

BUSINESS LAW

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Wk4: Law of Contract

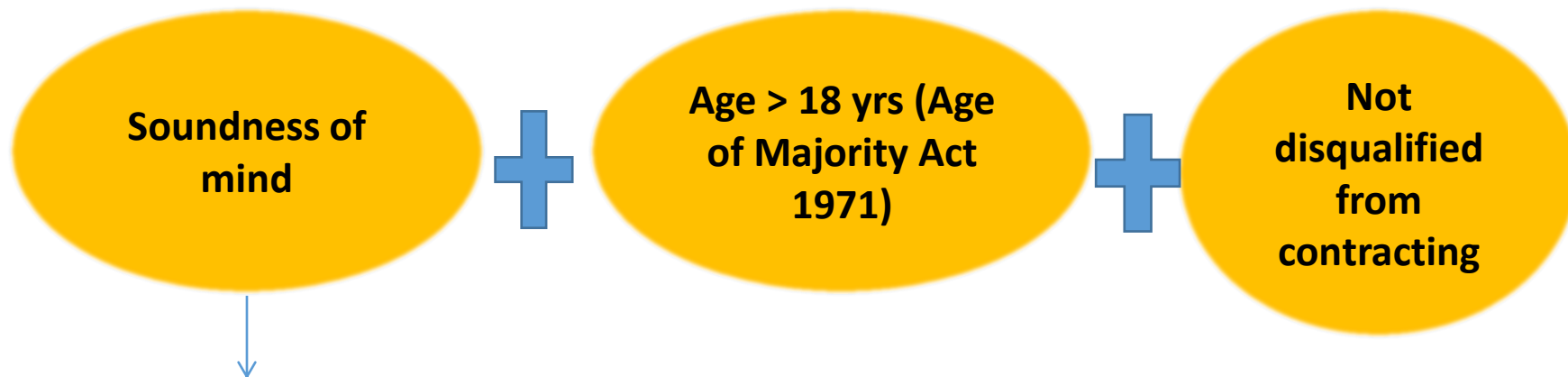


Wk4 Content

- **Capacity to contract**
- **Free consent**
- **Illegal and Void contract**

Capacity to Contract

- ✓ Important to look at this element if one of the party is not having **sound mind** or not at the **age of majority** or **not disqualified from contracting** at the time contract is entered into.



“..capable of understanding the contract & of forming a rational judgement as to its effect upon his interests” (s.12(1) of the CA 1950)

Parties Competent to Contract

- **s.10(1): agreements are contracts when parties are competent to contract, for lawful consideration, with lawful object & not declared void.**
- **S.11: competent to contract who is of age of majority according to the law which he is subject, of sound mind & not disqualified from contracting by any law to which he is subject.**
- **S. 12: sound mind for the purpose of contracting.**

Age > 18 (Age of
Majority Act
1971)

Legal principles:

- Below age 18 years: contract is void.
- Cash or in kind paid/ given to a minor cannot be recovered

Mohori Bibee v Dharmodas Ghose [1903]

D/minor took a loan. P knew he was a minor & asked D to sign a promissory note. Privy Council held: Loan was void.

Tan Hee Juan v Teh Boon Keat [1934]

Transfer of land executed by minor is not only voidable but void

What is the position at common law?

~If the contract benefits the minor, he can opt to affirm it when he reach the age of majority [i.e voidable contract]



Exceptions:

- 1) **Contract for necessities:** although still void, **s.69 of CA 1950** entitled the supplier to **get reimbursed from the property** of such incapable person

Condition to meet:

- Supplied with **necessaries suited to his condition in life.**
 - ~ What are necessities?
 - ~ Exclude luxuries: *Nash v Inman* (11 fancy waistcoats);
Ryder v Wombwell (silver goblet, jewelries)
- *GOM v Gurcharan Singh* (scholarship for education)

Age of Majority Act 1971

✓ Valid age to enter into contract: 18 years old.

