

**GERMANY AND SOUTH AFRICA
A COMPARATIVE STUDY OF THEIR CONCEPTS OF
CONTRACT LAW AND MISTAKE**

by

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree. |

SUMMARY

The problem of mistake and its impact on the formation of contract is a central issue in the law of contract of all legal systems. The thesis investigates this area by considering the manner in which it has been dealt with in Germany and South African law. Although both legal systems are of the civilian origin, the German law is a codified system, whereas South African law is an uncodified one, in which, in the absence of legislation, legal problems are resolved by decisions of the High Court operating under a strict doctrine of legal precedent. German law does not, in a formal sense acknowledge that judges can make law, but the thesis demonstrates the considerable weight that is nevertheless attached to judicial decisions in practice.

The impact of differences in legal methodology on substantive law is a principal theme of the investigation. It is addressed by means of a systematic comparison between the manner in which the two systems deal with concepts such as the juristic act and declarations of will, the notion of contract and the relevance of offer and acceptance as its constituent elements. Thereafter the broad topic of mistake as a circumstance that vitiates agreement and other defects of will such as deceit, duress and undue influence are considered.

Whereas German law as a codified system presents a comprehensive regulation of the issues, a case law system such as that of South Africa can only deal with matters brought before the courts by parties engaged in a dispute. Because judges also tend to frame decisions as narrowly as possible, such a system characterised by gaps in the law in relations to issues that have not been authoritatively determined. The resultant uncertainty is exacerbated by the fact that different courts might decide the same issue differently and that a considerable period of time might elapse before the issue is settled by the highest court in the judicial hierarchy.

In regard to matters of substance, both systems proceed from a common conceptual framework, but often tend to emphasise different aspects in coming to solutions. German law places great store on the notion of the declaration of will, a concept which is analysed in considerable detail in relation to its treatment in South African law. Although South African law recognises the notion of a juristic act, there is no sign of the refined and systematic discussion of the concept along the lines of German law. In consequence, concepts such as

offer and acceptance play a less important role in South African law. In relation to the treatment of mistake as well, the greater emphasis of German law on the declarations of will is in marked contrast to the more subjective approach of South African law and its resort to a theory of reliance as a corrective liability in cases of disagreement. Both systems adopt an approach with subjective and objective elements, but with a different mix of these elements in each instance.

An overriding conclusion is that both systems might have erred in placing too great an emphasis on objective elements in the determination of when contractual liability should be imposed. It is contended that renewed attention to the doctrine of *culpa in contrahendo* might enable both South African and German law to deal more satisfactorily with the problem of disagreement in contract.

OPSOMMING

Die probleem van dwaling en die uitwerking daarvan op kontraksluiting is 'n sentrale vraagstuk van die Kontraktereg van alle lande. Die proefskrif ondersoek hierdie problematiek deur die hantering daarvan in sowel die Duitse as die Suid-Afrikaanse reg te oorweeg. Alhoewel beide hierdie stelsels van romanistiese oorsprong is, is die Duitse 'n gekodifiseerde en die Suid-Afrikaanse 'n ongekodifiseerde stelsel. In die afwesigheid van wetgewing, word regsprobleme in Suid-Afrika aan die hand van die gemenerereg deur middel van beslissings van die Hoë Hof opgelos ingevolge 'n strenge presedentestelsel. Alhoewel die Duitse reg nie formeel erken dat regterlike beslissings regskeppend kan werk nie, toon die proefskrif aan dat daar tog in die praktyk groot gewig aan regterlike uitsprake geheg word.

Die uitwerking van hierdie metodologiese verskille is 'n hooftema van die ondersoek. Dit geskied by wyse van 'n sistematiese vergelyking van die hantering in die twee stelsels van begrippe soos die regshandeling en die wilsverklaring, die kontrak en die rol van aanbod en aanname as konstituerende elemente van 'n kontrak. Hierna kom die breë vraagstuk van dwaling aan die orde as 'n omstandigheid wat wilsooreenstemming ondermyn, asook die samehangende kwessies van bedrog, dwang en onbehoorlike beïnvloeding.

Alhoewel beide stelsels in substantiewe aangeleenthede uitgaan van 'n gemeenskaplike konseptuele raamwerk, word aangetoon dat by die bereik van oplossings, die klem dikwels heel verskillend geplaas word. Van sentrale belang is vir die Duitse reg is die wilsverklaringsbegrip, wat in vergelyking met die behandeling daarvan in Suid-Afrika in groot besonderhede ontleed word. Alhoewel die Suid-Afrikaanse reg, soos die Duitse reg, uitgaan van die begrip regshandeling, ontbreek die genuanseerde en sistematiese behandeling van die Duitse reg. As gevolg hiervan speel die begrippe aanbod en aanname 'n relatief minder belangrike rol in die Suid-Afrikaanse reg. Met betrekking tot die dwalingsproblematiek ook is die groter klem op die Duitse reg op die wilsverklaring van die partye opvallend en in skerp teenstelling tot die meer subjektiewe benadering van die Suid-Afrikaanse reg en die aanwending van die vertrouens teorie as 'n korrektiewe aanspreeklikheid in gevalle van 'n gebrek aan wilsooreenstemming. Alhoewel albei stelsels erkenning gee aan subjektiewe en objektiewe elemente, is daar verskille vir sover dit die relatiewe klem op elkeen aangaan.

Die oorkoepelende gevolgtrekking is dat albei stelsels miskien te veel gewig gee aan die objektiewe element by die bepaling van aanspreeklikheid. Die voorstel is dat daar weer met vrug na die leerstuk van *culpa in contrahendo* gekyk sou kon word.

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1 Introduction

By reason of his consciousness and ability to reflect upon himself and his actions, man is in a position to establish his own will, and thus to determine his own actions and their consequences. The formation of will is a complex and multi-phased process, influenced by heterogeneous influences, often not consciously examined by the individual.

The point may be illustrated by the apparently simple example of a person (let us call him P), who decides to buy a new pair of sunglasses. The process which culminates in a definite decision to act originates in an awareness that he is no longer satisfied with his old sunglasses. This may have been set in motion by a variety of impulses ranging from considerations of fashion to a concern for the need for protection against ultra-violet radiation. Be this as it may, at some point P will make the decision to buy a new pair at a certain price. P will generally have definite expectations of the new glasses, and will only be prepared to pay for a product that satisfies these expectations.

These expectations may, of course, be far removed from reality. Since beauty is in the eye of the beholder and beyond objective assessment, this may be impossible to verify with reference to the question of fashion. As regards the question of ultra-violet protection, however, it will be possible to establish objectively whether the expectations of the buyer are met by the actual characteristics of the product. And since, in our example, P has a definite opinion regarding the new glasses, it may be fairly assumed that he obtained information from some source or other.

It might, for example, be the case that P had asked the shopkeeper about the measure of protection offered by the sunglasses, and that he had been assured that this was of the highest standard. If we now assume that P associated the concept "highest standard" with a particular level of protection (derived, perhaps, from a scientific journal he had previously consulted), but that the shopkeeper was only expressing his personal opinion, we find ourselves facing a situation in which there is a discrepancy

between the expectations of P and the actual quality of the glasses. Should P purchase the glasses with the expectation that they will offer him the desired protection against certain levels of radiation, it may come to pass that, when he begins to experience problems with his eyes, he might want to revoke the sale on account of their defective quality and even contend that he had been cheated by the shopkeeper.

Inevitably, it seems, the process of contract formation entails a process of communication between the parties on the basis of information regarding the needs of the parties, external circumstances and the qualities of the performances bargained for.

The example illustrates the extent to which a simple procedure, like the purchase of a pair of sunglasses, can be riddled with problems arising from the risks that the information relied on and the process of communication between the parties may be defective.

Some further examples of problematic cases may help to illustrate the difficulties that may arise during the process of contract formation.

Case 1: S offers to sell B a tractor for the sum of R 11 000,00. Whilst pencilling down his offer he accidentally writes R 10 000,00. B receives the erroneous offer and promptly accepts. He is, however, fully aware of S's intention to sell the tractor for R 11 000,00 but does not trouble to enquire. S delivers the tractor to B and demands R 11 000,00 in return. B is only willing to part with R 10 000,00.

Case 2: T desires to rent one of L's holiday homes for the month of June. In his written offer, which was immediately accepted by L, he erroneously writes July instead of June. L has no knowledge of T's actual vacation plans. When T arrives laden with suitcases on 1 June, L points to the former's letter and refuses him accommodation. He does, however, insist on collecting rental for the month of July in which T cannot occupy the premises because he has to work.

- Case 3: B buys a painting from S. Both are convinced that it is a genuine Rembrandt and the price paid is determined accordingly. Later it becomes evident that the painting is a forgery of exceptional quality. B is outraged and demands to be reimbursed. S refuses to do so. Does it make a difference that S knew it to be a replica although he never asserted it to be an original?
- Case 4: B sends a written offer of R 500 000.00 per post to S in return for his race-horse "Storm". S is delighted because "Storm" has performed dismally in recent races. After posting his acceptance "Storm" regains its former qualities as a horse of exceptional ability and S regrets having accepted B's offer. S would like to withdraw his acceptance. Is this possible or is he already legally bound ?
- Case 5: An 88-year old B orders a brand-new Porsche from his local dealer. Shortly after posting his letter to this effect, he passes away. The Porsche-dealer accepts the order and confirms such per return post. Some days later he delivers the vehicle to the house of the recently deceased B where he finds only the mourning family, not his client. He demands payment - he does not care who pays.
- Case 6: P, in need of a lift to the airport, phones his acquaintance D. D declares himself willing to assist and promises to collect P punctually at the agreed time. Because his attention is captured by the television broadcast of a thrilling cricket match, D arrives late both at P's residence and subsequently the airport. P misses his plane. Can P raise a contractual claim against D? Does the outcome differ if the parties agreed on a fair remuneration for the shuttle service?

These instances reveal that various factual constellations may deviate from the ideal case of agreement. It goes without saying that the Law of Contract needs to be equipped to deal with such problems. The purpose of this thesis is to investigate, by

means of a systematic presentation, differences and common features in the approach of German and South African law to problems of this order, the questions raised by them relating to the nature of agreement and its status as a legally binding contract and, in particular, the question of what the outcome would be when the understanding of one of parties differs from that of the other.

Since this thesis envisages a comparative approach, it is in the main dedicated to a systematic description and, where necessary, elaboration of the position of the systems. In order for the problem of mistake and defects of will and their effect on contracts to be investigated, it will be necessary to provide some elaboration of the basic underlying principles of the two legal systems. Only if one understands the fundamental concepts governing the respective systems can one understand the treatment of problems such as those raised here.

Chapter 2 deals with the German legal system, and the South African approach is discussed in Chapter 3. The very classification and labelling of the topic in both systems reveal significant differences of approach, to some extent ascribable to the fact that German law, in contrast to South African law, is a codified system. I have nevertheless attempted to portray both systems according to the same systematic scheme.

Both chapters begin with a brief historical perspective followed by a discussion of the significant preconditions for the existence of a contract and the circumstances which preclude effective conclusion of a contract. Only thereafter is the approach of the two systems to the problems that typically arise during the process of contract formation addressed. The focus is exclusively on problems relating to the formation of contract. Apart from the need to limit the scope of this thesis, related issues such as that of a failure to perform and that of a warranty of performance are excluded so as to enable a more concentrated focus on the underlying foundations of "contract".

Chapter 4 compares the effective conclusion and formation of contracts, which operate under similar principles in both systems. The minor differences revolve

around exceptions made in both systems to the demand for consensus, and thus reveal the (equitable) theoretical inconsistencies which have arisen in both systems. The primary difference lies in the fact that, in Germany, an offer is binding once made, and thus even where mental illness occurs prior to acceptance. This is not so in South Africa, where offers are not binding prior to acceptance – despite the application of the postal rule.

An examination of the approach taken in both systems to the interpretation of contracts also reveals a significant overlap. In Germany, the demand that contracts be interpreted in the light of good faith and business custom means that the most “reasonable” interpretation will be applied. South African courts favour a similarly objective approach. The rubric of mistake, on the other hand, exposes the most fundamental difference between the systems. The categories of mistake provided by the BGB supply a balanced solution for each possible permutation, so that results are fairly consistent. In South African courts, on the other hand, objective and subjective criteria are weighed in individual cases, and resort may be made to the doctrine of *estoppel*, so that results are unpredictable, a situation which has found spurious resolution in the case of *Sonap Petroleum (SA) (Pty) v Pappadogianis*.¹

Chapter 5 deals with the erratic results of the emphasis, observable in both legal systems, on objective criteria for the interpretation of contract, and suggests that an increased reliance on the principle of *culpa in contrahendo* might provide a functional bulwark against the erosion of the basic principle of consensus – especially in the more adaptable South African system of case-law.

¹ 1992 3 SA 422 (A).

2 Germany

2.1 Introduction to the German legal system

Before discussing the subject matter of this thesis in detail, it is necessary to consider briefly the origins and nature of German private law and how historical developments in Europe have influenced the present system of private law in Germany.

2.1.1 Germany as a civil law country

Germany belongs to the realm of the civil law. Its private law and its method of legal thinking have been enormously influenced by the law of ancient Rome and the legal tradition to which it gave rise.² Of importance for present purposes is not the full sweep of 2000 years of Roman legal history, but rather developments over the last 1000 years, during which Roman law has made its way into the German legal system.

In the centuries after 1100 when the *Corpus Juris Civilis* (AD 529-35) of the Emperor Justinian began to be studied in Bologna, the legal learning of the Glossators (1100-1250) and the Commentators (1250-1500) spread throughout Europe. This was the beginning of the so-called second life of Roman law.³ In the same era Canon law developed as the law of the Catholic Church, and this law itself was strongly marked by the ways of Roman law. The practice of going to university to obtain basic training in law and to acquire the style of lawyerly dispute typical of the civilian tradition has been followed in Europe ever since.⁴

In the course of the thirteenth, fourteenth and fifteenth centuries the Roman law of the medieval scholars came to be recognised in the territory now known as Germany as a secondary source of law, which was applied parallel to the local law. The main reason for this reception was that German kings and emperors allowed the indigenous

² Larenz Allgemeiner Teil des Bürgerlichen Rechts 14 15: Horn/Kötz/Leser German Private and Commercial Law: An Introduction 8 9 10.

³ Van Mehren & Gordley The Civil Law System: An Introduction to the Comparative Study of Law 41 42; Thomas/Van der Merwe/Stoop Historical Foundations of South African Private Law 45-56.

⁴ Foster German Legal System and Laws 12.

inhabitants of the regions in Italy to continue to use Roman law for dispute settlement. Because Roman law was also favoured by some of these emperors, they decreed that Roman law should also apply to the German tribes.⁵ In 1495 the *Reichskammergerichtsordnung* laid down that the imperial court (*Reichskammergericht*), half of whose members were jurists, was, in the absence of special statutes and customs, to base its judgments on imperial and common law (*nach des Reiches und Gemeinen Rechten*). In practice, this meant Roman law as it had been received in Germany.

The second source of German law was Germanic law, the unwritten legal customs of the regions and localities.⁶ It is of some importance that some of these laws, such as the *Sachsenspiegel* (1221-7) and the *Schwabenspiegel* (1275), were collected and written down at an early stage.⁷

During the sixteenth, seventeenth and eighteenth centuries, legal scholars on the Continent attempted to adapt the Roman legal tradition to the requirements of modern practice while remaining faithful to it. But during this period the Law of Reason or the Law of Nature took root in Germany and elsewhere in Europe. In the manner typical of the classical and Christian tradition of natural philosophy, the adherents of this view sought to present legal material as a logical and orderly progression of concepts and principles.⁸ Two of the most important authors of this tradition at the beginning of its development were the Dutchman Hugo Grotius (1583-1645) and the German Samuel Pufendorf (1632-94). Later proponents of this school of thought were Christian Thomasius (1655-1728) and his pupil Christian Wolf (1679-1754). Scholars such as these were concerned not only with clarifying the concepts of

⁵ Horn/Kötz/Leser 9 10; Foster 12.

⁶ Foster 11.

⁷ Horn/Kötz/Leser 9.

⁸ Ebke & Finkin Introduction to German Law 3; Horn/Kötz/Leser 10.

Roman law as refined by the medieval jurists, but also with presenting the law in a logical manner and basing legal argument on deduction from its axioms.⁹

Apart from circumstances such as economic development and the needs of the market, this development was undoubtedly inspired by the Enlightenment, which led civilisation from the Middle Ages into modernity, and made concepts of human freedom and reason of central importance. The Law of Reason (or Law of Nature), having as its aim the establishment, within a comprehensive and logical framework, of laws that could apply to every citizen and every aspect of life, prepared the way for the codification movement of the eighteenth centuries.

Bavaria, as one of the German states, enacted a civil code in 1756 (*Codex Maximilianeus Bavaricus Civilis*), and Prussia enacted its General Law of the Prussian States in 1794.¹⁰ At this time, however, Germany was not a unified state, but comprised a number of independent entities. In spite of the fact that, at the end of the Napoleonic Wars, many Germans desired a national code of private law such as the French had obtained with their *code civil* in 1804, political and economic conditions led to the Congress of Vienna of 1815 leaving Germany in a state of political disunity. Although the HGB as a commercial code had by this time already been promulgated, the time was not ripe for a German Code.¹¹ Germany therefore remained a mere federation of states until the formation of the German Empire as a true federal state in 1871 under Otto Bismarck. By then, the need for a uniform legal system was indisputable.

The task of preparing the draft of a Civil Code embodying the basic principles of German private law was entrusted in 1874 to a special commission composed of eleven members.¹² The commission completed its work in 1887, when its draft was

⁹ Horn/Kötz/Leser 10; Van Mehren/Gordley *The Civil Law System An Introduction to the Comparative Study of Law* 38-42.

¹⁰ Horn/ Kötz/Leser 10.

¹¹ Horn/Kötz/Leser 10.

¹² Münchener Kommentar zum BGB Allgemeiner Teil 7; Palandt Bürgerliches Gesetzbuch – Kommentar Band 7. 2.

published and submitted for consideration by legal experts and other interested parties. Cogent criticism of the first draft resulted in the appointment of a second commission to revise it. The second draft was completed in 1895, and, after the introduction of numerous modifications, the final product became law at the 18th of August 1896, and entered into force on the 1st of January 1900,¹³ more than twenty-five years after the foundation of the German Empire. Because of the dominant position of Prussia within the German Empire, the Prussian Code supplanted all other laws applicable in Germany during the process of the drafting of the Civil Code.¹⁴

2.1.2 The BGB - an effective code

After more than a century, the BGB remains the centrepiece of German private law. It is considered very abstract and technical and, although for some too steeped in the Roman juridical mould, is nevertheless valued for its consistency and precision, especially in its use of legal concepts.¹⁵

A continuing criticism has been that in spite of a changing economic and political climate in Europe in the late nineteenth century, the provisions of the code did very little to address the social and economic concerns of the day and paid little heed to notions of social responsibility.¹⁶ This assertion leads to one of the principal arguments against legal codification, namely that a code is too rigid and static a system of law to allow the flexibility required to reflect changes in social conditions and values.¹⁷

The BGB has, nevertheless, proved itself to be a flexible and dynamic code, able to survive more than a century of enormous societal upheaval and change in Germany. Over the years of its existence it has survived the era of the Third Reich and was for

¹³ Münchener Kommentar zum BGB Allgemeiner Teil 7.

¹⁴ Münchener Kommentar zum BGB Allgemeiner Teil 8: Palandt Bürgerliches Gesetzbuch 2.

¹⁵ Münchener Kommentar zum BGB Allgemeiner Teil 13, 14 and 15.

¹⁶ Brox Allgemeiner Teil des Bürgerlichen Gesetzbuchs 17 18; Larenz 16 17.

¹⁷ But one should bear in mind that the system is open for reformation and modification. At present the Schuldrechtreform is of relevance. However, it will be not discussed in this study since it does not concern the subject matter of this thesis.

more than twenty years effective under the communist rule of the GDR, despite the fact that neither of these regimes adhered to the doctrine of laissez-faire which provided the initial underpinning for the code. Quite clearly, therefore, the Code has been responsive to the demands of changing societal and economic circumstances, and in particular to the imperatives more recently enshrined in the German Constitution (*Grundgesetz*).¹⁸

The code's longevity is in the main attributable to the fact that it relies on a relatively limited number of rules of quite general impact, for example those contained in §§ 133, 134, 138, 157, and 242 of the BGB. These provisions have enabled German judges to lead the law in new directions by means of innovative acts of judicial lawmaking. These provisions, and especially their applications, are of paramount importance for a full understanding of German law.¹⁹

Because judges are able, and sometimes compelled, to interpret the articles of the code, and because the results reached by different judges are not invariably consistent, the important role of case law is well recognised. Although judges are not formally bound to follow prior decisions, as under the system of precedent of English law, it is nevertheless customary, in practice, for lower courts to consider and follow the judgments of the BGH pertaining to matters requiring decision. Judicial decisions are therefore, in practice, a source of German law, and one cannot understand the provisions of the Code in the abstract without regard to the case law, which in many instances has developed solutions *praeter legem*, i.e. even contrary to the statutory rules.²⁰

The importance of the code itself and of the decisions of superior courts, however, ought not to obscure the impact of academic jurisprudence on the development of

¹⁸ Münchener Kommentar zum BGB Allgemeiner Teil 23-26; Palandt Bürgerliches Gesetzbuch 4.

¹⁹ Erman BGB Handkommentar I. Band 214-215, 221-222, 223-226; Münchener Kommentar zum BGB Allgemeiner Teil 1318-1328; Münchener Kommentar zum BGB Schuldrecht Allgemeiner Teil 97-122.

²⁰ Brox 18-38-39. Some examples are: RGZ 120, 249 ff; RGZ 78, 239 ff; BGHZ 21, 319 ff; BGHZ 23, 249 / 261; LG Bremen, NJW 1966, 2360 f.; BGHZ 21, 319 et seq.

German law. German courts frequently cite academic writers in their judgments and there is an active exchange between judicial opinion and the prevailing academic doctrine. Because judges are required to focus on practical concerns and academic authors often concentrate on preserving the integrity of the structure and logical patterns of the code, judicial and academic opinion often diverge in matters of substance. These interchanges often result in considerable complexity regarding important legal issues and according to some, bring about unnecessary legal uncertainty.²¹

Undoubtedly, however, the contributions of outstanding academic writers such as Dieter Medicus, Karl Larenz, Hans Brox and others have ensured that German judges do not stray too far from the Code and the restraints of logical reasoning.

2.1.3 Freedom of contract as a general principle

The BGB was produced in the era of classical individualism and *laissez-faire* that implied a “hands off” policy by government with respect to the agreements and arrangements between citizens, which are *in principle* supposed to reflect the result of free negotiation between the parties to the contract.²² This basic premise regarding the economic organisation of society and the ideal of individual freedom is also laid down in the German Constitution (Art.2 (1) *Grundgesetz*) of 1949.

Freedom of contract, however, entails two aspects, which have never been absolute and which have, in recent times, been limited in many ways through the creation of new provisions and norms.²³ The first, the freedom to conclude contracts, entails the freedom of individuals to decide whether and with whom a contract is to be

²¹ Youngs Sourcebook on German Law 5.

²² Larenz 84-87; Hübner Allgemeiner Teil des Bürgerlichen Gesetzbuches 262-264; Brox 46 47; Münchener Kommentar zum BGB Allgemeiner Teil 1222 1223.

²³ Examples are the labour law and AGBG, which is similar to the Unfair Contract Terms Act in UK. See Jauernig-Schlechtriem-Stürner Bürgerliches Gesetzbuch mit Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen 96; Münchener Kommentar zum BGB Allgemeiner Teil 1224; Foster 232.

concluded.²⁴ This aspect, as will be discussed hereafter, is limited by a person's individual capacity but may also be subject to limitations by statute, as for instance in the case of monopoly powers, which are obliged to supply gas, electricity or train services.²⁵ The second aspect is the freedom to determine the content of contracts. This freedom is even more restricted than the former, and can exist only within the general limits imposed by the BGB and by more general considerations of constitutionality, legality and morality. There is an increasing tendency towards greater governmental control and management of many aspects of life, often in response to a perceived need to protect the consumer or the environment.²⁶

2.1.4 The structure of the BGB

An understanding of the formal structure of the BGB is essential for any attempt to discuss the German notion of contract, its essential prerequisites and the approach of German law to the problems of mistake and defective consent.

The BGB is divided into five books. Each book is divided into Sections (*Abschnitte*), which are in turn sub-divided into Titles (*Titel*).

The first book, the general part (§§ 1 – 240 BGB), deals with general concepts of law and with definitions, including, amongst others, the capacity of natural and legal persons, juristic acts, mistake, duress and agency. The general part contains basic concepts and rules governing all the other Books of the BGB and law in general, unless excluded by specific rules or principles laid down in other enactments.

The second book deals with the law of obligations and contains general concepts pertaining to obligations (§§ 241 – 432 BGB). A special part contains rules for

²⁴ Brox, 47.

²⁵ Palandt Bürgerliches Gesetzbuch 131; Münchener Kommentar zum BGB Allgemeiner Teil 1226 1227 1228 1229 1230; § 6 EnergieWiG; § 22 PbefG, §§ 13a Abs.4 S.3,90 Abs.1 S. 3 GüKG; §§ 48,49 BRAO; § 15 PatG; § 61 UrhG; § 5 PflVersG-referring to § 5 PflVersG; BGH LM PflVersG Nr.3b=NJW 1973,751.

²⁶ Ebke & Finkin 175; Brox 47 48.

different kinds of obligations such as those arising from sale, lease and contracts of service (§§ 433 - 853 BGB), as well as the law of torts (§§ 823 – 853 BGB).

Book Three (§§ 854 – 1296 BGB) deals with the law of things and contains rules regarding both possession, eg the factual control over an object, and ownership, being the legal control over an object. It deals, in particular, with the acquisition and loss of ownership and the establishment of other property rights.

Books Four and Five contain rules regarding family law (§§ 1297 – 1921 BGB) and the law of succession (§§ 1922 – 2385 BGB).

Contracts and the problem of mistake in their formation are in the main regulated by the general part of the Code (exceptions are eg §§ 2078, 2281 and 1949 BGB). Admittedly there are also some special rules, dealing in particular with the consequences of defective agreement, but these will not be dealt with in the present thesis. It is also apparent that the formal structure makes it unnecessary to consider Books Two – Five in this study.

2.2 The general part – three general concepts of the BGB

The general part of the BGB deals with the general concepts of the civil law applicable to the entire BGB and to private law in general. From a conceptual perspective, it provides the framework for the understanding of every private law issue.²⁷ Three basic concepts of the general part of the BGB are of paramount importance in this regard: namely the juristic act, the declaration of will, and contract. These concepts stand in close relation to one another,²⁸ and an understanding of the juristic act and the declaration of will provides the key to the German notion of contract.

²⁷ Brox 25: Münchener Kommentar zum BGB Allgemeiner Teil 14: Foster 229 230.

²⁸ Larenz 314-330: Markesinis The German Law of Obligations Volume 1 31.

2.2.1 The Juristic act

The notion of the *Rechtsgeschäft* (juristic act) of German law is of central importance for the treatment of contract-related issues.

The term juristic act in the most general sense denotes the intentional creation of legal consequences by a legal subject.²⁹ Although it is not a formal requirement, and although the BGB does not always distinguish these terms,³⁰ a juristic act presupposes an effective declaration of will.³¹

The juristic act, together with other matters, is dealt with in Section 3 (§§ 104-185 BGB) of the general part. Section 3 itself is divided into six Titles.

“*Geschäftsfähigkeit*”, or the capacity to conclude a “*Rechtsgeschäft*”, is dealt with in Title 1 (§§ 104-115 BGB). Title 2 (§§ 116-144 BGB) deals with the “*Willenserklärung*” (declaration of will), and “*Vertrag*” (contract) is thereafter dealt with in Title 3 (§§ 145-157 BGB). The modalities to which a “*Rechtsgeschäft*” may be subjected, namely “*Bedingung*” (condition) and “*Zeitbestimmung*” (time provision) receive attention in Title 4 (§§ 158-163 BGB). Aspects related to the “*Rechtsgeschäft*” such as “*Vertretung*” (agency), “*Vollmacht*” (power of attorney), “*Einwilligung*” (prior consent) and “*Genehmigung*” (approval) are regulated in Titles 5 (§§ 164-181 BGB) and 6 (§§ 182-185 BGB) respectively.

The term “*Rechtsgeschäft*”, it must be stressed, although it features in various provisions of the BGB and stands at the head of the third Section, does not receive a statutory definition in the BGB at all. There is, nevertheless, at the present time no uncertainty as to its meaning.

In order to define the notion and to distinguish it from other concepts, it may be stated that by means of a juristic act a legal subject (*Rechtssubjekt*) can establish legal

²⁹ Brox 54; Larenz 314.

³⁰ Brox 54; Hübner 265.

³¹ Larenz 315.

consequences in the sense of creating, varying or extinguishing a legal relationship with another or in respect of a thing or an issue (*Rechtsobjekt*).³² A juristic act requires at least one declaration of will (*Willenserklärung*) as in the case of a unilateral legal act, eg the making of a will, but multilateral legal acts, such as contracts, require more than one such declaration.³³

The creation of legal consequences by means of intentional conduct, therefore, requires a declaration of will on the part of the actor. A legally binding agreement with another person demands the disclosure of his will or intention. Any other approach would be problematic from a social point of view. A declaration of will is therefore a precondition for each and every juristic act. In addition, as will be shown below, contract itself is a special manifestation of the juristic act.

As already indicated, the juristic act has to be distinguished from related but nevertheless distinct notions.

On the one hand there is the “*rechtsgeschäftsähnliche Handlung*” such as the setting of a time limit, consent to an operation or the establishment of a domicile which also brings about legal consequences. These are intentional acts, and on account of this similarity, attract the rules concerning the capacity to undertake juristic acts (“*Geschäftsfähigkeit*”) and the declaration of will (“*Willenserklärungen*”) by analogy.³⁴ In contradistinction to the juristic act, the legal consequences in these cases come about independently of the intention of the actor on account of the provisions of the BGB itself.³⁵ Human acts, such as the negligent destruction of a car by a person, also have legal consequences, not, however, in consequence of a declaration of will or intent, but merely because of the general law, eg the law of torts.³⁶ This second category of cases has even less in common with the notion of the

³² Brox 54; Larenz 314-315.

³³ Larenz 318-320; Brox 48 54.

³⁴ Brox 52 53;

³⁵ Larenz 511-514; Brox 53.

³⁶ Brox 52 53; Larenz 511.

juristic act than the category of “*rechtsgeschäftsähnliche Handlungen*”, and will also not be discussed here.

It is of cardinal importance that a juristic act invariably presupposes a declaration of will. The declaration of will, as the primary constituent of the juristic act, is regulated in §§ 116 –144 BGB.

2.2.1.1 The declaration of will

Before discussing the requirements for a declaration of will as the basis of a juristic act, it is necessary to refer to more general requirements for the validity of every juristic act, which, somewhat indirectly perhaps, also refer to the declaration of will.

In order that conduct on the part of a legal subject may bring about legal consequences, in other words, constitute a valid juristic act, requirements regarding legal capacity and formalities have to be satisfied.

2.2.1.1.1 Legal Capacity and its significance under German law

A legal act requires that the actor be capable of declaring his or her will, and this presupposes the capacity to form a legally relevant will.³⁷ The BGB differentiates between different levels of legal capacity by a resort to the notions of “*Rechtsfähigkeit*”, “*Handlungsfähigkeit*” and “*Geschäftsfähigkeit*” as expressing varying levels of competency in respect of the creation of legal duties and rights.³⁸

“*Rechtsfähigkeit*” refers to the capacity to be a bearer of rights and obligations,³⁹ and is not of great relevance for this discussion. It is of greater importance to distinguish “*Handlungsfähigkeit*” from “*Geschäftsfähigkeit*”. The former, the capacity to perform legally relevant acts,⁴⁰ denotes the general ability to obtain rights, undertake

³⁷ Brox 124; Larenz 99.

³⁸ Jauernig-Schlechtriem-Stürner 44; Brox 125-127.

³⁹ Münchener Kommentar zum BGB Allgemeiner Teil 826; Larenz, 35 42-43.

⁴⁰ Palandt Bürgerliches Gesetzbuch 68.

duties, incur liabilities, and to enforce juristic acts or obligations, but does not extend to “*Geschäftsfähigkeit*”, the capacity or competence to perform juristic acts.⁴¹

“*Handlungsfähigkeit*”, in other words, is a person’s capacity for legally relevant behaviour and comprises not only “*Geschäftsfähigkeit*” but denotes the capacity for delictual liability as well.⁴² “*Geschäftsfähigkeit*” is a component of the wider notion of “*Handlungsfähigkeit*”. But to acknowledge a person as being “*handlungsfähig*” does not entail recognition of that person as “*geschäftsfähig*” as well. A person who is “*geschäftsfähig*”, however, will ordinarily also be delictually responsible.

