LAW OF CONTRACT

(1) MAIN COMPONENTS OF A CONTRACT

- Intention to create legal relations
- Offer
- Acceptance
- Consideration/ reasonable cause
- Capacity to enter into a contract

(2) INTENTION TO CREATE LEGAL RELATIONS

- The law requires an intention to create legal relations to be present between the parties to a valid and enforceable contract.
- What is required is either an **intention** which **actually exists**, or an intention, having regard to all surrounding circumstances, the **law will deem to exist** in the minds of the parties.
- There is a **presumption in favour** of legal intention in **agreements between business people.**
- The general rule with regard to domestic/social agreements is that there is no legal intention.
  - *Balfour vs. Balfour* [1919] 2 KB 571
    The couple lived in Ceylon where the husband worked. They returned to England while the husband was on leave. Defendant returned to Ceylon for work. Wife was advised not to return to Ceylon due to health reasons. Prior to leaving to Ceylon, husband agreed to send £30 per month as support to his wife. Their relationship later deteriorated and began living apart. The husband stopped making the payments. The wife sought to enforce the agreement.

    Held: The agreement was a **purely social and domestic agreement** and therefore it was **presumed** that the **parties did not intend to be legally bound**. As there was no intent to be legally bound when the agreement was agreed upon, there can be no legally binding contract. Purely family arrangements such as those between husband and wife are often not intended to give rise to legal rights and obligations.

  - *Jones vs. Padavatton* [1969] 1 WLR 328
    A mother and daughter came to an arrangement whereby the mother agreed to maintain her daughter if she agreed to study for the bar (legal education). The daughter commenced her studies and the mother paid her an allowance. The arrangement was later altered and the mother agreed to provide a house in which her daughter could reside whilst she studied. Mother and daughter fell into dispute as to the occupancy of the house, and the mother sought possession.

    The court applied *Balfour vs. Balfour*. Held: A mother's promise to allow her daughter the use of a house was not an enforceable contract.

- There may be exceptions to the aforesaid general rule relating to domestic/social agreements as held in the following case:
  - *Simpkins vs. Pays* [1955] 1 WLR 975
    A grandmother, granddaughter and a lodger entered into a weekly competition run by a Sunday newspaper. The coupon was sent in the grandmother's name each week and all three made forecasts and they took it in turns to pay. They had agreed that if any of them won they would share the winnings between them. The grandmother received £750 in prize money and refused to share it with the other two. The lodger brought the action to claim one third of the prize money.

    Held: There was a binding contract despite the family connection as the lodger was also party to the contract. This rebutted the presumption of no intention to create legal relations.

(3) OFFER

- For a contract to be valid and enforceable, there should be an agreement between the parties to the contract; a meeting of minds. This agreement between the parties constitute of an offer and acceptance.
- An offer is an expression of willingness to contract on certain terms made with the intention that it shall become binding (on the offeror) as soon as it is accepted by the person to whom it is addressed (the offeree).
- Requirements of a valid offer:
  - Offer must be communicated.
  - There has to be a serious intention, the offer must be definite and certain. A vague and indefinite offer cannot by its acceptance give rise to a contract. Because a court of law cannot say what was actually sought to be enforced and therefore, cannot enforce it. Court will also presume that there was no serious intention to establish a legal bond and therefore no binding contract.
    E.g. Sale of a product without the mention of a quantity and/or a definite agreed price. The product not being properly identified. Offer to sell "10 mobile phones". If the uncertainty or vagueness which existed at the time of the contract clears up and becomes definite by the time the court is asked to enforce the contract – the contract may be enforced.
- What is not an offer?
  - "Tradesmen's Puff"
  - Supply of information
  - Invitations to treat

- <u>"Tradesmen's Puff"</u>:
  Sometimes statements can be regarded only as 'mere puffery' – the claims are made only for advertising purposes, to increase their sales and mean nothing.

