CHAPTER 6

2 ELEMENTS - AGREEMENT MUST BE POSSIBLE

2 LEGAL POSSIBILITY

PHYSICAL POSSIBLITY OF EXECUTION
LEGAL POSSIBILITY

CONTRACTS CONTRARY TO COMMON-LAW

CONSEQUENCES OF ILLEGALITY

CONTRACTS CONTRARY TO STATUTORY LAW
CONTRACTS CONTRARY TO COMMON-LAW

1. Contracts which cannot be legally executed
2. Agreements that are contrary to good morals
3. Agreements that are contrary to public policy

Constitution = Reliable indicator of good moral values & public policy

Agreement can be contrary to common-law - legally impossible to execute / against good morals / against public policy (interest).

Contracts contrary to common-law
A contract cannot be legally executed if rights & duties to the contract cannot be performed in accordance with general legal principles. Example: impossible to buy & sell something which is not capable of being privately owned (e.g., the Moon).
AGREEMENTS THAT ARE CONTRARY TO GOOD MORALS

CONTRARY TO GOOD MORALS OF COMMUNITY IF CONTRACT, PURPOSE / RIGHTS & DUTIES AGREED UPON ARE CONTRARY TO WHAT = PROPER & DECENT

CONVICTIONS OF COMMUNITY WRT GOOD MORAL VALUES DIFFER FROM COMMUNITY TO ANOTHER & CHANGE OVER TIME

EXAMPLE: PROMOTING SEXUAL MISCONDUCT & IMPAIR STABILITY OF MARRIAGE
AGREEMENTS CONTRARY TO PUBLIC POLICY

(A) AGREEMENTS INVOLVING ADMINISTRATION OF JUSTICE
(B) AGREEMENTS INVOLVING CRIMES & DELICTS
(C) AGREEMENTS AFFECTING SAFETY OF STATE
(D) AGREEMENTS RESTRAINING A PERSON'S FREEDOM TO PARTICIPATE IN LEGAL TRANSACTIONS
(E) AGREEMENTS RESTRAINING A PERSON'S FREEDOM TO PARTICIPATE IN TRADE
(F) GAMBLING CONTRACTS

CONTRACT, EFFECT / PURPOSE FOR CONCLUSION = HARMFUL TO INTEREST OF PUBLIC AT LARGE

SHOULD BE UNCONSCIONABLE, IMMORAL / ILLEGAL

EXISTING INDICATORS OF PUBLIC POLICY

EXISTING INDICATORS OF PUBLIC POLICY
AGREEMENTS INVOLVING ADMINISTRATION OF JUSTICE

ANY AGREEMENT WHICH MISUSES / THWARTS THE ADMINISTRATION OF JUSTICE = CONTRARY TO PUBLIC POLICY

EXAMPLE: AGREEMENT DEPRIVES CONTRACTING PARTY OF ANY & ALL OPPORTUNITY TO PROPERLY DEFEND HIMSELF AGAINST FUTURE WRONGS COMMITTED AGAINST HIM

EXAMPLE: CONTRACT NOT TO REPORT ANOTHER PERSON’S CRIME TO POLICE

CONTRACT = VOID
AGREEMENTS INVOLVING CRIMES & DELICTS

AGREEMENT TO COMMIT CRIME = CONTRARY TO PUBLIC POLICY & LEGALLY UNENFORCEABLE

ALSO APPLICABLE WHEN UNDERTAKING TO COMMIT A DELICT (DEFRAUD CREDITOR / INSURANCE COMPANY)
AGREEMENT BETWEEN PERSON & SUBJECT OF ENEMY STATE WHICH IS AT WAR WITH PERSON'S OWN COUNTRY = CONTRARY TO PUBLIC POLICY & NOT PERMISSIBLE IF AGREEMENT IS TO ADVANTAGE OF ENEMY STATE

