipson, T QC *et al*, *Carriage by Air* at 91.

### **7.3.2 Damage to Baggage and Cargo**

Articles 17(2) and 18(1) of the Convention provide that carriers are liable for damage to baggage and cargo. In respect of damage to cargo, article 18(1) provides that:

'The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.'

A few elements are important here:

- 'Loss' includes a total or partial loss of the contents of the baggage or cargo and even where the baggage is stolen by third parties.
- 'Cargo' includes all articles consigned to the carrier for the purposes of transportation by air (other than baggage accompanying passengers).<sup>4</sup>
- 'during the carriage by air' comprises (in terms of Article 18(2)) 'the period during which the baggage or cargo is on the charge of the carrier, whether in the aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome, in any place whatsoever.'

### **7.3.3 Damage cause by delay in the carriage by air of passengers, baggage or cargo**

Article 19 of the Convention provides that

'The carrier is liable for damage occasioned by the delay in the carriage by air passengers, baggage or cargo.'

Article 31 stipulates that a timely complaint must be made against the carrier. The period is 21 days in the case of delay of baggage or cargo (as opposed to 14 days as provided for in the Warsaw Convention).

If the parties agree in their contract of carriage to a specific date and time, the carrier will be liable for delay in not performing the carriage by that date and time. In most cases however, the carrier will *not* contract to deliver passengers, baggage or cargo within a stipulated time and will insert terms designed to ensure it is under no obligation to do so.<sup>5</sup> In the absence of express agreement specifying the time for performance by the carrier, courts have decided that the carrier should perform its obligations within a reasonable time.

### **7.4 Limitation in amount of liability in relation to delay, baggage and cargo**

Article 22(1) limits damage caused by delay in the carriage of persons to 4 150 SDRs. Article 22(2) limits the liability of the carrier in the case of destruction, loss, damage or delay to damage to 1 000 SDRs for each passenger unless the passenger made a special declaration of interest at the time when the checked baggage was handed over to the carrier and paid a supplementary sum where required. Article 22(3) relates similarly to the carriage of cargo and limits the liability of the carrier to 17 SDRs per kilogramme unless a special declaration of interest (as set out above) is made. This limited liability will not apply when the damage has arisen as a result of what in essence amounts to 'wilful misconduct' by the carrier or his servants or agents acting within the scope of their employment.

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<sup>4</sup> The term 'goods' in Article 18(1) of the original Convention was held to constitute virtually anything shippable, including a horse, bull semen and human remains! (see Philipson at 108).

<sup>5</sup> Standard conditions of carriage commonly provide that 'times shown in the ticket, timetable or elsewhere are not guaranteed and [the carrier] assumes no responsibility for making connections.'

## 7.5 Defences available to the Carrier

*In relation to the carriage of cargo:*

The carrier is not liable for loss of or damage to cargo, if that loss or damage resulted from one or more of the following:

- (i) inherent defect or vice of the cargo;
- (ii) defective packing of that cargo performed by a person other than the carrier or its servants or agents;
- (iii) an act of war or an armed conflict;
- (iv) an act of a public authority carried out in connection with the entry, exit or transit of cargo (article 18).

### *Contributory Negligence / Exoneration*

Article 22 provides that the carrier may be exonerated wholly or in part from its liability if the carrier can prove that the damage was caused in part by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights. In South Africa this would be done in terms of the Apportionment of Damages Act 34 of 1956.

Examples of such contributory negligence include situations where

- A passenger tripped over a visible piece of luggage left on the tarmac, which she could easily have avoided.
- A passenger left her seat to wave farewell to her daughter at the open door of the aircraft. The 'fasten seat belt' sign was illuminated at the time. At that moment, the ramp was pulled away from the aircraft and she fell to the ground sustaining injuries.

