

Act 13

Contract Act

2008

LAWS OF SOUTHERN SUDAN

THE CONTRACT ACT, 2008

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LAWS OF SOUTHERN SUDAN**THE CONTRACT ACT, 2008**

In accordance with the provisions of Article 59(2)(b) read together with Article 85(1) of the Interim Constitution of Southern Sudan, 2005, the Southern Sudan Legislative Assembly, with the assent of the President of the Government of Southern Sudan, hereby enacts the following—

**CHAPTER I
PRELIMINARY PROVISIONS**

1. Title and Commencement.

This Act may be cited as “The Contract Act, 2008 and shall come into force on the date of its signature by the President.

*Signed on
28th
November,
2008*

2. Repeal and Saving.

- (1) Any provisions of existing legislation in force in Southern Sudan which are governed by this Act are hereby repealed, or cease to operate in Southern Sudan provided that all proceedings taken, orders issued and regulations made thereunder, except to the extent they are cancelled by the provisions of this Act, shall remain in force or effect, until they are repealed or amended in accordance with the provisions of this Act.
- (2) Where any suit relating to any provision of an existing law was pending before the court prior to the coming into force of this Act, that suit shall continue to be heard by that court in accordance with the provisions of that law.

3. Purpose.

The purpose of this Act is to codify and consolidate the law relating to contracts and other related matters.

4. Authority and Application of the Act.

- (1) This Act is drafted in accordance with the provisions of Article 55, paragraphs 9 and 19(1) of Schedule B, and paragraph 2 of Schedule D of the Interim Constitution of Southern Sudan, 2005, which grants the Government of Southern Sudan authority over commerce, trade and other matters relating to businesses and their conditions of operation.
- (2) Save as otherwise provided in specific laws, this Act shall apply to all contracts, including contracts entered into by the government, supplemented by the Government procurement rules and regulations.
- (3) The Provisions of this Act shall apply to contracts made on or after the date of its coming into force of this Act.
- (4) In relation to contracts made before the enactment of this Act, its provisions shall apply subject to modification of those contracts.

5. Interpretations.

In this Act unless the context otherwise requires, the following words and expressions shall carry the meanings assigned to them respectively—

“acceptance” means an assent to an offer made by a person to whom the offer is made;

“child” means a person below the age of eighteen years;

“coercion” means to force to act or think in a certain way by use of pressure or threats or intimidation, to the prejudice of any person with the intention of causing any person to enter into an agreement;

“consent” means agreement of two or more persons obtained freely, upon the same thing in the same sense;

“consideration for a promise” means where, at the desire of a promisor, a promisee or any other person does or abstains from doing or promises to do or to abstain from doing something;

“contingent contract” means a contract to do something or not to do something where an event, collateral to a contract, does or does not happen;

“contract” means an agreement between two or more persons as defined in section 6 of this Act;

“counter - offer” means a response to an offer which proposes terms that are different from those stated in the offer but which does not express an outright rejection of the offer;

“documents of title to goods” includes any Act of lading, dock warrant, warehouse keeper’s certificate, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of possession or control of goods or which authorises or purports to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods represented by the document;

“mercantile agent” means a person who in the ordinary course of his or her business, has authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods or raise money on the security of goods;

“Minister” means the Minister for Legal Affairs and Constitutional Development;

“misrepresentation” means—

- (a) a positive assertion made in a manner which is not warranted by the information of the person who makes it or an assertion which is not true, though the person who makes it believes it to be true;
- (b) any breach of duty, assertion or statement of fact which without an intent to deceive, gains an advantage to the person who commits it or anyone who claims under that person by misleading another person to his or her prejudice or to the prejudice of any one claiming under that other person;
- (c) innocently causing a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement; or
- (d) a false statement of fact made by one party to another wilfully or deliberately, and without any belief in its truth, with the intention of inducing the other party to enter into the contract;

“offer” means a statement or conduct which indicates the willingness to do or to abstain from doing anything signified by a person to another with a view to obtaining the assent of that other person to the act or abstinence and made with the intention that it will become binding as soon as it is accepted;

“offeror” means the person making an offer;

“offeree” means the person to whom an offer is made;

“promise” for the purposes of this Act, means a pledge, vow or declaration of intention which the promisor makes towards another person to perform or do something or to refrain from performing or doing something, to the advantage of that person;

“promisee” means the person to whom a promise is made and for purposes of this Act, a person who accepts an offer;

“**promisor**” means the person who makes a promise, and for purposes of this Act, a person who makes an offer;

“**reciprocal promise**” means a promise that forms the consideration or part of the consideration for each other;

“**void agreement**” means an agreement that is not enforceable by law;

“**voidable contract**” means an agreement which has legal effect and force when it is made, but is liable to be subsequently annulled or set aside by the courts through the process of rescission at the option of a party to a contract.

CHAPTER II FORMATION OF CONTRACT

Definitions and General Rules

6. Definition of Contract.

A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration, with a lawful object and with the intention to be legally bound.

7. Definition of Agreement.

- (1) An agreement is a promise or a set of promises forming the consideration for each other, based on mutuality over terms.
- (2) Every agreement is a contract except where—
 - (a) the terms of the agreement are uncertain;
 - (b) the persons making the agreement do not intend to be legally bound by it; or
 - (c) the agreement lacks the necessary formal characteristics.

- (3) An agreement may be inferred from a written statement, the oral statements or the conduct of the parties, or from any combination herein.
- (4) An agreement will be inferred whenever an offer is met by an acceptance which relates to the offer and agrees to its terms.
- (5) An agreement may be revoked by a written statement, the oral statements or the conduct of the parties, or from any combination herein.
- (6) Where an agreement is inferred or revoked under this section, the rules applicable to the making, revocation or variation of offer and acceptance shall apply, so far as circumstances apply.

Offer

8. Meaning of Offer.

- (a) An offer is a statement of terms which the offeror proposes to the offeree as the basis of an agreement, coupled with a promise, express or implied, to adhere to those terms if the offer is accepted.
- (b) An invitation to make an offer, referred to as an invitation to treat, is a statement of terms for an agreement where no promise is made and where the person to whom it is made is himself or herself invited to make an offer.
- (c) For the purposes of the formation of contract, the following shall be presumed to constitute invitations to treat and not offers—
 - (i) an advertisement inviting performance of an act;
 - (ii) the publication of tender notices inviting the submission of tenders;

- (iii) the display of goods in a shop with prices marked; and
- (iv) the distribution of brochures catalogues and price lists of goods and services.

9. Offer May be Made to Different Persons.

An offer may be made to a specific person, to a class of persons or to the general public.

10. Number of Potential Agreements.

An offer may be made so as to invite a single acceptance thereby forming a single agreement or so as to invite a series of acceptances thereby forming as many agreements as there are acceptances.

11. Time When an Offer Takes Effect.

An offer shall take effect only when it reaches the offeree and remains effective until it is revoked or lapses.

12. Rejection of an Offer.

- (1) An offer ceases to have effect on its rejection by the offeree, whether or not the rejection is coupled with a counter-offer, unless it is stipulated by the offeror that the offer will continue despite any rejection.
- (2) A rejection of an offer may be made in any form but an ambiguous reply or a request for information or for a variation of the offer shall not be construed as a rejection.
- (3) A rejection takes effect only when it reaches the offeror and shall be of no effect if an acceptance of the offer or a withdrawal of the rejection reaches the offeror before or at the same time as the original rejection.

13. Lapse of an Offer.

- (1) An offer, whether revocable or irrevocable, lapses upon—
 - (a) the expiry of the specified period for acceptance;
 - (b) passage of a reasonable time, where no time is specified; or
 - (c) the failure of an express or implied condition of acceptance.
- (2) In determining what reasonable time is, regard shall be had to all the circumstances, including the nature of the transaction, custom and usage, and the rapidity of the means of communication employed by the offeror.
- (3) An offer does not lapse merely because the offeror or offeree dies or becomes incapable of contracting but only where the situation is so changed as to frustrate the purpose of the offer according to its terms.

*Acceptance***14. Meaning of Acceptance.**

- (1) Acceptance of an offer is an assent by the offeree to the terms of the offer coupled, where relevant, with a promise, express or implied, by the offeree to fulfil any obligations which may fall upon him or her under the proposed contract.
- (2) Where the assent is not express, it shall be inferred if—
 - (a) the terms of the offer require or permit the indication of assent by performance and the offeree starts or continues performance with the intention of accepting; or

- (b) the offeree takes the benefit of an offered performance which he or she has had reasonable opportunity to reject.
- (3) It is not clear whether an offer calls for an express assent or assent to be inferred from performance of an act, the offeree in accepting may choose either of the two.

15. Time When Acceptance Takes Effect.

Subject to the provisions of section 21 of this Act, an acceptance by express assent takes effect only when the communication of assent reaches the offeror and shall be of no effect if a withdrawal of the acceptance reaches the offeror before or at the same time as the original acceptance.