AGREEMENT TO PROVIDE MILITARY SUPPLIES TO ENEMY STATE = UNLAWFUL & INVALID

AGREEMENTS AFFECTING SAFETY OF STATE
SERIOUS INFRINGEMENT OF FREEDOM OF ACTION - PUBLIC POLICY CANNOT COUNTENANCE IT

NOW - VOIDABLE

AGREEMENTS RESTRAINING PERSON'S FREEDOM TO PARTICIPATE IN LEGAL TRANSACTIONS

NOT PERMITTED TO UNDERTAKE TO REFUSE INHERITANCE UPON FUTURE DEATH OF TESTATOR

DEPRIVED OF FREEDOM OF TESTATION BY AGREEMENT STIPULATING THAT POSSESSIONS WILL BE BEQUEATHED IN CERTAIN MANNER

MUST BE DISTINGUISHED FROM VALID DONATIONS BETWEEN LIVING

ANTENUPTIONAL CONTRACTS - EXCEPTION TO RULE

MAY APPOINT SPOUSE AS HEIR THEREBY PROVIDING FOR MAINTENANCE OF SURVIVOR

ROMAN TIMES SUCH AGREEMENTS VOID

SERIOUS INFRINGEMENT OF FREEDOM OF ACTION - PUBLIC POLICY CANNOT COUNTENANCE IT
AGREEMENTS RESTRAINING FREEDOM TO PARTICIPATE IN TRADE

2 TYPES OCCUR

(1) PURCHASER OF BUSINESS ENTERPRISE / PROFESSIONAL PRACTICE INSISTS ON INCL UNDERTAKING BY SELLER IN CONTRACT OF SALE - SPECIFIED PERIOD &/ WITHIN SPECIFIED GEOGRAPHICAL AREA, SELLER WILL NOT PRACTISE PROFESSION / CARRY ON BUSINESS IN COMPETITION WITH PURCHASER

(2) PROTECTION OF TRADE SECRETS & COMMERCIAL CONTRACTS

EXAMPLE: EMPLOYEE WILL NOT RENDER SAME KIND OF LABOUR / SERVICE WITHIN SPECIFIED PERIOD &/ SPECIFIED GEOGRAPHICAL AREA

2 PRINCIPLES OF PUBLIC POLICY IN CONFLICT

(1) EVERYONE SHOULD BE ABLE TO PARTICIPATE FREELY IN COMMERCE

(2) CONTRACTS MUST BE EXECUTED

EXAMPLE: RESTRAINT OF TRADE

EXAMPLE: RESTRAINT OF TRADE
WHERE IN CONFLICT, SET OFF AGAINST EACH OTHER

CONTRACTUAL COMMITMENT REGARDED AS STRONGER & TAKES PRECEDENCE

RESTRAINT OF TRADE CONTRACTS, IN PRINCIPLE VALID & ENFORCEABLE

WHERE CLAUDE DID NOT PROTECT LEGALLY RECOGNISABLE INTEREST OF EMPLOYER, BUT MERELE SOUGHT TO MINIMISE EXCLUDE COMPETITION, WOULD BE AGAINST PUBLIC POLICY & UNREASONABLE

COURT WILL NOT ALLOW THAT GENERAL / SPECIALISED SKILL & KNOWLEDGE THAT BELONG TO EMPLOYEE BE EXCL FROM LABOUR MARKED BY RESTRAINT OF TRADE

IF RESTRAINT UNREASONABLE, COURT WILL NOT GRANT COMMITMENT TO CONTRACT

RESTRAINT OF TRADE CONTINUED...
GAMBLING CONTRACTS

1 PARTY UNDERTAKES TO RENDER PERFORMANCE TO ANOTHER IF SOME FUTURE EVENT, DEPENDENT ON LUCK, OCCURS

BETTING, GAMING, GAMBLING & WAGERING - INTERCHANGEABLE TERMS

LOTTERIES ACT 57 OF 1997

NATIONAL GAMBLING ACT 33 OF 1996

GAMBLING / LOTTERY DEBTS INCURRED IN COURSE OF LAWFUL, REGULATED / LICENCED GAMBLING / LOTTERY ACTIVITIES - VALID & ENFORCEABLE

UNLAWFUL, UNREGULATED REMAIN SUBJECT TO COMMON LAW

@ COMMON-LAW GAMBLING CONTRACT MOSTLY VALID

LAW WILL NOT ASSIST IN ENFORCEMENT

GAMBLING CONTRACT NOT ENFORCEABLE IN COURT

LAW RECOGNISES EXISTENCE OF OBLIGATION

GAMBLING

CONTRACTS
CONTRACTS CONTRARY TO STATUTORY LAW

FORBIDDEN BY ACT OF PARLIAMENT, PROVINCIAL LAW / MUNICIPAL REGULATION

AGREEMENT - ILLEGAL / UNLAWFUL @ COMMON-LAW OFTEN REGULATED BY LEGISLATION TO EXTEND ORIGINAL PROHIBITION / TO ADD CRIMINAL SANCTIONS

