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FORMATION OF A CONTRACT AND ITS TECHNICALITIES: BANGLADESH PERSPECTIVES

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1. Introduction

Foundation of commercial transactions is built on what is, legally speaking, known as "contract". A contract, as commonly understood, is a negotiated settlement which, as well, referred to as "agreement". In the general sense of the terms the expression like "agreement" and "contract" are used interchangeably. However, in legal parlance "agreement" and "contract" are not viewed in the same sense and are having different legal status. As Professor Treitel puts it, formation of a "contract" involves two-stage procedure. In the first place, an "agreement" springs out of a proposal and, in the second place, a "contract" is formed out of an agreement.[1] This prescription, as it argued in this article, is well accommodated in the scheme of the Contract Act, 1872 (in concise "the Contract Act"). Section 2 (h) of the Contract Act states in forth right terms that an agreement enforceable by law is a contract. This definition corroborates the view that "agreement" and "contract" are not taken to signify same legal meaning and to constitute same legal obligations.

The Contract Act, to a large extent, encapsulated principles of English law prevailed during nineteenth century. The English colonial rulers intended to impose English secular principles of mercantile law by way of formulating a set of rules, which, later on, with the assent of her Majesty, was enacted as "Indian Contract Act, 1872" (now known as "Contract Act")having uniform application to all Indians of different denominations. The rules embodied in the Contract Act although, inter alia, construe relevant technical terms and lay down procedure to enter into contracts suffered from some inherent intricacy requiring judicial intervention for precision. As a result, since the time of the enactment the judges have constantly been being called to apply their judicial mind to construe the provisions of the Contract Act and a large

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1 Treitel G.H.: *The Law of Contract* Eleventh Edition (2003), published by Sweet & Maxwell Limited., 1011 Avenue Road, London NW3 3PF, UK, p. 8. See also *James Finlay PLC Vs. Meshbahuddin Ahmed* 46 DLR (1994) 624, para 17.

proportion of these judicial pronouncements has particular bearing on the procedure to form contracts.

This is particularly important to note here that the Contract Act does not have any discrete part/chapter incorporating rules on the procedure to enter into a contract. The rules are scattered across the enactment under convenient heads. Same conclusion may be drawn regarding judicial observations focusing on the procedure to form contracts inasmuch as these were pronounced in different circumstances, in different point of time and were recorded in different legal journals. It is, therefore, not exaggerating to say that this requires a thorough research to figure out the sequential steps needed to enter into a contract as prescribed by the Contract Act and jurisprudence developed thereunder. This article is a modest attempt for that end.

The article having examined the relevant provisions of the Contract Act and judicial decisions proposes to introduce a framework to form a contract and, in order to appreciate the functional aspect of the proposed framework, has developed some flow charts and diagrams. As the article progresses it realizes that the framework to form a contract as enunciated by the Contract Act in 1872 is still relevant and answers the need of the people; although the substantive provisions building blocks for the framework have, due to rapid change in the trading pattern and socio-economic condition in the twentieth century, become obsolete entailing massive renovation of the Contract Act. In section 1 this article focuses on the provisions of the Contract Act to figure out the procedure to make an agreement and in section 2 this article further undertakes an investigation to trace out the chronological steps required to form a contract out of an agreement.

Section 1: Formation of Agreement

2.1 Agreement in General:

Normally, agreement is reached by process of an offer by one party, termed the 'offeror', accepted by the other, termed the 'offeree'; and, before the offeree can enforce the offeror's promise, the offeree must give the consideration requested in the offer[2]. Section 2 (e) of the Act defines "agreement" stating: "Every promise and every set of promises, forming the consideration for each other, is an agreement." It appears from this definition that an agreement comprises two elements: (1) promise(s) and (2)

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2 *Halsbury's Laws of England*, contents provided by the Butterworths Direct Online Service, visited on 03/10/2005, Para 603

consideration[3]. Further, a promise stems out of two elements: offer and acceptance[4]. In final analysis this may be said that an agreement is the combination of a number of elements, namely, proposal, acceptance and consideration, bound together in the prescribed manner.

2.2 Procedure to Constitute Agreement

The artificiality of the definition of the term "agreement" provided by the Contract Act as mentioned above would impart legal and real business sense while the procedure of forming an agreement is examined. An agreement comprises a set of human actions technically called "proposal", "acceptance" and "consideration". These actions may be allowed to be arranged in triangular shape so as to culminate into an agreement. This is discussed below:

2.2.1 Proposal

It is universally accepted that to enter into a contract the first and foremost thing is to have a "proposal" or "offer". A "proposal" denotes one's desire to do or omit to do something bound up with an intention to enter into a legal relationship thereby with another. As stated in Halsbury's Laws of England, "An offer is an expression by one person or group of persons, or by agents on his behalf, made to another, of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain."[5] The expression "willingness to be bound to a contract" as used in the definition underscores that intention to enter into a legal relationship with another is key for the validity for an offer. This subjective approach of having an intention has impeccably been insulated in section 2 (a) of the Contract Act[6]. According to Contract Act, an offer is having two essential components: It is, in the first place an expression of the offeror's willingness to do or to abstain from doing something. Secondly, it is made with a view to obtaining the assent of the offeree to the proposed act or abstinence. Seemingly the second component of the definition contemplates that an

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3 It is, however, important that promises and consideration that may culminate into an agreement must have reciprocity.

4 See section 2 (b) of the Contract Act, 1872.

5 *Halsbury's Laws of England* note 2 above, at Para 632. This position of law is also subscribed by Prof. Treitel:Treitel note 1 above, at p. 8. See also 46 DLR (1994).HCD 624, at para 17.

6 This section defines the term "Proposal" in an incoherent but robust language: "When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal "

offerer shall be presumed to have an intention to bind himself legally to the offeree while making the offer. For example, A while in a self-service shop picks an item and places it on the cash counter saying, "I want to buy it", he expresses his intention to be legally bound to pay the shopkeeper stipulated amount when the shopkeeper is agreeable to sale the same to him. This intention on the part of the offerer is determined by what is called "objective test"[7].

However, a proposal as discussed above would not suffice to constitute an agreement. It needs to be accepted by the offeree.

2.2.2 Acceptance

"Acceptance" in terms of law of contract denotes a positive response on the part of the person receiving a proposal, i.e., offeree. But mere mental determination would not be sufficient. It needs some overt act by which an offeree can demonstrate his assent to have a bargain on the terms as stated in the proposal.[8] As Act[9] puts it: "When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted." Section 7 (1) of the Act further tunes this definition stating that an

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7 "It is a well-established principle of the English law of contract that an offer falls to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer."" *Centrovincial Estates plc v Merchant Investors Assurance Company Ltd* [1983] Com LR 158 (CA) as per Slade LJ. See also judgment of Bowen LJ in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256; Court of Appeal, 1892 Dec. 6,7. For more on the puzzle of subjectivity versus objectivity see Poole Jill : "*Case Book on Contract Law*" Sixth Edition, published by University Press, UK Pp. 17-19. This should be noted here that While addressing the question of intention of the contracting parties, law generally divides the agreements into: (1) commercial agreements and (2) family, domestic or social agreements. In the case of family, domestic or social agreements, the presumption is that there is no intention of the parties to create legal relations; but the presumption is just other way round in the case of commercial agreements: *Halsbury's Laws of England* note 2 above, at Para 719. For family or social arrangements see *Balfour v Balfour* [1919] 2 KB571 [CA); *Jones v Padavatton* [1969] 1 WLR 328 (CA); *Coward v Motor Insurers' Bureau* [1963] 1 QB 259 (CA). For commercial contracts see *Carlill v Smoke Ball Company* [1893] 1 QB 256.

