**National University of Singapore**

**Faculty of Law**

**LC1003 Law of Contract**

**AY2014-2015 (Semesters 1 & 2)**

**Final Examination – Examiners’ Report**

**General**

This 2.5 hour examination consisted of 5 compulsory questions of equal weightage. Question 1 was an essay question concerned with the role of statutes in the law of contract. Questions 2, 3, 4 and 5 were hypothetical questions which raised a range of contract law issues from topics that were covered in both semesters of the Academic Year. Each question was marked by a different examiner, with each examiner tasked with making qualitative assessments of almost 250 answer scripts based on their relative strengths and weaknesses. Students who performed well overall did consistently well in all 5 questions attempted, effectively communicating their mastery of the subject matter covered in this module. In many cases, the difference between a “B+” script and an “A-“ script often came down to how clearly, accurately, persuasively and critically the latter candidate expressed himself/herself. At the other end of the spectrum, the difference between a “D” and an “F” script lay in whether there was evidence that the candidate understood the question and whether a reasonable effort had been made respond to the issues raised by the question.

**Question 1**

Framework: This question gave students flexibility to choose the statutes they wished to discuss. However, once the statutes are chosen, the parameters of a good answer were quite specific, and students had to be careful to maintain their focus to keep their essay relevant. The main issues to be addressed were: (i) how the selected statutes have attempted to reform or supplement the common law; (ii) what new difficulties they have created; and (iii) whether these difficulties have diminished the value of the statutes. Issue (iii) could be approached by examining the law as it stood before the statute was enacted, and measuring this against the positive or negative effects of the statute.

Almost all students correctly included some discussion of the difficulties created by their selected statutes, and most students managed to reach a conclusion one way or another as to whether the value of the statutes was diminished by these difficulties. However, the strength of the analysis supporting their conclusions varied widely, and a number of students did not address issue (i) above.

Statute selection: The most appropriate statutes for consideration were the Unfair Contract Terms Act, the Frustrated Contracts Act, the Contracts (Rights of Third Parties) Act and the Misrepresentation Act. The majority of students chose well from amongst these statutes. A small number of students wrote their essays in the context of the Consumer Protection (Fair Trading) Act, the Evidence Act, the Electronic Transactions Act or the Sale of Goods Act. As only a limited part of these statutes was studied in the contract law course, it was more challenging to have sufficient knowledge to write a good essay. Nevertheless, some of these students persuasively fitted their answers into the framework required by the question, and were given due credit for salient points they made.

General comments: The specific substantive matters that should have been discussed in this question are well addressed in the textbooks and will not be covered here. The comments below relate to general matters.

(a) The grades obtained by students for Question 1 were well spread over the whole range of abilities, and grades from A+ to F were awarded.

(b) Students were not expected to provide a comprehensive list of the benefits or difficulties created by each statute, nor to analyse these in complex detail. An above-average grade could be obtained by identifying a few of the most obvious ones and embarking on a general discussion of these in a systematic way, bearing in mind the three aspects of the question set out above.

(c) Most students had at least a satisfactory substantive understanding of the particular aspect(s) of the statute that they chose to include in their respective answers. However, not many answers were consistently good across the three main issues mentioned above, nor across the two selected statutes. For example, an essay that was strong on the difficulties created by a statute might have omitted, or just cursorily discussed, how the statute supplemented or reformed the law, and vice versa. Or an essay might have dealt with one statute very well but the other dismally.

(d) Students had varying degrees of problems with time management and relevance. At the most extreme, there was a student who completely left out Question 1, and another who wrote several pages without addressing the question. These scripts obtained F grades. Although poor time management and /or irrelevance had a negative effect on grades, this was fortunately less severe in most cases.

(e) Where the CRTPA was selected for discussion, a common weakness was that too much time was spent on how common law tools were used to overcome the privity doctrine, leaving too little time for the CRTPA itself and for the second statute that needed to be examined.

**Question 2**

Purpose of the question: The key issues and the relevant law in this question – offer/invitation to treat, unilateral mistake in law and equity, and incorporation of terms by notice – were relatively clear cut, simple, and uncontroversial. It is expected that even the average candidate would identify all issues and the law reasonably accurately, and even the most straightforward application of the IRAC method would have sufficed for the purpose of organizing one’s answer. Carpet bombing with irrelevant issues, as many a panick-y candidates did, produced poor answers; precision guided penetrating munitions deployed with close attention to the terrain produced better answers. In other words, what this question is looking for is careful application of law to the facts. Students who simply regurgitated what they found in their muggers’ notes did not fare as well as those who made a conscious attempt at applying their understanding of the law to the facts presented to them in this hypothetical.