In the space provided below, write out the decision of *Chutter v KLM Royal Dutch Airlines* 132 F.Supp. 611 (S.D.N.Y., June 27, 1955) as it relates to contributory negligence:

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## 7.6 Jurisdiction

Under the Warsaw Convention, the claimant was restricted to four places in which to bring his/her claim, being:

- the place of domicile of the carrier;
- the carrier's principal place of business;
- the place where the contract for carriage was concluded;
- the place which is the destination of the journey.

In terms of article 33, the Montreal Convention adds a fifth jurisdiction for passenger claims:

- where the passenger has his or her principal or permanent residence at the time of the accident.

The creation of this fifth jurisdiction is subject to certain conditions.

## **7.8 'Non-Montreal' International Carriage and Domestic Carriage**

Whilst the domestic carriage by air is regulated by the Aviation Act 72 of 1962, this Act is primarily concerned with administrative matters and does not regulate the contractual relationship of the carriage directly. Thus, it can also be said that there are no statutory provisions governing carriage that is international but not governed by the Montreal Convention or that which is purely domestic. Carriage of these types is governed by the common law, except insofar as the common law has been modified by the parties. See for example, the South African Airways General Conditions of Carriage. Note however that the Air Services Act 51 of 1949 provides that the carriage of persons and goods by air may only be carried by a person in accordance with the terms and conditions of a licence granted by the National Transport Commission.

# CARRIAGE OF GOODS BY SEA ACT 1 OF 1986

(Afrikaans text signed by the State President)

[Assented To: 4 March 1986]  
[Commencement Date: 4 July 1986]

as amended by:

Shipping General Amendment Act 23 of 1997

## ACT

To amend the law with respect to the carriage of goods by sea, and to provide for matters connected therewith.

### ARRANGEMENT OF SECTIONS

1.	<a href="#">Application of Hague Rules</a>
2.	<a href="#">Seaworthiness not to be implied</a>
2A.	<a href="#">Units of account and conversion</a>
3.	<a href="#">Jurisdiction of courts</a>
3A.	<a href="#">Application of Act to Prince Edward Islands</a>
4.	<a href="#">State bound</a>
5.	<a href="#">Repeal of sections 307 to 311 of Act 57 of 1951</a>
6.	<a href="#">Short title and commencement</a>
Schedule -	<a href="#">The Hague Rules as amended by the Brussels Protocol, 1968</a>

### 1. Application of Hague Rules

- (1) Those Rules contained in the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968, which are set out in the Schedule (hereinafter referred to as the Rules) shall, subject to the provisions of this Act, have the force of law and apply in respect of the Republic in relation to and in connection with -
- (a) the carriage of goods by sea in ships where the port of shipment is a port in the Republic, whether or not the carriage is between ports in two different States within the meaning of [Article X](#) of the Rules;
  - (b) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract;
  - (c) any receipt which is a non-negotiable document marked as such if the contract contained in it or evidenced by it or pursuant to which it is issued is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading, but subject to any necessary modifications and in particular with the omission in [Article III](#) of the Rules of the second sentence of paragraph 4 and paragraph 7; and
  - (d) deck cargo or live animals, if and in so far as the contract contained in or evidenced by a bill of lading or receipt referred to in paragraph (b) or (c) applies to deck cargo or live animals, as if [Article I](#) (c) of the Rules did not exclude deck cargo and live animals, and in this paragraph "deck cargo" means cargo which by the contract of carriage is stated as being carried on deck and is so carried.



- (2) The State President may by proclamation in the *Gazette* amend the Schedule and subsection (1) of this section to give effect to any amendment of or addition to the Rules which may be made from time to time and adopted by the Government of the Republic.

