CHAPTER 4

CONCEPT OF CONSENSUS

CONSENSUS AS BASIS FOR CONTRACTUAL COMMITMENT

MAKING INTENTION KNOWN

INTENTION TO BE CONTRACTUALLY BOUND

COMMON INTENTION

MAKING INTENTION KNOWN
CONSENSUS AS BASIS FOR CONTRACTUAL COMMITMENT

A) Every 1 of the parties has serious intention to be contractually bound

B) Parties have common intention, must have same commitment in mind

C) Every party makes intention known to every other party by means of declaration of intention

Consensus / True agreement = basis for every contract

Consensus can mostly be revealed by external manifestations

Consensus can be reached only if:
Every party must have serious intention to be contractually bound.

Where parties have intention to reach understanding / make arrangement based on good faith, arrangement will give rise to 'gentleman's agreement' and not binding contract.

Statement make jokingly / to highlight good qualities of agreement (puffing) = generally not made with intention of creating legally enforceable obligations.
PARTIES MUST AGREE TO CONTRACTUAL OBLIGATIONS / COMMITMENTS WISH TO CREATE

COMMON INTENTION TO CONTRACT WITH EACH OTHER & MUST INTEND TO CREATE SAME LEGAL RELATIONSHIP

COMMON INTENTION
MAKING INTENTION KNOWN

CONSENSUS CAN ONLY EXIST IF PARTIES ARE MUTUALLY AWARE OF ANOTHER'S INTENTION

ALL PARTIES MUST BE AWARE OF TRUE AGREEMENT

EXISTENCE OF 2 INDEPENDENT BUT CORRESPONDING INTENTIONS CANNOT CREATE CONTRACT

WRITING, ORALLY / MEANS OF CONDUCT

MOST COMMON METHOD TO DETERMINE IF CONSENSUS REACHED - LOOK FOR OFFER & ACCEPTANCE OF IT
CONCEPTS OF OFFER & ACCEPTANCE

REACHING OF CONSENSUS REQUIRES EVERY PARTY DECLARE INTENTION TO CREATE ENFORCEABLE RIGHTS & DUTIES

OFFER = DECLARATION MADE BY OFFEROR - INDICATES INTENTION TO BE BOUND BY MERE ACCEPTANCE

ACCEPTANCE = DECLARATION BY OFFEREE - INDICATED AGREES TO TERMS OF OFFER EXACTLY AS PUT IN OFFER

USUAL WAY MAKE INTENTIONS KNOWN = OFFER & ACCEPTANCE
OFFER MUST BE MADE WITH INTENTION THAT OFFEROR WILL BE LEGALLY BOUND BY ACCEPTANCE BY OFFEREE

OFFER MUST BE COMPLETE

OFFER & ACCEPTANCE MUST BE CLEAR & CERTAIN

OFFER & ACCEPTANCE MAY BE MADE EXPRESSLY (WRITING / ORALLY) / TACITLY BY MEANS OF CONDUCT (NOD OF HEAD, MOVEMENT OF HAND/HANDING OVER OF MONEY)

OFFER OF ACCEPTANCE MUST BE COMMUNICATED

OFFER MUST BE ADDRESSED TO PARTICULAR PERSON / PERSONS / IN GENERAL TO UNKNOWN PERSON / PERSONS / GENERAL PUBLIC

REQUIREMENTS FOR OFFER & ACCEPTANCE
FALLING AWAY OF OFFER

- If Offerer / Offeree dies before offer is accepted
- If offer stipulates that is valid for certain period of time - if no time limit, expires within reasonable time
- If Offeree makes counteroffer - counteroffer is new offer
- If offeree rejects offer (cannot be revived)
- If before accepted, offerer informs offeree that revokes offer
CONTINUED EXISTENCE OF OFFER: THE OPTION