Some features of the best performers: The best scripts paid close attention to the wording of the sign in the advertising display, such as picking up on word ‘genuine’ and discussing how that influences the legal conclusion. A few outstanding students demonstrated an awareness that the words ‘60% off regular prices, strictly one-piece-per-customer’ is open to multiple interpretations. Quite a number of scripts picked up on the public policy angle behind cases such as *Carbolic Smoke Ball* and applied it to the bait-and-switch-esque context here – a pleasant surprise. Surprisingly few students picked up on the Consumer Protection (Fair Trading) Act angle. Those who did so did not necessarily do well (say, if due attention was not accorded to the main issues), but there were a few scripts that revealed a close reading of the statute, and should therefore be commended.

Common mistakes: Interestingly, this question turned out to be a trap for many an otherwise competent (judging by performance on other questions), if unwary, candidate who identified the issues but applied them to the facts overly cursorily. While time management and knowing when to stop are essential examination skills, the fact that all questions are weighted equally – and that the question seems on its face quite easy – should have alerted candidates to the need for greater attention to detail in this question. The most overwhelmingly common mistake was to treat unilateral mistake cursorily, with many candidates addressing only either the whether the designer’s identity is a contractual term point or whether Rachel had the requisite knowledge of the mistake, but not both.

A considerable number of students confused separate doctrines of mistake in law and in equity, and the distinction between unilateral and common mistake. In light of the considerable emphasis given to the common law/equity distinction in our jurisprudence and in class, this is disappointing. Also related is the failure to distinguish between voidness and voidability.

While not fatal, time- and labor-intensive expositions of Ming porcelain or of cereals did not help the candidate’s case. Application of law to facts does not necessarily call for comparison with facts of authorities relied upon; it calls for a dose of common sense and sensitivity to context. The point is to pick up on the ambiguities in meaning in the interaction between Rachel and Tina, e,g, whether Rachel had some kind of knowledge that (in one possible interpretation) Tina was offering to contract on the basis that the dress she was holding was designed by Mercedes.

A great many candidates also fell into the trap of seeing misrepresentation everywhere, and thereby missing the obvious mistake angle. As should be obvious to any candidate who has skimmed the entire examination paper before beginning to answer the questions, misrepresentation is tested elsewhere, and this should alert the candidate to the possibility that misrepresentation is not tested here.

Many students dismissed the sign in the window as an invitation to treat summarily. On the other hand, while it is not wrong to do so, many students also belabored the Becky portion unnecessarily, wasting valuable time that would have been more profitably spent on Tina’s issues.

**Question 3**

Expectations: This was a tough question and overall, the cohort’s performance on this question exceeded the examiner’s expectations. This question required analysis of a cause of action in breach of contract and the remedies thereby afforded, testing multiple linked issues. The main skill tested in this question was an ability to synthesize one’s understanding across different topics of terms, breach, remedies, and privity, and to demonstrate one’s understanding of how they were related in a systematic fashion. Accordingly, a premium was accorded to good organization of issues and a discussion of how each issue was contingent upon establishment of other issues. Students who compartmentalized their leaning into disparate topics, adopting an ‘issue-spotting’ ‘IRAC-type’ approach for each topic, without displaying understanding of how the issues related, produced unimpressive answers.

Characteristics of good answers: There were too many issues for in-depth analysis of all issues. That was not expected. The question served to differentiate those who merely regurgitated chunks of unapplied law according to a pre-prepared flowchart approach from those who could focus analysis on the most salient & pressing issues, discussing those in depth, while adeptly dismissing in short shrift issues were which peripheral and unlikely to succeed. This would require the student to have properly digested and internalized the relevant legal concepts. It therefore could be inferred that those who were able to do this possessed a higher-order skill. The examiner’s focus was less on exhaustive issue spotting by the candidate, but rather on whether the answer displayed possession of these skills. The top scripts managed to do this. Credit was given for citation of the key landmark cases, while less to no credit was given for copious citation of peripheral cases and irrelevant propositions of law, indicating pre-prepared regurgitation.

The question involved multiple possible claimants and multiple possible heads of damage. Accordingly, there were issues of privity and double liability (if both K and B brought suits in breach against R for the same type of damage – Blaine’s economic and non-economic losses). Students were required to identify who could sue whom for what, on whose behalf, and what type of loss each claimant could sue for.

Common mistakes: Students tended to misread the facts. The question involved a contract between K and R, which purported to benefit B by a pairing clause. This was not a solus/exclusive-distribution clause. It did not require that R, a boutique owner, obtain her supply of clothes solely from K and no one else. It merely required that, if R wanted to display K’s designs, she must pair them with B’s blazers. As to how R would obtain her supply of B’s blazers was left unstated in the facts, or in the express terms of this contract.

