



# ILLEGAL AND UNENFORCEABLE CONTRACTS IN GHANA



**Edition 15**



**INTEGRATED LEGAL CONSULTANTS**

[www.integratedlegalconsultants.com](http://www.integratedlegalconsultants.com)

## Newsletter

### *Editor's Note*

Integrated Legal Consultants (ILC) was founded in April 2007, in Accra, Ghana, to offer dedicated and innovative corporate legal services while ensuring that the Ghanaian and West African business community and our network of international clients benefit from the highest quality of corporate and commercial legal services that the Practice provides.

As part of this vision, our Practice has introduced the publication of newsletters on legal and economic issues that would be of interest to its clients and equally affect their transactions. This is our 15<sup>th</sup> edition.

Contracts are a key part of business activities and the daily lives of citizens of every nation. Parties to a contract are ordinarily bound by its content and its terms enforceable against a party in breach. There are however instances where a contract may be

deemed illegal or unenforceable under Ghanaian law. This Newsletter takes a look at illegal and enforceable contracts in Ghana.

In this issue, we have highlighted some key principles and cases relating to unenforceable contracts in Ghana.

We hope you find it informative and educative. Your feedback is welcome.

Happy New Year!

*Esohe Olajide*

**Editor**

*Olusola Ogundimu*

**Editor-In-Chief**

## Illegal And Unenforceable Contracts in Ghana

### Introduction

The American Restatement (Second) of Contracts (1981) defines a contract as “*a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes a duty.*”

Dowuona-Hammond in her book, **The Law of Contract in Ghana** also defines a contract as “*an agreement consisting of the exchange of promises which is recognized by law as giving rise to enforceable rights and obligations.*”

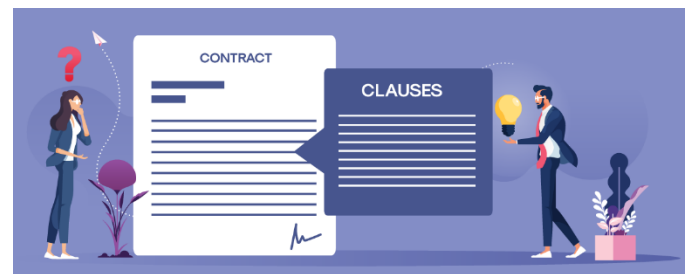
The above definitions emphasize that an agreement which qualifies as a contract involves the concept of promise, legal duty, enforceable rights and the presence of a remedy upon a breach of those rights and obligations.

There are certain elements which must be present in order for a valid and enforceable contract to be formed.

- i. Firstly, there must be an offer flowing from one party or parties and a final acceptance by another.
- ii. Secondly, both parties must be of legal age and capacity and must have the intention to create a legal relationship.
- iii. Lastly, there must be consideration which essentially signifies something of value that is given in exchange for a promise made to him, it may take the form of a return promise or the actual performance of a stipulated act.

In the absence of consideration, the promisee will be unable to enforce the promise made to him. However, a validly formed contract may be vitiated and considered unenforceable by certain factors such as, mistake, misrepresentation, duress, undue influence, unconscionability and illegality. A contract which is unenforceable may be voidable or void ab initio.

The focus of this article however is on illegal contracts and their enforceability. An illegal contract is one which may have all the elements of a valid contract present, but contains terms or has an object which is contrary to provisions of a statute or public policy.



### Contracts contrary to Statute

A contract is contrary to statute where it goes against the provisions of a statute in terms of its object or performance. In the case of **City & Country Waste v. Accra Metropolitan Authority 2 [2007-2008] SCGLR 409** the Supreme Court per Date-Bah JSC pronounced illegality on a contract between the plaintiff and the Assembly for waste disposal services, including landfill services, within the city of Accra, as the contract failed to satisfy the Standing Orders of the assembly and the Local Government Act, 1993. He stated as follows;

*“In our view, in the circumstances of this case, it is a necessary implication from the statutory provisions*

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*on District Tender Boards that contracts entered into in breach of them are illegal. The requirement that each District Assembly "shall have a district tender board which shall advise the Assembly on the award of contracts in the district" implies an obligation on the District Assemblies to seek such advice. The combined effect of the statutory rules on District Tender Boards, when construed purposively, has to be that there is a prohibition on concluding contracts in disregard of them. To hold otherwise would be to defeat their purpose."*

Generally, a contract such as this may be considered void and unenforceable but the court on some occasions have enforced contracts which go contrary to laws where the statute which the contract goes against seeks to merely raise revenue from breaches of that statute.

In **Smith v Mawhood [1845] 14 M & W452**, the plaintiff, a London tobacconist entered into a contract to sell a quantity of tobacco to the defendant. Under the relevant Excise Act any manufacturer or dealer in tobacco who did not have his name painted on his premises or sold tobacco without a licence was liable to a criminal fine of £200. The plaintiff did not comply with this. The defendant breached the contract and the plaintiff attempted to recover on the contract.

Alderson J asked whether the purpose of the statute was to affect the contract of sale or to serve some other purpose such as taxation or regulation. Where the subject matter of the contract was made illegal by statute or was contrary to justice, morality, or policy the contract would be void. However, where the subject matter of the contract was not itself illegal, the court would enforce the contract.

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Here, the purpose of the statute was not to make all sales of tobacco illegal but was to impose a fine on offenders who lacked a licence or correct signage in order to deter tax evasion.



### **Contracts contrary to Public Policy**

A court may be unlikely to enforce a contract if it goes against public policy or morality. It is difficult to define what the concept of public policy encompasses due to the fact that it may differ from jurisdiction to jurisdiction. Hence, the courts will normally adopt common law notions of public policy to fit the social and economic circumstances in their jurisdictions which in this case is Ghana.

As demonstrated in the case of **Foster v. Driscoll [1929] 1 KB 470** courts will not enforce Contracts which seek to interfere with regulations of foreign countries. In the Foster case, the English court refused to enforce a contract which the parties entered into to load a ship with whisky cargo to be smuggled across the United States since the object of the contract was a violation of the laws of a foreign country and as a result, contrary to the rules of public policy.

Furthermore, the courts will also refuse to enforce contracts which seek to completely oust their jurisdiction. In the case of **Ghana Private Road Transport Union (GPRTU) Tetteh v. Essilfie [2001-2002] SCGLR 786**; the Supreme Court held that the courts will normally respect the wishes of parties to an agreement to submit their disputes to an arbitration. However, the courts always have the power to inquire into the validity of the exclusionary clause and override it if it violates the principles of natural justice or seeks to completely oust the jurisdiction of the court and deny a party of a remedy.

A court for obvious reasons will not enforce a contract which has as its object the commission of a crime, tort or fraud on another party as it goes against public policy and morality.

In **Berg & Sadler v. Moore [1937] 2 K.B 158**, the court refused to enforce a contract where the plaintiff after being placed on the stop list by the tobacco association sought to import tobacco through another member of the association. He sued for the return of his goods after the defendant failed to deliver the said goods which were in the defendant's name, although he had made the payment for them.

These are but a few instances where the courts will refuse to enforce a contract for the simple reason that the contract is contrary to public policy and morality.

In conclusion, a contract may meet all the requirements and possess the elements which will ordinarily make it a valid contract but once the object or performance of the contract violates the provisions of a statute or goes contrary to public

policy, that contract will be deemed illegal and unenforceable by the courts of competent jurisdiction in Ghana.



**By Maame Aba Cobbinah**

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If you require any legal assistance in Ghana, kindly send an email to [ilc@integratedlegalconsultants.com](mailto:ilc@integratedlegalconsultants.com)

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