NATIONAL UNIVERSITY OF SINGAPORE
FACULTY OF LAW
LC1003 LAW OF CONTRACT
AY 2017-2018
FINAL EXAMINATION – EXAMINERS' REPORT

QUESTION 1

This essay question was deliberately crafted to be open-ended enough for students to showcase their understanding of the various statutes and equitable doctrines covered throughout this module. There were two main issues that students were expected to address – whether statutes and Equity played "pivotal roles" to the law of contract, and whether they enhanced "the overall coherence of the law". The former is fairly straightforward, requiring students to explain the significance and importance of statutes and equitable doctrines to the contract law framework. The vast majority of scripts had no difficulty doing this. The latter, on the other hand, could be sensibly interpreted in more than one way, giving students considerable room to maneuvre. "Coherence" could have been analysed from at least two perspectives, both of which required students to explore the underlying tensions between statutes/equitable principles and the common law:

(a) The consistency between the legal rules – do statutes and equitable principles complement/supplement or contradict common law principles?

(b) The contributions (whether positive or negative) made by the legal rules towards a unified legal framework underpinned by a particular set of values or objectives (e.g. achieving just and fair results, promoting freedom of contract, security of contracts etc.)

Students who performed well submitted answers that expressed a considered view of what they thought the parameters of the question were, before tailoring their substantive discussion around their understanding of the question. In contrast, there were many answer scripts which appeared to reproduce large chunks of pre-prepared commentary (probably based on their essays from tutorials or seniors' notes) which set out a laundry list of all the main features and imperfections of the Misrepresentation Act and Contracts (Rights of Third Parties) Act ("CRTPA') and doctrines of equitable mistake, undue influence and unconscionability. Not much credit could be given for such answers given that the closed-book format of this examination was relaxed this year, where students were permitted to bring in 10 sheets of A4-sized paper with their own materials.

At the other end of the spectrum, quite a few answers were hamstrung by serious conceptual and strategic mistakes. The question required students to discuss at least one statute and one equitable doctrine, but a surprising number of scripts did not cover both sources of law, focusing extensively on one or the other. Another group of answer scripts misconstrued the scope of "Equity", focusing on detailed discussions of the (common law) restitutionary claims for the recovery of monetary benefits transferred under illegal contracts as examples of how equitable doctrines contribute to the law of contract. A handful of candidates also submitted disappointing one-paragraph answers

and two students did not attempt to write anything for this question. Students are strongly discouraged from doing this because a nil response can only be awarded a score of zero.

In terms of statutes, the vast majority of students based their answers on the Misrepresentation Act and/or the CRTPA. Some students chose to discuss the Frustrated Contracts Act ('FCA"), the Unfair Contract Terms Act ("UCTA") and the Consumer Protection (Fair Trading) Act ("CPFTA"). What distinguished good answers from mediocre answers was the level of focus given by the student to *explaining* how and why the statute makes an important contribution to common law contract rules: Does it create a right of action where none existed at common law? Does it empower courts to do things that might help facilitate justice? Does it replace, alter or merely add to the common law? The discussion on the "coherence" of these statutes with the common law, and within the contract law framework as a whole, could have included a discussion of the following specific issues:

(a) Misrepresentation Act – Is the "fiction of fraud" (and reversal of the burden of proof) in section 2(1) coherent with the common law measure of damages for negligent misrepresentations? Does the discretion given to courts under section 2(2) to award damages in lieu of rescission promote alignment with the common law rules prohibiting termination of contracts for minor breaches of contract?

(b) CRTPA – How does this statutory exception to the privity rule sit with the justifications for having this common law rule (which has not been abolished) in the first place? Does introducing an additional statutory exception, over and above all the pre-existing common law exceptions to the privity rule, make the law more complicated? Or does it facilitate a policy of giving effect to the intentions of contracting parties and avoiding the artificialities of the common law techniques? To what extent does the CRTPA try to reconcile the third party's position in relation to other common law rules (consideration, defences, no double recovery etc) and statutes (e.g. UCTA) that promisees have to deal with?

