Elements required for the formation of a valid contract

Introduction:

When we think of any kind of business there comes the necessity of understanding and applying the rules, principles, norms, and usages of contract. Now a day there is hardly any business dealing that does not comes within the purview of contact. So it’s very important to have a clear and definite idea on thesubject of contract law. However, in this paper I’v tried to give a glimpse on this subject along with its application in practical day to day to business practices in various areas. This piece of work will demonstrate the very basic and primary areas of contract, like offer and acceptance, consideration etc, with a particular emphasis on the operation and operation of business contact. In addition, the paper contains importance of understanding the principle of liability in negligence in business practices and made an effort to apply such principles and practices in different business situations.

Requirement 1:

Importance of the essential elements required for the formation of a valid contract:

A contract is the agreement between parties regarding any kind of dealings that is enforceable in law. So an agreement between parties enforceable by law is a contract and never the others which are not enforceable by law. Suppose, an agreement to purchase 1-kg heroine is not enforceable by law and as such it cannot be a contract, but an agreement for the purchase of computer is enforceable by law and as such is a contract. In this regard, we can reach to a conclusion that all contracts are agreements, but not the vice versa.

A contract between the parties can be created

verbally;

in writing (including by electronic means and website);

by act, behave, conduct or inference or

By means of all or any of the above mentioned ways.

Essential Elements of a Valid Contract:

To be a contract, an agreement must fulfill the following conditions:

Proposal(offer) and acceptance;

the parties must be competent;

the consent of parties must be free;

there must have lawful consideration;

the object must be lawful; and

the agreement must not expressly declared void by law.

Beside the above mentioned elements the contract must be certain; possible of performance and written and registered if so required by law. However there can be special principles, terms and conditions applicable to the contract as agreed by the parties that concern specific subject matters, such as employment contract, the sale of moveable property, sale of immoveable property etc.

The Offer:

Offer is the starting pointfrom where an agreement gets life formally which ultimately may take the shape of a legally binding contract.

Offer means the formal expression of intention or willingness of one party to another to do or to refrain from doing an act in order to obtaining the assent of the other party to such act or omission. When one party signifies his willingness to other party in order to take consent of that party regarding any dealing, the party expressing such willingness is said to make an offer and he is called the offeror and the person to whom it is made is called the offeree . So it is clear that,

the offer must be communicated to the other party;

it can be revoked at any time prior to acceptance.

In this point we have to keep in mind that some kinds of transactions involve a preliminary negotiation in which one party invite the other to make an offer. Such an stage is called invitation to treat. Such primary negotiations are an way to reach a stage to make an offer. It is now well settled that negotiations to enter into a contract can amount to an invitation to treat but not an offer.

Acceptance:

An offer when accepted becomes contract. When the person to whom an offer is made signifies his assent thereto the offer is said to be accepted. Thus the essence of the acceptance is the assent or consent that is coming from the offeree . It simply speaks of giving one’s consent to the offer as it is

made by the offeror and as such it will be a valid acceptance to convert an offer into a contract. So the acceptance

must be communicated;

must be to the original proposal made otherwise it could be a " counter offer"

takes effect on the basis of the mode of communicating the acceptance to the offeror (in postal mode- on the date posted, in case of instant or electronic mode, occurs when received).

Competency of the Parties:

The law does not give everyone to enter into a contract rather prescribe certain specific qualification to attain to be competent to enter into a contract. A person to be competent to enter into a contract, must be –

of the age of majority;

of sound mind; and

not disqualified from contracting by any law which he is subject.

Thus negatively, the following persons cannot enter into contract:

minors;

persons of unsound mind; and

persons disqualified by any law.

Free Consent:

Free consent is an essential element of a valid contract. It is natural that for an agreement all parties to it must come to a common point. There are mainly two requirements to be a consent that the consent must given-

To the same thing, and

In the same sense.

So if the parties So to constitute a contract even mere consent is not sufficient, rather the consent must be free consent according to law agree upon different things or in different sense then this will not be treated as ‘ consent’. The term ‘ thing’ used in the first requirement means ‘ the contents or subject matter of agreement’.

On the other hand, to constitute a valid contract even mere consent is not sufficient, rather the consent must be free consent according to law. That is to say, to be a free consent, that must not be caused by, coercion, undue influence, fraud, misrepresentation and mistake. In other words, if consent is given being affected by any of the above elements, the consent will not be treated by the law as free consent.

