

# THE COMPLEXITIES OF ILLEGAL CONTRACTS IN INTERNATIONAL TRADE AND COMMERCE

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## Abstract

The general principle of law is that all over the world contract is enforceable except where it is tainted with illegality or certain vitiating elements are present. Illegal contract may be classified either as statutory or non-statutory. the term *illegality* in this area of law is very complex, as this differs from place to place, that is what is '*illegal*' in country 'A' may be '*legal*' in country 'B' and this is quite visible in international trade and commerce. International trade and commerce has gained much prominence in the recent times, partly because of technological advancement which effect is the increase in the volume of '*online*' trading activities, otherwise known as '*e-commerce*'. It is a common occurrence for conflict to arise between the parties to a contract where either of the party claims that the said contract is illegal and therefore unenforceable; such claims usually put the other party in dire straits particularly where he has furnished consideration. This paper considers in some depth issue of illegal contract generally and in particular trans-border commerce, the attendant consequence of unenforceability and rights of the parties. It is instructive to note that parties to a contract that is illegal in nature have no right of waiver or ratification; this is more so, when such illegality is statutory. The paper further addresses the complex nature of contractual relationship between parties who reside in two different jurisdictions, which the regulatory framework and policies on '*illegality*' in commerce differs.

Key words: Commercial transactions, e-contract, international trade, illegal contracts.

## 1.0 Introduction

Generally, a contract is an agreement between two or more parties which creates reciprocal legal obligation or obligations to do or not to do a particular thing. For there to be a valid contract, that parties must have not only intended the same thing, but they must be expressing the same thing (with a clear understanding) and at the same time.<sup>1</sup>

Basic essential elements of the contract must be present for there to be a valid contract, they are, namely: (i) offer (ii) acceptance (iii) consideration (iv) intention to enter into legal relations; and (v) legal capacity to enter into such an agreement.<sup>2</sup> However, it is imperative to note that there may be instances where all the stated elements are present in a contractual relationship and the supposedly formed contract remains unenforceable resulting from the presence of vitiating factors which often negate the principle of *consensus ad idem* (“meeting of minds” or “voluntariness of conduct”).

Such vitiating factors are (i) mistake (ii) misrepresentations (iii) duress; and (iv) illegality. Since the late 19<sup>th</sup> century, the world has become a global economic village as a result of technological advancement and the availability of information technology in all the countries of the world. This development has given rise to increase in cross border commercial transactions through what is popularly referred to as *online transaction* which includes electronic transfer of funds and e-signature.

## 1.2 International Trade and Commerce

It is generally believed by the economists and government of various countries of the world that international trade or trans-border economic transactions are quite advantageous and boost local economies.

International trade simply put, is the exchange or trade in goods and services between different nations or across the borders of various countries. This is aptly referred to as imports and

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<sup>1</sup> See *B.F.I.G v. Bureau of Public Enterprises* (2008) All FWLR Pt. 416; 1915 at 1937 paras. E-H

<sup>2</sup> See *Omidiji v. FMB* [2000] 40 WRN 118

exports. It could be between individuals, corporate bodies or nations.<sup>3</sup> However, it is important to note that contractual agreements made across border of various nations are broader in scope compared to what is traditionally defined as international trade. Thus, with the aid of technology, it is now possible in this century for residents of country A to trade in goods and services with country B.

Contract across border or online commercial transactions, unlike the traditional mode of trade in goods and services are not contract *inter partes*, whereby parties are physically present. This form of transaction dispenses with the physical presence of parties to the contract as the negotiations, signing of contract papers (where necessary) together with the payment of goods and services. One thing however not dispensed with; are the fundamental principles of a binding contract, namely-(i) offer, (ii) acceptance, (iii) consideration (iv) intention to enter into legal relations, and (iv) capacity of parties to a contract.<sup>4</sup>

It is noteworthy that a valid contract is not necessarily enforceable as there may be some vitiating factors that will render same unenforceable. Such vitiating factors are discussed in some depth-

### 1.3 Vitiating factors that render contracts unenforceable

#### i. Mistake

This *concept* refers to a situation where both parties to a contract did not mean the same thing, either one or both of them acted under *misconception*, *misunderstanding* or *erroneous belief* about some or all the terms of the contract. Mistake could be classified as: mutual mistake, common mistake, and unilateral mistake, mistake of law or of facts.<sup>5</sup> At common law, proof of mistake makes the contract *void ab initio*. According to *Sagay*, a party who had paid money under such a contract under the action for money paid and received to his use.<sup>6</sup>

