

Legality

Douglas Wilhelm Harder

One of the five elements required for an agreement to be a legally binding contract is that of lawful purpose. In all cases, if a non-essential term within a contract is found to be illegal, that term may be struck by the courts; but if an essential term within a contract is found to be illegal. We will discuss

1. breaches of the rule of law, specifically
 - a. the Competition Act of Canada, and
 - b. the Bankruptcy and Insolvency Act of Canada, and
 - c. the requirement to licence;
2. contravention of public policy;
3. illegal employment contracts; and
4. restraint of trade.

For a contract to be enforceable, it cannot breach statute law, common-law precedence, or any other applicable regulations, standards, codes or by-laws.

For example, any business contract that breaches the Competition Act of Canada, including anti-competitive practices such as

1. dumping, where products are sold at a loss hoping to eliminate competition, after which prices would be raised,
2. price fixing, where two or more companies collude to set prices,
3. exclusive dealing, where a party is obligated to purchase from one supplier,
4. refusal to deal, where a party is barred from using a particular supplier,
5. tying, where the sale of a product is linked to the purchase of another product not normally associated with the first,



"I Like a Little Competition"—J. P. Morgan

and there are others.

As a second example, when an entity declares bankruptcy, the purpose of the provision are to protect those who take risks in business where, if such risks were not taken, society as a whole may be significantly poorer off. Consider what would happen if slavery was the consequence of a failure in business—this would lead to significantly less innovation and risk. At the same time, the Act protects those who are injured by the bankruptcy. It is illegal, for example, to sell assets or product at significantly reduced prices prior to a bankruptcy with a goal of preventing those assets or products from coming into the hands of any creditors (fraudulent trading). For example, it is illegal to sell one's land to a relative or business partner at a reduced rate prior to declaring bankruptcy. It is also possibly illegal to continue in trade knowing that the company is insolvent, and knowing that the continued trade will simply increase the debt. Once it is clear to that bankruptcy is certain, actions that do not minimize the potential loss to creditors may also be seen to be illegal.

Additionally, if statutes, regulations, codes, standards or by-laws require that an individual be licenced, any contract where such services are to be provided by an individual who does not hold the requisite licence will be seen to be illegal and therefore unenforceable.

A contract may also be found to be illegal if it contravenes *public policy*, although this is seldom invoked. An example where a contract that was found to be contrary to public policy was in *Bovard v. American Horse Enterprises* in which a contract regarding the purchase of drug paraphernalia was found to be against public policy despite the items themselves not being illegal.

An example of an illegal employment contract would include any contract that violates employment labour laws, including, for example, working for less than minimum wage or forfeiture of the right to compensation in the case of an injury. In such cases, the employment contract may still be enforceable; however, the employer may then be required to compensate the individual for any breaches, such as lost wages or compensation for any injuries.

Any term within a contract that results in a restraint of trade may be found to be unenforceable if they unreasonably affect either the contracting parties or the public. Such terms will usually restrict the type of trade to not be engaged in with geographic and temporal limits.

For example, it would likely be unreasonable to hire a professional engineer to work within an industry and then expect that individual to not practice within that industry following the end of a contract. If, however, the employment contract involves significant specialized training that the individual did not have prior to employment, it may be more reasonable to impose such a constraint on that individual, as both the company and individual benefited from the additional training, and the sole purpose of providing the training was for this specific placement.

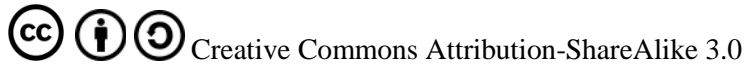
If the geographic or temporal extent is too large, the constraint may also be seen to be unreasonable: if an individual is constrained from seeking employment in his or her trade within the City of Toronto, this would likely cause unreasonable hardship. It would usually be unreasonable to constrain a former employee from engaging in similar work for many years.

In all cases, the courts will simply decide whether or not a restraint-of-trade clause is reasonable or unreasonable. They will never adjust to terms to make them reasonable if they are found to be unreasonable. Thus, if a one-year ban may be seen to be reasonable, but the contract specifies a 10-year ban, the courts would likely see this term to be unreasonable and render that ban unenforceable. They will never reduce it to, say, one year.

If, however, a constraint in trade may be found to be reasonable, if a party breaches such a term, the injured party may seek an injunction against the one breaching the contract preventing them from pursuing the line of trade as specified in the contract. In this case, subsequent breaches could additionally result in contempt of court charges.

This document is intended for the instruction and examination of ECE 290 *Engineering Profession, Ethics and Law* at the University of Waterloo. The material in it reflects the author's best judgment in light of the information available to them at the time of preparation. Any reliance on this document by any party for any other purpose is the responsibility of such parties. The author accepts no responsibility for errors or omissions, or for damages, if any, suffered by any party as a result of decisions made or actions based on the contents of this text for any other purpose than that for which it was intended.

Some content has been taken from Wikipedia together with verification and modifications by this author and therefore this document, with the exception of those paragraphs explicitly referenced to Marston, are licensed under the same the same licence:



References

Donald L. Marston, B.Sc., P.Eng., LL.B., *Law for Professional Engineers: Canadian and Global Insights*, 4th Ed., McGraw-Hill Ryerson, Toronto, 2008.