16. Form and Method of Acceptance.

Communication of acceptance may be in any form or by any method unless the offeror unambiguously states that he or she requires a special form or method, in which case acceptance by a different form or method shall not bind the offeror.

17. Late and Imperfect Acceptance.

- (1) An acceptance which is late or, being an acceptance which requires communication, is late in reaching the offeror or does not comply with a special form or method required may nevertheless be treated by the offeror as a valid acceptance.
- (2) Where the offeror is aware that an acceptance, if the system of transmission had been normal, would have reached him or her in due time, he or she shall be bound by the acceptance unless he or she promptly advises the acceptor by an appropriate communication that he or she regards the offer as having lapsed.

18. Acceptance Containing Qualifications.

- (1) A reply by the offeree which, while relating to the same subject matter as the offer, that contains proposals which differ from those in the offer constitutes a rejection of the offer coupled with a counter-offer.
- (2) Notwithstanding the provisions in subsection (1) above, there is neither a rejection nor acceptance if the offeree indicates that his or her proposal of different terms is an alternative offer not to be taken as a rejection of the original offer.
- (3) Notwithstanding the provisions of subsections (1) and (2) above, there is an acceptance if the different terms do not materially alter the terms of the offer unless the offeror promptly communicates his or her objection to the discrepancy and, if no such objection is communicated, the terms of the contract shall consist of the terms of the offer with the modification contained in the acceptance.

19. Potential Acceptors.

An offer can be accepted only by the person to whom the offer is made.

*Communication in Relation to Offer, Acceptance or Revocation***20. Communication of Offer, Acceptance or Revocation.**

- (1) A communication of an offer is made by an act or omission of a party who proposes the offer, by which that party intends to communicate the offer or which has the effect of communicating the offer.
- (2) A communication of acceptance of an offer is made by an act or omission of a party who accepts the offer, by which that party intends to communicate the acceptance or which has the effect of communicating the acceptance.

- (3) A communication of revocation of an offer or acceptance is made by any act or omission of a party who revokes or accepts the offer, respectively, by which that party intends to communicate the revocation or acceptance or which has the effect of communicating the revocation or acceptance.

21. Completion of Communication.

- (1) A communication of an offer is complete when it comes to the knowledge of the person to whom it is made or to that of a person having his or her authority to receive it and, in the case of a written communication, when it comes into the possession of either of such persons or is delivered to any place authorized for delivery of such a communication.
- (2) Notwithstanding the provisions of section 15 of this Act, communication of an acceptance is complete—
 - (a) as against the offeror, when it is put in a course of transmission to him or her so as to be out of the power of the acceptor; or
 - (b) as against the acceptor, when it comes to the knowledge of the offeror or to that person having his or her authority to receive it and, in the case of a written communication, when it comes into possession of either of such persons or is delivered to any place authorized for delivery of such a communication.
- (3) Communication of a revocation is complete—
 - (a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; or

- (b) as against the offeree, when it comes to the knowledge of the offeror or to that person having his or her authority to receive it and, in the case of a written communication, when it comes into possession of either of such persons or is delivered to any such place authorized for delivery of such a communication.

22. Acceptance to be Absolute.

- (1) An offer is converted into contract where the acceptance is—
 - (a) absolute and unqualified; and
 - (b) expressed in a usual and reasonable manner, except where the offer prescribes the manner in which it is to be accepted.
- (2) Where an offer prescribes a manner in which it is to be accepted and the acceptance is not made in that manner, the offeror may, within a reasonable time after the acceptance is communicated to him or her, demand that the offer is accepted in only the prescribed manner.
- (3) An offeror fails to demand that acceptance be made in the prescribed manner, the offeror shall be deemed to have accepted the offer.

23. Acceptance by Performing Conditions or Receiving Consideration.

The performance of the conditions of an offer or the acceptance of any consideration for a reciprocal promise which may be offered with an offer is an acceptance of the offer.

24. Revocation of Offer or Acceptance.

- (1) An offer may be revoked at any time before the communication of its acceptance is completed.

- (2) Notwithstanding the provisions of subsection (1) above, an offer may not be revoked where—
- (a) the term of the offer is express; or
 - (b) by implication from the circumstances, the preliminary negotiations, the practices which the parties have established between themselves or the customs and usages applicable to their relationship,
- the offer shall be irrevocable for a period which has not expired.
- (3) An acceptance may be revoked at any time before the communication of the acceptance is complete.

25. Mode of Revocation of Offer Under Section 21(3).

An offer is revoked by—

- (a) communication of the notice of revocation by the offeror to the other party;
- (b) lapse of the time prescribed in the offer, for its acceptance, or, where time is not prescribed, by the lapse of a reasonable time without communication of the acceptance;
- (c) the failure of the acceptor to fulfil a condition precedent to acceptance; or
- (d) the death or insanity of the offeror, where the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.

26. Express or Implied Promise.

A promise may be express or implied—

- (a) A promise is express, where an offer or an acceptance of a promise is made in words or in writing.
- (b) A promise may be implied, where an offer or an acceptance is neither written nor made orally.

27. Implied Terms in a Contract.

The express provisions of a contract are not exhaustive and provisions may be implied when—

- (a) in the light of the surrounding circumstances including the general law or any course of dealing between the parties, such provision must be taken to have been intended by the parties;
- (b) required to enable the contract to operate reasonably; or
- (c) required by any applicable statute, trade custom or local usage.

Consideration

28. Consideration.

- (1) Consideration is a promise, act, right, interest, profit or benefit given, a forbearance, detriment, loss suffered or responsibility undertaken by one party at the request of the other contracting party in exchange for the promise of the other contracting party.
- (2) Consideration is a pre-requisite for conclusion of a contract.
- (3) Notwithstanding the provisions of subsection (2) above, consideration shall not be a pre-requisite for modification or variation of a contract.

- (4) The consideration given—
- (a) need not be adequate;
 - (b) must be sufficient, real and tangible with discernible value;
 - (c) must not be past, i.e it must follow rather than precede an agreement;
 - (d) must move from the promisee; and
 - (e) must not include existing contractual or public duties except where it involves something extra or unless the other party gains an extra benefit.

Certainty

29. Indefinite or Incomplete Agreements.

An agreement is not a contract, if its terms are indefinite or incomplete except where there is a reasonably certain basis, by reference to methods agreed by the parties or prescribed by law or custom, upon which the court can resolve the uncertainties and considered the omission.

Intention to be Legally Boun

30. Intention of the Parties.

- (1) An agreement is not a contract where the parties do not intend to be legally bound by it.
- (2) Parties are deemed to have intended to be legally bound by the agreement where the agreement is not caused by—

- (a) coercion;
- (b) undue influence, as defined in section 53 of this Act;
- (c) fraud, as defined in section 54 herein;
- (d) misrepresentation; or
- (e) mistake, subject to the provisions of sections 56, and 57 of this Act.

Capacity to Contract

31. Capacity to Contract.

A person has capacity to contract where that person—

- (a) is eighteen years of age or above;
- (b) is of sound mind; and
- (c) is not disqualified from contracting by any law to which he or she is subject.

32. Contract by a Child.

- (1) Notwithstanding the provisions of section 31 above, a contract made by a child is unenforceable against him or her if it can be shown that enforcement would be unfair or unreasonable or against the interest of the child.
- (2) To determine whether it would be unfair, unreasonable or against the interest of the child to enforce a contract against a child, the circumstances shall be taken into account, in particular—
 - (a) the nature and value of the benefits to which the child is entitled under the contract;
 - (b) the burden which the obligations of the contract impose upon the child;

- (c) the actual and apparent ability of the child to discharge those obligations;
 - (d) the actual and apparent age and intelligence of the child;
 - (e) whether the child's parent or guardian has consented to or approved the making of the contract; and
 - (f) any misrepresentation made by the child relating to any of the matters referred to in paragraphs (c), (d) and (e) herein.
- (3) Where the child affirms the contract after majority, the contract becomes fully binding upon him or her as to both performance already made or due and performance due in the future to the same extent as if made by a person of full capacity and affirmation may be by express words or may be inferred from conduct.
- (4) Where the performance of a child under a contract is guaranteed by a person of full capacity, the guarantee is enforceable against the guarantor whether or not the contract is enforceable against the minor.

33. Sound Mind for Purposes of Section 31.

- (1) For purposes of entering a contract under section 31 of this Act, a person is said to be of sound mind, if at the time of entering into the contract, that person is capable of understanding the contract and of forming a rational judgment as to its effect upon his or her interests.
- (2) For purposes of this Act a person is of unsound mind if, by reason of mental disorder or the influence of drink or drugs, he or she is incapable of understanding the nature and consequences of the contract or is prevented from acting reasonably in entering into the contract.

