

# Chapter 4

## Free consent and void agreements

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# Free consent and void agreements

## 1 CONSENT: COERCION AND UNDUE INFLUENCE

### 1.1 Consent – Consensus ad idem

#### Definition: Consent [Section 13]

Two persons are said to consent when they agree upon the same thing in the same sense. Thus, the analysis of the above definition reveals that both the parties must be at the same frequency of mind at the time of entering into a contract i.e. Consensus ad idem.

#### Effect of absence of consent [Section 19]

The effect of absence of consent is that the agreement is not valid and is not enforceable by law.

**Please See The Example 01: Effect of absence of consent**

## Free consent

### Definition: Free consent [Section 14]

The consent is said to be free when it is not caused by:

- Coercion or
- Undue influence or
- Fraud or
- Misrepresentation or
- Mistake

### Effect of absence of free consent [Section 19A]

The effect of absence of free consent is that the contract becomes voidable except in case of mistake when the contract may be void or valid depending upon the nature of the mistake.

**Please See The Example 02: Effect of absence of free consent**

## 1.2 Coercion

### Definition: Coercion [Section 15]

Coercion is the:

- committing or
- threatening to commit any act  
which is forbidden by Pakistan Penal Code or
- unlawful detaining or
- threatening to detain,  
any property with an intention of causing any person to enter into an agreement.

The analysis of the above definition reveals that coercion may be compelling a person to enter into a contract under pressure or a threat.

**Please See The Example 03: The act forbidden by Pakistan Penal Code**

**Please See The Example 04: Unlawful threatening to detain the property**

**Please See The Example 05: Coercion**

**Please See The Example 06: Coercion**

## Effects of coercion [Section 19, 64 and 72]

The contract becomes voidable at the option of the party whose consent was so caused. The burden of proof lies on the party who rescinds the contract.

The party rescinding a voidable contract shall, if he has received any benefit from another party, restore such benefit i.e. restitution.

A person to whom money has been paid or anything delivered by coercion must repay or return it.

**Please See The Example 07: Effects of coercion**

## 1.3 Undue influence

### **Definition: Undue influence [Section 16 (1)]**

A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain unfair advantage over the other.

## Position to dominate in a relationship

A person is in a position to dominate the will of another where he:

holds the real or apparent authority over the other e.g. tax officer and taxpayer, police officer and accused being investigated.

stands in a fiduciary relation to the other e.g. parent and child, guardian and minor, advocate and client.

makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress e.g. medical attendant and patient.

**Please See The Example 08: Position to dominate**



## Presumption of position to dominate

In the relationships of father and son, guardian and minor, employer and employee, trustee and beneficiary, teacher and student, doctor and patient, solicitor and client, fiancé and fiancée and contract by or with Pardanasheen lady (completely secluded), it is presumed that a person is in a position to dominate the will of another person. The burden of proof lies on the person who is in the position to dominate.

**Please See The Example 09: Presumption of undue influence**

## Rebutting presumption

The presumption of undue influence can be rebutted by showing that:

- the dominant party has made a full disclosure of all the facts to the weaker party before making the contract
  
- the price was adequate
  
- the weaker party was in receipt of competent independence advice before entering into the contract.

**Please See The Example 10: Rebutting presumption**

## No presumption of position to dominate

In the relationships of landlord and tenant, creditor and debtor, husband and wife, principal and agent, there is no presumption that a person is in a position to dominate the will of another person. The burden of proof lies on the person who wants to set aside the contract on the basis of undue influence.

**Please See The Example 11: No presumption of undue influence**

## Effect of undue influence [Section 19 & 19A]

The contract becomes voidable at the option of the party whose consent was so caused. The contract may be set aside either absolutely or if the party who was entitled to avoid it has received any benefit, upon such terms and conditions as to the Court may seem just.

**Please See The Example 12: Effect of undue influence**

# Difference between coercion and undue influence

S.no	Coercion	Undue influence
1	<b>Consent</b> Consent is obtained by giving a threat of an offence or committing an offence.	Consent is obtained by dominating the will.
2	<b>Nature of pressure</b> It involves physical pressure.	It involves moral pressure.
3	<b>Relationship</b> Parties to a contract may or may not be related to each other.	Parties to a contract are related to each other under some sort of relationship.
4	<b>Reason</b> The objective is to compel a person to enter into a contract.	The objective is to obtain an unfair advantage.
5	<b>Criminal liability</b> Criminal liability is incurred, therefore it is illegal.	Criminal liability is not incurred.
6	<b>On whom</b> Coercion may be employed on a stranger	Undue influence may only be employed on the party whose consent is desired.
7	<b>By whom</b> It can be exercised by a stranger to the contract.	It can only be exercised by a party to the contract and not by a stranger.