OFFEROR CAN ENSURE CONTINUED EXISTENCE OF OFFER BY MEANS OF OPTION

OFFEREE AGREES TO 2ND OFFER - OFFEROR BOUND SUBSTANTIVE OFFER FOR PERIOD - MY NOT REVOKE / CONCLUDE WITH OTHER PERSON REGARDING SAME OBJECT

OPTION: FURTHER OFFER TO KEEP 1ST OFFER OPEN FOR SPECIFIED PERIOD

SUBSTANTIVE OFFER: OFFER TO CONCLUDE PARTICULAR CONTRACT
SPECIAL RULES WRT OFFER & ACCEPTANCE

- INVITATION TO MAKE OFFER
- AUCTIONS
- STATEMENTS OF INTENT
- CALLING FOR TENDERS
INVITATION TO MAKE OFFER

INTERNET TRADER'S VIEWPOINT: UNWANTED OFFERS - REJECT WITHOUT FURTHER LEGAL CONSEQUENCES

NOT TRUE OFFER

WEBSITE NOT REGARDED AS OFFER = INVITATION TO DO BUSINESS

ADVERTISEMENT / DISPLAY DOES NOT CONSTITUTE OFFER = INVITATION TO DO BUSINESS

CLIENT = OFFEROR
STATEMENTS OF INTENT

REFERS TO DOCUMENT IN WHICH PARTY indicates intention to contract, as opposed to offering to actually do so.

MERELY FORMS BASIS ON WHICH FURTHER NEGOTIATIONS REGARDING TERMS OF CONTRACT ARE BASED.
CALLING FOR TENDERS

WHERE TENDER IS CALLED FOR & PERSON CALLING FOR TENDER (ADVITISER) DOES NOT BIND HIMSELF TO ACCEPTING HIGHEST / LOWEST TENDER, CALL WOULD NORMALLY BE NO MORE THAN REQUEST TO SUBMIT OFFERS, WHICH ADVITISER MAY ACCEPT / REJECT AT WILL.
CERTAIN RULES RELATING TO SALE MADE KNOWN BEFOREHAND

CONDITIONS OF AUCTION: DISTINCTION BETWEEN AUCTIONS SUBJECT TO RESERVATION / AUCTIONS NOT SUBJECT TO RESERVATION

SUBJECT TO RESERVATION: EXAMPLE - Predetermined price is fetched / exceeded

NOT SUBJECT TO RESERVATION: SOLD WITHOUT RESERVE - AUCTIONEER MAKES OFFER

SOLD TO HIGHEST BIDDER

ONLY WHEN AUCTIONEER ACCEPTS BID IS CONSENSUS REACHED

BIDDER IS OFFEROR

AUCTIONS
CONTRACT ARISES AT MOMENT WHEN & AT PLACE WHERE CONSENSUS IS REACHED

MOMENT IMPORTANT - CAN STILL BE REVOKED / OFFER EXPIRED & WHEN DUTIES BECOME ENFORCEABLE

(1) WHERE OFFERER & OFFEREE ARE IN EACH OTHER'S PRESENCE

(2) WHERE PARTIES ARE NOT IN EACH OTHER'S PRESENCE

(3) ELECTRONIC AGREEMENTS

PLACE IMPORTANT - COURT JURISDICTION

MOMENT & PLACE OF FORMATION OF CONTRACT
WHERE OFFEROR & OFFEREE ARE IN EACH OTHER'S PRESENCE

USUALLY EASY TO DETERMINE TIME & PLACE

CONTRACT COMES INTO BEING AT TIME WHEN ACCEPTANCE IS COMMUNICATED & AT PLACE WHERE PARTIES HAPPEN TO BE AT THAT POINT IN TIME

REFERRED TO AS INFORMATION / ASCERTAINMENT THEORY - CONTRACT COMES INTO BEING WHEN & WHERE OFFEROR LEARNS OF ACCEPTANCE OF OFFER
WHERE PARTIES ARE NOT IN EACH OTHER'S PRESENCE

