LAW AND SOURCES OF LAW

Law

A body of rules of conduct of binding legal force and effect, prescribed, recognized, and enforced by controlling authority.

law is a system of rules and guidelines which are enforced through social institutions to govern behaviour.

Sources of law is a legal term that refers to the authorities by which law is made. There are a number of different sources that are used to define the creation and force of law, though not all are used equally. Some examples of sources include legislation, government regulation, court decisions, and custom.

Sources of law means the origin from which rules of human conduct come into existence and derive legal force or binding characters.It also refers to the sovereign or the state from which the law derives its force or validity.

Examples of sources of law include

Precedents

Precedent is one of the sources of law. The judgements passed by some of the learned jurists became another significant source of law. When there is no legislature on particular point which arises in changing conditions, the judges depend on their own sense of right and wrong and decide the disputes. Such decisions become authority or guide for subsequent cases of a similar nature and they are called precedents. The dictionary of English law defines a judicial precedent as a judgement or decision of a court of law cited as an authority for deciding a similar state of fact in the same manner or on the same principle or by analogy. Precedent is more flexible than legislation and custom. It is always ready to be used.

Customs

A custom is a rule which in a particular family or in a particular district or in a particular section, classes or tribes, has from long usage obtained the force of law. The dictionary of English law] defines custom as a law not written, which being established by long use and consent of our ancestors has been and daily is put into practice. Custom as a source of law got recognition since the emergence of sovereignty on the horizon of jurisprudence. It is an exemption to the ordinary law of the land, and every custom is limited in its application. They are practices that have to be repeated for a period of time.

Legislation

Legislation is that source of law which consists in the declaration of legal rules by a competent authority. Legislature is the direct source of law. Legislature frames new laws, amends the old laws and cancels existing laws in all countries. In modern times this is the most important source of law making. The term legislature means any form of law making. Its scope has now been restricted so a particular form of law making. It not only creates new rules of law it also sweeps away existing inconvenient rules.

CONTRACT LAW

It is a legal enforceable agreement entered into by two or more different persons with legal capacity. The parties should have serious intention to create legally binding obligations. Their agreement needs to be within parities'

contractual capacity. Furthermore, parties should communicate such intention without vagueness each to the other and being of the same mind to the subject matter.

Tort law

is a branch of the law which covers civil wrongs, such as defamation and trespassing, among many other transgressions. Under tort law, if someone suffers a physical, legal, or economic harm, he or she may be entitled to bring suit. If the suit is deemed valid, damages may be awarded to the victim to compensate for his or her troubles. Most tort laws are found in regional, state, and national civil codes, which often spell out limits on damages and the statute of limitations for tort cases.

Many people divide tort law into three rough categories: negligent torts, intentional torts, and strict liability torts. Torts arising out negligence are civil wrongs caused by negligent behavior or a failure to practice due diligence. For example, if you are playing soccer in the street and you accidentally kick the ball through someone's living room window, this may be a negligence tort. Medical malpractice and other forms of professional negligence are also covered under the umbrella of negligence torts.

Intentional torts are torts which involve a deliberate attempt to harm. Defamation is often viewed as an intentional tort, as is battery, fraud, false imprisonment, and interference with the economic operations of a company. Strict liability torts cover product liability; if a potato peeler takes your finger off when you operate it as directed, the manufacturer could be liable, for example.

Essentials of a contract

a) it should be lawful

b) possible of performance

c) within contractual capacity

d) with the serious intention to contract

e) union of minds of parties – consensus ad idem

f) it should not be vague

g) intention of both parties should be communicated

- A contract does not necessarily have to be in writing unless there is a specific statutory requirement that it be in writing.
- A verbal contract is as equally valid as a written one, provided that the party alleging the contract can prove agreement on certain terms.
- Writing is only important for evidence purposes although its not a requirement.
- The presence of an agreement is determined by there being an offer and an acceptance. This is only a general rule and does not follow that every contract has to be constituted by a clear offer and acceptance.

OFFER AND ACCEPTANCE

Offer

Definition

A statement by a person, called the offeror, indicating his willingness to contract which statement is made in the awareness that it shall become binding an acceptance by the other person called the offeree.

