

## Free consent

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## INTRODUCTION

### Learning outcomes

The overall objective of the syllabus is to give students an understanding of the legal system and commercial laws; and build a knowledge base of corporate laws.

#### Free consent

**LO**                    **On the successful completion of this paper, candidates will be able to demonstrate knowledge of laws relating to free consent of a contract.**

LO 2.5.1            Define free consent

LO 2.5.2            Know the effect of absence of free consent

LO 2.5.3            Be aware of factors which may affect the consent

LO 2.5.4            Identify and explain coercion, undue influence, fraud, misrepresentation and mistake.

### References to Legal Acts

Section number references embedded in the learning materials refer to the following legal acts unless otherwise stated:

Act	Chapters
Contract Act 1872	3-16
Partnership Act 1932	17
Negotiable Instrument Act 1881	18
Companies Act, 2017	19-27
Securities Act 2015	22

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## 1 CONSENT – Consensus-ad-idem

### Section overview

- Definition of consent
- Effect of absence of consent
- Definition of free consent
- Effect of absence of free consent

### 1.1 Definition of consent



#### 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.

### 1.2 Effect of absence of consent

The effect of absence of consent is that the agreement is not valid and is not enforceable by law. [Section 19]



#### Example: Effect of absence of consent

X has one Alto and one Coure. He wants to sell Coure. Y does not know that X has two cars. Y offers to buy X's Alto for Rs. 400,000. X accepts the offer thinking it to be an offer for his Coure. Here, there is no identity of minds in respect of the subject matter. Hence, there is no consent at all and hence there is no agreement.

### 1.3 Definition of 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

### 1.4 Effect of absence of free consent

The effect of absence of free consent is that the contract becomes voidable if the consent is obtained by coercion or undue influence or fraud or misrepresentation at the option of the party whose consent was so caused but if the consent is obtained by mistake then agreement may be void-ab-initio or contract is not voidable depending upon the nature of the mistake. [Section 19A]

## 2 COERCION

### Section overview

- Definition of coercion
- Effects of coercion

### 2.1 Definition of 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.



#### Example: Coercion

- A beats B and compels him to sell his bike for Rs. 20,000. Here, B's consent has been obtained by coercion because beating someone is an offence under the Pakistan Penal Code.
- A, on board an English ship causes B to enter into an agreement by an act amounting to criminal intimidation under the Pakistan Penal Code. A afterwards sues B for breach of contract at Karachi. A has employed coercion, although his act is not offence by the law of England and PPC was not in force at the time when or place where the act was done.

Coercion may be exercised from any person, and may be directed against any person, even a stranger.



#### Example: Coercion

- A threatens to kill C, B's daughter, if B refuses to sell his house to him. B agrees to sell his house. Here, B's consent has been obtained by coercion though C is not a party to the contract.
- A threatens to kill B if B refuses to sell his house to C. B agrees to sell his house. Here, B's consent has been obtained by coercion though A is not a party to the contract.

### 2.2 Effects of coercion

The effects of coercion are given below: [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.



#### Example: Effects of coercion

A threatens to kill B if he does not sell his BMW for Rs 1 million to A. B contracted to sell his BMW to A and receives the payments. Here, B's consent has been obtained by coercion. Hence, this contract is voidable at the option of B but A has no right to insist that contract shall be performed.

### 3 UNDUE INFLUENCE

#### Section overview

- Definition of undue influence
- Nature of relationship
- Effect of undue influence
- Difference between coercion and undue influence

#### 3.1 Definition of undue influence



##### Definition: Undue influence [Section 16]

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.

Thus the analysis of the above definition reveals that an undue influence means dominating in a relationship the will of the other person to obtain an unfair advantage. A contract is said to be induced by undue influence:

- Where the relations between the parties are such that
  - one of them in a position to dominate the will of the other and
  - uses that position to obtain an unfair advantage over the other.

#### 3.2 Nature of 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. parent and child
- stands in a fiduciary relation to the other e.g. already indebted
- 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.



##### Example: Undue influence

- A having advanced money to his son, B during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advances. A employs undue influence.
- A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.
- A being in debt to B, the money lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.
- A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at a unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

#### 3.3 Effect of undue influence

The contract becomes voidable at the option of the party whose consent was so caused. The burden of proof is on the party who was in a position to dominate the will of the other party not all cases [Section 19].