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<sup>3</sup> Market Business News. Retrieved Aug. 8, 2023, from <https://marketbusiness.com/international-trade-definition-meaning/>

<sup>4</sup> *Ibid.* Anson Law of contract, 28<sup>th</sup> edition: 27

<sup>5</sup> Black's Law Dictionary, eight edition, ed. B.A. Garner. St. Paul, MN, West Publishing Co. 1023

<sup>6</sup> *Sagay*, I.E. (1999) Nigerian Law of Contract, second edition Ibadan, Spectrum Books Limited: 238. See the celebrated case of *Cundy v. Lindsay* (1878) 3 A.C. 459; L.T. 573, *Knight, Frank and Rutley v. Attorney-General of Kano State* [1990] 4 NWLR Pt. 143: 210 is a typical example of common mistake.

In practice, mistake occurs more in international contractual relationships more than domestic contracts where parties are usually physically present. As noted earlier, in most of trans-border (online contracts or e-commerce) parties are not usually physically present to thoroughly examine and verify the terms and conditions of the contract. For instance, the court held in *Couturier v. Hastie*<sup>7</sup> per Lord Cranworth as follows:

*Looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold was that there was an existing something to be sold and to be bought...The contract plainly imports that there was something to be sold at the time of the contract and something to be purchased. No such thing existing, there must be judgement for the defendants.*

Generally, under the common law; a contract will be *void ab initio* where there is an operative mistake. However, where the presumed mistake is not within the ambit of operative mistake, such contracts will be considered valid and enforceable.<sup>8</sup> It therefore implies that all the cases of mistakes will render the contract unenforceable.<sup>9</sup>

## **(ii) Misrepresentation**

A misrepresentation is aptly defined as a false statement of material fact that has the effect of inducing the other party to enter a contract. It is usually made prior to the formation of contract.<sup>10</sup> Lord Blackburn in *Smith v. Chadwick*<sup>11</sup> laid emphasis on the place of inducement in misrepresentation as follows:

*I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and if it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was*

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<sup>7</sup> (1856) 5 HLC 673

<sup>8</sup> Yakubu, J.A. (2003), Law of Contract in Nigeria. Lagos. Malthouse Press Limited: 150

<sup>9</sup> See the cases of *Bell v. Lever Bros. Limited* (1932) A.C. 161; *Smith v. Hughes* (1871) LR 6 QB 597

<sup>10</sup> LawTeacher.net Misrepresentation. Retrieved Aug. 10, 2023 from <https://www.lawteacher.net>lectures>

<sup>11</sup> (1884) 9 App. Cas. 187:196

*induced to do so by the statement.*

According to some authors, the issue of the representor's intention is germane to prove of misrepresentation. They concluded therefore that, 'a representation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the reasons which induced him to make the contract.'<sup>12</sup> It therefore follows that, a statement of fact honestly made by a party cannot be held to be a misrepresentation because it turns out to be untrue.<sup>13</sup>

Misrepresentation could be classified as follows- (i) Fraudulent misrepresentation (ii) Negligent misrepresentation; and (iii) Innocent misrepresentation.

Lord Herschell in *Derry v. Peek*<sup>14</sup> defines fraudulent misrepresentation 'as a false statement made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false.'<sup>15</sup> Fraudulent misrepresentation vitiates what would have been otherwise a valid contract.

It is important to note that once fraudulent misrepresentation is proved, it is not a defence that misrepresentee would have discovered that the representation is false if he had been more diligent. Jesse, M.R., asserted this in *Redgrave v. Hurd*<sup>16</sup> as follows:

*If a man is induced to enter into a contract by false misrepresentation it is not sufficient answer to him to say, 'if you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as a defence under the Statute of Limitations.*

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<sup>12</sup> Cheshire, Fifoot & Furmston's Law of Contract (2006) Fifteenth edition, Oxford, Oxford University Press: 337-338

<sup>13</sup> See the Supreme Court of Nigeria case of *Teriba v. Adeyemo* [2010] All FWLR Pt. 533: 1884, paras. G-H

<sup>14</sup> (1889) 14 App. Cas. 337; 58 L.J. Ch. 864

<sup>15</sup> *Ibid.* at 374

<sup>16</sup> (1881) 20 Ch. D. 1; 51 L.J. Ch.113.