TELEPHONE: CONSIDERED TO BE IN EACH OTHER'S PRESENCE - PLACE: WHERE OFFERER IS

DISPATCH / EXPEDITION THEORY: POST. PLACE WHERE & TIME WHEN LETTER OF ACCEPTANCE IS POSTED

OFFEREE CAN UNDO ACCEPTANCE BY SPEEDIER MEANS OF COMMUNICATION BEFORE EARLIER COMMUNICATION COMES TO OFFERORS KNOWLEDGE

DISPATCH THEORY - PRIMARILY AIMED AT PROTECTING OFFEREE

OFFEREE CANNOT ENFORCE SLOWER LETTER OF ACCEPTANCE IF CHANGES MIND
CONSENSUS & DEFECTS IN WILL

CONSENSUS ABSENT: CONTRACT IS VOID

(1) ABSENCE OF CONSENSUS - MISTAKE

(2) IMPROPERLY OBTAINED CONSENSUS

CONSENSUS OBTAINED IMPROPER MANNER: VALID CONTRACT ARISES - VOIDABLE
MISTAKE EXISTS WHEN 1 / MORE PARTIES TO PROPOSED CONTRACT MISUNDERSTAND MATERIAL FACT / LEGAL RULE RELATING TO CONTRACT

NO CONSENSUS - NO CONTRACT

PARTIES WILL BE HELD TO DECLARATIONS OF INTENTION UNLESS CIRCUMSTANCES ARE SUCH THAT MISTAKE IS REASONABLE

ONLY MISTAKES WRT MATERIAL FACT, LEGAL RULE / PRINCIPLE WILL LEAD TO ABSENCE OF CONTRACT

MISTAKE = UNREASONABLE - NOT EXCUSED - PARTY MADE MISTAKE - HELD TO DECLARATION OF INTENTION

ABSENCE OF CONSENSUS - MISTAKE
REQUIREMENTS TO BE MET BEFORE MISTAKE WILL RENDER A CONTRACT VOID

- MISTAKE RELATES TO FACT, / LEGAL RULE / PRINCIPLE
- FACT / RULE / PRINCIPLE IS MATERIAL
- MISTAKE (WHETHER OF FACT / LAW) IS REASONABLE
MISTAKE MUST RELATE TO FACT, LEGAL RULE / PRINCIPLE

IN ORDER TO HAVE EFFECT ON CONSENSUS, MISTAKE MUST BE 1 OF FACT / LAW

MISTAKE IN LAW / FACT - ONLY INVALIDATE CONTRACT IF CONSIDERED TO BE EXCUSABLE IN CIRCUMSTANCES
MISREPRESENTATION: WHERE LEADS TO MATERIAL MISTAKE - RESULTS IN NO CONSENSUS - NO CONTRACT

MISTAKE MUST CONCERN MATERIAL FACT, LEGAL RULE / PRINCIPLE

MISREPRESENTATION: WILL NOT VOID - GIVES RISE TO VOIDABILITY

MISTAKE ABOUT NATURE OF CONTRACT

(C) INTERPRETATION (ATTACHED TO OFFER & ACCEPTANCE)

N/A: ATTRIBUTES OF OBJECT

TIME PERFORMANCE RENDERED, PLACE & METHOD OF DELIVERY, PERFORMANCE ITSELF

N/A: IMMATERIAL WHO PARTY SHOULD BE, FULL NAMES, CHARACTER

(A) IDENTITY
MISTAKE IN FACT / LAW MUST BE REASONABLE

IF NOT JUSTIFIABLE ERROR, CONTRACT ENFORCED, DESPITE DIFFERENCE FROM PARTY'S INTENTION

CAN RELY ON MISREPRESENTATION IF OTHER PARTY CREATED THE UNREASONABLE MISTAKE

CANNOT RELY ON MISTAKE IF NEGLIGENT / CARELESS / PAID INSUFFICIENT ATTENTION TO MATTER (NOT READING CONTRACT)

REASONABLE: IF REASONABLE PERSON IN SAME SITUATION WOULD MAKE SAME MISTAKE

CAN RELY ON MISREPRESENTATION IF OTHER PARTY CREATED THE UNREASONABLE MISTAKE
IMPROPERLY OBTAINED CONSENSUS

MISREPRESENTATION

UNDUE INFLUENCE

DURESS
**MISREPRESENTATION**

**DEFINITION:** Untrue statement / representation concerning existing fact / state of affairs, made by one party with aim & result of inducing contract.