## 2. Seaworthiness not to be implied

There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act, any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

### 2A. Units of account and conversion

- (1) The amounts mentioned in paragraph 5 (a) of [Article IV](#) of the Rules shall be converted into South African currency on the basis of the value of such currency on the date of the judgment or the date agreed upon by the parties.
- (2) For the purpose of converting from special drawing rights into South African currency the amounts mentioned in paragraph 5 (a) of [Article IV](#) of the Rules in respect of which a judgment is given, one special drawing right shall be treated as equal to such a sum in South African currency as the International Monetary Fund have fixed as being the equivalent of one special drawing right for -
  - (a) the day on which the judgment is given; or
  - (b) if no sum has been so fixed for that day, the last day before that day for which a sum has been so fixed.
- (3) A certificate given by or on behalf of the Treasury stating -
  - (a) that a particular sum in South African currency has been so fixed for a particular day; or
  - (b) that no sum has been so fixed for that day and that a particular sum in South African currency has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day,

shall be *prima facie* proof of those matters for the purposes of [Article IV](#) of the Rules; and a document purporting to be such a certificate shall, in any proceedings, be admissible in evidence and, in the absence of evidence to the contrary, be deemed to be such a certificate.

[S. 2A inserted by s. 48 of Act 23/97]

## 3. Jurisdiction of courts

- (1) Notwithstanding any purported ouster of jurisdiction, exclusive jurisdiction clause or agreement to refer any dispute to arbitration, and notwithstanding the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), and of [section 7](#) (1) (b) of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), any person carrying on business in the Republic and the consignee under, or holder of, any bill of lading, waybill or like document for the carriage of goods to a destination in the Republic or to any port in the Republic, whether for final discharge or for discharge or for discharge for further carriage, may bring any action relating to the carriage of the said goods or any such bill of lading, waybill or document in a competent court in the Republic.
- (2) The provisions of subsection (1) of this section shall not apply to arbitration proceedings to be held in the Republic which are subject to the provisions of the Arbitration Act, 1965.

**3A. Application of Act to Prince Edward Islands**

This Act shall also apply to the Prince Edward Islands referred to in [section 1](#) of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948), and any reference in this Act to the Republic shall include a reference to those Islands.

[S. 3A inserted by s. 49 of Act 23/97]

**4. State bound**

This Act shall bind the State.

**5. Repeal of sections 307 to 311 of Act 57 of 1951**

[Sections 307](#) to [311](#) of the Merchant Shipping Act, 1951, are hereby repealed.

**6. Short title and commencement**

This Act shall be called the Carriage of Goods by Sea Act, 1986, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

**Schedule**

**THE HAGUE RULES AS AMENDED BY THE BRUSSELS PROTOCOL, 1968**

**ARTICLE I**

In these Rules the following words are employed, with the meanings set out below -

- (a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
- (b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.
- (c) "Goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.
- (d) "Ship" means any vessel used for the carriage of goods by sea.
- (e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

**ARTICLE II**

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

### **ARTICLE III**

1. The Carrier shall be bound before and at the beginning of the voyage to exercise due diligence to -
  - (a) make the ship seaworthy;
  - (b) properly man, equip and supply the ship; and
  - (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.
3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things -
  - (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
  - (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
  - (c) The apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.
5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.
6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

- 6b. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.
7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.
8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

#### **ARTICLE IV**

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.
2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -
  - (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
  - (b) fire, unless caused by the actual fault or privity of the carrier;
  - (c) perils, dangers and accidents of the sea or other navigable waters;
  - (d) act of God;
  - (e) act of war;
  - (f) act of public enemies;
  - (g) arrest or restraint of princes, rulers or people, or seizure under legal process;
  - (h) quarantine restrictions;
  - (i) act or omission of the shipper or owner of the goods, his agent or representative;
  - (j) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

- (k) riots and civil commotions;
  - (l) saving or attempting to save life or property at sea;
  - (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
  - (n) insufficiency or inadequacy of marks;
  - (o) insufficiency of packing;
  - (p) latent defects not discoverable by due diligence; and
  - (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.
3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.
  4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract or carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.
  5.
    - (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666,67 units of account per package or unit or two units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.  
[Sub-para. (a) substituted by s. 50 of Act 23/97]
    - (b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there is no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.
    - (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.
    - (d) The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.  
[Sub-para. (d) substituted by s. 50 of Act 23/97]
    - (e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission

of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

- (f) The declaration mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.
  - (g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.
  - (h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.
6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

