

THE LAW OF CONTRACT



HKU | LAW

Semester 1 Review

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Plan for Today

- Review
- What Makes an Answer Good



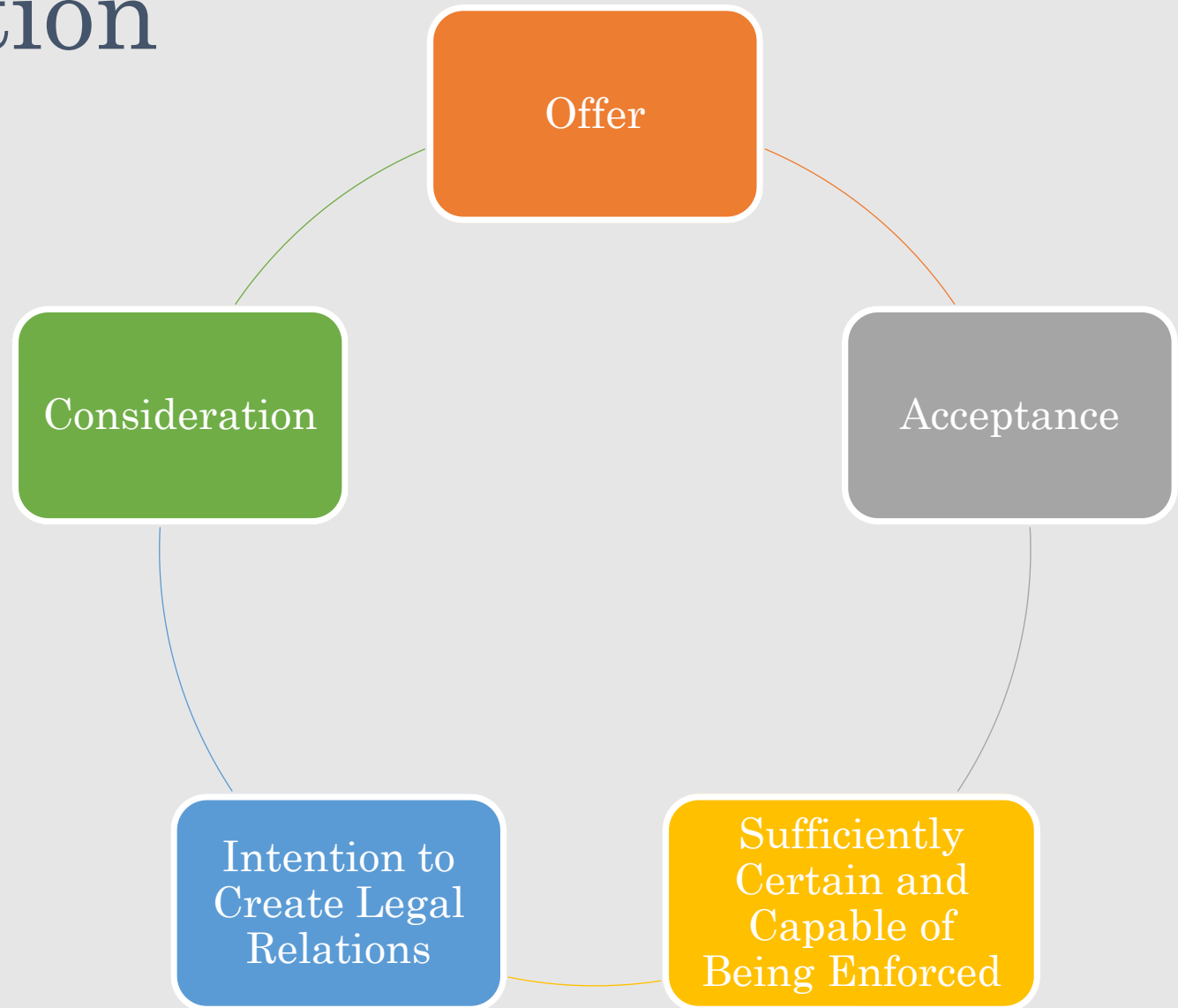


Semester in Review

- This review is not meant to be exhaustive although it will cover the main topics broached this semester.
- Not all testable material has been included. Unless otherwise specified, material discussed in the textbook, in lecture and in tutorial may feature on the mid-year examination.



Contract Formation



Offer

- “[A]n expression of willingness to contract on specified terms made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed”. *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm) [2012] 1 Lloyd’s Rep. 349.
- The existence of an offer is judged objectively, rather than subjectively. The issue is not the alleged offeror’s state of mind but how a reasonable person would have understood the alleged offeror’s words or conduct.
- But there can be no contract where the offeree knew or should have known of the offeror’s mistake.