**CONTRACT VOIDABLE REQUIREMENTS:**

- **(A)** Must be misrepresentation
  - N/A: Misrepresentation of law, honest opinion, estimate puffing
- **(B)** Made by one contracting party to another
  - Misrepresentation made by outsider
  - Keeping silent = misrepresentation only if duty to disclose relevant facts exists
- **(C)** Must be unlawful & material
- **(D)** Must have induced contract as stands
  - Not unlawful just because false. Importance is measured
- **(E)** Can be made intentionally, negligently / innocently
  - Referred to as requirements of casualty before conclusion of contract

**REFERENCES:**

- Requirements of casualty
- Before conclusion of contract
- Intentionally, negligently / innocently
- False statement / representation concerning existing fact / state of affairs
- Made by one party with aim & result of inducing contract
- Must be unlawful & material
- Must have induced contract as stands
- N/A: Misrepresentation of law, honest opinion, estimate puffing
- Made by one contracting party to another
- Misrepresentation made by outsider
- Keeping silent = misrepresentation only if duty to disclose relevant facts exists
EFFECT OF MISREPRESENTATION

DOES NOT EXCLUDE CONSENSUS, THUS CONTRACT NOT VOID

VALID CONTRACT ARISES - VOIDABLE @ INSTANCE OF DECEIVED PARTY

INNOCENT PARTY MAY CLAIM FOR BREACH OF CONTRACT

DAMAGE CLAIM DEPENDS ON DEGREE OF FAULT ATTRIBUTABLE TO MISREPRESENTATION

3 FORMS OF MISREPRESENTATION:

(1) INTENTIONAL MISREPRESENTATION

(2) NEGLIGENT MISREPRESENTATION

(3) INNOCENT MISREPRESENTATION

INNOCENT PARTY MAY CLAIM FOR BREACH OF CONTRACT
**INTENTIONAL MISREPRESENTATION**

- **CLAIM FOR DAMAGES FOR INTENTIONAL MISREPRESENTATION** = CLAIM IN DELICT & NOT CONTRACT
- **DECEIVED PARTY PLACED IN POSITION WOULD HAVE BEEN IF MISREPRESENTATION HAD NOT BEEN MADE**
- **BASIS FOR DAMAGES = DELICTUAL CONDUCT**
- **INNOCENT PARTY MAY CLAIM DAMAGES IRRESPECTIVE OF CHOICE OF UPHOLDING/RESCINDING CONTRACT**
- **PARTY MISLEADING OTHER KNOWS OTHER PARTY IS BEING MISLED / RECKLESS WRT TRUTH**
- **& IF STATEMENT IS MADE IN AWARENESS THAT IT IS FALSE / RECKLESSLY WITHOUT REGARD TO TRUTH / FALSENESS OF STATEMENT**
- **FALSE STATEMENT OF MATERIAL FACT MADE WITH INTENTION OF INDUCING CONTRACT**

**INNOCENT PARTY MAY CLAIM DAMAGES IRRESPECTIVE OF CHOICE OF UPHOLDING/RESCINDING CONTRACT**
NEGLIGENT MISREPRESENTATION

DEFINED AS FALSE STATEMENT OF MATERIAL FACT WHICH IS MADE NEGLIGENTLY & WITH AIM OF INDUCING CONTRACT

NEGLIGENCE ASSUMED IF PERSON MAKES STATEMENT BELIEVES TO BE TRUE, WITHOUT TAKING STEPS REASONABLE PERSON WOULD HAVE TAKEN IN CIRCUMSTANCES TO SATISFY THAT STATEMENT WAS TRUE