#### **ARTICLE IVbis**

1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage, whether the action be founded in contract or in tort.
2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.
3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.
4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provision of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

#### **ARTICLE V**

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

#### **ARTICLE VI**

Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligations as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading,

handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. Any agreement so entered into shall have full legal effect. Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

#### **ARTICLE VII**

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.

#### **ARTICLE VIII**

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

#### **ARTICLE IX**

These Rules shall not affect the provisions of any international convention or national law governing liability for nuclear damage.

#### **ARTICLE X**

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a contracting State, or
- (b) the carriage is from a port in a contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

[Schedule amended by s. 50 of Act 23/97]

# CARRIAGE BY AIR ACT 17 OF 1946

(Afrikaans text signed by the Governor-General)

*[Assented To: 8 May 1946]*

*[Commencement Date: 22 March 1955]*

**as amended by:**

Carriage by Air Amendment Act 5 of 1964

Carriage by Air Amendment Act 81 of 1979

Carriage by Air Amendment Act 15 of 2006

[with effect from 19 June 2007 – Proc. R16 / GG 30070 / 20070711]

## ACT

**To give effect to a Convention for the unification of certain rules relating to international carriage by air; to make provision for applying the rules contained in the said Convention, subject to exceptions, adaptations and modifications, to carriage by air which is not international carriage within the meaning of the Convention; and for matters incidental thereto.**

### ARRANGEMENT OF SECTIONS

1. [Definitions](#)
  2. [.....](#)
  3. [Provisions of Convention to have force of law](#)
  4. [.....](#)
  5. [Ratification of amendments of and additions to Convention](#)
  6. [Provision for applying Act and Convention to carriage by air which is not international](#)
  7. [Rules of court](#)
  8. [Regulations](#)
  9. [Short title](#)
- [SCHEDULE - CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR](#)

### 1. Definitions

In this Act -

“**Convention**” means the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999, as set out in the Schedule;

[Definition of “Convention” inserted by s. 1 of Act 15/2006]

“**Minister**” means the Minister of Transport;

“**Republic**” includes any territory in respect of which Parliament is competent to legislate.

“**this Act**” includes any regulation made under [section 8](#).

[Definition of “this Act” inserted by s. 1 of Act 15/2006]

[S. 1 substituted by s. 1 of Act 5/64]

### 2. ....

[S. 2 repealed by s. 2 of Act 15/2006]

### 3. Provisions of Convention to have force of law



- (1) The provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in the Republic in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing the carriage.
  - (2) The Minister may from time to time by notice in the *Gazette* declare who are the States Parties to the Convention and in respect of what territories they are respectively parties, and any such notice shall, except in so far as it has been varied or superseded by a subsequent notice, be conclusive evidence of the matters so declared.  
[Subs. (2) amended by s. 2 of Act 5/64 and substituted by s. 3 of Act 15/2006]
  - (3) Any reference in the Schedule to the territory of any State Party to the Convention shall be construed as a reference to the territories subject to its sovereignty, suzerainty, mandate or authority, in respect of which it is a party.  
[Subs. (3) substituted by s. 3 of Act 15/2006]
  - (4) Not more than one action shall be brought in the Republic to enforce liability under paragraph 1 of [Article 17](#) of the Schedule in respect of the death of any one passenger, and every such action, by whomsoever brought, shall be for the benefit of all such persons entitled to sue for damages in respect of the death of that passenger as either are domiciled in the Republic or, if not so domiciled, have indicated their desire to take the benefit of the action.  
[Subs. (4) substituted by s. 3 of Act 15/2006]
  - (5) Subject to the provisions of sub-section (6) the amount recovered in any such action shall be divided between the successful claimants in such manner as the court may deem just.
  - (6) The court in which any such action is brought may, at any stage of the proceedings -
    - (i) issue a rule calling upon interested parties to join in the action within a specified period;
    - (ii) make such order as appears to the court to be just and equitable in view of the provisions of the Schedule limiting the liability of a carrier and of any proceedings which have been or are likely to be commenced outside the Republic in respect of the death of the passenger in question.  
[Para. (ii) substituted by s. 3 of Act 15/2006]
  - (7) .....
- [Subs. (7) amended by s. 2 of Act 5/64, substituted by s. 1 of Act 81/79 and deleted by s. 3 of Act 15/2006]