- (3) A person who is usually of unsound mind but occasionally of sound mind may enter into a contract during periods when he or she is of sound mind.
- (4) A person who is usually of sound mind but occasionally of unsound mind may not enter into a contract during periods when he or she is of unsound mind.
- (5) Notwithstanding the provisions of subsections (3) and (4) above, a contract made by a person of unsound mind is unenforceable against him or her and he or she shall be entitled to restitution of benefits conferred by him or her under the contract if it can be shown that at the time of contracting, the other party was aware that he or she was of unsound mind.
- (6) Where the person who is of unsound mind affirms the contract when he or she is capable of understanding its nature and consequences and of acting reasonably in affirming it, the contract shall be fully binding upon him or her as to both performance already made or due and performance due in the future to the same extent as if it was made by a person of full capacity and affirmation may be by express words or may be inferred from conduct.
- (7) Where the performance of a person who is of unsound mind is guaranteed by a person of full capacity, the guarantee shall be enforceable against the guarantor whether or not the contract is enforceable against the person who is of unsound mind.

Form of Contract

34. Form of Contract.

- (1) A contract may be oral or written or partly oral and partly written or may be implied from the conduct of the parties.

- (2) A contract is in writing if it is—
 - (a) in the form of a data message;
 - (b) accessible in a manner usable for subsequent reference; and
 - (c) otherwise in written words.
- (3) Notwithstanding the provisions of subsections (1) and (2) above, an agreement is not a contract where it is not in the form which a statute or custom makes mandatory for a contract to come into existence.
- (4) Nothing in this Act shall affect any law in Southern Sudan relating to contracts by corporations or generally.
- (5) A contract of guarantee or indemnity shall be in writing.
- (6) In this section, “guarantee” and “indemnity” shall have the meanings assigned to them in Chapter IX of this Act.

CHAPTER III CONTENT OF A CONTRACT

Nature of Provisions of a Contract

35. Types of Provisions.

- (1) A contract may contain one or more of the following obligations—
 - (a) a promise as to future conduct of the contracting parties;
 - (b) undertakings as to future events beyond the control of the contracting parties;

- (c) representations as to existing or past events, fact or law; and
 - (d) obligations imposed by law or custom, and may contain provisions suspending, ending or otherwise affecting the operation of the contract.
- (2) Each of the parties to the contract shall be bound to fulfil the obligations assumed by or imposed on him or her by the contract.

36. Express Provisions Unknown to one Contracting Party.

The express provisions of a contract include not only those to which each party has knowingly agreed but also any provisions which one party may reasonably assume the other to have accepted because—

- (a) they were included in a document signed as a memorandum of the contract by the other party;
- (b) reasonable steps were taken to draw such provisions to the other party's attention on or before the conclusion of the contract.

37. Representations.

- (1) A representation, however expressed, as to existing or past state of fact or law made by one contracting party to the other may be presumed to be a provision of the contract, and hence constitute an undertaking as to the truth of the representation, where the contracting party to whom it was made reasonably relied on it upon entering into the contract.
- (2) Factors relevant in determining whether it is reasonable for one contracting party to rely on a representation made by another are—

- (a) whether the representation is incorporated in any writing evidencing the contract, although the mere absence of such incorporation shall not preclude the representation from being a provision of the contract;
 - (b) whether in the circumstances the advice of a person possessing expert knowledge or special skill is normally sought;
 - (c) whether one contracting party has expert knowledge or special skill not possessed by the other; and
 - (d) whether the representation was on a matter of importance to the contracting party to whom it was made.
- (3) A representation which is not a provision of the contract gives no rise to contractual remedy.

38. Incidence of Promises and Obligations.

- (1) The parties to a contract may provide that the whole or any part of its provisions shall not come into operation until the occurrence of an event.
- (2) The parties to a contract may provide that the whole or any part of its provisions shall cease to operate for the future upon the occurrence of an event.
- (3) The parties to a contract may provide that an obligation to perform one or more of the promises contained in the contract shall not arise before the occurrence of an event.

Contracting out of Provisions

39. Freedom to Contract Out.

Contracting parties are free to exclude from their contract, or limit the extent of any obligation imposed by law except as provided in section 40 below.

40. Limits Upon Contracting Out.

The exclusion or limitation by agreement between the parties of an obligation imposed by law shall be of no effect if such exclusion or limitation—

- (a) has been expressly prohibited by statute;
- (b) is held to be unreasonable by the court;
- (c) imposes a burden on performance;
- (d) if the exclusion goes to the root of the contract; or
- (e) was not reasonably brought to the attention of the other contracting party before or at the time of the conclusion of the contract.

Proving the provisions of a contract

41. Oral Modifications of a Written Contract.

- (1) Where the contracting parties have reduced their agreement into writing there is a presumption that the whole contract is contained in the written contract.
- (2) Notwithstanding the provisions of subsection (1) above, extraneous evidence, both oral and written may be introduced to defeat this presumption.

42. Oral Evidence that Contract Inaccurately Reduced to Writing.

Where the provisions of a contract are recorded inaccurately in writing and its true provisions can be established, the contract shall be enforced in accordance with the true provisions.

*Interpreting the Provisions of a Contract***43. Rules of Interpretation.**

The words used by the contracting parties shall be taken to be used in their natural meaning in the context in which they appear unless a special meaning is attributed to any of them by the parties themselves, or by trade custom or local usage not inconsistent with the words of the contract taken as a whole.

**CHAPTER IV
VOID AND VOIDABLE CONTRACTS****44. Void and Voidable Contracts.**

A contract is void where it had not been formed and it is voidable where it may be avoided by one of the parties.

- (1) A contract is void if it—
 - (a) is illegal or unlawful;
 - (b) fails to comply with prescribed formalities;
 - (c) lacks consideration;
 - (d) is entered into by a person lacking full contractual capacity;
 - (e) is entered into under a common mistake as to existing circumstances; or
 - (f) is frustrated by changed circumstances after it has been entered into.
- (2) A contract is voidable if it—

- (a) lacks the free consent of a contracting party because his or her field of choice is curtailed by pressure or influence; or
- (b) lacks the full consent of a contracting party because he or she has misunderstood the contract.

Illegal Contracts

45. General Rule.

Subject to the provisions of this Act, a contract which is illegal is void and unenforceable against either party and gives no rise to rights of restitution in respect of benefits conferred under it.

46. Definition of Illegal Contract.

- (1) A contract is deemed illegal if—
 - (a) declared to be illegal or unlawful, or otherwise specifically prohibited by statute;
 - (b) consideration is illegal; or
 - (c) if the thing intended to be done is against public policy.
- (2) an act is taken to be illegal if it is forbidden by statute or is contrary to public policy.
- (3) A contract is not rendered illegal solely by reason of occurrence of a breach of the law in the course of its performance, it will only be illegal if the law which is broken prohibits expressly or impliedly, that type of contract.
- (4) An action is deemed to be against public policy if it prejudices freedom of contract and is harmful to the public.

47. Contract for Illegal Purpose.

A contract—

- (a) the making of which constitutes a criminal or civil wrong;
- (b) to commit a criminal or civil wrong;
- (c) to sell public properties;
- (d) to trade with the enemy or do other acts harmful to the State;
- (e) to abuse the legal process, interfere with the course of justice or oust the jurisdiction of the courts;
- (f) to make payment in consequence of the deliberate commission of a crime or of a civil wrong;
- (g) to unreasonably restrain a marriage;
- (h) to commit sexual immorality;
- (i) the making or performance of which would be manifestly contrary to public policy in any other way;

is illegal.

Exceptional Cases

48. Enforcement and Restitution Where One Party is Innocent of Illegality.

Where, whether through ignorance of the facts or of law, a contracting party neither knows or ought reasonably to have known that the contract is illegal, he or she may, if the other contracting party knew or ought to have reasonably known of the illegality—

- (a) obtain specific enforcement of any severable part of the contract which can be performed without doing something that is illegal;
- (b) claim such compensation as will put both parties in the same position as if the contract had been performed;
- (c) claim restitution, including specific restitution of benefits conferred by him or her in performing the contract subject to his or her restoring, specifically or otherwise and to the extent that the court thinks fit, benefits conferred on him or her under the contract.

49. Enforcement of Part of Illegal Contract.

Where a contract is illegal only because some provisions in the contract are forbidden by statute or are contrary to public policy, the court may sever and enforce the part of the contract which is not illegal as if it were a separate contract, unless the illegality is such as to make it contrary to public policy to allow severance and enforcement.

Contracts Lacking Formalities

50. Contract Lacking Formalities.

A contract which fails to comply with all or any of the formalities prescribed by a statute, whether as to the form of the contract or as to the evidence by which it shall be proved, is unenforceable against the contracting parties.

Contracts Affected by Common Mistake

51. Contracts Initially Affected by Common Mistake.

- (1) Where before a contract was entered into—

- (a) the performance of a contracting party is impossible and neither of the contracting parties knew of such impossibility; or
 - (b) circumstances exist which are radically different from what both contracting parties believe them to be,
- then unless in the case of impossibility one contracting party has assumed the risk of that impossibility, the contract shall be unenforceable against either and each party shall be entitled to restitution and reimbursement of expenses from the other.
- (2) Save as otherwise provided in subsection (1) above, the existence of a mistake common to both contracting parties does not affect the validity of a contract.