Offer

- An offer must be distinguished from an invitation to treat which indicates a willingness to negotiate rather than a willingness to be bound.
- As a general rule, the following are invitations to treat and not offers:
 - the display of goods in shops
 - an advertisement of goods for sale
 - Advertisements for unilateral contracts are more likely to be regarded as offers than advertisements for bilateral contracts.
 - request to tender
- But attention must always be paid to the nature and content of communications. Courts take into account:
 - definiteness
 - specificity
 - completeness

Acceptance

- “[A] final and unqualified expression of assent to the terms of an offer”. *Chitty on Contracts* (2018).
- To bind the offeror, an acceptance
 - must be final and not tentative
 - must be unqualified, i.e. no conditions or variations
 - must be objectively manifested
 - may be expressed through conduct
- An acceptance made “subject to contract” is not final and hence not binding.

Acceptance

- An acceptance must usually be communicated to the offeror.
- There are two major exceptions to this rule:
 - Waiver
 - Note that waiver is more likely to be implied into a unilateral rather than bilateral contract.
 - The Postal Rule
 - An acceptance is effective when it is posted, not when it is received.
 - The parties must have contemplated an acceptance by post.
 - The offeror may preclude application of the postal rule by requiring “notice in writing”.
 - The postal rule does not apply to instantaneous communications.

Acceptance

- The offeror may prescribe a method of acceptance. An offer may, however, be accepted by other methods if
 - the alternative method is “no less advantageous” to the offeror
 - and the offeror has not made the form of acceptance mandatory, i.e. exclusive of all other methods
- As a general rule, silence will not be construed as acceptance.
 - But under certain circumstances, the subsequent course of dealing between the parties may establish a consensus.
- An offer cannot be accepted by someone who is ignorant of its existence.
 - How is this related to the idea of consideration?

Acceptance

- An offer can be terminated by
 - rejection
 - A counteroffer is tantamount to a rejection of the original offer.
 - But it is important to distinguish a counter-offer from an inquiry.
 - lapse of time
 - revocation
 - An offer may be withdrawn any time prior to acceptance, provided such withdrawal is communicated to the offeree
 - Except that an offer of a unilateral contract may not be withdrawn once the offeree has commenced performance.
 - death or supervening incapacity

Sufficiently Certain

- Where parties have omitted or glossed over key terms of their agreement, courts may find there to be no contract.
 - Which terms are key may vary according to the kind of contract under consideration.
- Uncertainty or vagueness may be resolved
 - by interpreting the document as a whole
 - by making use of the criteria or machinery agreed by the parties, such as an arbitration clause that covers disputes over the otherwise uncertain or vague term
 - by judicial valuation if the machinery breaks down and the machinery is not essential
 - by severance where the term is unimportant or meaningless
 - by terms implied in law

Intention to Create Legal Relations

- “[I]n all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asked itself: would reasonable people regard this agreement as intended to be binding?” *Merritt v. Merritt* [1970] 1 WLR 1211
- Two rebuttable presumptions:
 - Commercial agreements are intended to create legal relations
 - This presumption is very strong.
 - Social or domestic agreements are not intended to create legal relations
 - This presumption does not apply and may even be reversed if spouses are no longer on good terms.
 - Abstracting from the intention of the parties, policy reasons for this presumption are twofold
 - ❖ to avoid overburdening the courts
 - ❖ to avoid judicial intrusion into intimate relationships

Consideration

- A promisee must plead and prove that he or she has given consideration for the promise he or she is trying to enforce.
 - Otherwise, the promise is a *nudum pactum* unenforceable at common law.
 - But note that a promise not backed by consideration may still be enforceable if
 - it is contained in a valid deed
 - or promissory estoppel applies
- Consideration has to be adequate but need not be sufficient.

Consideration

■ Consideration

- 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”, *Currie v. Misa* (1875) LR 10 Ex 153
- means “something which is of value in the eye of the law”, *Thomas v. Thomas* [1842] 2 QB 851, 859
- must be given at the request of the promisor in return for the promise
 - Consideration has to move from the promisee but it does not have to move to the promisor.
 - There is a difference between giving consideration and fulfilling a condition.