4. ....  
[S. 4 repealed by s. 4 of Act 15/2006]

**5. Ratification of amendments of and additions to Convention**

- (1) The President may do all things necessary to ratify or adhere or accede to or cause to be ratified or adhered or acceded to on behalf of the Republic any amendments of or additions to the Convention which may from time to time be made, and by proclamation in the *Gazette* declare that the amendments or additions so ratified or adhered or acceded to shall be observed and have the force of law in the Republic.  
[Subs. (1) amended by s. 3 of Act 5/64 and substituted by s. 5 of Act 15/2006]
- (1)*bis* Any proclamation under sub-section (1) may provide for such exceptions and contain such incidental or supplementary provisions as may be necessary to give due effect to the relevant amendments of or additions to the Convention or to ensure that the international obligations of the Republic will be fulfilled.

[Subs. (1)bis inserted by s. 3 of Act 5/64]

- (2) For the purposes of this Act, any amendments or additions so ratified, adhered or acceded to and proclaimed shall subject to any exceptions or provisions referred to in sub-section (1)bis be deemed to be incorporated in the Schedule to this Act.

[Subs. (2) amended by s. 3 of Act. 5/64]

- (3) A proclamation under subsection (1) may not be made by the President unless the amendments of or additions to the Convention have been approved by resolution of Parliament.

[Subs. (3) added by s. 5 of Act 15/2006]

## **6. Provision for applying Act and Convention to carriage by air which is not international**

The Minister may, by notice in the *Gazette* apply any of the provisions of the Schedule to this Act and any provision of [section three](#) to such carriage by air, not being international carriage by air as defined in the said Schedule, as may be specified in the notice, subject to such exceptions, adaptations and modifications, if any, as may be so specified.

[S. 6 amended by s. 4 of Act 5/64]

## **7. Rules of court**

Rules of court may be made in the manner provided in [section forty-three](#) of the Supreme Court Act, 1959 (Act No. 59 of 1959), as to -

- (a) the manner in which any action to enforce liability under [Article seventeen](#) of the Schedule to this Act, or under the provisions of that Article as applied under [section six](#), is to be commenced and carried out, and the intervention by and addition of any party to any such action; and
- (b) the manner in which any action under the Schedule against any State Party is to be commenced and carried out.

[Para. (b) substituted by s. 6 of Act 15/2006]

[S. 7 amended by s. 5 of Act 5/64]

## **8. Regulations**

- (1) The Minister may make regulations -

- (a) prescribing the procedure to be followed by a carrier in connection with the settlement of claims under paragraph (1) of [Article 17](#) of the Convention in respect of the death of any passenger before any action has been instituted in a court of law or any other appropriate forum;
- (b) generally, on any other ancillary or incidental administrative or procedural matter which it is necessary or expedient to prescribe for the proper implementation or administration of this Act.

- (2) Any regulation made in terms of subsection (1) may provide that -

- (a) contravention thereof, or failure to comply therewith, is an offence; and
- (b) a person convicted of that offence is punishable with a fine or imprisonment for a period not exceeding five years.