Contracts Lacking Free Consent

52. Contracts Lacking Free Consent.

A contract lacks free consent if it is made by a person under undue influence, fraud, coercion, misrepresentation or because the circumstances permit improper economic advantage to be taken of him or her.

53. Undue Influence.

- (1) A contract is induced by undue influence where the relationship subsisting between the parties to the contract is such that one of the parties is in a position to dominate the will of the other party and uses that position to obtain an unfair advantage over the other party.
- (2) For the purposes of subsection (1) above, a party is deemed to be in a position to dominate the will of another party, where—

- (a) the party holds a real or apparent authority over the other party;
 - (b) the party stands in a fiduciary relationship to the other party; or
 - (c) the mental capacity of the other party is temporarily or permanently affected by reason of age, illness, mental or bodily distress.
- (3) Where a party who is in a position to dominate the will of the other party, enters into a contract with that other party and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall be upon the party in a position to dominate the will of the other party.
- (4) Nothing in subsection (3) above, shall affect the provisions of the Evidence Act.

54. Fraud.

- (1) Consent is induced by fraud where any of the following acts is committed by a party to a contract, or with the connivance of that party, or by the agents of that party, with intent of deceiving the other party to the contract or the agent of the other party, or to induce the other party to enter into the contract—
- (a) a suggestion to a fact which is not true, made by a person who does not believe it to be true;
 - (b) the active concealment of a fact by a person having knowledge or belief of the fact;
 - (c) a promise made without any intention of performing it;

- (d) any act intended to deceive the other party or any other person; or
 - (e) any act or omission declared fraudulent by any law.
- (2) For the purposes of this Act, mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, it is the duty of the person keeping silent to speak, or unless the silence is, in itself, equivalent to speech.

55. Voidability of Agreements Without Consent.

- (1) Where consent to an agreement is obtained by coercion, undue influence, fraud, misrepresentation or because the circumstances permit improper economic advantage, the agreement is a contract, voidable at the option of the party whose consent was obtained by coercion, undue influence, fraud or misrepresentation.
- (2) Where consent is caused by misrepresentation or by silence which is deemed fraudulent within the meaning of section 54 above, the contract shall not voidable if the party whose consent was obtained had the means of discovering the truth with ordinary diligence.
- (3) Fraud or misrepresentation which does not cause a party on whom the fraud or misrepresentation is effected, to consent to a contract, does not render a contract voidable.
- (4) A party to a contract, whose consent is obtained by fraud or misrepresentation, may, where that party thinks fit, insist that the contract be performed and that he or she is put in the position in which he or she would have been if the representations made, had been true.

- (5) A contract which is voidable on the ground that the consent of a party to the contract was caused by undue influence, may be set aside absolutely or where the party who was entitled to avoid it received any benefit under the contract, upon such terms and conditions as may seem just to the/a court.

Mistake as To Existing Circumstances

56. Mistake of Fact.

- (1) Where both parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, and if consent is obtained by mistake of fact, the agreement shall be void.
- (2) A contract is void where one of the parties to it operates under a mistake as to a matter of fact essential to the contract.
- (3) An erroneous opinion as to the value of the things which form the subject matter of an agreement shall not to be deemed a mistake as to a matter of fact.

57. Mistake of Law.

Where a contract is entered into by a mistake in respect of any law in force in Southern Sudan, the contract shall be void.

Lack of Consideration

58. Lawful Consideration or Objects.

- (1) Consideration or an object of an agreement shall be deemed to be lawful, except where the consideration or object—
 - (a) is forbidden by law;
 - (b) is of such nature that, if permitted would defeat the provisions of any law;

- (c) is fraudulent;
 - (d) involves or implies, injury to a person or the property of another person; or
 - (e) is declared to be immoral or against public policy by a court.
- (2) An agreement whose object or consideration is unlawful is void and a suit shall not be brought for the recovery of any money paid or thing delivered or for compensation for anything done under the agreement, unless—
- (a) a court is satisfied that the plaintiff was ignorant of the illegality of the consideration or object of the agreement at the time the plaintiff paid the money or delivered the thing sought to be recovered or did the thing in respect of which compensation is sought;
 - (b) a court is satisfied that the illegal consideration or object had not been effected at the time the plaintiff became aware of the illegality and repudiated the agreement;
 - (c) a court is satisfied that the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence; or
 - (d) the agreement is declared illegal by any law, with the object of protecting a particular class of persons of which the plaintiff is one.
- (3) Where a part of a single consideration for one or more objects, or one of several considerations for a single object is unlawful, the agreement shall be void.

59. Effect of Lack of or Failure of Consideration.

- (1) An agreement made without consideration shall be void except where the agreement—
 - (a) is expressed in writing and registered under the law for registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other;
 - (b) is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do; or
 - (c) is a promise, made in writing and signed by the person responsible for it or by the agent of that person, to pay wholly or in part a debt for which a creditor may have enforced payment for but is restricted by the law on limitation of actions.
- (2) Nothing in this section shall affect the validity of any gift given by a donor to a donee.
- (3) An agreement to which the consent of a promisor is freely given is not void merely because the consideration is inadequate.
- (4) Notwithstanding the Provisions of sub section (3) above, the inadequacy of consideration may be taken into account by a court in determining whether the consent of a promisor was freely given.

60. Agreement or Contract in Restraint of Profession, Trade etc.

- (1) An agreement which restrains a person from exercising a lawful profession, trade or business of any kind, shall to that extent be void, unless the restraint is reasonable in respect to the interests of the parties concerned and in respect to the interests of the public.

- (2) For purposes of subsection (1) above, an agreement in restraint of trade is not reasonable in respect to the interests of the parties, where the restraint exceeds what is reasonably necessary to protect a proprietary interest of a promisee.
- (3) The burden of proving that a restraint is reasonable in respect to the interests of the parties shall lie upon the promisee and the burden of proving that a restraint is unreasonable in respect to the interests of the public shall lie on the promisor.

61. Agreement in Restraint of Legal Proceedings.

- (1) An agreement which restricts a party absolutely, from enforcing his or her rights under or in respect of a contract, by legal proceedings or which limits the time within which the party may enforce his or her rights shall be void to that extent.
- (2) This section shall not—
 - (a) render illegal—
 - (i) a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject shall be referred to arbitration and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute referred to arbitration; or
 - (ii) any contract in writing, by which two or more persons agree to refer to arbitration any question which has already arisen between them; and
 - (b) affect any reference to arbitration under any law.

62. Agreement Void for Uncertainty.

An agreement, the meaning of which is not certain or capable of being made certain, shall be void.

63. Agreement by Way of Wager.

- (1) An agreement made by way of an unlicensed wager shall be void.
- (2) For the purposes of this section, “**wager**” means a promise to pay money or other consideration on the occurrence of an uncertain event.

CHAPTER V
PERFORMANCE OF CONTRACTS

Contracts Which Have to be Performed

64. Obligation of Parties.

- (1) The parties to a contract shall perform or offer to perform their respective promises unless the performance is dispensed with or excused under this Act or any other law.
- (2) A promise binds a representative of a promisor, in case of the death of the promisor before performance, unless a contrary intention appears from the contract.

65. Refusal to Accept Offer of Performance.

- (1) Where a promisor makes an offer of performance to a promisee but the offer is not accepted, the promisor shall not be responsible for non performance and shall not lose his or her rights under the contract.
- (2) An offer shall fulfil the following conditions—
 - (a) it shall be unconditional;

- (b) it shall be made at a time and place and under such circumstances that the person to whom it is made has a reasonable opportunity of ascertaining that the person by whom it is made is able and willing to do what he or she is bound to do by the promise; and
 - (c) where the offer is an offer to deliver anything to the promisee, the promisee shall have a reasonable opportunity to see that what is offered is what the promisor is bound by the promise to deliver.
- (3) An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

66. Refusal of Party to Perform Promise.

Where a party to a contract refuses or disables himself or herself from performing a promise in its entirety, the promisee may put an end to the contract, unless he or she signifies by words or conduct, to its continuance.

67. Person to Perform Promise.

Where it appears from the contract that it was the intention of the parties to a contract that a promise contained in it is to be performed by the promisor—

- (a) the promise shall be performed by the promisor; or
- (b) the promisor or the representative of the promisor may employ a competent person to perform the promise.

68. Performance From Third Party.

- (1) Except where the contract provides that a party shall perform his or her obligations personally or the nature of his or her performance is such as to require the application of skill, judgment or other qualifications personal to him or her, a promisor may delegate the performance required of him or her to a third party, and a promisor's performance may be effected without his or her knowledge or consent, by the promisee.

- (2) When the promisee accepts performance from a third person, the promisee shall not afterwards enforce performance against the promisor.