It appears that where a party made a statement to induce the other party to enter into a contract with him, knowing the statement to be false, a contract cannot be said to have been made as this negates the principle of *consensus ad idem* as it cannot be argued that minds of the parties met on all terms relating to the said contract. In the same vein, a party misled with a fraudulent intention cannot be said to have consented to the contract.

Generally in law, certain remedies are available to the aggrieved party once *fraudulent misrepresentation* is proved. However, there will be no remedy for an aggrieved party who failed to prove that there was a misleading or false statement made, that the maker knew the statement to be false, that he was actually induced by the said false representation and acted on it.

The Court of Appeal in *Dantata v. Mohammed*<sup>17</sup> brought to the fore remedies for fraudulent misrepresentation and drew a distinction with other forms of misrepresentation as follows:

*Different types of misrepresentations give rise to different remedies. Fraudulent misrepresentations can entitle the representee to rescind the contract while other types of misrepresentation merely give rise to an action for damages...*

Another type of misrepresentation in law is ***negligent misrepresentation***. Simply put, any representation made carelessly, or without reasonable grounds for believing it to be true. A major condition that must be present to prove negligent misrepresentation is that the maker of the statement owes the representee a duty of care. Such duty of care is deemed to exist between two people in fiduciary relationship. Such relationship may exist between a physician and patient, a lawyer and client or any other person or professional who owes the other party a duty of care.<sup>18</sup>

Viscount Haldane clarified the position of law regarding the question of liability for negligent misstatement as follows:

*Although liability for negligence in word has in material respects been developed in our law differently from liability in negligence in act. It is nonetheless true that a man may come under a special duty to exercise care in giving information and advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereo-type the case in which people can be held to have assumed such a special duty. Whether such*

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<sup>17</sup> [2013] All FWLR Pt. 675: 279 at 305, paras. D-E

<sup>18</sup> *Ibid.* Sagay, I.E, :320-321

*a duty has been assumed, must depend on the relationship of the parties and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.*<sup>19</sup>

Unlike the precision with which the fraudulent misrepresentation was analysed, certain controversies surround the basis for recognizing negligent misstatement as an actionable wrong under the common law. However, these controversies appeared to have been resolved and finally laid to rest by Lord Denning's dissenting judgment in *Candler v. Crane, Christmas & Co.*<sup>20</sup> where he limited such persons that could assume special duty of care to: '...accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books and other things and to make reports on which other people...other than their clients...rely in the ordinary course of business'. The above principle was successfully applied *Hedley Byrne & Co. Ltd. Heller & Partners Ltd.*<sup>21</sup>

*Innocent misrepresentation*, as defined in Anson's Law of Contract consists in misrepresentation in which no element of fraud or negligence is present. A clear distinction between innocent misrepresentation and other forms of misrepresentations is that, 'a person who has been induced to enter into a contract as the result of an innocent misrepresentation made to him by the other party to the contract is entitled to the remedy of rescission or to damages in lieu of rescission; but, in contrast with cases of fraudulent or negligent misrepresentation, cannot obtain damages in addition to rescission, only an indemnity.'<sup>22</sup>

## **(ii) Duress and Undue Influence**

Other factors that may vitiate what would otherwise have been a valid contract are 'duress and undue influence'. Where a party exerts some measure of pressure on the other party to a proposed contract to obtain his consent, it cannot be said that such contract was freely given. It is a general principle of contract that parties should be free to determine the terms and conditions of their proposed agreement.

The court will not hesitate to grant some reliefs to a party who was made to enter to a contract by use of coercion or subtle use of 'force'. Hard bargain without more will not give rise to any relief

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<sup>19</sup> Ibid. at 948

<sup>20</sup> [1951] 2 K.B. 164.

<sup>21</sup> [1964] A.C. 465

<sup>22</sup> Ibid. at 251

for duress and undue influence, as most contractual agreements are entered into under some form of economic pressure.

According to Treitel, the word 'duress' means actual or threatened unlawful violence to, or constraint of, the person of the other contracting party.<sup>23</sup> However, it is imperative to note that the recent judicial interpretations favour wider interpretation of 'economic duress'.<sup>24</sup> In *McCord v. Goode*<sup>25</sup>, duress means a situation where one person makes unlawful threats or otherwise engages in coercive behaviour that causes another person to commit acts that they would otherwise not commit.