In the following relationships it is presumed that a person is in a position to dominate the will of another person:

- Father and son
- Guardian and ward
- Employer and Employee
- Trustee and beneficiary
- Teacher and student
- Doctor and patient
- Solicitor and client
- Fiancé and fiancée
- Pardanasheen lady (Completely secluded)

In the following relationship there is no presumption that a person is in a position to dominate the will of another person:

- Landlord and tenant
- Creditor and debtor
- Husband and wife (non parada observing)

**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
- Price was adequate
- Weaker party was in receipt of competent independence advice before entering into the contract.

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. [Section 19A]

**3.4 Difference between coercion and undue influence**

S.no	Coercion	Undue influence
1	<p><b>Definition</b></p> <p>A contract is said to be caused by coercion when it is obtained by:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> committing or threatening to commit any act                             <ul style="list-style-type: none"> <li>• which is forbidden by Pakistan Penal Code or</li> </ul> </li> <li><input type="checkbox"/> unlawful detaining or threatening to detain.</li> </ul>	<p>A contract is said to be induced by undue influence:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Where the relations between the parties are such that                             <ul style="list-style-type: none"> <li>• one of them in a position to dominate the will of the other and</li> <li>• uses that position to obtain an unfair advantage over the other.</li> </ul> </li> </ul>
2	<p><b>Consent</b></p> <p>Consent is obtained by giving a threat of an offence or committing an offence.</p>	<p>Consent is obtained by dominating the will.</p>

S.no	Coercion	Undue influence
3	<b>Nature of pressure</b> It involves physical pressure.	It involves moral pressure.
4	<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.
5	<b>Reason</b> The objective is to compel a person to enter into a contract.	The objective is to obtain an unfair advantage.
6	<b>Criminal liability</b> Criminal liability is incurred, therefore it is illegal.	Criminal liability is not incurred.
7	<b>On whom</b> Coercion may be employed on a person other than a party whose consent is desired, for instance his son.	Undue influence may only be employed on the party whose consent is desired.
8	<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.
9	<b>Onus of proof</b> The onus of proof is on the party who wants to relieve himself of the consequences of coercion.	The onus of proof is on the party in a position to dominate the will of the other party.
10	<b>Restoration of benefit</b> The aggrieved party has to restore the benefit received.	The party avoiding the contract may or may not restore benefit.

## 4 FRAUD

### Section overview

- Definition of fraud
- Essentials of fraud
- Effects of fraud
- Silence as to fraud

### 4.1 Definition of 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 intent

- to deceive another party to it or his agent, or
- to induce to enter into a contract

#### By false assertion

A false representation of a fact made

- Knowingly or
- Without belief in its truth



#### Example: False assertion

A sells to B locally manufactured goods representing them to be imported goods charging a higher price, it amounts to fraud.

#### Active concealment

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, it will amount to fraud,



#### Example: Active concealment

Z a furniture dealer conceals the cracks in furniture sold by him by using some packing material and polishing it in such a way that the buyer even after reasonable examination cannot trace the defect, it would amounts to fraud through active concealment.

#### Empty promise

A promise made without any intention of performing it constitutes to fraud.



#### Example: Empty promise

Buying goods under a contract of sale with an intention of not paying the price is fraud.

#### Declared act

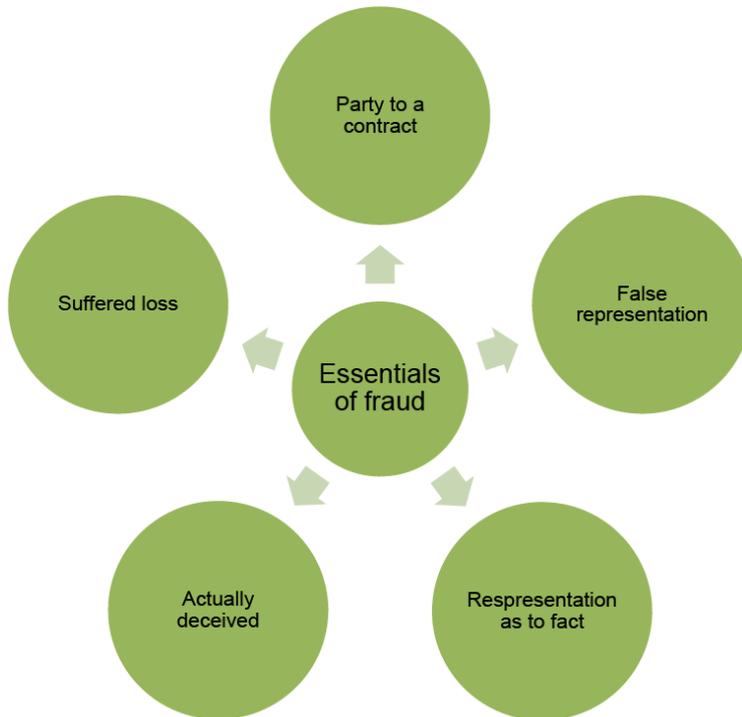
Any such act or omission as the law specially declares to be fraudulent

#### Fitted act

Any other act fitted to deceive.

