Podcast 1: The making of a contract

This podcast will introduce you to the key themes and topics covered in Part I of the book. The focus of Part I of the book is on how we use the law to determine when a contract has come into existence. This question is more important than one might imagine, and answering it is also less straightforward than one might imagine. Contracting is ubiquitous, but also unconscious. We enter into contracts all the time, but the fact that we are entering into a contract is rarely foremost in our minds. What we tend to be thinking about, instead, are our underlying motives for contracting: specifically, what we are looking to get out of the deal, whether we think the deal is a good deal, and why we are dealing with this particular person or organisation.

Let us consider two examples. When you step on a bus, you are in law making a contract with the bus company under which you agree to pay the fare and abide by the company's terms and conditions of carriage, in exchange for being permitted to ride the bus. Few passengers, if any, are consciously aware of the fact that they are making a contract, but that is how the law sees it. Now consider the contract you enter into with Facebook when you sign up for a Facebook account. The fact that the terms and conditions are presented on screen, and that you are asked to click on 'I agree', make it quite clear that you are entering into a contract. But despite that, for most people, the contract is not the focus of their attention. Their focus is, instead, finding friends, adding them to their friends list, setting a profile picture, and so on.

But even though we don't focus on the fact that we are creating them, contracts are very important, because they are the primary means through which we obtain goods and services. We get food by contracting with food-sellers, housing by contracting with landlords, education by contracting with universities, online communication tools by contracting with Google and Facebook, and so on. This is even more true in a commercial context, with a typical business relying on a vast network of contracts with employees, suppliers, customers, and lenders.

This makes the legal rules governing the creation of contracts quite important. If a contract was created, both parties have taken on legally binding obligations and acquired legal rights. If a contract was not created, no rights, or obligations have come into being. The law must, therefore, devise rules that determine, firstly, *whether* parties have agreed to create a contract and, secondly, *what* they have agreed to do through that contract. In Part I, our focus is on the first of these—the legal rules and principles that determine whether the parties have created a binding legal contract. The second task—of determining what that contract actually requires the parties to do—is the subject of Part II of this book.

In dealing with the task of determining whether a contract has come into existence, the law faces a fairly challenging set of issues. Not all discussions actually lead to contracts, and not everything that looks like a contract is in fact a contract. In the everyday context, we regularly enter into agreements that we wouldn't want to be legally enforceable—an agreement to meet a friend at the pub, for example, or an agreement with a friend to share notes and study together. In the commercial context, too, parties will enter into understandings that they do not want to be legally binding—for example, because they're still working out some of the details.

The law must be able to tell the one from the other, and it must be able to do so on a sensible basis. Because contracting is so ubiquitous, a law that is too expansive, or too narrow, will produce serious consequences. An effective law of contract must track real life as closely as possible, only giving effect to agreements of a type that parties would have wanted enforced.

Equally, in devising rules to cope with these issues, the law must also be able to deal with the fact that much of contracting is unconscious, and takes place without the parties consciously thinking about the fact that they are contracting. This, obviously, complicates the task, because the courts cannot simply ask what the parties thought they were doing. Often, the answer to that will be that they didn't actually think about their actions in legal terms.

The law of contract, accordingly, answers the question of whether a contract came into existence by looking at three sets of factors, or three requirements: firstly, whether the parties have reached agreement, secondly, whether they did so as part of an exchange in which each gave something of value, and thirdly, whether at the time of doing so, they had the intention to create legal relations. Chapters 2, 3, and 4 consider each of these factors in greater detail.

We start, in Chapter 2, by looking at the issue of agreement. Did the parties actually reach full agreement, or did they come close to agreement but not actually agree? How do we decide what constitutes full agreement? Must they agree on every particular? Is it good enough if they agree on the essentials, but continue to disagree on the details? What happens if the parties start work expecting a contract to be agreed, but end up not agreeing on the final terms? These questions are the subject of the law of offer and acceptance, which Chapter 2 discusses in more detail.

The second requirement is that the parties' agreement must relate to a transaction where each person gives something of value. The law of contract is concerned with self-interested action, not altruistic action. A promise which is wholly altruistic, or a promise where nothing is done or given in return is not a contract, and is not enforceable through the medium of contract law. In English law, we deal with these questions through the rules relating to consideration, which Chapter 3 discusses in detail.

The third requirement is that the parties must have the intention to create legal relations. If you're simply making a social arrangement—for example, to meet a friend at a café, or to call your mother once a week—you won't usually intend that arrangement to be legally binding. Similarly, commercial parties will sometimes sign letters of intent or other documents which are there to record a commercial understanding without binding the parties. The legal rules that determine how the law infers the presence or absence of an intention to create binding legal relations are discussed in Chapter 4.

Put together, these rules come close to mirroring how transactions work in the real world. However, they aren't by any means perfect, and the law therefore also includes other doctrines to deal with situations where the parties clearly intended there to be some legal consequences to their transactions, but where the way in which they interacted means that they haven't quite met the bar of the three sets of factors the law prescribes for a binding contract to come into existence. Chapter 5 focuses on the most important of these doctrines, the rules concerning a legal defence called estoppel.

A final point you should keep in mind is that contract law's way of viewing the world is a little distinctive, in that it operates through the medium of an objective test. In deciding whether the parties reached agreement, or whether they provided value to each other, or even whether they intended to create legal relations, the court is not looking at what the parties actually intended. Instead, it is proceeding objectively, on the basis of what a reasonable third party observer would have made of their words and deeds. It is that objective significance, rather than the subjective significance the parties themselves attached to their words and deeds, that matters to the law.

This objective approach is a fundamental aspect of English contract law, and it should always be in the back of your mind as you study the rules to which you will be introduced in this Part.