In his words of Anson stated that, 'today the general rule is that any wrongful act or threat which overcomes the freewill of a party constitutes duress...'<sup>26</sup> Economic duress could be aptly defined as an unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will.<sup>27</sup> Atiyah in his book explains the position of courts in the 21<sup>st</sup> century thus:

*Courts have shown a willingness to recognize the concept of 'economic duress.' For instance it has been held that a defence on these grounds may be available to the purchaser of a ship from a shipbuilder, if the latter extracts a promise of extra payment as a condition of delivery of the ship*<sup>28</sup>.

A more liberal interpretation which widens the scope of 'duress' under the common law was recognized in the case of *Smith v. Charlick* by Isaacs, J., thus:

*It is conceded that the only ground on which the promise to repay could be implied is 'compulsion'. The payment is said by the respondent, not to have been 'voluntary' but 'forced' from it, within the contemplation of the law ... 'compulsion' in relation to a payment of which refund is sought, whether it is called 'coercion,' 'extortion,' 'exaction,' or 'force' include every species of duress, actual or threatened, exacted by or on behalf of the payee and applied to the person or the property*

<sup>23</sup> Treitel, G.H. (2004) An Outline of The Law of Contract, Sixth Edition. Oxford, Oxford University Press: 176

<sup>24</sup> See the case of *The Universe Sentinel* [1983] 1 AC : 366 at 383

<sup>25</sup> 308 S.W. Retrieved Aug. 18, 2023 from <https://www.law.cornell.edu/wex>

<sup>26</sup> Anson, W.R. (1919) Principles of the Law of Contract. Arthur L. Corbin ed., 3d Am. ed.: 261-62

<sup>27</sup> Ibid. Black's Law Dictionary: 543

<sup>28</sup> Atiyah, P.S. (1981) An Introduction to the Law of Contract, 3<sup>rd</sup> Edition, Oxford, Clarendon Press: 230



*or any right of the person who pays.*<sup>29</sup>

Any contract entered into under duress negates *consent*, and as such the contract is voidable, where the claimant or the aggrieved person has successfully pleaded *duress*. It is however submitted that where both parties alleged duress, the court may classify such alleged duress as, ‘hard negotiations’ (which is an acceptable commercial practice) or bargains obtained in an unfair manner by both parties which the court considering the evidence before it may categorise as Undue Influence.

### What is an **Undue Influence**?

Undue influence could be defined as an equitable doctrine which involves a party to a contract taking advantage of the other party as a result of a vantage position the former occupies *vis- a- vis*, the contract. The aforementioned situation that is the inequity between both parties can vitiate one party’s consent as he could not exercise his freewill at the material time to the making of the said contract.<sup>30</sup>

A clear analysis of some of the vitiating factors earlier discussed revealed essentially two fundamental issues, namely: (i) Consent genuinely obtained is central to every contract, since the minds of both parties must meet on all issues (*consensus ad idem*); and (ii) A contract may on the face of it has all the essentials of a valid contract but may nevertheless be unenforceable where one or more of the vitiating elements are present. However, in a bid to streamline what appears to be overlapping features or definitions of some of these vitiating factors, Denning, M.R., propounded the principle of *inequality of bargaining power* as follows:

*I would suggest that all through these instances, there runs a single thread. They rest on ‘inequality of bargaining power’. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his ignorance or infirmity, coupled with undue influences or pressure brought to bear on him by or for the benefit of the other.*<sup>31</sup>

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<sup>29</sup> [1924] 34 C.L.R. 38. *Ibid.* I.E. Sagay: 342

<sup>30</sup> What is Undue Influence? Definition... Retrieved Aug. 21, 2023 from <https://www.investopedia.com/terms>

<sup>31</sup> Lloyd’s Bank Ltd. v. Bundy [1975] Q.B. 326; (1974) 3 All E.R. 757

However, it is important to state clearly for the purpose of this paper, that the principle of contract regarding vitiating factors of a contract is universally applicable, with perhaps a little or no modification in some non-common law jurisdictions. It is therefore a settled principle of law of contract, even where the nature of such commercial transaction is cross-border contract. This perhaps cannot be said of ‘illegal *and void contracts*’.

