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A Contract is a Consensual Expression of the Will of Two or More Entities

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Abstract: A contract is a consensual expression of the will of two or more entities aimed at achieving the permissible legal effects which consist in the creation, termination or change of a certain legal relationship. A contract is a bilateral legal transaction, ie it arises only if there is a consensual expression of the will of two or more entities, as opposed to unilateral legal transactions where the legal effect arises by a statement or on the basis of a declaration of will of one party. Contracts are most common in trade, civil, labor and other branches of law.

Keywords: Business, Contract, Negotiation, Pacta Sunt Servanda, Law.

INTRODUCTION

Given the examples of contracts, it may be appreciated that the simplest possible description of a contract is a 'legally binding agreement' [Kelly, D. *et al*., 2002]. It should be noted, however, that, although all contracts are the outcome of agreements, not all agreements are contracts; that is, not all agreements are legally enforceable. In order to be in a position to determine whether a particular agreement will be enforced by the courts, one must have an understanding of the rules and principles of contract law.

The emphasis placed on agreement highlights the consensual nature of contracts. It is sometimes said that contract is based on consensus ad idem, that is, a meeting of minds. This is slightly misleading, however, for the reason that English contract law applies an objective test in determining whether or not a contract exists. It is not so much a matter of what the parties actually had in mind as what their behaviour would lead others to conclude as to their state of mind. Consequently, contracts may be found and enforced, even though the parties themselves might not have thought that they had entered into such a relationship.

An oral contract is created by word of mouth and comes into existence when two or more people form a contract by speaking to each other [Brown, G. W. *et al*., 2008]. One person usually offers to do something, and the other party agrees to do something else in return. Most contracts are oral contracts of this nature.

Sometimes, however, it is desirable to put contracts in writing. A written contract assures that both parties know the exact terms of the contract and also provides proof that the agreement was made. A law, the Statute of Frauds, requires that certain contracts must be in writing to be enforceable.

An essential element for contract formation is agreement—the parties must agree on the terms of the contract and manifest to each other their mutual assent (agreement) to the same bargain [Clarkson, K. W. *et al*., 2012]. Ordinarily, agreement is evidenced by two events: an offer and an acceptance. One party offers a certain bargain to another party, who then accepts that bargain. The agreement does not necessarily have to be in writing. Both parties, however, must manifest their assent, or voluntary consent, to the same bargain. Once an agreement is reached, if the other elements of a contract are present, a valid contract is formed, generally creating enforceable rights and duties between the parties.

Every business enterprise, whether large or small, must enter into contracts with its employees, its suppliers of goods and services, and its customers in order to conduct its business operations [Mann, R. A. *et al*., 2011]. Thus, contract law is an important subject for the business manager.

Even the most common transaction may involve many contracts. For example, in a typical contract for the sale of land, the seller promises to transfer title, or right of ownership, to the land; and the buyer promises to pay an agreedupon purchase price. In addition, the seller may promise to pay certain taxes, and the buyer may promise to assume a mortgage on the property or to pay the purchase price to a creditor of the seller. If the parties have lawyers, they very likely have contracts with these lawyers. If the seller deposits the proceeds of the sale in a bank, he enters into a contract with the bank. If the buyer rents the property, he enters into a contract with the tenant. When one of the parties leaves his car in a parking

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lot to attend to any of these matters, he assumes a contractual relationship with the owner of the lot. In short, nearly every business transaction is based on contract and the expectations the agreed-upon promises create. It is, therefore, essential that you know the legal requirements for making binding contracts.

Formalities

A standard form contract is a written contract prepared by the stronger party and leaving no, or little, opportunity for negotiation [Terry, A, 2009]. They are generally take-it or leaveit contracts. We are all familiar with the protocol – "sign here, here and here" or "click here, here and here". In theory they can be negotiated but in practice they rarely are. They are rarely read and, even if they are, probably often only imperfectly understood. Contemporary life would be impossible – certainly difficult – without standard form contracts and it is absurd to suggest that we individually negotiate "everyday" contracts.

