Is there a Contract?

by **Ir. Oon Chee Kheng**

A contract, strictly a valid contract, underlines the very foundation of virtually all commercial transactions. Thus, it sounds strange if the question "Is there a contract" is asked. Nevertheless, this question may not sound strange if certain requirements are not observed.

First question first. What is a contract? For that matter, what is an agreement? These are if one were to view the finer points not the same. Section 2(h) of Contracts Act 1950 provides as follows:

> *"An agreement enforceable by law is a contract."*

This is also reinforced by section 10(1) of the Contracts Act 1950 which provides as follows:

> *"All agreements are contracts if they are made by the **free consent** of **parties competent to contract**, for a **lawful consideration** and with a **lawful object**, and are not hereby **expressly declared to be void**."*

These brief provisions thus sound the fine distinction between "agreement" and "contract". Strictly, parties enter and execute an "agreement", not a "contract". The enforceability of the agreement, if not disputed or challenged, renders the agreement a "contract". It is a question of law that this is so determined. It is also not one that is declared by the contracting parties. The agreement entered into must be "enforceable by law". And the enforceability tests are those underlined in section 10(1) which I have reproduced above. Thus said, the notion of "Contract Agreement" is strictly superfluous and meaningless.

Most engineers would have heard of "offer and acceptance" in contract law. This phrase is as common in contract law as "supply and demand" in economics and "stress and strain" in structural mechanics. It is a basic and fundamental principle in contract law that if party A ***unconditionally*** accepts the offer made by Party B, the parties have made an agreement.

This acceptance of offer is usually reduced into writing. Thus one sees a thick document, or a few volumes of thick documents, evidencing the agreement. Very often, this is after a laborious process of tendering exercise.

In the parlance of "offer and acceptance", the contractor who submits a tender is commonly said to have made an "offer" and the employer (or a promoter of the project) when it issues, by itself or its authorised agent (such as the architect, engineer or quantity surveyor) the letter of acceptance, accepts the offer.

Raja Azlan Shah, the current sultan of Perak, said the following when he was a High Court judge in the case of *Cheng Keng Hong v. Govt of the Federation of Malaysia* [1966] 2 MLJ 33:

> *"The law with regard to the acceptance of a tender is perfectly clear. The unconditional acceptance of a tender by the employer binds both parties, and a contract is thereby formed, the terms of which are ascertainable from the invitation to treat, the tender, the acceptance, and any other relevant documents …"*

Another distinction must also be made. The employer who puts up an advertisements inviting for tenders to be submitted is not making any "offer". Indeed, he is in law said to be making an invitation for offers to be submitted. This is akin to the display of goods in the shelves of shops with price tags on. The mere act of such display does not constitute any offer by the shopkeeper. It is only an invitation by the shopkeeper for shopper to make an offer by presenting the chosen goods to the cashier.

The above discussion however does not mean that for a contract to exist there must be documents evidencing such contract. Though it is highly desirable that there are documents evidencing contractual intent and the scope of such intent, the absence of such documents does not *per se* mean that there is no contract between the parties.

Imagine the following scenario. Party A issues a letter of intent to Party B (after Party B has submitted a fully priced bill of quantities, BQ) and in reliance of such a letter, Party B proceeds with works. No other documents were executed by the two parties thereafter. During the course of the works, Party B submits its claim based on the submitted BQ and he is also paid as such. When about, say 80% of the works have been done and Party B has only been paid about 40% of the works, Party A refuses to make further payments citing the reason that there is no concluded contract. Is Party A correct?

He may not be correct. Firstly, it must be pointed out that an agreement can be concluded by conduct of the parties involved. Secondly, it can safely be argued that after both parties have performed to varying extents their respective bargains, it will be difficult for one party to the deal to say it otherwise. The principle of estoppel will operate to deny such argument. Lord Justice Steyn of the English Court of Appeal says in the case of *G. Percy Terentham Ltd v. Archital Luxfer Ltd and Ors* [1993] 1 Lloyd's Rep 25 the following:

> *"The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. ... A contract can be concluded by conduct."* ■