

terms, they are said to have engaged in duress and the contract is voidable.

#### **Contract is voidable for duress (duress is duress)**

- One of the parties has imposed on the other party with force.
- The threat of force is sufficient to the threatened party's decision whether or not to enter into the contract.
- The threat must be:
- to the personal safety of the other party or to that of their loved ones (duress is duress)
- to the safety of the other party's goods or property (duress is duress)
- to the other party's economic or financial well-being, interest or economic status (duress is duress)

#### **Unlawful influence**

- If one party has influence over the other party and they take advantage of that influence such that the other party is not really exercising their independent judgment, the contract will be voidable on the grounds of undue influence (duress is duress).

#### **Four classes of undue influence**

- **1. Presumptive undue influence**
  - Some classes of relationships automatically give rise to the presumption of undue influence:
    - doctor and patient,
    - trustee and client,
    - trustee and beneficiary,
    - parent/parent and child, or
    - religious leader and follower
  - The presumption can also arise where the relationship is one of confidence where the stronger party gives advice and guidance and is relied on by the weaker party. The stronger party denied the advice will be relied on (duress is duress).
  - When the presumption arises, it is then up to the other party to prove that there was no undue influence exerted.

#### **2. Actual undue influence**

- Actual undue influence is where the transaction was entered into as a result of actual undue influence.
- The party asserting undue influence must prove it must show that the influence was exerted at the time of entering into the contract and that it was undue (i.e. it was an unconscionable use of any special capacity or opportunity that may have existed on either side and that affected the weaker party's will or freedom of judgment).
- Circumstances that constitute duress can also

- After we have established whether a contract has been formed (consent, agreement, and consideration) and all that, we can look at what the contract actually says - what is it that the parties have agreed to include in the contract - these are the terms of the contract.
- In the terms of the contract are the specific details of the agreement, including each party's rights and obligations.

#### **Express terms**

- Express terms are those terms explicitly agreed upon by the parties.
- There can be an oral or written or implied term.
- A term may be stated in a contract or verbally.
- If terms are not followed, they are said to be breached.
- Even in a contract that is written, oral or a combination of both.
- There are also statements that are the terms of the contract.
- If the parties reduce their contract into writing, then the terms of the contract are what is written.
- But sometimes statements can be made by either parties, even those statements are stated as terms of the contract.
- Not all statements made would be considered terms of the contract. Courts have made the following distinction:

- Representation as fact.
- Sales pitch.

#### **Representations**

- These are statements of fact made by one party before or at the time of making a contract to induce an offer to enter the contract.
- They are not regarded as terms, so they don't form part of the contract.
- This means even if they are breached, no action can be taken for breach of contract, but an action may be in misrepresentation (breach is breach) or under the Australian Consumer Law (breach is breach).

#### **Sales pitch**

- These are considered to be mere sales talk that is never intended to be taken seriously. No remedy available under contract law.

#### **Terms, conditions, and warranties**

- Whether a statement is a term of the contract or a representation that is not part of the contract depends on the intention of the parties.
- The Court applies an objective test (duress is duress) - what would a reasonable person, aware of the circumstances of the case, believe to be the parties' intention in regard to the statement?
- The court will look at the following objective factors:

- A collateral contract is a secondary contract in which the representation or promise the other party has entered into that main contract (duress is duress).
- If the representation or promise is not part of the contract, the collateral contract (duress is duress).
- Even if the collateral contract is not part of the contract, the other party cannot rely on the main contract.
- Only entitled to damages for breach of collateral contract.

#### **Exclusion clauses and disclaimer**

- Exclusion clauses or disclaimers are clauses that exclude or limit liability in a contract.
- A disclaimer is a statement that a party will not be in breach despite failing to perform one or more of their contractual obligations. They are used to limit or exclude liability for certain events.
- Examples: "No refunds", "Discontinued sale of food goods", "Sale in Commerce, as is".
- So, when a party is in breach of a law, they may try to rely on an exclusion clause to get out of trouble.
- Whether a disclaimer will effectively protect the party from liability for breach of contract depends on:
- The exclusion clause must be incorporated into part of the contract.
- The exclusion clause must be interpreted to be wide enough to cover the breach.
- The nature and extent of the exclusion clause must not have been unconscionable to the innocent party.
- The clause cannot exclude certain duties.

#### **Unconscionable**

- Like any term, the exclusion clause must be part of the agreement between the parties.
- If it is a signed document or an unsigned document?

#### **A. Signed documents**

- Signature rule: terms contained in a signed document will normally be part of the contract, regardless of whether they have been read or not (duress is duress).

