"Administrative Law".

In Section 1 of this course you will cover these topics:

- Discharge Of The Contract
- Formation Of The Sales Agreement
- Discharge Under The Sales Agreement

Topic : Discharge Of The Contract

Topic Objective:

At the end of this topic student would be able to:

- Understand the concept of Discharge Petition
- Learn about the History and process of a discharged contract
- Learn about Versions other than the U.S. House

Definition/Overview:

Overview: A conditional discharge is a sentence passed by a court whereby the defendant is not punished provided he or she complies with certain conditions. An absolute discharge is unconditional: in some jurisdictions, where no conditions are imposed at all, in others where the conditions have been successfully complied with. In some jurisdictions, a defendant is not regarded as having been convicted if he has been discharged.

Key Points:

1. Discharge Petition

A discharge petition is a means of bringing a bill out of committee and to the floor for consideration without a report from a Committee and usually without cooperation of the leadership. Discharge petitions are most often associated with the U.S. House of Representatives, though many state legislatures have similar procedures. They are used when the chair of a committee refuses to place a bill or resolution on the Committee's agenda; by never reporting a bill, the matter will never leave the committee and the full House will not be able to consider it. A successful petition "discharges" the committee from further consideration of a bill or resolution and brings it directly to the floor. The discharge petition,

and the threat of one, gives more power to individual members of the House and usurps a small amount of power from the leadership and committee chairs. The modern discharge petition requires the signature of an absolute majority of House members (218 members).

2. History and process

An early form of the discharge petition was introduced into House rules in 1910 as part of a series of measures intended to check the power of the disliked Speaker Joseph Gurney Cannon. The modern version, however, was adopted in 1931 by the 71st House. In 1935, the rules were changed so the number of signatures required to force a vote went from one-third of the chamber (145 votes) to a simple majority (218 votes).

Originally, signatories to a discharge petition were secret. Only once the petition acquired a majority would the clerk announce who signed. In 1993, the procedure was changed to make it public at every step of the process, with signers published in the Congressional Record. This change was spearheaded by Jim Inhofe (R-OK).

There are three basic forms of discharge petition:

- Directly on an unreported measure. This makes it difficult to amend, which may be considered a benefit or a drawback. The committee to be discharged can circumvent this to a degree by reporting the measure.
- To make a special rule providing that the unreported measure be recalled from committee and considered. This is the most common variety in modern times; as of the 107th Congress, all discharge petitions have been of this variety.
- To make a special rule providing that a reported measure that was never called for floor consideration be considered.

Once the House acts on a discharge motion, any further discharge petitions on the same subject are precluded for the remainder of the session of Congress (until the calendar year's close, normally). This is only relevant if the petition succeeds but the bill is rejected anyway, despite a majority of the House apparently wishing to bypass the Committee. If the motion is budget-related, then the Committee of the Whole is convened to amend it.

A discharge petition may only be brought after a measure has sat in committee for at least 30 legislative days without being reported; if the matter is considered as a special rule to the Rules Committee, then the period is 7 days instead. Once the requisite number of signatures is reached, the petition is placed on the Discharge Calendar, which is privileged business on the second and fourth Mondays of each month. This layover is waived during the last six

days of a session before sine dieadjournment. At the end of each session of Congress, any discharge petitions remaining unresolved or lacking the required number of signatures are removed from consideration.

563 discharge petitions were filed between 1931 and 2003, of which only 47 obtained the required majority of signatures. The House voted for discharge 26 times and passed 19 of the measures, but only two have become law. However, the threat of a discharge petition has caused the leadership to relent several times; such petitions are dropped only because the leadership allowed the bill to move forward, rendering the petition moot. Overall, either the petition was completed or else the measure made it to the floor by other means in 16 percent of cases.

3.Usage

Discharge petitions are rare. A successful discharge petition embarrasses the leadership; as such, members of the majority party are hesitant to support something that would make the Speaker and their own leaders look bad. (Naturally, the minority party will often support discharge petitions precisely to embarrass the leadership.) Furthermore, since the signers of a petition are not private, majority party members are pressured not to sign, and open themselves up to retribution from the leadership should they disobey.

When signing of a petition was secret or, more specifically, confirmation that it was signed was secret, as a Representative could claim whatever they liked petitions were generally only used for serious discontent in the majority. The secrecy also meant that members could claim to be for a piece of legislation while at the same time taking no action to force a vote on such legislation. With this secrecy removed, it became more difficult to dissemble in such a way; it also opened signers to more direct retribution from the leadership. Under the old system, if a petition was unsuccessful, the leadership would never know if a particular Representative signed the petition. If it was successful, all the "defectors" would at least be in the same boat. With open signing, the leadership can exert maximum pressure on stopping the last few signatures. Those who make the last few signatures open themselves to especially severe payback, as early signers could argue privately that they were only posturing, and didn't think the petition would ever pass. A strong counter-campaign from the leadership helped stop the proposal of William Zeliff (R-NH) and Rob Andrews (D-NJ) of "A-Z spending cuts," for example; the proposal received 204 signatures, but could not muster the last 14.

The removal of secrecy also encourages discharge petitions that exist merely to take a public stand on an issue. Since secrecy was removed in the U.S. House, thirty petitions have attained 60 signatures or fewer.

A notable situation where the threat of a discharge petition is extremely relevant is if the majority party in the House loses its majority for some reason, such as due to defections or deaths. If the old majority leadership refused to stand aside, the new majority could file a discharge petition to elect a new Speaker. This situation has not yet occurred.

The most recent successful discharge petition was the Bipartisan Campaign Reform Act, known as McCain-Feingold in the Senate and Shays-Meehan in the House. Starting in 1997, several attempts were made to bring it to the floor via the discharge petition. It finally passed in 2002, and the Senate passed it 60-40, narrowly avoiding a filibuster.

1993 saw the Discharge Petition Disclosure Bill passed. The bill, which made the rule change requiring public disclosure of signers, was itself filed with a discharge petition. The Balanced Budget Amendment received 218 signatures twice, in 1992 and 1993; however, it did not pass the Senate.

Prior to 1993, one must go back to 1985 to find another successful discharge petition in which the process was carried to its conclusion, rather than the bill dying or the leadership allowing the bill out of committee (since as noted above, some bills with pending petitions the leadership has simply relented on). This was the Firearm Owners Protection Act, known as McClure-Volkmer. The Act was a scaling back of gun control legislation that made it easier for gun shows to operate without government interference. The Senate passed the bill, but House Judiciary chair Peter W. Rodino, Jr. (D-NJ) declared it "dead on arrival." In response, the National Rifle Association launched a strong campaign to pass the bill in the House via discharge petition. Rather than let the Senate version of the bill out of committee, Rodino instead proffered a compromise piece of legislation with William J. Hughes (D-NJ). However, the discharge petition succeeded and the Senate version was passed after minor amendments were added.

4.Versions other than the U.S. House

Versions of the discharge petition vary widely in state legislatures. Some use petitions like the House, though others allow a motion to be made to discharge the committee, forcing legislators to vote. The threshold for discharge also varies. For instance, Wisconsinhas similar rules to the House; a simple majority is required to succeed, though a motion or a petition are both acceptable. The Kansas Legislature requires 56 percent approval (70 members). Pennsylvania allowed only 30% of its members to recall a measure from committee for a time. This was changed in 1925 to a majority of the Legislature, drastically curtailing the number of recalls; still, only 25 (about 10 percent) petition-signers are required to force a motion to be voted on by the floor. Though technically a vote on whether the bill

can proceed, the bill's supporters usually claimed that the vote was a vote on the bill itself, providing opportunities to the minority party to, at the least, force the majority party to be put on record as opposing a popular bill.

Discharge petitions also exist in the United States Senate, and require only 30 signatures. However, they are practically powerless and more a ceremonial registering of a dispute. Analogs to the discharge petition in parliamentary systems are rare. In such systems the Prime Minister often has even more control over the agenda than the Speaker of the House does in the United States. The closest may be a "conscience vote" (sometimes referred to as a "free vote"), in which members are released from party ties and allowed to vote as they wish on especially controversial issues.

5. Seal

In the history of law, a wax seal affixed to a contract or other legal instrument has had special legal significance at various times in the jurisdictions that recognize it. An instrument with such a seal affixed for this purpose is said to be under seal or sealed (this usage is different from sealed records). In the courts of common law jurisdictions, a sealed contract was treated differently from an unsealed contract, until this practice gradually fell out of favor in most of these jurisdictions in the 19th and early 20th century; the most significant difference was that sealed contracts were enforceable without consideration. This reflects classical contract theory, in which consideration was viewed as a formal aspect of a contract, so that a seal could be considered an alternative form. This view has fallen out of favor in common law courts, but parallel to sealed contracts, similar treatment of special form contracts for donative promises (absent consideration) continues even into the 21st century in the civil law courts of France and Germany.

The legal term seal arises from the wax seal, used throughout history for authentication (among other purposes). Originally, only a wax seal was accepted as a seal by the courts, but by the 19th century the definition had been relaxed to include an embossed paper wafer similarly affixed to an instrument, an impression in the paper on which the instrument was printed, a scroll made with a pen, or even the printed words "Seal" or "L.S." (for locus sigilli). Today, even in common law jurisdictions where the seal has greatly reduced significance, seals are still sometimes used on contracts (usually in the impression on paper form), presumably for symbolic purposes.

6. Sources of Contract Law

Contracts always involve the future. Problems frequently arise because events did not turn out as one or both of the parties had anticipated and they look to contract law to provide the

solution for that particular situation. Where do we go to find the rules to resolve contract disputes?

The principal state statute you will deal with in Contracts is the Uniform Commercial Code (UCC or Code). The Code has a number of parts, called Articles, that apply to different transactions. You will be concerned with Article 1, which contains General Provisions that apply to the whole Code, and Article 2, Sales.