Many students misused the Sale of Goods Act. There was no point implying a condition of correspondence with description, satisfactory/merchantable quality, or fitness for purpose; these conditions imposed duties upon the seller. We are here concerned with possible suits by K and B as against the buyer, R, for breach of her duties. A threshold examination of R’s first possible breach of the pairing clause (express term) was therefore required.

Many students jumped straight into asking whether R had breached an implied term. Many conflated the contextual approach to interpreting contracts with the process of implying terms in fact. Unlike the UK, the SG courts have steadfastly sought, in a trilogy of cases, to keep the two separate and distinct. Errors like these in the discussion of law differentiated scripts, indicating those who had read and digested the key cases.

Many missed out the issue of whether K’s stoppage of supply was itself a breach by wrongful termination, or merely exercise of a right to terminate. According it had to be asked whether R’s breach was repudiatory. Many did not understand the RDC approach and misapplied it. There was much confusion between renunciations, anticipatory breaches, and repudiatory breaches. Only a minority of scripts demonstrated understanding of the sequential approach to conditions/warranties and innominate terms RDC established here.

Many also missed out the possible loss of bargain damages K could claim (the first line would hint at this), being distracted by the damage to K &B’s reputation and the $500,000 deal. There was also some confusion as to how claims for damages for loss of chance related to the limiting doctrine of remoteness.

Only a small number of scripts dealt with the problem of double liability. Even fewer, possible only a handful, dealt with the procedural mechanism of joinder should K bring suit under the broad ground.

**Question 4**

Substantive issues raised in the question:

*Mike v Britney* – issues: undue influence (UI) and unconscionability. It would have been sensible for candidates to focus on presumed UI and demonstrate their understanding of:

1. the need to prove a relationship of trust and confidence (since it would not be presumed here);

2. when a transaction called for an explanation; and

3. the presumption that Mike will have to rebut, usually by showing that Britney received independent legal advice.

Relevant cases include: *Allcard*, *Etridge*, *Susilawati*, *etc.* This part of the question was reasonably well answered although surprisingly many answers said Britney could ‘easily’ prove her claim – the reality is that UI is not easy to establish. Quite a few answers focussed on so-called ‘actual’ UI which was okay but since this category veers towards duress, presumed UI was the more sensible approach. Fuller answers would also have considered unconscionability although it is less established in Singapore and it is debateable whether the facts support the elements. For this reason, confining your answer to unconscionability would have adversely impacted your mark. Some people got caught up in an unnecessary consideration discussion, one or two even saying that there was none: Mike promised to pay $10K to Britney which satisfies the requirement since consideration need not be adequate.

*Mike v Puck* – issues: recoverability of non-pecuniary damages and enforceability of the contract in light of the illegality.

This part of the Q was less well answered. Many went wrong by treating it as a restitution question. A good discussion would have recognised the need to ascertain whether the contract was prohibited – expressly or impliedly. Many answers were far too hasty to conclude that it was prohibited when there was little evidence to support such a conclusion. If, however, the contract was prohibited, you should have considered external remedies (collateral contract, tort). Arguably the contract was not prohibited and hence called for a discussion of the *Ting Siew May* proportionality approach.

*Mike v Jake* – issues: distinction between a deposit and an advance payment and Jake’s ability to get restitution following termination of the contract pursuant to an express clause.

This part of the Q was poorly answered - many students even failed to deal with it at all. Jake, having exercised his express right to terminate, no longer had a contract with Mike and wanted his money back – ie. he was seeking restitution on the basis probably of total failure of consideration. Since this was not a deposit, prima facie he was entitled to get the money back but Mike was making unmeritorious use of the illegality defence. In response, Jake could invoke the ‘not in pari delicto’ exception or possibly timeous rejection.

Common mistakes:

1. Lumping Puck and Jake together when their claims and predicaments were different.
2. Not keeping the distinction between enforcement and restitution – different principles apply.
3. Misreading the facts eg some answers assumed Jake had already gone on the trip, others discussed whether Puck could sue on Jake’s behalf under the broad/narrow ground – since both of them had contracts with Mike, there was no privity issue.
4. Identifying non-issues: eg whether Jake’s had a right to terminate under RDC Concrete when he was exercising an express right to terminate; some said Jake was in repudiatory breach and could be sued by Mike, ie ignoring his contractual right to terminate; others discussed Jake’s ability to get loss of bargain damages – he was not seeking damages, he wanted his money back.