Joint Liability and Rights

69. Joint Liability.

- (1) Where two or more persons make a joint promise, then unless a contrary intention appears in the contract, all the persons who make the joint promise shall be bound to fulfil the promise.
- (2) Where one of the persons who made the joint promise dies, the representative of that deceased person, jointly with the surviving person shall fulfil the obligations.
- (3) Where all the persons who made the joint promise die, their representatives shall fulfil their obligations jointly.

70. Obligation and Liability of Joint Promisors.

- (1) Where two or more persons make a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel one or more of the joint promisors to perform the whole promise.
- (2) Where a promisee who institutes a suit against one or several joint promisors obtains a decree against the promisor or promisors, nothing in this section shall be construed as permitting the promisee to institute any further suit arising out of the same cause of action, against any other joint promisor.
- (3) A joint promisor may compel the other joint promisor to contribute equally to the performance of the promise, unless a contrary intention appears from the contract.

- (4) Where a joint promisor defaults in a contribution to the performance of the promise, the other joint promisors shall bear the loss arising from the default, in equal shares.

71. Release of a Joint Promisor.

Where two or more persons make a joint promise, the release of one of the joint promisors by the promisee shall not—

- (a) discharge the other joint promisor; or
- (b) free the joint promisor who is released, from responsibility to the other joint promisor.

72. Joint Rights.

- (1) Where a person makes a promise to two or more persons jointly, then unless a contrary intention appears in the contract, the right to claim performance rests between that person and the other persons, jointly.
- (2) Where the person to whom a joint promise is made dies, the representative of that deceased person, jointly with the surviving persons shall fulfil the obligations.
- (3) Where all the persons who made the joint promise die, their representatives shall fulfil their obligations jointly.

Time and Place for Performance

73. Time for Performance.

- (1) Where a promisor is to perform a promise in a contract without a request by the promisee and time for performance is not specified in the contract, the engagement shall be performed within a reasonable time.

- (2) Where the promise is to be performed on a specific day and the promisor undertakes to perform it without a request by the promisee, the promisor may perform it at any time during the usual hours of business on that day, at the place at which the promise ought to be performed.
- (3) Where the promise is to be performed on a specific day and the promisor does not undertake to perform it without a request by the promisee, the promisee shall apply for the performance of the promise at a proper place within the usual hours of business.
- (4) Where the promise is to be performed without a request by the promisee and a place for its performance is not fixed, the promisor shall apply to the promisee to appoint a reasonable place for the performance of the promise.
- (5) The performance of a promise may be made in any manner and at any time which the promisee prescribes or sanctions.
- (6) Determination of what a proper time is, shall in each case be a question of fact.

74. Place of Performance.

- (1) Where a contract provides, expressly or by implication, for performance at a particular place, then unless an agreement is made to vary the place, performance shall be at that place.
- (2) Where no place for performance is specified, performance shall be at whatever place that seems reasonable and in particular,
 - (a) performance of a promise to supply goods is satisfied by making them available to the recipient at the supplier's place of business at the time of contracting; and

- (b) performance of a promise to pay money is satisfied by making the payments at the payee's place of business at the time of contracting.

Performance of Reciprocal Promises

75. Reciprocal Obligation to Perform.

Where a contract consists of reciprocal promises to be performed simultaneously, the promisor shall not perform his or her promise unless the promisee is ready and willing to perform his or her reciprocal promise.

76. Order of Performance of Reciprocal Promises.

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, the promises shall be performed in that order, and where the order is not expressly fixed by the contract, the promises shall be performed in the order which the nature of the transaction requires.

77. Liability of Party Preventing Event on Which Contract is to Take Effect.

- (1) When a contract contains reciprocal promises and one party to the contract prevents the other party from performing his or her promise, the contract shall become voidable at the option of the party who is prevented from performing his or her promise.
- (2) A party who sustains a loss as a result of non performance of a promise under sub section (1) above shall be entitled to compensation from the other party for any loss which he or she sustains.

78. Default in the Performance of Reciprocal Promises.

Where a contract consists of reciprocal promises and one of them cannot be performed, or where the performance of a promise cannot be claimed until the other promise is performed and the promisor of the other promise fails to perform it, the promisor shall not claim the performance of the reciprocal promise and shall be liable to pay compensation to the other party to the contract for any loss which the other party may sustain due to non-performance of the contract.

79. Failure to Perform Within a Fixed Time.

- (1) Where a party to a contract promises to do a certain thing at or before a specified time but fails to do the thing at or before the specified time, the contract or the part of the contract that has not been performed, shall be voidable at the option of the promisee, if the intention of the parties was that time was of the essence to the contract.
- (2) Where it was not the intention of the parties that time is of the essence to a contract, the contract does not become voidable by the failure to do the thing promised in the contract at or before the specified time; but the promisee shall be entitled to compensation from the promisor for any loss occasioned to the promisee, by the failure.
- (3) Where a contract is voidable on account of the failure by the promisor to perform his or her promise at the agreed time and the promisee accepts performance of the promise at a time other than the agreed time, the promisee shall not claim compensation for any loss occasioned by the non-performance of the promise at the time agreed.
- (4) Subsection (3) above, does not apply if at the time of acceptance of performance at a time other than the agreed time, the promisee gives notice to the promisor of his or her intention to claim compensation.

80. Agreement to an Impossible Act.

- (1) An agreement to do an act which is impossible to perform shall be void.
- (2) A contract becomes void, where the contract is to do an act which, after the contract is made, becomes impossible or unlawful or which by reason of an event which the promisor could not prevent, becomes impossible or unlawful.
- (3) Where a person promises to do an act which he or she knew or which with reasonable diligence, would have known to be impossible to perform and which the promisee did not know to be impossible or unlawful, the promisor shall be liable to compensate the promisee for any loss which the promisee may suffer as a result of the non performance of the promise.

81. Reciprocal Promise to do Legal and Illegal Acts.

Where a person makes a reciprocal promise, firstly to do a certain thing which is legal, and, secondly, under specified circumstances, to do a certain thing which is illegal, the promise to do the legal thing shall be a contract but the promise to do an illegal thing shall be a void agreement.

82. Alternative Promise, One Part Being Illegal.

Where an alternative promise, one part of which is legal and the other illegal, is made, only the legal part may be enforced.

*Appropriation of Payments***83. Application of Payment Where Debt to be Discharged is Indicated.**

Where a debtor, who owes several distinct debts to one person makes a payment to that person, with express indication or under circumstances that imply that the payment shall be applied to the discharge of a particular debt, the payment, if accepted, shall be applied accordingly.

84. Application of Payment Where Debt to be Discharged is Not Indicated.

Where a debtor omits to indicate the debt to which a payment shall be applied and there are no circumstances to indicate the debt to which the payment shall be applied, the creditor may apply the payment, at his or her discretion, to any lawful debt actually due to him or her and payable by the debtor, whether its recovery is barred by the law governing limitation of actions, or not.

85. Application of Payment Where no Party Appropriates.

- (1) Where none of the parties to a contract makes an appropriation, the payment shall be applied in discharge of the debts in order of time, whether the recovery is barred by the law governing limitation of actions, or not.
- (2) Where debts are of equal standing, payment shall be applied in discharge of each, proportionally.

*Contracts Which Need not be Performed***86. Effect of Novation, Rescission and Alteration of Contract.**

Where the parties to a contract agree to substitute the original contract with a new contract or to rescind or alter the original contract, the original contract need not be performed.

87. Promisee may Dispense With or Remit Performance of Promise.

A promisee may—

- (a) dispense with or remit, wholly or in part, to a promisor, the performance of a promise made by the promisor;
- (b) extend the time for the performance of a contract; or
- (c) accept instead of the promise, any satisfaction which he or she thinks fit.

88. Consequence of Rescission of Voidable Contract.

- (1) Where a person at whose option a contract is voidable, rescinds it, the other party to the contract need not perform any promise contained in the contract.
- (2) A party who rescinds a voidable contract shall, if that party had received any benefit from the other party to the contract, shall be liable to restore the benefit to the person from whom it was received.

89. Obligation of Person Who Receives Advantage Under a Void Agreement or a Contract That Becomes Void.

- (1) Where an agreement is found to be void or when a contract becomes void, a person who received any advantage under that agreement or contract shall restore it or pay compensation for it, to the person from whom he or she received the advantage.
- (2) Where a party to a contract incurs expenses for purposes of performance of the contract, which became void after performance under section 80(2) of this Act, the court may if it considers it just to do so in all the circumstances of the case—
 - (a) allow the other party to retain the whole or part of any advantage received by him or her;
 - (b) make an order that the party recovers the whole or part of any payments or other advantages which would have been due to him or her under the contract had it not become void, including, an advantage or part of an advantage, discharge or payment, not greater in value than the expenses incurred.

90. Communicating of a Rescission or Revocation by One Party to the Other of a Voidable Contract.

The rescission of a voidable contract may be communicated in the manner that applies to the communication of a revocation of an offer in accordance with the provisions of this Act.

