LAW AND COMMERCE: THE MALAYSIAN PERSPECTIVE

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CHAPTER 4

INTENTION TO CREATE LEGAL RELATIONS

by

MOHD. AKRAM BIN SHAIR MOHAMED

A contract is an agreement enforceable by law.¹ The basis of all contracts is an agreement, although not all agreements will inevitably result in contracts. The law does not recognise the existence of a contract merely because of the presence of mutual promises. Agreements are made daily in domestic and social life where the parties do not intend that their arrangements should be attended by legal consequences, should the engagement not be honoured. So to offer a colleague a meal of nasi kandar is not to invite litigation. As Lord Stowell vividly said, contracts must not be the sports of an idle hour, mere matters of pleasantry and badinage never intended by the parties to have serious effects whatever.²

It has now become a requirement that in addition to the essential elements of offer / proposal and acceptance and consideration, a third contractual element is required, i.e. the intention of the parties to create legal relations. Although this view commonly held in England³ has been challenged by no lesser person than the distinguished American jurist, Professor Williston⁴ who opined that the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century and useful only in systems