WHAT CONSTITUTE AN OFFER

There is a distinction between a firm offer and invitation to treat or negotiation. A firm offer is the one which is unconditional and unqualified, it states all the terms and the material facts on which the offer is based. It must become a contract upon an acceptance of the offer as it stands. Thus a "come lets negotiate" is not a firm offer – if a shop displays an item for sale at X dollars can we say that is a firm offer? In the case of *Crawley v Rex 1909 TS 1105* state that the complainant, a shop keeper had advertised a sale of a particular brand of tobacco at a very cheap price in order that he might attract the custom of a large number of the public. He put a placard outside his shop on which the price was shown, the Appellant entered the shop, bought the tobacco and went away. After some minutes he came back again asked for another pound of the same tobacco, unfortunately the complainant declined to serve the Appellant with the tobacco and told him to leave his shop, the Appellant refused to leave the shop whereupon he was arrested for trespass. The Appellant had argued that he had a contract of sale with the complainant but the court thought otherwise and held that there was no contract between the parties. It emphasized that the mere fact that a tradesman advertises the price of the goods he sells does not mean offer to any member of the public. It does not mean the right to enter the shop and purchase at the displayed price. The court also held in the case that: A contract is not constituted when any member of the public comes in and tenders the price mentioned in the advertisement. In summary therefore display of goods at a certain price is not a firm offer but only an invitation to treat. On the contrary, it is the customer who makes the firm offer by presenting goods at the till and when the shop owner accepts the offer to buy, a contract then comes into being.

Case

Carlill v Carbolic Smoke Ball Company

Where the company inserted an advertisement in the newspaper offering to pay 100 pounds to anyone who contracts the increasing epidemic of influenza or any disease caused by taking cold after having used their smoke balls 3 times daily for two weeks according to the printed directions supplied on each ball the advertisement went on to say that

1000 pounds had been deposited with the certain bank showing its commitment in the matter. During the last epidemic of influenza many thousands carbolic smoke balls were sold as preventives against the disease but in no ascertained case was the disease contracted by those using the smoke balls. The plaintiff alleged, on the faith/strength of an advertisement bought one of the balls at chemist and used it as directed three times a day for 2 weeks but she was attacked by the influenza and she claimed the 100 pounds reward price the court of first instance held and she was entitled to the 100 pounds but the defendants appealed but their appeal was dismissed. In point of law the advertisement in this case was an offer to pay 100 pounds to any member of the public who would have performed at those conditions set out in the newspaper. Performance of those conditions was held to constitute acceptance of the offer. The court held further and the offer was a continuing offer which was not important.

TERMINATION OF AN OFFER

Firstly an offer can be terminated by rejection by the offeree. It can lapse on the expiration of fixed period within which it was meant to be accepted. If there is no such fixed period within which an offer should be accepted an offer lapse after the expiry of some (reasonable time).

TYPES OF CONTRACT

The law recognizes that legally binding contracts can be written, verbal, or a mixture of both. However, for business purposes, written contracts are usually preferred due to the following reasons:

- The contents ('terms') are in writing for all to see
- They can ensure that precise language is used in describing the terms of the agreement
- There is, therefore, less opportunity for misunderstandings and conflicting assumptions
- There is less need to rely on memories of what was originally agreed
- The individuals involved in the transaction may change over time.

Written contracts

If the contract has been formally written and signed by the parties, there is an assumption that all the terms of the agreement are contained in the written document regardless of what may have been verbally agreed.

Additionally, contracts can be a combination of written and verbal agreements if the written agreement lacks detail and only covers very few terms. Prior to signing, a written contract must:

- Be presented to and understood by all parties to be valid; and

- Be recognised by all parties as a contract, that is, it must look like a contract and not simply a receipt or docket

Also, once a contract is signed, it is assumed that all the terms have been read and agreed to.

Verbal agreements

Verbal agreements rely on the good faith of all the parties involved and can be difficult to prove as opposed to written contracts. The following are some ways in which verbal agreements can be supported:

- The conduct of the other party both before and after the agreement
- Specific actions of the other party
- Past dealings with the other party

As desirable as a written contract is, in certain situations it may be counter-productive, such as:

- If the value of the transaction is not particularly high; and/or
- The presentation of a substantial document, possibly with many provisions, may raise more questions and uncertainty in the minds of the parties involved than it resolves, often ending in the transaction not proceeding.

TYPES OF CONTRACT

Contracts under Seal Traditionally, a contract was an enforceable legal document only if it was stamped with a seal. The seal represented that the parties intended the agreement to entail legal consequences. No legal benefit or detriment to any party was required, as the seal was a symbol of the solemn acceptance of the legal effect and consequences of the agreement. In the past, all contracts were required to be under seal in order to be valid, but the seal has lost some or all of its effect by statute in many jurisdictions. Recognition by the courts of informal contracts, such as implied contracts, has also diminished the importance and employment of formal contracts under seal.