The UCC is an odd duck. One of its principal goals, expressed in 1-102(2)(c) [Revised 1-103(a)(3)], is to make uniform the law among the various jurisdictions. You would think the easiest way to make the law uniform would be to enact a federal law. But that is not the way of the Code. The Code is promulgated by two groups, the National Conference of Commissioners on Uniform State Law (NCCUSL), and the American Law Institute (ALI). After both of these groups have approved proposed statutes that are drafted by a committee of experts, NCCUSL then takes the proposal to each state, asking the state to enact it. If every state enacts the same law, then the law is uniform. NCCUSL and the ALI have had tremendous success with the UCC, getting most of it enacted in every American jurisdiction. However, the UCC is not entirely uniform. Legislatures are of course free to change the proposed version in the course of enacting the law, and most legislatures have taken advantage of that freedom. The CALIlessons will cite to the Uniform version of the Code, but you should be aware that your state may have a nonuniform provision.

Topic : Formation Of The Sales Agreement

Topic Objective:

At the end of this topic student would be able to:

- Understand the concept of Offer and Acceptance
- Learn about Invitation to Treat
- Learn about Counter Offer
- Understand the meaning of Subject to Contract

Definition/Overview:

This topic deals with the formation of the sales agreement. Occasionally, "sales agreements" may refer to the sharing or contracting of primary functions of a sales contract.

Key Points:

1. Offer and Acceptance

The agreement of the parties is an essential ingredient in the formation of a contract. This may be analysed by offer and acceptance. An example is the quotation by a sub-contractor which is accepted by the main contractor. The acceptance must be unconditional. If the acceptance includes any terms or stipulations it will not bring a contract into existence but will constitute a counter-offer which can then be accepted by the original offeror. Contracts are often the result of many counter-offers.

2. Invitation to Treat

The distinction between an offer and an invitation to treat is that the latter is part of the preliminaries of negotiation, whereas an offer is legally binding once accepted, subject to compliance with the terms of the offer. A tender enquiry usually falls into the category of an invitation to treat.

3. Counter Offer

The conflict between the seller's conditions and those of the purchaser is often referred to as the `Battle of the Forms' in which it is the party who answers last who wins.

4. Subject to Contract

Generally, if a purported acceptance is expressed to be `subject to contract', or some other words are used which show that further negotiations or events are contemplated, there is no concluded contract. However there are exceptions.

5. Letters of Intent

To establish a contract not only requires agreement by the parties on all the terms they consider essential, but also sufficient certainty in their dealings to satisfy the common law requirement of completeness. An intention to create a legally binding relationship must also be present

It is not uncommon where goods are on long delivery for the purchaser to instruct the seller to place orders for materials in advance of a contract being entered into. In the event of there being no subsequent contract the seller will be entitled to be paid on a quantum meruit basis, ie reasonable remuneration which would normally take the form of a cancellation charge.

Topic : Discharge Under The Sales Agreement

Topic Objective:

At the end of this topic student would be able to:

- Understand the importance of Causes
- Learn about the Symptoms of a contract that may get discharged
- Grasp Knowledge about Examples of discharged contracts

Definition/Overview:

Frustration of Purpose

It is a defense to enforcement of the contract. Frustration of purpose occurs when an unforeseen event undermines a party's principal purpose for entering into a contract, and both parties knew of this principal purpose at the time the contract was made. Despite frequently arising as a result of government action, any third party (or even nature) can frustrate a contracting party's primary purpose for entering into the contract.

Frustration of purpose is often confused with the related doctrine of impossibility, which is closely related. The distinction between the two is that impossibility concerns the duties specified in the contract, whereas frustration of purpose concerns the reason a party entered into the contract. For example, suppose entrepreneur Emily leases space from landlord Larry so she can open a restaurant that only serves Tibetan Speckled Lizard meat. If the city rezones the property to forbid commercial uses, or if the property is destroyed by a tornado, then both Larry and Emily are excused from performing the contract by impossibility.

Key Points:

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The Restatement of Contracts, Second 265 defines frustration of purpose:

A circumstance is not deemed to be a "basic assumption on which the contract is made" unless the change in circumstances could not have been reasonably foreseen at the time the contract was made. As a result, it is rarely invoked successfully. Successful invocations usually come in waves during times of substantial tumult, such as after the passage of Prohibition, when bars and taverns no longer had a reason for their leases, or during major wars, when demand for many consumer goods and services drops far below normal.

If successfully invoked, the contract is terminated, and the parties are left as they are at the time of the litigation. The leading case in English law on the subject is the famous 1903 case of Krell v. Henry, which concerned a party who had rented a room for the purpose of watching the coronation procession of Edward VII. When the king fell ill, the coronation was indefinitely postponed. The hirer refused to pay for the room; the owner sued for breach of contract and the hirer then counter-sued for the return of his 25 deposit. The court determined that the cancellation of the coronation was unforeseeable by the parties, and discharged the contract, leaving the parties as they were: the hirer lost his one third deposit and the owner lost the rest of the rent.

In addition, the Court also noted that the doctrine of 'impossibility' could not be applied in this manner, because it would not have technically been 'impossible' for the lessee (the 'renter') to take possession of the flat on that prescribed day and merely sit in front of the window and view the street where the coronation parade was to occur. The point the Court was making is this: The death of the King did not make the execution of the contract 'impossible.' Rather, the cancellation of the parade merely frustrated the purpose for which, both gentlemen contracted for, originally. This concept is also called commercial frustration.

2. Causes

To the individual experiencing frustration, the emotion may more times than not be attributed to external factors which are beyond their control. Although mild frustration due to internal factors (e.g. laziness, lack of effort) is often a positive force (inspiring motivation), it is more often than not a perceived uncontrolledproblem that instigates more severe, and perhaps pathological, frustration. An individual suffering from pathological frustration will often feel powerless to change the situation they are in, leading to frustration and, if left uncontrolled, further anger.

Frustration can be a result of blocking motivated behavior. An individual may react in several different ways. He may respond with rational problem-solving methods to overcome the barrier. Failing in this, he may become frustrated and behave irrationally. An example of blockage of motivational energy would be the case of the worker who wants time off to go fishing but is denied permission by his supervisor. Another example would be the executive who wants a promotion but finds he lacks certain qualifications. If, in these cases, an appeal to reason does not succeed in reducing the barrier or in developing some reasonable alternative approach, the frustrated individual may resort to less adaptive methods of trying to reach his goal. He may, for example, attack the barrier physically or verbally or both.

3. Symptoms

Frustration can be considered a problem-response behaviour, and can have a number of effects, depending on the mental health of the individual. In positive cases, this frustration will build until a level that is too great for the individual to contend with, and thus produce action directed at solving the inherent problem. In negative cases, however, the individual may perceive the source of frustration to be outside of their control, and thus the frustration will continue to build, leading eventually to further problematic behaviour (e.g. violent reaction).

Stubborn refusal to respond to new conditions affecting the goal, such as removal or modification of the barrier, sometimes occurs. As pointed out by Brown, severe punishment may cause individuals to continue nonadaptive behavior blindly: Either it may have an effect opposite to that of reward and as such, discourage the repetition of the act, or, by functioning as a frustrating agent, it may lead to fixation and the other symptoms of frustration as well. It follows that punishment is a dangerous tool, since it often has effects which are entirely the opposite of those desired .

4. Examples

The worker who is refused time off to go fishing may "cuss out" his supervisor to his face or behind his back. If he is sufficiently aroused, he may strike out at him with his fists or with the nearest weapon. If the supervisor is not present or the worker's fear of the consequences of direct attack is stronger than his desire to attack, he may transfer his aggression to someone or something else. Taking his frustration out on his family or on some object like his car or his equipment are typical ways of transferring aggression. Another "solution" to frustration is regressive behavior becoming childish or reverting to earlier and more primitive ways of coping with the goal barrier. Throwing a temper tantrum, bursting into tears, or sulking are examples of regression. Wearing a long face and a worried look are other signs of this method of dealing with frustration.

James Joyce's novel Dubliners depicts very accurately the dimensions of frustration and how it affects people. The adult characters in the book experience all stages of the emotion and the resulting "paralysis", the inability to actively change the situation. Joyce's characters are exemplary of how people usually deal with frustration.

In Section 2 of this course you will cover these topics:

- Discharge Of The Sales Agreement
- Reviewing A Contract

Topic : Discharge Of The Sales Agreement

Topic Objective:

At the end of this topic student would be able to:

- Understand the Relation to equitable remedies
- Learn about Equitable remedies

Definition/Overview:

Unclean hands, sometimes clean hands doctrine or dirty hands doctrine is an equitable defense in which the defendant argues that the plaintiff is not entitled to obtain an equitable remedy on account of the fact that the plaintiff is acting unethically or has acted in bad faith with respect to the subject of the complaintthat is, with "unclean hands". The defendant has

the burden of proof to show the plaintiff is not acting in good faith. The doctrine is often stated as "those seeking equity must do equity" or "equity must come with clean hands".
A defendant's unclean hands can also be claimed and proven by the plaintiff to claim other equitable remedies and to prevent that defendant from asserting equitable affirmative defenses. In other words, 'unclean hands' can be used offensively by the plaintiff as well as defensively by the defendant. Historically, the doctrine of unclean hands can be traced as far back as the Fourth Lateran Council.