~but will not affect:

(a) the capacity of any person to act in marriage, divorce, dower & adoption;

(b) the religion and religious rites and usages of any class of persons within Malaysia;

(c) any **provision in any other written law contained fixing the age of majority for the purposes of that written law**
(S.4 AMA)

Exceptions:

- 2) **Scholarship:** s 4(a) of Contracts (Amendment) Act 1976 (Act A329)
- 2) **Marriage:** s.4(a) of AMA & Law Reform (Mg & Dv) Act 1976 [female above 16 authorised by licence]
- 2) **Insurance:** s.153(1) &(2) of Insurance Act 1996 [10-16 yrs old with parent/guardian's written consent]
- 5) **Apprenticeship & Employment:** Children & Young Person (Employment) Act 1966 (Revised 1988):
 - as long as benefiting the minor although burdensome

CONSIDER:

- Xi aged 12 went to Yi's shop and bought 1 kg of flour on credit.
 - ~used the flour to play games with his friends ;
 - ~ Xi's mother requested Xi to buy the flour;
 - ~ Xi is a married person and bought the flour for his family needs.

Consider Xi's liability under the law of contract.

Voidable contract

coercion / undue influence/ fraud/ misrepresentation



- When consent of one of the parties is lacking, the contract although validly entered into **may** be rescinded by the party whose consent is lacking.

Remember:

- Once a contract is validly entered into, it cannot be rescinded unless there's a lack of consent.
- If you don't perform your contract, you'll be in breach.

s.14: Consent: When the contract is not caused by:

**Coercion
(s.15)**

- Do /threat any act forbidden by the Penal Code, or
 - unlawful detaining / threatening to detain, any property, to the prejudice of any person whatever,
 - with the intention of causing any person to enter into an agreement

**Undue
Influence
(s.16)**

Relations subsisting between the parties; one party dominates the will of the other; & obtains an unfair advantage.

**Fraud
(s.17)**

Representation made with intention to deceive

**Misrepresentation
(s.18)**

Representation made without intention to deceive

Excluding: Statement of fact / opinion

Require proof of due diligence

Coercion

- *Nur Asia Sdn Bhd v Fosis Corp Sdn Bhd* [2006]:

- P (supplied goods) D; 2nd D gave oral guarantee.

- D x paid & asked 2nd D to sign written guarantee (in a restaurant & sandwiched between 2 men)

Held: there's committing/threatening to commit acts forbidden by Penal Code, viz. using criminal force or assault under ss 349-352 / criminal intimidation under ss 503 & 506. So there's coercion as defined under s. 15 & no free consent under s. 14.

- Coercion s. 15 not proven in:

- Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd* [1996]: refusal to supply goods at requested price is not unlawful detention of properties.

- S. 15 or s. 73 coercion?

- *Chin Nam Bee Dvlpmnt Sdn Bhd v Tai Kim Choo* [1988]: R paid addl sum of RM4k under threat to cancel house booking. Fall under s. 73 & given its ordinary & general meaning.

- RM4k recoverable.

Undue Influence

▪ *Ong Ban Chai v Seah Siang Mong* [1998]

Appellant (A) got irrevocable power of attorney of Respondent's (R) land (i.e A was R's agent). A transferred the land to himself & charged it to bank without R's knowledge. A did so to set-off for a loan A had given to R, which R couldn't pay. R wanted to avoid the transfer.

Held: there's domination of will by A. There's **fiduciary relationship** when power of attorney created. A had not helped R get independent legal advice with respect to the transfer.

a relationship in which one party places special trust, confidence, and reliance in and is influenced by another who has a **fiduciary duty** to act for the benefit of the party



*fiduciary relationship: have to act in good faith & inform the other party all material fact that might affect the interest of that other party

• **Fiduciary relationship only exists between:**

- 1- parents (*@ in loco parentis*) & son/daughter;
- 2- solicitor & client;
- 3- doctor & patient;
- 4- trustee & beneficiary (*cestui que trust*);
- 5- spiritual advisor & anybody in relationship with him/her;
- 6- in certain cases, between fiancée (seldom); but not between husband & wife

Fraud

***Kheng Chwee Lian v Wong Tak Thong* [1983]:** R had been persuaded to enter into a second contract on the false representation that the area of land to be transferred was of the same size as the land which R had agreed to buy under the first agreement.