Consideration:

Ordinarily consideration means mean the exchange of the price. It has different legal meaning which does not restrict it only within the area of monetary compensation rather to be consideration, law required that, something is to be done, forborne, or promised at the desire of the offeror. It may even be termed as ‘ burden discharged’ or in other sense ‘ sufferings’ in

the sense of losing something, may be that is one’s energy, service, money or anything valuable.

A paragraph from the book ‘ Law of Contract’ (10thedn, Sweet and Maxwell, 1999, at p. 64) Professor Treitel is worth mentioning –

“ The traditional meaning of consideration concentrates on the requirement that ‘ something of value must be given and accordingly states that ……. What the law is concentrate with is the consideration for a promise-not the consideration for a contract.” So consideration is the cause of acceptance and it –

Must be valuable. Something must be supplied in return of the offer of the offeror, eg. Money.

Must be lawful and non gratuitous.

Must not be something already paid or incurred(past consideration)

Lawful Object:

In order to execute a valid contract the object and consideration of a agreement must have to be lawful. The object and consideration are lawful unless-

It is forbidden by law; or

Is of such nature that, if permitted, it would defeat the provisions of any law; or

Is fraudulent; or

Involves or implies injury to any person or his property; or

It is regarded as immortal or against the public policy and public welfare.

Enforceability in Law:

Although an agreement may have all the essential elements, it may not be a enforceable contract because of some other issues like impossibility of performance or where the agreement unduly restrains any person in his trade. So if an agreement fails to satisfy the legal requirements of a contract then that becomes nothing but unenforceable by law which cannot turn into a contract ever rather a void agreement.

(P1. 1). Essential elements of the contract in a given scenario:

Adam, Owner of a house offers in face to face, Brad to sell his house at a certain price. Brad, accept the offer made by Adam and pay a portion of price for the house asked by him.

This is an example of a valid contract entered into by Adam and Brad for the sale of the house. In this transaction we will find all the essential elements for the formation of a valid contract. Moreover the contract is executed in a lawful manner. Here, Adam made the Offer which Brad Accepts in his Free Consent and pay Adam a portion of the Consideration (price). Both the parties are Competent to execute a contract and their Object is not also lawful. So the contract of sale of house between Adam and Brad is Enforceable in Law.

The impact of different types of contract:

Expressed and Implied contract:

If the offer and acceptance of contract are made in words, i. e, either expressed orally or in words, it is an express one. It can be of two types, i. e. Oral and Written.

On the other hand when there is no formal expression of such offer and acceptance rather it is implied from the acts or omission of the parties, it is regarded as an implied contract.

Valid contract:

An agreement enforceable by law is a contract and is valid. That is to say, a valid contract is that agreement which fulfils all requirements of a contract as imposed by law.

Voidable contract:

The voidable status of a contract is a temporary status which has to be made enforceable by law or has to be set aside and both these are dependant at the option of the parties at one side and not at the option of the other side. The law determines at whose option it will be validated or annulled in each particular case considering the nature of voidable contract. Thus a contract cannot remain as voidable forever; rather it has to be valid or void.

Void contract:

A contract becomes void by ceasing its enforceability by law. It is not a void ab initio. Because, law says that it has to cease its enforceability and it will be void only when it will cease that enforceability. Thus, the precondition of a void contract is the existence of a valid contract and afterwards somehow its

enforceability will be ceased and then it will be treated as a void contract. There may have various grounds for ceasing the enforceability of law, e. g., supervening impossibility or illegality.

Unilateral and Bilateral contract:

In the case of bilateral contract each party takes on an obligation, usually by promising the other for something- as for example James promise to sell something and Ben promise to buy it. By contrast an unilateral contract is one in which only one party assumes the obligation under the contract.

Terms in contracts – meaning and effect:

1. Express terms:

A. What did the parties say or write?

B. Are the statements of the parties terms of the contract.

2. Implied terms:

A. Terms implied by customs:

It is well established that a contract may be subjected to terms that are sanctioned by the custom, whether commercial or otherwise, they have not been expressly mentioned by the parties. Precedents states that in commercial transaction extrinsic evidence of customs and usages is admissible to annex incidents in written contracts, in matters with respect to which they are silent.

B. Terms implied by statute:

The translation of usages into agreement and of agreements into statutory terms is most evident in the history of the contracts for the sale of goods.

Moreover the provisions of Marine Insurance Act are another example in this regard.

C. Terms implied by courts:

Other terms have been judicially implied in a number of transactions. Thus in Lynch v Thorne,(1956) the Court of Appeal give judgment in favor of the defendant and held that they could not imply any term that would create an inconsistency with the express language of the bargain. Such a similar position was examined by the House of Lords in Lister v Ramford Ice and Gold Storage Company Ltd and majority of the judge gave judgment in favor of the respondent.