Key Points:

1. Relation to equitable remedies

Equitable remedies are generally remedies other than the payment of damages. This would include such remedies as obtaining an injunction, or requiring specific performance of a contract. Before the development of the courts of equity in England, such remedies were unavailable in the common law courts. Such remedies were developed in the equity courts as the payment of damages was often not a sufficient remedy for a plaintiff in certain circumstances. For example, if a landowner polluted the land of the neighbor, the common law tort of nuisance would only allow the innocent party to recover damages. Common law had no remedy that would force the defendant to stop the pollution. Equity courts developed such a remedy, the injunction, that provided an ongoing bar to the activity that caused the damage.
Equity courts realized that such extraordinary remedies were only justified in extraordinary cases, and would generally not grant such a remedy where damages were sufficient to make the plaintiff whole. For example, if a car dealership broke a contract of sale and refused to deliver a particular car, which now could only be obtained for $10,000 more than what the plaintiff was willing to pay, the courts would merely award the plaintiff $10,000 (in addition to the original amount paid, if it had already been paid). It would not force the dealer to obtain the exact same car and sell it to the plaintiff. However, if the subject matter of the sale were a particular work of art, the court would order specific performance and require the sale of the art work.
However, equity courts also realized that these extraordinary remedies were subject to abuse. For example, if a doctor had signed a non-compete agreement with a clinic, the non-compete clause might prevent the doctor from earning a living if he left the clinic's employment. As such, the court will generally only grant these remedies on the strictest terms. If there is any

indication that the plaintiff seeking the remedy had acted in bad faith, either prior to the commencement of the litigation or afterwards, the court will generally not grant the remedy. For example, if the doctor left the clinic because it was involved in insurance fraud, a court would most likely refuse to enforce the non-compete agreement by issuing an injunction, although it might allow the clinic to recover damages if they did lose business to the doctor.

2. Equitable remedy

In law, **equitable remedies** are the remedies developed and granted by the old courts of equity, such as the Court of Chancery in England, and still available today in common law jurisdictions. Equity is said to operate on the conscience of the defendant, so an equitable remedy is always directed at a particular person, and his knowledge, state of mind and motives may be relevant to whether a remedy should be granted or not.

Equitable remedies are distinguished from "legal" remedies (which are available to a successful claimant as of right) by the discretion of the court to grant them. In common law jurisdictions, there are a variety of equitable remedies, but the principal remedies are:

- injunction
- specific performance
- Account of profits
- rescission
- declaratory relief
- rectification
- estoppel
- certain proprietary remedies, such as constructive trusts or tracing
- subrogation
- in very specific circumstances, an equitable lien

The two main equitable remedies are injunctions and specific performance, and in casual legal parlance references to equitable remedies are often expressed as referring to those two remedies alone. Injunctions may be mandatory (requiring a person to do something) or prohibitory (stopping them doing something). Specific performance requires a party to perform a contract, for example by transferring a piece of land to the claimant.

An account of profits is usually ordered where payment of damages would still leave the wrongdoer unjustly enriched at the expense of the wronged party. However, orders for an account are not normally available as of right, and only arise in certain circumstances. Rescission and rectification are remedies in relation to contracts (or, exceptionally, deeds) which may become available.

Constructive trusts and tracing remedies are usually used where the claimant asserts that property has been wrongly appropriated from them, and then either (i) the property has increased in value, and thus they should have an interest in the increase in value which occurred at their expense, or (ii) the property has been transferred by the wrongdoer to an innocent third party, and the original owner should be able to claim a right to the property as against the innocent third party.

Equitable liens normally only arise in very specific factual circumstances, such as unpaid vendor's lien.

Equitable principles can also limit the granting of equitable remedies. This includes "he who comes to equity must come with clean hands" (ie the court will not assist a claimant who is himself in the wrong or acting for improper motives), laches (equitable remedies will not be granted if the claimant has delayed unduly in seeking them), "equity will not assist a volunteer" (meaning that a person cannot litigate against a settlor without providing the appropriate consideration e.g. Money) and that equitable remedies will not normally be granted where damages would be an adequate remedy. The most important limitation relating to equitable remedies is that an equitable remedy will not lie against a bona fide purchaser for value without notice.

Interestingly, damages can also be awarded in "equity" as opposed to "at law", and in some legal systems, by historical accident, interest on damages can be awarded on a compound basis only on equitable damages, but not on damages awarded at law. However, most jurisdictions either have ended this anachronism, or evinced an intention to do so, by modernising legislation.

Topic : Reviewing A Contract

Topic Objective:

At the end of this topic student would be able to:

- Understand the Classification of term and Warranty
- Learn about Status as a term

- Learn about Implied terms

Definition/Overview:

A **contractual term** is "Any provision forming part of a contract" Each term gives rise to a contractual obligation, breach of which can give rise to litigation. Not all terms are stated expressly and some terms carry less legal gravity as they are peripheral to the objectives of the contract.

Key Points:

1. Classification of term and Warranty

Conditions are terms which go to the very root of a contract. Breach of these terms repudiate the contract, allowing the other party to discharge the contract. A warranty is not so imperative so the contract will subsist after a breach. Breach of either will give rise to damages. It is an objective matter of fact whether a term goes to the root of a contract. By way of illustration, an actress' obligation to perform the opening night of a theatrical production is a condition, whereas a singers obligation to perform during the first three days of rehearsal is a warranty.

2.Status as a term

Status as a term is important as a party can only take legal action for the non fulfillment of a term as opposed to representations or mere puffs. Legally speaking, only statements that amount to a term create contractual obligations. Statements can be split into the following types:

- **Puff (sales talk):** If no reasonable person hearing this statement would take it seriously, it is a puff, and no action in contract is available if the statement proves to be wrong. It may also be referred to as "puffery". This is common in television commercials.
- **Representation:** A representation is a statement of fact which does not amount to a term of the contract but it is one that the maker of the statement does not guarantee its truth. This gives rise to no contractual obligation but may amount to a tort, for example misrepresentation.
- **Term:** A term is similar to a representation, but the truth of the statement is guaranteed by the person who made the statement therefore giving rise to a contractual obligation. For the

purposes of Breach of Contract a term may further be categories as a condition, warranty or innominate term.

There are various factor that a court may take into account in determining the nature of a statement. These include:

- **Timing:** If the contract was concluded soon after the statement was made, this is a strong indication that the statement induced the person to enter into the contract. **Content of statement:** It is necessary to consider what was said in the given context, which has nothing to do with the importance of a statement.
- **Knowledge and expertise:** In Oscar Chess Ltd v. Williams, a person selling a car to a second-hand car dealer stated that it was a 1948 Morris, when in fact it was a 1939 model car. It was held that the statement did not become a term because a reasonable person in the position of the car dealer would not have thought that an inexperienced person would have guaranteed the truth of the statement.
- **Reduction into Writing:** Where the contract is consolidated into writing, previous spoken terms, omitted from the consolidation, will probably be relegated to representations. The old case of Birch v Paramount Estates Ltd. provided that a very important spoken term may persist even if omitted from the written consolidation; this case concerned the quality of a residential house.

The parol evidence rule limits what things can be taken into account when trying to interpret a contract. This rule has practically ceased operation under UK law, but remains functional in Australian Law.

3.Implied terms

A Term may either be expressed or implied. An Express term is stated by the parties during negotiation or written in a contractual document. Implied terms are not stated but nevertheless form a provision of the contract.

4. Course of dealing

If two parties have regularly conduct business on certain terms, the terms may be assumed to be same for each contract made, if not expressly agreed to the contrary. The parties must have dealt on numerous occasions and been aware of the term purported to be implied. In Hollier v Rambler Motors Ltd. four occasions over five years was held to be sufficient. In British

Crane Hire Corp. Ltd. v Ipswitch Plant Hire Ltd. written terms were held to have been implied into an oral in which there was no mention of written terms.

5. Good faith

It is common for lengthy negotiations to be written into a heads of agreement document that includes a clause to the effect that the rest of the agreement is to be negotiated. Although these cases may appear to fall into the category of agreement to agree, Australian courts will imply an obligation to negotiate in good faith provided that certain conditions are satisfied

- Negotiations were well-advanced and the large proportion of terms have been worked out; and
- There exists some mechanism to resolve disputes if the negotiations broke down.

The test of whether one has acted in good faith is a subjective one; the cases suggest honesty, and possibly also reasonably. There is no such implied term under UK common law: an attempt was made by Lord Denning in a series of case during the 70s and 80s but they are no longer considered 'good law'. European legislation imposes this duty, but only in certain circumstances.

The Unfair Terms in Consumer Contracts Regulations 1999 reg 8 will render ineffective any 'unfair' contractual term if made between a seller or supplier and a consumer. Regulation 5 of the Statutory Instrument further elaborates upon the concept of 'unfair', which is rather novel to English law. 'Unfair' is a term that was not individually negotiated (i.e. standard form) that "causes a significant imbalance in the parties' rights and obligations arising under contract to the detriment of the consumer". This is not possible if the term is not contrary to 'good faith'; such as in Director General of Fair Trading v First National Bank, wherein the lack of a seemingly unfair interest term would leave the bank open to a very poor deal whereby no interest could be charged.

6. Subject to contracts

If a contract specifies "subject to contract", it may fall into one of three categories:

- The parties are immediately bound to the bargain, but they intend to restate the deal in a formalised contract that will not have a different effect; or
- The parties have completely agreed to the terms, but have made the execution of some terms in the contract conditional on the creation of a formalised contract; or

- It is merely an agreement to agree, and the deal will not be concluded until the formalised contract has been drawn up.

If a contract specifies "subject to finance", it imposes obligations on the purchaser:

- The purchaser must seek finance; and
- When offers of finance arrive, the purchaser must make a decision as to whether the offers of finance are suitable.

This may also refer to contingent conditions, which come under two categories: condition precedent and condition subsequent. Conditions precedent are conditions that have to be complied with before performance of a contract With conditions subsequent, parties have to perform until the condition is not met. Failure of a condition repudiates the contract this is not to necessarily discharge it. Repudiation will always gives rise to an action for damages.
In Section 3 of this course you will cover these topics:
Contract Language
Commercial Paper

Topic : Contract Language

Topic Objective:

At the end of this topic student would be able to:

- Understand the signs and conditions of contracts
- Learn about the Proposition
- UnderstandArguments related to Contract language

Definition/Overview:

Signs by inference are sometimes the consequence of words; sometimes the consequence of silence; sometimes the consequence of actions; sometimes the consequence of forbearing an action: and generally a sign by inference, of any contract, is whatsoever sufficiently argues the will of the contractor. Words alone, if they be of time to come, and contain a bare promise, are an insufficient sign of a free gift and therefore not obligatory.