MISLED PARTY CLAIM DAMAGES IRRESPECTIVE IF CONTRACT IS UPHOLDED / RESCINDED

MISLED PARTY BASE CLAIM FOR DAMAGES ON DELICTUAL PRINCIPLES
INNOCENT MISREPRESENTATION

FALSE STATEMENT MADE WITH INTENTION OF INDUCING CONTRACT, PARTY NOT FRAUDULENT / NEGLIGENT

DECEIVED PARTY HAS CHOICE OF UPHOLDING / RESCINDING CONTRACT

DECEIVED PARTY HAS NO CLAIM FOR DAMAGES

NO ROOM FOR APPLICATION OF DELICTUAL PRINCIPLES

INNOCENT MISREPRESENTATION

DECEIVED PARTY HAS CHOICE OF UPHOLDING / RESCINDING CONTRACT

DECEIVED PARTY HAS NO CLAIM FOR DAMAGES

NO ROOM FOR APPLICATION OF DELICTUAL PRINCIPLES
DURESS

DURESS = UNLAWFUL THREAT OF HARM / INJURY MADE BY PARTY TO CONTRACT / SOMEONE ACTING ON BEHALF TO CONCLUDE CONTRACT

DAMAGES CAN BE CLAIMED IRRESPECTIVE IF CONTRACT IS UPHOLDED / RESCINDED

DAMAGES CALCULATED ACCORDING TO NEGATIVE INTEREST

NEGATIVE INTEREST: POSITION WOULD HAVE BEEN HAD DURESS NOT OCCURED

CONTRACT = VOIDABLE

CONTRACT ARISES

CONTRACT ARISES
REQUIREMENTS FOR CONTRACT TO BE VOIDABLE BASED ON DURESS

(A) ACTUAL PHYSICAL VOILENCE / REASONABLE FEAR OF VIOLENCE / DAMAGE

(E) THREAT MUST CAUSE THREATENED PERSON TO CONCLUDE CONTRACT

(D) MUST BE EXERCISED BY 1 CONTRACTING PARTY AGAINST THE OTHER

COMMERCIAL BARGAINING - FREE WILL ALWAYS HAMPERED - HARD BARGAINING = NOT EQUIVALENT OF DURESS

(B) THREAT MUST BE IMMINENT / INEVITABLE EVIL

(C) THREAT OF HARM / VIOLENCE MUST BE UNLAWFUL

THREAT TO OBTAIN MORE BENEFICAL PERFORMANCE - COMPLY WITH REQUIREMENT OF UNLAWFULNESS

ECONOMIC DAMAGE / RUIN = RARE = NOT UNLAWFUL TO CAUSE IN COMPETITIVE ECONOMY
Undue influence is defined as any improper/unfair conduct by one of the contracting parties by means of which the other contracting party is persuaded to conclude a contract contrary to their independent will.

- Special relationship between parties: doctor & patient; attorney & client; guardian & minor.
- Abuse of ignorance, lack of experience, physical frailty, intellectual weakness, mental dependence.
- Contract comes into existence.
- Independent will not exercised.
- May elect to uphold/void & claim damages based on negative interest.

Additionally, any party subject to undue influence may elect to uphold/void the contract and claim damages based on negative interest.
ELEMENTS OF UNDUE INFLUENCE

1. PARTY WHO HAS ALLEGEDLY EXERCISED UNDUE INFLUENCE MUST HAVE ACQUIRED INFLUENCE OVER VICTIM

2. INFLUENCE MUST HAVE BEEN USED UNSCRUPULOUSLY TO PERSUADE VICTIM TO CONSENT TO TRANSACTION VICTIM WOULD NOT HAVE ENTERED INTO OF NORMAL FREE WILL & WHICH WAS TO VICTIM'S DISADVANTAGE

3. PARTY MUST HAVE USED INFLUENCE TO WEAKEN VICTIM'S ABILITY TO RESIST, SO THAT VICTIM'S WILL BECAME SUSCEPTIBLE