Express Contracts In an express contract, the parties state the terms, either orally or in writing, at the time of its formation. There is a definite written or oral offer that is accepted by the offeree (i.e., the person to whom the offer is made) in a manner that explicitly demonstrates consent to its terms.

Implied Contracts Although contracts that are *implied in fact* and contracts *implied in law* are both called implied contracts, a true implied contract consists of obligations arising from a mutual agreement and intent to promise, which have not been expressed in words. It is misleading to label as an implied contract one that is implied in law because a contract implied in law lacks the requisites of a true contract. The term quasi-contract is a more accurate designation of contracts implied in law. Implied contracts are as binding as express contracts. An implied contract depends on substance for its existence; therefore, for an implied contract to arise, there must be some act or conduct of a party, in order for them to be bound.

A contract implied in fact is not expressed by the parties but, rather, suggested from facts and circumstances that indicate a mutual intention to contract. Circumstances exist that, according to the ordinary course of dealing and common understanding, demonstrate such an intent that is sufficient to support a finding of an implied contract. Contracts implied in fact do not arise contrary to either the law or the express declaration of the parties. Contracts implied in law (quasi-contracts) are distinguishable in that they are not predicated on the assent of the parties, but, rather, exist regardless of assent.

The implication of a mutual agreement must be a reasonable deduction from all of the circumstances and relations that contemplate parties when they enter into the contract or which are necessary to effectuate their intention. No implied promise will exist where the relations between the parties prevent the inference of a contract.

A contract will not be implied where it would result in inequity or harm. Where doubt and divergence exist in the minds of the parties, the court may not infer a contractual relation-ship. If, after an agreement expires, the parties continue to perform according to its terms, an implication arises that they have mutually assented to a new contract that contains the same provisions as the old agreement.

A contract implied in fact, which is inferred from the circumstances, is a true contract, whereas a contract implied in law is actually an obligation imposed by law and treated as a contract only for the purposes of a remedy. With respect to contracts implied in fact, the contract defines the duty; in the case of quasi-contracts, the duty defines and imposes the agreement upon the parties.

Executed and Executory Contracts An executed contract is one in which nothing remains to be done by either party. The phrase is, to a certain extent, a misnomer because the completion of performances by the parties signifies that a contract no longer exists. An executory contract is one in which some future act or obligation remains to be performed according to its terms.

Bilateral and Unilateral Contracts The exchange of mutual, reciprocal promises between entities that entails the performance of an act, or forbearance from the performance of an act, with respect to each party, is a Bilateral Contract. A bilateral contract is sometimes called a two-sided contract because of the two promises that constitute it. The promise that one party makes constitutes sufficient consideration (see discussion below) for the promise made by the other.

A unilateral contract involves a promise that is made by only one party. The offeror (i.e., a person who makes a proposal) promises to do a certain thing if the offeree performs a requested act that he or she knows is the basis of a legally enforceable contract. The performance constitutes an acceptance of the offer, and the contract then becomes executed. Acceptance of the offer may be revoked, however, until the performance has been completed. This is a one-sided type of contract because only the offeror, who makes the promise, will be legally bound. The offeree may act as requested, or may refrain from acting, but may not be sued for failing to perform, or even for abandoning performance once it has begun, because he or she did not make any promises.

Unconscionable Contracts An **Unconscionable** contract is one that is unjust or unduly one-sided in favor of the party who has the superior bargaining power. The adjective *unconscionable* implies an affront to fairness and decency. An unconscionable contract is one that no mentally competent person would accept and that no fair and honest person would enter into. Courts find that unconscionable contracts usually result from the exploitation of consumers who are poorly educated, impoverished, and unable to shop around for the best price available in the competitive marketplace.

The majority of unconscionable contracts occur in consumer transactions. Contractual provisions that indicate gross one-sidedness in favor of the seller include limiting damages or the rights of the purchaser to seek court relief against the seller, or disclaiming a Warranty (i.e., a statement of fact concerning the nature or caliber of goods sold the seller, given in order to induce the sale, and relied upon by the purchaser).