S.no	Coercion	Undue influence
8	<p><b>Onus of proof</b></p> <p>The onus of proof is on the party who wants to relieve himself of the consequences of coercion.</p>	<p>The onus of proof is on the party in a position to dominate the will of the other party.</p>
9	<p><b>Restoration of benefit</b></p> <p>The aggrieved party has to restore the benefit received.</p>	<p>The party avoiding the contract may or may not restore benefit.</p>

**Please See The Example 13: Coercion**

**Please See The Example 14: Coercion**

**Please See The Example 15: Undue influence**

# 2 CONSENT: FRAUD AND MISREPRESENTATION

## 2.1 Fraud

### Definition: Fraud [Section 17]

Fraud means and includes any of the following acts committed:

- by a party to a contract, or with his connivance, or by his agent
  
- with an intent to deceive another party thereto or his agent to enter into a contract.

## Fraudulent acts

<b>Intentional false assertion</b>	A false representation of a fact made knowingly or without belief in its truth is fraud.
<b>Active concealment of facts</b>	The active concealment of a fact by one having knowledge or belief of the fact such as, where steps are taken by a seller concealing some material facts so that the buyer even after a reasonable examination cannot trace the defects, will amount to fraud.
<b>Intentional non - performance</b>	A promise made without any intention of performing it constitutes to fraud.
<b>Intention to deceive</b>	Any act with an intention to deceive is considered to be fraudulent.
<b>Certain acts or omissions</b>	Under certain situations, law declares certain acts and omissions to be fraudulent.

**Please See The Example 16: Intentional false assertion**

**Please See The Example 17: Active concealment of facts**

**Please See The Example 18: Intentional non-performance**

**Please See The Example 19: Intention to deceive**

**Please See The Example 20: Certain acts or omissions**

## Essentials of fraud

These essentials are discussed below:

<b>Party to a contract</b>	The fraud must be committed by a party to a contract or by anyone with his connivance or by his agent. Thus, the fraud by a stranger to the contract does not affect its validity.
<b>False representation</b>	It means that a false representation is made with the knowledge of its falsehood. It will equal to fraud if a true representation is made but becomes untrue at the time of formation of contract the fact is known to the party who made the representation.
<b>Representation as to fact</b>	A mere opinion does not amount to fraud. A representation must relate to a fact then it amounts to fraud.
<b>Actually deceived</b>	A deceit, which does not deceive is not fraud. The fraud must have actually deceived the other party who has acted on the basis of such representation.
<b>Suffered loss</b>	Loss has been suffered by the party who acted on the representation.

**Please See The Example 21: Essentials of fraud**



## Effects of fraud [Section 19]

The effects of fraud are as follows:

- The contract becomes voidable at the option of the party whose consent was so caused.
- The party whose consent was so caused may insist on performance of the contract.
- The party whose consent was so caused is entitled to claim damages.

**Please See The Example 22: Effects of fraud**

## Exceptions to rescind the contract

A party cannot rescind the contract where:

- silence amounts to fraud and the aggrieved party had the means of discovering the truth with ordinary diligence
- the party gave the consent in ignorance of fraud
- the party after becoming aware of the fraud takes a benefit under the contract
- an innocent third party before the contract is rescinded acquires for consideration and in good faith some interest in the property passing under the contract,
- the parties cannot be restored to their original position.

**Please See The Example 23 To 27 Exception to rescind the contract**

## Silence as to fraud [Section 17]

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 parties stands in fiduciary relationship or where silence itself is equivalent to speech.

**Please See The Example 28: Silence as to fraud**

## 2.2 Misrepresentation

### Definition: Misrepresentation [Section 18]

Misrepresentation means and includes:

#### Unwarranted statement

When a person makes a positive statement that a fact is true when his information does not warrant it to be so, though he believes it to be true this amounts to misrepresentation.

#### Breach of duty

Any breach of duty which without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him.

## Inducing mistake about subject matter (Innocent misrepresentation)

A party to an agreement induces (however innocently) the other party to make a mistake as to the nature or quality of the subject of the agreement.

