

DEFECTS IN THE CONTRACT :

- misrepresentation,
- mistake,
- duress and undue influence,
- illegality,
- incapacity

A number of different defects may affect the validity of a contract. These have differing legal consequences and may render a contract void, voidable or unenforceable. It is important to grasp the difference between these concepts.

A void contract = the defect is so serious that in the eyes of the law no contract ever came into existence. Even if both parties wish to enforce the contract this is not possible. If property has changed hands, ownership is not usually transferred and the property may be recovered.

An unenforceable contract = the contract is valid but is not enforceable against a vulnerable party (contractual incapacity)

A voidable contract = the defect is not serious enough to make the contract void, but the party whose right is infringed may choose to opt out the contract. It is considered valid unless one of the parties asks a court to « avoid » it (=declare it invalid). The most common circumstances under which a contract may be avoided come under different categories :

MISREPRESENTATION :

During pre-contractual negotiations, a false statement may be made, which induce a party to enter the contract.

A remedy in misrepresentation is available to the innocent party whether or not the statement became a term of the contract.

If it is a term of the contract, an action for breach of contract provides alternative remedies.

Misrepresentation makes the contract voidable.

The misrepresentee (the party to whom the false statement was made) is entitled to avoid the contract or to persist with it.

An actionable misrepresentation is :

1 a statement of fact which

2 is a material inducement to enter the contract.

STATEMENT OF FACT : this can be written, spoken, pictorial or may arise from other conduct

THE STATEMENT ACTED AS A MATERIAL INDUCEMENT : the misrepresentation must be an important influence, but does not have to be the only reason why the misrepresentee entered the contract. The misrepresentee must both know of the statement and rely on it.

The remedies available to the misrepresentee depend on the perceived state of mind of the misrepresenter at the point at which the statement was made:

- fraudulent misrepresentation : if the misrepresenter knows that the statement is untrue
- careless misrepresentation : a representer induces the claimant to enter into a contract, on the strength of a statement which the representer did not reasonably believe
- wholly innocent misrepresentation : even if a misrepresentation is made in good faith with no intention to deceive and without carelessness, the contract is rendered voidable. POSSIBLE REMEDIES : damages, rescission of the contract (= to return the parties to their pre-contractual position and this enables the misrepresentee to recover any money paid)

MISTAKE :

A mistake is made regarding the subject matter but the mistake is made in good faith. The contract will be rendered void. Such a mistake is said in law to be **operative** because it strikes at the root of the contract, effectively preventing any true agreement. In practice it is very rare.

Common mistake concerning the existence of the subject matter : both parties reasonably but wrongly believe that the subject matter exists at the time that make the contract.

Mutual mistake concerning the identity of the subject matter : both parties operate under different misapprehensions.

Unilateral mistake by one party regarding the identity of the other : one party is mistaken of the other. Mistaken identity usually arises from a fraudulent misrepresentation, which enables a fraudster (a »rogue «) to take possession of the victim's property. The contract is voidable for misrepresentation.

Unilateral mistake regarding the terms of the contract : parties will not usually be able to treat a contract as void by claiming that they were mistaken about the terms on which the contract was based. Exceptionally, the contract will be treated as void if the error would have been clearly evident to the other party, who will not be allowed to rely on it.

DURESS AND UNDUE INFLUENCE :

DURESS :

Duress is a common law doctrine, under which threats or use of violence to force a party to make a contract may make it voidable. In practice, physical duress is very rare.

Traditionally, the doctrine of duress encompassed only threats and violence against the person, but the courts extended the doctrine to cover **economic duress**. Such duress usually consists of threats by one party not to perform the contract with the other party unless the terms of the contract are varied in favor of the coercive party.

The following criteria are relevant to deciding whether the contract is voidable:

- the extent of the pressure employed.
- the level of protest evidenced by the aggrieved party.
- did the aggrieved party have any real choice about complying with the other party's threats ?
- was independent advice available to the aggrieved party ?

UNDUE INFLUENCE :

This is an equitable doctrine, applicable where one party abuses his or her personal influence or authority over another, to make that other party enter a transaction. If the influence is effective the transaction is voidable.

ILLEGALITY :

The rules governing illegal contracts are found in statute and common law.

CONTRACTUAL INCAPACITY :

MINORS :

Minors (people under the age of 18) are legally capable of making most kinds of contracts and may take steps to enforce them against the other party. The law protects minors by restricting the extent to which their contracts may be enforced against them. Some - like a contract to lend money to a minor - are never enforceable by the creditor; others are binding only to a limited extent.

MENTALLY IMPAIRED PERSONS :

The contractual capacity of a person who is mentally impaired is limited in two situations :

1 where the other party knew of the impairment

2 contracts for necessaries : a mentally impaired person is obliged to pay a reasonable price for necessaries when they are supplied by a seller who is aware of that person's mental state.