SALE OF WEAPONS & AMMUNITION / UNPOLISHED DIAMONDS BY & TO SOMEONE WHO DOES NOT HOLD LICENCE = PROHIBITED

LAW FORBIDS UNAUTHORISED TRADING IN LIQUOR WITHOUT LICENCE FOR LONGER THAN 1 MONTH

COURTS WILL HOLD AGREEMENT - VOID - IF DEFEAT PURPOSES OF LEGISLATION

CONTRACT MAY BE ILLEGAL & UNENFORCEABLE
CONSEQUENCES OF ILLEGALITY

UNLAWFUL / ILLEGAL CONTRACT = WITH FEW EXCEPTIONS VOID UNDER COMMON-LAW

STATUTORY ILLEGALITY WILL VOID CONTRACT IF LEGISLATURE MAKES INTENTION PLAIN BY ENACTING THAT AGREEMENT IN CONTRAVENTION OF PROHIBITION WILL BE NULL & VOID

NO PARTY ACQUIRES ENFORCEABLE RIGHTS / DUTIES FROM CONTRACT

EXAMPLES: THWARTING ADMIN OF JUSTICE, AGREEMENTS INVOLVING CRIMES & DELICTS & AGREEMENTS AFFECTING SECURITY OF STATE

SOME ILLEGAL AGREEMENTS NOT INVALIDATED, BUT ARE UNENFORCEABLE
CONSEQUENCES OF ILLEGALITY CONTINUED...

PREFERRED APPROACH - DETERMINE INTENTION OF LEGISLATURE IN ALL INSTANCES - PENALTY = SUFFICIENT SANCTION WITHOUT NEED TO VOID CONTRACT

WHERE AGREEMENT VOID TO ILLEGALITY, NO PARTY MAY INSTITUTE ACTION ON GROUNDS OF THE UNLAWFUL AGREEMENT

PAR DELICTUM CONTAINED IN MAXIMUM: IN PARI DELICTO POTIOR EST CONDITIO POSSIDENTIS (WHEN THERE = EQUAL GUILT THE POSSESSOR = IN THE STRONGER POSITION)

AS RESULT: PAR DELICTUM RULE

CAN USUALLY ALSO NOT RECLAIM ON GROUND OF UNJUSTIFIED ENRICHMENT

CANNOT CLAIM DAMAGES

THIS RULE EXPRESSED IN MAXIMUM KNOWN AS EX TURPI CAUSA NON ORITUR ACTIO (NO ACTION ARISES FROM A SHAMEFUL CAUSE)

THE AGREEMENT VOID TO ILLEGALITY, NO PARTY MAY INSTITUTE ACTION ON GROUNDS OF THE UNLAWFUL AGREEMENT

AS RESULT: PAR DELICTUM RULE
CONSEQUENCES OF ILLEGALITY CONTINUED...

PAR DELICTUM APPLIES TO ACTIONS WHICH ARE BASED ON UNJUSTIFIED ENRICHMENT

COURT MAY RELAX PAR DELICTUM IF PUBLIC INTEREST REQUIRES SUCH RELAXATION
Possibility & Certainty of Performance

Performance of Rights & Duties Flowing Form Contract Must Be Objectively Possible at Time of Conclusion of Contract

Possible to Perform Something Which Has Not Been Determined & = Not Determinable - Performance Should Be Certain / Ascertainable

Determined & Ascertainable Performance

Divisibility of Performance

Objective Possibility to Perform
OBJECTIVE POSSIBILTY TO PERFORM

IF PARTIES FAIL TO PERFORM - AMOUNT TO BREACH OF CONTRACT

THUS PERFORMANCE NOT IMPOSSIBLE & VALID CONTRACT ARISES, UNLESS AGREEMENT TO CONTRARY WAS REACHED

IF PERFORMANCE IS INCONVENIENT / DIFFICULT PERFORMANCE = NOT OBJECTIVELY IMPOSSIBLE

PERFORMANCE IMPOSSIBLE IF AT MOMENT OF CONCLUDING CONTRACT, IS OBJECTIVELY IMPOSSIBLE TO RENDER PERFORMANCE

EXAMPLE: AMINAL PARTY 1 SELLS TO PARTY 2 HAS ALREADY DIED

NO VALID CONTRACT ARISES

IF POSSIBLE FOR CERTAIN PERSON TO PERFORM, BUT NOT NECESSARILY OTHER PEOPLE, IMPOSSIBILITY IS MERELY SUBJECTIVE

THUS PERFORMANCE NOT IMPOSSIBLE & VALID CONTRACT ARISES, UNLESS AGREEMENT TO CONTRARY WAS REACHED
DIVISIBILITY OF PERFORMANCE