**Please See The Example 29: Unwarranted statement**

**Please See The Example 30: Breach of duty**

**Please See The Example 31: Inducing mistake about subject matter**

# Essentials of misrepresentation

These essentials are discussed below:

<b>Party to a contract</b>	The representation must be made by a party to a contract or by anyone with his connivance or by his agent. Thus, the representation by a stranger to the contract does not affect the validity of the contract.
<b>False representation</b>	There must be a false representation and it must be made without the knowledge of its falsehood i.e. the person making it must honestly believe it to be true.
<b>Representation as to fact</b>	A mere opinion does not amount to misrepresentation. A representation must relate to a fact if it amounts to misrepresentation.
<b>objective</b>	The objective is to induce the other party to enter into contract without the intention of deceiving the other party.
<b>Actually acted</b>	The other party must have acted on the faith of the representation.

## Effects of misrepresentation [Section 19]

The effects of misrepresentation are following:

- the contract becomes voidable at the option of the party whose consent was so caused.
  
- The party whose consent was so caused may insist on performance of the contract.

**Please See The Example 32: Effects of misrepresentation**

## Exceptions to rescind the contract

A party cannot rescind the contract where:

- the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence;
- the party gave the consent in ignorance of misrepresentation
- the party after becoming aware of the misrepresentation takes a benefit under the contract
- an innocent third party before the contract is rescinded acquires for consideration and in good faith some interest in the property passing under the contract,
- the parties cannot be restored to their original position.

**Please See The Example 33: Exception to rescind the contract**



# Difference between fraud and misrepresentation

S.no	Fraud	Misrepresentation
1	<p><b>Intention</b> Implies an intention to deceive.</p>	Representation is innocent without intent to deceive.
2	<p><b>Remedies</b> It is civil wrong and aggrieved party can claim damages in addition to Cancellation of contract.</p>	Aggrieved party can only avoid the contract but damages are only payable at discretion of court.

**Please See The Example 34: Fraud**

**Please See The Example 35: Misrepresentation – When rescission is not allowed**

**Please See The Example 36: Misrepresentation**

**Please See The Example 37: Fraud**

**Please See The Example 38: Fraud**

# 3 CONSENT: MISTAKE

## 3.1 Mistake of law

### Mistake of Pakistan law [Section 21]

Everyone is deemed to be conversant with the law of his country, and therefore, mistake of law is no excuse and it does not give right to the parties to avoid the contract.

**Please See The Example 39: Mistake of Pakistani Law**

### Mistake of foreign law [Section 21]

Mistake of foreign law stands on the same footing as the 'mistake of fact'. Here the agreement is void in case of bilateral mistake only.

**Please See The Example 40: Mistake of foreign law**

## 3.2 Mistake of fact

### Bilateral mistake [Section 20]

Where both the parties to an agreement are under a mistake as to a matter of facts essential to the agreement, the agreement is void.

An erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of facts.

### Bilateral mistake as to the subject matter

A bilateral mistake as to the subject matter includes the mistakes as to the existence of subject matter, quantity of subject matter, quality of subject matter, price of subject matter, identity of subject matter, and title of subject matter.

**Please See The Example 41: Bilateral mistake as to the subject matter**

## Bilateral mistake as to the possibility of performance

Where the parties believe that an agreement is capable of performance and actually it is not then it is said to be a bilateral mistake as to the possibility of performance due to which agreement is void.

**Please See The Example 42: Bilateral mistake as to the possibility of performance**

## Unilateral mistake [Section 22]

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to matter of facts.

**Please See The Example 43: Unilateral mistake**

## Exceptions

Following are the exceptions where agreement is void on the basis of unilateral mistake:

- Mistake relating to the identity of the person
- Mistake relating to the nature of the contract

**Please See The Example 44: Mistake relating to the identity of the person**

**Please See The Example 45: Mistake relating to the nature of contract**

**Please See The Example 46: Mistake**

# 4 EXPRESSLY DECLARED VOID AGREEMENTS

## 4.1 Agreements in restraint of trade [Section 27]

Every agreement by which anyone is restricted from exercising a lawful profession, trade or business of any kind, is to that extent void.

**Please See The Example 47: Agreements in restraint of trade**

Following are the exceptions where agreements in restraint of trade are not considered as void:

### **Exception: Sale of goodwill**

One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits are reasonable.