8 This proposition was made by Lord Blackburn in *Brogden V Metropolitan Railway Company* (1877) 2 App Cas 666 (HL): "...But when you come to the general proposition which [the judge at first instance] seems to have laid down, that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer, completes a contract, I must say I differ from that ...."

9 See Section 2 (b) of the Contract Act.

acceptance shall be absolute and unqualified.[10] Prof. Treitel while examining the concept of "acceptance" from English law perspective encapsulates the provisions of the Act and observes[11] that an acceptance is "a final and unqualified expression of assent to the terms of an offer."

The term "acceptance" has comprehensively been defined in Halsbury's Laws of England[12]: "An acceptance of an offer is an indication, express or implied, by the offeree made whilst the offer remains open and in the manner requested in that offer of the offeree's willingness to be bound unconditionally to a contract with the offeror on the terms stated in the offer." This definition by employing the word "signify" give emphasis to the fact that to make an acceptance the assent of the offeree needs to be communicated.[13] Whether or not the offeree has communicated his assent to the offeror would be determined, it is suggested,[14] by "objective test".

Therefore, acceptance may safely be termed as final willingness of the offeree which has the effect of converting the proposal into a promise.

This may be noted that "promise" refers to the "proposal" which offeree has already accepted[15]. The offeree is said to have accepted the proposal when he completes the communication of his acceptance[16]. The legal effect of completion of communication of an acceptance is that neither offerer nor the offeree can, afterward, revoke his part of the bargain[17] without incurring legal liability. But the performance of the promise can be enforced when it is proceeded by what is known as "consideration". Hence, it is appropriate here to explain "consideration".

2.2.3 Consideration

Traditionally, English law regards "consideration" as a detriment to the promisee and/or a benefit to the promisor. As Lush J puts it a valuable

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10 Section 7 (a) of the Contract Act.

11 Treitel note 1 above, pp 16-17.

12 *Halsbury's Laws of England* note 2 above, Para 650.

13 Communication of assent may be made expressly or impliedly: Section 9 of the Contract Act.

14 Treitel note 1 above, pp. 16-17. Further, to be valid, an acceptance is to be communicated in the prescribed manner.[14] "If the offer requests a promise, no contract is formed unless and until that promise is given; and, if the offer requests an act, no contract is formed unless and until that act is performed.": *Halsbury's Laws of England* note 2 above,Para 650.

15 Last sentence of section 2 (b) of the Contract Act.

16 Law prescribes that communication of acceptance is completed as against the offeree once it is brought to the notice of the offeror. Section 4 of the Contract Act.

17 Section 5 of the Contract Act.

consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.[18] Although traditionally, both benefit and detriment are to be present, it is suffice to have detriment to the promisee to support an act as consideration.[19] Again, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is causally linked to that promise.[20] The definition of consideration as given in the Contract Act[21] is largely based on the traditional approach of English law[22].

This traditional view of benefit and detriment has been criticised[23] on the grounds, in the first place, that out of a contract both the parties are benefited and so it is thought not to be correct to appreciate it from benefit and detriment perspective. Secondly, some time "notion of "benefit and detriment" sounds artificial to support consideration.[24] The consideration may be interpreted to exist making the corresponding promise binding although the promisor gets no benefit[25] and the promisee suffers no detriment[26] in the course of transaction.

On the contrary, Sir Frederick Pollock provided an alternative definition regarding the "consideration" as price for the promise.[27] This definition was adopted by House of Lords. Endorsing this view Lord Dunedin observed, "An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for

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18 *Curriev Misa* (1875) LR 10 Ex 153, p. 162.

19 Treitel note 1 above, p. 68 *Halsbury's Laws of England* note 2 above, Para 729.

20 *Halsbury's Laws of England* note 2 above, Para 728.

21 According to Section 2 (d) of the Contract Act "When at the desire of the promisor, the promisee or any other has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise ."

22 This statement is supported by the Indian Supreme Court in Chidam-barn lyer v. Renga lyer (1966) A.SC. 193-197.

23 Treitel note 1 above, p. 68.

24 Treitel note 1 above, p. 68.

25 For example, where A guarantees B's bank overdraft and the promisee bank suffers detriment by advancing money to B, then A is bound by his promise, even though he gets no benefit from the advance to B. Thus promise of A is enforceable although he receives no benefit from the transaction.

26 Under an export trading bank pursuant to a letter of credit undertakes to pay the exporter and promise of the exporter to deliver goods can be enforced against it although importer being promisee apparently suffers no detriment.

27 Pollock: *"Principles of Contract"* (13th Ed.), p. 133.

value is enforceable."[28]For example, against the promise of the seller to deliver agreed goods the buyer has deposited a stipulated sum. This act, namely, paying of stipulated amount of money, is the value and inducement for the promise and hence this can be legally enforced.[29]

So far it is emphasized that consideration consists of performance against a promise. But it is well settled that mutual promises can furnish consideration[30] and resulted bargain will impose binding obligations.[31] Only limitation being that these promises cannot be compelled unless the time for performance of promises arrives[32]. Further, consideration must not be confounded with "condition precedent"[33] or "motive"[34].

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28 In Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd [1915] AC 847, 855.

29 This definition of consideration has been rejected by Prof. Treitel on the ground that the definition being vague is less helpful in determining the existence of consideration in different set of facts. He, however, prefers to follow the traditional definition given by Lush J though being a critic of it.

30 Critical view is that this kind of consideration is not squarely covered by "benefit and detriment" theory as the performance is suspended upto a future point: Treitel note 1 above, p. 70.

31 Thoresen Car Ferries Ltd v Weymouth Portand BE [1977] 2 Lloyd's Rep. 614 at 619.

32 Where a seller having a promise from the buyer to pay the price on a specified future date promises to deliver the goods, these promises having reciprocity provide consideration for each other.

33 Unlike the condition-precedent consideration is a task requested for. Fulfilment of condition precedent creates an entitlement to the benefit of the promise; but consideration affords legal footing to enforce the promise [Holmes, The Common Law: Contract available at www.constitution.org visited on March 20th, 2008; see also Thomas v Thomas (1842) 2 QB. 851]. In Carlill v Carbolic Smoke Ball Co.[[33] [1893] 1 Q.B. 256] the plaintiff provided consideration for the defendants' promise by using the smoke-ball; but her catching influenza was only a condition of her entitlement to enforce that promise. For the former task was requested by the defendant and not the latter.