Key Points:

1. **The signs and conditions of contracts**

Express are words spoken with understanding of what they signify: and such words are either of the time present or past; as, I give, I grant, I have given, I have granted, I will that this be yours: or of the future; as, I will give, I will grant, which words of the future are called promise.Signs by inference are sometimes the consequence of words; sometimes the consequence of silence; sometimes the consequence of actions; sometimes the consequence of forbearing an action: and generally a sign by inference, of any contract, is whatsoever sufficiently argues the will of the contractor. Words alone, if they be of time to come, and contain a bare promise, are an insufficient sign of a free gift and therefore not obligatory.

2. **Proposition**

Contracts are invalidated only by some new fact.

The cause of fear, which make such a covenant invalid, must be always something arising after the covenant made, as some new fact or other sign of the will not to perform, else it cannot make the covenant void. For that which could not hinder a man from promising ought not to be admitted as a hindrance of performing.

Hobbes, Lev XIV 20

3. Argument

Any contract not to defend oneself against death, or to accuse oneself, is void.

A covenant not to defend myself from force, by force, is always void. For (as I have shown before) no man can transfer or lay down his right to save himself from death, wounds, and imprisonment, the avoiding whereof is the only end of laying down any right; and therefore the promise of not resisting force, in no covenant transfer any right, nor is obliging. For though a man may covenant thus, unless I do so, or so, kill me; he cannot covenant thus, unless I do so, or so, I will not resist you when you come to kill me. For man by nature choose the lesser evil, which is a danger of death in resisting, rather than the greater, which is certain and present death in not resisting. And this is granted to be true by all men, in that they lead criminals to execution, and prison, with armed men, notwithstanding that such criminals have consented to the law by which they are condemned.

A covenant to accuse oneself, without assurance of pardon, is likewise invalid. For in the condition of nature where every man is judge, there is no place for accusation: and in the civil state the accusation is followed with punishment, which, being force, a man is not obliged not to resist. The same is also true of the accusation of those by whose condemnation a man falls

into misery; as of a father, wife, or benefactor. For the testimony of such an accuser, if it be not willingly given, is presumed to be corrupted by nature, and therefore not to be received: and where a man's testimony is not to be credited, he is not bound to give it. Also accusations upon torture are not to be reputed as testimonies. For torture is to be used but as means of conjecture, and light, in the further examination and search of truth: and what is in that case confessed tendeth to the ease of him that is tortured, not to the informing of the torturers, and therefore ought not to have the credit of a sufficient testimony: for whether he deliver himself by true or false accusation, he does it by the right of preserving his own life.

4. Semantics

Each word and phrase in our language has a clear standard meaning. As a result, contracts can be drafted that will be far less subject to disputes over interpretation. On the other hand, the language is not very good at expressing many subjective and ambiguous concepts that are often necessary in contracts. Nor is it any good, in its present state, in referring to jurisdictions or doctrines of law. The language is nevertheless very different from a traditional programming language. Contractual terms are defined in terms of events that trigger their performance. Such events include dates and times, choices made by the parties, observable breaches of contract, and so on.

Our language is not a markup language. It is not about manipulating text for the purposes of drafting contracts. It is not about structuring text, specifying fill-out forms, defining static data formats, or similar tasks of languages such as HTML or XML. For those tasks one should use a markup language, or a text-manipulating programming language (e.g. Perl), not this language. Our language does something very different. It models the dynamics of contract performance -- when and under what conditions obligations should be performed.

The words and sentences of the language do not consist of instructions followed down the page from one step to the next. Instead, a contract is read (both by human and computer) by following nested definitions of contractual terms as they expand, and by looking at events in when statements and seeing what they trigger. If the drafter does need to explicitly construct a step by step calendar schedule, this can be done by using calendar-driven events or words like for and then.

The language encourages composition of contracts. Contracts, rights, and obligations can be nested. We call these nested structures clauses. Contracts and clauses involve two parties, the Holder, from whose point of view we read the contract, and a Counterparty. Multi-party agreements can be drafted by composing several two-party contracts.

Topic : Commercial Paper

Topic Objective:

At the end of this topic student would be able to:

- Understand the meaning of Issuance
- Learn about Line of credit
- Understand the meaning of Defaults

Definition/Overview:

Commercial paper is an unsecured promissory note with a fixed maturity of one to 270 days. Commercial Paper is a money-market security issued (sold) by large banks and corporations to get money to meet short term debt obligations (for example, payroll), and is only backed by an issuing bank or corporation's promise to pay the face amount on the maturity date specified on the note. Since it is not backed by collateral, only firms with excellent credit ratings from a recognized rating agency will be able to sell their commercial paper at a reasonable price. Commercial paper is usually sold at a discount from face value, and carries shorter repayment dates than bonds. The longer the maturity on a note, the higher the interest rate the issuing institution must pay. Interest rates fluctuate with market conditions, but are typically lower than banks' rates.

As defined by American law, commercial paper is a financial instrument that matures before nine months (270 days), and is only used to fund operating expenses or current assets (e.g., inventories and receivables) and not used for financing fixed assets, such as land, buildings, or machinery. By meeting these qualifications it may be issued without U.S.federal government regulation, that is, it need not be registered with the U.S. Securities and Exchange Commission. Commercial paper is a type of negotiable instrument, where the legal rights and obligations of involved parties are governed by Articles Three and Four of the Uniform Commercial Code, a set of non-federal business laws adopted by each of the 50 U.S. States.

Commercial paper is defined in Canada as having maturity of not more than one year and is exempt from the dealer registration and prospectus requirements.

At the end of 2007, more than 1,700 companies in the United States issue commercial paper. As of 2008 October 31, the U.S. Federal Reserve reported seasonally adjusted figures for the

end of 2007: there was $1.7807 trillion (short-scale, or 1,780,700,000,000) in total outstanding commercial paper; $801.3 billion was "asset backed" and $979.4 billion was not; $162.7 billion of the latter was issued by non-financial corporations, and $816.7 billion was issued by financial corporations.

Key Points:

1. Issuance

There are two methods of issuing paper. The issuer can market the securities directly to a buy and hold investor such as most money funds. Alternatively, it can sell the paper to a dealer, who then sells the paper in the market. The dealer market for commercial paper involves large securities firms and subsidiaries of bank holding companies. Most of these firms also are dealers in US Treasury securities. Direct issuers of commercial paper usually are financial companies that have frequent and sizable borrowing needs and find it more economical to sell paper without the use of an intermediary. In the United States, direct issuers save a dealer fee of approximately 5 basis points, or 0.05% annualized, which translates to $50,000 on every $100 million outstanding. This saving compensates for the cost of maintaining a permanent sales staff to market the paper. Dealer fees tend to be lower outside the United States.

2.Line of credit

Commercial paper is a lower cost alternative to a line of credit with a bank. Once a business becomes established, and builds a high credit rating, it is often cheaper to draw on a commercial paper than on a bank line of credit. Nevertheless, many companies still maintain bank lines of credit as a "backup". Banks often charge fees for the amount of the line of credit that does not have a balance. While these fees may seem like pure profit for banks, if the company ever actually needs to use the line of credit, it would likely be in serious trouble and have difficulty repaying its liabilities.

3.Defaults

Defaults on high quality commercial paper are rare, and cause concern when they occur. Notable examples include:

- On June 1970, Penn Central defaulted on a debt of $82 million

  This led to Fed intervention.

- On January 31, 1997, Mercury Finance, a major automotive lender, defaulted on a debt of $17 million, rising to $315 million.

  Effects were small, partly because default occurred during a robust economy.

- On September 15, 2008, Lehman Brothers caused two money funds to break the buck, and led to Fed intervention in money market funds.
  - In Section 4 of this course you will cover these topics:

The Study Of Contract Law

Foundation Of The Contract

Topic : The Study Of Contract Law

Topic Objective:

At the end of this topic student would be able to:

- Learn about Bilateral v. unilateral contracts
- Identify Contractual terms
- Learn about Classification of term
- Understand basic concepts about Common law
- Learn about Statutory
- Identify Remedies for breach of contract

Definition/Overview:

Agreement is said to be reached when an offer capable of immediate acceptance is met with a "mirror image" acceptance (ie, an unqualified acceptance). The parties must have the necessary capacity to contract and the contract must not be either trifling, indeterminate, impossible or illegal. Contract law is based on the principle expressed in the Latin phrase pacta sunt servanda (usually translated "pacts must be kept", but more literally "agreements are to be kept"). Breach of the contract is recognized by the law and remedies can be provided. Sometimes written contracts are required, such as when buying a house. However, most contracts can be and are made orally, such as purchasing a book or a sandwich. Contract law can be classified, as is habitual in civil law systems, as part of a general law of obligations (along with tort, unjust enrichment or restitution).

Contract: A contract is an exchange of promises between two or more parties to do, or refrain from doing, an act which is enforceable in a court of law. It is a binding legal agreement. That is to say, a contract is an exchange of promises for breach of which the law will provide a remedy.

Key Points:

1. Bilateral v. unilateral contracts

Contracts may be bilateral or unilateral. The more common of the two, a bilateral contract, is an agreement in which each of the parties to the contract makes a promise or promises to the other party. For example, in a contract for the sale of a home, the buyer promises to pay the seller $200,000 in exchange for the seller's promise to deliver title to the property.

In a unilateral contract, only one party to the contract makes a promise. A typical example is the reward contract: A promises to pay a reward to B if B finds A's dog. B is not obliged to find A's dog, but A is obliged to pay the reward to B if B finds the dog. In this example, the finding of the dog is a condition precedent to A's obligation to pay.

An offer of a unilateral contract may often be made to many people (or 'to the world') by means of an advertisement. In that situation, acceptance will only occur on satisfaction of the condition (such as the finding of the offeror's dog). If the condition is something that only one party can perform, both the offeror and offeree are protected the offeror is protected because he will only ever be contractually obliged to one of the many offerees; and the offeree is protected, because if she does perform the condition, the offeror will be contractually obliged to pay her.