IF INDIVISIBLE PERFORMANCE = OBJECTIVELY IMPOSSIBLE, NO VALID CONTRACT ARISES

ONLY PART OF DIVISIBLE PERFORMANCE = OBJECTIVELY IMPOSSIBLE - VALID CONTRACT ARISES IN RESPECT OF SEPARABLE PART WHICH CAN STILL BE PERFORMED

LAW CAN CONVERT DIVISIBLE PERFORMANCE INTO INDIVISIBLE

LAW CANNOT CONVERT INDIVISIBLE PERFORMANCE INTO DIVISIBLE

PERFORMANCE = DIVISIBLE IN CHARACTER IF PHYSICALLY POSSIBLE TO RENDER PERFORMANCE IN SEPARATE UNITS & IF = PARTIES INTENTION THAT PERFORMANCE SHOULD BE REGARDED AS DIVISIBLE

PERFORMANCE = INDIVISIBLE IN CHARACTER IF CAN BE RENDERED IN ONLY 1 MANNER - ENTIRETY
IMPOSSIBLE TO PERFORM UNDER AGREEMENT WHERE NATURE OF PERFORMANCE = UNCLEAR & AMBIGUOUS

LAW DISTINGUISHES BETWEEN FACULTATIVE OBLIGATION (RESULTS ON DETERMINED PERFORMANCE) & ALTERNATIVE & GENERIC OBLIGATIONS, WHERE EXERCISE OF SELECTION RESULTS IN ASCERTAINABLE PERFORMANCE

PERFORMANCE = DETERMINED, ASCERTAINABLE / UNCERTAIN MAY DEPEND ON CONTRACTING PARTY'S RIGHT UNDER CONTRACT TO CHOOSE / IDENTIFY SPECIFIC PERFORMANCE

DETERMINED & ASCERTAINABLE PERFORMANCE
DETERMINED PERFORMANCE

- Performance will be determined if parties expressly mention performance in agreement.

- Example of determined performance = found in facultative obligation.

- If performance becomes impossible without any fault on debtor's part, debtor will be relieved of obligation.

- Facultative obligation - performance = determined from beginning of contract & creditor = not entitled to claim different performance.

- Facultative obligation = some simple obligations debtor = authorised to perform a different specified performance if he chooses.
ASCERTAINABLE PERFORMANCE

Performance = ascertainable if at time of concluding contract, parties agree on criterion / formula to identify performance / agree that specified person will determine performance.

(1) Alternative obligation (performance of choice)

(2) Generic obligation

Obligations also ascertainable where identification of performance depends upon exercise of choice / application of formula.

Alternative & generic obligations - examples of such instances.
ALTERNATIVE OBLIGATION (PERFORMANCE OF CHOICE)

- Exists where party may select performance which is due from 2 or more different alternatives.
- Objects from which selection may be made & quantity to be set aside, must be established at time of concluding contract.
- Choice = irreversible & debtor = bound to deliver chosen performance.
- Debtor has right of selection (unless otherwise agreed).
- Impossibility of performing 1 of many alternatives will not relieve debtor from obligation - will have to choose between remaining options.
GENERIC OBLIGATION

(1) KIND OF COMMODITY FROM WHICH SELECTION MUST BE MADE

(2) METHOD OF SELECTION - NUMBER, MASS / MEASURE

(3) PARTY WHO MUST MAKE SELECTION - IF NOT AGREED - RIGHT = DEBTOR

SUBJECT TO ASSUMPTION THAT THINGS OF PARTICULAR KIND DO EXIST, PARTY TO GENERIC OBLIGATION CAN NEVER RELY ON IMPOSSIBILITY OF PERFORMANCE, SINCE KIND CANNOT BE EXTINGUISHED

PERFORMANCE = DETERMINED BY DESCRIBING KIND (GENUS) OF COMMODITY ITSELF NUMBER / MASS / MEASURE

GENERIC OBLIGATION INVOLVES SELECTION OF PERFORMANCE FROM SPECIFIC GENUS

VALID DETERMINATION :