## 2.0. Illegal Contracts

The word *illegal* simply means ‘against the law’; ‘not legal’, ‘unlawful’, not authorized by law or specific rules.<sup>32</sup> According to Collins English Dictionary, the word *illegal* is simply defined as, what is “forbidden by law; unlawful; illicit; unauthorized or prohibited by a code of official or accepted rules”. There is a consensus among the legal scholars that the definition and classification of illegal contract are not only difficult but could be very complex and problematic. According to Sagay, the term “illegal” when used with respect to contract is very wide in scope, ambiguous and devoid of sufficient clarity.<sup>33</sup>

Beatson did not mince words in describing “illegality,” thus: “The subject of illegality is one of great complexity and the effects of illegality are by no means uniform. This is because the seriousness of the illegality varies.”<sup>34</sup>

Another author comprehensively reflects on how complex and problematic the subject of illegality in contract could be, and therefore concluded as follows:

*An illegal contract is exceptionally difficult to define. It does not merely mean a contract contrary to the criminal law, although such a contract would indubitably be illegal. But a contract can well be illegal without contravening the criminal law, because there are certain activities which the law does not actually prohibit, but at the same time regards as contrary to the public interest and definitely to be discouraged, for instance, prostitution. While a void contract is not necessarily illegal, an illegal contract is often void. However, the consequences of illegal contract differ somewhat from those usually produced by a simply void contract, so illegal contracts*

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<sup>32</sup> Chambers 21<sup>st</sup> Century Dictionary, Revised edition, Edinburgh, Chambers Harrap Publishers Ltd. 671

<sup>33</sup> *Ibid.* at 359

<sup>34</sup> *Ibid.* Anson’s Law of Contract,: 348

*are usually accorded separate treatment.*<sup>35</sup>

The Supreme Court of Nigeria in an attempt to define the scope of an illegal contract held that such contracts are “prohibited by statutes or common law, coupled with provisions for sanctions, such as imprisonment in the event of its contravention are illegal”.<sup>36</sup>

However, in a bid to distinguish between ‘illegal’ and ‘void contracts’ the apex court held that the two terms cannot be used interchangeably and explained as follows:

*If the provisions of the law require certain formalities to be performed as conditions precedent for the validity of a transaction without imposing any penalty for non-compliance, the result of failure to comply with the formalities merely renders the transaction void. But if a penalty is imposed for non-compliance, the transaction is not only void but also illegal, unless the circumstances are such that the provisions of the statute stipulate otherwise.*<sup>37</sup>

It appears a more difficult situation may present itself when the court is faced with the interpretation and distinction between a contract *ex-facie* illegal and a contract not *ex-facie* illegal. The issue of illegalities in contract is considered a fundamental concept because of its effect on a contract when it is proved. When a contract is *ex facie* illegal, it simply means that the contract does not require any detailed interrogation before it is seen on the face value to be illegal. In a situation like this, the claimant may not need to plead illegality of such contract before the court will *suo motu* infer its illegality.

However, where a contract is NOT *ex facie* illegal, the court will expect the claimant to specifically plead illegality as same would not be inferred. The court emphasizing the distinction between a contract *ex facie* illegal and a contract that is not held as follows:

*Where a contract is not ex facie illegal and the question of illegality depends on the surrounding circumstance, then as a general rule, the court will not entertain the question of its illegality unless it is raised*

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<sup>35</sup> Ibid. Atiyah, : 38

<sup>36</sup> Pan Bisbilder Ltd. v. First Bank Ltd. (2000) FWLR, pt. 2: 177 at 188

<sup>37</sup> Ibid. at 188. See generally, *Solanke v. Abed & Anor* 1962 WR NLR 92 and *P. Kasumu & Ors. v. Baba Egbe* 14 WACA 444

*in the pleadings, in such circumstances, evidence adduced in support of the unpleaded illegality goes to no issue... Ex-facie, Latin for “on the face of it”, is a legal term used to note that a document’s explicit terms are defective without further investigation. So, where the contract is illegal on the face of it, the court must look into the issue, even where illegality has not been pleaded...*<sup>38</sup>

Similarly, it is important to examine the effect or consequence of illegal contracts *vis-à-vis* its enforceability by the courts.