## 4.2 Essentials of fraud

The essentials of fraud are shown below:



These essentials are discussed below:

### Party to a contract

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.

### False representation

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.

### Representation as to fact

A mere opinion does not amount to fraud. A representation must relate to a fact then it amount to fraud.

### Actually deceived

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.

### Suffered loss

Loss has been suffered by the party who acted on the representation.

## 4.3 Effects of fraud

The effects of fraud are as follows [Section 19]:

- 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.

### 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.

### 4.4 Silence as to fraud

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. [Section 17]



#### Example: Silence as to fraud

A sells by auction to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud by A.

B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

B says to A, "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech. If the horse turns out to be vicious. A can be held liable for fraud.

#### Note

In the early 80's the Federal Shariat Court decided that provision regarding position of silence in Contract Act is not in conformity with the teachings of Islam.

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## 5 MISREPRESENTATION

### Section overview

- Definition of misrepresentation
- Essentials of misrepresentation
- Effects of misrepresentation

### 5.1 Definition of 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

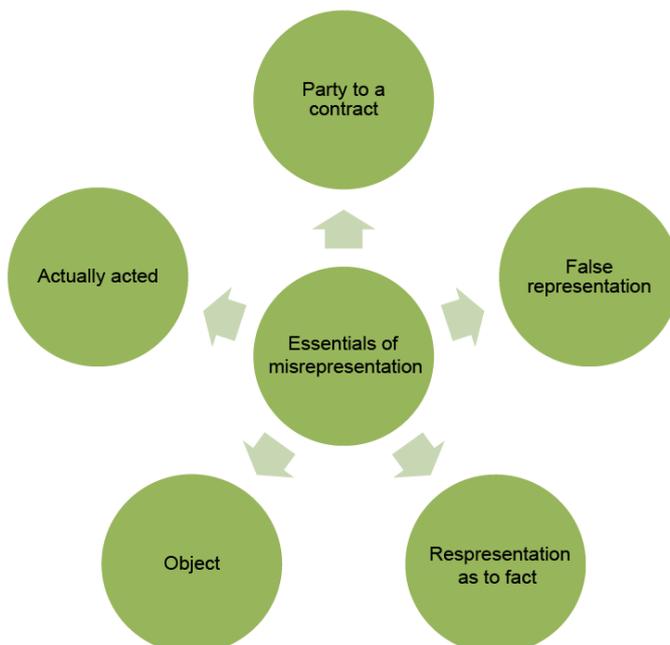
- to his prejudice or
- to the prejudice of anyone claiming under him.

#### 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.

### 5.2 Essentials of misrepresentation

The essentials of misrepresentation are shown below:



These essentials are discussed below:

**Party to a contract**

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.

**False representation**

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.

**Representation as to fact**

A mere opinion does not amount to misrepresentation. A representation must relate to a fact if it amounts to misrepresentation.

**Object**

The objective is to induce the other party to enter into contract without the intention of deceiving the other party.

**Actually acted**

The other party must have acted on the faith of the representation.

**5.3 Effects of misrepresentation**

The effects of misrepresentation are following [Section 19]:

- 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.