[S. 8 amended by s. 6 of Act 5/64 and substituted by s. 7 of Act 15/2006]

## **9. Short title**

This Act shall be called the Carriage by Air Act, 1946, and shall come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*.

## **SCHEDULE**

### **CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR**

The States Parties to this Convention

**RECOGNISING** the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonisation of private international air law;

**RECOGNISING** the need to modernise and consolidate the Warsaw Convention and related instruments;

**RECOGNISING** the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

**REAFFIRMING** the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

**CONVINCED** that collective State action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

**HAVE AGREED AS FOLLOWS:-**

#### **CHAPTER I GENERAL PROVISIONS**

[Article 1 - Scope of Application](#)

[Article 2 - Carriage Performed by State and Carriage of Postal Items](#)

#### **CHAPTER II**

*DOCUMENTATION AND DUTIES OF THE PARTIES RELATING TO THE CARRIAGE OF PASSENGERS, BAGGAGE AND CARGO*

[Article 3 - Passengers and Baggage](#)

[Article 4 - Cargo](#)

[Article 5 - Contents of Air Waybill or Cargo Receipt](#)

[Article 6 - Document Relating to the Nature of the Cargo](#)

[Article 7 - Description of Air Waybill](#)

[Article 8 - Documentation for Multiple Packages](#)

[Article 9 - Non-compliance with Documentary Requirements](#)

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## **CHAPTER I**

### **GENERAL PROVISIONS**

#### **Article 1 - Scope of Application**

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.
2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.
3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.
4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

#### *Article 2 - Carriage Performed by State and Carriage of Postal Items*

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in [Article 1](#).
2. In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.
3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

## **CHAPTER II**

### *DOCUMENTATION AND DUTIES OF THE PARTIES RELATING TO THE CARRIAGE OF PASSENGERS, BAGGAGE AND CARGO*

#### **Article 3 - Passengers and Baggage**

1. In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:
  - (a) an indication of the places of departure and destination;
  - (b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.
3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.
4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.
5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

#### **Article 4 - Cargo**

1. In respect of the carriage of cargo, an air waybill shall be delivered.
2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

#### **Article 5 - Contents of Air Waybill or Cargo Receipt**

The air waybill or the cargo receipt shall include:

- (a) an indication of the places of departure and destination;
- (b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and
- (c) an indication of the weight of the consignment.

#### **Article 6 - Document Relating to the Nature of the Cargo**

The consignor may be required, if necessary to meet the formalities of customs, police and similar public, authorities, to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting there from.

#### **Article 7 - Description of Air Waybill**

1. The air waybill shall be made out by the consignor in three original parts.
2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.
3. The signature of the carrier and that of the consignor may be printed or stamped.
4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

## **Article 8 - Documentation for Multiple Packages**

When there is more than one package:

- (a) the carrier of Cargo has the right to require the consignor to make out separate air waybills;
- (b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of [Article 4](#) are used.

## **Article 9 - Non-compliance with Documentary Requirements**

Non-compliance with the provisions of [Articles 4](#) to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

## **Article 10 - Responsibility for Particulars of Documentation**

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of [Article 4](#). The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.
2. The consignor shall indemnify the carrier against all damages suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.
3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of [Article 4](#).

## **Article 11 - Evidentiary Value of Documents**

1. The air waybill or the cargo receipt is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and the conditions of carriage mentioned therein.
2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

## **Article 12 - Right of Disposition of Cargo**

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.
2. If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.
4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with [Article 13](#). Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

#### **Article 13 - Delivery of the Cargo**

1. Except when the consignor has exercised its right under [Article 12](#), the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.
2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.
3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

#### **Article 14 - Enforcement of the Rights of Consignor and Consignee**

The consignor and the consignee can respectively enforce all the rights given to them by [Articles 12](#) and [13](#), each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

#### **Article 15 - Relations of Consignor and Consignee or Mutual Relations of Third Parties**

1. [Articles 12](#), [13](#) and [14](#) do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.
2. The provisions of [Articles 12](#), [13](#) and [14](#) can only be varied by express provision in the air waybill or the cargo receipt.