34 As prof. Treitel observes, a motive for making a promise is not necessarily consideration for it in the eye of law; but the consideration for a promise is always a motive for promising. [Holmes, The Common Law: Contract available at www.constitution.org visited on March 20th, 2008; see also Treitel note 1 above, p. 72]. This proposition may be well illustrated by the following example: In Thomas v Thomas (1842) 2 QB. 851. a testator shortly before his death expressed a desire that widow should during her life have the house in which he lived. After his death his executors "in consideration of such desire" promised to convey the house to the widow during her life or for so long as she should continue a widow, "with the condition that she should pay £1 per annum towards the ground rent, and keep the house in repair. In an action by the widow for breach of

It is evident from the foregoing discussion that:

(1) Consideration means any task, e.g., an act or omission or a promise thereof;

(2) These tasks are requested by the promisor and as such consideration is the motive for the promise of the promisor;

(3) These tasks are performed or undertaken as per the desire of the promisor and hence these have reciprocity with the promise of the promisor;

(4) To be consideration tasks are to be valuable, i.e., capable to be measured in terms of money, albeit nominal;[35] and

(5) These tasks are done or undertaken either by the promisee or any third party.

2.3 Agreement: Valid/void/voidable

It is evident from the foregoing discussion that the process of making an agreement commences with a proposal and it becomes a promise if accepted by the offeree and the promise becomes enforceable if and when offeree furnishes consideration.[36] Hence an agreement results from a combination of offer, acceptance and consideration. This process may be illustrated by a formula as shown in the following diagram:

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this promise, the consideration for it was held to be the widow's promise to pay and repair. Court regarded the desire of the testator as motive, not as consideration. Court observed: a motive for promising does not amount to consideration unless two conditions are satisfied, viz.: (i) that the thing secured in exchange for the promise is of some value in the eye of the law and (ii) that it moves from the promisee. Thus the testator's desire was a motive for the executors' promise, but not part of the consideration for it. The widow's promise to pay and repair was another motive for the executors' promise and did constitute the consideration.

35 Lloyd's Bank v Bundy (1975) Q.B. 326, 336, Per Lord Denning M.R; for more on this point see Pollock and Mulla: "*Indian Contract and Specific Relief Act*", India (1994), eleventh edition, pp. 33-34.

36 This may be brought to the notice of the readers that if the consideration required from the offeree is a promise, the giving of that promise is said to result in a bilateral or synallagmatic contract, under which both sides initially exchange promises; but, if the requested consideration is an act other than a promise, its performance is said to make a unilateral contract, whereupon the offeror becomes bound by his offer. *Halsbury's Laws of England* note 2 above, Para 603.

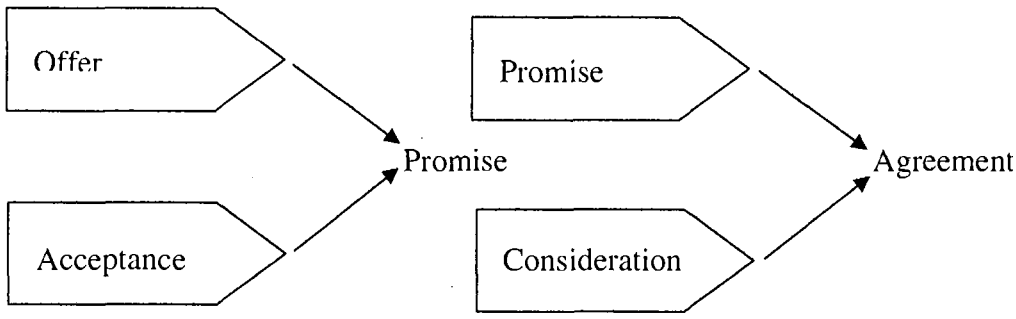

DIAGRAM 1

The Contract Act categorises agreements into (1) valid, (2) void and (3) voidable. Only completely perfect agreements become contracts. A completely valid contract is one that is enforceable by all the parties to it by one of the prescribed remedies.[37] Such contracts must be distinguished from those with varying degrees of imperfection, namely void[38] and voidable[39]. Therefore, obvious conclusion is that an agreement if so facto does not become a contract. It requires some further prerequisites and these are explained in the section 2 below.

Section 2: Formation of Contracts

3.1 Meaning of Contract

Section 2 (h) of the Contract Act defines "contract" as those agreements that are enforceable by law. Criteria for enforceability has been set out in section 10 of the Contract Act and these are two folds: primary and supplementary.

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37 See section 2 (h) of the Contract Act.

38 The expression "void agreement" is commonly used in a convenient term for an agreement which is not enforced by law. Such agreements are some time treated to be void from the very inception [See *Mohoribibee V Dharmodas Ghosh* (1903) 30 IA 114:30 Cal539]. The appellation "void" has also been used to describe an initially valid contract which ceases to have effect before its expiry (See section 56 of the Contract Act, 1872).

39 A "voidable contract" is one which is initially valid, but where one or more of the parties have right of election to avoid or to continue and so validate it [Section 2 (i) of the Contract Act]. Unless and until a right of avoidance is exercised, a voidable contract remains valid.

3.2 Primary Prerequisites

There are four primary prerequisites that an agreement ought to satisfy to enjoy enforceability and have the status of a contract, namely, (1) competent parties, (2) free consent of the parties, (3) lawful object and consideration and (4) agreement not being barred by law. It is noteworthy, aforesaid conditions are fundamental for the validity of all agreements. In the following pages these conditions are explained.

3.2.1 Competent parties

It is the first and foremost criteria for the legality of an agreement that the parties thereto are competent to contract. Only three categories of people are declared to be competent to contract. They are the persons who are of the age of majority, of sound mind and not being disqualified from contracting by law[40]. In other words, law declares three classes of persons as incompetent to make contracts; they are persons below the age of majority, i.e. minors,[41] persons with unsound mind,[42] e.g. a lunatic, and persons disqualified from contracting, e.g., bankrupt.[43]

3.2.1.1 Nature and Legal Effect of the Transaction

Perplexity lies in the fact that no where in the Contract Act this has been clarified as to what would be the legal status of the contracts made by such incompetent persons. It was in the root of controversy among the lawyers, jurists, judges. People had to wait for thirty years since the promulgation of the Act in 1872 to have a judicial pronouncement to put at rest this controversy. In 1903 the Privy Council in the landmark decision in Mohoribibee V Dharmodas Ghosh[44] observed that an contract made by a minor with a major person is not only void, but void ab initio. So there can

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40 Section 11 of the Contract Act.
The age of majority is generally eighteen, except when a guardian of minor's person or property has been appointed by the court, in which case it is twenty-one: Section 3, Majority Act, 1875.