Excluding and limiting terms:

The common law is quite familiar with the practice of inserting terms excluding and limiting liabilities by one party which would otherwise be his. This situation frequently arises where a documents purporting to express the terms of a contract is delivered to one of the parties and is not read by him. A passenger receives a ticket, stating the terms or referring to the terms set out elsewhere, on which a railway is prepared to carry him or take charge for his luggage. There are different view regarding such clauses. One view describes it as a promisor’s obligation and the other view describe it as mere defense.

P1. 3 Appropriate terms for a given situation:

Allan, buy a ticket to go to London from Liverpool. The ticket contains terms that he can carry only 10-kilo of goods and for more than that amount he has

to pay extra £5 for per 10-kilo. This is an example of excluding clause in the contract between him and the bus company.

Requirements 2:

2. 1 Practical application of the elements of contract:

Scenario:

According to the given problem for this assignment, the following advice has been provided:

Advice:

In the light of various elements of a valid contract, John McGurk's first telex is clearly an offer; which Collin McCellend was to accept. The general rule is that acceptance takes effect on communication and application of this rule is embodied in the cases of Entores and Brinkibon. Considering that the telex of acceptance was sent outside working hours, when should it take effect, and considering the factors mentioned in Brinkibon- intentions of the parties and standard business practice- where should the risk lie? In assessing where should the risk lie we have take into account the fact that Collin can reasonably think that his telex would be read shortly after the lunch hour was finished and to expect John to check where there is any reply from Collin. This is relevant because in other cases on communications, the court does not entertain the claim of the parties who fail to receive message because of their own fault or negligence(such as it was in Entores case). If Collin's telex is deemed to take effect when it is sent, a binding contract between them exist at that point and this will take priority over the contract with ford. We should then consider the position if the rule that acceptance

only takes effect on communication is strictly applied. The next issue in question is the communication by the other car dealer from whom Collin learnt that the car has been sold. It is clear from Dickinson v Dodds that information from third party can amount to revocation because the message from the third party is regarded as the offeror had said it himself. However the exception of this rule is that if the source of information is not reliable there would be no revocation and the offer would be still available for acceptance. But in the present case this exception is not applicable as the source is not untrustworthy and as such Collin cannot claim John to give effect to his acceptance. However Collin is still entitled to claim damages assuming a contract was made. He could only force John to sell the car to him if court granted specific performance. As the court grant specific performance of contract only when monetary compensation is not adequate to give the plaintiff proper remedy or where there is no other remedy available. Collin can be adequately compensated by money and this could be done by allowing Collin to claim the difference between the car's price and the cost of replacement i. e. more or less £2000.

2. 2 Law on terms in different contracts:

Terms of contract can either be conditions or warranties and it vary in various contracts depending on the nature and contents of the contract. Thus terms and conditions in the contract of sale of land are different from that of sale of goods. For better understanding see Terms of Contract-Meaning and Effect part of this paper in page.

2. 3 Evaluation of the effect of different terms:

Three kinds of contractual terms have normative effect and significance relative to each other's namely; Conditions, Warranties and Innominate terms.

Conditions: These are the most importance terms of contract and have serious consequences if breached. An innocent party can repudiate a contract and claim damages for breach of such terms. It is not necessary to mark such term as conditions in the contract and court will consider the intentions of the parties to determine such terms. See e. g. Schuler AG v Wickman Machine Tools Sales Ltd. (1974).

Such terms can also be determine by statutory provisions, (e. g. Sale of Goods Act 1979, provides that certain terms relating to title to goods and quality of goods are conditions) and by the case laws, typically standard terms in commercial contracts.

Warranties: It is of lesser importance than conditions and breach of such terms entitled the innocent to claim damages but not to repudiate the contract.

Innominate terms: It can be either conditions or warranties and breach of them can be serious or trivial depending on the particular fact and conditions. Such terms was first emerged in Hong Kong Fir Shipping Co. Ltd. v Kawasaki Ltd. (1962). See also The Mihalis Angelos case, Bunge Corp. v Tradax Export SA(1981) and The Naxos(1990). Ref. 1

Requirement 3:

Tort:

Law of tort the law of civil wrong but every civil wrong is not tort. For a civil wrong to be tort it must contain two conditions:-

The remedy is common law action for unliquidated damages and

The wrong is not exclusively a breach of contract, breach of trust or other merely equitable obligation.

Thus Winfield defines " tortuous liability arises from the breach of the duty primarily fixed by law; .....and its breach is repressible by an action for unliquidated damages. Ref. 2

3. 1 Differences between liabilities in Tort and Contract:

As to the source of interest and duty: The interest in tort and its corresponding duty are created by law but in case of contract they are created by the agreement between the parties to the contract.