- <u>Supply of information</u>:
  - It is necessary to have a clearer indication of a preparedness to enter into a contract, than merely providing terms or information upon which a party may be prepared to enter into such a contract.
  - ***Harvey vs. Facey [1893] UKPC 1***
    Negotiations over a property. Facey had been carrying on negotiations with the Mayor to sell a piece of property to Kingston City. Harvey, who wanted the property to be sold to him rather than to the City, sent Facey a telegram. It said, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price-answer paid". Facey replied on the same day: "Lowest price for Bumper Hall Pen £900." Harvey then replied in the following words. "We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession." Facey, however refused to sell at that price and Harvey sued.

    The Privy Council held that no contract existed between the two parties. The first telegram was simply a request for information, so at no stage did the defendant make a definite offer that could be accepted. The indication of lowest acceptable price does not constitute an offer to sell. Rather, it is considered an offer to treat (i.e., to enter into negotiations).

- <u>Invitations to treat</u>:
  - An "invitation to treat", is where a party is merely inviting offers, which he is then free to accept or reject. An invitation to treat is not capable of being accepted and is not intended to be binding. Whether an act or announcement is really an offer or only an invitation to treat depends on the intention of the parties as collected from their language and the nature of the transaction.
  - Examples: tenders, auction sales, display of goods/ price tag, advertisements.

- **Tenders**:
  - A tender notice is an invitation to treat. It is a request by the owner of the goods for offers to purchase them. It does not amount to an offer or promise to sell to the person who makes the highest tender or to buy from the person who makes the lowest.
  - The tenderer's reply to such notice constitutes the offer. Each tender will be considered an offer, which can be accepted or rejected.
  - The tenderer may at any time prior to the offer being accepted revoke his tender. However, cannot revoke after acceptance.
  - *Spencer vs. Harding (1870) LR 5 CP 561*
    An offer inviting tenders to be submitted for the purchase of stock did not amount to an offer capable of acceptance to sell that stock, but rather amounted to an invitation to treat. The absence of any specific wording such as "and we undertake to sell to the highest bidder" rebutted any presumption that the defendants had intended to be bound by a contract and distinguished the present circumstances from instances of reward contract offers or an offer to the world.

- **Auction sales:**
  - The auctioneer's *call for bids* is an *invitation to treat*, a request for offers.
  - The *bids made* by persons at the auction are *offers*, which the auctioneer can accept or reject as he chooses.
  - The offer is accepted by the fall of the hammer till which time it may be revoked by the bidder.
  - The auctioneer may withdraw items from the auction or cancel the auction altogether without incurring any liability from potential bidders.
  - *Payne vs. Cave (1789) 3 Term Rep. 148*
    Cave made the highest bid for Payne's goods at an auction. But then, Cave changed his mind and he withdrew his bid before the auctioneer brought down his hammer
    Held: Cave, the defendant, was not bound to purchase the goods. His bid amounted to an offer which he was entitled to withdraw at any time before the auctioneer signified acceptance by knocking down the hammer. The auctioneer's request for bids was an invitation to treat, and each bid constituted an offer which could be withdrawn at any time until it is accepted, and finally, the fall of the auctioneer's hammer constituted acceptance of the highest bid.

- **Display of goods/ price tag:**
  - The display of goods with a price tag attached in a shop window or on a supermarket shelf is not an offer to sell but an invitation for customers to make an offer to buy.
  - *Pharmaceutical Society of Great Britain vs. Boots Cash Chemists* [1953] EWCA Civ 6
    Held: The display of a product in a "self-service" store with a price attached is not sufficient to be considered an offer, but rather is an invitation to treat. By placing the goods into the basket, it was the customer that made the offer to buy the goods. This offer could be either accepted or rejected by the pharmacist at the cash desk. The moment of the completion of contract was at the cash desk, in the presence of the supervising pharmacist.

- **Advertisements**
  - Advertisements of goods for sale – normally interpreted as invitations to treat.
  - *E.g.:* Statements in catalogues and prospectuses. If it were regarded as an offer and the manufacturer ran out of stock – breach of contract for anyone who accepted such an offer as they could not provide stock.
  - *Grainger vs. Gough [1896] AC 325*
    Held: Posting catalogues of items for sale to people did not constitute an offer since there was insufficient detail.