42 Section 12 of the Contract Act defines the expression "person with unsound mind".

43 See section 94 of the Insolvency Act, 1997.

44 (1903) 30 IA 114:30 Ca1539. This principle was further extended to hold that a minor who has made an agreement by misrepresenting his age may afterward disclose his real age. There is no estoppel against him: [*Gadigeppa Bhimappa Mets v Balangowda Bhimangowada*, AIR 1931 Bom 561]. On the same principle a minor cannot be held liable for his acts in tort if the liability arises out of a contract.[44] Then this will be an indirect way to enforce an agreement against a minor. However, if the tort is independent of a contract, he cannot escape liability: [*Fawcett v Stnethurst* (1914) 84 LJKB 473:112 LT 309; Hari v Dulu Miya, (1934) 61 Cal 1075].

be no contract by a minor and hence no contractual liability arising out of it[45]. The protection of interest of the minor person was the prime concern of the judiciary while delivering the judgment.[46]

As laid down in Mohoribibee's case a minor shall incur no personal contractual liability and as such he cannot be compelled to shoulder any liability thereunder. Now question arises if a minor gets into a contract committing fraud as to his age, can the benefit which such minor has received be restored to the other party in the event of refusal by such minor person to fulfil his part of the contract? This has been answered in the negative in the Mohoribibee's case on the ground that the major person who enters into the contract having knowledge of the infancy cannot claim refund of the money. What if the other party is having no knowledge about the infancy? Dominant view is that the minor shall restore the benefit to the other party as the contract is being avoided on the ground of infancy[47]. On the contrary, if a minor gets into a contract and supplies full consideration or performs his part of the contract, can the other party being a major person come out of the contract on the strength of the Mohoribibee's case without incurring any liability? The consistent view is that the major person will be precluded from denying performing his part of the contract[48].

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45 Such a transaction which is void is a nullity (E.G., a vendee purchasing a minor's land sold by an unauthorised person such as his mother is no more than a trespasser in the estate of such minor: PLR (Dac) 627.

46 every man is the best judge of his own interests and it is well reflected on the doctrine of consideration: see Pollock and Mulla note 35 above, Pp. 33-34. But this presumption is suspended in the case of children.

47 But as to the nature of restoration conflicting views are traceable. According to one opinion, the major person can recover the property, if traceable, delivered to the minor person under the contract; but he cannot seek to recover its price or damages, for, if allowed to do so, the court would be enforcing the contract against a minor: [*Ajudhia Prasad v Chandan Lal* AIR 1937 All 610(FB); *Gokeda Latchurao v VBhimayya*, AIR 1956 AP 182]. However, other view does not allow the minor to avail any undue benefit hiding behind his infancy and is, therefore, ready to direct a minor even to pay compensation to the other party when the contract is avoided: [[47] *Khan Gul v Lakha Singh* ILR (1928) 9 Lah 701: AIR 1928 Lah 609]. This latter view is endorsed by the Indian legislature: See section 33 of the Specific Relief Act, 1963 (in force in India).

48 Reason lies in the fact that this would go against the minor person and negate the principle as laid down in Mohoribibee's case [*Atim Ali V Ashraf Ali* 11 DLR 185; *Raghava Chariar v Srini-vasa* (1916) 40 Mad 308: AIR 1917 Mad 630 (FB); *General American Insurance Co Ltd v Madanlal Sonulal*, (1935) 59 Born 656; *Thakur Das v Mt Pulti*, AIR 1924 Lah 611. *Ulfat Rai v Gauri Shanker*, (1911) 33 All 657; *Jaykant v Durgashankar*, AIR 1970 Guj 106]. If the contract is avoided even at the suit of an

It is submitted that provisions of the Contract Act applicable to the contracts made by minors cease to address all aspects comprehensively and so these are required to be reviewed.

3.2.1.2 Exception

The cardinal rule settled in Mohoribibee's case is subject to some exception. Broadly speaking, contracts that are generally beneficial[49] for a minor or for his "basic necessary"[50] or for his full enjoyment of the right to get employment ensured by statute[51] can be enforced by or against the minor.

It is to be noted that above principles stated about the contracts by or on behalf of a minor are applicable with necessary modifications to all contracts where one of the parties is incompetent according to section 11 of the Act to enter into a contract.

3.2.2 Free Consent

It is the second requirement for the validity of an agreement. A true contract requires the agreement of parties freely made with full knowledge and without any feeling of restraint[52]. Hence, section 10 of the Act entails the parties to an agreement to have not only "consent"[53]but also "free consent"[54]

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innocent third party, the full benefit shall be restored to the minor [*Walidad Khan v Janak Singh* AIR 1935 All 370].

49 pLR (1960) (WP)73;11 DLR 185; 21 DLR (SC) 54; 20 DLR (WP) 101.

50 For example, section 68 of the Contract Act gives validity to a contract by a minor if the same is concluded for the supply of "basic necessary" to such minor person or his dependents. But the liability that arises under section 68 of the Act is not a personal one; it is the estate of a minor person that may be liable to be attached by the Court to provide pecuniary benefit to the other party. What is necessary is a relative fact, to be determined with reference to the fortune and circumstances of the particular person. The station in which he moves in; the difficulties he is exposed to; the benefits he is entitled to etc. are basic factors to be considered. Necessaries must be things which the minor actually needs. Objects of mere luxury cannot be necessaries, nor can objects which, though of real use, are excessively costly. For example, supply of food, cloths etc. may be termed as necessaries. So also a contract for medical or legal services. A contract by a minor widow to pay for her husband's funeral may fall under the same category: see Pollock and Mulla note 35 above, p. 177. As settled in *Nash V Inman* [1908] 2 KB 1. to render an infant's estate liable for necessaries "two conditions must be satisfied, (1) the contract must be for goods reasonably necessary for his support in his station in life, and (2) he must not have already a sufficient supply of these necessaries" and it is immaterial whether this fact is known to the other party or not.

51 See sections 34 and 44 of Bangladesh Labour Act, 2006.

52 Pollock and Mulla note 35 above, p. 158.

53 The term "consent" denotes that two or more persons agree upon the same thing in the same sense while entering into a contract: Section 13 of the Contract Act.

for the legality of the agreement.[55] Broadly speaking, consent of the parties is not deemed to be free if it is tainted by pressure, misleading representation or by factual variance without the knowledge of the parties and, therefore, the resulted agreement may sustain a degree of legal disability. This criteria is shown in the diagram below:

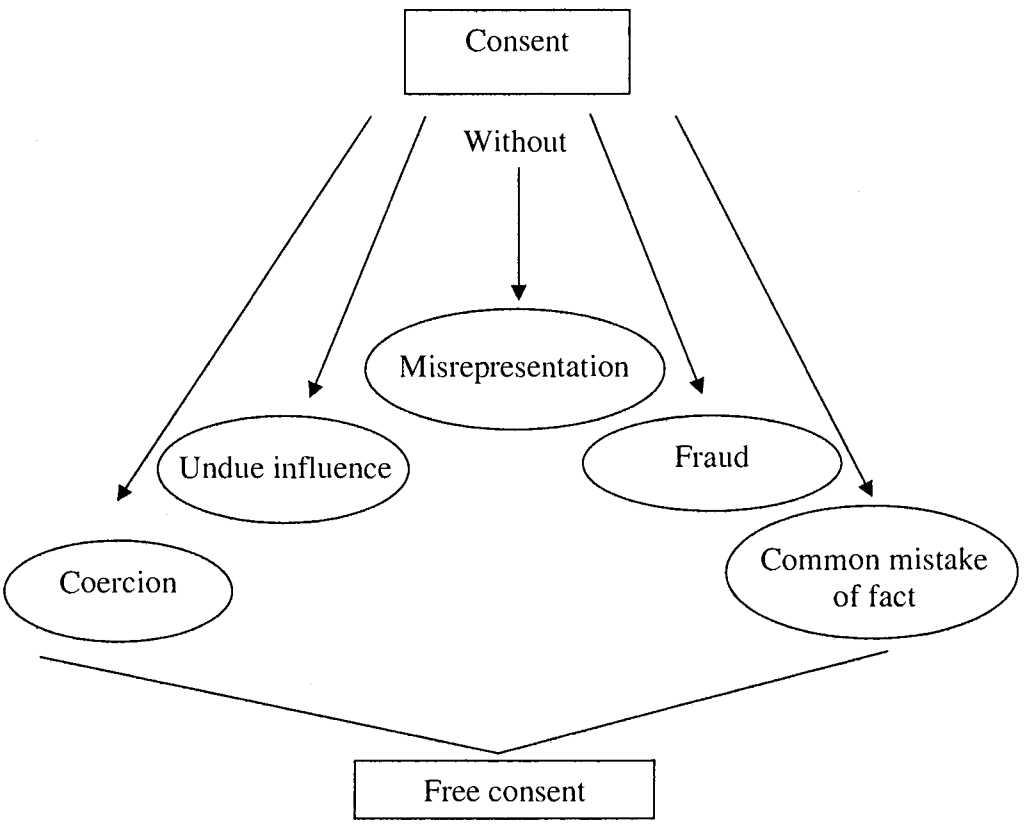

DIAGRAM 2

This criteria demands further clarification.

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54 Section 14 of the Contract Act defines this expression and states that a consent to an agreement is not free if it is caused by coercion, undue influence, fraud, misrepresentation or mistake.

55 This proposition has been deduced having considered the provisions of sections 10, 13 and 14 of the Contract Act.

3.2.2.1 Consent Obtained Under Pressure

Some time parties to an agreement may be allowed to have the feeling of restraint in one way or other to give assent to such agreement against their will. The resulted agreement will not become a contract; rather it is categorized as a voidable contract which may be set aside at the option of the innocent party either on the plea of "coercion" or "undue influence"[56].

3.2.2.1.1 Coercion

Coercion involves exerting of pressure through the use of force or violence. Motive of the party resorting to use of force or violence is important. As section 15 of the Contract Act puts it, if a person, with an intention to cause another to get into a contract, (1) commits or threatens to commit any offence[57] or (2) unlawfully detain or threatens to detain any property, to the prejudice of that another, the person said to have committed "coercion".[58]

So to constitute coercion there must be the committing or threatening to commit any offence[59] or the unlawful detaining or threat to detain any property[60] to the prejudice of another[61]. Coercion involves actual or imminent use of force but for which the person so coerced gives his consent.

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56 Sections 19 and 19A of the Contract Act entitle the innocent parties either to rescind the contract or seek compensation. See section 2 (i) of the Contract Act for the meaning of the term "voidable contract". See also section 29 of the Sale of Goods Act, 1930 to appreciate the effect of such contracts in case of sale of goods.

57 Section 15 of the Contract Act refers to the offences as defined by the Penal code, 1860.

58 Section 15 of the Contract Act.

59 Where in a case a bond was executed by a person while under custody by an order of a Court having no jurisdiction, it was held that the bond was not binding inasmuch as the same was executed under duress: [[59] *Banda Ali v. Banspat Singh*, 40 I.C. 352; (1882) 4 All 352. The Allahabad High Court in this case presumed that any confinement by a Court without jurisdiction is an unlawful detention which has fiercely been criticised: see Pollock and Mulla note 35 above, P. 204]. Same rule was applied to set aside a contract wherein a man forced his wife and son to give assent to a contract to transfer a piece of land by threatening to commit suicide: [*Amiraju v. Seshama* (1918) 41 Mad. 33; for English view on duress to person see *Barton v Armstrong* [1976] AC 104 (PC)].

60 Where a land attached by a Court belonged to a third party and such party deposited a sum with protestseeking release of the property, the payment was regarded to have been made under coercion: [[60] 17 CWN 541; 17 CLJ 478 PC].

61 1927 MWN 761.

Simple fear of criminal proceeding[62] or mere suspicion[63] may not be sufficient to avoid the contract on the ground of coercion.

Although traditionally "coercion" covers duress to person as well as property, it is very recent phenomenon that the judiciary has shown its inclination to another form of duress. Courts have accepted that a contract can be set aside where illegitimate commercial pressure is exerted by one party on another and this form is often referred as "economic duress"[64]. This is questionable how far the text of section 15 of the Contract Act (without any further amendment) can accommodate the concept of "economic duress"—a staggering truth for modern intricated trade relationship. However, the concept of "economic duress" has come under severe criticism[65].

3.2.2.1.2 Undue Influence

The concept of "undue influence" was introduced by the Court of Equity[66] to supplement the common law relief of "duress" or "coercion"[67]. This

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62 *Noor Muhammad vs Abdul Sattar Jan*, PLD 1959 (Kar) 348; 22 A 224; (1900) 22 ,All. 224; (1882) Ptmj. Rec. No. 135.

63 29 B 149.

64 A contract may be avoided on the ground of economic duress if the commercial pressure alleged to constitute such duress that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure. In *DSNB Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530, Dyson J formulated the criteria as requiring that the pressure or threat being applied should have the effect of producing a feeling of compulsion or lack of practical choice. For more cases from English law see *Pao On v Lau Yiu* Lon [1980] AC 614 (PC); *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd, The Atlantic Boron* [1979] QB 705; *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293; for Indian approach see 50 M 786; 105 IC 5; 192 7 Mad 852; for American perspective see Williston on Contracts, 3rd ed., vol. 13 (1970), section 1603.

65 Atiyah severely criticised this concept of consent being vitiated by duress and considered that it was likely to lead to irrelevant inquiries into the psychological motivations of the party pleading duress [(1982) 98 LQR 197]; see also Smith (1997) 56 CLJ 343.

66 In about forteenth century the Court of Equity was established in Great Britain to give relief to those who had no remedy under common law: http://en.wikipedia.org/wiki/Equity_(law)#Development_of_equity_in_England visited on 14.01.09.