As far as equity is concerned, most students chose to discuss the equitable doctrines of mistake (common mistake and unilateral mistake), undue influence and unconscionability. A small minority also included the doctrines of rectification, promissory estoppel and specific performance in their answers. The answers submitted had no difficulty setting out the relevant principles and case law, though many conveyed the impression that, compared to their common law counterparts (in the doctrines of mistake), the equitable doctrines had "lower thresholds" that made it easier for them to be invoked to achieve "fairness" for claimants (who were laboring under a mistake). This was problematic because the conventional view of Equity was that it does not try to make it "easier" for contracts to be vitiated – it simply has a *different* set of (stringent) criteria, focusing on the unconscionability of the conduct of the parties, for when a contract may be set aside. While it may be said that the *scope* of the equitable doctrines is potentially *broader* than their common law counterparts (e.g "fundamental misapprehension" vs "fundamental mistake" in common mistake), the dearth of cases in which the equitable versions of the mistake doctrine have been successfully invoked and applied make it difficult to define their elements (one of the reasons why the UK courts have rejected them) with any real precision (though see the actual knowledge vs constructive knowledge plus impropriety formulation for unilateral mistake in *Digilandmall*). The discussion on the "coherence" of these equitable doctrines with the common law, and within the

contract law framework as a whole, could have included a discussion of the following specific issues:

(a) Mistake – Why are the Singapore courts so attracted to the idea of retaining a distinct equitable jurisdiction for common and unilateral mistake alongside the common law doctrines? How different are the tests for these doctrines at common law and in equity – and if they are essentially the same, what meaningful role can Equity play if the common law test has not been met? Is there a problem of incoherence if the doctrine of unilateral mistake (as to terms) in equity overlaps with the doctrine of unconscionability?

(b) Undue influence and unconscionability – How necessary/useful is it to have these separate doctrines alongside the doctrine of duress? Would the law make more sense if they were amalgamated together into a single "umbrella" doctrine of unconscionability? To what extent do these equitable doctrines undermine the value which contract law places on upholding contracts and security of transactions?

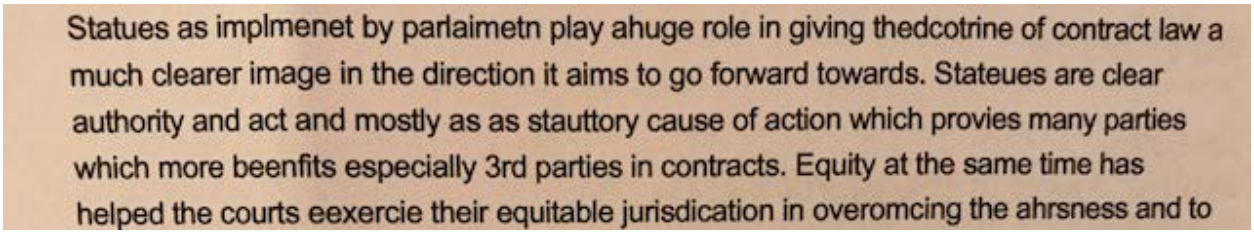
Finally, students are advised NOT to do the following:

(a) Making excessive typographical errors. These make it difficult for the examiner to follow your arguments and convey the impression that you are not looking at your laptop screen while transcribing from your prepared notes. It also makes you appear incoherent.
(See **Annex I**)

(b) Not setting aside enough time for each question. You should divide your time equally between the questions because you will be assessed on the basis of what your examiner can reasonably expect you to produce, for each of the 3 questions you are expected to have attempted, within one-third of the total time given to you for the examination.
(See **Annex II**)