- However, advertisements may be construed as offers if they are unilateral (i.e. open to the world at large to accept). - *Carlill vs. Carbolic Smoke Ball Company*
  E.g.: offers for rewards

- *Carlill vs. Carbolic Smoke Ball Company* [1892] EWCA Civ 1 [England and Wales Court of Appeal (Civil Division) Decisions]
  - The Carbolic Smoke Ball Co. made a product called the "smoke ball"; a cure *inter alia* for influenza.
  - The Company published advertisements in several newspapers claiming that it would pay £100 to anyone who got sick with influenza after using its product according to the instructions provided with it and that £1,000 is deposited with a specified bank, showing their sincerity in the matter.
  - Mrs. Carlill saw the advertisement, bought one of the balls and used it for nearly two months until she contracted the flu. She claimed £100 from the Company.
  - The Court of Appeal unanimously held that there was a fully binding contract for £100 with Mrs. Carlill.

Defendant's arguments to demonstrate the advertisement was a mere invitation to treat rather than an offer	**Court's reasons for rejecting the defendant's arguments**
1. The advert was a sales puff and lacked intent to be an offer.	1. The statement referring to the deposit of £1,000 demonstrated intent and therefore it was not a mere sales puff.
2. It is not possible to make an offer to the world.	2. It is quite possible to make an offer to the world.
3. There was no notification of acceptance.	3. In unilateral contracts there is no requirement that the offeree communicates an intention to accept, since acceptance is through full performance.
4. The wording was too vague to constitute an offer since there was no stated time limit as to catching the flu.	4. Whilst there may be some ambiguity in the wording this was capable of being resolved by applying a reasonable time limit or confining it to only those who caught flu whilst still using the balls.
5. There was no consideration provided since the 'offer' did not specify that the user of the balls must have purchased them.	5. The defendants would have value in people using the balls even if they had not been purchased by them directly.

- Termination of an Offer:
  - Lapse of time
  - Offeree's Rejection
  - Counter Offer
  - Death of either party before acceptance
  - Destruction of subject matter.
  - Insanity/ Mental Incapacity

- Illegality
- Revocation of the offer before acceptance
- Failure of a condition subject to which the offer was made
- Change of status of the offeror

- **Lapse of time** – where the parties fix a time during which the offer remains open, it must be accepted within this time. Where the parties do not fix such a time, an offer terminates after a reasonable period of time and it is left to the court to say what is a reasonable time within which the offer should be accepted. A reasonable period of time will vary depending upon the type of contract.
  E.g.: An offer to sell bananas will terminate more quickly than an offer to sell cement.

- **Offeree's Rejection** – an offer terminates if the offeree receives the offer and rejects it. Once the offeree rejects the offer, the offeree does not have the right to accept the offer. Any attempt to do so may constitute a new offer to the original offeror or for acceptance by the offeree there has to be a renewed offer from the offeror. An offer may be rejected expressly or by conduct from which the offeror is justified in inferring that the offeree intends not to accept the offer. A request for further information does not amount to rejection.

- **Counter Offer** – If an offeree makes a counter offer or counter proposal in response to an offer, the original offer terminates. This is the case with negotiations. If a party attempts to negotiate new or additional material terms to the offer, the original offer terminates. Attempting to offer ancillary or non-material terms may not terminate the offer.

- **Death of either party before acceptance** – an offer cannot be accepted by the offeree's representatives after the offeree's death as an offer may be regarded as a personal matter. Similarly, the death of the offeror terminates the offer.

- **Destruction of subject matter** – an offer terminates automatically if the subject matter of the contract (i.e., goods, property) is destroyed prior to acceptance. If the offer has already been accepted, this could serve to void the contract.

- **Insanity/ Mental Incapacity** – the offer lapses where the offeror loses his reason or becomes incapable of consenting, for there can be no consent where there is no mind capable of consenting. The offer does not become effective again if the offeror regains mental capacity.