The BGB regulates the issue as to which persons enjoy the capacity to undertake juristic acts. Although the BGB contains no specific provisions to this effect, it proceeds on the basis that the capacity to undertake juristic acts commences with the onset of majority, which, under § 2 BGB, is 18 years.⁴³

A sharp distinction is made between those who are legally incompetent and have no capacity to undertake juristic acts (§ 104 BGB), those enjoying limited legal competence (§ 106 BGB) and those who are fully competent.⁴⁴

The efficacy or otherwise of a purported juristic act therefore depends primarily on the capacity of the particular legal subject to declare his or her will in a legal sense.

The written declaration, for example, of a 6 year old boy that he wants to leave his bicycle to his friend does not entail any legal consequences. The issue is settled by the more or less mechanical application of the provision that a person who has not completed his 7th year is legally incompetent⁴⁵ and that a declaration by such a person is null and void.⁴⁶

⁴¹ Larenz 99.

⁴² Palandt Bürgerliches Gesetzbuch. 68.

⁴³ Hübner 296-298; Larenz 99.

⁴⁴ Larenz 99-100; Hübner 297-300; Brox 127-129.

⁴⁵ §104 BGB.

⁴⁶ §105 BGB.

Whereas there is no scope in such a case for a judge to interpret the applicable norms, this becomes a possibility in respect of a declaration of intent by a major who wishes to buy a car. Such a declaration might be valid or void, depending on the subject's mental condition at the time of declaration. The relevant statutory criteria of a "disturbance of mental activity through disease" and "its nature as a transitory one"⁴⁷ have to be construed by the judge, and it is possible that, faced with the same facts, different judges might come to different results. However, should the judge conclude that the requirements of § 104 (2) BGB are satisfied, the particular act must be declared void under the strict provision of § 105 BGB.

The capacity to undertake a juristic act is, therefore, in actual fact a precondition for the validity of a juristic act. In the absence of "legal capacity", there is no need to evaluate the conduct of the legal subject with respect to its validity as a juristic act at all. The legal subject is either competent (at least in a limited sense) to undertake a juristic act or not. If not, there is no need for a further investigation of questions regarding the existence of a juristic act.

A similar situation obtains regarding the issue of formalities.

2.2.1.1.2 Formalities and their significance for juristic acts

German law is based on the principle of consensualism, which means that juristic acts, including contracts, generally do not require formalities for legal efficacy. Freedom of form is a general principal of German law.⁴⁸

There are, nevertheless, various instances where, for a variety of reasons, formalities of different kinds are required. Formalities may serve to clarify whether there is an

⁴⁷ §104(2) BGB.

⁴⁸ Larenz 406-408; Münchener Kommentar zum BGB Allgemeiner Teil 1008; Jauernig-Schlechtriem-Stürner 66; Brox 139; Palandt Bürgerliches Gesetzbuch 91; Ebke & Finkin 176.

agreement between legal subjects or not,⁴⁹ are of evidentiary significance and may fulfil a warning function, especially in respect of onerous juristic acts.⁵⁰

A brief overview of the different types of formality will suffice for present purposes.

In respect of juristic acts, the BGB distinguishes four different levels of formality:

- Writing as required by statute (*gesetzliche Schriftform*, § 126 BGB)
- Writing as prescribed by the parties (*gewillkürte Schriftform*, § 127 BGB)
- Notarial documentation (*notarielle Beurkundung*, § 128 BGB)
- Public certification (*öffentliche Beglaubigung*, § 129 BGB)

If formal requirements at any of these levels are ignored or violated, the juristic act is as a general rule devoid of legal effect.⁵¹ As is the case in questions of legal capacity, the BGB determines the legal consequences of formal defects clearly and formalistically.⁵²

A bequest to a friend of a set of golf clubs which does not comply with the formal requirements of the BGB regarding wills (§§ 2231, 2247 BGB) will accordingly be void on account of § 125 BGB. In respect of formal requirements as well, it is unnecessary to investigate the validity of a declaration if a required or agreed-upon formality is ignored by the party or parties to it.

Many German textbooks, it must be admitted, adopt a different order of treatment in this regard. Questions of legal capacity and formalities are often discussed following a treatment of the declaration of will.⁵³ This approach does not, however, seem useful for present purposes. Unlike a textbook, which, for didactic purposes, has to deal

⁴⁹ Hübner 351; Larenz 407; Brox 139.

⁵⁰ Larenz 407; Palandt Bürgerliches Gesetzbuch 91.

⁵¹ Hübner 356; Brox 143. There are exceptions, which shall not be discussed here, eg § 518 (2) BGB (notation) and some applications of § 242 BGB.

⁵² § 125 BGB.

⁵³ See for example Larenz 407.

with every aspect of the subject matter, the more restricted scope of the present work permits a rather more selective focus.

The general definition of the juristic act and its preconditions do not clarify the meaning of the declaration of will as its principal constituent. The invalidity of the declaration in cases of defective capacity and form flow from the statutory provisions themselves, ie §§ 105,125 BGB, and does not turn on the question of what a declaration of will is and what its prerequisites are. These issues only come to the fore where a person past the age of majority who is of sound mind declares something in the appropriate way.

2.2.1.1.3 Requirements for a valid declaration of will

As in the case of “juristic act”, the BGB has no definition of “declaration of will”. The Code does, however, contain numerous provisions which regulate various aspects of the central concept.⁵⁴ The very term *declaration of will* indicates, however, that apart from an internal or subjective element, ie the will to bring about a legal consequence, it comprises also the declaration, ie the external manifestation of the legal consequences desired by the declarer.⁵⁵

This brief description serves only as a starting point for the understanding of the concept in German law.

2.2.1.1.3.1 “Will” in its legal sense

It is in the first instance necessary to elaborate on the concept “will”, which in itself is too general to yield precise results. It is generally accepted that the will comprises a number of elements.

In the first instance, cognisance must be taken of the the *Handlungswille*, ie the intention to act. The utterance, for example, of a sleeping or unconscious person, is

⁵⁴ Brox 48.

⁵⁵ Larenz 333.

wholly irrelevant, even if he or she appears to be expressing a wish to buy or sell something. It is essential that the person should act purposefully.⁵⁶

Up to 1991, a *Rechtsbindungswille*, ie the intention to be legally bound by one's act, was a second element. This particular component was, however, finally abolished by a judgment of the BGH:

“In spite of the absence of the conscious making of a declaration (intention to be bound, business intention), a declaration of will is present if the declarer, by using the care necessary in the affairs of life, could have perceived that this statement might, according to good faith and business custom, be regarded as a declaration of will, and if the recipient did in fact also understand it. It can be avoided in accordance with §§ 119, 121, 143 of the BGB.”⁵⁷

The implications of this decision shall not be discussed at present.

A further component of will in the legal sense is the *Geschäftswille*, that is the intention of a person to engage in a particular transaction. In contradistinction to the *Rechtsbindungswille*, this refers to the intention of the legal subject to achieve a particular legal consequence, and not just any consequence whatsoever.⁵⁸

If, for example, S wants to sell an article to B for € 5430.00 and he correctly declares this to B, he has a definite will in the legal sense in respect of both his own declaration and its special legal consequence.

The subjective aspect of a declaration of will therefore entails two essential elements. Apart from the necessity of intentional conduct in general, the intention of the legal subject should be directed towards achieving particular legal consequences. As a matter of logic it seems that the intention to engage in a juristic act and to be bound

⁵⁶ Medicus 83; Brox 49.

⁵⁷ BGHZ 91, 324; 109, 177.

⁵⁸ Brox 50; Hübner 284-285.

thereby does entail both an awareness and an intention that the act will result in consequences.

2.2.1.1.3.2 The declaration [of will]

Without an outward manifestation of the intent to effect legal consequences, the intention is, as indicated above, legally ineffective.

The declaration may be expressly articulated in words, but may also be inferred from conduct.⁵⁹ For example, a car driver, who fills his tank with petrol indicates, without saying a single word, that he wants to purchase petrol. This is admittedly only the case if he does not entertain any dishonest intention. In such a case, the question of the so-called factual contract becomes relevant, an issue which will be considered in a later section.

Recognition that a declaration may be made by non-verbal conduct does not mean that mere silence will, as a rule, be sufficient to constitute a declaration of will. Amongst legal subjects silence ordinarily does not mean anything at all in a legal sense. Silence may be relevant as a legal act in cases within the ambit of § 362 of the HGB.⁶⁰ Apart from this special instance, which will not be discussed here, silence may be relevant as conduct in a legal sense in consequence of § 149 BGB, which in certain circumstances compels legal subjects to act.⁶¹

2.2.1.1.3.2.1 Legally binding as opposed to social agreements

The question of the intention to engage in a transaction and the outward declaration thereof is closely connected with the issue of non-binding declarations of will made merely for social reasons. This distinction is a matter of interpretation, depending on a range of factors, including the surrounding circumstances.⁶²

⁵⁹ Hübner 287; Larenz 357-359.

⁶⁰ Medicus 37-43 83; Brox 99-100.

⁶¹ See below: 2.2.2.2.3.

⁶² Hübner 286; Medicus 252 253 254.

In the case, for example, where D. asks his acquaintance P. whether he needs a lift, and his friend thanks him for the offer and gets into D's car, and is subsequently injured in an accident, the question of whether the offer was made with the intention to be legally bound or just as a favour would depend on whether or not D was aware that his friend had to reach his train by a certain time and whether he had charged his passenger for the lift or not.

The inescapable need in this and other cases to interpret a declaration of will in order to establish its precise significance is apparent from the provision in the BGB of rules for the interpretation of declarations of will. Because a declaration of will is of significance for the constitution of a juristic act, the interpretation provisions in actual fact bear on the wider notion of the juristic act and on the determination of its legal consequences.⁶³

2.2.1.1.3.3 The interpretation of declarations of will

The BGB states that the interpretation of a declaration is directed at the actual intention underlying it, irrespective of its literal meaning.⁶⁴ The principal test to be applied by judges when interpreting a declaration of intention is, therefore, supposedly a subjective one.⁶⁵ With reference to the example of the passenger conveyed in his friend's car,⁶⁶ German judges would have to investigate the actual intention of D. On this basis, the question is whether D intended to make himself liable for damages in case of an accident. An indicator in this regard might be whether he had charged his passenger for the lift.

A consideration of all these questions might enable a judge to make a finding as to whether the offer had been made with the intent to establish a legal bond, or merely as

⁶³ Münchener Kommentar zum BGB Allgemeiner Teil 1068-1069: Brox 66-68.

⁶⁴ § 133 BGB.

⁶⁵ Münchener Kommentar zum BGB Allgemeiner Teil 1068-1080: Brox 67 68; Erman 218-219; Palandt Bürgerliches Gesetzbuch 101.

⁶⁶ See above: I [case 6].

a favour. Needless to say, § 133 BGB is not only relevant to the question of whether there is a juristic act or not, but is also of importance in many other contexts.

A supplementary provision in § 157 BGB and its relation to § 133 BGB will be discussed at a later stage.

2.2.1.1.3.4 Paragraphs 134, 138 BGB - their importance for the validity of legal acts

To complete the overview of the notion of juristic act, it is now necessary to discuss two other important provisions relevant to the validity of juristic acts.

Unlike the provisions previously discussed, which deal with the preconditions for a juristic act or a declaration of will, two key provisions enable German judges to declare a legally effective declaration of will or a juristic act to be null and void.

These rules, which are of enormous importance for the phenomenon of juristic acts and therefore also for contracts,⁶⁷ embody limitations on the freedom of contract. Generally speaking, their aim is to ensure the overall coherence of the legal system, as well as to protect weaker legal subjects against more powerful parties.⁶⁸

2.2.1.1.3.4.1 Paragraph 134 BGB

The rule of § 134 BGB deprives an act of a legal subject, which violates another rule of German law of legal consequences by declaring a juristic act that contravenes a statutory prohibition to be void unless a different consequence is to be inferred from the statute.

⁶⁷ Münchener Kommentar zum BGB Allgemeiner Teil 1087-1088: Brox 147-154.

⁶⁸ Palandt Bürgerliches Gesetzbuch 105 111-113: Münchener Kommentar zum BGB Allgemeiner Teil 1087-1088.

The underlying idea is to preserve the overall unity of the German legal system.⁶⁹ by, for example, preventing a professional murderer from claiming payment from his client.

2.2.1.1.3.4.2 Paragraph 138 BGB

Paragraph 138 BGB, on the other hand, relates to immoral acts and to those by which a legal subject gains an unfair advantage over another.⁷⁰ The open-ended terms in which it is phrased permit judges considerable leeway regarding the control over immoral and exploitive contracts.⁷¹ In 1969, for instance, the BGH related the notion of “good morals” to the feeling of propriety common to all fair and right thinking persons.⁷²

2.2.1.2 Juristic acts recognised by the BGB

As indicated above, the concept “juristic act”, which is based on the notion of a “declaration of will”, is of general application for the entire area covered by the BGB and, indeed, the whole of private law. Not restricted to a limited number of applications, it is the basic tool for the regulation of all endeavours to effect voluntary changes to legal relationships, and as such is operationalised by means of a number of formal subdivisions of the central organising concept.⁷³

2.2.1.2.1 Unilateral juristic acts

A first distinction is with reference to the number of legal subjects involved in the act. It has been indicated that a juristic act requires at least one declaration of will. Juristic acts which require only one such declaration are characterised as being unilateral in nature. Belonging to this category, and provided for by the BGB in its different

⁶⁹ Brox 147.

⁷⁰ § 138 BGB.

⁷¹ BAG NJW 1986, 85f; BGH NJW 1976, 710, 711; BGH NJW 1956, 1272; BGH NJW 1961, 822; BGH NJW 1965, 580; BGH NJW 1968, 932, 934; RGZ 99, 107, 108 f; RGZ 140, 184, 190; RGZ 114, 338, 341; BGH NJW 1968, 1571; BGH NJW 1987, 2014 f (bill for € 67875,00 at the end of a nightclub visit).

⁷² BGH NJW 1990, 704.

⁷³ Brox 48-49 54.

books, are, for instance, the declaration of rescission (a form of termination of an obligation), the grant of a power of authority to an agent and the testamentary disposition.⁷⁴

A common feature of the unilateral legal act is that a party is entitled to change his or her legal relationship to another legal subject or thing without the need for the consent of another. The principal consideration in the recognition of a unilateral legal act is whether any other legal subject has a legitimate interest in the matter that necessitates its approval.⁷⁵ In the case of succession, for instance, it is clear that the interest of the testator in the disposition of his goods is the sole concern of the law.

2.2.1.2.2 Receipt of a declaration as prerequisite for its operation

A further classification of declarations of will turns on whether a declaration is received by another person, or takes effect independently of receipt.

The BGB recognizes declarations of both kinds. The most important instance of the second kind is the offer of reward (*Auslobung*), a declaration of intention that does not require communication to a legal subject who qualifies for the award.⁷⁶ A further example is the declaration of one's ultimate will.⁷⁷

In general, however, declarations of will have to be received by those whose interests are affected by the particular legal act in order to be effective.⁷⁸ Of paramount importance in this regard for juristic acts and contracts in particular, is § 130 BGB, which stipulates the manner in which a declaration of will becomes effective as against absent persons.

⁷⁴ Brox 54.

⁷⁵ Münchener Kommentar zum BGB Allgemeiner Teil 880-881 1052-1053.

⁷⁶ Regulated in §§ 657-661 BGB: Palandt Bürgerliches Gesetzbuch, 695 697: Jauernig-Schlechtriem-Stürner 771.

⁷⁷ Münchener Kommentar zum BGB Allgemeiner Teil 881: Jauernig-Schlechtriem-Stürner 72.

⁷⁸ Brox 52.

In general, a declaration of will, if not previously revoked, becomes effective when it reaches the absent addressee (§ 130 (1) BGB). The operation of a declaration is not affected by the death or subsequent incompetence of its maker (§ 130 (2) BGB).

For obvious reasons, however, the efficacy of a declaration of will cannot depend on whether the potential recipient in fact received or not. In order to prevent a circumvention of the provision, eg by an employee who expects to be dismissed not opening the letter containing the notice of termination of service, the provisions of § 130 BGB have been interpreted by the German courts to mean that, apart from the case where a declaration of will which needs to be received to become effective actually reaches the opposite party, it is necessary and also sufficient that it has come into circulation in accordance with the intention of the declarant in circumstances whereunder the declarant could expect it to have reached the intended recipient, even if by indirect means.⁷⁹

2.2.1.2.3 Multilateral juristic acts - contracts

In contrast to unilateral juristic acts, multilateral juristic acts require more than one declaration of will in order to produce results. Where, for example, someone declares his intention to sell his horse orally without anybody being in a position to hear the statement, the requirements for a valid declaration of will and a valid juristic act according to the BGB are satisfied. It is clear, however, that such a declaration cannot bring about any legal consequences. The obvious reason is that the declaration in this case necessarily depends on a reply in order that a change in the declarer's legal relationship to the horse and an intended acquirer thereof might be effected. The ordinary meaning of the word "sell" implies that there is another party who buys the article offered for sale. A transaction of this kind presupposes agreement between at least two interested parties.

⁷⁹ RGZ 99, 23; BGH LM Nr.15=NJW 1980, 990; BAG NJW 1989, 606.

In cases like these, therefore, another legal subject has to react to the initial declaration, and to this end, it is necessary that the second party should have received the first declaration as envisaged by § 130 BGB.

In such cases, one generally speaks of contracts or agreements. And in view of the ordinary meanings of these words, unless one wants to take into account the possibility of contracting with oneself,⁸⁰ it is logical to style agreements or contracts as bi- or multilateral juristic acts within the German understanding of that concept.

From the definition of “juristic act” it follows that a contract under German law requires at least two declarations of will in order that the desired legal changes may be achieved. Basil Markensinis provides an apt parable for the interrelation of the three basic concepts of the German law of obligations.

“... contracts can be likened to molecules of ... German law, ie the smallest components of the specific substance which shapes legal relations between private individuals. But German law, ... does not stop at identifying contract as molecules. Rather than looking at the smallest components of specific substances, it will look at the elements, ie it will focus on the atoms which make up the molecules. If contracts are molecules, then legal transactions are too large not to broken up into smaller pieces. Just as atoms have a nucleus, declaration of intentions lie at the centre of legal transactions.”⁸¹

One should therefore always bear in mind that a contract consists of juristic acts and that all juristic acts have at their core at least one declaration of will. Not every declaration of will amounts to a juristic act, however, and not all juristic acts are contracts.

For instance, the man who offers his horse to nobody in particular, declares his will properly, but does not perform a juristic act. His declaration logically presupposes

⁸⁰ Which is possible under special circumstances but generally prohibited under § 181 BGB.

⁸¹ Markensinis 31 (he uses the term legal transaction instead of juristic act).

receipt by somebody and because it does not fulfil the requirements of § 130 BGB, it does not become effective. The testator, on the other hand, who declares his last will in the appropriate way, performs a juristic act but one which is not a contract, and which does not have to be received by anybody in order to become effective.

2.2.2 Contracts under the BGB

The question now is whether or not the BGB itself provides a proper definition for the concept “contract”. Not surprisingly, we do not find in the code a formal definition of what a contract is.

The BGB contains rules regarding “offer” and “acceptance” as constituent elements of a contract, and uses the word “contract” (*Vertrag*) quite often, but does not supply a formal explanation of the concept. The meaning of the concept has to be inferred from the technical rules of the Code.

The third title of Section 3 of the BGB bears the heading “Contracts”.⁸² and it might therefore be helpful to start with its first article.⁸³

Paragraph 145 BGB does not define the term “contract”, but presumes an understanding of what it is. There is in fact no article in the entire BGB that brings any greater clarity regarding the definition of contract. The creators of the BGB simply wove their understanding of contract into the framework of the code. A perusal of the articles of the third title of section 3 yields an understanding of what a contract is under German law and of its main prerequisites. A generally accepted view is that a contract under German law consists of an agreement between parties who wish to bring about certain legal consequences. In order for this to happen, one of the parties must indicate his intention to enter into a binding arrangement with another under certain preconditions, and that person must indicate assent to this proposal.

⁸² See above: 2.1.4.

⁸³ § 145 BGB.

A contract thus involves corresponding declarations of will articulated by the would-be contracting parties, and is designed to engage them in a legal bond.⁸⁴ Needless to say, a contract will only be created if the preconditions for a juristic act and a declaration of will are fulfilled.

2.2.2.1 Requirements of an offer

Under German law an offer must be precise and complete as to the essential elements of the proposed contract: the detail regarding agreement on incidental terms may be left open.⁸⁵

Although offers nowadays often consist of many pages, the basic criterion as to whether an offer exists or not, is whether the recipient can establish the essentials of agreement by a simple affirmative response.⁸⁶

A more extended definition is that the offer must render the content of the proposed contract sufficiently certain or at least capable of ascertainment.⁸⁷ The requirement that the offer be “sufficiently specific” implies as well that one should be able to discern to whom the offer is addressed.

2.2.2.1.1 Offer *ad incertis personas*

Despite the requirement of certainty, German law recognizes an offer made to indeterminate persons, for instance offers made by way of vending machines. Acceptance in such a case does not require that the offeror be notified, but should nevertheless qualify as an act of intent under § 151 BGB.⁸⁸ Although the article deals with the acceptance of an offer, and not, strictly speaking, with the offer itself, many academic writers assume that § 151 BGB recognizes an *offer ad incertis personas*.

⁸⁴ Medicus 33; Larenz 515 516; Brox 48-89; Jauernig-Schlechtriem-Stürner 94.

⁸⁵ Larenz 517 518; Brox 89 90.

⁸⁶ Hübner 401.

⁸⁷ Jauernig-Schlechtriem-Stürner 98; Brox, 89; Palandt Bürgerliches Gesetzbuch 134.

⁸⁸ § 151 BGB.

The courts also assume that there is no need to address the offer to determinate persons where business customs render this unnecessary.⁸⁹

2.2.2.1.2 *Invitatio ad offerendum*

Case law and academic opinion are also at one in treating newspaper advertisements, prospectuses, merchandise catalogues and displays in shop windows as mere invitations to treat (*invitatio ad offerendum*) and not as offers. Underlying this sensible conclusion is the consideration that the intention to engage in a particular juristic act (*Geschäftswille*) is absent in such cases. A contrary intention would expose the declarant to the risk that an indeterminate number of persons might, by mere acceptance, establish contracts irrespective of the declarant's capacity to perform them. The person to whom the so-called *invitatio ad offerendum* is addressed is therefore required to make the offer with a view to its acceptance by the initial declarant.

Whether this situation differs from the case of the vending machine is debatable. Arguably, someone who sets up a cigarette-vending machine would also be unwilling to place the limited number of cigarette boxes on offer to everybody who might come along, since the number of potential buyers is likely to exceed the supply of boxes in the machine.

As in the case of *invitatio ad offerendum*, the intention to supply an indeterminate numbers of customers with goods must generally be assumed to be absent. It therefore seems to me more acceptable to resolve the problem of offers *ad incertas personas* by means of the notion of an *invitatio ad offerendum*, so that the insertion of coins into the cigarette machine would constitute an offer by means of conduct. The response whereby the seller supplies the customer constitutes acceptance under § 151 BGB.

⁸⁹ Münchener Kommentar zum BGB Allgemeiner Teil 1270-1272.

2.2.2.1.3 The duration of the offer

The BGB regulates the period for which the offer remains open for acceptance in some detail. An offer is a declaration of will that must be received by another party. Paragraph 130 BGB⁹⁰ stipulates precisely that an offer, if not made in the presence of the offeree, becomes effective as such only when received by the other party.

Offers made in the physical presence of the offeree or to persons with whom the offeror is in immediate contact, ie by telephone, must be accepted immediately.⁹¹ The BGB rules that an offer lapses not only if it is rejected,⁹² but also if it is not accepted in a timely fashion.⁹³

An offer made to an absent person can only be accepted up to the point in time at which the offeror might expect the arrival of the answer in usual circumstances.⁹⁴ What amounts to a reasonable time for the purposes of § 147 (2) BGB has been considered by German courts, but need not be discussed here.

2.2.2.1.4 The irrevocability of the offer

As is apparent from the first sentence of § 145 BGB,⁹⁵ an offer once made is irrevocable. The offeror is bound by his declaration until the offeree rejects the offer, or until the elapsement of the period fixed for acceptance or of a reasonable period.

This approach poses inherent risks for the offeror. For example, a salesman who offers a product to a client for € 2000,00 and who subsequently realises that he has not taken value-added tax into account faces the prospect that the client might insist on accepting the offer of € 2000,00.

⁹⁰ § 130 BGB.

⁹¹ § 147 BGB.

⁹² § 146 BGB.

⁹³ § 148 BGB.

§ 149 BGB.

⁹⁴ § 147 BGB.

⁹⁵ § 145 BGB.

Although, according to § 130 BGB,⁹⁶ an offer will be rendered ineffective if a revocation reaches the offeree before or at the same time as the offer, this safeguard is of limited practical relevance because its application is a matter of timing and dependent on circumstances which cannot be influenced by the offeror. The second half-sentence of § 145 BGB therefore provides the means of avoiding the binding effect of an offer. It allows that a resort to qualifications such as “offer subject to change” or “revocable offer”, excludes the binding effect of an offer. Whether such “qualified” offers are real offers is a moot point. The case law of the *Reichsgericht* treated them as non-offers (*invitatio ad offerendum*), but nowadays there is a tendency to treat such declarations as real offers, capable of acceptance, in view of the principles of good faith of § 242 BGB.

In the final analysis, therefore, it is safer to say that the precise effect on the declaration of such qualifying statements depends on the facts of each case. Such an approach does, of course, however, result in elaborate distinctions and considerable uncertainty.

2.2.2.2 Acceptance

As a matter of logic, a contract requires at least one other declaration of will in addition to, and corresponding to the offer. This second declaration of will is the acceptance of the offer. In order to be effective, an acceptance must be free and unreserved, must correspond to the declared will of the offeror and have been communicated to him.

2.2.2.2.1 The acceptance must be free

The principle of freedom of contract recognised under German law implies that there is no obligation to accept an offer. Modern conditions have, however, necessitated a number of exceptions where there is a duty to contract. Apart from § 149 BGB,⁹⁷

⁹⁶ See above: 2.2.2.1.3.

⁹⁷ See below: 2.2.2.2.3.

certain entities, such as public utilities that provide electricity, gas and rail services, are duty bound to enter into contracts.⁹⁸

Such interference with the notion of freedom of contract remains controversial,⁹⁹ but irrespective of whether it is justified with reference to considerations of public law or the BGB itself,¹⁰⁰ it is widely regarded as lawful and compatible with the German legal system.

2.2.2.2.2 Communication of the acceptance

An acceptance is as much a declaration of will as an offer and is therefore also subject to the prerequisites in this regard. More particularly, an acceptance has to be received by the offeror or his representative in order to be legally effective as a declaration of will.

Because § 145 BGB makes an offer generally irrevocable, the offeror is entitled to know whether his offer has been accepted or not. The provisions of § 130 BGB are therefore applicable to both offers and acceptances. There are exceptions to this general rule, however. Apart from § 151 BGB, which states that in certain circumstances a communication of the acceptance is unnecessary, it also is dispensed with where a contract is notarially authenticated without both parties being present at the same time.¹⁰¹

2.2.2.2.3 Belated or conditional acceptance

A further important aspect is that of belated or conditional acceptance. Paragraph 146 BGB states that an offer lapses if not accepted within a reasonable time. The issue of belated acceptance is, however, the subject of a special provision. According to § 149 BGB, if a declaration of acceptance that reaches the offeror late has been sent in such

⁹⁸ See above: 2.1.3.

⁹⁹ Jauernig-Schlechtriem-Stürmer 96: Münchener Kommentar zum BGB Allgemeiner Teil 1226-1227 1270; Palandt Bürgerliches Gesetzbuch 131.

¹⁰⁰ Münchener Kommentar zum BGB Allgemeiner Teil 1227 1228.

¹⁰¹ § 152 BGB.

a way that it should have reached him punctually on regular dispatch, and if the offeror must have realised this, he should notify the acceptor of the delay immediately after receipt of the declaration, insofar as this has not already happened. If he delays the dispatch of the notification, the acceptance is not regarded as belated.

In contrast to the general principle that silence cannot attract legal consequences,¹⁰² a failure to "speak" might, thus, complete a juristic act in certain circumstances.

In terms of § 150 BGB, an acceptance made belatedly or punctually but conditionally with additions, limitations or other alterations, is treated as a rejection of the offer and amounting to a counter-offer.

Because the phenomenon of the conditional acceptance (§ 150 (2) BGB) brings about uncertainty as to whether there is assent to the offer or a rejection thereof, it often raises the problem of disagreement.

2.2.2.3 Disagreement in the formation of contract

Because a contract is constituted by agreement between the parties, difficulties arise where the existence of a contract is disputed on the grounds that, in spite of apparently concurring declarations of will, agreement has not been reached.

A distinction needs to be made between the case where parties are aware of the fact that, despite an exchange of offer and acceptance, agreement has not been reached, and the case where they are unaware of this. In the first case, it is doubtful whether there is a contract. The parties after all, know that they have not reached agreement. In the second case, where the parties assume that there is a contract between them but realize afterwards that they failed to agree, the position is more complicated.

2.2.2.3.1 Open lack of agreement (*offener Dissens*)

Open lack of agreement exists where, to the knowledge of the parties, they are not completely in agreement. The juristic consequences of this state of affairs depend on

¹⁰² See above: 2.2.1.1.3.2.

whether and to what extent any agreement has been reached. If the lack of agreement concerns aspects fundamental to the intended contract (*essentialia negotii*), the contract fails *ab initio*; if it relates to peripheral issues (*accidentalia negotii*), it takes legal effect. The points deemed fundamental depend, amongst other criteria, on the type of transaction. The price of an article, for example, is always a fundamental point in a contract of sale.¹⁰³ This may appear to contradict rules laid down in § 119 (2) BGB, relating to mistakes, which will be described below, under that heading.

Paragraph 154 BGB is in the main a rule of interpretation, which allows the German judge to construe the conduct of the parties in the special circumstances regarding the question of whether a contract has been reached or not.¹⁰⁴ There are also other rules that are relevant to the issue of whether the terms disagreed upon are essential. Apart from § 133 BGB, which was discussed above,¹⁰⁵ §§ 157 and 242 BGB may also come into play. Paragraph 155 BGB is also of importance in delineating when a state of affairs may exclude a contract. In an oblique way, it establishes the essentials of an agreement.

2.2.2.3.2 Hidden lack of agreement (*versteckter Dissens*)

According to § 155 BGB, although the parties to what is regarded by them as a concluded contract have in fact not agreed on a point on which agreement is required, such agreement will be valid to the extent that it can be assumed that the contract would have been concluded even without agreement on this point.

This rule deals with the case where there is a lack of agreement or ambiguity of which the parties are unaware. If the declarations are unclear, for instance, and open to different interpretations, there is obviously no agreement and no contract.

Paragraph 155 BGB maintains the contract to the extent that the disagreement relates to non-essential terms, but only if the parties would have gone ahead even if they had

¹⁰³ § 154 BGB: Brox 122; Larenz 527-528; Münchener Kommentar zum BGB Allgemeiner Teil 1304.

¹⁰⁴ Münchener Kommentar zum BGB Allgemeiner Teil 1303.

¹⁰⁵ See above: 2.2.1.1.3.3.

been aware that the particular matter had not been agreed upon. If the lack of agreement concerns fundamental terms, there is no contract.¹⁰⁶

If, however, the declarations are on the face of things clear and unambiguous, but the parties entertain different notions as to what they wanted and meant, there is a contract, but the question of mistake comes to the fore.

2.2.2.4 Paragraph 157 BGB and its relationship to paragraph 133 BGB

Paragraph 157 BGB¹⁰⁷ forms part of the section of the code dealing with contracts and therefore applies only to them. The emphasis therein on objective standards appears to be in conflict with § 133 BGB, which adopts a subjective focus.

An important case regarding the matter of hidden dissent and the interpretation of contracts is the famous *Haakjöringsköd* case. Here both parties were in complete agreement that the contract was for the purchase of “meat”. At all relevant times, both parties used the Norwegian term for shark meat (*Haakjöringsköd*), whereas in fact both intended to contract for whale meat.

According to § 155 BGB, there was no contract: the kind of meat is undoubtedly an essential aspect of such a contract. On the application of the objective standards of § 157 BGB, therefore, one might conclude that the contract was for shark meat.

The court, however, held that in terms of § 133 BGB, effect had to be given to the actual intention of the parties. Thus it was held that there was a contract for the purchase of whale meat.¹⁰⁸

2.2.2.5 Paragraph 242 BGB - good faith and business custom

Paragraph 242 BGB, which requires performance to be effected according to the requirements of good faith and business custom, plays an enormous role regarding the

¹⁰⁶ Jauernig-Schlechtriem-Stürner 105 106; Brox 123; Münchener Kommentar zum BGB Allgemeiner Teil 1314; Foster 242.