In unilateral contracts, the requirement that acceptance be communicated to the offeror is waived. The offeree accepts by performing the condition, and the offeree's performance is also treated as the price, or consideration, for the offeror's promise. A common type of unilateral contract is the offer of a reward, E.G., 'Dog Lost, Answers to Bad Wolf, 50 reward for the safe return'. This is unilateral because although the offeror commits to paying 50 if the dog is safely returned, nobody is actually contractually committed to finding and returning the dog.

Courts generally favour bilateral contracts. The general rule in the United States is: "In case of doubt, an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses." Restatement (Second) of Contracts 32 (1981) (emphasis added). Here the law attempts to

provide some protection from the risk of revocation in a unilateral contract to the offeree. Note that if the offer specifically requests performance rather than a promise, a unilateral contract will exist.

2. Contractual terms

A contractual term is "[a]ny provision forming part of a contract". Each term gives rise to a contractual obligation, breach of which can give rise to litigation. Not all terms are stated expressly and some terms carry less legal weight as they are peripheral to the objectives of the contract.

2.1. Boilerplate

As discussed in Tina L. Stark's Negotiating and Drafting Contract Boilerplate, when lawyers refer to a boilerplate provision, they are referring to any standardized, one size fits all contract provision. But lawyers also use the term in a more narrow context to refer to certain provisions that appear at the end of the contract. Typically, these provisions tell the parties how to govern their relationship and administer the contract. Although often thought to be of secondary importance, these provisions have significant business and legal consequences. Common provisions include the governing law provision, venue, assignment and delegation provisions, waiver of jury trial provisions, notice provisions, and force majeure provisions.

3. Classification of term

3.1 Condition or Warranty. Conditions are terms which go to the very root of a contract. Breach of these terms repudiate the contract, allowing the other party to discharge the contract. A warranty is not so imperative so the contract will subsist after a warranty breach. Breach of either will give rise to damages.

It is an objective matter of fact whether a term goes to the root of a contract. By way of illustration, an actress' obligation to perform the opening night of a theatrical production is a condition, whereas a singers obligation to perform during the first three days of rehearsal is a warranty.
Statute may also declare a term or nature of the term to be a condition or warranty; for example the Sale of Goods Act 1979 s15A provides that terms as to the title,

description, quality and sample (as described in the Act) are conditions save in certain defined circumstances.

3.2 Innominate term. Lord Diplock, in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., created the concept of an innominate term, breach of which may or not go to the root of the contract depending upon the nature of the breach. Breach of these terms, as with all terms, will give rise to damages. Whether or not it repudiates the contract depends upon whether legal benefit of the contract has been removed from the innocent party. Megaw LJ, in 1970, preferred the legal certainty of using the classic categories of condition or warranty. This was interpreted by the House of Lords as merely restricting its application in Reardon Smith Line Ltd. v Hansen-Tangen.

3.3 Status as a term

Status as a term is important as a party can only take legal action for the non fulfillment of a term as opposed to representations or mere puffery. Legally speaking, only statements that amount to a term create contractual obligations. There are various factor that a court may take into account in determining the nature of a statement. In particular, the importance apparently placed on the statement by the parties at the time the contract is made is likely to be significant. In Bannerman v. White it was held a term of a contract for sale and purchase of hops that they had not been treated with sulphur, since the buyer made very explicit his unwillingness to accept hops so treated, saying that he had no use for them. The relative knowledge of the parties may also be a factor, as in Bissett v. Wilkinson in which a statement that farmland being sold would carry 2000 sheep if worked by one team was held merely a representation (it was also only an opinion and therefore not actionable as misrepresentation). The reason this was not a term was that the seller had no basis for making the statement, as the buyer knew, and the buyer was prepared to rely on his own and his son's knowledge of farming.

3.4. Implied terms

A term may either be express or implied. An express term is stated by the parties during negotiation or written in a contractual document. Implied terms are not stated

but nevertheless form a provision of the contract. Terms may be implied due to the facts of the proceedings by which the contract was formed. The Privy Council proposed a five stage test in BP Refinery Westernport v. Shire of Hastings. to determine situations where the facts of a case may imply terms (this only applies to formal contracts in Australia). However, the English Court of Appeal sounded a note of caution with regard to the BP case in Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd in which the Master of the Rolls described the test as "almost misleading" in its simplicity. The classic tests have been the "business efficacy test" and the "officious bystander test". The first of these was proposed by Lord Justice Bowen in The Moorcock. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied - the bare minimum to achieve this goal. The officious bystander test derives its name from the judgment of Lord Justice Mackinnon in Shirlaw v. Southern Foundries (1926) Ltd but the test actually originates in the judgment of Lord Justice Scrutton in Reigate v. Union Manufacturing Co (Ramsbottom) Ltd This test is that a term can only be implied in fact if it is such a term that had an "officious bystander" listening to the contract negotiations suggested that they should include this term the parties would "dismiss him with a common 'Oh of course!'". It is at least questionable whether this is truly a separate test or just a description of how one might go about arriving at a decision on the basis of the business efficacy test.

Some jurisdictions, notably Australia, Israeland India, imply a term of good faith into contracts. A final way in which terms may be implied due to fact is through a previous course of dealing or common trade practice. The Uniform Commercial Code of the United States also imposes a duty of good faith in performance and enforcement of contracts covered by the Code, which cannot be derogated from.

4. Common law

- Liverpool City Council v. Irwin established a term to be implied into all contracts between tenant and landlord in multistory blocks that the landlord is obliged to take reasonable care to keep the common areas in a reasonable state of repair.

- Wong Mee Wan v Kwan Kin Travel Services Ltd. established that when a tour operator contracts to for the sale of goods.

  These terms will be implied into all contracts of the same nature as a matter of law.

5. Statutory

The rules by which many contracts are governed are provided in specialized statutes that deal with particular subjects. Most countries, for example, have statutes which deal directly with the sale of goods, lease transactions, and trade practices. For example, most American states have adopted Article 2 of the Uniform Commercial Code, which regulates contracts for the sale of goods. The most important legislation implying terms under United Kingdom law are the Sale of Goods Act 1979, the Consumer Protection (Distance Selling) Regulations 2000 and the Supply of Goods and Services Act 1982 which imply terms into all contracts whereby goods are sold or services provided. Three ways of evaluating a contracted exchange as coercive or voluntary:

- Moral consideration: Objective consideration of right or wrong outside of the objective cause, or the perceived cause. Example: X occurs everyday at 5 pm. X is wrong. Anything that avoids X is good, allowing X, even if all parties agree, is bad.
- Phenomenological consideration - what models did the participants have which influenced the perception of what was to occur or what had occurred. Example: I observe X,Y every day at 5 pm. I contract against X. Today I did / did not see Y occur.
- Statistical consideration - did the participants have a statistical prediction, likelihood of an event occurring which is covered by the contract. Example: X happens every day at 5 pm, I enter a contract to avoid X. X does or does not occur.

6. Remedies for breach of contract

A breach of contract is failure to perform as stated in the contract. There are many ways to remedy a breached contract assuming it has not been waived. Typically, the remedy for breach of contract is an award of money damages. When dealing with unique subject matter, specific performance may be ordered. As for many governments, it was not possible to sue the Crown in the UK for breach of contract before 1948. However, it was appreciated that

contractors might be reluctant to deal on such a basis and claims were entertained under a petition of right that needed to be endorsed by the Home Secretary and Attorney-General. S.1 Crown Proceedings Act 1947 opened the Crown to ordinary contractual claims through the courts as for any other person.

6.1. Damages

There are five different types of damages. Firstly, Compensatory damages which are given to the party which was detrimented by the breach of contract. With compensatory damages, there are two heads of loss, consequential damage and direct damage. Secondly, Exemplary damages which are used to make an example of the party at fault to discourage similar crimes. Fines can be multiplied by factors of up to 50 for such damages. Some jurisdictions do not allow exemplary damages for breach of contract, eg, England & Wales. Thirdly, Liquidated Damages really a pre-estimate of loss agreed upon in the contract, so that the court is saved the process of calculating compensatory damages and the parties have greater certainty. Liquidated damages clauses are often called "penalty clauses" in ordinary language, but the law distinguishes between liquidated damages (legitimate) and penalties (invalid). A penalty clause is one which is intended to operate "in terrorem" to deter breach and are typically excessive in amount compared with the greatest loss which the parties could have anticipated as resulting from breach at the time the contract was made (though it will still be an invalid penalty if circumstances change and the sum is reasonable by the time of the actual breach). The parties' terminology is not determinative and the court will decide whether the clause is a penalty or one for liquidated damages. A test for determining which category a clause falls into was established by the English House of Lords in Dunlop Pneumatic Tyre Co. Ltd v. New Garage & Motor Co. Ltd. Fourthly, Nominal damages which consist of a small cash amount where the court concludes that the defendant is in breach but the plaintiff has suffered no quantifiable pecuniary loss (often sought to obtain a legal record of who was at fault). Fifthly, Punitive damages which are used to punish the party at fault. These are not usually given regarding contracts but possible in a fraudulent situation. Again, these are not permitted in all jurisdictions, with England & Wales, for instance, prohibiting them.