#### **Article 16 - Formalities of Customs, Police or Other Public Authorities**

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.
2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

### **CHAPTER III**

#### **LIABILITY OF THE CARRIER AND EXTENT OF COMPENSATION FOR DAMAGE**

##### **Article 17 - Death and injury of Passengers-Damage to Baggage**

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.



2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.
3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.
4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

#### **Article 18 - Damage to Cargo**

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.
2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
  - (a) inherent defect, quality or vice of that cargo;
  - (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;
  - (c) an act of war or an armed conflict;
  - (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.
3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.
4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

#### **Article 19 - Delay**

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

#### **Article 20 - Exoneration**

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that

such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent, that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1, of [Article 21](#).

#### **Article 21 - Compensation in Case of Death or Injury of Passengers**

1. For damages arising under paragraph 1 of [Article 17](#) not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
2. The carrier shall not be liable for damages arising under paragraph 1 of [Article 17](#) to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:
  - (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
  - (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

#### **Article 22 - Limits of Liability in Relation to Delay, Baggage and Cargo**

1. In the case of damage caused by delay as specified in [Article 19](#) in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.
2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.
3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.
4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of [Article 4](#), the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.
5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.
6. The limits prescribed in [Article 21](#) and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the

litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

### **Article 23 - Conversion of Monetary Units**

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.
2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier "prescribed in [Article 21](#) is fixed at a sum of 1 500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of [Article 22](#); 15 000 monetary units per passenger with respect to paragraph 2 of [Article 22](#); and 250 monetary units per kilogramme with respect to paragraph 3 of [Article 22](#). This monetary unit corresponds to sixty-five and a half milligram's of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.
3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in [Articles 21](#) and [22](#) as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

### **Article 24 - Review of Limits**

1. Without prejudice to the provisions of [Article 25](#) of this Convention and subject to paragraph 2 below, the limits of liability prescribed in [Articles 21](#), [22](#) and [23](#) shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of [Article 23](#).
2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

#### **Article 25 - Stipulation on Limits**

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

#### **Article 26 - Invalidity of contractual Provisions**

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

#### **Article 27 - Freedom to contract**

Nothing contained in this convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the convention, or from laying down conditions that do not conflict with the provisions of this convention.

#### **Article 28 - Advance Payments**

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

#### **Article 29 - Basis of Claims**

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

#### **Article 30 - Servants, Agents-Aggregation of Claims**

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.
2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.
3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

#### **Article 31 - Timely Notice of Complaints**

1. Receipt by the person entitled to delivery of checked baggage of cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of [Article 3](#) and paragraph 2 of [Article 4](#).
2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.
3. Every complaint must be made in writing and given or dispatched within the times aforesaid, 4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

### **Article 32 - Death of Person Liable**

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

### **Article 33 - Jurisdiction**

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.
2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.
3. For the purposes of paragraph 2.
  - (a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;
  - (b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.
4. Questions of procedure shall be governed by the law of the court seised of the case.

### **Article 34 - Arbitration**

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.
2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in [Article 33](#).
3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

#### **Article 35 - Limitation of Actions**

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
2. The method of calculating that period shall be determined by the law of the court seised of the case.

#### **Article 36 - Successive Carriage**

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of [Article 1](#), each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.
2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.
3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

#### **Article 37 - Right of Recourse against Third Parties**

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

### **CHAPTER IV**

#### **COMBINED CARRIAGE**

#### **Article 38 - Combined Carriage**

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of [Article 18](#), apply only to the carriage by air, provided that the carriage by air falls within the terms of [Article 1](#).
2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

## CHAPTER V

### CARRIAGE BY AIR PERFORMED BY A PERSON OTHER THAN THE CONTRACTING CARRIER

#### **Article 39 - Contracting Carrier-Actual Carrier**

The provisions of this Chapter apply when a person (hereinafter referred to as “the contracting carrier”) as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as “the actual carrier”) performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

#### **Article 40 - Respective Liability of Contracting and Actual Carriers**

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in [Article 39](#), is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

#### **Article 41 - Mutual Liability**

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.
2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in [Articles 21, 22, 23](#) and [24](#). Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this convention or any special declaration of interest in delivery at destination contemplated in [Article 22](#) shall not affect the actual carrier unless agreed to by it.