Held: Rescinded & award damages.

***Letchemy Arumugan v Annamalay* [1982]:** D made fraudulent misrep to P, an illiterate rubber tapper, & induced her to enter into a S&P agreement. D said the documents she was required to sign was for a loan she took & to free the land from a charge.

Held: Rescinded & award damages.

Misrepresentation

Sim Thong Realty Sdn Bhd v The Kim Dar @ Tee Kim[2003]: R entered into contract to buy land from A to build factory. A's agent represented there was road access to the land. But there was none. R refused to complete the sale, so A brought an action against R for breach of contract. A argued R couldn't rescind because R could have discovered the misrepresentation by **ordinary diligence**.

Held: A could not provide evidence to show that R had means of discovering the misrepresentation by ordinary diligence. R can rescind the contract.



ordinary diligence: the degree of care which the common man exercises with respect to his affairs

Misrepresentation

Keates v The Earl of Cadogan [1851]:

P sought a house to rent. Met D who told him he got a house for rent. P immediately paid him deposit & went to the house. House was in a ruinous condition. P claimed D cheated him.

Held: No evidence of fraud. P also failed to set aside contract based on misrepresentation because P did not exercised due diligence. There is **no duty to disclose facts** which known might affect the other party's decision to enter the contract



duty to disclose



ordinary diligence

Duty of disclosure: Explanation to s.17 & Illustration (a) & (b) of s. 17

i) Must give full disclosure of material facts for Contract of Utmost Good Faith / *Uberrimae fidei*: duty to be honest & truthful

Abu Bakar v Oriental Fire & Gnrl Insurance

Tan Kang Hua v Safety Insurance

Goh Chooi Leong v Public Life Assurance Co. Ltd.



Uberrimae fidei contracts:
Insurance contract & Partnership contract

ii) Must give full disclosure of material facts for fiduciary contract

Confidence given to the other party; that other party must show that he's exercising the due care & trust.

~ not abuse his position

~ must disclose the fact

Nocton v Lord Ashburton

The duty is not imposed on all confidential relationship: *Bell v Lever Brothers Ltd* : contract of service.

▪ ordinary diligence.

Say that there's an auction of land. You read the Proclamation of Sale & went to view the land. You successfully bid the land. You paid the 10% of bidding price. You then hired a surveyor to value the land. Then only you discovered that the land did not conform to the description in the Proclamation of Sale.

Can you rescind the contract & claim your deposit back?

Should you hire a surveyor before bidding to show you have done ordinary diligence?



- ***Gemakota Enterprise Sdn Bhd v Public Bank Bhd*** [1998]:

To do so would have been extraordinary diligence rather than ordinary diligence.

~ if you would need to incur excess costs beyond what expected of a common person in such circumstances in order to determine the truth or untruth of the representation made.



➤ Half-truths?

Dimmock v Hallet (1866): D described property which is subject of negotiations for sale as fully let, without disclosing that the tenants have given notice to quit. Held: a misrepresentation

So, do not make statements which are true but which are misleading because they do not reveal all the relevant facts.

➤ Change of circumstances?

With v O'Flanagan [1936]: Information was true at the time it was given. Sale took place 5 months after that information given, & D did not tell the change of circumstance that would affect P's decision in buying. Held: P successfully sought rescission of the sale.