¹⁰⁷ § 157 BGB.

¹⁰⁸ RGZ 99, 147 (148).

interpretation of legal acts. Although not contained in the general part of the BGB, but in the second book (law of obligations), it has found general application throughout the German civil law,¹⁰⁹ so that its application is not limited to the law of contractual obligations but extends to legal acts generally.¹¹⁰

As has been already indicated, it is one of the key provisions used to develop private law in response to the demands of changing economic and social circumstances.

The overview of the concept "juristic act" has shown that it requires a declaration of will in respect of its required elements by a legally competent person. If these prerequisites are met, § 133 BGB requires it to be construed in the light of the actual intention of the legal subject. Thereafter, it has to be established whether the declaration satisfies the standards set by § 134 BGB and § 138 BGB. An affirmative answer yields the conclusion that the declaration takes effect as a legal act. In spite of this, the wide formulation of § 242 BGB may nevertheless render the legal act unenforceable.

In view of the restricted focus of this thesis, three examples of the resort to § 242 by the German Courts will suffice to illustrate its significance.

In RGZ 161, 330, 338, a vendor who charged a very high price for a plot of land because of its exceptional view was prevented from building on an adjacent plot which he owned, because it would destroy the view from the first plot. This conclusion was reached in spite of the absence in the contract of a term or duty to this effect.

¹⁰⁹ Münchener Kommentar zum Bürgerlichen Gesetzbuch Allgemeines Schuldrecht 95 96; Jauernig –Schlechtriem-Stürner 162 163; Palandt Bürgerliches Gesetzbuch 207 208.

¹¹⁰ Jauernig-Schlechtriem-Stürner 163; Ermann I. Band . 478; Palandt Bürgerliches Gesetzbuch 208.

In RGZ 107. 78. in 1923, the *Reichsgericht* revalued mortgage repayments to reflect the true value of the property rather than allow them be paid in inflated and almost worthless marks.

The question of good faith was also considered in a 1991 judgment of the BGH.¹¹¹ Here the court abolished the necessity of the so-called *Rechtsbindungswille*, ie an intention to be legally bound, as a requirement of a declaration of will. A principal basis for this conclusion was found in § 242 BGB and the principle of good faith and business custom.¹¹² In this case the plaintiff had demanded a guarantee of his debtor. The debtor's bank wrote to the applicant, stating that it would guarantee the debt. The defendant bank later wrote to the plaintiff, stating that it had not intended to guarantee the debt, the correspondence in question being sent in error. The plaintiff sued for payment of the debt on the basis of the original guarantee. The BGH allowed the claim, on the basis that the freedom granted by the BGB in relation to declarations of intention implies an obligation on the part of the declarer, who must carry the "Erklärungsrisiko" (or the declaration risk). Any behaviour amounting to the creation of a legal right on the part of the recipient will be considered a declaration of will on the part of the declarer, irrespective of whether the latter had consciously intended it as such.

The court's ruling in this case makes it quite clear that, in cases where the declarer should reasonably have perceived that his statement might be regarded as a declaration of will, and where the recipient in fact understands it as such, it will be held binding.

Paragraph 242 BGB, then, is an equitable principle, with wide-ranging implications, which in fact affect all areas covered by the BGB.

¹¹¹ See above: 2.2.1.1.3.1.

¹¹² BGHZ 91, 324; 109, 177.

2.2.3 The factual contract

Although German contract law is based on the principle of consensus, sight should not be lost of a leading decision of the BGH regarding the so-called factual contract.¹¹³ This particular case is an illustration of the application of § 151 BGB, but it also concerns a wider issue, namely whether a contract can be created by factual conduct independently of the actual intention of one of the parties (in cases where there is never any doubt as to the intention of the declarer).

The BGH acknowledged that a contract, and thus contractual liability, can be brought about even though one party is explicitly unwilling to enter into a legal relationship. A brief overview will indicate how the court came to its decision.

During the period from 3 September to 12 October 1953 the defendant parked her motor vehicle several times in the City Hall Market car park. This was a supervised car-park, the use of which required a fee. The defendant refused to pay the fee, and made it clear to the attendant from the outset that she did not wish to enter into any contract. She explained that this was a public car-park, for which she believed she had no obligation to pay. Thus despite objections and demands for payment on the part of the management, the defendant continued to park without paying.

The courts were precluded from finding a contract based on conduct (ie based on an implicit declaration of intention), since the defendant had made it clear from the outset that no such intention existed. The BGH finally found the defendant liable for payment on the basis of contractual obligation, finding that a factual contract existed.

Despite the fact that the plaintiff's case was based only on the unlawful enrichment of the defendant, or on a tort committed by her, the court did not consider itself prohibited from considering whether, in this case, the legal relationship of the parties might be regarded as being of a contractual nature, despite the absence of legally effective declarations (§ 151 of the BGB).

¹¹³ BGHZ 21, 319.

The court made reference to its agreement with the views of academics Haupt¹¹⁴ and Tasche¹¹⁵ that a contract may be concluded by factual conduct even when the intention to be legally bound is lacking. This was found relevant in this case, which occurred in the context of “the realities of life in present day mass transport.” In this context, the use of parking areas conspicuously designated as such, and requiring a tariff, brings the user into a contractual legal relationship, irrespective of that person’s verbally expressed intention or attitude.

It has been noted that “this contentious case has had almost no consequences”.¹¹⁶ The controversial decision has, thankfully, not lead to influential decisions in other, related cases.

2.3 Defects of Consent: Mistake

2.3.1 Introduction

Before this topic can be dealt with, it is necessary to define the concept mistake. The considerations introduced in the introduction make it clear that the intention to modify one’s legal relationship to other people may develop through several stages before the inner intention is manifested in an objective way.

During this process the person in question will, as a rule, be in contact and in communication with the outside world, on the one hand in order to gather information relevant for coming to a decision; and also to express intentions and opinions to others. Both of these processes of communication can lead to discrepancies between the expectations on the part of one or more parties and reality, and this, of course, affects the will as well. All these situations may be subsumed under the notion of mistake or defective will.

¹¹⁴ “Über faktische Vertragsverhältnisse” Festschrift der Leipziger juristischen Fakultät für Silber Band II S 1.

¹¹⁵ “Vertragsverhältnis nach nichtigem Vertragsschluß” in Jherb Bd 90, 101 (128).

¹¹⁶ Medicus 132.

The discussion that follows will treat situations involving defects of will or mistake which arise directly from the behaviour of the parties. In contrast to instances of unethical or immoral behaviour and the issues of formality and capacity, which might also lead to a transaction being legally defective as a result of legal rules, the topic of mistake relates to the conduct and expectations of the legal subjects involved in a transaction. This section of this study will accordingly be restricted to a discussion of such situations and their juristic treatment.

It should be noted that the terms mistake and defective will are not mutually exclusive, and indeed they go hand in hand. Ultimately they describe a situation where there is a discrepancy between the real (objective) facts of “life” (*Sachverhalt*) and the perceptions thereof of the parties involved.

Case I:

B wants to buy a golden ring for his fiancée, in order to impress her. He assumes that she enjoys wearing jewellery. He plans to spend € 500.00 at most. At the jewellery shop the shopkeeper shows him a ring, which B takes to be made of gold. B states: “I want to buy this golden ring for € 500.00”. The shopkeeper assents to this declaration.

In the ideal case, the development from the initial motive to the final declaration is free from defects, but mistakes may readily occur at different stages during this development.

2.3.2 The different constellations

The creators of the BGB sought to distinguish three major groups of cases involving mistake in the formation of contract.

In the first instance, the declarer’s motive might not be in accordance with the actual circumstances (variation 1). The factual basis of the declarer’s intention to create or vary a particular legal relationship is defective in such a case. In the given example, it might for instance appear that B’s girlfriend has in fact fallen in love with another or has an intense dislike of jewellery. Both of these circumstances would have had an

impact on B's motives if he had known about them. Another possibility (variation 1a)) is that B's assumption as to the substance of the ring is unfounded. Both aspects relate to the relationship of his will to external circumstances, whether material or subjective.

A second variation might be that the declarer did not in fact intend a particular legal consequence at all. He might, for instance, declare what he wants to declare, but without intending that his declaration should lead to legal consequences. In such a case the declarant wilfully brings about a discrepancy between his declaration and its apparent outward meaning and actual intention. B might, for instance, declare in the presence of his girlfriend that he wants to buy the ring for € 500.00 merely to impress her without any intention of buying the ring at all.

The third and final variation refers to the possibility of mistake during the act of declaration, ie in the expression of the will, so that the subjective intention to engage in a particular juristic act (*Geschäftswille*)¹¹⁷ deviates from the declaration which is made: B. intends to say "I want to buy the ring for € 500.00 " but in fact says "I want to buy the ring for € 5000.00". In such a case the mistake relates to the communication or expression of the will.

The decisive issue in all of these cases is that the mistaken party (whether offeror or offeree) is disappointed with the contract, will deny liability and the opposite party will endeavour to enforce it. The solution of this conflict of interests goes to the heart of the idea of what a contract is.

2.3.2.1 The solution adopted in the BGB

As regards the effect of mistake on contract, the draftsmen of the BGB had the choice between two opposing academic views.

¹¹⁷ See above: 2.2.1.1.3.1.

The *Willenstheorie* on the one hand, holds that the existence of a juristic act is decisively determined with reference to the actual intention of the declarant. A declaration which does not correspond to or reflect the actual intention of the declarant does not attract legal consequences at all, at least not according to its tenor.¹¹⁸ It is quite clear that such an approach favours a party who labours under a mistake when uttering a declaration. In variation 2 above, the shopkeeper would, according to this approach, not be entitled to claim the price. Because of B's mistake, his declaration is ineffective as an offer, and therefore no contract is concluded because of the lack of an essential component – in this case, B's intention.

An opposing view (*Erklärungstheorie*) holds that only the declaration itself ought to be taken into consideration, and that the actual intention of the declarant is irrelevant. In variation 3, therefore, B would be obliged to pay € 5000,00 for the ring instead of € 500,00. According to this view, only the recipient of a declaration is protected and every mistake of a declarant counts against him.

In the case of variation 2, B, of course, would be held to his word, irrespective of his intention.

In the final analysis the drafters of the BGB did not fully adopt any of these academic views. They decided instead to frame the provisions of the code in such a way as to accommodate various categories of mistake. In respect of these categories they carefully considered the competing interests and whether they merited protection or not. The BGB accordingly distinguishes between three categories of mistake and provides three different solutions for them.¹¹⁹

In the first instance, it is clear that certain mistakes regarding declarations of will are treated as legally irrelevant and as not affecting the validity of a declaration of will. In these cases the *Erklärungstheorie* is relevant, because the recipient is protected

¹¹⁸ Brox 166.

¹¹⁹ Münchener Kommentar zum BGB Allgemeiner Teil 874 875 876: Brox 166.

irrespective of what the declarer really believes or means at the time of his declaration.¹²⁰

The *Willenstheorie* would, of course, yield the opposite result, since only that which the declarer intended would be of relevance, rather than that which reached the recipient.¹²¹

In a second category are defects of will which entail the substantive invalidity of the particular declaration of will and thus result in the invalidity of the entire juristic act. The declaration in such cases is null and void by operation of law without any need for further action by the declarant. Here one recognizes the idea of the *Willenstheorie* because only the declarant is protected.¹²² His declaration of will does not bring about the legal consequences which would have ensued if his declaration had been valid.¹²³

In the third class of case, the defect of intention is legally relevant, but the declarant who utters a declaration by mistake has to take certain steps to eliminate the consequences of his conduct. The declarant must challenge his own declaration in order to escape from the obligation established thereby. This category reveals a combination of *Erklärungstheorie* and *Willenstheorie* since the declaration is in principle valid, but voidable by the declarant in certain circumstances.

At first sight it might seem unfair to allow the declarant an election to decide whether he wants to set aside his declaration and by so doing to free himself of the obligation. But as will be shown presently, his right to challenge the declaration is subject to certain requirements and qualified by the need to protect the other party. This is

¹²⁰ Brox 166 167.

¹²¹ Palandt 82.

¹²² Brox 167 168.

¹²³ Brox 167.

achieved by the rule that the declarer is liable to compensate the other party for his reliance loss (*Vertrauensschaden*).¹²⁴

2.3.3 Defects of consent and their treatment in the BGB

2.3.3.1 Defects of motive

As already has been indicated, a mistake of the first category does not influence the legal effect of the declaration at all. For example, if in variation 1, B contends that he does not have to pay the price for the ring because he made his declaration on the mistaken assumption that his girlfriend loved him, he will not avoid liability. The BGB in general does not afford protection against the frustration of personal motives only. Hence B also cannot, in response to the shopkeeper's claim, contend that he was unaware of the fact that his girlfriend disliked jewellery.

Such mistakes, which occur during the formation of the intention to undertake a juristic act (*Motivirrtümer*) are legally irrelevant.¹²⁵

2.3.3.2 Defects which result in nullity of the juristic act

The second group, which comprises declarations of will that are void, is comprehensively regulated in §§ 116-118 BGB.

Cases of so-called mental reservation (*geheimer Vorbehalt*) occur when a declarant does not seriously intend the declaration to be legally effective, and implies this by the tenor of the putative declaration.¹²⁶ According to paragraph 116 BGB a declaration of will is not invalid merely because the declarant entertains hidden reservations regarding its efficacy. The declaration is ineffective only when it is made

¹²⁴ Brox 167 168; Münchener Kommentar zum BGB Allgemeiner Teil, 891; Medicus 93 107.

¹²⁵ Brox 166 167; Larenz 370; Medicus 85; Wieser "Der Kalkulationsirrtum" JA 1986 577 578.

¹²⁶ § 116 BGB.

to a third party who knows it to be spurious. In addition, the declarer must assume that the recipient is aware of his secret reservation.¹²⁷

Paragraph 116 BGB stresses the relevance of the recipient's actual knowledge or ignorance of the declarer's reservation.¹²⁸ A recipient who is aware of the declarer's reservation does not deserve legal protection, and in such a case a declaration does not entail legal consequences for the declarant.

Variation 3 can be used as an example. If the shopkeeper was aware that B merely intended to impress his girlfriend, it would be unfair to claim the price from him. To do so would, amongst other considerations, flout the principle of § 242 BGB.¹²⁹ One should note, however, that this will remain the case even where the declarant wrongly assumed that the shopkeeper was aware of his intention.

The simulated or sham transaction is a special case, in which both the declarant and the recipient intend that the declaration shall not to have legal operation according to its tenor.¹³⁰ As in the previous example, there is in such a case no need to protect either of the parties involved.¹³¹ The simulated transaction is a false front obscuring the actually intended legal act. For instance, the sale of a house is agreed for a price of € 2 000 000,00, but the written and notarised contract indicates a price of € 1 000 000,00 in order to save taxes. The effect of § 117 (1) BGB is to render the false transaction inoperative.¹³² In this example there is of course a real transaction, ie the contract for € 2 000 000,00. Because of § 117 (2) BGB, which subjects the actually

¹²⁷ Brox 170. If the declarer presumes that the recipient is aware of his mental reservation, § 118 BGB is applicable.

¹²⁸ Brox 170; Jauernig-Schlechtriem-Stürner 55 56; Palandt Bürgerliches Gesetzbuch 80.

¹²⁹ See above: 2.2.2.5.

¹³⁰ § 117 BGB.

¹³¹ Jauernig-Schlechtriem-Stürner 56; Brox 172 173; Münchener Kommentar zum BGB Allgemeiner Teil, 897; Palandt Bürgerliches Gesetzbuch 80 81.

¹³² And not by § 117 (2) BGB as stated in Foster's German legal System & Laws 243.

intended juristic act to the rules applicable to the sham transaction, the former will be void for lack of compliance with the prescribed formalities.¹³³

A declaration which is made without a serious intention to be bound is void, according to § 118 BGB.¹³⁴ For example if B tells his friend: “ Yes of course, I want to buy your old rusty bicycle for € 4000.00”, his declaration does not constitute a juristic act. The only requirement for applying § 118 BGB is that the declarer should have been joking and that the circumstances be such that he is entitled to expect that the lack of sincerity will be obvious to the other party. It does not matter whether the recipient is in actual fact aware of the lack of sincerity or not.¹³⁵ Whether B’s friend thought that he was really keen on buying a rusty bicycle, is irrelevant according to § 118 BGB.

At first sight this might seem unfair. It is conceivable that the recipient might, without any negligence on his part, have relied on the declaration. In such a case, however, the BGB provides a special rule in § 122 BGB, which will be discussed hereafter.

Common to all the instances of the second group of defects of will is that the declarant does not have to take further steps to avoid his declaration. This is because there is no opposing interest of sufficient weight to require that legal recognition be given to declarations of this kind.

2.3.3.3 Defects which lead to a right of rescission

The juristic mechanism of rescission permits a declarant to rescind his own declaration of will provide certain requirements are met. A party is thereby permitted to withdraw from a contract, even as a result of a unilateral mistake.¹³⁶

¹³³ Brox 173.

¹³⁴ § 118 BGB.

¹³⁵ Jauernig-Schlechtriem-Stürmer 57: Münchener Kommentar zum BGB Allgemeiner Teil, 905.

¹³⁶ Münchener Kommentar zum BGB Allgemeiner Teil 908 909 910: Brox 174 175.

With the exception of contracts of extended duration, such as employment or leasing contracts, the transaction is, as a result of rescission, regarded as void *ab initio* (*ex tunc*).¹³⁷ In consequence of the nature of contract as a multi-lateral juristic act, the contract as a whole becomes ineffective upon the avoidance of only one necessary part of it.

In other words, if one party to a contract successfully challenges its declaration of will, relating to either the offer or the acceptance, the transaction as a whole is avoided because of the lack of an essential component.

The second important point is that the rescission only extends to the obligatory relationship.

On account of the principle of abstraction, which distinguishes sharply between the contract as the obligatory act and the act of delivery envisaged by it, the return of goods delivered or transferred under the contract is regulated by the law of unjustified enrichment.¹³⁸

2.3.3.3.1 Rescission under paragraphs 119 and 120 BGB

For reasons of legal certainty and with a view to the maintenance of good faith in legal relationships, rescission according to § 119 BGB and § 120 BGB as well as under § 123 BGB is restricted to a limited number of grounds.¹³⁹ By means of these provisions, the creators of the BGB sought to balance the interests of the contracting party who has relied on a declaration and the interests of the declarant who might suffer disproportionately from a mistake in respect thereof.¹⁴⁰

Paragraph 119 BGB reads as follows:

¹³⁷ § 142 BGB; Brox 188-189; Medicus 92; Münchener Kommentar zum Bürgerlichen Gesetzbuch Allgemeiner Teil, 1211.

¹³⁸ § 812 BGB; Münchener Kommentar zum BGB Allgemeiner Teil 1210; Jauernig-Schlechtriem-Stürner 1031.

¹³⁹ Larenz, 476-478; Westermann "Einheit und Vielfalt in der Irrtumslehre" JUS 169-170.

¹⁴⁰ Münchener Kommentar zum BGB Allgemeiner Teil 908-910; Brox 176; Singer "Geltungsbereich und Rechtsfolgen der fehlerhaften Willenserklärungen" JZ 1989, 1030-1032.

§ 119 BGB (Rescission due to mistake)

- 1) A person who, when making a declaration of will, is in error as to its content, or did not intend to make a declaration of such content at all, may rescind the declaration if it may be assumed that he would not have made it with knowledge of the facts and with reasonable appreciation of the situation.
- 2) An error as to the content of the declaration is regarded in the same way as an error as to those characteristics of a person or thing which are regarded in business as essential.

For purposes of rescission, the BGB differentiates between mistakes as to the meaning or content of the declaration (*Inhaltsirrtum*) and mistakes as to the actual declaration (*Erklärungsirrtum*), a distinction which is often difficult to draw in practice.

2.3.3.3.1.1 Mistake as to content

Such mistakes occur when the declarant has one thing in mind and thinks that he has accurately expressed himself, but is understood in a different sense by the recipient. In other words, this relates to ignorance on the part of the declarant regarding the actual content of the declaration.

If a shopkeeper, for example, places a price-tag for € 100.00 on a coffee machine (which amounts to an *invitatio ad offerendum* under German law), but the price the shopkeeper actually had in mind was € 200.00 and a customer offers to buy the coffee machine according to the price-tag (without mentioning the price), the shopkeeper who agrees to this offer assuming that the price-tag says € 200.00 is mistaken about the meaning of his acceptance. He is ignorant of the fact that the price tag is for € 100.00 and not € 200.00, and this mistake in fact causes his declaration. He assumes that he is assenting to a offer for € 200.00.

Errors (or mistakes) of content include those relating to identity, calculation and also mistakes of law.¹⁴¹ Calculation mistakes are those where the error is in the calculations which precede the declaration of will. Although the fault lies in the

¹⁴¹ This at least was the view of the Reichsgericht - see Jauernig-Schlechtriem-Stürner 59.

formation of the will, the courts view such problems subjectively from the receiver's point of view. Should the recipient be expected to have recognised the mistake, and should the rescission involve hardship on the part of the declarer, the courts will allow the contract to be rescinded.¹⁴² This jurisdiction is an exception to the principle that mistake in the formation of the will does not constitute a ground for rescission and is derived from the dictates of good faith.¹⁴³

Mistakes as to law, eg as regards the legality or legal consequences of a transaction, do not extend to mere ignorance as to the true state of the law, which would not give rise to a ground for rescission according to § 119 (1) BGB.

With regard to mistakes as to law issuing from the declarant, the German law distinguishes between irrelevant and relevant mistakes, the latter rendering the declaration of will void:

If the legal consequence of which the declarant is unaware is not related to the declaration of will *per se* there is no discrepancy between will and the declaration of will. For example: where V sells his car to P, there being no provision in the contract regarding the liability of the vendor for material defects (this following from statute), it will be irrelevant whether V considers himself not to be liable for material defects as a result of provisions in that regard not being made in the contract.¹⁴⁴

On the other hand, when the legal consequence in question concerns the explicit content of the declaration of will, there is a discrepancy between the declarant's will and his declaration. Should the contract for the sale of a vehicle, described above, contain, for example, a provision limiting the liability of the vendor with regard to legal mistake, the vendor believing this to free him from liability for material defects,

¹⁴² RGZ 64, 266 ff; Medicus, 88; Brox 183.

¹⁴³ Giesen "Zur Relevanz des Kalkulationsirrtums" JR 1971, 403; Wieser, "Der Kalkulationsirrtum" NJW 1972, 708.

¹⁴⁴ Palandt 87.

then he will be held to be in error regarding the content of his declaration, which will allow him to rescind his declaration.¹⁴⁵

Mistakes of identity concern a declaration regarding a person or thing other than the one intended. But one has to bear in mind that if both parties attach the same erroneous meaning to an expression, term or description used by them, the contract will stand on the basis of the intended rather than the expressed meaning. The *Haakjöringsköd*-case¹⁴⁶ is a typical application of the rule *falsa demonstratio non nocet*.

2.3.3.3.1.2 Mistake in the declaration of the will

Paragraph 119 (1) BGB permits the rescission of a declaration of will where a mistake in the declaration brings about a result different from that intended. Cases of misspelled words provide typical examples, and Variation 3¹⁴⁷ would be a typical instance.

Because cases of both *Erklärungsirrtum* and *Inhaltsirrtum* fall under § 119 (1) BGB, it is unnecessary to determine the exact character of a mistake in a particular case since the results will always be identical.¹⁴⁸

2.3.3.3.1.3 Paragraph 119 (2) BGB

The place of § 119 (2) in the systematic scheme of the BGB and its precise meaning is still a topic of academic discussion.¹⁴⁹ The prevailing view is that it constitutes an exception to the general principle that mistakes in motive are legally irrelevant.¹⁵⁰

Mistake as to an essential characteristic under § 119 (2) BGB concerns the properties or qualities, i.e. the essential characteristics of an object or a person, the subject-matter

¹⁴⁵ Palandt 87 88.

¹⁴⁶ See above: 2.2.2.4.

¹⁴⁷ See above: 2.3.2.

¹⁴⁸ Brox 178.

¹⁴⁹ Münchener Kommentar zum BGB Allgemeiner Teil 945-957; Palandt Bürgerliches Gesetzbuch 84 85.

¹⁵⁰ Jauernig-Schlechtriem-Stürmer 59; Medicus 90.

of or party to an agreement. The notion of a characteristic is extremely wide, but it has to amount to an implied condition of the contract or constitute the fundamental basis of the agreement. A characteristic is essential if it is of objective importance to the contract, and it must relate to either the object of a purchase or to a person involved in it.¹⁵¹

In addition to the natural composition of the material subject-matter of the contract, essential characteristics include the factual or legal standing of the subject-matter of or party to the agreement, where this is relevant to the agreement, in that it affects the valuation or usefulness of the subject-matter.¹⁵² Such relationships must be essential to, characterise or identify the subject-matter or person.¹⁵³ In relation to the material subject-matter, § 119 (2) BGB makes it clear that not all characteristics are essential.¹⁵⁴ Where the contract itself does not provide points of reference in this regard, the circumstances of each transaction must be examined.¹⁵⁵

With reference to this definition, the courts have concluded that the essential characteristics of the subject-matter of or party to an agreement include only those factual and legal qualities that specifically characterise it, thereby excluding attributes which only indirectly effect its value.¹⁵⁶

It remains the case that in general mistakes regarding external factors, eg mistakes of motive, are irrelevant and cannot lead to rescission.¹⁵⁷ Hence the fact that the non-occurrence of a wedding for which one has bought a present would not provide sufficient ground for rescinding the purchase.¹⁵⁸ Neither will mistakes merely as to

¹⁵¹ Brox 180.

¹⁵² BGH 34, 32, 41

¹⁵³ RG 149, 238; BGH 16, 54 57, BGH 70, 47

¹⁵⁴ BGH 88, 246

¹⁵⁵ Palandt 89

¹⁵⁶ BGHZ 16, 54, 57; Brox, 181; Jauernig-Schlechtriem-Stürner 59.

¹⁵⁷ See above: 2.3.3.1.

¹⁵⁸ Brox 166, where a similar example is provided.

the value or the price of a thing lead to rescission¹⁵⁹ unless they relate to an essential quality of the thing.¹⁶⁰

It should be noted that the criteria of *accidentalium negotii* as opposed to *essentialium negotii*, described above in relation to open lack of agreement,¹⁶¹ have a different significance in the context of the price of a thing. Paragraph 154 BGB deals with cases in which the parties have not reached agreement with regard to the price to be paid. Paragraph 119 (2) BGB, on the other hand, deals with the question of whether a particular party has erred with regard to a particular criterion – often the particular error of entertaining a false expectation regarding the price, for example. This constellation is to be separated from the applicability of § 154 BGB.

Authenticity, for example of a painting, is regarded as an essential quality, but never the mere price of the object. When a person buys a painting under the mistaken belief that it is worth € 500 000.00, but it has a market value of only € 50 000.00, his mistake is not of the least significance. He cannot claim to have made a legally relevant mistake unless the price determination is the result of a mistaken perception regarding factual or legal qualities of the particular painting, eg that it is authentic or that it is in good condition. The following are typical examples of essential qualities: the size or position of a plot of land and the possibility of building structures on it;¹⁶² the resistance to light of a particular material;¹⁶³ the age of a second-hand motor vehicle¹⁶⁴ or the lack of a criminal record of a prospective employee.¹⁶⁵

Mistake as to a characteristic according to § 119 (2) BGB is differentiated from mistake as covered by § 119 (1) BGB, in that will and declaration correspond in the former case. The declarer makes a mistake, not as to the subject-matter or the content

¹⁵⁹ BGHZ 16, 54.

¹⁶⁰ BGHZ 6, 371.

¹⁶¹ See above: 2.2.2.3.1.

¹⁶² RGZ 61, 86.

¹⁶³ Jaernig-Schlechtriem-Stürner 59.

¹⁶⁴ BGHZ 1978, 221.

¹⁶⁵ But only under limited preconditions - see Münchener Kommentar zum BGB Allgemeiner Teil 985 986.

of the declaration, but rather as to the characteristics of the subject-matter, and therefore as to a material fact that lies outside of the declaration.¹⁶⁶ Thus mistake under § 119 (2) BGB is not to be understood as a particular kind of declaration mistake, but rather as a mistake in motive which, as an exception to the general rule, is legally relevant.

It is worth noting that mistakes in calculation are not covered by § 119 (2) BGB, since a mistake in calculation is not a mistake as to characteristics – but rather at most a signifier of the fact that the method of calculation was faulty. Again, mistake as to characteristic must be essential: and will only be considered essential if, by reason of explicit or implied agreement, it is of fundamental importance to the transaction.

Whether a particular characteristic is essential and a mistake pertaining to it a legally relevant one, depends in the final analysis on the circumstances of each case and the type of contract concluded by the parties.¹⁶⁷ A rigidly dogmatic approach does not seem appropriate.¹⁶⁸ The example of the previous convictions of an employee illustrates the fact that results might differ depending on whether the matter concerns a refuse collector or an accountant.

In instance I (variation 1a),¹⁶⁹ therefore, there would be a ground for rescission according to § 119 (2) BGB if the ring was not made of gold, since a contract to buy such a ring implies that it should be golden, even if the ring turns out have been made from a more expensive metal such platinum.

Paragraph 119 (2) BGB does deviate, therefore, from the principle that mistakes in the formation of the will to engage in a juristic act are of no legal consequence,¹⁷⁰ but finds application only under limited preconditions.

¹⁶⁶ Stgt OLGz 83, 304.

¹⁶⁷ Münchener Kommentar zum BGB Allgemeiner Teil 957.

¹⁶⁸ Jauernig-Schlechtriem-Stürner 59; Palandt Bürgerliches Gesetzbuch 84.

¹⁶⁹ See above: 2.3.1.

¹⁷⁰ Medicus 85 86; Jauernig-Schlechtriem-Stürner 59.

Paragraph 120 BGB covers mistakes in communication, which may occur during the transmission of the declaration, and relates to things incorrectly said or written. A typical case is where an assistant, or employee or other third party mistakenly hears or writes something which is thereupon conveyed to the other party, as if it were a correct reflection of the will of the declarant.

2.3.3.3.2 The declaration of rescission

Rescission requires an *Anfechtungserklärung*. Under § 143 BGB, the declaration of rescission must indicate the intention to do so clearly to the other party. The formal composition of this document is not significant, the only demand being that it should contain a clear and explicit declaration of the will to rescind.¹⁷¹ Paragraph 142 BGB makes it clear that as a result of rescission, the contract is avoided.

2.3.3.3.2.1 The declaration of rescission in cases of paragraphs 119 and 120 BGB

With a view to legal certainty, the declaration of rescission is subjected to time limitations. These are laid down by § 121 BGB and § 124 BGB, the latter provision being inapplicable to cases governed by § 119 BGB and § 120 BGB.

Rescission brings about legal consequences for the opposing party and is therefore itself a declaration of will according to § 130 BGB.¹⁷² In order to prevent a reliance by the affected party on the initial declaration, it is essential that he be informed about the changed legal position.¹⁷³ Rescission therefore becomes effective only upon the fulfilment of the requirements of § 130 BGB. A party who wants to rescind is obliged to do so as soon as he becomes aware of the mistake,¹⁷⁴ but the particular circumstances of each situation will be taken into account, it being recognised that a party is entitled to a period for reflection and legal advice.¹⁷⁵

¹⁷¹ BGH JR 1984, 322 323.

¹⁷² Münchener Kommentar zum BGB Allgemeiner Teil 1213.

¹⁷³ Brox, 187: Münchener Kommentar zum BGB Allgemeiner Teil 1213 1214.

¹⁷⁴ § 121 BGB: Jauernig-Schlechtriem-Stürmer 61: Münchener Kommentar zum BGB Allgemeiner Teil 970 971.

¹⁷⁵ Brox 187: Münchener Kommentar zum BGB Allgemeiner Teil 971 972.

Paragraph 121 (1) sentence 2 BGB lays down a special rule. A delay in the receipt of the declaration of rescission will negatively affect the declarer if the delay is imputable to fault on his part.¹⁷⁶ Hence the risk of delay is basically on the side of the opposing party. Paragraph 121 BGB, however, applies only in cases governed by §§ 119, 120 BGB.

2.3.3.3.3 Deception and threats

Apart from mistake, German law provides an additional basis for challenging a declaration of will in circumstances going beyond those covered by §§ 119, 120 BGB. This concerns the special case where the declarer is manipulated into making a declaration of will, so that the mistake is in the final analysis caused by someone else and is not really the responsibility of the declarer at all. In view of their special circumstances, such situations receive a differentiated treatment.

In the case of deceit, the situation is characterised as a *Motivirrtum* which is legally relevant, not merely because of the potential prejudice to the victim, but also on account of the BGB's concern for the protection of the freedom of the will.¹⁷⁷ In the case of threats, on the other hand, the situation should more properly be characterised as a manipulation of the will of the declarer, and is thus also protected under the principle of the freedom of will.