91. Neglect or Refusal of Promisee to Afford Reasonable Facilities for Performance.

Where a promisee neglects or refuses to afford a promisor reasonable facilities for the performance of his or her promise, the promisor shall be excused by the neglect or refusal of the promisee from performing the promise.

92. Discharge by Frustration.

- (1) Where a contract becomes impossible to perform or is frustrated and where a party cannot show that the other party assumed the risk of impossibility, the parties to the contract shall be discharged from further performance of the contract.
- (2) Any sum paid or payable to a party under a contract before the time the parties are discharged under sub section (1) above. shall, in the case of the sum paid, be recoverable from the party as money received by that party for his or her use and in the case of any sum payable, cease to be payable.
- (3) Where the party to whom any sum was paid or was payable under sub section (2) above, incurred expenses before the time of discharge in, or for the purpose of, the performance of a contract, the court may, where it considers it just to do so, having regard to all the circumstances of the contract, allow the party to retain or, as the case may be, recover the whole or any part of the sums paid or payable, which shall not exceed the expenses incurred.

- (4) Where a party to a contract has by reason of anything done by any other party to the contract or for the purpose of the performance of the contract, obtained a valuable benefit, other than a payment of money to which the provisions subsection (3) above apply, before the time of discharge, the other party shall recover from the party a sum, if any, not exceeding the value of the benefit to the party obtaining it, as the court may consider just, having regard to all the circumstances of the contract and in particular—
- (a) the amount of any expenses incurred before the time or discharge by the party who benefited for the purpose of the performance of the contract, including any sums paid or payable by that party to any other party in pursuance of the contract and retained or recoverable by that party under subsection (3) above; and
 - (b) in relation to the said benefit, the effect of the circumstances giving rise to the frustration of the contract.
- (5) For the purposes of subsection (4) above, in estimating the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the sub section, include a sum that appears to be reasonable in respect of overhead expenses and in respect of any work or services performed or rendered personally by that party.
- (6) In considering whether any sum ought to be recovered or retained under this section, by any party to a contract, the court shall not take into account any sums which, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any law.

- (7) Where any person assumed obligations under a contract in consideration for conferring a benefit by a party to the contract upon any person, whether that person is a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3), of this section, any benefit conferred as a benefit obtained by the person who assumed the said obligations.
- (8) For the purposes of this section, frustration occurs whenever the law recognises that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that thing which was undertaken by the contract.
- (9) A contract may be deemed to be frustrated where as a result of unforeseen contingencies or events, the performance of the contract becomes physically impossible or where such events radically change the nature of the obligations originally undertaken under the contract.
- (10) Notwithstanding the provisions of subsection (9) above, parties to a contract shall not be deemed to be discharged from the obligation to perform the contract if it is established that the frustration was self-induced.

CHAPTER VI CONSEQUENCES OF BREACH OF CONTRACT

93. Compensation for Loss or Damage Caused by Breach of Contract.

- (1) Where there is a breach of contract, the party who suffers the breach shall be entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her, which arose in the usual course of business from the breach or which the parties knew when they made the contract, to be likely to result from the breach.

- (2) The compensation referred to in sub section (1) above, shall not be given for remote and indirect loss or damage sustained by reason of the breach.
- (3) Where an obligation similar to that created by contract is incurred and is not discharged, any person injured by the failure to discharge it shall be entitled to receive the same compensation from the party in default, as if that person had contracted to discharge it and had breached the contract.
- (4) In estimating the loss or damage arising from a breach of contract, the means of remedying the inconvenience caused by non performance of the contract, which exist, shall be taken into account.

94. Compensation for Breach of Contract Where Penalty is Stipulated.

- (1) Where a contract is breached, and a sum is named in the contract as the amount to be paid in case of a breach or where a contract contains any stipulation by way of penalty, the party who complains of the breach shall be entitled, whether or not actual damage or loss is proved to have been caused by the breach, to receive from the party who breaches the contract, reasonable compensation not exceeding the amount named or the penalty stipulated, as the case may be.
- (2) The penalty stipulated under subsection (1) above, may provide for an interest on the amount of compensation to be paid.
- (3) Notwithstanding the provisions of subsections (1) and (2) above, a person shall be liable, upon breach of the condition of an instrument, to pay the whole sum mentioned in the instrument, where that person—
 - (a) enters into any bail, bond, recognisance or other instrument of the same nature; or

- (b) gives a bond for the performance of a public duty or an act in which the public is interested, under the provisions of any law or under the orders of any level of government.
- (4) The amount stipulated by a contracting party in the contract as payable upon a breach, shall only be payable by the party in breach if the amount is reasonable in the circumstances, that is, where the amount represents a genuine pre-estimate of probable loss.

95. Party Rightfully Rescinding Contract, Entitled to Compensation.

A party who rightfully rescinds a contract, shall be entitled to consideration for any damage which that person sustains through the non performance of the contract.

96. Right to Specific Performance.

- (1) Where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract.
- (2) A party shall not be entitled to specific performance of a contract where—
 - (a) it is not possible for the person against whom the claim is made, to perform the contract;
 - (b) the rights of a third party acquired in good faith would be infringed by the specific performance;
 - (c) specific performance would occasion hardship to the person against whom the claim is made, out of proportion to the benefit likely to be gained by the claimant;

- (d) the person against whom the claim is made shall at the same time be entitled, although in breach, to terminate the contract; or
- (e) the claimant committed a substantial breach of his or her obligations under the contract but where the breach is minor, specific performance shall be available to him or her subject to his or her paying compensation for the breach.

97. Right of Third Party to Enforce a Contractual Term.

- (1) Subject to the provisions of this Act, a person who is not a party to a contract may in his or her own right enforce a term of the contract where—
 - (a) the contract expressly provides that he or she may do so; or
 - (b) subject to the provisions of subsection (2) below, a term of the contract confers a benefit on that person.
- (2) Subsection (1) (b) above, does not apply where on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by a third party.
- (3) A third party shall be expressly identified in a contract by name, as a member of a class or as answering a particular description; but need not be in existence at the time the contract was entered into.
- (4) This section does not confer a right on a third party to enforce a term of a contract except where the term is subject to and in accordance with any other relevant term of the contract.

- (5) For the purpose of exercising the right to enforce a term of a contract, a third party shall be entitled to any remedy that would have been available to him or her in an action for breach of contract, had that third party been a party to the contract, and the rules relating to damages, injunctions, specific performance and any other relief shall apply accordingly.
- (6) Where a term of a contract excludes or limits liability in relation to any matter, any reference in this Act are to the enforcement of a term of a contract, shall be construed as a reference to the third party availing himself or herself of the exclusion or limitation.

98. Contract Subsequently Frustrated.

Where a contract is frustrated after it has been entered into because—

- (a) the performance of a contracting party becomes impossible or illegal and neither party can show that the other has assumed the risk of impossibility or illegality; or
- (b) a radical change of circumstances has occurred, the parties shall be excused from the moment of frustration from further performance and shall be entitled to restitution and reimbursement of expenses.

99. Variation of Contracts.

Where any right, duty, or liability arose under an agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom will bind both parties to the contract.

CHAPTER VII CONTINGENT CONTRACTS

100. Contract Contingent on Event Happening.

A contract to do or not to do a particular thing, at a particular place, which is contingent upon an uncertain future event, shall not be enforced except where and until that event happens, and where the event becomes impossible, the contract shall become void.

101. Contract Contingent on Event Not Happening.

A contract to do or not to do a particular thing where an uncertain future event on which the contract is contingent does not happen, may be enforced after the happening of that event becomes impossible, but not before that.

102. Contract Contingent on Conduct of a Person.

Where a future event on which a contract is contingent is the way in which a person is to act at an unspecified time, the event shall be considered to have become unattainable where that person does anything which renders it impossible for him or her to act within a definite time or under further contingencies.

103. Contract Contingent on Happening of Specified Event Within a Specified Time.

- (1) A contract to do or not to do a particular thing, which is contingent on the happening of a specified or uncertain event within a specified time, becomes void where—
 - (a) at the expiration of the time fixed, the event has not happened; or
 - (b) before the time fixed, the happening of the event becomes impossible.

- (2) A contract to do or not to do a particular thing, which is contingent on the fact that a specified event or uncertain event does not happen within a fixed time, may be enforced—
- (a) when the time fixed for the happening of the event expires and the event has not happened; or
 - (b) before the time fixed expires, where it becomes certain that the event will not happen.

104. Agreement Contingent on an Impossible Event.

An agreement to do or not to do a particular thing, which is contingent on the happening of an impossible event, shall be void, whether the impossibility of the event is known to the parties to the agreement or not, at the time the agreement was entered into.

CHAPTER VIII

RELATIONS SIMILAR TO THOSE CREATED BY CONTRACT

105. Claim for Necessaries Supplied to Person Incapable of Contracting.

Where a person, incapable of entering into a contract or anyone whom that person is legally bound to support, is supplied by another person with necessaries suited to the condition of life of that person or of anyone that person is legally bound to support, the person who furnished the supplies shall be entitled to reimbursement from the property of the person who is incapable of entering into that contract.