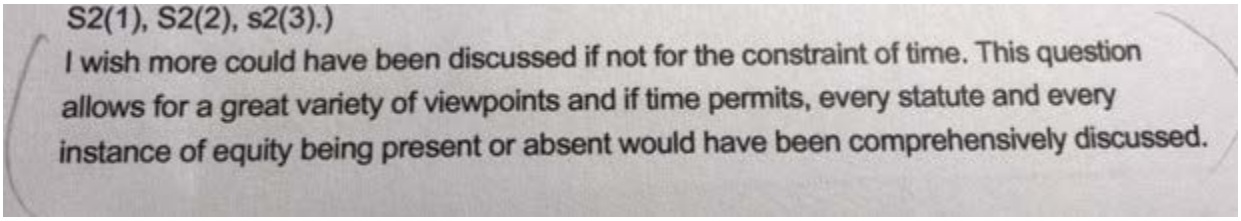
(c) Re-interpreting the question to suit your pre-prepared answers to essay questions from previous years (e.g. "certainty" vs "fairness" in contract law). Attempts to shoe-horn your pre-prepared text into your answer scripts detract from what the examiner expects you to do: to engage with the *actual* question posed, to craft your arguments in *direct* response to the question and to make use of the materials you have studied to support these arguments.
(See **Annex III**)

Annex I



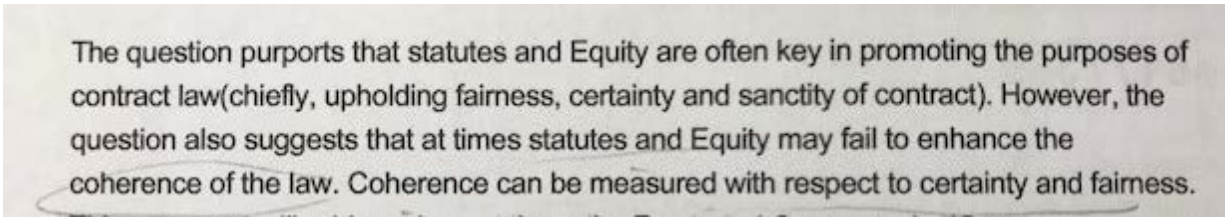
Statues as implmenet by parlaimetn play ahuge role in giving thedcotrine of contract law a much clearer image in the direction it aims to go forward towards. Stateues are clear authority and act and mostly as as stauttory cause of action which provies many parties which more beenfits especially 3rd parties in contracts. Equity at the same time has helped the courts eexercie their equitable jurisdication in overomcing the ahrsness and to

Annex II

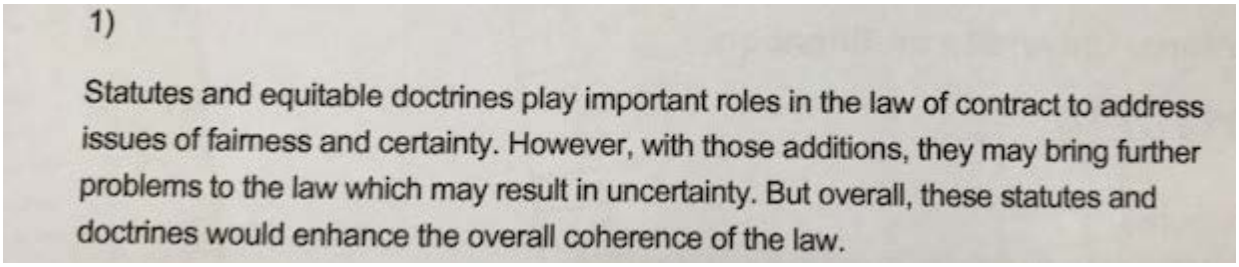


S2(1), S2(2), s2(3).)
I wish more could have been discussed if not for the constraint of time. This question allows for a great variety of viewpoints and if time permits, every statute and every instance of equity being present or absent would have been comprehensively discussed.

Annex III



The question purports that statutes and Equity are often key in promoting the purposes of contract law(chiefly, upholding fairness, certainty and sanctity of contract). However, the question also suggests that at times statutes and Equity may fail to enhance the coherence of the law. Coherence can be measured with respect to certainty and fairness.



1)

Statutes and equitable doctrines play important roles in the law of contract to address issues of fairness and certainty. However, with those additions, they may bring further problems to the law which may result in uncertainty. But overall, these statutes and doctrines would enhance the overall coherence of the law.