2.3.3.3.3.1 Deceit

Deceit entails the creation of a false impression or mistake in the mind of a declarant. Deceit may take an active form, as where the victim is supplied with false facts, but it may also occur by omission, eg by way of a suppression of the truth, where a party is legally obliged to inform the other of certain facts.¹⁷⁸

¹⁷⁶ Münchener Kommentar zum BGB Allgemeiner Teil 972.

¹⁷⁷ Jauernig-Schlechtriem-Stürner 62; Brox 194; Münchener Kommentar zum BGB Allgemeiner Teil 979.

¹⁷⁸ Brox 194; Münchener Kommentar zum BGB Allgemeiner Teil 984 985; Jauernig-Schlechtriem-Stürner 63.

The employee of a car sales firm, for example, is duty bound to inform a would-be purchaser about the accident record of a car. This duty is independent of any enquiry in this regard by the purchaser.¹⁷⁹

In instance I¹⁸⁰ the shopkeeper would be obliged to inform B that the ring is not made of gold if it that is not the case. Because B indicated that he wanted to buy a golden ring, silence on part of the shopkeeper would entail a suppression of the truth about the real substance of the ring. The principle of good faith of § 242 BGB is again operative and establishes a duty to inform the opposing party.

The extent of a duty to inform, it must be noted, depends very much on the circumstances of each particular case.¹⁸¹ There is no general duty to disclose facts relevant to the decision of the other party. Non-disclosure of facts will only be considered fraudulent insofar as the facts in question fall into the category of facts which there is a specific duty to disclose.¹⁸² Facts which one is duty-bound to disclose are based on § 242 BGB,¹⁸³ and fall into the following categories:

1. Questions posed by the other party, which must be answered fully and correctly.¹⁸⁴
2. Particularly important circumstances: circumstances which would obviously be of decisive importance to the other party must be revealed.¹⁸⁵ This applies above all to circumstances which might hinder the goal of the contract or endanger it significantly. Thus, a vendor may not fail to reveal an essential defect in the sale object.¹⁸⁶

¹⁷⁹ BGH NJW 1967, 1222-1224; OLG Bremen DAR 1980, 373; OLG Frankfurt VersR 1981, 388-390.

¹⁸⁰ See above: 2.3.1.

¹⁸¹ BGH NJW 1967, 1222-1224; OLG Bremen DAR 1980,373; OLG Frankfurt VersR 1981,388-390.

¹⁸² RG 77, 314.

¹⁸³ Palandt 92.

¹⁸⁴ BGH 74, 383; BGH NJW 67, 1222.

¹⁸⁵ Palandt, 92.

¹⁸⁶ BGH NJW 90, 975.

3. Certain relationships of trust create a duty to disclose. For example, in the case of familial or close personal relationships¹⁸⁷ or close business relationships of trust developed over many years.¹⁸⁸ The basis for the duty to disclose can lie in the position of the party in a business transaction (his professional position), for example in the case of a banker¹⁸⁹ or an investment fund manager.¹⁹⁰ The duty to disclose exists on the part of these professional classes insofar as the other party is inexperienced in business.¹⁹¹

2.3.3.3.2 Duress

Under § 123 BGB, duress is defined as a threat of some harm directed at a party, that threat being within the power of the person making it. The threat has to be unlawful, and the criteria of unlawfulness require thorough and careful consideration.¹⁹² Because a threat of violence entails a resort to illegal means to obtain a declaration from the victim, it always constitutes duress.

Not every threat is unlawful, however.¹⁹³ If, for instance, after weeks of negotiations concerning a contract, one party breaks off the process and the other party insists on the conclusion of the contract and extracts the necessary declaration of will by a threat of legal action based on *culpa in contrahendo*, this will not be unlawful. A legal subject is, after all, entitled to assert his rights by court action.

The question of whether a threat of criminal prosecution constitutes a threat in the sense described in § 123 BGB raises the issue of proportionality, in this case of the threat to its aim. The *Reichsgericht* has decided that the threat to prosecute a spouse for bigamy¹⁹⁴ arising during negotiations between spouses as a result of the end of their marriage does not grant a right of rescission to the wronged (bigamous) party.

¹⁸⁷ BGH NJW 92, 300.

¹⁸⁸ Palandt 93.

¹⁸⁹ RG 111, 233.

¹⁹⁰ BGH 80, 80 84.

¹⁹¹ BGH 47, 207 211.

¹⁹² Brox 201: Münchener Kommentar zum BGB Allgemeiner Teil 999; see BGH NJW 1966, 2399.

¹⁹³ Münchener Kommentar zum BGB Allgemeiner Teil 1000.

¹⁹⁴ Bigamy is no longer punishable as an offence.

insofar as the performance demanded by the person making the threat fulfils certain conditions.¹⁹⁵

The *Bundesarbeitsgericht* has decided that the drawing up of a redundancy contract between parties (employee and employer), effected by the threat of criminal prosecution (by the employer who wanted to get rid of his employee), will be held valid, if a reasonable employer, with full knowledge of the circumstances would have considered a criminal prosecution as against the employee.¹⁹⁶

Thus, the threat of criminal prosecution *per se* does not fall within the compass of § 123 BGB.

2.3.3.3.3 Causality

The conduct of the person who resorts to threats or deceit in order to obtain consent to contract is relevant only if it is the cause of the declaration made by the victim. If a declarant does not take the threat seriously, or sees through the deceit, he is not entitled to challenge his declaration subsequently. In such a case, his mind was not manipulated by the other at all, and his declaration not defective in a legal sense.¹⁹⁷

2.3.3.3.4 Intentional acts

The person who resorts to duress or deceit must have acted intentionally. The perpetrator should intend the victim to make a declaration which he would not have made if not deceived or threatened.¹⁹⁸ Nevertheless, because the aim of § 123 BGB is the protection of the freedom of will, the decisive factor will not be the intention of the person making the threat, but rather the reception of that threat by (and its effect upon) the threatened party.¹⁹⁹

¹⁹⁵ RG 166, 44.

¹⁹⁶ BAG DB 85, NZA 87, 91.

¹⁹⁷ Palandt Bürgerliches Gesetzbuch 90.

¹⁹⁸ Brox 202 203.

¹⁹⁹ Münchener Kommentar zum BGB Allgemeiner Teil 1001 1002: Jauernig-Schlechtriem-Stürner 65; BGH NJW 82, 2302; BGH NJW 1982, 2301 2302.

2.3.3.3.5 The position of third parties

Paragraph 123 (2) BGB also provides a solution for cases in which duress emanates from third parties. If the person with whom the victim enters into an agreement is not the wrongdoer, it must be established whether that person knew or ought to have been aware of the misconduct of the third party. If so, the declarer is entitled to rescind his declaration as against him.²⁰⁰

This article also regulates the case where there is no opposing party, but one who acquires a right directly as a result of the manipulated declaration. If a person, other than the one to whom the declaration was required to be made, obtains a right directly as a result of the declaration, the declaration may be rescinded as against him. This person, however, must have actually been aware or should reasonably have been aware of the manipulating facts.²⁰¹

In the case of deceit, in contrast to the grounds for rescission falling under § 119 BGB, the party challenging the declaration and the person making the spurious declaration of will need not be identical. The declaration may also have been induced, in the manner defined under § 123 BGB, by a third party. According to § 123 (2) S.1 BGB, the other party to the agreement must allow for the deceit of a third party, if he was aware of such deceit.

An agent will not be considered a third party under § 123 BGB. Due to the fact that, under § 164 BGB, an agent is held to represent the will of the principal, his deception will be held equivalent to the deception of a party to the contract.

Thus, if a declaration is elicited by means of the deception of an agent, it will be considered voidable.

There is some controversy with regard to the position of third parties in this regard.

²⁰⁰ Brox 197.

²⁰¹ Münchener Kommentar zum BGB Allgemeiner Teil 991 992: Jauernig-Schlechtriem-Stürner 64.

2.3.3.3.6 The declaration of rescission in cases covered by § 123 BGB

A declaration of rescission in respect of cases within the ambit of § 123 BGB is, on account of the particular circumstances, regulated differently from those in respect of cases covered by § 119 BGB and § 120 BGB. The application of § 142 BGB, regarding contracts *ex tunc*, is also applicable to cases falling under § 123 BGB.

In cases of threats and deception, the period of rescission is longer than in the case of § 121 BGB.²⁰² The reason for this is that under § 124 BGB the declarer is in need of special protection whereas the opposing party, who has extracted the declaration by improper conduct, is not.²⁰³

2.3.3.4 Legal consequences of rescission - §§ 119, 120 and § 123 BGB

A declaration of will which has been rescinded is void *ab initio*.²⁰⁴ That means that the entire contract is void, and hence unenforceable and regarded as never having existed at all. This nullity is substantive and a contract can only be established by being constituted anew.²⁰⁵

Where a contract is vitiated only in part, however, the unaffected part can be enforced to the extent that it is severable from the affected part.²⁰⁶ This might be the case where a buyer who buys three paintings from a seller subsequently rescinds his declaration under § 119 (2) BGB in respect of one painting, which is a forgery. Depending on whether the contract is divisible, that is, on whether it would have been entered into even if the affected part had been omitted, the contract for the purchase of the two other paintings can still be enforced.

In cases of rescission it is clear that the party in opposition to rescission (in this case the vendor), relied on the affected declaration, and assumed the validity of the

²⁰² § 124 BGB.

²⁰³ Brox 199; Münchener Kommentar zum BGB Allgemeiner Teil 1004-1005; Palandt Bürgerliches Gesetzbuch 91.

²⁰⁴ See above: 2.3.3.3.

²⁰⁵ Münchener Kommentar zum BGB Allgemeiner Teil 1207; Brox 199; Palandt Bürgerliches Gesetzbuch 128.

²⁰⁶ § 139 BGB.

contract. In order to prevent injustice to this party, the BGB provides a special regime that has already been referred to in connection with § 118 BGB.²⁰⁷

Under § 122 BGB, the declarant is, in cases where a declaration of will is void under § 118 BGB, or rescinded under §§ 119, 120 BGB, required to compensate the other party for the damage sustained in consequence of relying on the validity of the declaration. This liability does not, however, extend beyond the interest of the other party in the validity of the declaration.

The claim to compensation under § 122 BGB is therefore restricted to the injured party's reliance loss, ie the amount that will place him in the position he would have been in had the contract not been concluded.²⁰⁸ Losses reflecting his expectation interest, ie with reference to the position that would have obtained had the contract been completed, are not recoverable.²⁰⁹

A second limitation stipulates that compensation for reliance loss is restricted with reference to the extent of the potential expectation interest, in two ways:

Firstly, the compensation is limited to loss suffered due to reliance (§ 122 (1) BGB), as opposed to that suffered due to non-fulfillment of the contract. Reliance loss refers to the loss suffered because the applicant relied on the validity of the contract. Damages should put him in the position in which he would have been, had negotiations never been entered into. This is not to be confused with damages suffered due to non-completion, in which case damages should return the applicant to the position in which he would have been had the contract been completed.

The second limitation refers to the limitation of damages recoverable to the extent of the actual loss suffered due to reliance. Let us take for example a case where a party books a holiday home for one month for € 3000,00. Intending to book the house for

²⁰⁷ See above: 2.3.3.2.

²⁰⁸ Jauernig-Schlechtriem-Stürmer 61: Münchener Kommentar zum BGB Allgemeiner Teil 976.

²⁰⁹ Brox 191: Münchener Kommentar zum BGB Allgemeiner Teil 976.

the month of July, he accidentally writes 'June'. As soon as he realises his mistake, he rescinds his declaration. The lessor may successfully demand damages to cover his administrative costs of € 6,00 and payment of € 2800.00 the loss of which he has suffered as a result of turning away other potential customers, who would have rented for € 2800.00.

The damages recoverable under § 122 BGB are limited to the extent of the loss suffered due to non-fulfillment. In other words, should the lessor have turned down an offer of € 3500.00 in reliance on the rescinded contract, the damages recoverable by him in reliance will nonetheless be limited to the amount of the rescinded contract.

The underlying reason for this limitation is that the injured party ought not to be put in a better position than he would otherwise have been because of the mistake of the rescinding party. Without this limitation, the right of rescission would become entirely meaningless, since rescission could result in the mistaken party being worse off than he would have been were he to perform the unwanted contract.²¹⁰

Paragraph 122 (2) BGB states that knowledge of the grounds for rescission or negligent ignorance thereof on the part of the injured party excludes the duty to compensate on the part of the rescinding party. To hold otherwise would be incompatible with the principle of good faith.²¹¹

It should be self evident that, in respect of § 123 BGB, the perpetrator has no right to claim compensation from the victim. To require the latter to pay compensation to the perpetrator or to a third party who knew or ought to have been aware of the unlawful act would be absurd.²¹²

²¹⁰ Brox 192.

²¹¹ Münchener Kommentar zum BGB Allgemeiner Teil 976 977; Jauernig-Schlechtriem-Stürner 62.

²¹² Münchener Kommentar zum BGB Allgemeiner Teil 979.

Moreover, the systematic position of § 122 BGB establishes that it does not apply to cases within the scope of § 123 BGB.²¹³

2.4 The *Abstraktionsprinzip*

German law regards the conclusion of and performance of a contract as two distinct legal acts which, although related in so far as performance constitutes the fulfilment of the duty established by the contract, are notionally distinct. This differentiation finds expression in the principle of abstraction (*Abstraktionsprinzip*),²¹⁴ which entails that the act of performance is abstracted in a legal sense from the obligation which gave rise to it.²¹⁵

A contract of sale between a seller and buyer creates an obligation for the former to deliver the goods and for the latter to pay the price.²¹⁶

The contract of sale by itself, however, does not serve to transfer ownership of the goods. To this end, a further juristic act, delivery, in the nature of a disposition (*Verfügung* or *Verfügungsgeschäft*), is required. This in itself is constituted by an offer and acceptance and, in the ordinary case, also by the transfer of physical possession of the goods (§ 929 BGB). The acquisition of something by a purchase entails, therefore, the conclusion of two agreements between the parties and also the transfer of possession of the goods. The agreement that the property itself should be transferred to the purchaser usually concludes with the transfer of physical possession, and is known as *dinglicher Vertrag*, because the transfer of property is regulated by the law of things.²¹⁷

²¹³ Jauernig-Schlechtriem-Stürner 61: Münchener Kommentar zum BGB Allgemeiner Teil 974.

²¹⁴ Brox 62 63; Jauernig-Schlechtriem-Stürner 1031.

²¹⁵ Brox 62.

²¹⁶ § 433 BGB.

²¹⁷ See above: 2.1.4.; Box 57.

There are, however, examples of *Verfügungsgeschäfte* or *Verfügungsverträge* which are regulated by the law of obligations, the most important of which is the cession of a claim (*Forderungsabtretung*).²¹⁸

As a result of this fundamental feature of German law, the rescission of, for example, a contract of sale on the grounds of mistake will not necessarily entail the avoidance of the transfer of possession of the goods.

The seller cannot therefore recover the goods by means of proprietary remedies, but must resort to a personal claim. The act of transfer of possession itself might, however, be affected by a mistake that could result in its nullity or voidability without the contractual cause being called into question at all.

The principle of abstraction is of particular importance for the protection of third parties who acquire goods in good faith. Because the efficacy of an act of transfer is evaluated independently of the validity of the antecedent contract, a buyer may well become owner of an article delivered to him even though the contract of sale is vitiated by a defect of consent. This implies that a third party who acquires from such a purchaser will not be affected by defects of consent affecting the contractual cause for delivery.

The principle of abstraction is therefore of considerable importance for the resolution of problems occasioned by mistake in contract.

²¹⁸ Palandt Bürgerliches Gesetzbuch 423 424.

3 South Africa

3.1 Introduction

South Africa owes its existence to the first colonization by the Dutch, whose state was a feudal dependent of the German Empire by the end of the 15th century. By the end of the 15th century the reception of Roman law into Germany, and therefore also the Netherlands, was an accomplished fact, and the so-called Roman-Dutch law developed as a direct consequence of the fusion between Roman law and the Germanic law of Holland.²¹⁹ Roman-Dutch law was formally introduced into the Cape by Jan van Riebeeck, who established a refreshment station for the Dutch in 1652. It eventually spread across the borders of the Cape into the Orange Free State and the erstwhile Transvaal and Natal.²²⁰

Roman-Dutch law, however, is not the exclusive foundation of the present South African legal system. During an aggressive colonisation programme in the late 18th and the early 19th centuries, Britain occupied the Cape, initially in 1795 and then again in 1806. As a result the English Common Law attained a presence in South Africa. Despite the presence of the British, however, Roman-Dutch law initially remained the common law of the inhabitants of the Cape.²²¹

Only after 1814, when the Cape was finally handed over to Britain, did English legal law take hold. Government by the English over a populace that included a significant English element meant that English ideas, and especially English principles of law and government, gained ascendancy and found their way into the law.²²² In the field of obligations and contract, however, the law retained its essentially Roman character.

²¹⁹ Joubert *General Principles* 1 2; Thomas/Van der Merwe/ Stoop 46-64.

²²⁰ Joubert, 2 3; Fouché *Legal Principles of Contracts and Negotiable Instruments* 7.

²²¹ Zimmermann & Visser *Southern Cross* 46-49; Fouché 8.

²²² Examples for this are the English criminal procedure introduced in 1826, followed by English law of evidence in 1830. See Fagan "Roman-Dutch Law in its South African Historical Context" *Southern Cross* 51.

although some notions were received from English law. The South African law of contract might be described as a comprising mixture of various legal systems, namely Roman, Roman-Dutch and English law.²²³

Although legislation is a major source of modern law, the South African law of contract has essentially maintained its character as a case law system. As in Germany, the courts are the institutions through which the law is applied and enforced. In South Africa also, the function of a judge is to apply the law and not to make it.²²⁴ The crucial difference is that, in contrast to Germany, South Africa has never resorted to a universal codification of Private law. For that reason, the resolution of juristic problems must be approached in a different way. Judges are bound to resolve disputes by the application of rules of law. Often, however, there would appear to be no rule applicable to the dispute. Because judges, however, have to resolve cases put before them, new rules are frequently developed from historical sources and with reference to general legal principles. Such a decision establishes a judicial precedent. Because of the imprecise methodology, it may happen that another judge settles a similar dispute in a different way, a state of affairs that results in uncertainty and a lack of uniformity.

In order to avoid such a state of affairs, judges adhere to the *stare decisis* rule, which requires courts to stand by earlier judgments handed down by higher courts.²²⁵ Application of the principle of judicial precedent serves certainty so far as it ensures consistency in the resolution of disputes, within the hierarchy of courts.²²⁶

²²³ Girvin "The Architects of the Mixed System" Southern Cross 95-138; Thomas/Van der Merwe/Stoop 7-8.

²²⁴ Fouché 9; but see Zimmermann & Visser "Introduction – South African Law as a Mixed System" Southern Cross 10: "an important key to understanding South African law lies in appreciating the fact that, whilst it is largely civilian in substance, it is also shaped by the traditional conviction of its judges to be the custodians of the law....".

²²⁵ Zimmermann & Visser "Introduction – South African Law as a Mixed System" Southern Cross 11-15.

²²⁶ Fouché 10.

However, judicial precedents are not rigid rules of law and if a court is of the opinion that a previous judgment was wrong, a new judicial precedent is created.

An understanding of the notion of precedent in a case law system presupposes an awareness of the distinction between *ratio decidendi* and *obiter dictum* as elements of a judicial decision. The latter is an incidental remark made by a judge in arriving at his decision. It does not form part of the reasoning upon which the decision is based, and is therefore not binding on later courts. *Obiter dicta* may, nevertheless, have persuasive authority upon lower courts.²²⁷ The *ratio decidendi* is the legal reason upon which a judgment is based. It is this aspect of a judgment that is binding and to be followed by other courts in similar cases.

3.2 Requirements for contracts external to the parties

For the creation of a contract the law imposes requirements unrelated to the agreement of the parties. These relate to the issues of contractual capacity, formalities and legality.

Should any of these requirements not be fulfilled, the contract will be invalid, irrespective of full agreement between the parties.

3.2.1 Contractual capacity

Contractual capacity under South African law is the legally recognised ability of legal subjects to perform legal acts, such as a contract. Thus only persons with possession of the requisite capacity may conclude contracts. Although people are regarded as enjoying contractual capacity in an equal measure, the capacity of some persons is limited in the sense that they are only able to conclude legal acts within certain parameters. Others, again, have no contractual capacity at all, and are wholly unable to conclude juristic acts.

²²⁷ Hahlo/Kahn South Africa The Development of its Laws and Constitution 256.

Such restrictions, or a total lack of capacity, derive from the fact that certain groups of people are regarded in law as lacking the capacity for an expression of will which the law will recognise.²²⁸ In this regard, South African law recognises divisions relating to contractual capacity.

Full contractual capacity is enjoyed by men and women who are older than 21 years, whether married or not, and various kinds of juristic persons. Limited contractual capacity entails that persons between the age of 7 and 21 years and so-called prodigals are only able to conclude contracts with the assistance of certain other persons.²²⁹ Other persons, such as insane persons, person who are intoxicated to the extent that they do not know what they are doing and minors below the age of 7 years do not possess any contractual capacity at all, not even with the assistance of another person.

3.2.2 Formalities

As a rule, informal agreements are binding and a valid contract may therefore be concluded orally or even tacitly.²³⁰ In general, therefore, South African law does not require formalities for the validity of a contract.²³¹

For a variety of policy reasons, and to ensure that parties have enough time to consider their interests carefully before committing themselves, formalities of various kinds have been prescribed by law. For different kinds of contracts, certain formalities are applicable.²³² Such interference with the common law has been criticised by judges and jurists at various times.

Formalities might also be imposed by the parties themselves, so that there will be no contract until the document has been drawn up and executed. Such a case must be

²²⁸ Newman/ McQuoid-Mason *The South African Law of obligations* 15; Fouché 76.

²²⁹ Joubert 120 121; Newman/ McQuoid-Mason 15.

²³⁰ *Goldbalt v Fremantle* 1920 AD 123 128-9; *Woods v Walters* 1921 AD 303 305.

²³¹ Joubert 154; Kerr *Principles* 122.

²³² Eg that the contract must be rendered in writing, that the contract must be notarially executed, and that the contract must be registered.

distinguished from those where the written document is intended only as an evidential record of the terms of a binding oral agreement. The presumption is that a reduction to writing is intended merely for the purposes of record and proof. This presumption can be rebutted by proof of an intention that no contract was to come into existence until the written document was signed.²³³

Failure to comply with formalities, whether presented by law or imparted by the parties, renders the contract null and void.

3.2.3 Legality

Another requirement for a contract is that it must be lawful, ie concluded in accordance with statute and common law.²³⁴

A contract violates the common law if it is against public policy or moral standards (*contra bonos mores*), a standard entailing a considerable measure of judicial discretion, which has been considered in numerous judgments.²³⁵

A constant theme is that the power to declare a contract contrary to public policy should be exercised sparingly and only when the impropriety of the agreement and the element of public harm are manifest.²³⁶

Various statutory provisions prohibit juristic acts or conduct of a contractual nature. Whether a contract which contravenes a statutory provision is void depends on the intention of the legislature, and must be established by an examination of the statute as a whole as well as its scope and purpose.²³⁷

Although the general rule is that what is prohibited is rendered void, the proper legal conclusion may be that legislature is content to impose a penalty, without nullifying

²³³ Goldblatt v Fremantle 1920 AD 123 128-129; Woods v Walters 1921 AD 303 305.

²³⁴ Schierhout v Minister of Justice 1926 AD 99.

²³⁵ Joubert 106 107 108; Wilken v Kohler 1913 AD 135; Sutter v Scheepers 1932 AD 165; Swart v Smuts 1971 1 SA 819 (A) 829C-830C.

²³⁶ Botha v Finanscredit (Pty) Ltd 1989 3 SA 773 (A) 782 I-783 C.

²³⁷ Wilken v Kohler 1913 AD 135 141-5; Sutter v Scheepers 1932 AD 165 173-4.

the contract, especially with regard to revenue statutes.²³⁸ Various considerations regarding this issue have to be taken into account.²³⁹

3.3 The South African notion of contract

South African law inherited from Roman-Dutch law a notion of contract based generally on consensus.²⁴⁰ The foundation for the modern South African law of contract was therefore provided by the premise that every agreement, no matter how informally achieved, was enforceable, provided it had a reasonable cause. The subsequent development of this premise, however, was not without difficulties. Although, as has been indicated, the Roman-Dutch law acknowledged the term *justa causa*, it remained unclear on exactly what that meant. The influence of English notions of contract led to uncertainty regarding the very basis of contractual liability, and to a dispute which occupied South African law for a considerable period of time.²⁴¹ The Chief Justice of the Cape Supreme Court, Sir Henry de Villiers controversially attempted to equate the *justa causa* of Roman-Dutch law with the English requirement of valuable consideration.²⁴² This attempt ultimately failed with *Conradie v Rossouw*, where it was stated that “the only element that our law requires for a valid contract is consensus ...in or de *re licita ac honesta*.”²⁴³ and South Africa’s contract law was finally rid of the concept of valuable consideration.²⁴⁴

Despite this, a fully comprehensive definition of the South African notion of contract seems impossible. Although contract can be classified as an *agreement* which creates or is intended to create a legal obligation between the parties thereto,²⁴⁵ it is well

²³⁸ *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 188 A-189 C.

²³⁹ *Swart v Smuts* 1971 1 SA 819 (A) 829 C-830 C; *Oothuizen v Standard Credit Corp Ltd* 1993 3 SA 891 (A) 904 F-905 G.

²⁴⁰ Hutchison “Formation of Contract” Southern Cross 165.

²⁴¹ Hutchison “Formation of Contract” Southern Cross 165

²⁴² Hutchison “Formation of Contract” Southern Cross 166.

²⁴³ *Conradie v Rossouw* 1919 AD 279 320, cf 324.

²⁴⁴ Joubert 32-35; Hutchison “Formation of Contract” Southern Cross 166 - 173.

²⁴⁵ Joubert 21.

established that contractual liability can also be derived from a reasonable belief in the existence of agreement induced in the mind of a contracting party by the conduct of the other party, and thus even in the absence of agreement.²⁴⁶

According to the primary definition, if A wants to sell his horse to B, a contract will arise only if they both agree on the object to be delivered and the price to be paid for it. Following the second view, agreement and payment will arise even in the absence of explicit agreement on the terms of the agreement. Such an approach, is, of course, incompatible with the classical consensus approach. It is obvious that to adopt contradictory bases for contract must lead to tension and a lack of coherence in the law, and there has been sustained debate, on whether enforceability depends not exclusively on the concurrence of the subjective wills of the contractants, or the objective concurrence of the declaration made by the parties, but also potentially on the reasonable expectations conveyed to the mind of each party by the conduct or expression of the other.²⁴⁷ These alternatives to the primary signifier of a contract – consensus – will be discussed below.²⁴⁸

3.3.1 The will theory

As has been previously indicated, South African contract law is principally based on the notion that a contract is created when contractants reach a consensus to create an obligatory relationship.²⁴⁹

According to the will theory, a contractant is legally bound to a contract because, if, and in so far as, such consensus has occurred between him and his co-contractant(s).

²⁴⁶ Hutchison "Formation of Contract" Southern Cross 180-193. There is a wealth of literature dealing with this problem. See eg Van der Merwe et al Contract: General Principles 14-42; Lubbe/Murray Contract Cases, Materials and Commentary 106 – 109; Joubert 79-80; Hahlo/Kahn South Africa. The development of its Laws and Constitution 441-442; Kritzinger "Approach to contract a reconciliation" (1983) 100 SALJ 47; Van Rensburg (1986) 49 THRHR 448; Cockrell "Reliance and private law" 1993 Stell LR 41.

²⁴⁷ Eg Hoffman "The basis of the effect of mistake on contractual obligations" (1935) 52 SALJ 432. Kritzinger "Approach to contract: a reconciliation" (1983) 100 SALJ 47.

²⁴⁸ See below: 3.3.2.

²⁴⁹ Van der Merwe et al Contract: General Principles 13; Saambou-Nasionale Bouvereiniging v Friedmann 1979 3 SA 978 (A) 993F.

The will theory therefore demands a concurrence of wills between all parties involved.²⁵⁰ By implication, there is no contract where an actual consensus is prevented by any factor.²⁵¹

3.3.1.1 Elements of consensus

The will theory requires agreement on three elements. Firstly, the contractants must agree on the consequences which they want to achieve, secondly, they must have the intention to bind themselves legally, and finally, they must be aware of their agreement.²⁵²

3.3.1.1.1 Agreement about the consequences

A contract involves the creation of obligations. Consensus can therefore only exist if the parties involved are *ad idem* about the obligations or obligation they wish to establish. Not only must the parties agree on whom they want to contract with, they must also be *ad idem* as regards the performance or performances to be rendered under the contract.

3.3.1.1.2 Intention to be legally bound – *animus contrahendi*

The intention to be legally bound is also known as *animus contrahendi* and has been the subject matter of several judgments by South African courts.²⁵³ The concept of *animus contrahendi* was explicitly equated with an intention to be bound, and distinguished from the underlying cause of contract (*redelike oorsaak*), by Jansen JA in *Saambou-Nasionale Bouvereniging v Friedman*.²⁵⁴ A statement of the price by the vendor will be held to be an offer only when it is made with the intention of being bound by the offeree's acceptance.²⁵⁵ Furthermore, the courts have employed

²⁵⁰ Van der Merwe et al 13.

²⁵¹ Van der Merwe et al 13.

²⁵² Christie 67; Van der Merwe et al 16.

²⁵³ See for example: *Hayter v Ford* (1895) 10 EDC 61 69.

²⁵⁴ *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 991.

²⁵⁵ *Hottentots Hollands Motors (Pty) Ltd v R* 1956 1 PH K22 (C).

commercial language to define a true offer as a “firm offer”, which will be “certain and definite in its terms” and “made with the intention that when it is accepted it will bind the offeror.”²⁵⁶

An expression of will that is made without the intention to establish a legal obligation is not sufficient for the creation of a contract. A simple social arrangement, therefore, does not lead to legal consensus. It does not matter whether or to what extent the persons might regard themselves as bound in honour, they do not normally want to create legal consequences.²⁵⁷

Neither can a statement made in jest or in a moment of anger lead to consensus, since its declarer did not seriously intend to commit himself in a legal sense.²⁵⁸ The logic operating here is that a consensus between the declarer of such a statement and the receiver with regard to a contractual bond cannot be achieved since one party (here the declarer) does not want to be legally bound at all. Consensus is therefore excluded.²⁵⁹

3.3.1.1.3 Awareness of their agreement

A final requirement of the will theory is that the parties who agree should be aware of this fact. Coinciding wills alone cannot constitute consensus, since the term itself implies that the contractants should each have knowledge of the declaration of the other party. Otherwise they cannot be said to have agreed to it. Consensus will therefore only exist where one party becomes aware of the other’s expression of will and assents to it.

A leading case in this regard is *Bloom v American Swiss Watch Co.*²⁶⁰ By means of a newspaper advertisement, a representative of the Swiss Watch Company offered a reward for information, to be given to the CID, which would lead to the arrest of

²⁵⁶ Wasmuth v Jacobs 1987 3 SA 629 (SWA).

²⁵⁷ Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 169.

²⁵⁸ Christie 34.

²⁵⁹ Van der Merwe et al 15; Bourbon-Leftley v WPK (Landbou) Bpk 1999 1 SA 902 (C).

²⁶⁰ 1915 AD 100; Christie 52 53 and 63 64.

thieves and the recovery of property stolen from his premises. The reward was to be paid in proportion to the value of property recovered.

The advertisement was held to be an offer specifying a method of acceptance. However, although Bloom satisfied the prescribed method of acceptance, he could not be the acceptor of the offer because, being at the time unaware of the reward, he lacked *animus contrahendi*.

3.3.2 Alternative approaches

For reasons of policy, eg legal certainty, good faith, protection of reasonable expectations, South African law recognizes that the creation of contracts is not merely a matter of consensus.²⁶¹ Alternative theories will now be considered.

3.3.2.1 Declaration theory

The declaration theory states that contractants are legally bound not because of the coincidence of their subjective intention, but on the basis of their objectively coinciding declarations of will.²⁶²

Although the declaration theory accepts that the will of the contractants determines their contract, it qualifies the will theory insofar as the existence of consensus is established with reference to the objective content of the declared will, and without reference to the alternative intentions potentially established by enquiry into its subjective intent. What is important is not what the contractants may have intended, but rather what they actually declared.

South African case law contains a number of statements which support a more objective approach to the constitution of contracts and the treatment of *dissensus*.²⁶³ None of them, however, supports the declaration theory as such.

²⁶¹ Van der Merwe et al 13.

²⁶² Van der Merwe et al 28.