There is no general requirement that contracts be made in writing [Kelly, D. *et al*., 2002]. They can be created by word of mouth or by action, as well as in writing. Contracts made in any of these ways are known as parol or simple contracts, whereas those made by deed are referred to as speciality contracts. It is generally left to the parties to decide on the actual form that a contract is to take, but, in certain circumstances, formalities are required:

• Contracts that must be made by deed
• Contracts that must be in writing (but not necessarily by deed)
• Contracts that must be evidenced in writing

Essential Elements

As has been seen, not every agreement, let alone every promise, will be enforced by the law [Kelly, D. *et al*., 2002]. But what distinguishes the enforceable promise from the unenforceable one? The essential elements of a binding agreement, and the constituent elements of the classical model of contract, are as follows:

• offer;
• acceptance;
• consideration;
• capacity;
• intention to create legal relations;
• there must be no vitiating factors present.

The first five of these elements must be present, and the sixth one absent, for there to be a legally enforceable contractual relationship.

Unconscionability

In the procedural unconscionability context, the US courts have taken divergent views as to what constitutes procedural unconscionability in internet transactions [Yuthayotin, S, 2005]. One trial court held that the arbitration clause is procedurally unconscionable as it is adhesive to the contract, being drafted by one contracting party having superior bargaining strength, and imposed on the other contracting party who only had the option of either adhering to the contract and all its terms or rejecting it. However, other courts' determinations of procedural unconscionability may not be based on the adhesive nature alone. One has concluded that, by clicking a box on the website which including terms in a hyperlink, the clicking party has indicated lawful assent to those terms and that this did not constitute an unconscionable procedure. In another instance, a lack of negotiation and the existence of unequal bargaining power did not indicate an unconscionable procedure as the consumers were free to shop around on the internet where there are myriad of offerors of goods and services or where a party had a fair opportunity to refuse the electronic standard agreement. Also, some courts have considered that consumers having unlimited time to learn terms and conditions makes forum selection clauses legally enforceable.

On the substantive unconscionability aspect, whether terms are substantive unconscionable usually depends on their particular content and language. One judicial decision, for example, concluded that consumers failed to prove that they would be deprived of any remedy which they were legally entitled to if the arbitration settlement was applied, thus failing to meet the requirements of the test of substantive unconscionability. Another court similarly refused a claim that an agreement was unconscionable based on its content where it included an exclusive forums clause. On the other hand, a different court opined that an arbitration clause is unconscionable because there is a sole determiner of matters concerning disputes, a prohibition against consolidating consumers' claims and the imposition of prohibitive arbitration fees and restrictions on the venue where consumers could conduct proceedings, deeming the contents of the contract to be oppressive.

In e-transactions, consumers have often argued that a forum selection clause or an arbitration clause is unfair and unconscionable in its content as it appears to limit the use of a class action. There are divergent opinions of courts as to

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whether the term of a contract that removes recourse to a class action is unenforceable. For example, one court ruled that a seller has no right to constrain the procedural tool of class actions and such contractual limitation (e.g. a forum selection clause or an arbitration clause) has no effect on enforcement. However, another court legally enforced an arbitration clause present in online a wrap agreement as it found there was insufficient evidence of an intention to cheat a large number of consumers.

Also, it is interesting to point out that without the doctrine of procedural unconscionability, the courts have sometimes bypassed considering the issue of substantive unconscionability and whether the contract contains unfair or unreasonable terms. A court once left unanswered the question of whether the content of an applicable law and forum clause which designated the law of a distant, foreign, jurisdiction were inherently oppressive and unfair or not. Instead, the court concluded that because procedural unconscionability was absent, the doctrine of unconscionability would not apply.

Negotiation

Most of the forms in this book are contracts [Crawford, T, 2004]. A contract is an agreement that creates legally enforceable obligations between two or more parties. In making a contract, each party gives something of value to the other party. This is called the exchange of consideration. Consideration can take many forms, including the giving of money or writing or the promise to create writing or pay for writing in the future.

Contracts Require Negotiation

When both parties have something valuable to offer each other, it should be possible for each side to come away from the negotiation feeling that they have won. Win–win negotiation requires each side to make certain that the basic needs of both are met so that the result is fair.