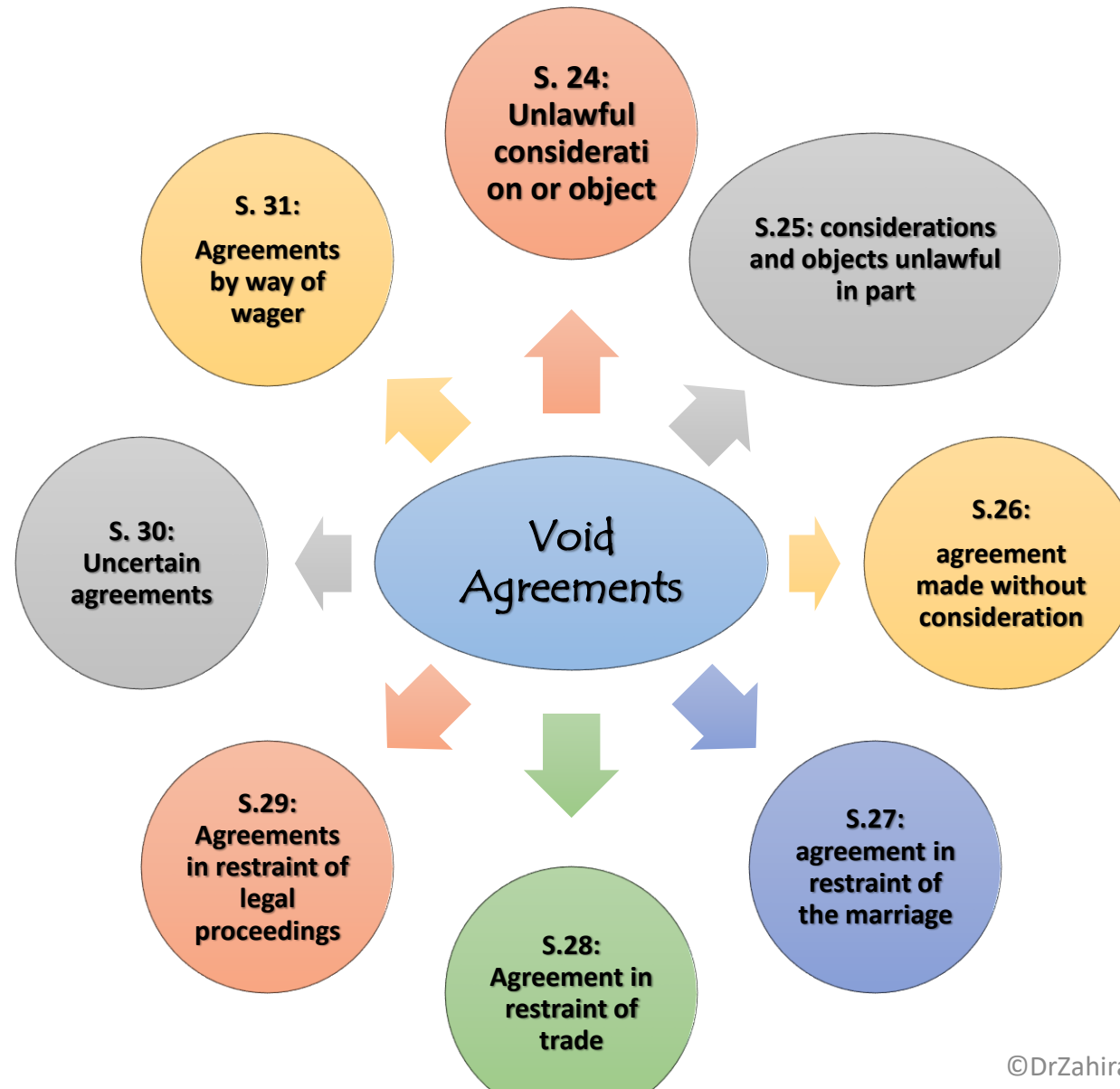


- Lessons Learnt: Provide 10 points

- To do:

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VOID & ILLEGAL CONTRACT

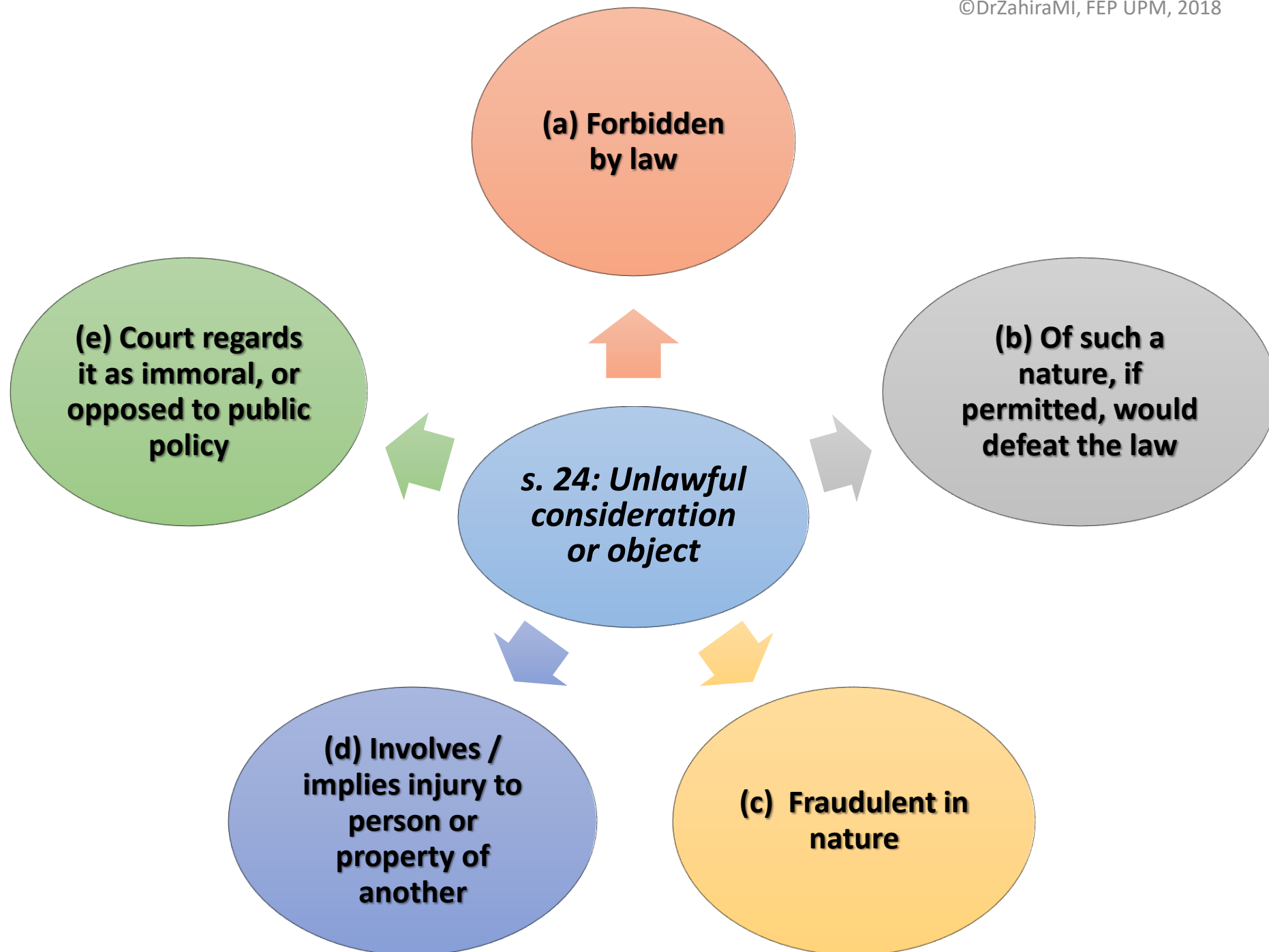


Concept

- an agreement not enforceable by law is said to be **void**: s.2(g)
- An agreement **enforceable** by law is a contract: s.2(h)
- A contract which ceases to be enforceable by law becomes **void when it ceases to be enforceable**: s.2(j)

- *Kanthilal v Ranchhoddas* [1953] AB 98; AIR 1953 Bom 98; per Shah J:

All unlawful or illegal agreements are void; but all void agreements are not necessarily illegal.



s. 24 (a) & (b)

Manang Lim Native Sdn Bhd v Manang Selaman: agreement in contravention of statute & entered into for an illegal consideration is a void agreement.

Menaka v Lum Kum Chum: A, registered moneylender lent \$ to R on security of a charge in her own name, not her firm. Held: void because contravene s.15 of Moneylender Ordinance 1951.

Chung Kiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990]: loan given by A in contravention of s.67 of Companies Act 1965.

Amfinance Bhd v KT Steel Sdn Bhd & Ors [2008]: lease agreement was void as against Bill of Sale Act 1950 & BAFIA.