67 Under common law a contract could not be invalidated if consent to the contract was found to have been obtained against violence or a threat of violence the effect of which was to bring about a coercion of the will.[67] So a contract could not be set aside under common law although consent was obtained by undue pressure unless the element of violence was established. Therefore, Court of Equity, in order to ensure justice, started

equitable relief was replicated in the Contract Act promulgated in 1872 for the Indian Sub-Continent. According to the Contract Act a person is said to have exercised "undue influence" to obtain consent from another if:

(1) He is, because of existing relationship, stands in a dominating position towards another,

(2) Dominating party uses his position to dictate the will of the other and thus induces him to enter into a contract and

(3) The resulted contract is unconscionable which brings unfair advantage to the dominating party.[68]

The presumption of undue influence is applicable between two persons who are having a relationship existing and because of such rapport one person by default gets higher or dominating footing. A person is said to be in the dominating position if he can exercise authority (either real or apparent) over, or having fiduciary relationship with, the other.[69]

Although undue influence usually arises in fiduciary position,[70] but as between the strangers who may have no fiduciary relations, certain forms of coercion, oppression or compulsion may amount to undue influence[71] and it is immaterial whether the undue benefit squeezed out of the contract is had by the dominating party or a third party[72]. Accordingly, agreements executed by a pardanashin lady[73] or a poor and illiterate woman[74] or any

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to invalidate contracts under the relief of "undue influence" in the cases where one party induced the other to enter into the contract by actual pressure without the presence of any violence or any threat thereof: See Treitel note 1 above pp. 405 and 408.

68 Section 16 (2) (a)-(b). In essence, if a person has some influence over another person and by means of that influence has reduced that will of that person to his subjection whatever may be the nature of the influence: spiritual, moral, social or any other influence and if the transaction is unjust then it is such coercion as is sufficient to constitute undue influence: [Bindu Mukhi V Sm Sarda Sundari 1954 6 DLR 97].

69 Section 16 (2) of the Contract Act.

70 Relationship that subsists between father and child, spiritual leader and his followers, physician and his patient, lawyer and his client etc. are the examples of fiduciary relationship and father, spiritual leader, physician and lawyer are deemed to have occupied the position of confidence and are in the dominating position: Pollock and Mulla note 35 above, Pp. 234-235.

71 *Bindu Mukhi V Sm Sarda Sundari* 1954 6 DLR 97

72 Pollock and Mulla note 35 above, P. 234. This ought to be noted that the wordings of section 16 of the Contract Act are not wide enough to afford relief to the innocent parties and hence responsive judicial interpretation is the last resort for the people with grievance.

73 *M/s Ittihad Mills V Commisioner of Income Tax* 1969 21 DLR Karachi 325.

person under a threat of criminal proceeding are fit to attract the presumption of undue influence[75] and as such may be avoided by the party complaining[76]. But the relationship between mother and daughter was held to be not appropriate for the presumption of undue influence.[77]

3.2.2.2 Consent Induced by Misleading Statements:

In the pre-contract stage one party may make representation as to any matter relevant for the transaction inducing the other party to enter into an agreement. This information some time may appear to be misleading or untrue. The representee may, if he enters into an agreement placing reliance on such representation, be allowed[78] to rescind the same or get compensation on the plea of misrepresentation or fraud since the contract thus made is a voidable one.

3.2.2.2.1 Misrepresentation

One party, namely, the representor, may make false statement either innocently or negligently as to any material fact for the purpose of inducing the other party, i.e., representee,[79] to enter into an agreement and the representee gives his assent but for such inducement, the consent of the representee is obtained by what is known as "misrepresentation"[80].Section 18 of the Contract Act[81] while defining "misrepresentation" has been

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74 *Mohammad Sheikh V Minuddin Sheikh* 1970 22 DLR 677.

75 *Purnendu Kumar Das V Hiran Kumar Das* 1969 21 DLR 918.

76 Section 19A of the Contract Act.

77 *Noah Chand Vs. Mst. Hossain Banu others; Noah Chand Vs, Fulmati Beva others* 6BLD(HCD)I 73; Ref: 33 I.A. 86; A.I.R. 1920(P.C.)65. It is to be noted here that the burden of proof lies in the first instances on the party who raises the plea of undue influence. If that party proves that the other party was not only in a position to dominate his will but that the transaction entered into was unconscionable, the burden of proof that the dominating party did not use his dominating position to obtain an unfair advantage over the other is shifted on to him: See section 16 of the Contract Act; see also *Bindu Mukhi V Sm Sarda Sundari* 1954 6 DLR 97; *Mohan Bashi Saha V United IndustrialBank* 1968 20 DLR 9.

78 See note 56 above.

79 Representees may be of three kinds: (1) Persons to whom the representation is directly made and their principals; (2) persons to whom the representor intended the representation to be passed on and (3) members of a class at which the representation was directed: See Pollock and Mulla above P. 254.

80 This may be the position of modern Common Law: Anson, Law of Contract 22nd Ed., 207sqq.

81 However, the wordings of section 18 of the Contract Act has fiercely been criticised being vague: See Pollock and Mulla note 35 above, Pp. 246, 257.

structured on the said principle of English law[82]. As the Contract Act puts it, following conducts of the representor, namely,

(1) A positive statement, although not true, but the representor believes it to be true, or
(2) any innocent failure or breach of duty which, in the first place, gains any benefit to the representor and, secondly, misleads the representee to his prejudice, or
(3) causing, however innocently, the representee to make a mistake as to the substance of the thing which is the subject of the agreement

constitutes "misrepresentation";[83] provided that any one of these things have been done as an inducement to cause the representee to enter into an agreement.

3.2.2.2.2 Fraud

According to English law a representor is guilty of fraud if he makes an ambiguous statement intending it to bear a meaning which is to his knowledge untrue, and if the statement is reasonably understood in that sense by the representee[84]. The Contract Act attaches same level like the English law while defining "fraud" in relation to contracts. An act is said to be fraudulent if the person alleged to have defrauded has deceptive mind. As section 17 of the Contract Act puts it, following acts, whereby to obtain consent from another to a contract is called "fraud":

(1) Any statement which the maker does not believe to be true,

(2) the active concealment of a fact by one having knowledge or belief of the fact ;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

As emphasised by Section 17 of the Contract Act, acts or omissions referred above shall not be regarded as fraud unless these are accompanied by deceptive mind[85]. However, the legal status of a contract induced by fraud

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82 Pollock and Mulla note 35 above, P. 247.

83 In case of misrepresentation, a representee has two remedies open to him: (1) to elect to rescind the contract and to demand from the representor a complete restoration if that is possible; or (2) to affirm the contract and sue for damages: See sections 19, 39, 64, 75 etc. of the Contract Act. The representee to get any of the above remedies has to prove: (a) the language relied upon does import or contain a representation of some material facts; (b) the representation is untrue; and (c) the representee in entering into the contract was induced so to do in reliance upon it.

84 Treitel note 1 above, P. 337.

85 The principal difference between fraud and misrepresentation lies in the fact that in the one case the representor does not believe it to be true and in the other he believes it to

will be, like misrepresentation, voidable at the option of the representee[86] with the right of the representor to rely upon rule of caveat emptor[87].