The strongest statement, which is often quoted as supporting a declaration theory, is that of in Wessels JA:

“The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestations of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract.”²⁶⁴

It would be going too far to see this as explicit approval for the declaration theory. The statement merely affirms that, in searching for the actual intention of the parties in accordance with the will theory, a court is compelled to look for that intention in its external manifestation, namely the objective conduct of the parties.²⁶⁵

3.3.2.2 Reliance theory

A further alternative approach to the issue of whether there is a contract or not, which is quite often applied in South African law, is the reliance theory. According to this view, a contract is based on the intention of one party to an agreement and the reasonable impression or reliance on his part that the opposite party had the identical intention regarding the contract.

Clearly, the reliance theory can only be used if, according to the will theory, consensus is lacking. If both parties have coinciding intentions there is consensus and thus a contract between them. It is not of great importance whether one party had any

²⁶³ I Pieters & Company v Salomon 1911 AD 121 130; National & Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 2 SA 473 (A) 479; Allen v Sixteen Stirling Investments (Pty) Ltd 1974 4 SA 164 (D) 172.

²⁶⁴ South African Railways & Harbours v National Bank of South Africa Ltd 1924 AD 704.

²⁶⁵ Van der Merwe et al 28 29; Christie 26.

particular impression of the other's intention.²⁶⁶ If, however, there is a (material) mistake by one contractant or both, and as a result no actual consensus, the reliance theory establishes a contract in cases where one of the parties has reasonably relied on the impression created in his mind by the other party that there was consensus.²⁶⁷ The extent to which this approach has been applied by the South African courts will be shown below, in the sections on mistake and disagreement.

3.4 Formation of contract

Contracts, except in exceptional cases,²⁶⁸ are constituted by the acceptance of an offer.²⁶⁹ It is, therefore, necessary to discuss the concepts of "offer" and "acceptance", in order to establish what their prerequisites are.²⁷⁰

Like German law, South African law regards contracts as belonging to a species of legal facts known as juristic acts ("regshandelinge") - which is equivalent to *Rechtsgeschäft* under German law. A juristic act is the lawful act of a legal subject which has at least some of the consequences which its author intended to bring about.²⁷¹ From the previous discussion, it should be clear that the conduct of both parties are independent legal acts, since both intend to bring about a particular legal consequence, i.e. the contract.

3.4.1 Offer

An offer is a declaration by the offeror of his intention to conclude a contract, which states the terms on which he is prepared to contract. In making an offer, a person puts forward a proposal with the intention that by its mere acceptance, without more, a

²⁶⁶ Van der Merwe et al 29.

²⁶⁷ Hutchison "Formation of Contract" Southern Cross 180-189.

²⁶⁸ See *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) 432E.

²⁶⁹ *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241; *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) 532E.

²⁷⁰ Van der Merwe et al 43.

²⁷¹ Van der Merwe et al 5.

contract shall be formed. This approved definition refers to the requirement for *animus contrahendi*, which has been reviewed above.²⁷²

3.4.1.1 The offer must be clear and unambiguous

In order to provide the basis for a contract, an offer must be clear, in other words it must contain sufficient information to place the offeree in a position to know what the offeror has in mind.

If any of the material terms of a declaration intended as an offer are vague and obscure or ambiguous, the declaration will be ineffective as such.²⁷³

3.4.1.2 The offer must be complete

Moreover, the offer must contain all the terms which the offeror wishes to embody in the contract. The offeree will be bound only by those terms set out in the offer. It therefore follows that if any essential terms of the intended contract are omitted, the declaration cannot be considered as an offer and it cannot lead to a contract, and the same applies should the contract omit the material terms of the envisaged contract.²⁷⁴

3.4.2 Declarations which do not amount to offers

It is often necessary to decide whether a particular proposal made in the course of negotiations amounts to an offer or not,²⁷⁵ and in this regard, various kinds of declaration that are to be distinguished from true offers might usefully be listed and briefly discussed here.

It must be emphasised that these categories are not rigid or watertight. The cases show that it is often difficult to apply the distinction between true offers and other statements in practice. Everything will depend on the facts and circumstances of each particular case.

²⁷² Christie 32; see above: 3.3.1.1.2.

²⁷³ Christie 36 108 116.

²⁷⁴ Van der Merwe et al 44.

²⁷⁵ See *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) where the correspondence between the parties was analysed step by step.

3.4.2.1 Invitations to treat

A statement intended to induce another to enter into negotiations with a view to arriving at a contract may vary between a simple request to another to state his views,²⁷⁶ and a statement of one's own views with an invitation to the other party to discuss them.²⁷⁷

To distinguish an offer from a mere invitation to do business, it must be established whether the declarer acted with the intention to enter into a legally binding agreement. If not, his declaration can hardly be seen as an offer but amounts merely to an invitation to treat.²⁷⁸

The decisive South African case on this subject, *Crawley v Rex* 1909 TS 1105, involves circumstances very similar to those mentioned in relation to the decisive German ruling, and the judgments operate under the same logic.²⁷⁹

The Plaintiff shopkeeper placed a placard outside his shop advertising the sale of a particular brand of tobacco at a cheap price to attract the public. Having bought some of the tobacco, Crawley returned for more but the shopkeeper refused to serve him and requested that he leave. He refused and was charged with statutory trespass. One of his defences was that, by accepting the offer made on the placard, he had concluded a contract with the shopkeeper and was entitled to remain in the shop until the contract was performed.

The court found that there was no contract, but rather an *invitatio ad offerendum*. It was held to be contrary to logic that the shopkeeper should be taken to have intended his notice as an offer to enter into a contract. Smith J held the notice to amount to an announcement of his intention to sell the goods to somebody. This was differentiated from an intention to sell to potentially "thousands of members of the public [who]

²⁷⁶ Christie 37.

²⁷⁷ Ferguson v Merensky 1903 TS 675.

²⁷⁸ Joubert 39.

²⁷⁹ See above: 2.2.2.1.2.

might crowd into the shop, all of whom would then have a right of action against the proprietor for not performing the contract.”

The surrounding circumstances will also be decisive, as the leading case of *Efroiken v Simon*²⁸⁰ demonstrates. This 1921 case involved the telegram from a grain broker in Johannesburg to his counterpart in Cape Town, which read: “Have seller 3000 oats each January June 11s local export if taken export any difference in railage to be charged to buyers instructions ninth.” This correspondence was taken to be an outline of the circumstances of a potential long-term sale by credit agreement, which could be arranged if the recipient broker could find a suitable buyer. Thus the buyer found by the broker was not entitled to accept the terms put forward by the telegram so as to conclude a contract. This may not have been the case if the broker had communicated with a particular buyer directly.

3.4.2.2 Request for an offer

If a declaration is expressed as a request for an offer, it obviously cannot itself be considered an offer. In cases when it is not expressly stated to be a request, the surrounding circumstances may show that a proposal should be correctly interpreted as a request for an offer, insofar as it does not expressly indicate the intention of the declarer to make an offer.²⁸¹

Thus, for example, the advertisement of goods for sale at a stated price will normally be dealt with as a request for an offer rather than as a firm offer to sell.²⁸² This would apply also to a request that a buyer be found. As in the previous situation, it is of some importance to establish whether *animus contrahendi* was present, in order to distinguish such a declaration from a real offer.²⁸³

²⁸¹ *Efroiken v Simon* 1921 CPD 367.

²⁸² *Bird v Sumerville* 1960 4 SA 395 (N) 401 D.

²⁸³ *Christie* 37 38.

3.4.2.3 Statements of information

Information supplied (often in response to an enquiry), which provides details about the terms on which a person may be willing to offer, but does not communicate an intention to be bound by those precise terms as an offer, is referred to as a statement of information.²⁸⁴ In effect, these will amount to conditional statements: “These would be my terms, if I was to make an offer.”²⁸⁵

A statement which does no more than convey information, is not considered to be accompanied by *animus contrahendi*.²⁸⁶

The factual background and the wording of the particular statement may, of course, yield the conclusion that it was intended as an offer.²⁸⁷

3.4.2.4 Statements of intention

A statement of intention does not, in general, amount to an offer.²⁸⁸ although the possibility that it does so increases when the statement is addressed to a particular person.²⁸⁹

It can often be difficult to distinguish between statements that declare an intention to contract and an actual offer. Where there is doubt, it is necessary to establish whether the declarant displayed an intention to be bound to the terms of his statement, should it be accepted.²⁹⁰ In this regard an examination of the surrounding circumstances may be decisive, even where the statement itself appears unconditional. For example, the statement “I shall sell to the first comer who brings £100,000 in cash” has been held to be a mere general expression of intention.²⁹¹ Conversely, an ostensibly conditional

²⁸⁴ Christie 38; Hottentots Holland Motors (Pty) Ltd v R 1956 1 PH K 22 (C); Societe Commerciale de Moteurs v Ackermann 1981 3 SA 422 (A).

²⁸⁵ Christie 38.

²⁸⁶ Efroiken v Simon 1921 CPD 371; Hottentots Holland Motors (Pty) Ltd v R 1956 1 PH K 22 (C).

²⁸⁷ Truter v Rosenthal (1896) 8 HCG 117; Young v Land Values Ltd 1924 WLD 216 221.

²⁸⁸ Rood v Venter 1903 TS 221.

²⁸⁹ Brown & Co v Jacobsen 1915 OPD 42.

²⁹⁰ Christie 39.

²⁹¹ Rood v Venter 1903 TS 221.

statement may be found to be a definite offer. For example, a letter conveying a request to another party not to press for payment of a third party's debt contained the statement: "should you require a guarantee from me I am quite willing to do so.....Trusting you agree to my proposal." This was deemed by the court to amount to an offer to guarantee payment of the debt.²⁹²

3.4.2.5 Calling for tenders

A call for tenders is generally understood to fall short of an offer. Here, the same logic applies as in the case of advertisements: a person calling for tenders may hardly be expected to commit himself to an offer made to any number of unknown persons.²⁹³ For that reason, the seeking of tenders is no more than an invitation to do business and the response thereto is an offer that can be accepted or rejected by the person who called for tenders. An obligation to accept the highest or lowest or a particular tender cannot be implied.²⁹⁴

Apart from this lack of *animus contrahendi*, calls for tenders will also lack the material details necessary to constitute a complete offer. In construction contracts for instance, tender documents such as plans and specifications are presumed to be given for the convenience of potential tenderers and not with any guarantee of their accuracy. By incorporating them in his tender, a tenderer makes them his own. This may lead to unfortunate results, for example if they are unworkable or inaccurate and the works prove impossible or unexpectedly difficult.²⁹⁵

3.4.2.6 Proposals for partial, incomplete or provisional agreement

This term refers to conditional proposals, which may be made while parties are in the process of negotiating a binding agreement.²⁹⁶ In cases where the comprehensive and precise agreement aimed at between the parties may involve protracted negotiations,

²⁹² Brown & Co v Jacobson 1915 OPD 42.

²⁹³ Christie 47.

²⁹⁴ Leyds v Simon 1964 1 SA 377 (T); Christie 47.

²⁹⁵ Robertson v Maurice Nichols (Pty) Ltd 1938 NPD 34; Felton Skead and Grant v Port Elizabeth Municipality 1964 4 SA 422 (E).

²⁹⁶ Pitout v North Cape Livestock Co-op Ltd 1977 4 SA 842 (A) 850 D.

it is not unusual for the progress achieved to date to be recorded in a partial agreement. This allows the parties to confirm the terms on which they are in agreement, which in turn may encourage progress towards further agreement. Such partial agreements normally become obsolete when a final agreement, on which the parties are willing to contract, is reached. Clearly, such a system is open to potential abuse in cases where a final agreement is never concluded, and where one party seeks to hold the other to the terms of the partial agreement.²⁹⁷ The success of this endeavour will depend on whether the partial agreement can be classified as a true contract. This in turn will depend on an analysis of whether an offer can be isolated; and if so, whether the contractual and circumstantial evidence shows that the offeree was aware or ought to have been aware that the offer was intended to be accepted on a provisional basis only, with the conclusion of a binding contract to be dependent on agreement on further points.²⁹⁸

An indication that further terms remain outstanding or unsettled will not necessarily be enough to preclude an intention to be bound. In certain cases, it may be taken to have been understood by the parties that outstanding terms will conform to what is considered reasonable²⁹⁹ or usual.³⁰⁰ In such a case, no further agreement is necessary, so that the proposal will amount to a potentially binding offer.³⁰¹ Even the mention in a proposal of the need for further agreement after acceptance of the proposal does not therefore necessarily indicate that the initial agreement is of a provisional nature only.

Ascertainment of the intention of the parties will of course be central, and this will be gathered from an examination of their conduct, the terms of the agreement and the surrounding circumstances.

²⁹⁷ Christie 39 40.

²⁹⁸ Christie 39; see also *Pitout v North Cape Livestock Co-op Ltd* 1977 4 SA 842 (A) 850 D.

²⁹⁹ *Blundell v Blom* 1950 2 SA 627 (W) 633; *Fourlamel (Pty) Ltd v Maddison* 1977 1 SA 333 (A) 342 A; *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 2 SA 807 (A) 812.

³⁰⁰ *Lindner v Vogtmannsberger* 1965 4 SA 108 (O) 110H-111D.

³⁰¹ Christie 40.

The courts will consider the possibility that the intention may have been to conclude a binding contract which would stand if no agreement was reached on the outstanding matters, but would be incorporated in and superseded by any further final agreement.³⁰² South African courts have also decided that the mention of further agreements may amount to a *pactum de contrahendo*, which is a binding agreement to make a contract in future.³⁰³

3.4.3 Communication of offers

As mentioned above,³⁰⁴ an offer should reach the other party in order that he may assent to it, and thereby constitute a contract, for one cannot accept an offer of which one is unaware.³⁰⁵

3.4.3.1 Offers to the public

An offer is usually addressed to a specific person with whom the offeror wishes to conclude a contract. However, South African law acknowledges the possibility that an offer may be made to the public or to indeterminate persons, eg by means of an advertisement or any other method of mass communication, and that such offers may ripen into a contract as a result of acceptance in the appropriate way.³⁰⁶

Whether such advertisements are offers or merely invitations to negotiate or puffs, must be ascertained from the wording of the advertisement and the factual background, and, in the event of ambiguity, with reference to the surrounding circumstances.³⁰⁷ In interpreting an advertisement it is always relevant to consider the practical results of interpreting it as an offer.

³⁰² Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 1 SA 508 (A) 516 A-517C; Lewis v Oneanate (Pty) Ltd 1992 4 SA 811 (A).

³⁰³ Hirschowitz v Moolman 1985 3 SA 739 (A) 765 I; H Merks & Co Ltd v The B-M Group (Pty) Ltd 1996 2 SA 225 (A) 233 D-235 G.

³⁰⁴ See above: 3.4.

³⁰⁵ Bloom v The American Swiss Watch Co 1915 AD 100.

³⁰⁶ Bloom v The American Watch Co 1915 AD 100 102 105 107.

³⁰⁷ Neugebauer & Co Ltd v Hermann 1923 AD 564 572; Raath v Commissioner for Inland Revenue 1954 3 SA 764 (T).

On this basis an advertisement of the price of goods exposed for sale is not normally an offer, because if so interpreted, it would deprive the seller of his liberty to choose his customers and would expose him to claims for breach of contract if he had insufficient goods to satisfy all persons purporting to accept his offer.³⁰⁸

The principle that an offer has to be communicated to the offeree and be noticed by him is demonstrated by the manner in which the question of reward is treated. When a reward is offered by advertisement, it can be claimed only by a person who has complied with the requirements specified in the advertisement.³⁰⁹ Further, and more importantly here, a reward cannot be claimed by a person if he was unaware of the offer at the time he complied with its requirements, because he could not be regarded as accepting an offer of which he was unaware.³¹⁰

Advertisements offering a reward or competition may seek to avoid litigation by stating that the offer is binding in honour only, or subject to the offeror's discretion or that the offer's decision shall be final.³¹¹ Reservations of this kind, which exclude *animus contrahendi*, will be effective unless they contravene a statutory requirement.³¹²

3.4.3.2 Auctions

The question of whether an auctioneer makes an offer by calling for bids, or each bidder makes an offer by bidding, which crucially determines which party, as offeree, will decide whether the contract is to be entered into or not,³¹³ depends on the advertised or announced conditions of sale laid down by the organiser of the auction.

³⁰⁸ *Crawley v R* 1909 TS 1105; *Hottentots Holland Motors (Pty) Ltd v R* 1956 1 PH K 22 (C).

³⁰⁹ *Sephton v American Swiss Watch Co* 1913 CPD 1024 1032-3; *Lee v American Swiss Watch Co* 1914 AD 121.

³¹⁰ *Bloom v American Swiss Watch Co* 1915 AD 103.

³¹¹ *Gerson v United Tobacco Co (South) Ltd* 1931 CPD 283.

³¹² *De Villiers v Sports Pools (Pty) Ltd* 1975 3 SA 253.

³¹³ *Christie* 49.

If the terms of the auction require the auctioneer to accept the highest bid, he becomes the offeror and is obliged to accept the highest bid, provided it is *bona fide*.³¹⁴ *Bona fides* is excluded if the bidder has agreed with other bidders to keep bids down,³¹⁵ or if the bidder acts without the required intention (*animus contrahendi*).³¹⁶ If the terms of the auction do not require the auctioneer to accept the highest bid, his call for bids is an invitation to those present to make offers. Therefore, each bid is an offer, which the auctioneer is not obliged to accept.³¹⁷ Whether he accepts or not, is normally a question of whether the seller has fixed a reserve price. If the reserve price is not revealed to bidders their bids are offers.³¹⁸

An advertisement setting out particular terms on which the auction is to be held, is binding on the seller and auctioneer.³¹⁹ Bidders who attend the auction in response to the advertisement are also bound by them,³²⁰ this effect being produced by the auctioneer's tacit offer to conduct the auction on the advertised terms, and each bidder's acceptance of that offer by bidding during the auction.

3.4.3.3 Tacit offers

South African law acknowledges that offers may be made tacitly by conduct.³²¹ The only difference between a tacit contract and an express contract lies in the method of proof, it being necessary to prove a tacit contract by inference from the conduct of the parties.³²² With regard to auction situations, an exception is made, in so far as a party

³¹⁴ *Neugebauer & Co Ltd v Hermann* 1923 AD 564 570-1; *Shandel v Jacobs* 1949 1 SA 320 (N) 325-326.

³¹⁵ *Neugebauer & Co Ltd v Hermann* 1923 AD 564.

³¹⁶ *Shandel v Jacobs* 1949 1 SA 320 (N); *SWA Amalgameerde Afslaers (Edms)Bpk v Louw* 1956 1 SA 346 (A).

³¹⁷ *Demerara Turf Club Ltd v Wight* (1918) AC 605 (PC); *Neugebauer & Co Ltd v Hermann* 1923 AD 564; *Shandel v Jacobs* 1949 1 SA 320.

³¹⁸ *Christie* 50 51.

³¹⁹ *Neugebauer & Co Ltd v Hermann* 1923 AD 564 571 572; *Demerara Turf Club Ltd v Wight* (1918) AC 605 (PC).

³²⁰ *Shandel v Jacobs* 1949 1 SA 320 (N); *Nicolau v Navarone Investments (Pty) Ltd* 1971 3 SA 883 (W) 884-5.

³²¹ *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 429-30.

³²² *Bremer Meulens (Edms) Bpk v Floros* 1966 1 PH A36 (A).

to an auction must clarify in advance the manner in which his conduct is to be interpreted.

3.4.4 Termination of offer

Having discussed general principles regarding the offer under South African law, it becomes necessary to investigate the law on the termination of offer. It will appear that termination of an offer does not depend merely on the offeror, but can result also from the conduct of the offeree and from external circumstances.

3.4.4.1 Revocation

The concept of *pollicitatio* (enforceable unilateral promise) has not been accepted by South African law,³²³ so that South African law does not accord an offer any obligatory effect. It may therefore be freely revoked by the offeror.³²⁴ A withdrawal or revocation by the offeror at any time before the offer has been accepted will, as a general rule, terminate it.³²⁵ Revocation is effective from the moment that it is communicated to the offeree. The communication need not necessarily be by the offeror but may also emanate from a authorized person.³²⁶ But if acceptance has already occurred, a contract has been established and the offer cannot be revoked.

3.4.4.2 Effluxion of time

An offer may contain a time clause stipulating a period within which the acceptance must take place. Upon effluxion of this period the offer expires automatically and it can no longer be accepted.³²⁷ If an offer does not contain a time clause, it must be accepted within a reasonable period.³²⁸ What constitutes a reasonable period cannot be determined in the abstract, but will differ from case to case.

³²³ Hutchison "Formation of Contract" Southern Cross 174.

³²⁴ Van der Merwe et al 46; Newman/ McQuoid-Mason 24.

³²⁵ Christian v Ries (1898) 13 EDC 8 15; Hersch v Nel 1948 3 SA 686 (A) 693.

³²⁶ Greenberg v Wheatcroft 1950 2 PH A 56 (W).

³²⁷ Joubert 43.

³²⁸ Dietrichsen v Dietrichsen 1911 TPD 496.

3.4.4.3 The option - an irrevocable offer?

As mentioned above, offers are considered to be revocable until acceptance has taken place. But what is the state of affairs if the offeror expressly or implicitly declares that he wishes his offer to be irrevocable or that it will remain open until a specified date?

The traditional answer is provided by Coetzee J in *Anglo Carpets (Pty) Ltd v Snyman*:³²⁹

“It is trite law that an offer can at any time before acceptance thereof be revoked and that the mere statement that it is irrevocable or not revocable for a certain period is ineffective. The only way in which this result can be achieved is if there is indeed a binding agreement on this aspect.”

Such declarations are therefore considered as unilateral declarations, which do not have a binding effect on the declarer.³³⁰

3.4.4.4 Rejection and Counter-offer

An offer will lapse when it is rejected by the offeree.³³¹ A counter-offer is regarded as a rejection, and so as terminating the original offer.³³² Cases do, however, arise in which a declaration of the offeree which inquires or even rejects an isolated term of the offer, does not amount to a rejection of the offer as a whole.³³³

³²⁹ 1978 3 SA 582 (T) 585H.

³³⁰ Kritzinger 1983 SALJ 441; Zeffert 1972 SALJ 152; Kotze v Newmont SA Ltd 1977 3 SA 368 (NC). Against this view with considerable arguments: Christie 57 58 59, whose views have found acceptance in *University of the North v Franks* (2002) 11 LAC 5.2.8.

³³¹ Wessels para 175.

³³² Christie 69 70.

³³³ *Stephen v Pepler* 1921 EDL 70.

Therefore, as Christie states, the rule is a general rather than an absolute one.³³⁴ Of decisive importance is the wording used by the parties and the circumstances of the transaction.

3.4.4.5 Death

If contract formation is seen as requiring the meeting of corresponding intentions, the effect of the death of the offeror (or of the offeree, for that matter) seems beyond question. Because one party is dead, consensus can no longer be reached.³³⁵ The tendency to take a more objective approach to contract may, however, introduce complexities in this regard.³³⁶ Thus the rigid rule stated above has been waived in cases where an offer indicates that it might also be accepted by an executor. These cases remain exceptional, since the assumption seems to be that an offeror intends that a contract will come into place between himself and the offeree personally.³³⁷

3.4.4.6 Loss of contractual capacity

In view of the impossibility of consensus being reached, a loss of contractual capacity is accorded an effect similar to the death of a party.³³⁸ The exceptional circumstances referred to above may also be relevant in such cases however.³³⁹

3.4.5 Acceptance

The offer must be accepted in order to establish agreement,³⁴⁰ and this holds true even for unilateral contracts such as donations.³⁴¹ Acceptance entails an affirmative response to an offer that has come to the attention of the offeree.³⁴² This implies that no contract is created in the case of simultaneous identical cross-offers, neither of

³³⁴ Christie 70.

³³⁵ Kahn "Some mysteries of offer and acceptance" (1955) 72 SALJ 246 269; Christie 54.

³³⁶ Costain & Partners v Godden 1960 4 SA 456 (SR); Hitzeroth v Brooks 1965 3 SA 444 (A).

³³⁷ Christie 55.

³³⁸ Christie 55.

³³⁹ Kahn "Some mysteries of offer and acceptance" (1955) 72 SALJ 246 269.

³⁴⁰ Dietrichsen v Dietrichsen 1911 TPD 486 494-5; Whittle v Henley 1924 AD 138 148.

³⁴¹ De Kock v Executors of Van de Wall (1899) 16 SC 463; Union Free State Mining and Finance Corp Ltd v Union Free State Gold and Diamond Corp Ltd 1960 4 SA 547 (W).

³⁴² Bloom v The American Swiss Watch Coompany 1915 AD 100; Van der Merwe et al 48.

which has been accepted by the other party.³⁴³ The precise question has not arisen in South Africa, but in the English case *Tinn v Hoffman & Co* it was held that there was no contract in such cases.³⁴⁴ This reflects the subjective theory of contract, for according to the declaration theory there would be a contract, since it holds that coinciding declarations alone are sufficient.³⁴⁵

For a declaration to amount to an acceptance certain requirements have to be met.

3.4.5.1 Who may accept

A basic principle is that a simple contractual offer made to a specific person can be accepted only by that person.³⁴⁶ Because everyone is in principle entitled to decide with whom he wants to contract, a purported acceptance by some other person is ineffective and does not bring about the conclusion of a contract.³⁴⁷

Closely connected to the question of who may accept an offer is the question of the other party's knowledge of the particular offer. When a person "accepts" an offer of which he is unaware, typically by performing an act which, unknown to him, is specified as acceptance in an offer made to the public, there is no agreement and therefore no contract.³⁴⁸ Another case which entails the same problem is where an acceptance of an offer is made in anticipation.³⁴⁹

When the offer is addressed to the general public, it is a matter of interpretation whether it was open for acceptance by the first person only, or also for acceptance by further persons.³⁵⁰

³⁴³ Christie 60-61.

³⁴⁴ *Tinn v Hoffmann & Co* (1873) 29 LT 271.

³⁴⁵ Van der Merwe et al 13.

³⁴⁶ *Levin v Drieprok Properties (Pty) Ltd* 1975 2 SA 397 (A).

³⁴⁷ *Blew v Snoxell* 1931 TPD 226; Christie 64.

³⁴⁸ *Bloom v The American Swiss Watch Co* 1915 AD 100.

³⁴⁹ *Kotze v Newmont SA Ltd* 1977 3 SA 368 (NC).

³⁵⁰ See above: 3.4.3.1.

3.4.5.2 Clear and unambiguous acceptance

The acceptance must be clear and unambiguous, leaving no doubt that the offer has been accepted.³⁵¹ The offeree's response must extend to all the terms contained in the offer, and should strictly conform to the terms thereof.³⁵² A qualified acceptance does not signify agreement, so that if the offeree attaches a condition to his acceptance, it is a matter of counter-offer,³⁵³ which will destroy the validity of the acceptance.³⁵⁴

3.4.5.3 Period for acceptance

If the offer states a period within which acceptance is to take place, the offeree must accept within this period in order to form a contract. A late acceptance is irrelevant, since there is at that stage no offer open to which the offeree could assent.³⁵⁵

3.4.6 Communication of acceptance

In order to achieve agreement, and therefore a contract, it is normally necessary for the offeree's acceptance to be communicated to the offeror.³⁵⁶ If one requires consensus for a contract, it is a question of logic that a contract cannot be concluded until the offeree has not only decided in his own mind to accept the offer, but has communicated his acceptance to the offeror. For achieving consensus it is therefore essential that both parties have to be informed about each other's state of mind. According to the courts, however, an offeror may expressly³⁵⁷ or even impliedly³⁵⁸

³⁵¹ Boerne v Harris 1949 1 SA 793 (A); Kahn v Raatz 1976 4 SA 543 (A).

³⁵² Joubert 43-45.

³⁵³ Christian v Ries (1898) 13 EDC 8; Joubert v Enslin 1910 AD 6 29; JRM Furniture Holdings v Cowling 1983 4 SA 541 (W).

³⁵⁴ Jones v Reynolds 1913 AD 366; Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd 1962 3 SA 143 (A).

³⁵⁵ Laws v Rutherford 1924 AD 261.

³⁵⁶ Hersch v Nel 1948 3 SA 686 (A); Driftwood Properties (Pty) Ltd v McLean 1971 3 SA 591 (A).

³⁵⁷ McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16.

³⁵⁸ R v Nel 1921 AD 339; Remini v Basson 1993 3 SA 204 (N) 211.

dispense with the necessity for communication, or the negotiations may reveal that neither party contemplated that communication would be necessary.³⁵⁹

3.4.6.1 Tacit acceptance and silence as acceptance

Just as an offer can be made tacitly, so can an acceptance.³⁶⁰ According to South African law, acceptance might therefore be inferred from a demand for delivery of the subject matter of the offer.³⁶¹ Silence or inactivity in response to an offer is not, in general, sufficient to raise an inference of acceptance. On the other hand South African law regards certain circumstances (especially a business relationship or a course of dealing) as giving rise to a "duty to speak".³⁶² The approach is that when an offer or an assertion of rights is made, the recipient who does not reject the offer or assertion when according to ordinary commercial practise and human expectation he would reject it, may well be taken to have accepted it.³⁶³ The answer will depend on the facts of each case.³⁶⁴

The general rule under South African law is that the offeror cannot, without the consent of the offeree, specify that the latter's silence will be taken as an acceptance of the offer.³⁶⁵ Applied to the case of unsolicited goods received by a person, this principle means that the recipient is not ordinarily obliged to keep and pay for the goods³⁶⁶ or to return them,³⁶⁷ but his acceptance of the offer may be inferred from his making beneficial use of the goods or otherwise exercising ownership over them.³⁶⁸

³⁵⁹ *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 4 SA 296 (T).

³⁶⁰ *Timoney and King v King* 1920 AD 133; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A).

³⁶¹ *Goldfrey v Paruk* 1965 2 SA 738 (D) 742 B.

³⁶² *Sun Radio and Furnishers v Republic Timber & Hardware (Pty) Ltd* 1969 4 SA 378 (T).

³⁶³ *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 2 SA 1 (A) 10B-12B.

³⁶⁴ See *Commaile v Steyn* 1914 CPD 1100 1103; *Benoni Produce and Coal Co Ltd v Grundelfinger* 1918 TPD 453; *Seedat v Trucker's Shoe Co* 1952 3 SA 513 (T) 517 F-518 B; *Poort Sugar Planters (Pty) Ltd v Umfolosi Co-operative Sugar Planters Ltd* 1960 1 SA 531 (D) 541 B-F; *Wilmot Motors (Pty) Ltd v Tucker's Fresh Meat Supply Ltd* 1969 4 SA 474 (T) 476 H-477 H as against *Martin v De Kock* 1948 2 SA 719 (A) 735; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 2 SA 795 (A) 800A-801B.

³⁶⁵ *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 422.

³⁶⁶ *Bellingham & Co v Smith* (1894) 8 EDC 155.

3.4.6.2 Method of acceptance

In cases where the offer contains no indication of the manner of acceptance, the offeree is free to accept the offer in any manner which he deems proper. Sometimes, however, an offer contains certain conditions regarding the way in which it is to be accepted, for instance that acceptance must be in writing. In these cases acceptance must take place in the prescribed way in order to constitute valid acceptance and ultimately a valid contract.³⁶⁹

3.4.7 The conclusion of the contract

As a basic rule, South African law accepts that a contract is concluded when and where consensus is reached, usually at the place where and when a person who has made an offer is informed that it has been accepted by a person entitled to do so.³⁷⁰ The so-called 'information theory', which governs South African legal principles regarding the conclusion of a contract, is based on the notion that the primary ground of contractual liability is the true agreement between the parties to the transaction.³⁷¹ As we will see, numerous exceptions to this general principle have been made.

According to the information theory, this is the point in time at which the offeror becomes aware of the acceptance. This is easily applied to situations in which the parties are in each others presence, since there is no need to consider problems of timing. At the very moment the acceptance is heard and understood by the offeror the contract is said to be concluded (if all other prerequisites are fulfilled).

Where contracts are concluded between parties who are at a distance from one another conclusions become more difficult. It might, for example, be possible for the

³⁶⁷ Charles Velkes Mail Order 1973 (Pty) Ltd v CIR 1987 3 SA 345 (A) 358B-E.

³⁶⁸ Charles Velkes Mail Order 1973 (Pty) Ltd v CIR 1987 3 SA 358 F.

³⁶⁹ A to Z Bazaars (Pty) Ltd v Minister of Agriculture 1975 3 SA 468 (A).

³⁷⁰ Dietrichsen v Dietrichsen 1911 TPD 486; Fern Gold Mining Company v Tobias (1890) 3 SAR 134; Bloom v American Swiss Watch Company 1915 AD 100; Amcoal Collieries Ltd v Truter 1990 1 SA 1 (A) 4.

³⁷¹ Van der Merwe et al 43.

offeror to claim that he did not was informed about an acceptance, despite the fact that the written acceptance was placed in his letterbox.