106. Obligation of Person Enjoying Benefit of Non-Gratuitous Act.

- (1) Where a person lawfully does anything for another person or delivers anything to another person, not intending to do so gratuitously and the other person enjoyed the benefit, the person who enjoyed the benefit shall compensate the person who provided the benefit in respect of or to restore, the thing done or delivered.

- (2) Compensation shall not be made where the person sought to be charged had no opportunity of accepting or rejecting the benefit.

107. Responsibility of Finder of Goods.

A person who finds goods that belong to another and takes them into his or her custody shall be subject to the same responsibilities as a bailee, as provided in Chapter X of this Act.

108. Liability of Person to Whom Money is Paid or Thing is Delivered by Mistake or Under Coercion.

A person to whom money is paid or anything is delivered by mistake or under coercion, shall repay or return the money or thing so delivered.

CHAPTER IX INDEMNITY AND GUARANTEE

109. Interpretations of Chapter Nine.

In this Chapter, unless the context otherwise requires—

“creditor” means a person to whom a guarantee is given;

“continuing guarantee” means a guarantee which extends to a series of transactions;

“contract of guarantee” means a contract to perform a promise or to discharge the liability of a third party in case of default of that third party, which may be oral or written;

“contract of indemnity” means a contract by which one party promises to save the other party from loss caused to that other party by the conduct of the person making the promise or by the conduct of any other person;

“guarantor” means a person who gives a guarantee;

“indemnity” means an undertaking by which a person agrees to reimburse another upon the occurrence of an anticipated loss;

“principal debtor” means a person in respect of whose default a guarantee is given.

110. Right of Indemnity Holder When Sued.

A promisee in a contract of indemnity, acting within the scope of his or her authority shall be entitled to recover from the promisor—

- (a) any damages which the promisor may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (b) any costs which the promisor may be compelled to pay in any suit, if in bringing or defending the suit, the promisee did not contravene the orders of the promisor and acted as it would have been prudent to act in the absence of any contract of indemnity or if the promisor authorised him or her to bring or defend the suit; and
- (c) any sums which the promisor may have paid under the terms of any compromise of any suit, where the compromise is not contrary to the orders of the promisor and is one which is prudent for the promisor to make in the absence of any contract of indemnity or where the promisor authorised the promisee to compromise the suit.

111. Consideration for Guarantee.

Anything done or any promise made, for the benefit of a principal debtor, may be sufficient consideration to a guarantor to give a guarantee.

112. Liability of Guarantor.

- (1) The liability of a guarantor shall be to the extent to which a principal debtor is liable, unless otherwise provided by a contract.
- (2) For the purpose of this section the liability of a guarantor takes effect upon default by the principal debtor.

113. Revocation of Continuing Guarantee.

- (1) A continuing guarantee may, with regard to future transactions, be revoked by a guarantor at any time, by notice to a creditor.
- (2) In the absence of any contract to the contrary, the death of a guarantor operates as a revocation of any continuing guarantee to future transactions.

114. Liability of two Persons who are Primarily Liable, not Affected by Arrangement Where one is to be Guarantor on Default of the Other.

Where two persons contract with another person to undertake a certain liability and also contract with each other that each of them shall be liable on the default of the other to that other person, the liability of the two persons to that other person under the first contract shall not be affected by the existence of the second contract, even where that other person is not aware of the existence of the second contract.

115. Discharge of Guarantor by Variance in Terms of Contract.

Any variance made in the terms of a contract between a principal debtor and a creditor without the consent of a guarantor discharges the guarantor from any transaction which is subsequent to the variance.

116. Discharge of Guarantor by Release or Discharge of Principal Debtor.

A guarantor shall be discharged by any contract between a creditor and a principal debtor, where the principal debtor is released or where an act or omission of the creditor, discharges the principal debtor.

117. Discharge of Guarantor When Creditor Compromises With, Gives Time to or Agrees not to Sue Principal Debtor.

A contract between a creditor and a principal debtor where the creditor makes a compromise with the principal debtor or promises to give time to or not to sue the principal debtor, discharges the guarantor unless the guarantor assents to the contract.

118. Guarantor not Discharged Where Agreement is Made With Third Person to Give Time to Principal Debtor.

Where a contract to give time to a principal debtor is made by a creditor with a third person and not with the principal debtor, the guarantor shall not be discharged.

119. Forbearance of Creditor to Sue Does not Discharge Guarantor.

Mere forbearance on the part of a creditor to sue a principal debtor or to enforce any other remedy against the principal debtor, does not, in the absence of any provision in the guarantee to the contrary, discharge the guarantor.

120. Release of One Co-Guarantor Does Not Discharge the Other.

Where there are co-guarantors, a release by a creditor of one of the guarantors does not discharge the other guarantor and does not free the guarantor who is released from his or her responsibility to the other guarantor.

121. Discharge of Guarantor by an act or Omission by Creditor.

A guarantor shall be discharged where the eventual remedy of the guarantor against a principal debtor is impaired, because a creditor—

- (a) did an act which is inconsistent with the right of the guarantor; or
- (b) omitted to do an act which his or her duty to the guarantor requires him or her to do.

122. Rights of Guarantor on Payment or Performance.

Where a guaranteed debt becomes due or where default of a principal debtor to perform a guaranteed duty takes place, the guarantor shall upon payment or performance of all that the guarantor is liable for, be vested with all the rights which the creditor had against the principal debtor.

123. Right of Guarantor to Benefit From Securities of Creditor.

- (1) A guarantor shall be entitled to the benefit of every security which a creditor has against a principal debtor at the time the contract of guarantorship was entered into, whether the guarantor knew of the existence of the security or not.
- (2) Notwithstanding the provisions of sub section (1) above, where a creditor loses or parts with the security, without the consent of the guarantor, the guarantor shall be discharged to the extent of the value of the security.

124. Guarantee Obtained by Misrepresentation.

A guarantee obtained by a misrepresentation made by a creditor or with the knowledge and assent of a creditor, concerning a material part of the transaction, shall be voidable.

125. Guarantee on Contract That Creditor Shall Not Act Until Co-guarantor Joins.

Where a person gives a guarantee upon a contract that a creditor shall not act upon the contract until another person joins as co-guarantor, the guarantee shall not be valid where that other person does not join.

126. Implied Promise to Indemnify Guarantor.

- (1) In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the guarantor.
- (2) A guarantor shall be entitled to recover from the principal debtor any sum the guarantor rightfully paid under the guarantee on the contract.

127. Co-guarantor Liable to Contribute Equally.

In the absence of any contract to the contrary, co-guarantors for the same debt or duty, jointly or severally, under the same or different contracts and with or without the knowledge of the existence of each other, shall be liable, between themselves, to pay an equal share of the whole debt or of that part of the debt which remains unpaid by the principal debtor.

128. Liability of Co-guarantors Bound in Different Sums.

Co-guarantors who shall be bound in different sums shall be liable to pay equally as far as the limits of their respective obligations permit.

**CHAPTER X
BAILMENT****129. Interpretations of Chapter Ten.**

In this Chapter, unless the context otherwise requires—

“**bailee**” means the person to whom goods are delivered;

“**bailment**” means the delivery of goods by one person to another for some purpose, upon a contract that the goods shall, when the purpose is accomplished, be returned or disposed of according to the direction of the person who delivered them;

“**bailor**” means the person who delivers the goods;

“**pledge**” means the bailment of goods as security for payment of a debt or performance of a promise;

“**pledgee**” means the person with whom a pledge is deposited;

“**pledgor**” means the person who gives a pledge to another.

130. Modes of Bailment.

- (1) Where a person delivers goods to another for some purpose or upon a contract that the goods shall, when the purpose is accomplished, be returned or disposed of according to the directions of the person who delivered them, the person to whom the goods are delivered is the bailee.
- (2) Where a person in possession of goods under another contract holds the goods as bailee, that person becomes the bailee under the existing contract and the owner becomes the bailor of goods although the goods might not have been delivered by way of bailment.

131. Delivery to Bailee.

The delivery of goods to a bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold the goods on behalf of the bailee.

132. Duty to Disclose Fault in Bailed Goods.

- (1) A bailor shall disclose to a bailee, any fault in bailed goods, of which the bailor is aware and which materially interferes with the use of the goods or exposes the bailee to extraordinary risk.
- (2) Where the bailor does not make the disclosure required under sub section (1) above, the bailor shall be responsible for any damage that may arise to the bailee, directly from the fault.
- (3) Where the goods are bailed for hire, the bailor shall be responsible for the damage, whether or not the bailor was aware of the existence of the fault in the bailed goods.

133. Duty of Care by a Bailee.

A bailee shall take as much care of the goods bailed to him or her, as a person of ordinary prudence would do under similar circumstances; take care of his or her own goods of the same bulk, quantity and value, as the bailed goods.