Compensatory damages aim at compensating the plaintiff for actual losses suffered as accurately as possible. They may be "expectation damages", "reliance damages" or "restitutionary damages". Expectation damages are awarded to put the party in as good of a position as the party would have been in had the contract been performed as promised. The court assesses what the likely benefit to the plaintiff of the proper performance of the contract would have been, on a balance of probabilities. Reliance damages are usually awarded where no reasonably reliable estimate of expectation loss can be arrived at, or at the option of the plaintiff (the plaint will include a claim by the plaintiff for damages, so the plaintiff sets the agenda to extent). Reliance losses cover expense suffered in reliance on the promise made by the defendant which the defendant has breached, rather than lost profits. Examples where reliance damages have been awarded because profits are too speculative include the Australian case of McRae v. Commonwealth Disposals Commission which concerned a contract for the rights to salvage a ship which was not in fact there. It was not possible to evaluate with any reliability the profits that might have been made, given the risks and uncertainties of the venture, but the plaintiff's expenditure in conducting a fruitless search for the vessel could be awarded. In Anglia Television Ltd v. Reed the English Court of Appeal went so far as to award the plaintiff expenditure incurred before the contract was executed, in preparation for performance of the contract, when a contract was subsequently executed and then breached by the defendant. Furthermore, once a breach has occurred, the non-breaching party is said to have a duty to mitigate damages. Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation. The UCC states, "Consequential damages... include any loss... which could not reasonably be prevented by cover or otherwise." UCC 2-715. In English law the chief authority on mitigation is British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railway Co. of London[1912] AC 673, but Professor Michael Furmston having stated that the rule is that a plaintiff will not recover damages for loss that would not have occurred had he taken reasonable steps to mitigate loss, has warned that "it is wrong to express this rule by stating that the plaintiff is under a duty to mitigate his loss",

Hadley v. Baxendale establishes general and consequential damages. General damages are those damages which naturally flow from a breach of contract. Consequential damages are those damages which, although not naturally flowing

from a breach, are naturally supposed by both parties at the time of contract formation. An example would be when someone rents a car to get to a business meeting, but when that person arrives to pick up the car, it is not there. General damages would be the cost of renting a different car. Consequential damages would be the lost business if that person was unable to get to the meeting, if both parties knew the reason the party was renting the car. However, there is still a duty to cover; the fact that the car was not there does not give the party a right to not attempt to rent another car.

Whenever you have a contract that requires completing something, and a person informs you before they begin your project that it will not be completed, this is referred to as anticipatory breach. When it is neither possible nor desirable to award damages measured in that way, a court may award money damages designed to restore the injured party to the economic position that he or she had occupied at the time the contract was entered (known as the "reliance measure"), or designed to prevent the breaching party from being unjustly enriched ("restitution").

6.2. Specific performance

There may be circumstances in which it would be unjust to permit the defaulting party simply to buy out the injured party with damages. For example where an art collector purchases a rare painting and the vendor refuses to deliver, the collector's damages would be equal to the sum paid. The court may make an order of what is called "specific performance", requiring that the contract be performed. In some circumstances a court will order a party to perform his or her promise (an order of "specific performance") or issue an order, known as an "injunction," that a party refrain from doing something that would breach the contract. A specific performance is obtainable for breach of a contract to sell land or real estate on such grounds that the property has a unique value. In the United States, specific performance is an illegal remedy for personal services contracts or employment contracts, due to the fact that such remedy is regarded as involuntary servitude, which, by way of the 13th Amendment to the United States Constitution, is only legal "as punishment for a crime whereof the criminal shall be dully convicted."

Both an order for specific performance and an injunction are discretionary remedies, originating for the most part in equity. Neither is available as of right and in most

jurisdictions and most circumstances a court will not normally order specific performance. A contract for the sale of real property is a notable exception. In most jurisdictions, the sale of real property is enforceable by specific performance. Even in this case the defenses to an action in equity (such as laches, the bona fide purchaser rule, or unclean hands) may act as a bar to specific performance.
Related to orders for specific performance, an injunction may be requested when the contract prohibits a certain action. Action for injunction would prohibit the person from performing the act specified in the contract.

6.3. Procedure

In the United States, in order to obtain damages for breach of contract or to obtain specific performance or other equitable relief, the aggrieved injured party may file a civil (non-criminal) lawsuit in state court (unless there is diversity of citizenship giving rise to federal jurisdiction). If the contract contains an arbitration clause, the aggrieved party must submit an arbitration claim in accordance with the procedures set forth in the agreement. Many contracts provide that all disputes arising thereunder will be resolved by arbitration, rather than litigated in courts. Customer claims against securities brokers and dealers are almost always resolved by arbitration because securities dealers are required, under the terms of their membership in self-regulatory organizations such as the NASD or NYSE to arbitrate disputes with their customers. The firms then began including arbitration agreements in their customer agreements, requiring their customers to arbitrate disputes. On the other hand, certain claims have been held to be non-arbitrable if they implicate a public interest that goes beyond the narrow interests of the parties to the agreement (i.e., claims that a party violated a contract by engaging in illegal anti-competitive conduct or civil rights violations). Arbitration judgments may generally be enforced in the same manner as ordinary court judgments. However, arbitral decisions are generally immune from appeal in the United States unless there is a showing that the arbitrator's decision was irrational or tainted by fraud. Virtually all states have adopted the Uniform Arbitration Act to facilitate the enforcement of arbitrated judgments. Notably, New York State, where a sizable portion of major commercial agreements are executed and performed, has not adopted the Uniform Arbitration Act.

In Englandand Wales, a contract may be enforced by use of a claim, or in urgent cases by applying for an interim injunction to prevent a breach. Likewise, in the United States, an aggrieved party may apply for injunctive relief to prevent a threatened breach of contract, where such breach would result in irreparable harm that could not be adequately remedied by money damages.

Topic : Foundation Of The Contract

Topic Objective:

At the end of this topic student would be able to:

- Learn about Contractual theory
- Learn about Contractual formation

Definition/Overview:

Contract theory: Contract theory is the body of legal theory that addresses normative and conceptual questions in contract law. One of the most important questions asked in contract theory is why contracts are enforced. One prominent answer to this question focuses on the economic benefits of enforcing bargains. Another approach, associated with Charles Fried, maintains that the purpose of contract law is to enforce promises.

Key Points:

1. Contractual theory

This theory is developed in Fried's book, Contract as Promise. Other approaches to contract theory are found in the writings of legal realists and critical legal studies theorists. More generally, writers have propounded Marxist and feminist interpretations of contract. Attempts at overarching understandings of the purpose and nature of contract as a phenomenon have been made, notably 'relational contract theory' originally developed by U.S. contracts scholars Ian Roderick Macneil and Stewart Macaulay, building at least in part on the contract theory work of U.S. scholar Lon L. Fuller, while U.S. scholars have been at the forefront of developing economic theories of contract focussing on questions of transaction cost and so-called 'efficient breach' theory.

Another dimension of the theoretical debate in the contract is its place within, and relationship to a the wider law of obligations. Obligations have traditionally been divided into contracts, which are voluntarily undertaken and owed to specific person or persons, and obligations in tort which are based on the wrongful infliction of harm to certain protected interests, primarily imposed by the law, and typically owed to a wider class of persons. Recently it has been accepted that there is a third category, restitutionary obligations, based on the unjust enrichment of the defendant at the plaintiffs expense. Contractual liability, reflecting the constitutive function of the contract, is generally for failing to make things better (by not rendering the expected performance), liability in tort is generally for action (as opposed to omission) making things worse, and liability in restitution is for unjustly taking or retaining the benefit of the plaintiffs money or work. Compare with the U.S. context, the Uniform Commercial Code defining "Contract" as "the total legal obligation which results from the parties agreement" and does not attempt to state what act is essential to create a legal duty to perform a promise. The common law describes the circumstances under which the law will recognise the existence of rights, privilege or power arising out of a promise.

2. Contractual formation

In common law systems, the five key requirements for the creation of a contract are: 1. offer and acceptance (agreement) 2. consideration 3. an intention to create legal relations 4. legal capacity 5. formalities In civil law systems, the concept of consideration is not central. In addition, for some contracts formalities must be complied with under what is sometimes called a statute of frauds. One of the most famous cases on forming a contract is Carlill v. Carbolic Smoke Ball Company decided in nineteenth-century England. A medical firm advertised that its new wonder drug, a smoke ball, would prevent the catching of flu by those who used it in accordance with instructions, and if it did not, buyers would receive 100. When sued, Carbolic argued the ad was not to be taken as a serious, legally binding offer. It was merely an invitation to treat, and a gimmick. But the court of appeal held that it would appear to a reasonable man that Carbolic had made a serious offer, primarily because of the reference to the 1000 deposited into the bank. People had given good "consideration" for it by going to the "distinct inconvenience" of using a faulty product. "Read the advertisement how you will, and twist it about as you will," said Lindley LJ, "here is a distinct promise expressed in language which is perfectly unmistakable".

Where a product in large quantities is advertised in a newspaper or on a poster, it may be an offer, but generally speaking it will be regarded as an invitation to treat, since even when large stock is held it is still limited, whilst the response to an advertisement may be unlimited. This was the basis of the decision in Partridge v. Crittenden a criminal case in which the defendant was charged with "offering for sale" bramblefinch cocks and hens. The court held that the newspaper advertisement could only be an invitation to treat, since it could not have been intended as an offer to the world, so the defendant was not guilty of "offering" them for sale. Similarly, a display of goods in a shop window is an invitation to treat, as was held in Fisher v. Bell another criminal case which turned on the correct analysis of offers as against invitations to treat. In this instance the defendant was charged with "offering for sale" prohibited kinds of knife, which he had displayed in his shop window with prices attached. The court held that this was an invitation to treat, the offer would be made by a purchaser going into the shop and asking to buy a knife, with acceptance being by the shopkeeper, which he could withhold. (The law was later amended to "exposing for sale".) A display of goods on the shelves of a self-service shop is also an invitation to treat, with the offer being made by the purchaser at the checkout and being accepted by the shop assistant operating the checkout: Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd. If the person who is to buy the advertised product is of importance, for instance because of his personality, etc., when buying land, it is regarded merely as an invitation to treat. In Carbolic Smoke Ball, the major difference was that a reward was included in the advertisement, which is a general exception to the rule and is then treated as an offer.

2.1. Offer and acceptance

The most important feature of a contract is that one party makes an **offer** for an arrangement that another **accepts**. This can be called a 'concurrence of wills' or 'ad idem' (meeting of the minds) of two or more parties. The concept is somewhat contested. The obvious objection is that a court cannot read minds and the existence or otherwise of the agreement is judged objectively, with only limited room for questioning subjective intention: Richard Austen-Baker has suggested that the perpetuation of the idea of 'meeting of minds' may come from a misunderstanding of the Latin term 'consensus ad idem', which actually means 'agreement to the [same] thing'. There must be evidence that the parties had each from an objective perspective engaged in conduct manifesting their assent, and a **contract**will be formed when the

parties have met such a requirement. An objective perspective means that it is only necessary that somebody gives the impression of offering or accepting contractual terms in the eyes of a reasonable person, not that they actually did want to form a contract.