- **Illegality** – an offer terminates by operation of law if the subject of the offer (the activity or product) becomes illegal. If the offer has been accepted, the subject matter becoming illegal will void the contract.

- **Revocation of the offer before acceptance** – an offer may ordinarily be withdrawn by the offeror at any time prior to acceptance unless the offeror has by the terms of the offer or by his own conduct precluded himself from doing so (there are certain offers, known as "firm offers", that state that the offer cannot be revoked for a certain period. This type of offer is a form of contract in itself). If the offeree has already accepted the offer, a valid contract exists and an attempt to revoke the offer may constitute breach of the contract. The revocation of the offer must be communicated to the offeree. If the knowledge of the revocation came about through a third party, it has to be considered whether the information was such that a reasonable man should feel persuaded of its accuracy.

- **Failure of a condition subject to which the offer was made** – if an offer is made subject to an essential condition, and the condition is not satisfied, the offer will not be capable of acceptance. The condition may be express or implied.

- **Change of status of the offeror** – e.g. (1) an offer lapses where it was made in relation to the property of the offeror who becomes bankrupt. Upon bankruptcy his property would vest in his trustee and as such not possible for the offeror to dispose of it. (2) an offer made by a partnership lapses if before acceptance the partnership is dissolved.

(4) ACCEPTANCE

- In order for a valid acceptance to take place, an offer must still be in force.
- Acceptance must be absolute and unqualified. Acceptance subject to conditions, additions, restrictions alterations amounts to a refusal/rejection of the original offer and consequently a new offer in those terms – counter offer (an alternative proposal made by the offeree in substitution for the original offer which could be accepted by the original offeror). However, conditions which do not qualify the offer but merely express what the offer already implies in fact or in law; or requests for information; request for addition or modification of terms as a favour, does not invalidate acceptance so long as it is clear that the offer is accepted, whether such request be granted or not.
- An offer becomes irrevocable upon acceptance.
- Generally, only the offeree is entitled to accept the offer. If it is accepted by a third party, there is no concurrence of mind, and therefore no contract.
- Acceptance must be clear and unambiguous. The recipient is not required to apply any special knowledge in ascertaining the meaning of the acceptance. E.g. letter in a different language, requirement to solve a puzzle etc. In such an instance, the offeror may refuse such acceptance.
- Acceptance must be in the manner indicated. The offeror is the master of his offer. He is entitled to prescribe the method of acceptance, to the exclusion of other methods. Where no exclusive method of acceptance is indicated, the offeree is entitled to accept by an equally expeditious or more expeditious method than that indicated. If he chooses a less expeditious method, he does so at his own risk. Where the offer is required by law to be in a particular form, there is no requirement that the acceptance must also be in that form.
- Acceptance must be communicated to the offeror. This principle clearly applies where the parties are in the presence of one another or when they bargain over the telephone. However, exceptions may apply. For example, silence or inaction may amount to acceptance.
- Acceptance could be by express words or by the conduct of the offeree. If the offer takes the form of a promise in return for an act, the performance of that act is in itself an adequate act of acceptance.
  <u>E.g.</u>
  1. Performance of an act in response to an advertisement of reward. *Carlill vs. Carbolic Smoke Ball Company*
  2. Dispatch of goods from a shop in response to an order placed by a customer.

- <u>Performance in ignorance of an offer:</u>
  An offer is not considered to have been made until it has been communicated to the offeree on the basis that an offeree cannot assent to an offer unless he knows of its existence. Consequently, acts done or words spoken in ignorance of an offer by a person for whom the offer was intended will not amount to acceptance, and it may be shown that such conduct or language did not mean assent.
  Exception: where an offeree, in ignorance of the terms of an offer, so conducts himself as to justify the other party (i.e. the offeror) in inferring assent. E.g. a person who signs a document which is in a language that he does not understand, not knowing that it contains a proposal of a contract. If he does not require the document to be read to him or translated to him, he may find himself bound by it in the absence of fraud.