QUESTION 2

Helga v Gruber/Hubert

The main issue here is on privity. Any discussion on whether the exemption clause is applicable to the situation at hand (considering the *Canada Steamship* rules, *contra proferentum*, etc) should be kept brief. The same goes for the implication of terms in fact that the desserts should be delivered in good condition.

Most students noted correctly that the exemption clause was inapplicable pursuant to s 2(1) of the UCTA and that Gruber cannot rely on it. Falling violently ill would appear to come within the meaning of "personal injury" in s 14 of the UCTA. However, some students did not go on to discuss how Helga can recover for the losses suffered by her colleagues attending the training seminar. In this regard, most students noted correctly that Helga herself did not fall ill and that only her colleagues did.

This will require a discussion of the narrow and broad ground laid down in, among others, *Panatown*, *Prosperland* and *Family Food Court*, which Helga might resort to. Interesting discussions were had on the requirements to be satisfied, such as whether in the case of the narrow ground, a transfer of proprietary interest was still required in light of *Darlington* (*Family Food Court* not being exactly clear on the matter) and whether the requirement applies to food situations, and not just limited to property and shipping cases.

Helga's Colleagues v Gruber/Hubert

Many students did not discuss this issue. The CRTPA would be relevant here. It is arguable that her colleagues "the occupants of Suite 077V, OLLA Hotel" are expressly identified by class and so come within s 2(3) of the CRTPA. Given the circumstances, s 2(1)(b) would also be satisfied with s 2(2) not being applicable.

The other point to consider is s 8(2) which deals with a third party who is suing to enforce a term of the contract. Given that only s 2(2) of the UCTA is referred to therein, s 2(1) of the UCTA will still apply. This has the effect of rendering the exemption clause incapable of being relied on by Gruber/Hubert. Section 6 of the CRTPA should also be noted.

Helga v Xiao Wu

Most students discussed the common law position and the application of the requirements laid down in *Scruttons* and *The Eurymedon*, with the accompanying criticisms of the latter, in particular.

Surprisingly, a significant number did not also discuss the position of Xiao Wu ("XW"), a third party, under the CRTPA. It would appear that XW satisfies s 2(3) of the CRTPA, being a member

of a class. Section 2(1)(b) would also be satisfied, with s 2(2) not being applicable in the circumstances.

However, s 4(6) of the CRTPA would apply to disallow XW to rely on the exemption clause in light of s 2(1) of the UCTA.

Rene v Gruber/Hubert

The issue here is essentially one of misrepresentation. Most students correctly identified the requirements for an operative misrepresentation. The requirements were well discussed.

Having established an operative misrepresentation which renders the contract voidable, most students went on to talk about the remedies of rescission and damages. On rescission, it would appear that there are no bars. However, it is arguable that there may be affirmation on the facts as NN's revenues had fallen by $10,000 per month suggesting that a certain duration of time had passed after NN became aware of the problems.

The remedy of damages was well discussed depending on the type of misrepresentation involved. However, a significant number of students did not discuss s 2(1) of the Misrepresentation Act which was a lost opportunity to discuss *Royscot Trust* and *RBC Properties*.

Some students were mistaken that only when Gruber/Hubert failed to discharge the burden in s 2(1) of the Misrepresentation Act that rescission was available. Section 2(1) is only concerned with damages and not rescission. Rescission is a remedy available for all types of misrepresentation irrespective of the outcome in s 2(1), although the court has a discretion not to allow it under s 2(2) of the Misrepresentation Act. The representee might want to affirm the contract (in which case the contract cannot be rescinded) and yet claim damages under s 2(1) for losses suffered.

Gruber/Hubert v Otto

This issue on restraint of trade in the employment context was well answered.

Students had no difficulty applying and discussing the relevant case law and principles in this area, namely, restraints of trade are *prima facie* illegal at common law and unenforceable unless (i) Gruber/Hubert had a legitimate proprietary interest to protect (such as trade secrets and business connections) and (ii) the restraint is reasonable as between the parties and in the interests of the public, after taking into account various factors.