3.2.2.3 Factual Variation Without Knowledge: Mistake

"Mistake" refers to an erroneous understanding of the parties concerned as to any matter essential for the agreement[88]. Mistake that vitiates consent to an agreement has to result from common or bilateral misconstruction of the factual matters.

Consent to an agreement may be affected by common mistake in either of the ways mentioned hereinafter and the agreement thus formed is a nullity being void[89]. In the first place, mistake may altogether defeat mutuality between the parties. It is at the root of every contract that the parties shall agree upon the same thing in the same sense[90] and this is often referred as true consent or consensus ad idem. If, for example, at the time of entering into a contract for sale of a specific ship, parties have got different ships in mind, they cannot be said to have agreed in the same thing in the same sense[91]. In the second place, mistake may not have the effect of defeating the object of the contract; rather it may mislead the parties as to the purpose which they contemplate. For example, parties have got into a contract without having any knowledge that, at the time of the contract, the subject-matter of the contract has been destroyed. Here parties have given consent but for the defective knowledge of the matter and hence consent is not deemed to have been given freely[92].

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be true though in both cases it is a misstatement of fact which misleads the representee[85]

86 *Karnaphuli Paper Mills Ltd. V Amanullah* 1971 23 DLR 150.

87 See section 22 and exception to section 19 of the Contract Act. Under English law principle of caveat emptor shall not be available as a defence if the consent is obtained by fraud: See Poole note 7 above, P. 508.

88 Certain facts are essential to every agreement. They are: (1) the identity of the parties; (2) the identity and nature of the subject-matter of the contract; and (3) the nature and content of the promise itself: A. Singh: "*Principles of Mercantile Law*" India, (2000) P. 118.

89 See section 20 read with section 13 of the Contract Act.

90 Section 13 of the Contract Act.

91 *Raffles v. Wichelhaus* 2 H. & C. 906; 133 R.R 853. For a good survey on the mistake as envisaged in section 13 of the Contract Act, see Pollock and Mulla note 35 above, Pp. 183-197.

92 See section 20 of the Contract Act. Section 20 will come into operation if (1) both the parties are mistaken, (2) the mistake is as to a matter of fact and (3) the fact about which they are mistaken is essential to the agreement.

Two points need to be clarified: In the first place, above rules shall have no application to unilateral mistake. In case of unilateral mistake, one of the parties being under a mistake gives consent and hence the agreement cannot be avoided[93] on the ground of mistake. Secondly, bilateral mistake as discussed above shall relate to "matter of fact" as oppose to "matter of law". If the bilateral mistake is as to a matter of law in force in Bangladesh, this agreement, however, remains valid. But mistake as to any foreign law shall have same effect as mistake of fact[94].

3.2.3 Lawful Consideration and Object

It is the third mandatory requirement that an agreement shall be made with lawful consideration and the purpose of the agreement shall also be lawful. Seemingly, this requirement rather relates to the applied aspect of consideration. This may be recalled that Act requires the presence of three elements for the formation of an agreement, such as, proposal, acceptance and consideration.[95]However, such agreement shall enjoy the status of a contract only when the considerations supplied by the parties are legal. As section 23 of the Contract Act puts it, if the consideration or object of an agreement is not lawful, the agreement is void. Followings are the situations in which consideration or object is regarded to be unlawful:

(1) it is forbidden by law;
(2) it is of such a nature that, if permitted, it would defeat the provisions of any law;
(3) it is fraudulent;
(5) it involves or implies injury to the person or property of another; or
(6) the Court regards it as immoral, or opposed to public policy.

This may be apposite to mention here that a contract is an arrangement which creates obligations for the parties thereto and these are appropriate to be enforced by legal process.[96] This postulation entails that under a contract, in the first place, no one can enjoy any legal rights against an act done by him in an unlawful manner and, secondly, no one is subjected to undertake any obligation the performance of which will not be legal. Section 23 of the Act is constructed on the principle of public policy to effectuate this legal

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93 Section 22 states this rule which encapsulates the principle of law of sale of goods, namely, "caveat emptor" (buyer be aware).

94 Section 21 of the Contract Act.

95 See para 2.2 above.

96 *Bangladesh Air Service (Pvt. Ltd. Vs. British Airways PLC* 49 DLR (1997) AD 187, para 27.

prescription[97]. Therefore, an agreement falls under section 23 is regarded as *void ab initio* precluding the parties thereto from claiming any legal remedies thereunder[98].

3.2.4 Agreements not Forbidden by Law

The forth and final mandatory requirement for the validity of an agreement is that agreement is not expressly barred by law. This may be recalled here that section 23 of the Act sets out, on the ground of public policy, some criteria which an agreement must satisfy to become a contract. Bar of section 23 shall have general application to all kinds of agreements. In addition to these generalise prohibition statutes may expressly regard agreement of specific category not to be legal. For example, the Contract Act has declared that certain types of contracts cannot be made lawfully. These are as follows:[99]

(1) Agreements in restraint of marriage,
(2) Agreements in restraint of lawful trade,
(3) Agreements in restraint of legal proceeding,
(4) Agreements having ambiguous meaning,
(5) Agreements by way of wager,
(6) Agreements contingent on impossible events,
(7) Agreements the performance of which has become either impossible or illegal, etc.

Although an agreement satisfies all first three conditions, namely, it is made between the competent parties with their free consent and it is made with lawful consideration and for lawful object, nevertheless the

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A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement having made for illegal purpose cannot impose any lawful obligation upon the parties and as such law will decline to enforce the respective promises of A and B: [Illustration (h) to section 23 of the Contract Act; see also *Md. Joynal and others Vs. Rustam Ali Mia and others* 4BLD(AD)86; Ref: 21 DLR 918; 5DLR 114 and 338.

98 To bring any contract within the purview of section 23 this has to be shown that the contract is either unlawful or immoral or opposed to public policy: *Mohammad Irfan Sayed Vs. Mrs. Rukshana Matin and others* 16 BLD (AD)223; *Meherunnessa Khatun Vs. Abdul Lattif and another* 6BLD(AD)279 Ref: 31 DLR(AD) 155; 38 DLR(AD) 1; *S.M. Anwar Hossain Vs. Haft Abdul Malek and others* 5BLD(HCD)290 Ref: 17 DLR(SC)369: PLD 1965(S.C.) 425:28 DLR 238; 12 DLR 459; PLR (1960) 2 WP 602; 21 DLR (Peshawar) 313.

99 See Sections 26-30, 36 and 56 of the Contract Act.

agreement shall not become a contract if falls under any of the categories of agreement referred to in the present heading.[100]

3.3 Secondary or Supplementary Conditions

Apart from the four primary conditions as discussed in para 3.2 above, tatutes[101] state some further conditions for agreements to comply with and the provisions of the Contract Act are effective[102] subject to such statutory rules.