The case of Carlill v. Carbolic Smoke Ball Co. (above) is an example of 'unilateral contract', obligations are only imposed upon one party upon acceptance by performance of a condition. In the U.S., the general rule is that in "case of doubt, an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests orby rendering the performance, as the offeree chooses."

Offer and acceptance does not always need to be expressed orally or in writing. An implied contract is one in which some of the terms are not expressed in words. This can take two forms. A contract which is implied in fact is one in which the circumstances imply that parties have reached an agreement even though they have not done so expressly. For example, by going to a doctor for a checkup, a patient agrees that he will pay a fair price for the service. If one refuses to pay after being examined, the patient has breached a contract implied in fact. A contract which is implied in law is also called a quasi-contract, because it is not in fact a contract; rather, it is a means for the courts to remedy situations in which one party would be unjustly enriched were he or she not required to compensate the other. For example, a plumber accidentally installs a sprinkler system in the lawn of the wrong house. The owner of the house had learned the previous day that his neighbor was getting new sprinklers. That morning, he sees the plumber installing them in his lawn. Pleased at the mistake, he says nothing, and then refuses to pay when the plumber delivers the bill. Will the man be held liable for payment? Yes, if it could be proven that the man knew that the sprinklers were being installed mistakenly, the court would make him pay because of a quasi-contract. If that knowledge could not be proven, he would not be liable. Such a claim is also referred to as "quantum meruit".

2.2. Consideration and estoppel

Consideration is known as 'the price of a promise' and is a controversial requirement for contracts under common law. It is not necessary in all common law or civil law systems, and is considered by some to be unnecessary as the requirement of intention to create legal relations by both parties meets the same requirement under contract.

The reason that both exist in common law jurisdictions is thought by leading scholars to be the result of the combining by 19th century judges of two distinct threads: first the consideration requirement was at the heart of the action of assumpsit, which had grown up in the middle ages and remained the normal action for breach of a simple contract in England & Wales until 1884, when the old forms of action were abolished; secondly, the notion of agreement between two or more parties as being the essential legal and moral foundation of contract in all legal systems, promoted by the 18th century French writer Pothier in hisTraite des Obligations, much read (especially after translation into English in 1805) by English judges and jurists. The latter chimed well with the fashionable will theories of the time, especially John Stuart Mill's influential ideas on free will, and got grafted on to the traditional common law requirement for consideration to ground an action in assumpsit. The idea is that both parties to a contract must bring something to the bargain, that both parties must confer some benefit or detriment (for example, money, however in some cases money will not suffice as consideration - eg when one party agrees to make a part payment of a debt in exchange for being released from the full amount). This can be either conferring an advantage on the other party, or incurring some kind of detriment or inconvenience towards oneself. Three rules govern consideration.

- Consideration must be real, but need not be adequate. For instance, agreeing to buy a car for a penny may constitute a binding contract. While consideration need not be adequate, contracts in which the consideration of one party greatly exceeds that of another may nevertheless be held invalid for lack of real consideration. In such cases, the fact that consideration is exceedingly inadequate can be evidence that there was no consideration at all. Such contracts may also be held invalid for other reasons such as fraud, duress, or being contrary to public policy. In some situations, a collateral contract may exist, whereby the existence of one contract provides consideration for another. Critics say consideration can be so small as to make the requirement of any consideration meaningless.
- Consideration must not be from the past. For instance, in Eastwood v. Kenyon, the guardian of a young girl obtained a loan to educate the girl and to improve her marriage prospects. After her marriage, her husband promised to pay off the loan. It was held that the guardian could not enforce the promise because taking out the loan to raise and educate the girl was past consideration--it was completed before the husband promised to repay it.

- Consideration must move from the promisee. For instance, it is good consideration for person A to pay person C in return for services rendered by person B. If there are joint promisees, then consideration need only to move from one of the promisees.

Civil law systems take the approach that an exchange of promises, or a concurrence of wills alone, rather than an exchange in valuable rights is the correct basis. So if you promised to give me a book, and I accepted your offer without giving anything in return, I would have a legal right to the book and you could not change your mind about giving me it as a gift. However, in common law systems the concept of culpa in contrahendo, a form of 'estoppel', is increasingly used to create obligations during pre-contractual negotiations. Estoppel is an equitable doctrine that provides for the creation of legal obligations if a party has given another an assurance and the other has relied on the assurance to his detriment. A number of commentators have suggested that consideration be abandoned, and estoppel be used to replace it as a basis for contracts. However, legislation, rather than judicial development, has been touted as the only way to remove this entrenched common law doctrine. Lord Justice Denning famously stated that "The doctrine of consideration is too firmly fixed to be overthrown by a side-wind."

2.3. Intention to be legally bound

There is a presumption for commercial agreements that parties intend to be legally bound (unless the parties expressly state that they do not want to be bound, like in heads of agreement). On the other hand, many kinds of domestic and social agreements are unenforceable on the basis of public policy, for instance between children and parents. One early example is found in Balfour v. Balfour. Using contract-like terms, Mr. Balfour had agreed to give his wife 30 a month as maintenance while he was living in Ceylon (Sri Lanka). Once he left, they separated and Mr. Balfour stopped payments. Mrs. Balfour brought an action to enforce the payments. At the Court of Appeal, the Court held that there was no enforceable agreement as there was not enough evidence to suggest that they were intending to be legally bound by the promise. The case is often cited in conjunction with Merritt v. Merritt. Here the court distinguished the case from Balfour v. Balfour because Mr. and Mrs. Merritt, although married again, were estranged at the time the agreement

was made. Therefore any agreement between them was made with the intention to create legal relations.

In Section 5 of this course you will cover these topics:

- Elements Of Formation, Part I
- Elements Of Formation, Part Ii
- Problems Of Formation

Topic : Elements Of Formation, Part I

Topic Objective:

At the end of this topic student would be able to:

- Learn about the Essential Elements of a Contract

Definition/Overview:

Our whole economy is based on the freedom of individuals to contract and a system of laws that enforces contracts freely entered into. But a lot of people may not be aware of what are the essential elements required to make an enforceable contract. Recently I was asked if a contract not in writing is binding. We are so accustomed to seeing contracts in writing that many people assume that a contract must be in writing (and lengthy) before it is enforceable.

Key Points:

1. Essential Elements of a Contract

Agreement is essential to any contract. Before there can be a contract, there must be a consensus ad idem: that is, there must be a meeting of the minds. The two sides to a contract, whether for the construction of the liner Queen Elizabeth or for having your lawn cut, must agree on the fundamental terms of the contract. There must be an intention to enter into a legally binding contract. Whether the parties have reached an agreement is determined by an objective standard. What each party believes the other to be agreeing to will not be the determining factor. Rather, would an objective bystander, acting reasonably, looking at all of the facts relevant to the question conclude that the parties had come to an agreement on the

essential terms of the contract with the intent to form a legally binding relationship? If so, there is a contract between the parties.

An agreement can be found in the simplest of words or conduct. The contract for the construction of the Queen Elizabeth, one of the largest liners in its days, was contained in a letter from the builder containing words to the effect "We agree to build the Queen Elizabeth for 5 million pounds". To form a contract, there are no particular words that must be used by the parties. However, there must be an offer by one side and an acceptance of the offer by the person to whom the offer was made. Without both an offer and an acceptance, there can be no consensus ad idem or a meeting of the minds which is essential to form a contract. An offer is simply a statement or other indication that the individual is prepared to enter into a contract with another on certain terms. The offer must be expressed in a manner capable of acceptance without anything further required of the person receiving the offer other than to indicate acceptance. It must also be clear that the person making the offer is prepared to be bound by the terms if the offer is accepted. If I make the statement to you "I will cut your lawn for $5.00", this is an offer which on acceptance will form a contract.

The offer must be more than just an "invitation to treat"; that is, not merely expressing general intent to enter into a contract and inviting an offer in keeping with the general intent. A good illustration is the display of merchandize at a store with a price tag. The display of the merchandize does not constitute an offer waiting for a customer to walk in and accept the offer. Rather, it is an invitation to treat by the store owner. The offer is made when the customer presents the merchandize to the cashier and tenders the amount of the price. At that point, the merchant is free to accept the offer and sell the item. To illustrate this, lets assume a mischief maker has switched price tags so that the latest cd by the hottest jazz sensation is priced at $5.00. When you take this to the check-out counter, the store is not bound to sell the cd to you for this price. The store owner is perfectly entitled, in law, to say that the item is mislabelled and will not be sold for that price.

Acceptance is simply some indication by the person receiving the offer that the offer is accepted. The acceptance must be clear and absolute and without conditions attached. The objective bystander must be able to determine that the offer has been accepted. In response to my offer to cut the lawn, your response "That sounds like a good deal" is not acceptance. If I proceed to cut the lawn as a result, there is no contract. However, if you say words to the

effect "we have a deal" or more precisely, "I accept", then there is a binding contract. If I then cut the lawn, I have an enforceable contract under which I could collect the $5.00.

The acceptance must be made before the offer has expired. Most offers contain a time limit within which the offer can be accepted. Once the offer has expired, it can not be accepted unless the person making the offer has renewed it. If there is no time limit by which the offer must be accepted, then the law requires the offer be left open for acceptance for a reasonable period of time. What exactly is a reasonable period of time will depend upon the particular circumstances of each case. The offer must be accepted before it is withdrawn. An offer can be withdrawn before acceptance unless one of the terms of the offer is that it will remain open for acceptance until a specified time. On occasion, the circumstances of the dealings between the parties may be such that the law would impose a term on the parties to keep the offer open for acceptance for a reasonable period of time.