Consideration

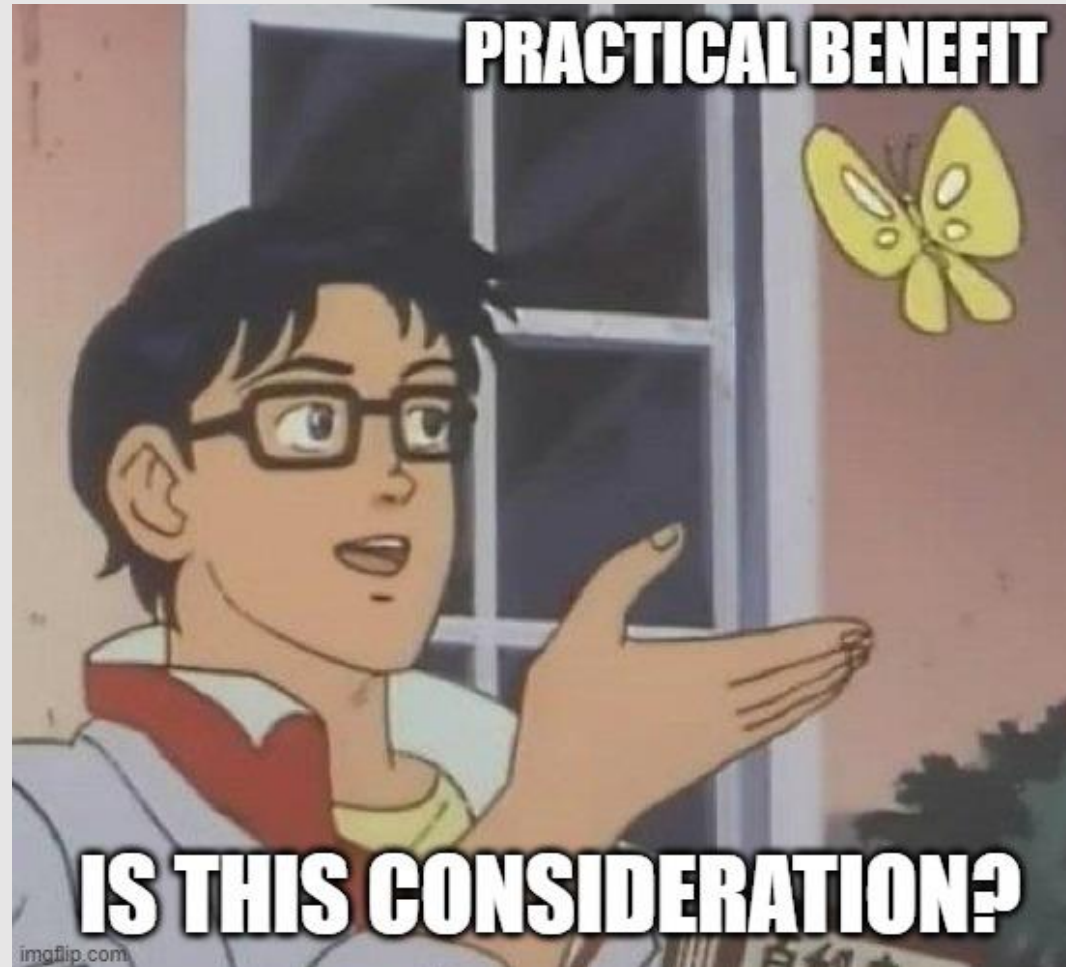
- Promisee's relinquishment of a bad or invalid claim is good consideration unless the promisee knows his or her own claim to be baseless.
- Past consideration is not good consideration.
 - Exception where act performed at request of promisor under assumption that it will be paid for.
- Traditionally, existing duties fall into three types
 - Discharge of an existing duty to the promisor is not good consideration. Part-payment of a debt is not good consideration for full discharge of the debt.
 - Performance of public duty or duty imposed by law not good consideration unless supererogatory.
 - Performance of a duty owed to a third party is good consideration.

One-Sided Modification

Under current doctrine, there is a distinction between

- Promises to pay more for the same
 - A “practical benefit” may qualify as sufficient consideration. *Williams v. Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1
 - But precise definition of “practical benefit” remains elusive and not every threat to breach counts as duress.
 - Richard Posner’s Three Situations provides a framework for thinking about one-sided modifications the law should not enforce.
- Promises to accept less for the same
 - A “practical benefit” may qualify as sufficient consideration. *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2016] EWCA Civ 553
 - But “practical benefit” here cannot be part payment or a promise of future payment.

One-Sided Modification



Promissory Estoppel

- A promise may be enforceable in the absence of consideration where estoppel applies.
- To invoke promissory estoppel, there has to be a
 - clear promise
 - and reliance on the promise
 - Detriment, though helpful, is not necessary.
 - such that it would be inequitable for the promisor to go back on the promise.
 - Courts look, among other things, at the amount of time elapsed, the nature and extent of the reliance induced and whether the promisee exploited the vulnerability of the promisor.

Promissory Estoppel

- Under English law, promissory estoppel may only be used as a shield, not a sword.
 - Promissory estoppel may be used offensively in other jurisdictions.
 - In Hong Kong, promissory estoppel has been invoked to limit the powers of a controlling shareholder to sell company-owned property without giving the promisee a share of the profits or to evict the promisee pending such sale. *Luo Xing Juan v. Estate of Hui Shui* [2009]12 HKCFAR 1
- Generally speaking, promissory estoppel is
 - suspensive as to future obligations
 - may be extinctive as to past obligations
 - but regard must be had to the scope of the promise.