**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.

## 6 MISTAKE

### Section overview

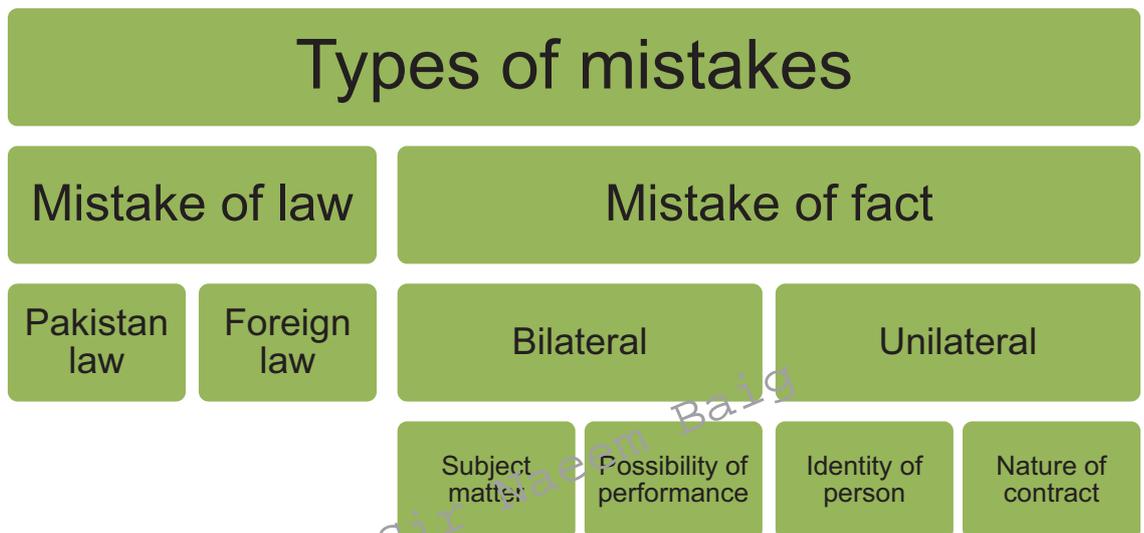
- Mistake
- Types of mistakes

### 6.1 Mistake

Where both the parties to an agreement are under a mistake as to matters of facts essential to the agreement, the agreement is void [Section 20].

### 6.2 Types of mistakes

The types of mistakes are shown below:



#### Mistake of Pakistan law

A contract is not voidable because it was caused by a mistake as to any law in force in Pakistan. [Section 21]

#### Mistake of foreign law

A mistake as to the law not in force in Pakistan has the same effect as a mistake of fact i.e. void. [Section 21]

#### Bilateral mistake

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. [Section 20]



#### Example: Bilateral mistake

- A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Karachi. It turns out that, before the date of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of facts. The agreement is void.

### **Bilateral mistake as to the subject matter**

A bilateral mistake as to the subject matter includes the following mistakes as to the:

- existence of subject matter
- quantity of subject matter
- quality of subject matter
- price of subject matter
- identity of subject matter
- title of subject matter



#### **Example: Bilateral mistake as to the subject matter**

- A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of bargain though neither party was aware of the fact. The agreement is void because there is bilateral mistake as to the existence of subject matter.
- A agrees to buy from B all his horses believing that B has two horses but B actually has three horses. The agreement is void because there is bilateral mistake as to the quantity of subject matter
- A agrees to buy a particular horse from B. Both believe it to be a race horse but it turns to be a cart horse. The agreement is void because there is bilateral mistake as to the quality of the subject matter.
- A agrees to buy a particular horse from B who mentioned in his letter the price as Rs 1,150 instead of 5,150. The agreement is void because there is bilateral mistake as to the price of the subject matter.
- A agrees to buy from B a certain horse. B has one race horse and one cart horse. A thinks that he is buying race horse but B thinks that he is selling cart horse. The agreement is void because there is bilateral mistake as to the identity of subject matter.
- A agrees to buy a particular horse from B. That horse is already owned by A. The agreement is void because there is bilateral mistake as to the title of 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.

### **Unilateral mistake**

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. [Section 22]



#### **Example: Unilateral mistake**

A buys' a painting believing it to be worth Rs 100,000 while in fact it is worth only Rs 10,000.

### **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



#### **Example: Mistake relating to the identity of the person**

A knew that on "account of his criticism of the plays in the past, he would not be allowed entry to the performance of a play at the theatre. The managing director of the theatre gave instructions that ticket should not be sold to A. A, however, obtained a ticket through one of his friends. On being refused admission to the theatre, he sued for damages for breach of contract. It was held that there was no contract between the theatre company and A as the theatre company never intended to contract with A.



**Example: Mistake relating to the nature of contract**

An old illiterate man was induced to sign a bill of exchange by means of a false representation that it was a mere guarantee. It was held that he was not liable for the bill of exchange because he never intended to sign a bill of exchange.

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## 7 CHAPTER REVIEW

### Chapter review

Before moving on to the next chapter check that you now know how to:

- Discuss the meaning of consent
- Explain when a consent is said to be free
- Understand the effects and meaning of coercion, undue influence, fraud and misrepresentation
- Discuss the laws relating to the effect of mistake on contracts

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