Palaniappa Chettiar v Arunasalam Chettiar: S&P of land to avoid payment of extra stamp duty.

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong

Amalgamated Steel Mills Bhd v Ingeback



s. 24(c) it is fraudulent

Illustrations under s.24:

- (e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.*
- (g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal. (~secret profit)*

s.24 (d) it involves or implies injury to the person or property of another; or

Syed Ahamed Alhabshee v Puteh binte Sabtu (1922)

Mohd Ali Jahn b Yusop Sahibjahn & Anor v Zaleha bt Mat Zin & Anor [1995]

(e) the court regards it as immoral, or opposed to public policy.

~ Sexual immorality is treated as a head of public policy under common law.

Pearce v Brooks [1861]: contract of hire of vehicle for purpose of prostitution.

~ In M'sia, immorality is not merely sexual immorality.

Aroomogum Chitty v Lim Ah Hang: \$ lent on promissory note for purpose of running a brothel was held not recoverable.

Illustrations under s.24:

(j) A, who is B's advocate, promises to exercise his influence, as such, with B in favour of C, and C promises to pay \$1,000 to A. The agreement is void, because it is immoral.

- **Contract that against public policy:** Contract that tend to bring about a state of affairs which law regards as harmful to society
- 'Harmful' depends on circumstances of case.
- *Theresa Chong v Kin Khoon & Co:* restricted approach by Gill CJ i.e scope of public policy in M'sia should follow common law: dealing with unregistered remisier that contravene the by-laws of the SE did not make the contract illegal as being opposed to public policy.

- Later cases expand the scope of public policy:

Banque Nasionale de Paris v Wuan Swee May & Anor [2000]

The public policy in one country, even at the same point of time, may be different from that of another country

When a Malaysian court is considering the issue of public policy in Malaysia, it should look at Malaysian law, Malaysian government policy, Malaysian moral values and all other relevant factors then prevailing in Malaysia

Find out the type of agreement
considered as against public policy at
common law compared to Malaysia

Contract in Restraint of Trade (RoT)

- s.28 : “Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void”.
- ~ RoT cannot be enforced & regarded as void not illegal.

Wrigglesworth v Anthony Wilson:

P & D agreed that D was restrained from practising as advocate & solicitor within 5 miles of Kota Bahru town for period of 2 years after the termination of his service contract with P. D breached. Held: the restraint void.

- ~ s. 28 is different from Common law : At c/l, judge has discretion to decide

~s.28: recognised 3 exceptions to the general rule:

Exception 1

Saving of agreement not to carry on business of which goodwill is sold;

One who sells the goodwill of a business may agree with the buyer to refrain 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 appear to the court reasonable, regard being had to the nature of the business.

Exception 2

of agreement between partners prior to dissolution;

Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception 1.

Exception 3

or during continuance of partnership.

Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

- **Restrictive covenant** in employment is outside s. 28:

Schmidt Scientific Sdn Bhd v Ong Han Suan [1997]:

Court allowed an injunction to restrain ex-employees from using, disclosing and/or divulging confidential information and/or trade secrets of an ex-employer.

Employee, you cannot:

- i- Use confidential info of this company for yourself or others;
- ii- Work for others whilst working in this company; &
- iii- Work for others in same or similar business for two years after termination.



CONSEQUENCES OF ILLEGALITY:

s. 66: *“When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it.”*

~ Restitution is possible if the **illegality** is not known to the party seeking it. If one of the parties is aware of the illegality, he alone will be disqualified from invoking s.66.

Ahmad b. Udoh & Anor v Ng Aik Chong: R leased padi land from A for 6 years & \$1500 was paid therein. This agreement contravened s.3(1) of PCO. A then disallowed R to till the land & R claimed the return of the \$. Held: both were ignorant of the illegality at the time of executing the agreement, s.66 would apply.

Menaka v Lum Kum Chum: contract was discovered ‘void’ only after the proceedings had been started.

Yeap Mooi v Chu Chin Chua & Ors: only one party unaware of illegality, she only can recover her money (innocently depositing \$).

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Q & A