Evaluations

- ✓ Access the SFTL system via the weblink <http://setl.hku.hk/> where there are instructions, FAQ and a list of forms for completion.
- ✓ Note that there are separate links for COURSE, TEACHER and TUTOR.
- ✓ Click the “Submit” button when you have completed all the questions in a form
- ✓ Continue to complete other forms, if any, by repeating the above process
- ✓ Your evaluation will be saved anonymously, without any identification



WHAT MAKES AN ANSWER GOOD?

- PARK OPEN 5AM UNTIL SUNSET
- NO VEHICLES ALLOWED IN THE PARK
- ALCOHOL IS NOT PERMITTED IN THE PARK
- PETS MUST BE ON A LEASH
CLEAN UP AFTER YOUR PET
- SLEEPING IS NOT PERMITTED IN THE PARK

CITY CODES 33.06, 18A AND 6.01

What Makes an Answer Good?

Relevant Legal Materials

Section 1 of the Park Act: “No vehicles are allowed in the park”.

State v. Jones: Held, roller skates are not vehicles.

- “Although the Park Act does not define the word ‘vehicle’ . . . we follow the plain meaning of the term. The word ‘vehicle’ calls to mind a motorized mode of transportation, not a human-powered one”.

People v. Thomson: Held, motor home is a vehicle.

- “We think it clear that Thomson’s motor home is a vehicle...The classic example of a vehicle is a car or truck. A motor home is much like a truck in size and complexity, with a small living area connected to it. We can imagine close cases that would force us to draw difficult lines as to the scope of the Act. But this case is not one of them”.

<https://volokh.com/posts/1168382003.html>

What Makes an Answer Good?

Examination Question

“Betty is a law student at ILS who lives off-campus. She often rides to class in a gas-powered scooter, a two-wheeled motorized scooter that has a one-cylinder gasoline engine and a top speed of about 20 miles per hour. One day she decides to ride her scooter through a nearby park on her way to school.

Analyze Betty’s liability under the Park Act.”

<https://volokh.com/posts/1168382003.html>

What Makes an Answer Good?

Terrible Answer

“Betty may face liability under the Park Act. However, I think she is in the clear. I don’t think her conduct violated the law. There are laws that regulate the park, but here Betty has not violated them. The government may disagree, and it’s possible that there is a judge somewhere who would rule in favor of the government. But on the basis of the law, I think it is absolutely clear that Betty is not liable”.

Bad Answer

“The issue is whether Betty is liable under Section 1 of the Park Act because she may have brought a ‘vehicle’ into the park. This is a close question. On balance, though, I don’t think the scooter was a ‘vehicle’”.

What Makes an Answer Good?

Average Answer

“The issue is whether Betty is liable under Section 1 of the Park Act because she may have brought a ‘vehicle’ into the park. Vehicle is not defined, but under *Jones* we follow the ‘plain meaning’ of the term. This is a close question; on one hand, a scooter is kind of like a car, but on the other hand, it’s also pretty different. Under the plain meaning approach, I don’t think a scooter is a ‘vehicle’”.

<https://volokh.com/posts/1168382003.html>

What Makes an Answer Good?

Good Answer

“Did Betty violate Section 1 of the Park Act because she brought a ‘vehicle’ into the park? Vehicle is not defined, but under *Jones* we follow the ‘plain meaning’ of the term. That advice is not very helpful here, though as whether a scooter is a vehicle does not seem plain one way or the other. I think the scooter is probably a ‘vehicle’ because it has a motor, which seemed to be a very important factor in the *Jones* case. Roller skates don’t have motors, but Betty’s scooter had a one-cylinder gas-powered engine.”

<https://volokh.com/posts/1168382003.html>

What Makes an Answer Good?

Excellent Answer

“Betty’s liability hinges on whether her motorized scooter was a ‘vehicle’ under Section 1 of the Park Act. The Act does not define vehicle, but *Jones* and *Thomson* provide guidance. The facts here are somewhere between those two cases. Unlike Jones’s roller skates, Betty’s scooter has a one-cylinder gas engine: It is ‘a motorized mode of transportation, not a human-powered one’ under *Jones*. On the other hand, it is a very modest means of transportation that is far from the size and complexity of a car or truck under *Thomson*. This seems to be one of the ‘close cases’ mentioned in Thomson, in part because *Jones*’s focus on the powerplant points in one direction and *Thomson*’s focus on size and complexity points in another direction. Scooters are powered but small and simple. It’s unclear which matters more, and Betty’s liability under Section 1 depends on it”.



"That's all Folks!"™