The nature and basis of contract

1. The notion of contract

The law of contract is a **body of legal rules relating to the conclusions and consequences rights and duties of contracting parties**. **A contract** may be defined as **an agreement entered into by two or more persons with the intention of creating a legal obligation or obligations** (***animus contrahendi***). The agreement should be one that the **law recognises as being binding** on the parties.

2. Requirements for a valid contract

The agreement must satisfy each of the following requirements:

- **Consensus**: the **minds of the parties must meet** (or at least **appear to meet**) on all material aspects of their agreement;
- **Capacity**: the parties **must have the necessary capacity** to contract;
- **Formalities**: where the agreement is required, unusually, to be in a certain form, these **formalities must be observed**;
- **Legality**: the **agreement must be lawful** – that is, **not prohibited by statute or common law**;
- **Possibility**: the obligations undertaken must be **capable of performance when the agreement is entered into**; and
- **Certainty**: the agreement must have a **definite or determinable content**, so that the **obligations can be ascertained and enforced**.

3. The nature of contract

A **contract is a juristic act**. It is more like a will than a delict. However, whereas the execution of a will is always a unilateral juristic act, the **conclusion of a contract is necessarily bilateral, or even multilateral**.

A **contract entails promises or undertakings on one or both sides**. The undertaking may be to make a certain performance: **to give something, to do something or to refrain from doing something**.

The **modern concept of contract is a generalised one**: an agreement **does not have to be of a specific type**, such as sale, lease or deposit in order to qualify as a contract. This flows from the fact that there is **freedom of contract**, which means that **parties can agree to anything that is possible and lawful**. All contracts are consensual and are *bona fide*.

4. Contract and the law of obligations

The law of **contract forms part of private law**, and more particularly, the law of obligations.

4.1. The concept of obligations

An obligation is a **legal bond between two or more persons**, obliging the one to give, do or refrain from doing something to or for the other. The **legal relationship** created by an obligation **is a personal one**, **binding only the parties** to it. If the obligation is **enforceable by action in a court of law** (as is usually the case), **it is** referred to as **a civil obligation**, to **distinguish it from the less common natural obligation**. The **primary sources** of obligations are **contract and delict**. Other sources include **unjustified enrichment, *negotiorum gestio*** (unauthorised administration of another person's affairs), family relationships, wills and statutes.

5. *Essentialia, Naturalia and Incidentialia*

In the law of contract we distinguish between *essentialia, naturalia* and *indicentialia*. ***Essentialia*** is the **minimum, essential characteristics** of nominate contracts. ***Naturalia*** are the **terms implied by law**; these may be excluded in certain cases. ***Incidentialia*** are the **additional terms agreed by the parties** in regulating their relationship.

6. Void, voidable and unenforceable

Void contracts refer to the situation where **no contract exists at all**. **Voidable** refers to a contract that is **valid but can be invalidated** at the instance of one of the parties. **Unenforceable** contracts are contracts that are **valid but not (directly) enforceable**.