Pacta Sunt Servanda

No aspect of modern life is entirely free of contractual relationships [Clarkson, K. W. *et al*., 2012]. You acquire rights and obligations, for example, when you borrow funds, when you buy or lease a house, when you obtain insurance, and when you purchase goods or services. Contract law is designed to provide stability and predictability, as well as certainty, for both buyers and sellers in the marketplace.

Contract law deals with, among other things, the formation and enforcement of agreements between parties (in Latin, pacta sunt servanda—"agreements shall be kept"). Clearly, many promises are kept because the parties involved feel a moral obligation to keep them or because keeping a promise is in their mutual self-interest. The promisor (the person making the promise) and the promisee (the person to whom the promise is made) may also decide to honor their agreement for other reasons. In business agreements, the rules of contract law are often followed to avoid potential disputes.

By supplying procedures for enforcing private contractual agreements, contract law provides an essential condition for the existence of a market economy. Without a legal framework of reasonably assured expectations within which to make long-run plans, businesspersons would be able to rely only on the good faith of others. Duty and good faith are usually sufficient to obtain compliance with a promise, but when price changes or adverse economic factors make compliance costly, these elements may not be enough. Contract law is necessary to ensure compliance with a promise or to entitle the innocent party to some form of relief.

e-contracts

Electronic contracts, or e-contracts, must meet the same basic requirements (agreement, consideration, contractual capacity, and legality) as paper contracts [Miller, R. L. *et al*., 2013]. Disputes concerning e-contracts, however, tend to center on contract terms and whether the parties voluntarily agreed to those terms.

Online contracts may be formed not only for the sale of goods and services but also for licensing. The "sale" of software generally involves a license, or a right to use the software, rather than the passage of title (ownership rights) from the seller to the buyer.

Sellers doing business via the Internet can protect themselves against contract disputes and legal liability by creating offers that clearly spell out the terms that will govern their transactions if the offers are accepted. All important terms should be conspicuous and easy to view.

An important rule to keep in mind is that the offeror (the seller) controls the offer and thus the resulting contract. The seller should therefore anticipate the terms he or she wants to include in a contract and provide for them in the offer. In some instances, a standardized contract form may suffice. At a minimum, an online offer should include the following provisions:

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1. Acceptance of terms. A clause that clearly indicates what constitutes the buyer's agreement to the terms of the offer, such as a box containing the words "I accept" that the buyer can click.
2. Payment. A provision specifying how payment for the goods (including any applicable taxes) must be made.
3. Return policy. A statement of the seller's refund and return policies.
4. Disclaimer. Disclaimers of liability for certain uses of the goods. For example, an online seller of business forms may add a disclaimer that the seller does not accept responsibility for the buyer's reliance on the forms rather than on an attorney's advice.
5. Limitation on remedies. A provision specifying the remedies available to the buyer if the goods are found to be defective or if the contract is otherwise breached. Any limitation of remedies should be clearly spelled out.
6. Privacy policy. A statement indicating how the seller will use the information gathered about the buyer.
7. Dispute resolution. Provisions relating to dispute settlement, such as an arbitration clause or a forum-selection clause.

Functions

No aspect of modern life is entirely free of contractual relationships [Miller, R. L. *et al*., 2012]. You acquire rights and obligations, for example, when you borrow funds, buy or lease a house, obtain insurance, form a business, and purchase goods or services. Contract law is designed to provide stability and predictability both for buyers and sellers in the marketplace.

Contract law assures the parties to private agreements that the promises they make will be enforceable. Clearly, many promises are kept because the parties involved feel a moral obligation to do so or because keeping a promise is in their mutual self-interest. The promisor (the person making the promise) and the promisee (the person to whom the promise is made) may decide to honor their agreement for other reasons. Nevertheless, the rules of contract law are often followed in business agreements to avoid potential problems.

By supplying procedures for enforcing private agreements, contract law provides an essential condition for the existence of a market economy. Without a legal framework of reasonably assured expectations within which to plan and venture, businesspersons would be able to rely only on the good faith of others. Duty and good faith are usually suffi cient, but when dramatic price changes or adverse economic conditions make it costly to comply with a promise, these elements may not be enough. Contract law is necessary to ensure compliance with a promise or to entitle the innocent party to some form of relief.