As to the nature of duty: In tort duty not to violate the interest of another person is toward persons generally, not to any particular person. In contract such duty is only towards the parties to the contract and not towards any strangers.

As to nature of remedy: In tort damages are always unliquidated but for breach of contract liquidated damages can be claimed where specified in the contract.

Others: Even where unliquidated damages are claimed the principle of liability in tort and contract differ. In contract damages are of compensatory nature except in case of contract of marriage and action by trader against his banker for dishonoring his check while there is sufficient balance to his credit. In tort, on the other hand, exemplary may in certain be awarded by the court.

3. 2 Nature of liability in Negligence:

Generally in all torts the liability is based on intentions or negligence. An act is negligent if its consequences are neither desired nor are substantially certain but are so probable that a reasonable man would have foreseen and avoid them. Thus, in certain cases of negligence the defendant may not have knowledge of his conduct or consequences thereof, but in many cases he has knowledge of both. It is the element of desire for consequences, which can distinguish negligence from intention. In case of intention actual or presumptive desire is always there, whereas in case of negligence there can never be desire for consequences.

3. 3 Vicarious liability in business:

Vicarious liability means the liability for the wrong committed by another person. Normally, a person is held liable for wrongs committed by him but sometimes he may be held liable for wrongs committed by other persons. Common example of such liability are liability of master for acts of his servants, done in course of employment, liability of partners for torts committed by a fellow partners, liability of principal for acts of his agent done within the scope of authority and liability of an employer for acts of an independent contractor employed by him.

Thus vicarious liability in business can be found in the business practice of agency and in partnership business. In both the cases a person who is liable for any breach of contract cannot be held liable rather the person on behalf of whom he enters into contract will be liable. Thus when there occurs any wrong or breach of any contract or any part thereof by an agent acting on behalf of and within the authority of the principal, then the principal and the agent will be held liable. The same rule applies in the case of partnership business and for the wrong of a partner the fellow partners become liable subject to certain conditions and exceptions. Thus in the case of various contracts and business dealings there arises vicarious liability.

Requirement 4:

4. 1 Applications of the elements of tort of negligence and defences in different business situations:

There are certain general conditions which must be fulfilled or satisfied before a person can be held liable for any tort. Negligence is one of such essential elements and it has significant effect in the ordinary course of various business practices. However negligence can be both, an element as well as a defense in appropriate cases of business.

Negligence as elements:

Negligence is the lack of application of reasoning and ordinary prudence on the part of the defendant for, that he can be held liable for any damages results from such damages. In every business practice or in other words, contract it is the duty of both the parties to act and behave in a reasonable and wise manner and perform his obligation diligently. Thus as an independent tort negligence means the infliction of damage by breach of a

legal duty to take care which the defendant owed to the plaintiff. This if there occurs any breach or any party suffer loss for the negligent act and omission of the other, it will entitled the plaintiff seek relief and damages for such negligent behave.

As a defense, contributory negligence:

Contributory negligence is a special defense to an action for negligence. When any breach, damage or accidents occurs not solely due to the negligence of the defendant but also partly due to the lack of ordinary care on the plaintiff's part, the part of the negligence of the plaintiff is called contributory negligence because it also contributes towards bringing about of the consequence. The defense of the contributory negligence will fail if there is no lack of reasonable care and attention on the plaintiff's part.

However the scope of the defense was already narrowed by invention of the rule of last opportunity in Davis v Mann (1842) case. It was further limited by extension of the last opportunity rule to situations where actually the defendant was not in a position to avoid the accident but he lost the opportunity because of some of fault on his part. Thus the leading case is, British Columbia Electric Rly v Loach(1916).

4. 2 Applications of the elements of vicarious liability in given business situations:

A, is appointed as agent for B for certain activities with the authority to enter into contract of selling A's car. A enters into a contract with C for selling the car for £2500. However after the compellation of the contract it is discovered

by A that the car has certain defects which was unknown to A and hence C claims damages.

In such a situation A is not liable for the act done by him as he has acted upon and within authority of B. Here not a rather B is vicariously liable and C can sue B, not for his claim.

Concluding Remarks:

Though sources of interest in contract and tort are different yet they may co-exist or concur in the same case. In such case interest is created by the contract as well as general law. In the realm of modern business practices contractual obligations and its breach are so much important and in this regard to get proper remedy and appropriate its very much essential to have clear and sound knowledge on contractual obligations, liabilities along with various liabilities of tort law.