

## 4.2FORMATION OF CONTRACT

What is a Contract?

A contract is an agreement between two parties which can be legally enforced.

How do we know whether the contract is legally enforceable?

In order for a contract to be enforceable there are five essential elements which need to be present;

### 1. Intention

There must be a clear intention for the parties to create a binding obligation.

### 2. Capacity

The parties must clearly be capable of forming a legally enforceable relationship. Incorporated companies, partnerships and individuals all have the capacity to create a contract. In contrast infants or insane persons do not.

### 3. Agreement

This is probably the most important element. Its presence is fundamental to the formation of a legally binding contract.

In order for the courts, an arbitrator, or any other party with jurisdiction to determine that agreement has been reached a clear offer and unconditional acceptance needs to be present.

### 4. Certainty of Terms

It is not necessary that every term is agreed for example a building contract could be let using a bill of quantities based on approximate quantities. However, there must be general agreement as to the terms of the contract.

### 5. Consideration

Under English law consideration may be defined as the giving of a benefit of some kind to the other party with whom you have or wish to contract. Usually this takes the form of money in commercial contracts although it could be quite literally be given in any form.

For example in the Joint Contracts Tribunal NSC/W collateral warranty agreement between an Employer and Sub-Contractor consideration is typically in the form of a pledge that the Sub-Contractor will carry out and complete the sub-contract works in such a manner as to not require the Main Contractor to seek an extension of time and a reciprocal pledge by the Employer to operate direct payments to the Sub-Contractor where the Main Contractor has failed to discharge payment in accordance with the terms of the Sub-Contract.

In a contract between a Main Contractor and Sub-Contractor, consideration is the pledge of money by the Contractor on the one hand and the supply of labour, plant and materials by the Sub-Contractor on the other.

Consideration is not necessarily required where a contract is executed as a deed i.e. there may be one way obligations by one party with no benefit being provided by the other, Under Scottish law voluntary obligations assumed with the absence of any consideration may be enforceable.