Lawyers

Lawyers are in business to protect your rights and to work for you [McGuckin, F, 2005]. No matter how small your business, there are numerous areas where you should consult with a lawyer. Few people understand the fine print on contracts and legal documents, yet once you sign on the dotted line, you have contracted to adhere to specific terms, and these agreements can be upheld in court. People often don't understand the content of a contract but sign it anyway.

Many people have lost money on smiles, verbal agreements, and handshakes. Generally, a contract does not have to be in writing to be binding on the parties. The problem with verbal agreements is proving the contents of the contract once a dispute arises. Although it is human nature to want to trust people, get everything in writing anyway. The most common areas where a lawyer can help you follow:

1. Buy-sell agreements
2. Setting up a partnership, corporation, or LLC
3. Building and capital equipment leases
4. Royalty agreements
5. Agent and distributorship agreements
6. Franchise agreements
7. Disputes with clients
8. Corporate affairs

Civil Law

The express terms of the contract are those which the parties have either in words or documents specifically agreed should be part of it [Nayler, P, 2006]. Where they have left gaps in their agreement, the law will often provide default rules which will apply in the absence of a contrary intention. While the approach of civil law and common law to this 'gapfilling' exercise differs in material respects, the results can often be similar.

Civil law tends to classify contracts by name – for example, sale, hire, agency, brokerage, and so forth – and lays down in the relevant code the obligations relating to such contracts. When the contract negotiated by the parties does not

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correspond with a recognised named contract, the courts will resort to a variety of interpretation devices – for example, by drawing an analogy between the contract in question and the one in the code it most closely resembles. The existence of these 'nominate' contracts goes some way to explaining the different drafting styles found in civil law and common law jurisdictions. A contract drawn up by an English or American lawyer, for example, is often a long and detailed document which attempts to provide for every contingency. On the other hand, a contract prepared against the background of civil law can be relatively short and simple. While the most important matters might be expressly provided for, the parties may decide to leave the details to be determined in accordance with the provisions of the governing code.

International Law

International law is law set up by states and applicable to these states and in most cases their nationals [Keizer, J. *et al.*, 2007]. It is laid down in rules referred to as Treaties, Conventions, Regulations and Declarations. Most states around the world have signed up to several thousand of these rules in which case that state is referred to as a Contracting State of this Treaty or Convention. The effect of signing a Treaty can vary from Treaty to Convention. The states that sign a Treaty or a Convention wish to be bound to this set of rules. Sometimes states reserve the right to determine the effect of this Treaty or this Convention on their state or their nationals at a later point in time.

The aim of International Private Law is to solve legal problems arising out of different legal systems that apply to international, legal relationships. As every country has its own legal system, so a legal relationship f.e. arising out of a contract of sale may have links with at least two national legal systems. In the event the legal conflict only involves two parties living in the same country, no such choice for a legal system exists. International Private Law provides a set of rules to either decide on the matter, or refer the litigating parties to a national legal system where the answer lies. Basically every country has its own International Private Law, but over the years several Treaties and Regulations have been set up to deal with these legal problems internationally. International Private Law deals with three main issues: jurisdiction in case of litigation between two parties coming from different states (including the possibilities of executing the verdict given by the court of law that has jurisdiction, in the countries of the litigating parties), the law to be applied in case of international litigation between two private parties, and solutions to legal problems arising out of an international legal relationship.

CONCLUSION

A commercial contract is concluded between traders and belongs to the field of trade law. In the relations from trade agreements, trade customs are applied, the application of which was agreed upon by traders and the practice they developed among themselves. In other words, trade customs that traders regularly apply in the same relations also apply if the participants in them have not explicitly or tacitly excluded their application. In concluding trade agreements, traders have broad autonomy regarding the regulation of their relations, and borders are only constitutional principles, coercive regulations and the morals of society. A trade contract is considered to have been concluded when the traders have agreed on the essential components of the contract.

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