#### **B. Unsigned documents**

- If the document is unsigned, need to consider:
- Did the reasonable person have regard to the document as one that would contain contractual terms? If no, then can't rely on the exclusion clause (duress is duress).
- If yes, then can't rely on the exclusion clause (duress is duress).
- If the document is unsigned, need to consider:
- Did the reasonable person have regard to the document as one that would contain contractual terms? If no, then can't rely on the exclusion clause (duress is duress).
- If yes, then can't rely on the exclusion clause (duress is duress).

- Whether a term is a condition or a warranty is a legal question.

- The other party will be entitled to damages in the event of:
- any breach of contract, whether total or partial, actual or anticipatory, conditional or warranty.
- breach of a collateral contract, or
- misrepresentation.
- The objective of the court in making an award of damages is to restore the other party to the position they would have been in if the breach or misrepresentation had not occurred, that is, if the contract has been performed properly.

#### **Contractual remedies**

- If the other party can demonstrate to the court that an award of damages is not a satisfactory remedy, the court may decide to provide an equitable remedy, such as:
- specific performance, or
- injunction.
- An order of specific performance:
- A court order directing the party in breach to fulfil their contractual obligations (breach is breach).
- An injunction:
- A court order forbidding someone from engaging in particular conduct that will be a breach of the law or infringe the legal rights of another (breach is breach).

#### **Consumer guarantees and remedies**

- The ACL is primarily concerned with protecting the interests of consumers against unfair practices of traders and providing adequate remedies to consumers when there is a breach of the ACL.
- The ACL protects consumers against:
- unconscionable conduct.
- misleading or deceptive conduct.
- unfair contract terms.
- The ACL also has been given consumer rights which buying goods and services, establishes product safety laws and information standards, establishes product liability and establishes manufacturer's liability for defective goods.

#### **Unconscionable conduct**

- Unconscionable conduct is a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- Section 51 of the ACL requires conduct to be unconscionable.
- A person who suffers loss because a business has contravened s51 can commence legal proceedings against the business and seek one or more of the wide range of remedies offered by the ACL.
- The range of remedies provided by the ACL is much wider than that available in common law for misrepresentation or breach of contract.
- Alternatively the business can lodge a formal

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**Alphose Zingoni**



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## **Table of Contents Ied Final Exam Cheat Sheet**

1. Understanding the eBook Ied Final Exam Cheat Sheet
  - The Rise of Digital Reading Ied Final Exam Cheat Sheet
  - Advantages of eBooks Over Traditional Books
2. Identifying Ied Final Exam Cheat Sheet
  - Exploring Different Genres
  - Considering Fiction vs. Non-Fiction
  - Determining Your Reading Goals
3. Choosing the Right eBook Platform
  - Popular eBook Platforms
  - Features to Look for in an Ied Final Exam Cheat Sheet
  - User-Friendly Interface
4. Exploring eBook Recommendations from Ied Final Exam Cheat Sheet
  - Personalized Recommendations
  - Ied Final Exam Cheat Sheet User Reviews and Ratings
  - Ied Final Exam Cheat Sheet and Bestseller Lists
5. Accessing Ied Final Exam Cheat Sheet Free and Paid eBooks

- Ied Final Exam Cheat Sheet Public Domain eBooks
- Ied Final Exam Cheat Sheet eBook Subscription Services
- Ied Final Exam Cheat Sheet Budget-Friendly Options
- 6. Navigating Ied Final Exam Cheat Sheet eBook Formats
  - ePub, PDF, MOBI, and More
  - Ied Final Exam Cheat Sheet Compatibility with Devices
  - Ied Final Exam Cheat Sheet Enhanced eBook Features
- 7. Enhancing Your Reading Experience
  - Adjustable Fonts and Text Sizes of Ied Final Exam Cheat Sheet
  - Highlighting and Note-Taking Ied Final Exam Cheat Sheet
  - Interactive Elements Ied Final Exam Cheat Sheet
- 8. Staying Engaged with Ied Final Exam Cheat Sheet
  - Joining Online Reading Communities
  - Participating in Virtual Book Clubs
  - Following Authors and Publishers Ied Final Exam Cheat Sheet
- 9. Balancing eBooks and Physical Books Ied Final Exam Cheat Sheet
  - Benefits of a Digital Library
  - Creating a Diverse Reading Collection Ied Final Exam Cheat Sheet
- 10. Overcoming Reading Challenges
  - Dealing with Digital Eye Strain
  - Minimizing Distractions
  - Managing Screen Time
- 11. Cultivating a Reading Routine Ied Final Exam Cheat Sheet
  - Setting Reading Goals Ied Final Exam Cheat Sheet
  - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Ied Final Exam Cheat Sheet
  - Fact-Checking eBook Content of Ied Final Exam Cheat Sheet
  - Distinguishing Credible Sources
- 13. Promoting Lifelong Learning
  - Utilizing eBooks for Skill Development

- Exploring Educational eBooks

#### 14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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