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CONTRACT A

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1. Offer

Contract

‘An agreement or set of promises that the law will enforce (i.e. for breach of which the law will provide a remedy)’ – Coote, ‘The Essence of Contract’

Nature of contracts

Unique

- Parties create their own obligations, unlike other areas of law
- Contract is an everyday occurrence, which underlines all commercial/economic activities
- Foundational to all commercial law subjects

Underlying Themes

- Freedom of contract
- Objective approach
- Economic efficiency
- Fairness (the law abhors certain types of conduct in contracting, such as cheating, lying and deception)

UN Convention on Contracts for the International Sale of Goods 1980 (Schedule to Goods Act 1958 (Vic)) ‘CISG’ or ‘Vienna Sale Convention’

- 85 countries are parties to this agreement, with the most noticeably missing being the United Kingdom
- Provides a global set of uniform legal rules for contracts regarding the international sale of goods
- Has force of law in Victoria (displaces domestic law) (s 86 CISG)

Applicability: Articles 1-6

Contracts between businesses (B2B), between parties with places of business in different countries that have ratified CISG; or where rules of private international law (i.e. conflict of law rules) would apply the law of a country that has ratified CISG as governing the contract; or where parties ‘opt in’ and choose CISG to apply. It covers the formation of contracts, as well as the rights and obligations of sellers and buyers arising from the contract.

Where the CISG doesn’t apply: Articles 1-6

- Domestic contracts (where both parties are in Australia)
- Sales to consumers (B2C)
- Contracts for services, nor mixed contracts
- Not for certain excluded goods (e.g. by auction, stocks, shares, or money, ships, vessels, hovercraft, aircraft, or electricity)

CISG Article 19 allows acceptance of an offer which contains additional or different terms, as long as they do not materially alter the terms of the offer.

3. Consideration

Consideration is required for the enforceability of any promise not made in a deed (a document under seal). Any agreement not supported by consideration and not made in a deed is *nudum pactum* (naked agreement) and is unenforceable.

The **promisee** is the person seeking to enforce the promise, and the **promisor** is the person making the promise.

Benefit/Detriment requirement

In order for this requirement to be satisfied, there must be a detriment incurred by the promisee, or a benefit conferred on the promisor at the instance of the promisee.

The 'bargain' requirement

The benefit or detriment must be given in return for (i.e. exchanged for) the promise being sought to be enforced; as the price paid or the promise (*Australian Woollen Mills Pty Ltd v Commonwealth*). 'Bargain' is distinguished from reliance acts or conditional gifts.

Executory consideration is where undertaking is made, but yet to be carried out; usually in the form of a promise to do something in the future. **Executed consideration** is where undertaking is carried out, and the promise is fulfilled.

A request from the promisor is relevant but not conclusive in establishing quid pro quo (*Australian Woollen Mills; Beaton v McDivitt*).

There is a distinction between a promise made in return for an act, and a conditional gift (*Australian Woollen Mills; Beaton v McDivitt*).

There is a distinction between an act performed in reliance of a promise, rather than the agreed price for a promise. An act performed in reliance will not constitute consideration but may give rise to estoppel (*Beaton v McDivitt*).

Adequacy of consideration

Adequacy refers to the fairness of the exchange, which is not something the Courts will inquire into (*Woolworths v Kelly*). **Nominal consideration** (such as a peppercorn) will be sufficient consideration.

Sufficient consideration

Sufficiency means something of value must be provided, equal to the value of the service/goods being exchanged.

Past consideration

Past consideration is not good consideration (*Roscorla v Thomas*). As a general rule, a promisor's promise must be coextensive with the promisee's consideration. Consideration past and executed will not support any further promise made by the promisor.

Consequences of non-compliance

Unenforceability

Lack of necessary formalities will render a contract unenforceable. 'It is clear of course that non-compliance with the Statute of Frauds does not render a contract void, that its provisions are procedural, and that in terms it precludes the bringing of any 'action' unless its requirements are satisfied. But plainly the policy of the statute is to deny the enforceability of contracts to which it applies unless proved by the necessary writing.' (*Popiw v Popiw*).

Part performance

A contract that infringes the writing requirement may be enforceable when part has been performed.

Implications

If performed according to its tenure, rights may validly be conferred under it. May be relied upon by way in defence (*Thomas v Brown*). Circumstances may give rise to constructive trust or equitable estoppel.

Narrow View

'Acts relied upon as part performance must be unequivocally, and in their own nature, be referable to some such agreement as that alleged.' (*Maddison v Alderson*)

Acts did not unequivocally point to this type of contract (*Ogilvie v Ryan*). The act needs to fit the present scenario in relation to the contract.

In *Khoury v Khouri* the court said the narrow view prevails until HCA rules otherwise.