Adhesion Contracts Adhesion contracts are those that are drafted by the party who has the greater bargaining advantage, providing the weaker party with only the opportunity to adhere to (i.e., to accept) the contract or to reject it. (These types of contract are often described by the saying "Take it or leave it.") They are frequently employed because most businesses could not transact business if it were necessary to negotiate all of the terms of every contract. Not all adhesion contracts are unconscionable, as the terms of such contracts do not necessarily exploit the

party who assents to the contract. Courts, however, often refuse to enforce contracts of adhesion on the grounds that a true meeting of the minds never existed, or that there was no acceptance of the offer because the purchaser actually had no choice in the bargain.

Aleatory Contracts An aleatory contract is a mutual agreement the effects of which are triggered by the occurrence of an uncertain event. In this type of contract, one or both parties assume risk. A fire insurance policy is a form of aleatory contract, as an insured will not receive the proceeds of the policy unless a fire occurs, an event that is uncertain to occur.

Void and Voidable Contracts Contracts can be either void or Voidable. A void contract imposes no legal rights or obligations upon the parties and is not enforceable by a court. It is, in effect, no contract at all.

A voidable contract is a legally enforceable agreement, but it may be treated as never having been binding on a party who was suffering from some legal disability or who was a victim of fraud at the time of its execution. The contract is not void unless or until the party chooses to treat it as such by opposing its enforcement. A voidable contract may be ratified either expressly or impliedly by the party who has the right to avoid it. An express ratification occurs when that party who has become legally competent to act declares that he or she accepts the terms and obligations of the contract. An implied ratification occurs when the party, by his or her conduct, manifests an intent to ratify a contract, such as by performing according to its terms. Ratification of a contract entails the same elements as formation of a new contract. There must be intent and complete knowledge of all material facts and circumstances. Oral Acknowledgment of a contract and a promise to perform constitute sufficient ratification. The party who was legally competent at the time that a voidable contract was signed may not, however, assert its voidable nature to escape the enforcement of its terms.

FORMS OF CONTRACT

Many construction contracts in the construction industry are based upon standard forms of contract. That is, pre-written contracts that are tried and tested and available for purchase for the purposes of a particular project. Therefore, there are many different types of standard forms on the market that cater for the differing needs of particular projects and approaches to procurement.

Some advantages of standard form contracts include:

- There is no need to produce (and incur the legal costs of producing) ad-hoc contracts for every project
- There is a degree of certainty regarding the interpretation of the clauses of the contract (particularly those standard forms that have been in existence for some time and have been tested in the courts)
- The parties know (with reasonable certainty) the consequences of various possible courses of action

Another important benefit of using standard forms is that they can help to reduce the potential for disputes in a number of ways, for example:

- The fact that standard forms of contract have been in wide use for a number of years means that there is an existing body of case law in relation to the main sets of standard forms which can assist in resolving disputes to the interpretation of particular clauses
- The standard forms are likely to avoid many disputes which may arise on a project because of the fact that the established standard forms have been revised over time

- Insurers are generally more relaxed when asked to provide insurance for projects which are to be carried out under a standard form and this can result in lower premiums

Clauses in a document-contract

A contract clause is a section or provision within a written contract or agreement. Each clause included in the agreement addresses some specific aspect of the overall covenant between the two parties that are agreeing to the terms and conditions detailed within the text of the document.

An **assignment clause** is a clause prohibiting or permitting a complete transfer of rights under the contract to another party.

A **confidentiality clause** is a clause in which certain information is labelled private and prohibited from being disclosed or distributed to anyone other than specifically identified individuals or organisations.

A **consideration clause** is a clause setting forth that which a party undertakes to do (or not do), which induces the other party to enter into the agreement. Consideration clauses typically set forth the terms of payment and/or the price of the contract.

An **entire agreement** clause states that the written terms of the agreement represent the whole agreement and that any prior or oral agreements have been **consolidated** into the written document. An entire agreement clause is sometimes referred to as a **whole agreement** clause, a **merger** clause (in the US) or an **integration** clause.

A **force majeure** clause is designed to protect against failures to perform contractual obligations caused by unavoidable events beyond a party's control, such as natural disasters (referred to in some contracts as "acts of God") or wars.

An **indemnification** clause is a provision in a contract in which one party agrees to be financially responsible for specified types of damages, claims, or losses. In such clauses, one party promises to reimburse (or "hold harmless") the other party in the event any such claims are brought.

A **liquidated damages** clause lists the amount pre-determined by the parties as the penalty for breach (ie the amount the breaching party will have to pay the **non-breaching party**).

A **severability** clause provides that, in the event one or more provisions of the agreement are declared unenforceable, the rest of the agreement remains **in force**.

A **termination** clause sets forth when, and under which circumstances, the contract may be **terminated** (=ended).