As this has been shown in this article that generally the Contract Act provides the procedure for the formation of contracts[103]. No particular form is prescribed by the Contract Act for the contracts to be made. However, this general rule is now subject to a number of exceptions imposed by statutes in force in the country. Following forms are found to have been prescribed by laws to make different types of contracts:

(1) Contract made in writing;
(2) Contract executed with proper stamp duty;
(3) Contract made by registered deed;
(4) Contract made in the presence of witnesses etc.

This is more or less obvious that if the statutory requirement is that the contract should be executed in a particular manner and that requirement is also mandatory, there cannot be the slightest doubt that either the document should be executed in that manner or not at all. If the contract is executed in violation of such requirement it is invalid.[104]

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100 This should be noted that all of these agreements may not render the transaction illegal. Agreements in restraint of marriage, lawful trade, legal proceedings etc. may not have fatal consequence if the bargain is found to be reasonable. Whether or not any agreement is reasonable would be determined by the court having considered the circumstances.

101 The Negotiable Instruments Act, 1881; the Companies Act, 1994; the Procurement Act, 2006; the Bangladesh Labour Act, 2006; the Stamp Act, 1899;the Registration Act, 1908; the Transfer of Property Act, 1882, amongst other statutes, worth mentioning, that define forms for contracts.

102 As second paragraph of section 10 of the Contract Act puts it, "Nothing herein contained shall affect any law in force in Bangladesh, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

103 In particular, the elements of a contract and the process for them to be combined so as to culminate into a contract.

104 PLD 1976 Lahore 1192; (1986) BLD 14; PLD 1981 Karachi 170; PLR 1958 Dacca 394; 1984 BLD 157. See also Sections 33 and 35 of the Stamp Act, 1899; section 49 read with section 17A of the Registration Act.

Process of forming a contract[105] is shown in the following diagram:

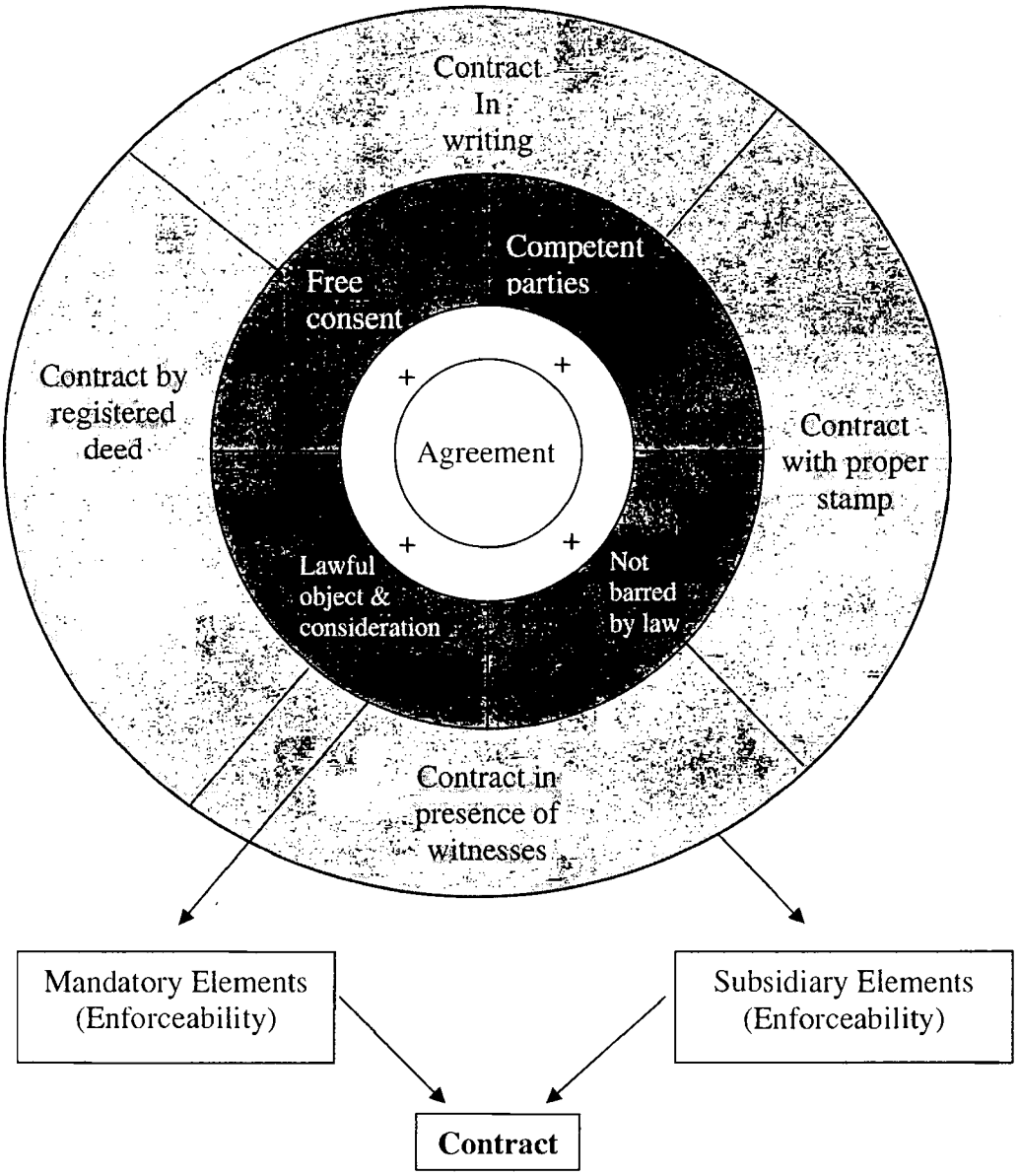

DIAGRAM 3

105 It is submitted that the process of making a contract as described in section 2 above has been endorsed by the High Court Division in James Finlay PLC Vs. Meshbahuddin Ahmed reported in 46 DLR (1994) 624, para 17.

4. Conclusion

It is evident from the foregoing discussion that law of contract enforceable in Bangladesh envisages a structure for entering into a contract. This framework carefully designed by the framers of the Contract Act ought to be understood by all concerned. Fair compliance of the procedure as laid down by the said framework to conclude a contract would certainly expose the parties to less disputes reducing the likelihood of being embroiled in hostile legal proceedings and would result in less disruption in the business.

It is indispensable to be mentioned here that since the promulgation of the Contract Act in 1872 we have witnessed, in the last one and half centuries, change in the socio-economic condition in the Sub-Continent which precipitated drastic change in thoughts and beliefs of people, their mutual relationship, trading pattern etc. making the commercial transactions very intricated. Advancement of technology added a new dimension to such intricated trading process. But it is surprising to note here that the Contract Act as in force in Bangladesh, so far from its commencement in nineteen century, has undergone no basic changes. Hence, prescription given by the Contract Act regarding entering into a contract, as a whole, does not seem to be rational at all and is not suitable for trading in the reality of twenty-first century and hence the Contract Act as mentioned in several places of this work, requires massive and comprehensive overhauling.