**Please See The Example 48: Sale of goodwill**

## Exception: Partners' agreements [Section 11, 36, 54 & 55 of Partnership Act]

The Partnership Act allows following agreements as an exception to the agreement in restraint of trade:

<b>Existing partner</b>	Subject to contract between partners, a partner may not carry on any business competing with that of the firm while he is a partner.
<b>Outgoing partner</b>	An outgoing partner may agree with his partners that he will not carry on any business similar to that of the firm for a specified period and for specified local limits.
<b>Dissolution of firm</b>	Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm for a specified period and for specified local limits.
<b>Sale of goodwill</b>	Partner(s) may upon the sale of the goodwill of a firm, make an agreement that partner(s) will not carry on any business similar to that of the firm for a specified period and for specified local limits.

**Please See The Example 49: Partners' agreement**

## Trade combinations

An agreement between different firms in the nature of a trade combination in order to maintain a price level and avoid under selling is not void.

**Please See The Example 50: Trade Combinations**

## Service Agreements

During the employment, agreement of services often contains a clause by which an employee is prohibited from working anywhere else. Such a clause in service agreement by which an employer restricts the employee from engaging in any competing business or accepting any other employment is not restraint of trade. Further, where legitimate interest or goodwill or trade secret of employer is involved an employer may restrict his employee even after the end of employment but such restriction should be just and reasonable.

**Please See The Example 51: Service Agreements**



## 4.2 Wagering agreement [Section 30]

An agreement between two persons under which money or money's worth is payable, by one person to another on the happening or non-happening of a future uncertain event is called a wagering agreement. An agreement by way of wager is void.

**Please See The Example 52: Wagering agreement**

### Effects of Wagering Agreement

The effects of wagering agreements are following:

- Such agreements are void
- No suit can be filed to recover the amount won on any wager.
- Transactions which are collateral to wagering agreements may also be void.

**Please See The Example 53: Effect of wagering agreement**

## Transactions which are not held wagers

- Prize competitions which are games of skill e.g. picture puzzles, athletic competitions.
- An agreement to contribute to a plate or prize of the value of Rs. 500 and above to be awarded to the winner of a horse race.
- If there is intention of actually receiving and delivering goods (or shares) at a future date, this is not wagering agreement. If only price difference or fluctuation is to be paid or received, this is wagering agreement; and
- Contract of insurance

**Please See The Example 54: Transactions which are not held wagers**

## 4.3 Other void agreements

### Agreements in restraint of legal proceedings [Section 28]

Every agreement by which any party is restricted from enforcing his right under a contract by the usual legal proceedings or which limits the time within which he may enforce his right is void.

**Please See The Example 55: Agreements in restraint of legal proceedings**

### Exceptions

- An agreement between two or more persons who agree that any dispute which may arise between them shall be referred to arbitration, is valid.
  
- An agreement whereby parties agree not to file an appeal in upper court of law, is valid.
  
- Parties making contract to select one court of law between two courts equally competent.

**Please See The Example 56: Exception to agreements in restraint of legal proceedings**

## Agreements in restraint of marriage [Section 26]

Every agreement in restraint of the marriage of any person other than a minor is void. This is because the law regards marriage and married status as the right of every individual.

**Please See The Example 57: Agreements in restraint of marriage**

## Uncertain agreements [Section 29]

An agreement the meaning of which is not certain or capable of being made certain are void.

**Please See The Example 58: Uncertain agreements**

## Agreements contingent on impossible events [Section 32]

Contingent agreements to do or not to do anything, if an impossible event happens are void whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

**Please See The Example 59: Agreements contingent on impossible events**

## Agreements to do impossible acts [Section 56]

An agreement to do an impossible act is void.

**Please See The Example 60: Agreements to do impossible acts**

## Agreements to enter into an agreement in the future

An agreement to enter into an agreement in the future is void.

**Please See The Example 1: Agreements to enter into an agreement in the future**

## Effect on agreement collateral to void agreement

When an agreement is void, other agreement which is collateral to it is also void and is not enforceable by law if the other party has knowledge about it.

**Please See The Example 62: Effect on agreement collateral to void agreement**

**Please See The Example 63: Wager**

**Please See The Example 64: Agreement in restraint of trade and legal proceedings**

**Please See The Example 65: Wage**

# Topics Covered

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