However, an offeree who knows that an offer has been made to him but does not know all its terms may duly accept whatever terms it contains.

- Rewards for providing information –
  - Where services rendered in ignorance of the offer fulfill the terms of the offer.
    Gibbons vs. Proctor (1891) 64 L.T. 594 (England)
    In this case, the courts allowed a police officer to claim a reward even though he had furnished the required information before the printing of the advertisement offering the reward. However, no reasons were given by the judge. Therefore, this case met with severe criticism.
    Williams vs. Carwardine (1833) 5 C.& P. 566 (England)
    In this case, a person who was aware of the existence of an offer of a reward for information relating to the discovery of a murder, gave the required information, influenced not by the reward but by other motives. It was held that the person was entitled to the promised reward.
  - Contrary view:
    Fitch vs. Snedaker (1868) 38 N.Y. 248 (America)
    In conformity with the general principles governing the acceptance of offers, it was held that there could be no assent to an offer by a person unaware of the fact that it had been made.
    Bloom vs. American Swiss Watch Co. (1915) A.D. 100 (South Africa)
    An informer furnishing information in ignorance that a reward had been promised was not entitled to recover it.

- Postal Rule:
  - This is a rule of contract law that makes an exception to the general rule that an acceptance is only created when communicated directly to the offeror.
  - *Adams vs. Lindsell:*
    The postal rule was first established in this case. The acceptance is complete as soon as it is posted. It is not necessary for the offeror to receive the acceptance.
  - The postal rule applies where it is agreed that the parties will use the post as a means of communication. The postal rule states that where a letter is properly addressed and stamped the acceptance takes place when the letter is placed in the post box. An offer can no longer be revoked once the acceptance has been posted and it is generally irrelevant that it never arrives, or arrives late.
  - *Household Fire Insurance v Grant [1879] 4 Ex D 216*
    The postal rule was affirmed, which states that acceptance is effective when it is mailed, as long as the parties consider the post as an acceptable way of communicating. This rule is true even though the letter never arrived. Posting acceptance creates a 'meeting of minds', which created a binding contract.
  - *Henthorn v Fraser [1892] 2 Ch 27*
    "Where the circumstances are such that it must have been within the contemplation of the parties that, according to ordinary usage of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."
  - The offeror, when choosing the postal system as his chosen means of communication should understand and bear the risks naturally associated with such a method, such as delayed, damaged or lost mail.
  - The postal rule will not apply if loss or delay of the letter is due to the fault of the offeree, who has, for example misaddressed it.
  - Instantaneous communication (telephone, fax, face to face, telex) – The general acceptance rule should apply. Therefore, acceptance must be communicated.
  - Applicability of the postal rule with regard to modern forms of communication:
    (a) Telephone:

It is an instantaneous form of communication. It has been held that a telephone conversation is the same as a conversation that is held between two people in the same room so the 'receipt' rule applies; this means that the offeror has to receive communication of acceptance before a contract has been established, this is obviously different to the postal rule in the fact that receipt has to be acknowledged by the offeror.

(b) Fax/Telex:
Entores v Miles Far East Corp [1955] 2 QB 327
The court held that the postal rule did not apply for instantaneous communications. Since Telex was a form of instant messaging, the postal rule of acceptance would not apply and instead, acceptance would be when the message by Telex was received. This general principle on acceptance was held to apply to all forms of instantaneous communication methods. Acceptance *via* these forms of communication had to be clear before any contract is created.

There is also an assumption that a message of acceptance sent during normal business hours by means of instantaneous communication can be reasonably expected to have been received

Brinkibon Ltd v Stahag Stahl und Stahlwarenhandel GmbH, ([1982] All ER 293)/ [1983] 2 AC 34
The court reaffirmed ***Entores v Miles Far East Co***, which stated that the postal rule did not apply to instantaneous forms of communication, which would include Telex. However, a problem arises where an instantaneous method is used but the message is not actually instantaneous. The court held that in the case of an error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender, the responsibility and risk was on the person who receives the message if they choose not to man their machines.