No conditions can be attached to the acceptance and terms of the offer cannot be changed. If conditions are attached or terms are changed, the parties are merely negotiating and may ultimately reach agreement on the terms of the contract. For example, if your response is that you will pay me $5.00 to cut the lawn but I must cut again next month for the same price, there is no contract. You have made a counter offer which I am free to accept or reject. Likewise, the acceptance can not be conditional on some other events.

The contract constitutes a bargain. The acceptance of the offer is the bargain the parties have struck: - an exchange of a promise for a promise or act has been made. It is this consideration that makes the contract binding. Consideration is some benefit or advantage to the person making the offer and a corresponding cost or prejudice to the person accepting the offer. It is left to the parties to determine whether or not the consideration is adequate; only the parties can judge whether or not it is a good bargain. The law only requires that there be sufficient consideration; something of value must be given. The consideration can not be something given or promised in the past. To be valid, the consideration must be a new promise or some fresh benefit exchanged for the offer. This is subject to the courts refusing to enforce an alleged contract where the consideration is so inadequate as to raise suspicions of fraud or to make the contract unconscionable.

In general then, as long as the basic elements of an offer and acceptance with consideration are present, the parties have a valid and binding contract. There is no requirement that the

contract be in writing except in certain special situations such as the sale of land. The problem is that if the verbal exchanges of the parties are to be relied upon, it may prove difficult and in some cases impossible to determine precisely the terms of the contract if there in fact is a contract. If the court can not with reasonable certainty determine the terms that the parties have agreed to, the court can not enforce the alleged contract. It is for this reason that it is wiser to have a contract in writing although writing itself is no assurance that the alleged contract is clear and precise.

Topic : Elements Of Formation, Part Ii

Topic Objective:

At the end of this topic student would be able to:

- Understanding the meaning of a Binding Contract
- Learn about Contract: the elements of a contract

Definition/Overview:

Competent Parties: For a contract to be valid, each side must have the capacity to enter into it.

Consideration: If the other side is to be held to the contract, you must give up something in exchange.

Mutual Assent or Meeting of the Minds: This means that each side must be clear as to the essential details, rights, and obligations of the contract.

Key Points:

1. Binding Contract

Competent Parties - For a contract to be valid, each side must have the capacity to enter into it. Most people and companies have sufficient legal competency. A drugged or mentally-impaired person has impaired capacity and chances are a court may not hold that person to the contract. Minors (e.g., usually those under eighteen) cannot, generally, enter into a binding contract without parental consent, unless it is for the necessities of life, such as food,

clothing, or for student loan contracts.

Consideration - If the other side is to be held to the contract, you must give up something in exchange. This is called consideration. No side can have a free way out or the ability to obtain something of value without providing something in exchange. Money is the most common form of compensation, but it can also be property, giving up a right or valid claim, making a promise to do or not to do something, or anything of value. Agreeing to perform an illegal or illicit act is not consideration and the contract is void.

Mutual Assent or Meeting of the Minds - This means that each side must be clear as to the essential details, rights, and obligations of the contract. Putting the deal down on paper prior to signing it goes A LONG way to avoid future misunderstandings and disputes. Meeting of the minds sometimes can be expressed by words spoken or gestures made or can be inferred from the surrounding circumstances. There is no meeting of the minds if: (1) one side is obviously joking or bragging, (2) there is no actual agreement (i.e., the farmer who is selling a gelding and the buyer thinks the horse is a brood mare), or (3) both sides have made a material mistake as to the terms or details of the contract.

2. Contract: the elements of a contract

The first step in a contract question is always to make sure that a contract actually exists. There are certain elements that **must** be present for a legally binding contract to be in place. The first two are the most obvious:

- An offer: an expression of willingness to contract on a specific set of terms, made by the offeror with the intention that, if the offer is accepted, he or she will be bound by a contract.
- Acceptance: an expression of absolute and unconditional agreement to all the terms set out in the offer. It can be oral or in writing. The acceptance must exactly mirror the original offer made.
- A counter-offer is not the same as an acceptance. A counter-offer extinguishes the original offer: you cant make a counter-offer and then decide to accept the original offer! But
- A request for information is not a counter-offer. If you ask the offeror for information or clarification about the offer, that doesnt extinguish the offer; youre still free to accept it if you want.

It is very important to distinguish an offer from an **invitation to treat** that is, an invitation forother peopleto submit offers. Some everyday situations which we might think are offers are in fact invitations to treat:

- Goods displayed in a shop window or on a shelf.
  - When a book is placed in a shop window priced at 7.99, the bookshop owner has made an invitation to treat.
  - When I pick up that book and take it to the till, I make the **offer** to buy the book for 7.99.
  - When the person at the till takes my money, the shop **accepts** my offer, and a contract comes into being.

- Adverts basically work in the same way as the scenario above. Advertising something is like putting it in a shop window.

- Auctions:

- The original advertising of the auction is just an invitation to treat.
- When I make a bid, I am making an offer.
- When the hammer falls, the winning offer has been accepted. The seller now has a legally binding contract with the winning bidder (so long as there is no reserve price that hasnt been reached)

  N.B: an offer can be revoked at any time before it is accepted, so long as you inform the person you made the offer to that the offer no longer stands.

- **Consideration**: each party to the contract must receive something of value.

  This is best illustrated by an example: suppose I promise to give you my watch, but you dont give me anything in return. If I break my promise and keep my watch, you cant then go to court and make me give it to you. The contract isnt legally binding: you didnt give me any **consideration** for my promise. So put simply, consideration is the price paid for the others promise. There are four legal maxims that apply to consideration:

- Consideration must move **from the promisor**;
- Consideration need not move to the promisee;

- Past consideration is not good consideration;
- The consideration given must be **sufficient**, but it need not be adequate.

The detail isnt necessary here, but there is a separate note on them if youre interested.

- **Intention to create legal relations**: if my brother offers me a lift to London, and I say Ill contribute to the cost of the petrol and then dont, there isnt necessarily a binding contract that he can sue me under. If the arrangement is an informal, social one, then my offer to pay for petrol probably wasnt made with the intention of being legally bound.

In general, arrangements of a social nature are presumed not to be legally binding, whilst commercial arrangements are presumed to be intended as binding contracts. Of course, these presumptions can always be rebutted in court by producing evidence to the contrary.

Topic : Problems Of Formation

Topic Objective:

At the end of this topic student would be able to:

- Understand the Problems of a Contract
- Learn about Arbitration law
- Learn about Codification

Definition/Overview:

This topic deals with the problems related to the formation of a contract.

Key Points:

1. Problems of a Contract

Many contracts involve more than two persons. The law of contracts provides special rules for regulating claims by multiparty plaintiffs or claims against multiparty defendants, or for determining rights among the parties. Multiparty problems arise in other contexts as well. There is the problem of whether the immediate parties to a contract can enter into an agreement that will confer rights upon a person not an original party to the contract. Probably because the dogmatic structure of contract law was largely formed on the model of the

simpler two-party situation, and because the contract for the benefit of third parties did not have great practical importance until such relatively modern developments as the emergence of life insurance, many systems of contract law have encountered difficulty in working out the relationship between the third party and the underlying contract. English law took the view that, as a rule, a person cannot acquire a right on a contract to which he is not a party. Some of the problems posed are difficult to resolve: under what circumstances and to what extent should the third party control the underlying contract when, for example, the original parties desire to rescind or modify it?

Another variation of the party problem is presented by efforts to add or substitute parties to a contract. In the absence of an express regulation of the problem in the basic contract, the law works with the notion of the presumed intention of the contracting parties, based on considerations of fairness and practicality. A contracting party cannot, in principle, assign to another his right under a contract if the assignment would result in a significant change in the burden assumed by the other contracting party. A contractual right to receive money or goods is a different matter; it can ordinarily be assigned because the resulting burden on the person under obligation is not great, and because society as a whole benefits from having this flexible economic and legal instrument.

One problem of contract law that has been mentioned above deserves further considerationthe problem of interpretation. Many rules of contract law are simply presumptions, based on experience and tradition, as to what the parties ordinarily intend; if they clearly intend otherwise, the rules are not mandatory. Problems of interpretation frequently arise with respect to the particulars of a given agreement; thus the court seeks to determine what the parties actually had in mind. The effort to ascertain intention may encounter difficulties arising from the law of evidence. Many legal systems limit the use of testimonial evidence to explain the essential elements of a written contract.

2. Arbitration

Modern commercial practice relies to a growing extent on arbitration to handle disputes, especially those that arise in international transactions. There are several reasons for the growing use of arbitration. The procedure is simple, it is more expeditious, and it may be less expensive than traditional litigation. The arbitrators are frequently selected by a trade association or business group for their expert understanding of the issues in the dispute. The

proceedings are private, which is advantageous when the case involves trade or business secrets. In many legal systems, the parties can authorize arbitrators to base their decision on equitable considerations that the law excludes. Finally, when the parties are from different countries, an international panel of arbitrators may offer a greater guarantee of impartiality than would a national court. Despite these advantages of arbitration, the development of contract law may suffer considerably by a withdrawal from the courts of litigation involving some of the most significant and difficult problems of the present day, all the more so because the reasoning in arbitral awards is usually not made public.

3. Codification

Trade and commerce flow increasingly across national and state boundaries. In response to this there have been many efforts to unify the traditional legal systems. In the United States, the Uniform Commercial Code has replaced earlier uniform statutes such as the Sales Act and the Negotiable Instruments Law; by 1970 it had been adopted by every state including, although in part only, Louisiana. Internationally, the decade of the 1960s saw significant progress toward uniform regulation of the law of sales. The creation of a uniform body of substantive rules is, of course, easiest when the communities involved have roughly similar rules and principles. In addition, the greater the volume of multistate transactions, the greater the pressure for uniform regulation. It is understandably easier to achieve a Uniform Commercial Code within the United States than to create such a system internationally.

When a transaction has a significant relationship with more than one legal order, difficult problems of private international law often arise with respect to which law shall govern. A kind of halfway point between legal diversity and unification the creation of uniform rules for choice of lawis of some help, and in this area the Hague Conference on Private International Law has done significant work.