The courts initially adopted the view that the time of conclusion of a contract was determined by the information theory, irrespective of whether the parties were contracting *inter praesentes* or *inter absentes*.³⁷² In the course of time, however, it became more and more difficult to follow this approach rigorously. In 1921 the Cape court, in *Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd*,³⁷³ adopted a different approach regarding commercial contracts concluded *inter absentes* by offer and acceptance through the post. The court conceded that from a theoretical perspective the information theory accorded with the modern notion of contract based on the agreement of the parties. Nevertheless the so-called "expedition theory" was adopted as the most satisfactory pragmatic way of determining the time (and place) of conclusion of a postal contract. These contracts were held to arise at the moment (and place) of posting the acceptance.³⁷⁴ In so deciding, the court rejected not only the so-called information theory, but also two other approaches to the problem. According to the *declaration theory*, for instance, a contract comes into being at the time when and the place where the letter of acceptance is written, in other words, when the offeree has declared his acceptance.³⁷⁵ Another approach is embodied in the *reception theory*. In terms of this theory the contract comes into existence where and when the letter of acceptance is received, therefore even before it has been read. The decisive question is whether the letter has reached its destination.³⁷⁶

Against the background of these diverse approaches, the position of South African law regarding the issue of when (and where) a contract is concluded can be considered with reference to contract formation between parties at a distance from one another.

³⁷² Van der Merwe et al 51.

³⁷³ 1921 CPD 244.

³⁷⁴ *Cape Explosive Works Ltd v South African Oil & Fat Industries Ltd* 1921 CPD 266.

³⁷⁵ Joubert 45.

³⁷⁶ Joubert 45.

3.4.7.1 Contracts made by post

Subsequent to the decision in *Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd.*³⁷⁷ the courts have affirmed the view that the expedition theory is applicable to contracts which are created by means of the post.³⁷⁸ It is important to note that the expedition-theory is restricted to postal contracts and is not a rule generally applicable to contracts which are concluded *inter absentes*.³⁷⁹ Another crucial aspect is that the intention of the parties must always prevail.³⁸⁰ Therefore the rule does not apply if any other intention of the parties appears from their agreement³⁸¹ or if the offeror in his offer prescribes when the contract will come into existence.³⁸²

Another situation which has been considered is the case where the offer is made *inter praesentes* (verbally) but the acceptance takes place by means of the post. Here the postal rule does not apply. Acceptance by post may well have been contemplated, but it will not be assumed that the offeree is impliedly authorised to bring the contract into being at the moment he posts his letter of acceptance.³⁸³ It is of course a different matter if the parties have agreed that the acceptance shall be posted. A further example for non-application of the expedition theory is when the acceptance has been posted to the wrong address. An immaterial mistake in the address will be ignored, however.³⁸⁴ As in the former example, the information theory applies. The law has, moreover, modified the expedition theory in so far as it requires that the post must operate regularly, so the theory cannot be applied when the post is not operating at the time of acceptance.³⁸⁵

³⁷⁷ 1921 CPD 244.

³⁷⁸ *Kerguelen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487.

³⁷⁹ *Van der Merwe et al* 52.

³⁸⁰ *Kergeulen Sealing and Whaling Co Ltd v CIR* 1939 AD 503.

³⁸¹ *SA Yster en Staal Industriële Korporasie Bpk v Koschade* 1983 4 SA 837 (T).

³⁸² *Coloured Development Corp Ltd v Sahabodien* 1981 1 SA 868 (C).

³⁸³ *Bal v Van Staden* 1902 TS 128 135-6 142; *Smeiman v Volkorsz* 1954 4 SA 170 (C).

³⁸⁴ *Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* 1959 3 SA 208 (SR).

³⁸⁵ *Bal v Van Staden* 1902 TS 128 136-7 145.

Another very important question arises when an offeree withdraws his acceptance by a faster means of communication after having posted it. The matter has not been finally settled, but has been raised peripherally.

In *A to Z Bazaars (Pty) Ltd v Minister of Agriculture*³⁸⁶ such a telegram was held to be ineffective. The Appellate Division³⁸⁷ decided the case on other grounds, but Jansen JA doubted whether the rule that posting the letter brings the contract into existence should necessarily preclude the possibility of neutralisation of a posted acceptance before its receipt by the offeror.³⁸⁸

This approach seems reasonable when one considers the case of an hypothetical offeror who in good faith relies on a telegraphed withdrawal and believing that the offeree does not wish to enter into a contract, sells the goods in question to somebody else. The offeree then could then, in principle, change his mind and argue that his withdrawal was ineffective in law, with negative consequences for the offeror.³⁸⁹

3.4.7.2 Contracts made by telephone

In 1935, South African law was required to consider for the first time which rule has to be applied to contracts made by telephone. The court preferred the expedition theory and Greenberg J stated:

“In my opinion, when a person makes an offer over the telephone he authorises the use of this instrument for an acceptance, and as soon as the acceptance is uttered into the telephone, whether he hears it or not, there is an acceptance.”³⁹⁰

³⁸⁶ 1974 4 SA 392 (C).

³⁸⁷ *A to Bazaars (Pty) Ltd v Minister of Agriculture* 1975 3 SA 468 (A).

³⁸⁸ Jansen JA stated: “...nor is it at all clear that the principle [expedition theory], mainly conceived for the protection of the offeree, should necessarily preclude the possibility of neutralisation of a posted acceptance before its receipt by the offeror.”

³⁸⁹ Christie 84.

³⁹⁰ *Wolmer v Rees* 1935 TPD 319.

Although other considerations raised by the court do contain a measure of truth,³⁹¹ this statement is unpersuasive.

It takes no account of the fundamental importance of agreement in the conclusion of contract. It also seems quite illogical that – whether the parties are in one another’s physical presence or otherwise – the declaration should not have to be received, ie heard, in order to be accepted and thus agreement established.³⁹² However, after a period of some uncertainty, the Eastern Cape Provincial Division held in 1965 that the information theory has to be applied because in cases of contracts made by telephone the parties are in the same position as when they are *inter praesentes*. The matter was finally settled in the case of *S v Henckert*,³⁹³ where the view point of the Eastern Cape Provincial Division was confirmed.

3.4.7.3 Contracts made by electronic means of communication

The Electronic Communications Act 25 of 2002 (the ECT act) became law in August 2002, finally establishing a formal structure to define, develop, regulate and govern electronic-commerce in South Africa. Part 2 of the act provides the default situation where parties have not agreed amongst themselves what term will govern the formation of contracts electronically.³⁹⁴ In this regard, the act follows the reception theory, in that an acceptance of an offer by electronic means will be deemed valid once it is received in the computer system of the offeror.³⁹⁵

³⁹¹ Greenberg J stating: “...It seems to me it would be importing a dangerous doctrine if one held that the offeror could say afterwards ‘It may be that you accepted my offer and did so in an audible tone, but I happened to be thinking of something else and I did not hear you, and therefore I am not bound...’ From my point of view this reasoning concerns merely the question of proof and evidence, rather than the issue of when a contract is concluded.

³⁹² Christie 87.

³⁹³ 1981 3 SA 445 (A) 451 B.

³⁹⁴ Section 21.

³⁹⁵ Section 22(2).

3.5 Interpretation of contract

In order to determine the contents of a contract and the extent of liability thereunder, it is necessary to interpret the declarations that embody it. The theoretical approach underpinning the interpretation of contracts is that the intention of the parties has to be determined.³⁹⁶ South African law provides a great many rules of interpretation, which principally reflect an objective and linguistic approach to revealing the intended meaning of contracts. Although the rules allow the courts some flexibility in that the written provisions of a contract may be interpreted within the context in which they came to exist, it is debatable whether South African Law in practice reflects the supposedly subjective orientation of the interpretative exercise.

3.5.1 The technique of interpretation – content and context.

In interpreting a contract the court inquires into the common intention of the contractants as it appears from the wording agreed to by both parties. The written document, if it speaks with sufficient clarity, is presumed to express their common intention.³⁹⁷ The first step in construing a contract is therefore to determine and adopt the ordinary grammatical meaning of the words used by the contractants, unless this would result in some absurdity, repugnancy or inconsistency with the rest of the contract.³⁹⁸

Another principle is that the words must not be construed in isolation, but in the context of the entire contract.³⁹⁹

It is difficult to precisely determine the scope of contractual context. To begin with, it is clear that the context should include the contract as a whole.⁴⁰⁰ This, in turn has been defined, in contrast to statutory interpretation, as including even marginal notes.

³⁹⁶ Joubert 59.

³⁹⁷ Total South Africa (Pty) Ltd v Bekker 1992 1 SA 617 (A).

³⁹⁸ Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 1 SA 641 (A); Coopers & Lybrand v Byrant 1995 3 SA 761 (A).

³⁹⁹ List v Jungers 1979 3 SA 106 (A); OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd 1993 3 SA 471 (A).

⁴⁰⁰ List v Jungers 1979 3 SA 106 (A).

at least insofar as these notes are taken to represent the common intention of the parties.⁴⁰¹ Analogously, in cases where a printed contract has been added to in any way by written words, the two aspects must be reconciled as far as possible.⁴⁰² Where attempts to this effect fail, however, the written words will be held to prevail (regardless of chronology).⁴⁰³ The deletion of words in advance of agreement will be respected, so that they must be ignored, and no inference drawn from their deletion.⁴⁰⁴

A fundamental principle of statutory interpretation which has been applied in the contractual context is that primacy should be afforded to the intended effect of the agreement, over and above any strictly semantic interpretation which may present itself.⁴⁰⁵ This principle has been concisely stated (in its original context) by Schreiner JA in *Jaga v Dönges*:

“... ‘the context’, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often more important is the matter of the statute, its apparent scope and purpose, and within limits, its background.”

The ordinary grammatical meaning of the words employed will not be adopted by the court if the common intention of the contractants was to use the words in some special or technical sense. This common intention may appear from the context of the contract itself⁴⁰⁶ or may be proved by evidence.⁴⁰⁷

Evidence of an identificatory nature to apply the contract to the facts is admissible,⁴⁰⁸ but this principle should not be extended to permit extrinsic evidence to be led to

⁴⁰¹ *Parkinson v Matthewes and Drysdale* 1930 WLD 58; *Bekker v Western Province Sports Club (Inc)* 1972 SA 803 (3) 818 (D).

⁴⁰² *Badenhorst v Van Rensburg* 1985 2 SA 321 (T).

⁴⁰³ *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 1 SA 7 (A).

⁴⁰⁴ *Pritchard Properties (Pty) Ltd v Koulis* 1986 2 SA 1 (A).

⁴⁰⁵ Lewis “Interpretation of Contracts” *Southern Cross* 210 211; *Christie* 241 242.

⁴⁰⁶ *List v Jungers* 1979 3 SA 106 (A).

⁴⁰⁷ *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317.

⁴⁰⁸ *Le Riche v Hamman* 1946 AD 648; *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A).

show that the application of the unambiguous wording of the contract would result in an absurdity that is not apparent from the contract itself.⁴⁰⁹ This seems to me to be a fine distinction, which might not be easily made in practice.

It may happen that sufficient certainty about the meaning of the contract cannot be achieved by the method described above. To resolve such problems South African law permits recourse to evidence of the surrounding circumstances (ie notions that were probably in the minds of the parties when they formed the contract). This can include evidence of previous negotiations and correspondence between the contractants and even subsequent conduct by the parties showing the sense in which they acted on the document, but not direct evidence of their own intentions.⁴¹⁰ When even an inquiry regarding the surrounding circumstances does not help, recourse may be had to what passed between the parties on the subject of the contract.⁴¹¹ This subtle balancing of the need to interpret contracts in the context in which they were formed with the need to respect the integrity of the written document, is reflects the adherence of South African law to the parol evidence rule.

3.5.1.1 The parol evidence rule

This rule is an outstanding example of how South African law has been influenced by English law⁴¹² and it has been the subject of some academic controversies.⁴¹³ It operates to exclude parol evidence, that is evidence from sources extrinsic to the contractual document which runs counter to its terms. The rule has its foundations in public policy, on the basis that certainty would be promoted and litigation shortened by confining evidential matters to the four corners of the contractual document.

⁴⁰⁹ *Trollip v Jordaan* 1961 1 SA 238 (A).

⁴¹⁰ *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A); *Total South Africa (Pty) Ltd v Bekker* 1992 1 SA 617 (A).

⁴¹¹ *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A).

⁴¹² Lewis "Interpretation of Contracts" *Southern Cross* 196-198.

⁴¹³ Lewis "Interpretation of Contracts" *Southern Cross* 197-198; Joubert 160-161.

The rule first entered the jurisdiction of South Africa at the highest judicial level by means of a 1914 decision of the Appellate Division, in *Lowrey v Stedman*:⁴¹⁴

“The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added to or varied by oral evidence.”

In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd.*⁴¹⁵ Watermeyer JA declared:

“Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.”

It is important to note that this rule applies where a document (or documents) is taken to be intended to comprise the whole contract. The notion of integration, which according to some forms the basis of the rule, is defined in the following terms by Wigmore:

“This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical significance of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: When a jural act is embodied in a single memorial, all other utterances of the

⁴¹⁴ 1914 AD 532.

⁴¹⁵ 1941 AD 43.

parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."⁴¹⁶

In the case of an integrated document, then, the document (or documents) will be accepted as the sole evidence of the terms of the contract.

The inherent danger of an exclusive reliance on parol evidence is expressed by Corbett JA in the leading case of *Johnston v Leal*,⁴¹⁷ in a ruling which does something to help distinguish between relevant contextual evidence and extrinsic evidence:

"It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. ...To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered."⁴¹⁸

The rule is of a controversial nature, as has been indicated, and it has been discussed whether it belongs to substantive law or the law of evidence.⁴¹⁹ However, the rule exists and is part of South African case law.⁴²⁰

3.5.1.2 Resolving linguistic ambiguity

If the grammatical and ordinary meaning of the words does not lead the court to an interpretation of the contract, reference should be made to whichever of the classical rules of interpretation best fits the problem.⁴²¹

⁴¹⁶ Wigmore Evidence vol 9 Sec 2425; cf *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A); *Venter v Birchholtz* 1972 1 SA 276 (A).

⁴¹⁷ 1980 3 SA 927 (A).

⁴¹⁸ *Johnston v Leal* 1980 2 SA 927 (A).

⁴¹⁹ Hoffmann/ Zeffert *The South African Law of Evidence* 293.

⁴²⁰ Lewis "Interpretation of Contracts" *Southern Cross* 198.

Change of language

A deliberate change of expression will *prima facie* be taken to signify a change in the intended meaning.⁴²²

Presumption against tautology or superfluity

This rule introduces the presumption that no word is tautological or superfluous, but that every part of a contract was intended to have some effect.⁴²³

Restriction of general words (*eiusdem generis, noscitur a sociis*)

In cases in which an examination of the context makes it clear that the parties intended that certain words should carry a special rather than their general meaning, effect will be given to the special meaning intended.⁴²⁴ However, where no special meaning was attached to a word, effect will be given to the full extent of its general meaning, even insofar as this entails aspects of which the parties were unaware.⁴²⁵

Generalis specialibus non derogant

Special provisions will be accorded greater importance than general ones.⁴²⁶

Expressio unius est exclusio alterius

It may be presumed that the express mention of one item indicates an intention to exclude other similar items which are not mentioned. This presumption, however, may be rebutted, and the courts are not hostile to pleas that a particular item was, in fact, mentioned *ex abundante cautela* (without excluding others).⁴²⁷

⁴²¹ Zimmermann & Visser . - Lewis - 198 –200.

⁴²² Cradock v Estate Cradock 1949 3 SA 1120 (N).

⁴²³ Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd 1984 1 SA 61 (A); But notice: Commercial Union Assurance Co of South Africa Ltd v Kwazulu Finance and Investment Corp. 1995 3 SA 751 (A).

⁴²⁴ Grobbelaar v Van de Vyver 1954 1 SA 248 (A); Ovcon (Pty) Ltd v Administrator, Natal 1991 4 SA 71 (D).

⁴²⁵ Lanfear v Du Toit 1943 AD 59.

⁴²⁶ James North (Zimbabwe) (Pv) Ltd v Mattinson 1990 2 SA 228 (Z).

⁴²⁷ Florida Road Shopping Centre (Pty) Ltd v Caine 1968 4 SA 587 (N).

If analysis of the language of the contract under the preceding guidelines cannot resolve the ambiguity, the contract is considered void due to vagueness.⁴²⁸ This extreme measure will, however, often be avoided in the light of equitable intervention.

3.5.1.3 Equitable interpretation

While it is trite that a court has no equitable jurisdiction to improve an unambiguous contract,⁴²⁹ equitable considerations do play a role in the process of interpretation. A construction that does not give one party an unfair or unreasonable advantage over the other will be adopted if the contract is truly ambiguous. In *Rand Rietfontein Estates Ltd v Cohn*⁴³⁰ De Wet JA quoted from Wessels:

“The Court will lean to that interpretation which will put an equitable construction upon the contract and will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.”⁴³¹

Equity will also prefer a convenient and effective interpretation, as the following rules spell out:

Avoidance of inconvenience

The argument *ab inconvenienti* applies to cases of ambiguity and entails that the construction that will lead to the least inconvenience will be preferred.

⁴²⁸ *Levenstein v Levenstein* 1955 3 SA 615 (SR).

⁴²⁹ *Van Rensburg v Straughan* 1914 AD 317; *De Haviland Estates (Pty) Ltd v Mc Master* 1969 2 SA 312 (A); *South African Warehousing Services (Pty) Ltd v South British Insurance Co Ltd* 1971 3 SA 10 (A).

⁴³⁰ 1937 AD 317.

⁴³¹ *Less v Bornstein* 1948 4 SA 333 (C).

Thus, for example, in the case of *Deutsche Evangelische Kirche zu Pretoria v Hoepner*.⁴³² the ambiguities of the church's constitution were interpreted with a view to avoiding potentially costly delay and uncertainty.

Ut res magis valeat quam pereat

This rule favours an interpretation which renders a contract fully efficacious to one that renders it abortive.⁴³³

Construction *contra proferentem* or *contra stipulatorem*

This general rule is applied in cases of otherwise unresolvable ambiguity, so that any contract will be interpreted against the person who drew it up and was thus responsible for the ambiguity (*contra proferentem*).⁴³⁴ A related rule is that an ambiguity will be resolved against the promisee so as to impose the lighter burden on the promisor (*contra stipulatorem*).⁴³⁵ In a case of conflict between these rules of final resort, the former should prevail.⁴³⁶

3.6 Defects of consent

As we have seen,⁴³⁷ valid consent implies that the will of the person, as expressed during the formation of an agreement is both a true reflection of that person's intentions, and that those intentions were not formed in circumstances which might invalidate them.

Where a person's will has been formed in consequence of a misapprehension, whether self-induced or as a result of external influences, it may in particular circumstances be

⁴³² *Deutsche Evangelische Kirche zu Pretoria v Hoepner* 1911 TPD 218.

⁴³³ *Kotze v Frenkel & Co* 1929 AD 418; *Du Plessis v Nel* 1952 1 SA 513 (A).

⁴³⁴ *Jonnes v Anglo African Shipping Co (1936) Ltd* 1972 2 SA 827 (A).

⁴³⁵ *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 3 SA 99 (A).

⁴³⁶ *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 3 SA 99 (A).

⁴³⁷ See above: 2.3.

held to be legally defective. The law deals with this possibility under several categories.

We will firstly examine the position under South African law where a party misapprehends a material circumstance during negotiations and declares his consent to the contract on the basis of an unfounded assumption.

Also to be considered is the position where one party declares his assents, but this is obtained in an improper way, for example by means of duress. The approach of South African law to such situations, and the extent to which the solutions are related to questions of agreement, eg whether the contract is binding but voidable, or wholly void for lack of agreement, must be ascertained. Also to be investigated is the extent to which solutions are arrived at independently of the notion of agreement, for example on the basis of a lack of certainty or good faith.

The primary focus of the investigation concerns the effect of mistake on the agreement which constitutes the contract. It will be seen that outcomes differ according to the kind of mistake that occurs, and also depending on whether one or other of the parties must take responsibility for what has occurred.

What has to be established is how South African law defines mistake in the contractual context, and what juristic solutions it provides if the mistake is not imputable to the opposite contractant (or a third person). The investigation will finally consider the position that obtains when the relevant mistake is caused by somebody other than the mistaken party.

3.6.1 Mistake

The discussion in this study has proceeded on a distinction between “self induced” defects of will and those caused by “external factors”.⁴³⁸ This section focuses on the former category and its resolution by law.

South African cases make it clear that for a mistake to be legally relevant, it must concern a material aspect of contract and should, in addition, be reasonable (*justus*). In respect to materiality, South African law distinguishes between mistakes regarding the content or consequences of the contract and those relating only to the motive or reason which led a person to conclude a contract.

3.6.1.1 Material mistake

Material mistakes are those that relate to the consequences or content of the agreement as expressed in its material terms,⁴³⁹ and entails that the parties are in disagreement regarding the the constituent aspects of the consensus. Examples are any mistake with regard to an obligation or obligations under the contract, that is to say, in regard to a performance due under the agreement, mistakes in respect of the incidental terms thereof and the identity of the parties to the agreement.⁴⁴⁰

In contrast to material mistakes, which result in disagreement about the elements of contract, a mistake in motive has no bearing on the elements or consequences of the contract. Since it does not effect agreement, the contract remains valid.⁴⁴¹

In the example previously given,⁴⁴² it is beside the point that B’s girlfriend has a liking for gold. This circumstance merely relates to B’s motive for buying such a ring; it does not prevent agreement on the elements of the contract, and is therefore

⁴³⁸ See above: 2.3.1.

⁴³⁹ Logan v Beit (1890) 7 SC 197; National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 2 SA 473 (A); Diedericks v Minister of Lands 1964 1 SA 49 (N); Urban v Stead 1978 2 SA 713 (W); Papadopoulos v Trans-State Properties and Investments Ltd 1979 1 SA 682 (W); Du Toit v Atkinson’s Motors Bpk 1985 2 SA 893 (A).

⁴⁴⁰ Van der Merwe et al 16.

⁴⁴¹ Diedericks v Minister of Lands 1964 1 SA 49 (N).

⁴⁴² See above: 2.3.1.

irrelevant in a material sense. There is no mistake regarding the content or consequences of the contract. B is merely under the mistaken impression that his girlfriend likes gold or that she is faithful. But should B mistakenly believe that the agreement has been concluded subject to a term that his girlfriend likes gold or is faithful, the mistake would be material because it relates to a term which is supposedly part of the contract.⁴⁴³

Mistakes of law have historically constituted something of an anomaly in terms of the understanding of material mistake. Although such mistakes may certainly affect the consequences of an agreement, they have nevertheless traditionally been treated as insufficient to affect the consensus between the parties.⁴⁴⁴ When a party is mistaken regarding the legal aspects of the contract, his mistake is not considered material, according to the maxim *ignorantia juris neminem excusat*.⁴⁴⁵ Nowadays, however, in keeping with the theoretical basis of material mistake, no distinction should be drawn between mistakes of fact and law.⁴⁴⁶

Declarations are sometimes made without the declarer intending to be legally bound thereby. A classic example is that of an offer (or acceptance) in jest, where the party in question cannot be heard to claim that his declaration was in jest, although statements lacking in *animus contrahendi* may arise in other circumstances. But whether a contractual liability exists in spite of the absence of *animus contrahendi* and therefore consensus, depends on whether the other party knows or ought as a reasonable man to have known that *animus contrahendi* is lacking.⁴⁴⁷ This relates to

⁴⁴³ See Van der Merwe et al 17.

⁴⁴⁴ *Sampson v Union & Rhodesia Wholesale Ltd* (in liquidation) 1929 AD 468; *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 2 SA 102 (GW).

⁴⁴⁵ *Kimberley Share Exchange Co v Hampson* (1883) 1 HCG 340.

⁴⁴⁶ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A), which opens the way for equating mistakes of fact and law in general.

⁴⁴⁷ *Heatlie v Colonial Government* (1887) 5 SC 353; *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W).

the crucial aspect of the reasonableness of the mistake and will be discussed under the rubric *justus error*.⁴⁴⁸

3.6.1.2 The taxonomy of mistake

South African law tends to distinguish between unilateral, common and mutual mistake.

3.6.1.2.1 Unilateral mistake

A unilateral mistake exists where one of the parties misunderstands an aspect of the contract, whereas the other party is aware of the true state of affairs.

A, for example, knows the spoon which he is selling to B to be silver-plated, while B thinks it is made of solid silver. One might readily assume that the parties in such a case have not reached consensus and the contract should therefore be void or at least open to rescission. The position is not so simple, however.

The seller is only liable for the qualities which he has claimed the item in question has. This means that a mistake about a quality is often immaterial.⁴⁴⁹ It will be relevant only in cases where the purchaser believed the seller was giving a warranty regarding a certain quality, whereas the seller had no intention to do so.⁴⁵⁰

In *Maritz v Pratley*⁴⁵¹ the court came to the conclusion that there is a material unilateral mistake regarding an *essentiale negotium* if it concerns the identity of the thing sold. In this case, A wanted to sell a mirror, and B thought that the mirror was being sold together with a marble slab on which it stood at the auction hall. This was regarded by the court as a question of identity, rather than of the quality of the thing.

Where a unilateral mistake is adjudged to be material in a particular case, the outcome will be affected by a consideration of what a reasonable man would have understood

⁴⁴⁸ See below: 3.6.2.3.3.

⁴⁴⁹ *Trollip v Jordaan* 1961 1 SA 238 (A).

⁴⁵⁰ *Van der Merwe et al* 17 18.

⁴⁵¹ (1894) 11 SC 345.

under the circumstances – a consideration which is considered in more detail under *justus error*, below.⁴⁵² Where a mistaken party cannot show that his mistake to be reasonable, he may be held to the contract on the basis of quasi-mutual assent (reliance theory).

3.6.1.2.2 Common mistake

Common mistake exists where parties are in full agreement about the contract and its consequences, but are both labouring under the same mistake. The central issue is whether both parties would not have contracted if aware of the true state of affairs. A common mistake on a matter which did not affect the understanding of both parties has no effect on the validity of the contract.⁴⁵³

For example A and B think that the spoon which B is buying from A is made of solid silver, while it is actually silver-plated. If B's mistake is the result of his own conclusion regarding the substance, there is only a unilateral mistake in motive and the contract is still valid if A would have contracted in any event.⁴⁵⁴ Although there is wide-spread agreement that there is no contract where both parties labour under a mistake in motive,⁴⁵⁵ opinions differ on the theoretical explanation for this outcome. Apart from the notion that a mistake of this kind is in itself sufficient to vitiate the agreement, there are those who attempt to explain the consequence of common mistake in terms of initial impossibility.⁴⁵⁶ The prevailing view is that the agreement is abortive if in the circumstances the agreement was based on a common supposition constituting a material term of the contract.⁴⁵⁷

⁴⁵² See below: 3.6.2.3.3

⁴⁵³ Hillview Properties (Pty) Ltd v Strijdom 1978 1 SA 302 (T).

⁴⁵⁴ Joubert 57–60 78.

⁴⁵⁵ Dickinson Motors (Pty) Ltd v Oberholzer 1952 1 SA 443 (A). Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd 1978 1 SA 914 (A).

⁴⁵⁶ Such as a sale of *res extincta*.

⁴⁵⁷ Van Reenen Steel (Pty) Ltd v Smith 2002 4 SA 264 (SCA); Van der Merwe et al 19 20; Christie 380 381; Joubert . 78 79.

Even if this is not accepted, such mistake will certainly be material if it relates to a matter which was vital to the transaction, in the sense that if either of them had been aware of the true position the transaction would not have gone through.

3.6.1.2.3 Mutual mistake

A mutual mistake occurs when parties come to different but reasonable understandings of an ambiguous aspect of the contract, and are unwittingly at cross purposes, while believing themselves to be in agreement. This is sometimes referred to as mistake about *dissensus*. For example, A, the owner of both a stallion and a mare, offers to sell "my horse" to B. A is referring to his stallion, while B assumes he is referring to the mare. In this case, each party reasonably develops an understanding which is different from the understanding of the other. They have not actually achieved consensus, and so the contract is void.⁴⁵⁸

As mentioned, the issue of reasonableness is decisive with respect to the question of contractual liability in cases of disagreement. If one party's understanding of what was agreed was unreasonable, the party whose understanding was reasonable will be entitled to enforce his version of the contract on the basis of quasi mutual assent.⁴⁵⁹ However, if both parties are reasonable or both are unreasonable the contract must be held void *ab initio* for lack of true agreement.⁴⁶⁰

In relation to mistake reference is often made to further categories of romanistic origin. These assist in determining whether a mistake is material or not. One speaks about *error in corpore* if the parties are mistaken regarding the identity of the thing.⁴⁶¹ A mistake regarding the substance from which an article is made called *error in substantia*; this in turn is a special manifestation of the general concept of an error as to the quality of an article, *error in qualitate*. Here the parties are at one with regard

⁴⁵⁸ Allan v Sixteen Stirling Investments (Pty) Ltd 1974 4 SA 164 (D).

⁴⁵⁹ Van Ryn Wine and Spirit Co v Chandos Bar 1928 TPD 417.

⁴⁶⁰ Maritz v Pratley (1894) 11 SC 345; Dobbs v Verran 1923 EDL 177; Ocean Cargo Line Ltd v FR Waring (Pty) Ltd 1963 4 SA 641 (A).

⁴⁶¹ Maritz v Pratley (1894) 11 SC 345.

to the identity of the item, but not with regard to its quality.⁴⁶² *Error in negotio* refers to a mistake about the nature (type) of the contract entered into by the parties.⁴⁶³ Another kind of mistake is *error in persona* which means that one party is mistaken regarding the identity of the party with whom he is concluding the contract. This kind of mistake will prevent consensus only if the identity of the other person is of material importance to the contract.⁴⁶⁴

3.6.2 The treatment of disagreement

It is apparent from remarks already made that even in cases of material mistake, the mistaken party might nevertheless be contractually liable. The conclusion that a mistaken party will not invariably be entitled to rely on disagreement means that the will theory in its original form is no longer applied by South African courts.

An unqualified application of the will theory would mean that every material mistake would exclude contractual liability. Either party would be entitled to rely on the lack of consensus to avoid liability. This might be acceptable when both parties are aware of the mistake, but if one or both are unaware of it, unacceptable results might follow. In order to prevent the consistent application of the will theory from having unfair results in cases of disagreement which is not immediately evident, South African jurisprudence has considered alternative approaches to the basis of liability in such cases.

3.6.2.1 *Culpa in contrahendo* – a rejected approach

The doctrine of *culpa in contrahendo* acknowledges that no contract can arise where consensus is lacking owing to a mistake by one of the parties to an agreement. Unfair results are corrected by the recognition that where the mistaken party has suffered

⁴⁶² *Trollip v Jordaan* 1961 1 SA 238 (A).

⁴⁶³ *Standard Bank v Du Plooy, Standard Bank v Coetzee* (1899) 16 SC 161.

⁴⁶⁴ *Landsbergen v Van der Walt* 1972 2 SA 667 (R).

loss. he has a claim for delictual damages against the other. if the mistake has been caused by negligent or intentional conduct the of other party to the agreement.⁴⁶⁵

3.6.2.2 Estoppel

The doctrine of estoppel was adopted into South African law from English law.⁴⁶⁶ It essentially provides that where a person. the representor. conducts himself in such a way that another reasonably understands it to evince an intention to contract on a particular basis. the representor will be held to his ostensible intention if not to do so would lead to injustice.⁴⁶⁷

It has been pointed out that the doctrine of estoppel entails the enforcement of a quasi-contract in cases where intention and therefore consensus is lacking. The party falsely asserting an intention will be estopped from relying on his lack of intention where he himself has encouraged or tolerated reliance on it. so that the fiction of a contract is maintained between the parties.⁴⁶⁸

In cases of estoppel therefore. the reasonable expectation of the representee is enforced. although of course. the court cannot create a contract where no *consensus ad idem* was in fact reached between the parties.

As a doctrine having its basis in equity therefore. the effects of an application of estoppel will not extend to third parties. Additionally. and again as a result of the equitable roots of the doctrine. a heavy burden of proof is placed on the plaintiff. who will be required to prove all of the elements of estoppel by representation. including detrimental reliance.⁴⁶⁹

⁴⁶⁵ Van der Merwe et al 23.

⁴⁶⁶ *Connoek's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 2 SA 47 (T).

⁴⁶⁷ Van der Merwe et al 23.

⁴⁶⁸ Hutchison "Formation of Contract" *Southern Cross* 188; Van der Merwe et al 25.

⁴⁶⁹ Van der Merwe et al 27.