Mondial Shipping and Chartering BV v Astarte Shipping Ltd [1995] 2 Lloyd's Rep 249
The court reaffirmed ***Brinkibon Ltd v Stahag Stahl und Stahlwarenhandel GmbH*** but limited to within business hours. Accordingly, where a message sent later on in the day on a Friday was held to only be communicated on the next working day (Monday morning). [This seems fair as it is not practical to regard all messages sent at all times as indifferent to face to face communication.]

(c) Online contracting (other than e-mail) (for example a CD bought from an online shop):
There is no actual space in time between the sending and the acceptance of the offer. Therefore, instantaneous communication. This is seen as quite similar to a transaction in a shop. The item on the webpage is seen to be an invitation to treat. The customer then puts the items in their virtual basket and proceeds to checkout where they give their credit card details to the seller. This constitutes an invitation to buy; an offer (similar to the situation in ***Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd***). The website then displays a confirmation of order; the acceptance is often only communicated by dispatch of the goods themselves. Therefore, the general rule applies in internet/online contracting by stating the order/acknowledgment of the order 'will be deemed to be received when the parties to whom they are addressed are able to access them'. Therefore, acceptance must be communicated. The postal rule therefore does not apply as internet contracting is held to be a method of instantaneous communication.

(d) E-mail:
The average person may regard e-mail as just as instantaneous as a fax or telex; however, an e-mail is not sent directly between the two devices, instead it is transferred through a server. First the sender creates a message on his computer and opens the connection to the internet service provider (ISP). Then the sender presses the send button, which, so long as the

network is not busy and the receiver's e-mail address has been correctly entered, transmits it along the international network of computers until it reaches the intended receiver's ISP. From the sender's ISP the e-mail enters the internet where it may bounce from a minimum of one computer to many millions, before reaching the ISP of the receiver. The recipient will then be able to retrieve the message by logging onto their ISP and downloading the message. E-mail is therefore, not considered as an instantaneous form of communication, on the basis that there can be a gap in time between dispatch and deemed receipt. In transmission of the acceptance through e-mail, the message is considered to be out of the offeree's position at the time the offeree connects to the internet and presses the 'send' button. The person has no control over the acceptance once he has pressed send just as if he had put it into a mail box. It has been held that e-mail is a system that is similar to post but on a speedier basis and therefore, it seems logical to say that e-mail messages between parties are instantaneous and accordingly, direct the general 'receipt' rule should apply.

However, there is a contrary view because e-mails generate instantaneous error messages indicating success or failure. On that basis, the acceptance must be communicated to the offeror and it is considered that the offeree will not have taken all reasonable steps until they receive confirmation of successful sending. There is no risk or major detriment to the offeree to ensure that they repress send until successful delivery since sound business practice and common sense prevail.

(5) CONSIDERATION / REASONABLE CAUSE (*JUSTA CAUSA)*

- The common law doctrine of "consideration" has an economic value (the money value passed) and is an essential component of the validity of a contract. A valuable consideration in the eye of the law may be where each party has bought the other's promise either by doing some act in return for it or by offering a counter promise. Consideration need not be adequate but must be of value. Examples of consideration – the act of giving, act of performance, to abstain from doing an act, to suffer detriment or loss, to assume a liability or responsibility which did not bind one before. An existing moral obligation (which is not enforceable at law) does not constitute a good consideration [*Currie v. Misa*, (1875) LR 10 EX 153].
- However, generally, "consideration" is not prevalent in Sri Lanka. In the Roman Dutch law, the simple requirement of "just causa" suffices and this is what is generally operative in Sri Lanka. However, in respect of contracts governed by principles of English law (mainly because of statutory provisions) consideration may be required, e.g., contracts for the sale of goods and bills of exchange (which are governed by English law).
- Causa denotes the ground, reason or object of a promise, giving such promise a binding effect in law. It has a much wider meaning than the English term "consideration" and comprises the motive or reason for a promise and also purely moral consideration. [*Lipton v. Buchanan*, (1904) 8 NLR 49, confirmed in 10 NLR 158]. A moral obligation suffices to constitute "causa" [*Jayawickrema v. Amarasuriya*, (1918) 20 NLR 293, 294, (Privy Council)].