### **Effects of Illegal contracts**

Generally, a contract that is illegal on its face cannot be enforced. A contract which is prohibited by virtue of statutory provisions or at common law is *void ab initio*. It is as good as saying, there was never a contract between the parties and therefore none of the parties can claim any right on it. This is garbed in the latin maxim ‘*ex turpi oritur non actio*’.<sup>39</sup>

This position of law was succinctly explained in *Holman v Johnson*<sup>40</sup> by Lord Mansfield as follow:

*The objection that the contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so.*

*The principle of the public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if*

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<sup>38</sup> *Olowu v. Building Stock Ltd.* [2020] All FWLR Pt. 1071: 609-610 paras. F-B See generally *Sodipo v. Lemminkainen OY (No.2)* (1986) 1 SC 197; *Okagbue v. Romaine* (1982) All NLR 111, (1982) 5 SC 133

<sup>39</sup> See *Inyang v Ebony* [2001] 25 WRN: 138

<sup>40</sup> [1775] 1 Cowp. 341 at 343

*the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, potior est conditio defendentis.*

The position of law is crystal clear where both parties from the inception of the contract are aware of the illegality, that is where both parties are equally guilty- *in pari delicto, potior est conditio possidentis*, and none of the parties can bring an action for the purpose of making any claim under the contract. A strict adherence of this rule will be to the defendant's advantage as he becomes the beneficiary of such a contract.

To avoid a situation where unscrupulous party may take advantage of the *delicto* rule to 'reap the fruits' of illegal contract; the law therefore permits certain exceptions to the general principle. In the circumstances mentioned below, the *in pari delicto* rule will not operate.

- i. Where the parties are not *in pari delicto*. This may occur where plaintiff was made to enter into the contract by fraud, duress or undue influence, he may be allowed to recover the money, goods or properties so transferred under the contract.
- ii. Where the statute breached or public policy violated was designed to protect the plaintiff (claimant) against the defendant.
- iii. Where fiduciary relationship exists between the parties and plaintiff is the beneficiary.
- iv. Where the claim can be based on a ground independent of the illegal contract.
- v. Where the plaintiff repents before the contract is performed.

### **Issues of illegalities in cross-border contracts-**

Cross-border commercial transaction, that is, where the parties to a contract reside and carry on businesses in two or more countries are now commonplace in view of technological advancement and the surge occasioned by the aftermath effect of Covid 19.

It is significant to note that the principles governing law of contracts are universal in nature save for few peculiarities introduced by the municipal laws of different nations in the adaptations of the basic principles.

Unique example of such peculiarities could be found in illegal contracts for the following reasons:

- i. What the law considers illegal in a nation sometimes differ from the other nation. For example, the use of marijuana and trade in same is legal in some states in the United States of America<sup>41</sup> while the trade in, and use of same is prohibited in Nigeria.<sup>42</sup> Similarly, there are other goods which production, sale or use of are expressly permitted in Nigeria but are classified as 'illegal' by other nations of the world.<sup>43</sup>
- ii. In the same vein, there may be some government policies and legislations which failure for strict adherence thereto may make the ensuing contractual transactions illegal.

An example of this was comprehensively considered by the Court of Appeal in *Adelekan & 23 Ors. v Central Bank of Nigeria*<sup>44</sup> This case originated from another case, *Alao v ACB*, where a citizen of Benin Republic, granted credit facilities to his Nigerian customers by providing CFA Francs for their children who were studying in England. He was issued bank drafts in settlement/reimbursements of the sums advanced by him. All the bank drafts were dishonored. The court deciding on the legality or otherwise of the contract per Augie, JCA quoted verbatim His Lordship Ogwuegbu, JSC as follows:

*The unknown Nigerians obtained loans of CFA Francs from the appellant in Cotonou, Benin Republic without the permission of the Minister of Finance. The appellant is not an authorized dealer. The transaction is clearly in contravention of section 3(i) of the Exchange Control Act. The said Nigerians made payments in the United Kingdom in liquidation of said loans and again, without the permission of the Minister of Finance. This is in breach of section 7(c) of the Exchange Control Act. The two sets of transactions are also in breach of section 1 (1), (a) (i)- (iv), (b), (e) and (2) of the Exchange Control (Anti-Sabotage Act). The purported transaction*

<sup>41</sup> For example Missouri State sometime in year 2022 legalized recreational marijuana and commenced the legal adult-use sale in February 2023. See generally Missouri Marijuana Laws 2024- <https://missouristatecannabis.org/laws>. Retrieved Aug. 19, 2024. Such other states include: Arizona, Virginia, Ohio, California etc. Within the same United States, the possession, growing, selling, distribution and the use of recreational marijuana is illegal in Texas.