Thus although the doctrine has been expressly accepted by the Appellate Division as being an acceptable plea in the appropriate circumstances,⁴⁷⁰ it is not widely resorted to in practice.⁴⁷¹

3.6.2.3 Contractual liability on objective grounds

3.6.2.3.1 Declaration theory

Although South African case law contains a number of *dicta* supporting a more objective approach to the creation of contracts and dissensus,⁴⁷² it can hardly be said that the declaration theory⁴⁷³ as such is of real importance for the treatment of problems related to contractual liability.

3.6.2.3.2 Reliance theory

Instead, the South African courts have adopted the reliance theory as an alternative basis for a contract where there is no consensus.⁴⁷⁴ Two versions of the reliance theory may be identified, depending on whether the contract assertor is, in cases of disagreement, required to establish the elements of a contract on an objective basis, or whether, given that the existence of an objective contract is presumed in cases of hidden disagreement, the law requires the contract resiler to establish that he is not bound on an objective basis.

The first version entails a direct protection of reliance,⁴⁷⁵ and has its foundation in the English case *Smith v Hughes*.⁴⁷⁶ In such cases, the party who wishes to enforce a contract where the other party raises disagreement must prove two elements. He must

⁴⁷⁰ Van der Merwe et al 26.

⁴⁷¹ Van der Merwe et al 26.

⁴⁷² Hutchison "Formation of Contract" Southern Cross 183.

⁴⁷³ See above: 3.3.2.1.

⁴⁷⁴ *I Pieters & Company v Salomon* 1911 AD 121; *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A); *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 993, 995.

⁴⁷⁵ Van der Merwe "Die Duiwel, die Hof en die Wil van 'n Kontraktant" JC Noster 13 31.

⁴⁷⁶ (1871) LR 6 QB 597.

prove that the other party has created in his mind the belief or reliance that full consensus has been reached between them. Protection is afforded the defendant by virtue of the fact that the test here is objective, that is to say, it must be shown that a reasonable man under the circumstances would have understood the conduct of the defendant in the same way.⁴⁷⁷

The relevance of fault or prejudice on the part of the apparent promisor remains unresolved in the case law, and an issue of some controversy.⁴⁷⁸ There has not yet been a clear statement by the courts in this regard.⁴⁷⁹ This is true also of the question of whether reliance must be detrimental to the plaintiff.⁴⁸⁰

The second approach manifests itself in the *justus error* doctrine.⁴⁸¹ In cases where there is, ostensibly, objective agreement, a party who wishes to escape contractual liability must prove *justus error*. The mistaken party will be held to the contract on the basis of quasi-mutual assent, ie the reliance theory,⁴⁸² unless he can show that his mistake was reasonable (*justus error*).⁴⁸³ This will be assumed to be the case where the mistake is imputable to the contract assertor because he induced the mistake or was aware of it, or ought as a reasonable person to have been aware of it.⁴⁸⁴ Whether, if the mistake cannot be imputable to the contract assertor in any of these ways, the contract resiler may yet avoid liability by establishing that his mistake nevertheless was reasonable, is uncertain.⁴⁸⁵ The South African courts have developed some guidelines regarding the question of whether a unilateral mistake is reasonable or not. Thus a mistake is not reasonable if it was due the mistaken party's own fault, for

⁴⁷⁷ Van der Merwe et al 30-32.

⁴⁷⁸ Christie 28 29; Van der Merwe et al 30 31.

⁴⁷⁹ Mondorp Eiendomsagentskap (Edms) Bpk v Kemp & De Beer 1979 4 SA 74 (A); Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 1 SA 978 (A).

⁴⁸⁰ Van der Merwe et al 32; Christie 29 30.

⁴⁸¹ See below: 3.6.2.3.3.

⁴⁸² See above: 3.3.2.2.

⁴⁸³ See below: 3.6.2.3.3.

⁴⁸⁴ George v Fairmead (Pty) Ltd 1958 2 SA 465 (A); National and Overseas Distributors Corp (Pty) Ltd v Potato Board 1958 2 SA 473 (A); Sonap Petroleum SA (Pty) Ltd v Pappadogianis 1992 3 SA 234 (A).

⁴⁸⁵ National and Overseas Distributors Corp (Pty) Ltd v Potato Board 1958 2 SA 473 (A).

example where he has not carried out reasonably necessary inquiries before committing himself to the contract.⁴⁸⁶ Reasonableness has also been denied when the mistaken party did not read the contract before signing⁴⁸⁷ or carelessly misread one of the terms.⁴⁸⁸ The same applies to circumstances in which the mistaken party did not insist on having a contract in a language he could not understand explained to him⁴⁸⁹ or misinterpreted a clear and unambiguous contract.⁴⁹⁰

Through the doctrine of *justus error*, the reliance theory has become established as an explanation for an alternative basis for a contract when consensus is lacking but it is nevertheless equitable to hold a party to an impression of consent which he induced in another.⁴⁹¹

3.6.2.3.3 A unified approach

By demanding proof that the material mistake was also reasonable under the particular circumstances, the courts have limited the effect of dissensus on the existence of a contract. The final decision about the existence of a contract has become dependent on subjective as well as objective considerations. This is also the import of a direct recourse to induced reliance by means of the *Smith v Hughes* doctrine.

The fact that the direct reliance theory and *justus error* doctrine approach the same problem from opposite perspectives, leads to a certain degree of tension and uncertainty. In *Sonap Petroleum (SA) (Pty) v Pappadogianis*,⁴⁹² the Appellate Division reviewed the law relating to mistake in contract and attempted a reconciliation between these closely related approaches.

⁴⁸⁶ Diedericks v Minister of Lands 1964 1 SA 49 (N); Springvale Ltd v Edwards 1969 1 SA 464 (RA); Osman v Standard Bank National Credit Corp Ltd 1985 2 SA 378 (C).

⁴⁸⁷ Standard Credit Corp Ltd v Naicker 1987 2 SA 49 (N).

⁴⁸⁸ Patel v Le Clus (Pty) Ltd 1946 TPD 30.

⁴⁸⁹ Mathole v Mothe 1951 1 SA 256 (T).

⁴⁹⁰ Van Pletsen v Henning 1913 AD 82 89; Irwin v Davies 1937 CPD 442.

⁴⁹¹ Sonarep (SA) (Pty) Ltd v Pappadogianis 1992 3 SA 234 (A) 238-239.

⁴⁹² 1992 3 SA 234 (A).

Although South African law, as we have seen, is primarily interested in the objective manifestations of agreement,⁴⁹³ it may fruitfully pay heed to more subjective considerations in cases of alleged dissensus, as this important case demonstrates. Harms AJA stated that, in such cases, the reliance theory had to be resorted to in order to determine whether or not a contract has come into existence.

In a classical application of the theory, he deemed it unnecessary to determine whether the mistaken party had been justified in his mistake, and he did not favour the application of estoppel either. On the facts of the case, it seemed clear to him that the contract assertor had had constructive notice of the mistake, which he had chosen to ignore to his own advantage. Therefore there had never been any meaningful consensus, and the agreement in question was void *ab initio*.

The issue of mistake now appears to be more easily resolved: one merely needs to ask whether or not the parties had reached consensus; and, if not, whether a reasonable belief that consensus had been achieved had been induced in the mind of one party by the other. The foundation for liability is thus extended from consensus to reasonable reliance thereon, and an alleged contract will be *void ab initio* where neither is found to exist.⁴⁹⁴

3.6.3 Consensus obtained by improper means

As has been shown above, the requirement of an actual or apparent meeting of the minds of contractants renders the intention of the parties to a contract of paramount importance.⁴⁹⁵

A prospective contractant might declare a particular intention in consequence of the most diverse reasons: mostly he will do so in reaction to the particular circumstances. In all probability, he will act on certain expectations regarding the meaning of the words exchanged as well as on his expectations in relation to the particular subject

⁴⁹³ See above: 3.5.

⁴⁹⁴ Hutchison "Formation of Contract" 193.

⁴⁹⁵ See above: 3.3.1.1.2.

matter of the envisaged contract. It might happen that in a particular case the intention or the expectation of a legal subject does not correspond with the actual circumstances of the case. This general scenario was considered in the previous section.

As we have seen, South African law will not consider as legally relevant every factor that might conceivably influence an expression of will.⁴⁹⁶ Consideration of subjective factors will be counterbalanced by the concern that – in keeping with the principles of good faith and public interest – serious expressions of will must be adhered to and given their intended legal consequences. On the other hand, expressions of will which are obtained by means of improper pressure should obviously not be given legal effect, due regard being given to the principles of good faith. Thus in order for a contract to be effectively constituted by agreement, that agreement must be a free and independent expression of the will of both parties.⁴⁹⁷ Of present relevance are situations where agreement is vitiated because a party was, in the formation of his will, influenced in a way which the law holds to be improper. Situations of this kind can be approached in one of two ways.

One approach would deny the existence of the juristic act altogether, and treat the contract as absolutely void *ab initio*.⁴⁹⁸ Although support for such a solution is to be found in common-law authorities, it has not been approved by the South African courts.⁴⁹⁹

The more popular view is that the contract should be viewed as merely voidable, so that effect may be given to it unless the party whose consensus was obtained improperly elects to rescind it.⁵⁰⁰ Various circumstances will render an agreement defective, and hence voidable, in this sense.

⁴⁹⁶ See above: 3.6.1.

⁴⁹⁷ Van der Merwe et al 71.

⁴⁹⁸ Van der Merwe et al 71.

⁴⁹⁹ Lubbe “Voidable Contracts” Southern Cross 262.

⁵⁰⁰ Christie 331.

3.6.3.1 Misrepresentation

Misrepresentation is usually divided into three classes.⁵⁰¹ These will first be outlined, and the qualifications applicable to them discussed, before we return to the available remedies.

3.6.3.1.1 Classes and qualifications

Misrepresentation is divided into simple, fraudulent and negligent misrepresentation, and is qualified by requirements of materiality and causation.

3.6.3.1.1.1 Simple misrepresentation

Misrepresentation refers to statements made before a contract is made, which do not form part of the contract. Because this is so, an action for breach will not succeed should the statement turn out to be unfounded. Nevertheless, there are statements which are distinguished from mere puffs or commendations (which are legally irrelevant) by being so seriously made as to invite reliance on them, which are covered under the category of misrepresentation.⁵⁰²

Misrepresentations are false statements of past or present fact, made by one party to another during the negotiations preceeding agreement.⁵⁰³ Mere declarations of opinion which prove unfounded are said to be beyond the scope of misrepresentation, irrespective of whether they consist of opinions on questions of law⁵⁰⁴ or fact,⁵⁰⁵ or whether they refer to the past, present or future.⁵⁰⁶ This rule is, however, qualified in the case of fraudulent conduct, so that where a party fraudulently misrepresents his opinion on any matter with a view to encouraging the other to enter the contract, and

⁵⁰¹ Burchell "Honest Misrepresentation and Damages" (1950) 67 SALJ 121.

⁵⁰² *Small v Smith* 1954 3 SA 434 (SWA); *Mazza v Jones* 1973 2 SA 740 (RA) ("puffing in reverse" by stating one cannot afford the price asked).

⁵⁰³ *Feinstein v Niggli* 1981 2 SA 684 (A).

⁵⁰⁴ *Sampson v Union and Rhodesia Wholesale Ltd* 1929 AD 468.

⁵⁰⁵ *Lamb v Walters* 1926 AD 358.

⁵⁰⁶ *Feinstein v Niggli* 198 2 SA 684 (A).

where the other does in fact rely on the false statement, a misrepresentation vitiating the agreement will be held to have occurred.⁵⁰⁷

The doctrine of rescission for misrepresentation is premised on a duty of good faith, since the law in this regard recognises that misrepresentation may be implied, and may even be made by silence or an omission to disclose information.⁵⁰⁸ On the other hand, the law stops short of implying a general rule that all material facts must be disclosed, so that any non-disclosure might amount to a misrepresentation by silence.⁵⁰⁹ Public policy considerations continue to allow a party to make a bargain to his own best advantage. A misrepresentation by silence will occur where only part of the truth has been told and the omission of the remainder causes a misleading impression⁵¹⁰ or where the facts have changed materially since a true representation was made.⁵¹¹ Apart from certain instances where a duty to disclose is recognised,⁵¹² a legal duty to disclose a material fact might arise in view of the circumstances of a particular case.⁵¹³ Despite the duty generally imposed on any party signing contractual documents to look to his own interests, someone who is aware of the fact that the other is unlikely to read a document which contains unexpected or particularly onerous terms may find the contract vitiated by misrepresentation by silence.⁵¹⁴ In such circumstances also there is a legal duty to disclose and a failure to do so constitutes a misrepresentation.

3.6.3.1.1.2 Fraudulent misrepresentation

⁵⁰⁷ Orkin Bros Ltd v Bell 1921 TPD 92.

⁵⁰⁸ Speight v Glass 19611 SA 778 (D); Novick v Comair Holdings Ltd 1979 2 SA 116 (W).

⁵⁰⁹ Novick v Comair Holdings Ltd 1979 2 SA 116 (W).

⁵¹⁰ Marais v Edlman 1934 CPD 212.

⁵¹¹ Cloete v Smithfield Hotel (Pty) Ltd 1955 2 SA 622 (O).

⁵¹² A seller for instance is under a duty to disclose known defects, and a prospective insured must disclose circumstances material to the risk undertaken by the insurer: see Van der Merwe et al 78-79.

⁵¹³ Dibley v Furter 1951 4 SA 73 (C).

⁵¹⁴ Kempston Hire (Pty) Ltd v Snyman 1988 4 SA 465 (T).

A fraudulent misrepresentation is one made without an honest belief in its truth.⁵¹⁵

Lord Herschell stated in *Derry v Peek*:⁵¹⁶

“Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth.”

This view was adopted in *R v Myers*⁵¹⁷ and it can be taken as the accepted view under South African law.

Thus, absolute knowledge on the part of the misrepresenter that the misrepresentation is not honest is unnecessary, if it results from fraudulent abuse of ignorance.⁵¹⁸ However, negligence while making inquiries or unreasonableness in drawing conclusion from facts, irrespective of how gross that negligence or unreasonableness may be, cannot amount to the absence of honest belief.⁵¹⁹

Fraud may be constituted by silence in situations where a party has knowledge or constructive notice of material facts, and has actively concealed those facts with a view to inducing another party to enter a contract based on a material misapprehension.⁵²⁰ Silence will also be deemed fraudulent in situations where the silent party is aware that the other party is unaware of material facts,⁵²¹ or where a duty of care is implied by virtue of the fact that the other party is reliant on him for

⁵¹⁵ *Hamman v Moolman* 1968 4 SA 340 (A).

⁵¹⁶ (1889) 14 AC 337 (HL) 374.

⁵¹⁷ 1948 1 SA 375 (A).

⁵¹⁸ *R v Myers* 1948 1 SA 375 (A).

⁵¹⁹ See below: 3.6.3.1.1.3.

⁵²⁰ *R v Myers* 1948 1 SA 375 (A); *Dibley v Furter* 1951 4 SA 73 (C).

⁵²¹ *Van der Merwe v Meades* 1991 2 SA 1 (A).

disclosure of certain material facts.⁵²² Similarly, telling part of the truth while remaining silent with regard to related material facts will also amount to fraud.⁵²³

3.6.3.1.1.3 Negligent Misrepresentation

A further type of misrepresentation is that attended by negligence on the part of the representor. The representor may honestly believe his statement to be correct (if he does not, one is dealing with fraudulent misrepresentation), but the decisive question in such a situation is whether his honest belief was negligent in the circumstances.

In *R v Myers*,⁵²⁴ Greenberg JA underlined the fact that the element of honest belief distinguishes negligence from fraud, a distinction which can be difficult to draw in some cases:

“It appears to me that negligence in making enquiries..... whether such negligence....be gross or of lesser degree, can never [itself] amount to an absence of honest belief.”

Thus, where there is a shadow of doubt, leading to even the most half-hearted enquiries, the requirements for honest belief set out in *Derry v Peek*⁵²⁵ will not have been met.

Greenberg JA further referred to the dictum of Innes CJ in *R v Nkosi*⁵²⁶ that:

“Dolus and culpa (in the sense of negligence) are distinct conceptions, underlying distinct fields of legal liability. They can never be identical: for the one signifies intention, and the other connotes an absence of intent. No doubt

⁵²² *Meskin v Anglo-American Corp of SA Ltd* 1968 4 SA 793 (W); *Orban v Stead* 1978 2 SA 713 (W).

⁵²³ *Marais v Edlman* 1934 CPD 212.

⁵²⁴ 1948 1 SA 375 (AD) 383.

⁵²⁵ 14 AC 337.

⁵²⁶ 1928 AD 488 489.

the law sometimes regards gross negligence as equivalent to fraud – notably in certain cases involving civil liability.”

3.6.3.1.1.4 The misrepresentation must be material

A misrepresentation must, under South African law, be material in order to be of legal significance. In other words it is not sufficient that the misrepresentation is of a merely incidental or unimportant nature, it must be of such a kind as would probably have induced a reasonable person to conclude the contract.⁵²⁷

In this context, the misrepresentator must take his victim as he finds him, except that a representee who regards an unimportant misrepresentation as more material than it would be treated by a reasonable man in his position, is not entitled to redress.⁵²⁸

The objective qualification is waived in the case of fraudulent misrepresentation, in which case the misrepresentation does not have to be one that would have misled a reasonable man, but is merely required to have misled the particular party in question.⁵²⁹

3.6.3.1.1.5 The misrepresentation must induce the contract

A key factor in identifying relevant representation is the question of causation, ie whether the representation induced a party to enter into the contract, when he would otherwise not have done so.⁵³⁰

The crucial question of whether the misrepresentation actually induced the representee to enter the contract is established by an examination of the facts and circumstances of each case.⁵³¹

⁵²⁷ Service v Pondart-Diana 1964 3 SA 277 (D).

⁵²⁸ Forbes v Behr & Co (1896) 13 SC 304 311; Woodstock, Claremont, Mowbray and Rondebosch Councils v Smith (1909) 26 SC 681.

⁵²⁹ Otto v Heymans 1971 4 SA 148 (T).

⁵³⁰ Roorda v Cohn 1903 TH 279 283; Josephi v Parkes 1906 EDC 213; Khan v Naidoo 1989 3 SA 724 (N).

⁵³¹ Schultz v Myerson 1933 WLD 199.

It will not become irrelevant by virtue merely of the fact that other factors were influential also.⁵³² but it will become immaterial where it can be proven that the misrepresentee was, in fact, aware of the misrepresentation.⁵³³ This remains true in cases of agency, but not where there was fraudulent collusion between the party perpetrating misrepresentation and the agent of the misrepresentee.⁵³⁴

Another important rule is that the representee is entitled to rely on a misrepresentation without inquiring as to its correctness, even if this would be a simple procedure (since a misrepresenter must take his victim as he finds him, as we have seen).⁵³⁵ The only exception to this principle operates *contra proferentem*, and is applicable to exclusion clauses stating that there will not be a right to cancel on grounds of misrepresentation.

A misrepresentation made by a third party will not qualify for the remedies available in the various circumstances listed thus far. The principle in operation is that an innocent party should not be allowed to suffer, nor a guilty party benefit, as a result of misrepresentation. This will not usually be the case in the case of misrepresentation by a third party, where none of the parties to the contract are implicated.

The rule was stated as follows by Watermeyer J in *Karabus Motors (1959) Ltd v Van Eck*⁵³⁶

“It is a general rule of our law that if the fraud that induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties.”

⁵³² *Symons and Moses v Davies* 1911 NPD 69.

⁵³³ *Poole and McLennan v Nourse* 1918 AD 404 418-9.

⁵³⁴ *Simon v Equitable Marine and Fire Insurance Co Ltd* (1892) 9 SC 455.

⁵³⁵ *Sampson v Union and Rhodesia Wholesale Ltd* 1929 AD 468; *Christie* 329.

⁵³⁶ 1962 1 SA 451 (C).

3.6.3.1.2 Remedies

A misrepresentation which induces a contract might affect the transaction either by rendering it void or – more likely in South African law – voidable. Either case may allow damages.

3.6.3.1.2.1 Nullity of the transaction

Where the misrepresentation induces in the mind of the representee such a fundamental error that the contract into which he appears to have entered is not in fact the transaction he wanted, the misrepresentation affects his consent absolutely and the resultant disagreement excludes the possibility of a contract in terms of the will theory.⁵³⁷ Subject only to the possible application of the objective reliance theory, the representee will be entitled to escape liability under the transaction.

3.6.3.1.2.2 The right to rescind

A second possibility is that the misrepresentation might merely make the contract voidable at the instance of the representee. However, it does not seem to be very clear whether an aggrieved party may always rescind the contract. In principle, as we have seen, the requirement for rescission is that the misrepresentation in fact induced the victim to enter a contract which he would not otherwise have concluded.⁵³⁸

This criterion, however, is virtually impossible to establish in a practical situation. The better view is that a right to rescind should be available in all cases where the elements outlined above are established. This is the position in case law, where the notion that rescission be restricted to cases where the misrepresentation caused the contract as a whole is not applied.

⁵³⁷ *Preller v Jordaan* 1956 1 SA 483 (A); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Maresky v Morkel* 1994 1 SA 249 (C).

⁵³⁸ *Van der Merwe et al* 101 102.

Since, as we have seen, material misrepresentation need not be fraudulent,⁵³⁹ even negligent and simple misrepresentation ought to afford such a right.⁵⁴⁰

3.6.3.1.2.1.1 Exercising the right to rescind

If the fact of misrepresentation becomes known to the misrepresentee, he must elect within a reasonable time whether to rescind or stand by the contract, and of course he cannot both approbate and reprobate.⁵⁴¹ A reasonable time in this context means no more than that the misrepresentee is not required to make an immediate election. Even if he decides only after a reasonable time has elapsed, he will not be debarred from making his election, since delay, according to South African law, is not *per se* a defence to proceeding for rescission.⁵⁴² An election to affirm the contract, whether expressly or by conduct, results in the loss of the power to rescind,⁵⁴³ and the right to do so is also restricted if third parties have already acquired rights in good faith as a result of the contract.⁵⁴⁴

According to South African law, a rescission takes effect from the time the representee informs the representor that he has rescinded, or serves a summons claiming rescission.⁵⁴⁵

3.6.3.1.2.2 Damages

Apart from rescission, a representee has always been entitled to claim delictual damages for fraudulent misrepresentation irrespective of whether he elects to rescind the contract or stand by it.⁵⁴⁶

⁵³⁹ Van der Merwe et al 102 103.

⁵⁴⁰ Kerr 158.

⁵⁴¹ Bowditch v Peel and Magill 1921 AD 561; Frost v Leslie 1923 AD 276.

⁵⁴² Atlas Diamond Mining Co (Bultfontein Mine) Ltd v Poole (1882) 1 HCG 20 32 35; Ambrose and Dunning v Dalton 1921 SR 116; Penefather v Swaffield 1926 EDL 253.

⁵⁴³ Feinstein v Niggli 1981 2 SA 684 (A).

⁵⁴⁴ Penefather v Swaffield 1926 EDL 256; Toffee v Prudential Building Society 1944 WLD 186.

⁵⁴⁵ Lebedina v Schlechter and Haskell 1931 WLD 247.

⁵⁴⁶ Claassens v Pretorius 1950 1 SA 37 (O).

Since such damages are delictual rather than contractual in nature,⁵⁴⁷ they may also be claimed against a third party whose misrepresentation induced the mistaken party to enter a contract.⁵⁴⁸ Damages will be available to neither party in cases of mutual fraud.⁵⁴⁹

The question whether an action for delictual damages is available for negligent misrepresentation inducing a contract – long a controversial point under South African law,⁵⁵⁰ was finally answered in the affirmative in *Bayer South Africa (Pty) Ltd v Frost*.⁵⁵¹

3.6.3.2 Duress

“Duress is a threat of harm or intimidation which engenders fear in a person, which causes him to conclude a contract.”⁵⁵² It should be clear that the consent of the victim in such cases is obtained in an improper manner, provided certain criteria have been satisfied. Where the threat is wrongful, effective and imminent, and is directed at relevant parties, the victim can, analogously with misrepresentation, claim delictual damages for loss suffered in addition to the remedy of rescission..

3.6.3.2.1 The object of the threat

Although the doctrine of duress clearly envisages a subjective effect on the victim, the test contains an objective element, in that the fear induced must be reasonable for “the sort of person the victim is”.⁵⁵³

The scope of the doctrine with regard to the object of the threats remains unresolved. Threats to the victim’s family will obviously constitute duress, but there have been intimations that this should not be extended to include remote relations or strangers.

⁵⁴⁷ *Trotman v Edwick* 1951 1 SA 443 (A).

⁵⁴⁸ *Tail v Wicht* (1890) 7 SC 158.

⁵⁴⁹ *Christie* 313.

⁵⁵⁰ *Joubert* 99-101.

⁵⁵¹ 1991 4 SA 559 (A).

⁵⁵² *Christie* 349.

⁵⁵³ *Christie* 351.

⁵⁵⁴ This position may well be found to be untenable with regard to the test described above, and there remains no explicit authoritative statement on the subject.

The decisive ruling in this respect was *Broodryk v Smuts*, in which the court confirmed that a threat to the family of the party is relevant.⁵⁵⁵ In this case, the threat of internment was held to be directed not only to the plaintiff, depriving him of his own freedom, but also to his family, as it would deprive them of his support. The party's property was added in *Hendricks v Barnett*.⁵⁵⁶

3.6.3.2.2 The imminence of the threat

Moreover, the threat must be of an imminent or inevitable evil in the sense that the party could not have avoided it except by entering into the contract.⁵⁵⁷ However, this requirement will not be rigidly applied if the party acted on the spur of the moment.⁵⁵⁸

3.6.3.2.3 The wrongfulness of the threat

The threat must be *contra bonos mores* or unlawful. Whether this is the fact will depend on the circumstances of the case.

A threat which induces payment of a legal debt will never constitute duress.⁵⁵⁹ On the other hand, a threat that induces the giving of a liquid document acknowledging the debt does amount to duress.⁵⁶⁰ This peculiar anomaly illustrates a certain imbalance between the operation of duress in relation to threats of criminal as against civil legal steps in South Africa.

⁵⁵⁴ Christie 352.

⁵⁵⁵ 1942 TPD 47.

⁵⁵⁶ 1975 1 SA 765 (N).

⁵⁵⁷ Joubert 104-106.

⁵⁵⁸ *Broodryk v Smuts* 1942 TPD 47.

⁵⁵⁹ Christie 357.

⁵⁶⁰ *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C).

A threat to bring civil proceedings will not amount to duress, but a threat to bring unjustified criminal proceedings may do so.⁵⁶¹

A threat to bring civil proceedings which causes another to contract is not considered duress, since a person who is legally entitled to bring such an action should not suffer for doing so. Thus, a threat to dismiss an employee lawfully is not duress, nor is a threat to sue, since the applicant will pay for a failed litigious action. This principle is firmly established in South African law, extending even to a threat made to a divorced wife that her custody of their children would be investigated if she did not pay her former husband a sum of money.⁵⁶²

The situation regarding threats to bring criminal proceedings is more difficult. A threat to bring criminal proceedings where the prosecution would not be justified is clearly *contra bonos mores*. The appropriate treatment of cases where an employer threatens to prosecute an employee for theft unless he pays or promises to pay back the sum allegedly stolen has been quite contentious.

The crucial question here has been identified by Corbett J as being the issue of whether the employer has obtained advantages to which he is not otherwise entitled. This will be the case where he obtains a liquid document and an apparent agreement as to the amount owing, probably to his own advantage. The advantage flowing from the terms of payment of any such acknowledgement of debt would make the contract *contra bonos mores*. In any case, an express or implied agreement not to prosecute in exchange for the advantages mentioned amounts to the crime of compounding, so that the contract is illegal and therefore void.⁵⁶³

⁵⁶¹ Threat to bring criminal proceedings: *Hamilton Paneelkloppers v Nkomo* 1991 2 SA 534 (O).
Threat to bring civil proceedings: *Shepstone v Shepstone* 1974 1 SA 411 (D).

⁵⁶² *Shepstone v Shepstone* 1974 1 SA 411 (D); Christie 353, but see *Shepstone v Shepstone* 1974 2 SA 462 (N) where it was held that the agreement induced by the threat was *contra bonos mores* and for that reason unenforceable.

⁵⁶³ *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C); Christie 354.

The advantages listed by Corbett J have been discounted in a series of Transvaal cases. Nestadt J stated in *Machanick Steel and Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd*⁵⁶⁴

“On the Transvaal approach, it seem to me that in deciding whether the contract had been entered into under duress, or whether it amounts to a compounding, the same test in determining whether the threat of prosecution was contra bonos mores has to be applied, namely did the creditor thereby extract or extort something to which he was not otherwise entitled.”

3.6.3.2.4 Duress emanating from third parties

Rescission is also available by virtue of duress applied by a third party.⁵⁶⁵ In *Broodryk v Smuts*,⁵⁶⁶ Ramsbottom J accepted in an *obiter dictum* that the legal conclusion should be the same even if the third party and the other party to the contract are in no way connected.

3.6.3.2.5 Damage

Finally, there is the criterion of damage. This supposed element is potentially somewhat misleading, and does not refer to an evaluation of the effect of the contract, but rather to the effectiveness of the duress itself. This means that the threat must have caused damage: that is to say, it must have actually induced the threatened party to enter into the particular contract. Thus, damage is equivalent to effective duress.⁵⁶⁷

3.6.3.3 Undue influence

“Undue influence exists if one party has acquired a psychological influence over the other party which weakened his powers of resistance and made his will pliable, and uses this influence in an unscrupulous manner to persuade him to consent to a

⁵⁶⁴ 1979 1 SA 265 (W); see also *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C).

⁵⁶⁵ Christie 357 358.

⁵⁶⁶ 1942 TPD 47.

⁵⁶⁷ *Padayachey v Lebesse* 1942 TPD 10.

transaction which is to his detriment and which with normal free will he would not have entered into."⁵⁶⁸ Whether there is a special relationship between the parties or not, is of no importance.⁵⁶⁹ and there is no presumption of undue influence which the other party must rebut in such cases.⁵⁷⁰

Since there is no presumption of undue influence under South African law, the party seeking relief bears the onus of proof, as he does in the case of misrepresentation and duress, and must prove that the contract is one which, but for the undue influence, would not have been made. In other words, the party seeking relief must be proved to have been induced by the undue influence to enter into the contract. As with misrepresentation and duress, undue influence will be material only insofar as it actually induces the victim to enter the contract.⁵⁷¹

4 Evaluation

⁵⁶⁸ Christie 356-359; *Preller v Jordaan* 1956 1 SA 483 (A); *Patel v Grobbelaar* 1974 1 SA 532 (A).

⁵⁶⁹ *Preller v Jordaan* 1956 1 SA 483 (A).

⁵⁷⁰ *Miller v Muller* 1965 4 SA 458.

⁵⁷¹ Christie 361.

4.1 General remarks on basic differences between the systems

Before a comparison of the two legal systems considered here and an evaluation of their treatment of the subject matter of this study can be made, some general remarks are appropriate.

That both systems are rooted in the Romanistic tradition does not imply identity of origin. Developments in Europe during the renaissance period were far too multi-dimensional to have involved the uniform adaptation of Roman law in Western Europe. As indicated in Chapter 2, German law represents a system based upon codification, whereas the South African system is, in the field of contract, at least, in the main rooted in the case law. Amongst other significant consequences, which are addressed later, this means that the legal principles are come to by completely different methods and with points of reference unique to each system.

The German judge is required to apply the law to the facts placed before him without in the least being required to consider or quote old Roman principles or their interpretation by medieval academic authors. The written law alone, in other words the BGB and other relevant codes, are authoritative for his reasoning. This has the immediate consequence that the German lawyer tends to focus only on the law, without much contemplation of its origins. That some of the astonishingly complex and structured ideas and legal concepts derived from the Code are based to a considerable extent upon notions of Roman law, becomes apparent only when the historic development of laws in the BGB and their development in past epochs is illuminated.⁵⁷²

Although the basis of every judicial decision is to be found in the written law, in the German case the BGB, it will by now be clear that, throughout the long lifetime of the BGB judicial law-making, especially in respect of the general clauses (for example § 138 BGB and § 242 BGB), has assumed significant proportions. Even so, the basis

⁵⁷² See above: 2.1.1.

for every judicial innovation remains the text of the Code itself, just as this remains the basis for every judicial decision. However, it is also quite obvious that the somewhat cryptic words, for example, of § 242 BGB allow significant room for interpretation.

South African law is a different matter. South African judges cannot refer to a codified law which purports to state the entire corpus of Private law principles, since such a compilation does not exist. Instead, courts rely to a significant extent upon principles developed from the views of recognised authors of the Roman-Dutch law in long lines of judicial decisions.