(6) CAPACITY TO CONTRACT

- Capacity to contract means the legal competence of a person to enter into a valid contract. Usually the capacity to contract refers to the capacity to enter into a legal agreement and the competence to perform some act.
- All persons have the capacity to contract. However, the law provides protection to certain persons as provided below.

- Minors (below 18 years):
  - Persons who supply "necessities" to minors are entitled to recover a reasonable price.
  - Necessities include food, clothing, medicine etc.

- Ratification of contract by the minor after becoming a major; contract is effective from the time it was made.

- Mentally unsound persons:
  - At the time of entering into the contract if a person is insane, then the contract is null and void even though the other party has entered into the contract without knowing – *Soysa vs. Soysa 19 NLR 314*
  - Persons who supply "necessities" to such persons are entitled to recover a reasonable price.

- Intoxicated persons:
  - People who are intoxicated by drugs or alcohol are usually not considered to lack capacity to contract. Courts generally rule that those who are voluntarily intoxicated shouldn't be allowed to avoid their contractual obligations, but should instead have to take responsibility for the results of their self-induced altered state of mind. However, if a party is so far gone as to be unable to understand even the nature and consequences of the agreement, and the other (sober) party takes advantage of the person's condition, then the contract may be voidable by the intoxicated party.

(7) FACTORS AFFECTING THE VALIDITY OF A CONTRACT

- An agreement must not be defective. There are several factors that may affect the validity of a contract.
  (a) Mistake
  (b) Misrepresentation
  (c) Duress
  (d) Undue influence
  (e) Illegality
  (f) Frustration

- Mistake:
  - A mistake is an erroneous belief (at the time of contracting) that certain facts are true. If raised successfully, and if its proven that there was a radical difference in what was signed and what the party thought was signing, the contract may be set aside.
  - E.g.: Mistake as to the nature of the contract, mistake as to the identity of the persons contracted with.
  - Mistake of the quality has no effect.

- Misrepresentation:
  - A misrepresentation is an untrue or misleading statement of fact which induces a person to enter into the contract.
  - The misled party may normally rescind (cancel) the contract, and/or may be awarded damages.
  - There are three categories of misrepresentation: fraudulent, negligent and innocent.
  - Fraudulent misrepresentation – where a false representation is made with the intention to deceive. Can claim damages and for the contract to be set aside.
  - Negligent misrepresentation – a representation made carelessly and negligently without taking reasonable care to ensure that the representation is accurate. Can claim damages and for the contract to be set aside.
  - Innocent misrepresentation – the person did in fact honestly believed it to be true. Can claim damages.
  - Misrepresentation is relevant only if the following conditions are present:
    1. representation must be a representation of a material fact;
    2. representation must have been made before the conclusion of the contract in order to induce the other party;

3. intention to misrepresent must be there;
4. the misrepresentation must be acted upon by the other party.

- Duress:
  - Any party entering to a contract must enter willingly, particularly if it is to be enforceable.
  - Duress in contract law involves illegitimate threats or violence of a physical nature used to compel someone to do something. Where the threat is a contributing reason for entering into an agreement, even if not the main reason, the agreement is voidable.
  - This applies where a party may be acting under a fear of actual or threatened danger.
  - The fear must be reasonable.
  - The threat should have been immediate.
  - The threat should have involved illegal conduct.
  - Damage should have resulted from so acting or forbearing.

- Undue influence:
  - In undue influence, a person takes advantage of a position of power/trust over another person. This inequality in bargaining power may affect the weaker party's consent. Therefore, the consent of one party is not voluntary.
  - Undue influence is generally by words or conduct not amounting to duress.
  - The contract is voidable.