Broad view

'Acts of part performance must, on a balance of probabilities, prove the existence of some contract, and are consistent with the contract alleged.' (*Regent v Millett*)

CISG Article 11 – a contract of sale need not be concluded in, or evidenced by, writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

7. Privity

An enforceable contract gives rise to legal rights and obligations. At common law, such rights and obligations affect only those who are 'privity' (i.e. parties) to the contract. If consideration is provided, they are third party beneficiaries.

'It must be accepted that, according to our law, a person not a party to a contrary may not himself sue upon it so as directly to enforce its obligations. For my part, I find no difficulty or embarrassment in this conclusion. For my part, I find no difficulty or embarrassment in this conclusion. Indeed, I would find it odd that a person to whom no promise was made could himself in his own right enforce a promise made to another.' – per Barwick CJ in *Coulls v Bagot's Executor & Trustee Co Ltd*

Implications of the Privity Rule:

- A contract cannot impose a burden on a third party without that party's consent

Assess at time of departure: detriment should be assessed at the time of the representor's departure or threatened departure from the assumption per *Je Maintiendrai*: the parties were better off financially each month but at the time of the departure from the assumption, the lump sum constituted a detriment

Remedies

Common law estoppel: expectation interest – as if the fact was true

Equitable estoppel:

- Starting point: relying party has prima facie entitlement to have the relied upon assumption made good unless it would be disproportionate (*Deane J Commonwealth v Verwayan; Guimelli v Guimelli*).
 - Subject to pragmatism (e.g. property may no longer be available)
 - Subject to proportionality and justice (courts will provide the 'minimum equity' to do justice between the parties) – *Commonwealth v Verwayan*
 - Relief is discretionary

10. Express Terms

Identifying express terms

Express terms could be wholly oral; wholly written; or partly written and partly oral. Written contracts could be contained in a single document, or a combination of two or more documents.

Written terms and the effect of signature

Incorporating terms

1. Incorporation by signature: terms signed by a party
 - General rule is that a party is bound by the terms contained in a contractual document that he or she has signed regardless of whether the party read or understood the terms before signing (*L'Estrange v F Graucob*)
2. Incorporation by notice: statements contained in signs or notices displayed on business premises, internet websites, tickets, etc.
3. Incorporation by course of dealings: terms from earlier contracts/dealing between the parties
4. Statements made during negotiations: oral or written statements made at various stages of the negotiations leading up to the conclusion of the contract

Exception to the rule in *L'Estrange v F Graucob*

The effect of signature may be avoided where (1) the consent to be bound has been vitiated by factors such as fraud or misrepresentation (or duress, undue influence or unconscionable dealing), and (2) the document could not reasonably be expected to contain contractual terms.

3. Question 3 – Interpretation: As a matter of construction, does the exclusion clause operate to exclude or limit liability in relation to the issue in dispute?

11. Implied terms

Where there is a gap in a contract the court will either do nothing (allow losses to lie where they fall) or imply a term (fill the gap in the contract).

Courts can recognise three categories of implied terms (*Byrne v Aus Airlines*).

The **ACL** provides mandatory consumer guarantees for consumer contracts (legislative implied terms). These cannot be expressly excluded by the parties (s 64 **ACL**).

Terms implied by fact: depends on the facts of the case and are implied on the presumed intention of the parties, that being the parties would have included them if they turned their minds to them (*The Moorcock*).

Formal Contracts

Strict application of the ‘**BP Refinery**’ 5-point test, (*BP Refinery*) applied in *Codelfa*; *Re Ronim*:

1. It must be reasonable and equitable (*Codelfa*; *Re Ronim*; *Con Stan Industries*) – reasonableness alone is not sufficient; a term which is beneficial to one party but detrimental to another is unlikely to be equitable
2. It must be necessary to give business efficacy to the contract (*Codelfa*; *The Moorcock*; *Re Ronim*; *Con Stan Industries*) – **test:** would a reasonable person consider the proposed term necessary to enable the contract to operate in a business-like manner? (*The Moorcock*)
3. It must be so obvious it goes without saying (*Mackinnon LJ* in *Shirley v Southern Foundries*)
4. Capable of clear expression
5. Does not contradict express terms (*Brennan J* in *Codelfa*)

Informal contracts

BP Refinery Test is not as strictly applied (*Byrne v Aus Airlines*)

- Key issue: is the term necessary for reasonable or effective operation of a contract of that nature in the circumstances of the case? (*Deane J* in *Hawkins v Clayton*, endorsed in *Byrne v Aus Airlines*; *Breen v Williams*)
- Must be obvious (*Breen*)

Terms implied by law

Requirements

- The term must be applicable to a definable class of contractual relationship; and
- It must be recognised as a term suitable to be implied in all contracts of that class, by reason of necessity (*Liverpool City Council v Irwin*)