#### **Article 42 - Addressee of Complaints and Instructions**

Any complaint to be made or instruction to be given under this convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in [Article 12](#) shall only be effective if addressed to the contracting carrier.

#### **Article 43 - Servants and Agents**

In relation to the carriage performed by the actual carrier, any servant or agent of the carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

#### **Article 44 - Aggregation of Damages**

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

#### **Article 45 - Addressee of Claims**

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately.

If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

#### **Article 46 - Additional Jurisdiction**

Any action for damages contemplated in [Article 45](#) must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in [Article 33](#), or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

#### **Article 47 - Invalidity of Contractual Provisions**

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

#### **Article 48 - Mutual Relations of Contracting and Actual Carriers**

Except as provided in [Article 45](#), nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

### **CHAPTER VI**

#### **OTHER PROVISIONS**

#### **Article 49 - Mandatory Application**

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

#### **Article 50 - Insurance**

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.



## **Article 51 - Carriage Performed in Extraordinary Circumstances**

The provisions of [Articles 3](#) to 5, [7](#) and [8](#) relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

## **Article 52 - Definition of Days**

The expression "days" when used in this convention means calendar days, not working days.

## **CHAPTER VII**

### **FINAL CLAUSES**

## **Article 53 - Signature, Ratification and Entry into Force**

1. This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.
2. This convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of [Article 1](#), paragraph 1(b) of [Article 3](#), paragraph (b) of [Article 5](#), [Articles 23, 33, 46](#) and paragraph (b) of [Article 57](#), applies equally to a Regional Economic Integration Organisation. For the purpose of [Article 24](#), the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organization.
3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.
4. Any State or Regional Economic Integration Organisation which does not sign this convention may accept, approve or accede to it at any time.
5. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.
6. This Convention shall enter into force on the sixtieth day following the date of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.
7. For other States and for other Regional Economic Integration Organisations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.
8. The Depositary shall promptly notify all signatories and States Parties of.
  - (a) each signature of this Convention and date thereof;
  - (b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;

- (c) the date of entry into force of this Convention;
- (d) the date of the coming into force of any revision of the limits of liability established under this Convention;
- (e) any denunciation under [Article 54](#).

**Article 54 - Denunciation**

1. Any State Party may denounce this Convention by written notification to the “ Depository.
2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depository.

**Article 55 - Relationship with other Warsaw Convention Instruments**

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to
  - (a) the Convention for the Unification of Certain Rules Relating 10 International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);
  - (b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);
  - (c) the Convention, Supplementary 10 the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);
  - (d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 197 (hereinafter called the Guatemala City Protocol);
  - (e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or
2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

**Article 56 - States with more than one System of Law**

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. Any such declaration shall be notified to the Depository and shall state expressly the territorial units to which the Convention applies.
3. In relation to a State Party which has made such a declaration:

- (a) references in [Article 23](#) to “national currency” shall be construed as referring to the currency of the relevant territorial unit of that State; and
- (b) the reference in [Article 28](#) to “national law” shall be construed as referring to the law of the relevant territorial unit of that State.

**Article 57 - Reservations**

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

- (a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or
- (b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

**IN WITNESS WHEREOF** the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

**DONE** at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols.

[Schedule amended by Proc. R.294/67 and GN R1329/97 and substituted by s. 8 of Act 15/2009]

**- END OF COURSE OUTLINE -**