**Contracts: contract formation**

**Introduction to contract formation**

This text gives an overview of some of the most important concepts and terminology related to what constitutes a legal contract and when it is enforceable.

1 Read through the text quickly. Then match these questions (a-e) with the paragraphs that answer them (1-5).

a What form can an enforceable contract take?

b When do third parties possess enforceable rights in a contract?

c On what grounds related to the formation of a contract may its validity be attacked?

d What are the elements of an enforceable contract?

e What are the essential terms of a contract?

1 As opposed to civil law, where contracts are generally formed simply through offer and acceptance, in the common law , a promise becomes an **enforceable** contract when there is not only an **offer** by one **party** (**offeror**) that is accepted by the other party (**offeree**) but also an exchange of legally sufficient **consideration** (a gift or donation does not generally count as consideration): hence the equation learned by law students: offer + acceptance + consideration = contract. The law regards a **counter offer** as a **rejection** of the offer. Therefore. a counter offer does not serve to form a contract unless, of course, the counter offer is accepted by the original offeror.

2 For a promise to become an enforceable contract. the parties must also agree on the **essential terms** of the contract. such as price and **subject matter**. Nevertheless. courts will enforce a vague or **indefinite** contract under certain circumstances. such as when the conduct of the parties. as opposed to the written **instrument**, manifests sufficient certainty as to the terms of the agreement.

3 An enforceable agreement may be manifested in either written or oral words (an **express contract**) or by conduct or some combination of conduct and words (an **implied contract**). There are exceptions to this general rule. For example, the Statute of Frauds requires that all contracts involving the sale of real property be in writing.

4 In a contractual dispute, certain defences to the **formation** of a contract may permit a party to escape his/her obligations under the contract. For example, **illegality of the subject matter, fraud in the inducement, duress and the lack of legal capacity** to contract all enable a party to attack the validity of a contract.

5 In some cases. individuals/companies who are not a party to a particular contract may nevertheless have enforceable rights under the contract. For example, contracts made for the benefit of a third party (**third-party beneficiary contracts**) may be enforceable by the third party. An original party to a contract may also subsequently transfer his rights/duties under the contract to a third party by way of an **assignment of rights** or **delegation of duties**. This third party is called the **assignee** in an assignment of rights and the **delegate** in a delegation of duties.

**Key terms: Defences to contract formation**

Match these defences (1-4) with their definitions (a-d).

1 illegality of the subject matter

2 fraud in the inducement

3 duress

4 lack of legal capacity

a when one party does not have the ability to enter into a legal contract. i.e. is not of legal age, is insane or is a convict or enemy alien

b when one party induces another into entering into a contract by use or threat of force, violence, economic pressure or other similar means

c when either the subject matter (e.g. the sale of illegal drugs) or the consideration of a contract is illegal

d when one party is intentionally misled about the terms, quality or other aspect of the contractual relationship that leads the party to enter into the transaction