

**- A guide to the critical elements of contract law, highlighting the clauses that businesses should always include in their agreements to protect their interests.**

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## **1. INTRODUCTION**

Contract law is a subject that affects businesses globally daily and governs the essence of business and trade itself. If treated lightly, one is likely to get the short end of the stick under a contract. Contract law refers to the law that regulates the formation, operation, and enforcement of agreements between parties. The said agreements are entered into with intention of creating legally binding relations between the parties. It is important to note that subsistent and critical elements of the contract law in Zambia are adopted from the common law and progressively form part of the Zambian law through continued application by the Zambian courts.

## **2. CRITICAL ELEMENTS OF CONTRACT LAW**

Contract law demands that certain critical elements must exist for there to be a valid and enforceable contract between parties to a contractual agreement.

The first element is a valid offer. An offer is defined as a clear and unqualified communication of an intention or willingness to enter into a contract on specified terms with another party.<sup>1</sup> The second element of a contract is the acceptance of an offer, which must be unconditional and clearly communicated to the offeror in order to create a binding agreement (contract) between the parties. The case of *Finance Bank Zambia Limited v Socotec International Inspection Zambia Limited and another*<sup>2</sup> establishes that once an offer is made and accepted, a valid contract is made between the parties.

Where conditions are attached to the acceptance, it is regarded as a counteroffer and is then subject to acceptance by the other party. The court in the case of *Hyde v Wrench* aptly established the settled principle that a counteroffer automatically revokes the initial offer which in turn cannot be acceptable unless offered again by the offeror.<sup>3</sup>

The two principles above fully describe a meeting of minds between the parties to a contract. Acceptance goes to the meeting of minds and agreement between the parties.

The third critical element is consideration. Consideration entails something of value given by one party to the other, for which another thing of value is exchanged with the other party.

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<sup>1</sup> London Ngoma and Others v LCM Company Limited CAZ Appeal No. 122 of 2017.

<sup>2</sup> Finance Bank Zambia Limited v Socotec International Inspection Zambia Limited and Zambezi Oil and Transport Company Limited (In Receivership) (2010) ZR (2) 225.

<sup>3</sup> Hyde v Wrench (1840) 3 Beav 334. Kindly note that the English case referred to herein is persuasive purposes only.

Consideration can be monetary or otherwise and can be an act or forbearance or a promise thereof.<sup>4</sup>

The fourth critical element of contract law is the intention to create legal relations. This element largely depends on the relationship between the parties and the ascertainable intentions of the parties in their expressions or conduct. Agreements or promises in social or domestic relationships such as between wife and husband may not always be intended to create legally binding relations, while agreements between ‘business parties’ are often held to constitute an intention to create legally binding relations.<sup>5</sup> This essentially means that parties to a contract should understand and accept that in the event that one party breaches the contract, the other party will be entitled to legal recourse.

The fifth critical element is that of capacity which is a person’s ability to enter into a binding and enforceable contract. When a party to a contract does not have the capacity to enter into a contract, that contract will be invalid *ab initio* or invalid from its inception. To have the capacity to enter into a valid contract, a natural person should be mentally sound and should not be a minor. As regards entities created by virtue of statute such companies, partnerships, clubs, and societies, the person executing the contract on behalf of the said entity should be a duly authorised representative.

The final critical element is the subject matter of the contract. A contract where the subject matter relates to the performance of an illegal or unlawful act is not a valid contract. Therefore, parties entering into a contract for murder, for example, cannot be upheld by the courts of law.

### **3. ESSENTIAL CLAUSES OF AN AGREEMENT**

The ideal time a party to a purported contract should protect itself from any possible risks is at the commencement of any transaction. In order to ensure that the said party’s interests are secure, the party to the contract should ensure that clauses that protect its interests are inserted in the agreement governing the business relationship or transaction.

Whether one is entering into a contract with an individual, a private company, public company, a parastatal, or the State, one needs to be alive to the most fundamental clauses that are recommended in every agreement. Different agreements are drafted to meet varying subject matters and demands from the parties however, there are essential clauses that are recommended for insertion in every agreement. This writing addresses what can be termed as essential clauses of an agreement and explains the relevance of these essential clauses to the formation, interpretation, performance, and indeed enforcement of the agreement.

#### **i. Parties Clause**

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<sup>4</sup> Currie v Misa (1875) LR 10 Ex 153.

<sup>5</sup> Ng'ambi, S.P. & Chungu, C., Contract Law in Zambia, 2<sup>nd</sup> Edition (Claremont: Juta and Company Ltd, 2021), 86.