- Illegality:
  - An agreement must be lawful in both form and content. An agreement to commit a crime or for a legally prohibited purpose is not a lawful contract.
    (i) Illegal by statute (implied or express prohibition by statute). Express – where the transaction requires a license, but the agreement has been entered into without the relevant license been obtained. Implied – where statute requires a particular form to be followed. An agreement required to be by deed (such as a transfer of land, or most leases) that is merely oral or in writing may be unenforceable.
    (ii) Illegal by common law (fraudulent objective).
    (iii) Illegal as opposed to public policy or morality [agreements conflicting with the interests of the country in relation to national security/ public service/ administration of justice; agreements conflicting with considerations of morality (restrictions on marriage); agreements restraining individual freedom (restraints regarding employment)].
  - Contract is void.

- Frustration:
  - Frustration occurs where a contract becomes impossible to perform, or where performance would be pointless or substantially different from that anticipated. Unlike some other factors affecting the validity of a contract, the contract here is valid up until the "frustrating event".

(8) CONDITIONS AND WARRANTIES IN A CONTRACT

- A condition is a vital term going to the foundation of the contract.
  E.g. An opera singer falls ill and does not come to perform on the first few days of the opera as agreed. Therefore, the organizers had to obtain services of another singer who agreed to perform only if she was given the opportunity to perform on all the days of the opera. The organizers refused the services of the first opera singer. The court held that the organizers were entitled to so refuse since the first opera singer was in breach of a condition.
- A warranty is a term that is subsidiary. It is an obligation which must be performed but is not vital and therefore, a failure to perform will not affect the substance of the contract.

E.g. An opera singer agreed to come 6 days before the opera for rehearsals. But he fell ill and came only 3 days before the opera. Organizers couldn't refuse his services as it was only a breach of warranty.

(9) TERMS AND REPRESENTATIONS IN A CONTRACT

- Where the representee indicates to the representor the importance of the statement made by the representor, this is likely to be held to be a term: *Couchman v Hill* 1947 KB 554 – if the statement is of such importance that the offeree would not have entered into the contact if he had known it to be untrue, it is likely to be a term.
- Terms included in the written document are terms any verbal statements will be representations.
- If the representor has the greater knowledge, it is more likely to be a contractual term and if the representee has the greater knowledge it is more likely to be a representation.
- Express and Implied Terms:
  - Express – which are expressly provided in the contract.
  - Implied – which the law implies into the contract unless the parties stipulate to the contrary.

(10) FORMAL REQUIREMENTS IN A CONTRACT

- Certain contracts must be in writing and notarially executed – Section 2 of the Prevention of Frauds Ordinance. E.g. sale, transfer etc. of immovable property.
- Contracts dealing with guarantee or suretyship, mortgage of a policy of insurance must be in writing and signed by the person undertaking liability – Section 18 of the Prevention of Frauds Ordinance.

(11) PRIVITY OF CONTRACT

- Privity of contract means that only a party to the contract may sue or be sued upon it. In other words, a contract cannot confer rights or impose liabilities upon one who is not a party to the contract.
- *Dunlop Tyre Company vs. Selfridge (1915) AC 847* – third parties are not subject to liabilities or restrictions under a contract.

(12) DISCHARGE OF CONTRACTS

- By performance of the contract. This refers to the discharge of the duties assumed by the parties under the contract in accordance with its terms; the fulfillment of the obligations under the contract.
- By agreement between the parties.
- Frustration. Subsequent to the formation of the contract, without fault of either party, the contract becomes incapable of being performed due to an unforeseen event resulting in the obligations being radically different from those contemplated by the parties to the contract.
- Breach of duties by either party; failure to perform the obligations under the agreement in whole or in part. This could be express or implied. Express – where the party states in so many words that he will not discharge the obligations undertaken. Implied – where by his own act he disables himself from performance or makes it impossible for the other party to render performance.
- By operation of law (e.g. set-off, merger, destruction, prescription, death, insolvency, judgment, winding up).