Although the principle of *stare decisis*, briefly discussed under 3.1, may suggest the conclusion that regard is to be had only to previous judgments, and that a direct link to the ancient authors may be superfluous, this in fact is not the case. The precedents have their roots in the principles of the Roman-Dutch law, and the “old masters” and their views are still cited today. Despite the significant influence of English common law which, in the course of South Africa’s eventful history, resulted in the mixed character of South African law, the law of obligations in particular still reflects its romanistic origins, even if modified by the influence of the Dutch authors. Such obvious proximity to Roman law cannot be as readily detected in a system such as that of Germany, in which Roman principles and legal constructions find themselves within a closed legal sphere and are, as a result, somewhat hidden or camouflaged.

One significant difference between the codified and uncoded systems which became apparent through this study lies in the methods for the development of law in response to the demands of justice.

The BGB is a statutory enactment formally approved by the legislature. This implies, in the context of a tradition based on the division of power, that law is exclusively created by parliament and that judges are appointed merely to apply the norms so established. Independent development of law is not a function of the judge, as an instrument of the judiciary. This standpoint is enshrined in various constitutional

regulations in Germany, even if it has to be conceded that it cannot be understood in absolute terms. Many cases simply cannot be satisfactorily resolved merely with reference to the wording of the relevant code. There are, therefore, many instances of Judge-made law, but these are exceptions to the rule and are only permissible when the Code does not provide clear provisions for the issue requiring resolution. This occurs relatively rarely because of the complexity and vast scope of the BGB, which was conceived and designed as an enactment to address and resolve all future problems.

Returning to case law systems such as that practiced in South Africa, the application of law and its development assumes a different aspect. It is fundamental to South African Law that any contentious issue be brought before a court of law by private parties in order that the law concerning the matter may be determined. To some extent, this principle becomes more practicable with the passage of time: as more and more juristic problems are decided, subsequent disputes may be settled according to the rule of *stare decisis*.

The problem regarding the conclusion of a contract by means of the telephone can serve as an example.⁵⁷³ The dispute, when it arose had, to that date, not been heard by a court. Hence it was impossible to determine with certainty how South African law would react to this problem. Unlike German law, which would refer to § 147 BGB as the relevant norm, South African law did not have such a provision at its disposal when the dispute arose in 1935. Regrettably, the judgment was not made by the highest court. Only in 1965 did the matter come up again, when a court of equal ranking reached a different conclusion on the same matter, resulting in greater uncertainty. A final settlement was only reached in 1981 with a decision on the matter by the highest court.

This raises the question of legal certainty in a case law system: citizens may simply be unable to determine the outcome of litigation with any approach to certainty. Insofar

⁵⁷³ See above: 3.4.7.2.

as a case law system is based on the changing circumstances of life, rather than on any apparently immutable logical code, the need for the continuous development of that system will necessarily carry very obvious implications for legal certainty.

The preceding reflections make it clear to a German lawyer that the case law system poses problems that cannot occur within his own legal system, simply because it is based on different principles. This is not to deny that German law accommodates the principle of *stare decisis* to some extent. Although the principle is absent in theory, German law is, in practice, clearly influenced by judicial decisions. Decisions of the BGH, for example, set important precedents for lower courts, although they are not bound by them in theory, but rather only to the law itself. Such precedents serve an important function in respect of legal certainty, with the result that lower courts, in practice, pay great heed to them. It is more than unlikely that a lower court will intentionally disregard the view of the BGH or any other superior court.

4.2 Contracts under both legal systems – common features and differences

For purposes of the comparison of the two systems, attention will first be given to themes common to them, before attention is focused on dissonances.

4.2.1 Common characteristics

With regard to the conclusion of contracts, both German and South African law set fundamental preconditions, which need to be fulfilled before the conduct of both parties can lead to a legally recognised agreement. As previously indicated, a distinction needs to be drawn between requirements relating to the participating legal subjects and those that the law sets as parameters for the conclusion of contracts.

4.2.1.1 Contractual capacity

The first requirement sets conditions relating to the capacity of the individual to decide freely in respect of legal transactions. The overview of both legal systems reveals these requirements to be virtually identical. In South African as well as in

German law, for instance, minors are, in general, excluded from entering into contracts. The difference regarding the age of majority reflects society's value judgment regarding the accountability and insight of younger individuals, but this is a matter of detail rather than of legal principle.

Both countries apply similar criteria to intoxicated and mentally disabled individuals pertaining to the conclusion of a contract. A noteworthy variation in principle from German law occurs in the South African recognition of the "prodigal", which entails a restriction on the capacity of an individual regardless of mental health. Under German law, an individual needs to be mentally ill for his declaration of will to be null and void, so that a person is free to dissipate his patrimony by means of irresponsible transactions. Because the concept of the prodigal is of little practical importance in South Africa, however, the differences between the systems are rather insignificant in practical terms.

4.2.1.2 Formalities

On the question of formalities also, there is little difference between the systems under discussion. Although both recognise the principle that a disregard of legally prescribed formalities or formalities agreed upon by both parties will render the contract null and void, both systems adhere to the general informality of contract.

4.2.1.3 Legality

A further area of consequence relates to the need for contracts to conform to the requirements of public policy, good faith and the moral convictions of the community. The approach of the BGB in provisions such as §§ 134, 138, 242 BGB, discussed in chapter 2,⁵⁷⁴ is to some extent mirrored by the decisions of the South African courts. In both systems, the use of rigid criteria relating to this aspect is avoided in favour of a flexible approach in the light of the circumstances of the case at hand. Of

⁵⁷⁴ See above: 2.2.1.1.3.4; 2.2.2.5.

importance is also the recognition that the contravention of a prohibition will not invariably lead to the complete nullity of the contract.⁵⁷⁵

As a provisional result, it seems fair to conclude that, with regard to these prerequisites, there exist no decisive differences between the systems as regards the effective conclusion of a contract.

4.2.2 Contract formation

The core of the investigation addresses the question whether and to what extent the concept of “contract” differs within the two legal systems. The emphasis within both legal systems is that what has to be determined is whether the parties have committed themselves to a legally binding agreement and are bound to certain performance obligations. Both systems also accept that the parties need to be in agreement as to the essential terms stipulated in the contract.

Such a consensus logically requires that both parties should be aware of the substance of the contract and to have agreed to it of their own free will.⁵⁷⁶

This is immediately apparent from the wording of the relevant provisions of the German code. The declaration of will (*Willenserklärung*) indicates the central importance of the intentions of the parties concerned. Although, in South African law, one cannot refer to the wording of a code for the substantiation of this subjective approach, numerous decisions reveal the need for the corresponding wills of the parties as a prerequisite for the genesis of a contract. Both systems therefore require two or more relevant individual actions in order to establish an agreement.

Remarkably, German law subdivides offer and acceptance, as juristic acts, into smaller components, by means of the concept of the declaration of will,⁵⁷⁷ a construction which is of importance in establishing whether a contract has been

⁵⁷⁵ See above: 2.2.1.1.3.4.1; 3.2.3; *Brisley v Drotsky* 2002 4 SA 1 (SCA).

⁵⁷⁶ See above: 2.2.1.2.3; 2.2.2; 3.3; 3.4.

⁵⁷⁷ See above: 2.2.1; 2.2.1.1.

concluded and whether it is vitiated by error. Although South African law to some extent recognises the term “juristic act”,⁵⁷⁸ there is no sign of the refined, systematic analysis of the concept along the lines of German law. The explanation for this lies, on the one hand, in the fact that the development of a comprehensive and complicated code, such as the BGB, represents the concern of its creators to establish a logical and holistic system of concepts to accommodate the greatest possible constellation of circumstances.

South African law, on the other hand, although starting its development with the same set of basic concepts, the notions of offer and acceptance derived from Roman and English law, proceeded in a piece-meal fashion typical of a case law approach unmindful of broader theoretical and systematic considerations. A sensitivity to such “scientific” concerns typical of German law arrived late in South Africa, and might be dated to the establishment of the Law Faculty at Stellenbosch in 1921, which for the first time focused attention on modern continental legal developments.

Disregarding this important difference in the conceptual apparatus for the resolution of contractual problems, the understanding of the basic concepts of both offer and acceptance are in important respects the same. The term *animus contrahendi*, for instance, is familiar to both legal systems and both require it for effective conclusion of a contract.

Both offeror and offeree need to share in the *animus contrahendi*, even if the issue is, under both systems, generally discussed principally under the heading “offer”. Both systems also distinguish between conduct which serves merely to elicit contracts, such as the *invitatio ad offerendum* and request for an offer, and acts which manifest the actual intention to bind oneself legally.⁵⁷⁹

⁵⁷⁸ See above: 3.4.

⁵⁷⁹ See above: 2.2.1.1.3.2.1; 2.2.2.1.1; 2.2.2.1.2; 3.4.2.

It is noteworthy that German law provides further subdivisions of the concept *animus contrahendi*.⁵⁸⁰ as part of the elaboration of the complex concept of declaration of will. In relation to this, the decision of the BGH in 1991⁵⁸¹ resulted in the rejection of the established requirements of a general transactional intention. Although this decision might be justified by the result achieved in that case, it is unpersuasive in its reasoning and contrary to the need for a logical and consistent application of law.

The abolition of the requirements of a general transactional intention (*Rechtsbindungswille*) in conjunction with the retention of a requirement of an intention to enter into a particular transaction, is in its indecisiveness as problematic as the conclusion that although five fingers are required to clench a proper fist, fingers may in certain conditions be done away with. With respect to the theme of the intention to be bound and the somewhat more complicated concept of *animus contrahendi* which is found in German law, divided as it is into several separate components, it will at this stage be clear that these sub-divisions are, in certain respects of dubious practical relevance.

It would seem more useful to return to the unitary concept of *animus contrahendi* to which South African law confines itself. This seems particularly apparent in the light of the decision discussed above, where the complicated academic basis of the German concept of the will to be bound has arguably led to an illogical decision.

The overview of the precise requirements for the legal effectiveness of offer and acceptance makes it clear that these are nearly identical in both systems.⁵⁸² In both systems, an offer needs to be sufficiently determined and contain all significant components (*essentialia negotii*) of the contract. The requirements for a successful acceptance are held in common by both legal systems, namely:

⁵⁸⁰ See above: 2.2.1.1.3.1.

⁵⁸¹ See above: 2.2.1.1.3.1.

⁵⁸² See above: 2.2.2: 3,4.

1. The acceptance must be made by the party to whom the offer was made (or by his agent).
2. Acceptance must be clear and unambiguous, and must correspond with the offer made.
3. Acceptance can occur tacitly.
4. Rules relating to silent acceptance are also fundamentally identical in both systems.

All these elements have been refined by the courts of both countries under discussion to relative measures and indicate that both legal systems understand contract as entailing the manifestation of an intention to contract by the parties. This principle, called the “will theory” in South African literature, is not maintained absolutely in either of the legal systems examined.

4.2.2.1 The legal consequences of the offer

A fundamental and significant difference between the systems under review regarding the effects of an offer, which ultimately touches the very foundation of contract law, must be addressed as a prelude to a more detailed evaluation of the treatments of mistake in contract.

4.2.2.1.1 Germany

As has been indicated above, an offer is legally binding on the offeror. As soon as the offer reaches the correct addressee, the offeror is obliged to honour an acceptance thereof and is hence legally committed.

A revocation is possible only if relayed before or simultaneously with the offer.⁵⁸³ It is obvious that this is to the advantage of the recipient of the offer, regardless of whether he accepts the offer or declines it, and that the offeror is in a relatively disadvantaged position, subject to safeguards to protect his interests.⁵⁸⁴

4.2.2.1.2 South Africa

South African law takes a different position in assuming that the offeror is not bound by his offer. The offeror's capacity to revoke his offer independent of whether it has come to the attention of the offeree, but restricted with reference to whether the latter has already accepted the offer and thereby established a contract. The offeree is therefore in a weaker position during the formation of contract. He needs to anticipate and guard against revocation until such time that he accepts the offer, and is thus in a position of uncertainty.

4.2.2.2 Effectiveness of acceptance

Since the binding nature of the offer depends significantly upon the offeree's acceptance thereof, the moment at which this is deemed to take place is of fundamental importance. This consideration, of course, is only relevant if the parties are contracting *inter absentes*. Should they be in one another's presence, the offeree has to react without delay unless otherwise agreed. However, should the parties, for example, reside in different cities and communicate primarily by mail, the moment when a letter of acceptance is deemed to take legal effect is extremely significant. In this regard, there is a marked difference between the two systems.

4.2.2.2.1 The German solution

Under German law all declarations of will which must be received by the addressee to become effective are subject to § 130 BGB and its interpretation according to the courts. In consequence, all such declarations of will become effective upon their

⁵⁸³ See above: 2.2.2.1.4.

⁵⁸⁴ See above: 2.2.2.1.4.

receipt by the receiver or their expected receipt under ordinary and expected conditions.⁵⁸⁵

This does not affect the principally favourable position of the offeree, but has implications for the efficacy of a revocation by the offeror.

4.2.2.2 The South African solution

Regarding the conclusion of contracts by means of the post,⁵⁸⁶ the expedition theory is to be applied. This approach might at first seem to strengthen the view that law protects the offeree at the cost of the offeror. Whether this is indeed the case seems to be open to question, in view of the following considerations.

Firstly, the expedition theory places the offeror at a disadvantage. He cannot evaluate whether he is already legally bound, since he normally has no way of determining whether or when the offeree has posted his acceptance. A further problem resulting from this approach occurs when the offeree aims to nullify his postal acceptance by means of a faster medium of communication. This problem has been mitigated with respect to electronic means of communication, by means of which an acceptance becomes valid on receipt.⁵⁸⁷

4.2.2.3 The duration of the offer

Under German law the question of a statement of intent, and hence an offer, is unaffected by the passing away of its maker or a change in his mental capacity, so that the receiver thereof can rely on the validity of the offer made to him, irrespective of the occurrence of subsequent events.

Not so under South African law, where the death or mental illness of the offeror nullifies any offer not yet accepted by the offeree. This is substantiated on the basis that consensus can no longer be achieved between the offeror and the offeree, and

⁵⁸⁵ See above: 2.2.1.2.2.

⁵⁸⁶ See above: 3.4.7.1.

⁵⁸⁷ See above: 3.4.7.3.

because the offer is intransmissible. This argument becomes suspect in view of the recognition of a contract under the expedition theory, where, irrespective of the absence of agreement, a contract comes into being as soon as the acceptance is posted.

Why the offeree who posts an acceptance in the erroneous belief that his contractual partner is alive and in good mental health should be treated differently, and put at a disadvantage, is not clear. There are, unsurprisingly, some indications of a critical response to this rule.

German law regards death or loss of mental health capacity as irrelevant in view of considerations of legal certainty and good faith. That such an approach militates against the consensus principle is beyond doubt. The apparently problematic possibility of being contractually bound to a deceased party is avoided by means of the fact that the heirs of the deceased step into his position as a result of the laws relating to succession (§ 1922 BGB) and its principle of universal succession. Whether this entails a detrimental position for the heirs depends solely on the actions of the deceased during his lifetime.

4.2.2.4 Offers to the public

As cases such as *Bloom v The American Swiss Co* and *Lee v American Swiss Watch Co*⁵⁸⁸ illustrate, South African law requires that persons whose conduct seemingly satisfies the requirements of a public offer of reward must have knowledge of such an offer. Only then can the promised reward be collected by such a person on the basis of a contract that has been brought into being by acceptance.

This can lead to results which may not conform to a common notion of justice. The person, for example, who returns a missing dog to its rightful owner, while unaware of a reward offered publicly, may well be surprised to learn that he is not entitled to the reward if he only becomes aware of it subsequently. On the other hand, the logic is consistent, when one considers that a reward offered to the public in return for

⁵⁸⁸ See above: 3.4.3.1.

certain conduct is a type of offer, with its familiar legal requirements and consequences.

German law has, for such situations, developed the notion of the *Auslobung* under §§ 657-666 BGB. Under this regulation, the conduct of an individual alone will qualify him for a reward, regardless of his awareness of the reward, or lack thereof.

4.2.2.5 Contracts concluded tacitly or silently

Both legal systems recognise that contracts can be conducted tacitly, by non-verbal conduct, and even by silence.⁵⁸⁹

4.2.3 Interpretation of contracts

The field of interpretation of contracts reveals further discrepancies between the two legal systems under consideration. In this regard, the choice of an objective or a subjective approach becomes significant.

The interpretation of contracts is, without doubt, a fundamental component of contract law. The question of interpretation comes to the fore where the parties differ as to the meaning to be given to their agreement. This places the judge in the difficult position of having to decide whether the parties intended to bind themselves contractually and, if so, what the effect of their contract was intended to be. In this manner, a fundamental problem affecting the application of law as a whole comes to the fore. Either one evaluates the concerned parties' intentions at the time of contract formation, or one evaluates their declarations or actions, according to criteria which are independent of their intentions and which seek to represent the likely interpretation of a reasonable third party.

The former approach is without doubt a subjective one and aligns itself with the will theory according to which the respective intentions of the concerned parties are decisive. But this subjective approach contains an inevitable weakness in its practical

⁵⁸⁹ See above: 2.2.1.1.3.2; 3.4.3; 3.4.6.

application, insofar as the true will of a party is only known to himself and evidence for the presence of a given state of mind can never truly be determined by a court of law. As a result a party could, in court, maintain that he never intended to enter into the particular contract with the other and, according to a strictly subjective method of interpretation, it may never be possible to prove the opposite. The existence of a contract would have to be denied.

4.2.3.1 Interpretation of contracts or declarations of will under German law

The creators of the BGB developed a compromise in response to this problem. Paragraph 157 BGB determines that contracts need to be interpreted according to the dictates of good faith having regard to business custom. This obviously constitutes an objective approach, which does not regard the will of the individual parties, but prefers the impression left on an average person with regard to business custom.

But this is only one side of the coin, since § 133 BGB determines that in the interpretation of the declaration of will, the true will of the declaring party shall be decisive. Since every contract consists of at least two such declarations of will, the German judge is compelled to consider both concurrently when deciding a case relating to the content of a contract or even its existence. Further provisions, such as § 242 BGB which, like § 157 BGB, protects the recipient in case of reliance, also need to be considered in the evaluation of each individual case.

4.2.3.2 Interpretation of contracts under South African law

Under South African law, the interpretation of disputed contracts is closely interrelated with the law of evidence. Added to that a number of rules, which often appear in conflict with one another, exist.⁵⁹⁰

In the final analysis, the determination of frames of reference, insofar as they cannot be objectively determined from the contract itself (from, for example, terms and wording) is significant. Generally it can be concluded that essentially objective

⁵⁹⁰ See above: 3.5.

criteria dominate the decision, insofar as these are generally taken to be the preferred method of ascertaining the intentions of the parties at the time of contract formation.

4.2.4 Mistake

What has become clear is that the crucial question is whether the contract is to be evaluated with reference to predominantly subjective or objective criteria. The topic of mistake or defective consent make this point key beyond all doubt. Various factual constellations bring into question the effective conclusion of a contract: the BGB provides three distinct categories of cases and endeavours to predetermine the legal consequences of all the various permutations within these categories.⁵⁹¹ The object is to categorise all possible constellations and their legal consequences systematically, according to the evaluation of the interests of the affected parties and their respective knowledge regarding the mistakes or defects in each case. To this end the creators of the BGB avoided a commitment to either the will or declaration theory, focusing instead on the weight of individual party interests.

South African law reveals that, despite numerous decisions and academic discussions, no final solution has as yet been achieved. What can, however, be ascertained is that the will theory and the reliance theory are applied to each individual case in order to reach a just solution. Furthermore, the English principle of estoppel has also been applied in some cases, although, as we have seen, this is an inherently weak solution.

A peculiarity of South African law is the frequent application of the *justus error* doctrine, a manifestation of the reliance theory. It requires not only that the error should be material in order to nullify a contract, but also that it should be reasonable. This can, of course, also be the case in German law, since not every misrepresentation is necessarily considered relevant, but the notion that the mistake needs to be reasonable to exclude contractual liability is basically foreign to German law.

⁵⁹¹ See above: 2.3.2; 2.3.3.

German law does not concern itself with the question of whether the mistaken party was reasonable in making the mistake. If he makes a "material" mistake, he may rescind his declaration and escape contractual liability but will suffer the consequences of § 122 BGB.⁵⁹² This differs, of course, in cases in which the recipient is proven to have knowingly accepted the misconceived declaration or has initiated such.⁵⁹³

South African law has attempted to reconcile the direct reliance theory and the *justus error* approach in *Sonap Petroleum (SA) (Pty) v Pappadogianis*.⁵⁹⁴ It remains to be seen whether this will provide a final answer to the problem. What seems certain is that German law, with its structured and systematic approach, provides more legal certainty than its South African counterpart.

Comparing South African and German principles regarding the questions of misrepresentation, differences manifest themselves in the distinction between contracts deemed *void ab initio* and those granting the right to rescind, depending on whether the error was fundamental due to the misrepresentation and on whether the misrepresentee can prove that the misrepresentation was made with the actual or constructive intent of inducing the opposite party to conclude the contract.

The criteria according to which conduct is classified as improper are, however, virtually identical. Duress is, on the whole, treated equally in both systems, although German law has never required that the threat should be directed at the party or his family.⁵⁹⁵

On the whole, it may be asserted that the systems under consideration differ significantly with respect to certain legal issues and hence reach dissimilar results for similar cases. With all due respect, it seems that the South African legal system has

⁵⁹² See above: 2.3.3.4.

⁵⁹³ And under some further circumstances - see above: 2.3.3.3.3.

⁵⁹⁴ 1992 3 SA 422 (A).

⁵⁹⁵ See above: 3.6.3.2.

yielded decisions that hinder rather than facilitate the clear and efficient regulation of the various aspects of contract formation.

5 Conclusion

In the course of this thesis I had the opportunity to consider various juristic questions related to contract law and the problems related thereto. Furthermore, I had the task of illuminating, presenting and comparing these topics from the point of view of both German and South African law. As a German lawyer and a practising attorney, I am grateful for the insights gained into the case law system of South Africa and its method of operation. To conclude this dissertation I would like to take the opportunity to share my own thoughts, insofar as this has not yet been done, about the problems arising in contract law.

According to Wessel JA:

“The law does not concern itself with the working of minds of the parties to a contract, but with the external manifestations of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract.”⁵⁹⁶

His statement addresses a problem concerning contractual law in its entirety. In the preceding pages it has been indicated that a purely subjective approach to the resolution of problems related to contractual disputes is just not feasible, unless one

⁵⁹⁶ SAR & H v National Bank of South Africa Ltd 1924 AD 704 715.

makes contractual liability dependent on the fact that the party against whom a claim is raised in court concedes that he has, indeed, concluded the contract concerned. This is an unlikely scenario, since a court would not have to decide that matter. Nor does the opposite approach, in other words a purely objective evaluation of the circumstances provide a conclusive solution.

Should one assume, for a moment, that the objective approach is the decisive one, one would reach absurd conclusions. For example if A offers to sell for 100 and B says: 'I accept', the contract of sale which will arise is for 100, even if A meant 1000 and B wanted to say: 'I accept, but only at 50.' In fact, even if both A and B meant 1000 there will still be a contract for 100.

As can be seen, this approach does not yield acceptable results. This approach could not be united with the principles of freedom of will and private autonomy since everybody would be exposed to contractual liabilities without desiring or intending these in any way.

The case illustrated under 2.2.3, may serve as a relevant example. This decision is unique in its disregard for the fundamental principles of contract law (and freedom of will) and is therefore not desirable at all. It is worth noting that, in this case, contractual liability cannot be assumed even under the objective theory, since the party concerned indicated clearly and understandably to the other party its desire not to be contractually bound. Although leading academic authors (including those cited in the decision of the court) initially welcomed the judgment, even they eventually concluded that it was not proper to ignore the will of the concerned party or even to disregard the openly declared will of the party who did not want to enter into a contractual agreement.

5.1 The combination of subjective and objective criteria and its risks

The solution to this fundamental problem is sought, in both of the systems under examination, by a combination of both approaches. General legal certainty and the protection of good faith with respect to the recipient of a declaration, regardless of whether this is the offeror or the offeree, are considerations which lead to the application of objective criteria. These methods may lead to just verdicts in particular cases, but in a case law system⁵⁹⁷ the danger exists that a multitude of decisions might yield results of unfathomable complexity.

This problem of unpredictability should, in principle, not arise within a legal system of codified law since the applicable rules have been formulated beforehand. With regard to this problem, however, this is not entirely the case in German law, since the fathers of the BGB contented themselves with provisions which afford the judge a considerable measure of discretion.⁵⁹⁸ However, for certain constellations, strict precepts have been provided.⁵⁹⁹

In general then, the combination of subjective and objective criteria which has evolved in response to problems of interpretation has led to an over-emphasis on objective criteria. This in turn has led to the erosion of essential principles of contract law, particularly the fundamental tenet of consensus of wills. The danger of this tendency becomes apparent with reference to the judgment of the BGH (BGHZ 21, 319) discussed above.⁶⁰⁰ In this judgment the will of one party was completely disregarded although the party clearly expressed its intent. The question which might arise is whether a person's will with regard to contractual liability will remain legally relevant.

⁵⁹⁷ As a matter of fact this is also of relevance in the German system - in light of the binding effect of decisions of superior courts.

⁵⁹⁸ See above: 2.2.1.1.3.3; 2.2.2.4; 2.2.2.5.

⁵⁹⁹ See above: 2.3.3.

⁶⁰⁰ See above: 2.2.3.

This problem does not seem to have occurred in South Africa, since there has been no pertinent case in which the explicitly declared intention *not* to enter into a contract has, nonetheless, resulted in contractual liability.

5.2 A resort to the principles of *culpa in contrahendo*?

Be that as it may, the deciding question now becomes whether the problem can be considered from another point of view and can be solved with alternative, although not necessarily new, legal methods.

In order to solve these problems it would be, in my opinion, a sensible move to strictly distinguish between an existing contract and the resort to artificial constructions that merely feign the former. In other words, the decisive issue remains whether it is really necessary to simulate a contract in order to impose liability on a party who has acted unreasonably in entering into a transaction on account of a mistake. A juristic approach, which has almost been forgotten, the doctrine of *culpa in contrahendo*, might provide a satisfactory solution.

By way of a preliminary caveat, it must be noted that *culpa in contrahendo* has been repeatedly resorted to by outstanding jurists in an attempt to overcome the inherent problems of this part of contract law.⁶⁰¹ It is also well known that their attempts have met with little success. Nonetheless I consider it premature to reject the principle underlying this approach as out-dated or impractical.

As we have seen, the combination of subjective and objective approaches applied in both systems has led to an over-emphasis on objective criteria, and to the erosion of essential principles, particularly the need to recognize the will of the contracting individual. Be this as it may, legal certainty is the decisive argument for giving weight to objective criteria in addition to a person's will in regard to questions of

⁶⁰¹ Hutchison "Formation of Contract" Southern Cross 181. Paragraph 122 BGB is in fact a provision which grants delictual claims according to *culpa in contrahendo*.

contractual liability. Whether the argument based on legal certainty justifies the actual emphasis on objective criteria in the analysis of contract law to such a great extent merits further investigation, however.

Generally speaking, everybody entering into a contract without unreasonable behaviour on his part, is entitled to seek some form of protection by the law if the opposing party denies its contractual liability. But should this protection against the contract denier necessarily entail the imposition of *contractual* liability? The consequence of such an approach, as can be seen in the numerous decisions regarding dissensus and mistake, is that true consensus between the parties may become irrelevant.

The imposed contract ultimately rests solely upon the expectation of the party concerned and upon whether such an expectation is justified in the light of objective criteria. It is apparent that such definition of contract has strayed substantially from the direct consensus approach.

A contract, in essence, consists of an agreement between parties. As one moves away from this subjective requirement (consensus) towards a contract based on objective criteria, one is confronted with the danger that the actual will of the parties will begin to lose its position of importance. Of course, it is illogical in the extreme to suggest that objective criteria should be ignored. It is nevertheless prudent to suggest that they may be give effect to not by the imposition of contractual liability, but rather by means of a corrective liability of a delictual or *sui generis* kind.

5.3 Possible criteria

As will be clear from the preceding discussion, I consider it eminently reasonable to consider solving problems of the kind raised by this enquiry independently of contract law altogether. In my opinion two arguments justify such a strategy.

Firstly, it results in clearer criteria with respect to formation of contract, which should aim exclusively at true consensus regarding the *essentialia negotii* of the agreement. Ill-founded personal motives or preconceptions should be disregarded unless they are closely related to both the conclusion and content of the particular contract.⁶⁰²

Secondly, there is every possibility of protecting a party who reasonably relied on the existence of a contract.

A conceivable approach might be that the contract denier, the party who raised expectations that a binding contract had been entered into, be required to financially compensate the frustrated party. With regard to the extent of such compensation § 122 BGB provides a good example.⁶⁰³ A further possibility is that the non-mistaken party be afforded the right to legally enforce the contract as understood by him. In other words, a legal responsibility to honour the contract would be placed on the mistaken party. By making these alternatives available to the aggrieved party at his election, that party's interest should be protected sufficiently.⁶⁰⁴

Certain prerequisites will have to be fulfilled in order to justify such claims. Should the contract assertor demand relief from the party denying the contract, the following requirements should be met:

1. If the contract is denied on the ground of dissensus, it should be investigated whether the mistakes are at all relevant. In other words, consensus should not be denied on the grounds of misconceptions due to personal motives.
2. The non-mistaken party needs to prove that he relied on the existence of the contract. This should exclude dishonest or fraudulent persons who have caused the defect of the mistaken party or have been aware of the mistake.

⁶⁰² See above: 2.3.3.1; 3.6.1.1; 3.6.1.2.

⁶⁰³ See above: 2.3.3.4.

⁶⁰⁴ In both situations we would have a delictual claim. But this is from my point of view not insoluble.

3. The belief of the aggrieved party in the existence of the contract must be justified on objective criteria. In other words, a reasonable person should have accepted a binding contract under identical circumstances.
4. The mistaken party must have negligently engendered the reliance in the non-mistaken party.

Should all these prerequisites be fulfilled, then, in my opinion, nothing stands in the way of holding the mistaken party liable on the basis outlined above. Of course it needs to be added that these criteria need to be subjected to further refinement and interpretation.

The question of requiring negligence on the part of the mistaken party remains a challenging aspect of the argument, and leads back to the question in how far a contract denier can claim to be excused of responsibility for his mistake because of the influence or conduct of third parties or other external factors. In other words, is it relevant at all if a reasonable person, supplied with identical information as the contract denier would have made the same mistake?

From my point of view, negligence on the part of the mistaken party should *prima facie* be presumed in all cases in which the mistake was not induced by the non-mistaken party or persons acting on its behalf. My substantiation for this is that every person enjoys freedom in the formation of his will and the gathering of information to this end and hence must be responsible for risks that arise during this process which are not imputable to the non-mistaken party. The consideration of legal certainty supports this view since the aggrieved person, to the extent that he acts honestly, will not be able to anticipate every possible mistake or defect of will on the side of his opposite number. Such a person must therefore be placed in a position where he is entitled to rely on the objective declaration of the other party. Whether the mistake was reasonable or not eventually remains a subjective question, and the recipient of a declaration who acts normally and lawfully will be unaware of defects of will on the part of his opposite number and whether such was reasonable or not.

Irrespective of the question whether the fundamental principles of *culpa in contrahendo* will ever be taken into consideration by South African courts in deciding on matters relating to mistakes on contracts, a case law system offers the flexibility to redefine and correct the law and its development along these lines. Because of its inflexibility regarding its fundamental principles, a system of codified law is not afforded that opportunity

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9 Abbreviations

Germany

BAG	Bundesarbeitsgericht	Federal Labour Court
BGB	Bürgerliches Gesetzbuch	Civil Code
BGH	Bundesgerichtshof	Federal Court of Justice
BGHZ	Entscheidungen des BGH in Zivilsachen	Decisions of the Federal Court of Justice in Civil cases
BRAO	Bundesrechtsanwaltsordnung	Federal Statute on Attorneys
DAR	Deutsches Autorecht (Zeitschrift)	German law of automobiles
EnergieWiG	Energiewirtschaftsgesetz	Energy - Economy Act
GG	Grundgesetz	Constitution
GüKG	Güterkraftverkehrsgesetz	Act of goods traffic
HGB	Handelsgesetzbuch	Commercial Code
LG	Landgericht	Regional Court

LM	Lindenmeyer-Möhring. Nachschlagewerk des BGH	Lindenmeyer-Möhring. Reference book of the Federal High Court
NJW	Neue Juristische Wochenzeitschrift	New weekly law journal
NZA	Neue Zeitschrift für Arbeitsrecht	New labour law journal
OLG	Oberlandesgericht	Regional Appeal Court
PatG	Patentgesetz	Patent Act.
PbefG	Personenbeförderungsgesetz	Person's Transport Act
PflVersG	Pflichtversicherungsgesetz	Act of duty to insure automobiles
RGZ	Entscheidungen des Reichgerichtes in Zivilsachen	Descisions of the Empire Court in civil cases
UrhG	Urhebergesetz	Copyright Act
VersR	Versicherungsrecht	Insurance law(journal)