<sup>42</sup> The Dangerous Drug Act Cap D1 LFN 2004 prohibits the production, sale (whether importation or exportation) and or use of same.

<sup>43</sup> *Mountain Dew*, a carbonated drink freely taken in Nigeria is prohibited in some counties of the world such as Japan and many other EU countries.

<sup>44</sup> [2016] All FWLR pt. 843:

*with the alleged Nigerians involving exhibits ‘A’ to ‘A4’ are illegal. The obligations or prohibitions imposed by the Exchange Control Act, unless otherwise prescribed, apply to all persons, notwithstanding that they are not in Nigeria and are not Nigerian citizens. The appellant in the circumstances is as much guilty as his Nigerian collaborators’.*

What appears to be a major puzzle here is that, will the absence of knowledge of an existing law regulating such contract avail a claimant who seeks to use that as a defense contrary to the legal maxim- *ignorantia legis non excusat*, that is, *ignorance or absence of knowledge of an existing law is not an excuse?*

The Supreme Court in *Pan Bisbilder Ltd. v First Bank Ltd.*<sup>45</sup> resolved the puzzle by asserting that a party who is ignorant of the illegality in a contract may recover money paid or property transferred under such contract. The court applied the *in pari - delicto* principle.

The court went further to extend this remedy for the aggrieved person to cover cases of undue influence, duress, deceit and fraud. It is therefore clear that a party to an illegal contract who is a victim of undue influence or fraud can recover money or property transferred under such circumstances. Okay Achike, JSC in *Pan Bisbilder Ltd.*<sup>46</sup> laid the matter to rest thus:

*I would like to emphasise the point that an assertion that a party to an illegal contract acted under pressure or undue influence is a further extension of the exception that if parties to an illegal contract are not in pari delicto...the party on whom superior power or influence was operated may well recover money or property exchanged in such circumstances.*<sup>47</sup>

However, it is important to note that reliance on the exception of undue influence must be established by evidence positive enough or strong inference that can be drawn from the surrounding circumstances.

## Conclusion

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<sup>45</sup> [2000] FWLR pt. 2: 77 at 190-191. See also the case of *Cowan v Milbourne* (1867) L.R. 2 Ex 230.

<sup>46</sup> (Supra) See also the following cases: *Smith v Cuff* (1817) 105 E.R. 1203, *Atkinson v Derby* 6 H & N 778 and *Hughes v Liverpool Society* (1916) 2. K.B. 482.

<sup>47</sup> *Ibid.* 191

There have been recurring issues of illegal contract in international commercial transactions space. This is usually as a result of lack of sufficient information regarding statutorily prohibited goods and services. Similarly, the issue of knowledge and compliance with certain legal process and procedure regulating certain contracts within a jurisdiction is so fundamental that it might give rise to illegality.

Notwithstanding the robust judicial intervention, this aspect of contract remains problematic and could be a landmine for unsuspecting parties to a contract. Appraisal of plethora of cases reveals that courts sometimes swim against the tide to maintain a balance between public policy, morality and doing justice particularly when it comes to *substantial justice* as against *technicality*.

An instance of the aforesaid is the case of *Globestar Engr. Co. Nig. Ltd. v Malle Holdings Limited*<sup>48</sup> where the court insisted that it will not embark on inquisitorial investigation where nothing illegal is apparent.

It is important that every party to cross-border commercial transactions understand not only the nature of the business being entered into but also the knowledge of the regulatory framework of the jurisdictions of both parties. This could be done through the engagement of facilitators who understand the business terrain.

Another problematic issue which parties should put into consideration is the treatment of a contract which was not illegal at the time parties entered into the contract but which later became illegal thereafter by operation of law. A good example is goods which were prohibited after the contract had been entered into. Simple resolution of this kind of quagmire is to apply the principle of law that states that law cannot take a retrospective effect.

However, the panacea might not be as straightforward as that; particularly where either of the parties to a contract was mischievous.

It is therefore suggested that parties take advantage of technological advancement in almost all the nations of the world to probe thoroughly into every details regarding the said contract, which may include even the identity of the other party.

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<sup>48</sup> [2005] All FWLR part 256:1309 at 1319, paras. B-C