134. Liability of Bailee for Loss.

In the absence of any special contract, the bailee shall not be responsible for the loss, destruction or deterioration of the bailed goods, where the bailee takes the amount of care required under section 133 above.

135. Termination of Bailment Due to act of Bailee.

A contract of bailment shall be voidable at the option of the bailor, where the bailee does any act with regard to the bailed goods, which is inconsistent with the conditions of the bailment.

136. Unauthorised Use of Bailed Goods.

Where a bailee makes use of the bailed goods contrary to the conditions of the bailment, the bailee shall be liable to compensate the bailor for any damage arising to the goods from or during that use.

137. Mixture of Goods of Bailee and Bailor.

- (1) Where the bailee with the consent of the bailor, mixes the goods of the bailor with his or her own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the goods produced.
- (2) Where the bailee without the consent of the bailor, mixes the goods of the bailor with his or her own goods and the goods in the mixture can be separated or divided, the property in the respective goods remains in the parties individually.
- (3) Where the bailee mixes the goods of the bailor with his or her own goods without the consent of the bailor under sub section (2) above, he or she shall bear the expenses of the separation or division and any damage which arises from the mixture.
- (4) Where the bailee without the consent of the bailor mixes the goods of the bailor with his or her own goods in such a manner that it is not possible to separate the bailed goods from the other goods and to deliver them back, the bailor shall be entitled to compensation by the bailee for the loss of the goods.

138. Repayment by Bailor of Necessary Expenses.

Where under the conditions of bailment, the goods are to be kept or carried or where work is to be done upon the goods by a bailee for a bailor and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him or her for the purpose of the bailment.

139. Restoration of Goods Lent Gratuitously For a Commercial Purpose.

- (1) A lender of goods may, where the loan is gratuitous for commercial purpose, at any time request for the return of the goods, even where the goods were lent for a specified time.
- (2) Where, on the faith of a gratuitous loan made for a specified time under subsection (1) above, a borrower acts in such a manner that the return of the goods lent, before the time agreed upon would cause the borrower a loss exceeding the benefit actually derived from the loan, the lender shall where he or she compels the return, indemnify the borrower for the amount in which the loss occasioned exceeds the benefits derived.

140. Return of Bailed Goods.

A bailee shall return or deliver without demand from a bailor, according to the directions of the bailor, the bailed goods, as soon as the time or the purpose for which the goods were bailed expires.

141. Failure to Return Goods.

Where by the fault of a bailee, the goods are not returned, delivered or tendered at the proper time, the bailee shall be responsible to the bailor for any loss, destruction or deterioration of the goods, from that time.

142. Termination of Gratuitous Bailment.

A gratuitous bailment shall be terminated in any of the following circumstances—

- (a) where the goods bailed are returned;
- (b) where the time of bailment expires;
- (c) by agreement of the parties;

- (d) where the subject matter of the bailment is destroyed; or
- (e) upon the death of the bailor or bailee.

143. Bailor Entitled to Increase or Profit From Bailed Goods.

In the absence of any contract to the contrary, the bailee shall deliver to the bailor or according to the directions of the bailor, any increase or profit which might have accrued from the bailed goods.

144. Responsibility of Bailor to Bailee.

A bailor shall be responsible to a bailee for any loss which the bailee may sustain, where the bailor was not entitled to make the bailment or to receive back the goods or to give directions, in respect of the goods.

145. Bailment by Several Joint Owners.

In the absence of an agreement to the contrary, where several joint owners of goods bail the goods, the bailee may deliver the goods back to one joint owner or according to the directions of that joint owner, without the consent of the other owners.

146. Bailee not Responsible on Redelivery to Bailor Without Title.

Where the bailor has no title to the goods and the bailee, in good faith, delivers the goods back to the bailor or according to the directions of the bailor, the bailee shall not be responsible to the owner, for the delivery.

147. Right of Third Party Claiming Bailed Goods.

Where a person, other than the bailor, claims bailed goods, that third person may apply to the court to stop delivery of the goods to the bailor and to decide the title to the goods.

148. Right of a Finder of Goods.

- (1) A finder of goods has no right to sue the owner for compensation for trouble and expense, voluntarily incurred by him or her to preserve the goods and find the owner.
- (2) Where the owner of goods offers a specific reward for the return of goods lost, the finder may retain the goods until he or she receives the compensation.
- (3) Where the owner of goods offers a specific reward for the return of goods lost, the finder may sue for the reward and may retain the goods until he or she receives the reward.

149. Right of Finder to Sell.

Where goods which are commonly the subject of sale are found but the owner cannot with reasonable diligence be found or where the owner refuses upon demand, to pay the lawful charges of the finder of the goods, the finder may sell the goods, where—

- (a) the goods are in danger of perishing or of losing the greater part of their value; or
- (b) the lawful charges of the finder, in respect of the goods, amount to two-thirds of the value of the goods.

150. Lien of Bailee.

Where a bailee, in accordance with the purpose of the bailment, renders any service involving the exercise of labour or skill in respect of the bailed goods, the bailee may, in the absence of a contract to the contrary, retain the goods until he or she receives the remuneration due, for the services rendered in respect of the goods.

151. General Lien of Bankers, Brokers, Warehouse Keepers, Advocates and Insurance Brokers.

- (1) A banker, a broker, a warehouse keeper, an advocate or an insurance broker may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to him or her.
- (2) Any person other than the person mentioned in sub section (1) above, may not retain, as a security for balance due, goods bailed to that person unless there is an express contract to that effect.

152. Rights of Pledge.

A pledgee may retain any goods that are pledged for the payment of—

- (a) a debt or the performance of a promise;
- (b) the interest of the debt; and
- (c) any expenses incurred by the pledgee for the possession or preservation of the pledged goods.

153. Pledgee not to Retain Goods for Debt or Promise.

- (1) In the absence of a contract to that effect, a pledgee shall not retain any pledged goods except for the purpose for which they are pledged.
- (2) In the absence of anything to the contrary, the contract referred to in subsection (1) above, shall be presumed in regard to subsequent advances made by the pledgee.

154. Right of Pledgee to Extraordinary Expenses Incurred.

A pledgee shall not be entitled to receive from a pledgor, extraordinary expenses incurred by the pledgee for the preservation of any pledged goods.

155. Right of Pledgee Where Pledgor Defaults.

- (1) Where the pledge defaults on payment of a debt or the performance of a promise within the time stipulated, in respect of the pledged goods, the pledgee may—
 - (a) institute a suit against the pledgor upon the debt or promise and retain the pledged goods as a collateral security; or
 - (b) sell the pledged goods, on giving the pledgor reasonable notice of the sale.
- (2) Where the proceeds of the sale undertaken in accordance with the provisions of subsection (1) (b) above, are less than the amount due in respect of the debt or promise, the pledgor shall not be liable to pay the balance and where the proceeds of the sale are higher than the amount so due, the pledgee shall pay the surplus to the pledgor.

156. Right of Pledgor to Redeem on Default.

- (1) Where time is stipulated for the payment of a debt or the performance of a promise, for which a pledge is made and the pledgor defaults in the payment or the performance at the stipulated time, the pledgor may redeem the pledged goods at any subsequent time, before the actual sale of the goods.
- (2) The pledgor shall, where the goods are redeemed under subsection (1) above, pay any expenses which may arise from his or her default in payment or performance at the stipulated time.

157. Pledge by Mercantile Agent.

- (1) Where a mercantile agent is with the consent of an owner, in possession of goods or the documents of title to goods, any pledge made by the mercantile agent while acting in the ordinary course of business of a mercantile agent, shall be as valid as if the mercantile agent was expressly authorised by the owner of the goods to make the pledge.
- (2) Where a pledge is made under sub section (1) above, the pledgee shall be deemed to act in good faith and to have no notice at the time of the pledge, that the mercantile agent had no authority to pledge.
- (3) Where a mercantile agent validly pledges the documents of title to goods, the pledge shall be deemed to be a pledge of the goods.
- (4) Where the pledgor obtained possession of the other goods pledged by him or her under a contract which is voidable under section 61(1) of this Act, but the contract is not rescinded at the time of the pledge, the pledgee shall acquire good title to the goods, where the pledgee acted in good faith and without notice of the defect in the title of the pledgor.

158. Pledge Where Pledgor has Limited Interest.

Where a person pledges goods in which he or she has limited interest, the pledge shall be valid to the extent of that interest.

159. Suit by Bailor or Bailee Against Wrong Doer.

- (1) Where a third person wrongfully deprives a bailee of the use of bailed goods or the possession of such goods or damages the goods, the bailee shall be entitled to use any remedies the owner would have used if bailment had not been made.

- (2) The bailor or bailee may institute a suit under sub section (1) above, against the third party, for deprivation or damage.
 - (3) Whatever is obtained by way of relief of compensation in any suit brought under subsection (2) above, shall, as between the bailor and the bailee, be dealt with according to their respective interests.
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