On the question of severance, it was suggested by some students that the blue pencil test could also be used in respect of the 10-year period by cancelling out the "0" so that it is only for 1 year and hence the restraint will be good. This is notwithstanding that courts frown on employers drafting overly-wide restraint clauses to try their luck and then rely on reading down by the courts (*Smile Dental*).

QUESTION 3

The comments below address some of the main themes we saw when marking responses; they are not exhaustive. The question fell into three parts.

Michelle and Edith (on behalf of OLLA and Nouvion Novena)

(a) On the whole, this section was not done well.

(b) Many students focused upon Edith's awareness of Michelle's error. That could certainly be relevant, but it was important first to decide the type of mistake involved. There was much confusion here.

(c) A key distinction was whether Michelle's error related to: (1) what Edith was (objectively) promising; or (2) what Michelle believed she was buying (i.e. the characteristics of the cheese). In other words, was it a mistake as to the terms of the contract, or merely a mistake as to facts? Few answers gave a good explanation of this point. If students considered that this was a mistake as to facts, rather than terms, then equitable unilateral mistake *as to terms* could not come to the rescue.

(d) Another tack was to consider whether there was an express or implied term in the contract that the cheese would be suitable for consumption by guests at the event. If so, then there is a straightforward claim for breach; Michelle would probably have a right to reject the cheese upon delivery.

(e) Some students conflated (c) and (d), thinking that they had to prove that the term was included in the contract before resorting to the doctrine of mistake as to terms. That is incorrect. Moreover, it may well be contradictory, since Michelle's understanding of the terms could then be correct, not mistaken.

(f) Arguments based upon misrepresentation were usually unconvincing. Some answers did not adequately address the objection that silence of itself is generally not a misrepresentation. Factual analogies to quite different cases were not helpful.

Edith and Rene

(a) Students generally did better in this part of the question. Potential lines of argument included duress, undue influence and unconscionability.

(b) Many answers were formulaic, copying passages from textbooks/slides/cases (sometimes without bothering to change abbreviations) and then applying them mechanically. It was also apparent that some students had read no deeper than the slides or textbook, because they did not actually understand what the various elements meant.

(c) Better answers were more thoughtful. They explained which vitiating factors were more likely to succeed and why, and then structured the analysis accordingly. Better answers also made more thorough use of the facts.

(d) Common weaknesses in this section included: (1) mixing up facts/elements used to establish presumed and actual undue influence; (2) asserting that the pressure in duress was illegitimate in a broad-brush way, in particular, giving little or no consideration to whether the conduct itself was lawful/unlawful; (3) mixing up the threat and demand elements in duress.

Edith and Crabtree

(a) There was great divergence in responses to this part. There were, principally, two lines of argument.

(b) The first – *assuming the contract to be valid* – considered whether this was a case of breach or frustration.

(i) Although we are not told why the engines failed, there is probably a good argument that this is a straightforward breach of contract. The damages recoverable might include sums expended by Edith that have become wasted by breach. Some students went into classification of terms as conditions, warranties, etc. Unless the claim was contingent upon termination, this was off point.

(ii) Many students went straight for frustration, though this is a far rarer occurrence in real life. We suspect they were tempted by the idea of getting payments back under the Frustrated Contracts Act.

(c) The other line of argument, which was obviously raised by the facts, was illegality. Some responses got confused about who would be the claimant and who would raise the defence.

(d) A majority of students were aware of the framework for determining whether a contract is illegal and approached the circumstances as presenting either (1) a contract to commit a legal wrong, or (2) a contract that was *ex facie* lawful but with an illegal object or purpose. Unfortunately, few answers carefully analysed the parties' negotiations/agreement so as to justify which of (1) or (2) was the right characterisation. Some students tried to apply a test of proportionality to all kinds of illegality, which is misconceived under Singapore law.

(e) If the contract was void for illegality, there was then an issue about Edith's right to recover her payment on some non-contractual basis. The better answers noted the different options laid out in *Ochroid* and then analysed Edith's prospects of success under each.