The parties' clause shows the names, particulars (such as nationality in the case of individuals or incorporation status in the case of companies) and description of the parties. The clause is essential as it also creates an opportunity for the parties to identify the capacity in which each of the parties is entering into and executing the agreement.

## **ii. Recitals**

The recitals in the agreement present a factual and historical background of the agreement. While the recitals are not an enforceable clause of the agreement, the recitals can be used to explain developmental circumstances of the subject matter. For instance, in the case of a transaction for land where a party is selling property as a personal representative, the recitals can help detailing that fact, including the date of the passing of the title holder and whether or not the party selling the land has acquired the necessary court appointment by way of grant of probate / letters of administration. Recitals can also help in interpreting the spirit of the agreement when the substantive clauses of the agreement result in an ambiguity.

## **iii. Term and effective clause**

The term of the agreement is an essential clause as it specifies the length and circumstances under which the obligations, rights, and benefits of the parties to the agreement will subsist as between the parties. Further, the effective clause stipulates when the agreements shall take effect. An agreement could be signed on a specific date whilst only taking effect at a future, or indeed even a past, date or after the performance of certain obligations.

## **iv. Financial or payment clause**

The payment clause is vital to every agreement as the parties are required to clearly provide for the payment sum, payment method, currency of payment, late payment penalties and repercussions for late payment. Others will argue that this is the heart of any agreement. However, this clause may be done away with if the parties to the agreement agree that performance of the contract will not be subject to any payment whatsoever.

## **v. Conditions Precedent**

This clause provides for the conditions or requirements without which the whole agreement would be defeated.<sup>6</sup> An example of the condition precedent is an agreement for a merger of two or more entities which is subject to the parties' obtaining the relevant approvals from a regulatory body such as the Competition and Consumer Protection Commission and the Bank of Zambia. From the forgoing, it can be noted that without the necessary approvals, the merger or acquisition cannot reasonably be expected to proceed. Suffice to state that specific conditions precedent clauses will vary depending on the subject matter of the agreement and the circumstances that would wholly defeat the intentions of the parties to the agreement.

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<sup>6</sup> Hong Kong Fir Shipping Company Limited v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26.

#### **vi. Termination clause**

The termination clause specifies the requirements for notice and the attendant conduct of either party actioning their intention to terminate the agreement in circumstances where the agreement is not terminating automatically by effluxion of time. The termination clause is important as every contract should have an “exit”.

#### **vii. Governing law**

The governing law clause allows the parties to agree on the law which they wish to have apply to the agreement. In the event that a dispute arises between the parties, the governing law clause would determine the law that would be applicable.

#### **viii. Force majeure**

A force majeure or an act of God clause enables the parties to stipulate what would occur in the event of ‘an act of God’. Most force majeure clauses provide for a suspension of the agreement until the event comes to an end. It rarely releases the parties of their obligations under an agreement. Parties to an agreement are required to clearly state whether notice shall be required when a party experiences a force majeure event and as to when notice should be given when the event comes to an end.

#### **ix. Confidentiality**

Confidentiality clauses clearly stipulate which information shall remain confidential between the parties. This clause protects the parties’ interests as trade secrets and other sensitive pieces of information exchanged between or among the parties can be preserved and excluded from disclosure.

#### **x. Amendment**

The amendment clause ensures that the terms of the agreement shall not be subject to change or amendment without the consent of both parties. Some organisations such as the State would require the amendment of an agreement to undergo extensive approval processes, such as the legal and financial advisers’ clearance or guidance. Therefore, parties to an agreement should be well aware of the repercussions and length of time it would take to amend an agreement.

#### **xi. Dispute Resolution**

The dispute resolution clause avails an opportunity for the parties to stipulate a mode of dispute resolution to be used in settling disputes arising out of the performance of the agreement. Parties would be required to state whether the dispute would be resolved by way of arbitration, mediation, negotiation or any other dispute resolution mechanism. A party that cannot afford the high fees of a protracted litigation process can protect its interest by opting for shorter and timely dispute resolution methods such as arbitration. Further, parties that seek to maintain their working relationship in the business would protect that their mutually beneficial interest by employing mediation which can preserve their relationship.

### 3. CONCLUSION

From the above, it should be noted that having satisfied and met the critical elements of the contract law in Zambia, the next stage in the formulation of a valid agreement is the drafting of an appropriate agreement for the execution of the parties to meet their set objectives. The salient and essential clauses have been discussed above. The list is however not exhaustive as different agreements will demand the inclusion and embodiment of different clauses. Further, various other clauses of an agreement from those discussed above may be equally essential as they allow for the proper performance of agreed. What we cannot emphasise enough, is the importance of understanding the nature of the agreement and the subject matter as these two elements shall guide the parties on the type of agreement and the clauses that should be inserted therein.

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