**Question 5**

Framework of issues: The objective of this question was primarily for students to identify and evaluate the various legal options open to Britney which may enable her to avoid payment of the additional $10,000 under the fresh contract with Sam for her home renovation works (the “new contract”). To this end, the main arguments/issues that students should have explored were:

(i) Whether Sam would not be able to enforce the new contract against Britney for lack of consideration (in particular, whether Sam provided any ‘practical benefit’ to Britney constituting consideration for the new contract);

(ii) Whether Britney can set aside the new contract on the basis that it was entered into as a result of duress exerted by Sam, in particular:

a. Economic duress by Sam’s threat to not continue with the project should Britney fail to meet his demand for the additional $10,000; and

b. Lawful act duress by Sam’s threat to report Britney to the authorities for housing a large number of animals without an animal shelter licence;

and

(iii) Whether Britney can set aside the new contract on the basis that it was entered into as a result of Sam’s misrepresentation that he was the only authorised contractor appointed by LTE, when there were in fact more than a dozen authorised contracts.

Other issues raised by students included the vitiating factors of common mistake, illegality and unconscionability, as well as some creative arguments relating to duress to goods, and also the issue of anticipatory breach of contract by Sam. Though these issues were not the main focus of the question, students were given credit to the extent that their analysis of these issues was cogent and relevant. Little credit was given where students raised irrelevant issues or demonstrated conceptual confusion (for example, spending unnecessary words discussing frustration; or discussing promissory estoppel instead of practical benefit).

Characteristics of good answers: Overall, this question was quite well done. As the average performance was good, the scripts that stood out demonstrated the following features (the absence of which characterised scripts that performed relatively worse):

(a) Issue-spotting: Ability to spot all the above issues (if not more). Those that discussed just one or two issues would not have performed as well. A common error in respect of the duress issue was to fail to distinguish between economic and lawful act (or some other type of) duress, which many students muddled together, or else discussed one but not the other potential categories of duress. There were a small number of scripts that raised a large number of issues (sometimes relevant and sometimes irrelevant) without discernment or adequate analysis, an approach which also negatively affected their performance on this question.

(b) Organisation and prioritisation: The good scripts demonstrated good judgment by organising their responses with headings setting out the issues clearly, and devoting sufficient time to discussing each issue. For example, ceteris paribus, a script that spent 3 pages discussing consideration and a paragraph on duress would naturally perform relatively worse overall than a script that devoted sufficient (not necessarily equal) time and space analysing all issues.

(c) Answering the question: The better scripts did not simply run through the issues mechanically to tick off the boxes from formation to vitiating factors, but showed that they were answering the question by tailoring their response to Britney’s desired outcome (i.e. avoiding the potential liability of paying Sam $10,000 under the new contract).

(d) Discussion of authorities and application to facts: The better scripts made reference to an appropriate number of authorities for each issue, and more importantly, synthesized the authorities to express a clear and cogent rule, which they applied to the facts of the question. Good scripts also took effort to analogise and distinguish the facts of the hypothetical from the cases in the reading list (e.g. contrasting Sam’s actions with the situation in *Sharon Global Solutions Pte Ltd*). The better scripts also conscientiously dealt with all relevant facts raised in the hypothetical. For example, given that Britney appeared to capitulate to Sam’s demands because of lawful act duress (i.e. on the fear that her cats might be taken away), whether the causation requirement for economic duress (threat to breach the contract) was met, and/or whether Sam’s false statement that he was the only authorised contractor fulfilled the element of ‘inducement’ for a successful plea of misrepresentation. Credit was given for discussing such sub-issues (e.g. the rules relating to causal requirements for duress and misrepresentation), rather than for getting the ‘right’ answer.

(e) Evaluation of various legal options discussed: The better scripts managed to compare and contrast the various arguments raised, and draw links between the issues (e.g. consideration and economic duress).

(f) No conceptual errors: Scripts that demonstrated some degree of conceptual confusion (e.g. assuming that practical benefit in Williams meant ‘peace of mind’, or conflating the requirements of consideration and promissory estoppel) would naturally have performed worse, given that the cohort as a whole demonstrated quite a good grasp of the basic legal concepts relevant to the question.

(g) Overall coherence: The better scripts had a clear and logical flow to their arguments. While scripts were evaluated primarily for content, weight was also given to the clarity of thought reflected in the script. For example, two different scripts might have discussed the similar issue of duress, but the script that set out the issue, elements of duress, and application of the duress doctrine would have certainly fared better than one that went into a rambling or disjointed (though not absolutely incorrect) discussion without reference to clearly articulated rules (e.g., beginning the analysis with “There is duress because Sam is clearly taking advantage of Britney just because she has money…”). Such imprecision in expression would negatively impact a candidate’s performance. Conversely, credit was given for clear and precise expression.

Common errors:

1. Some students did not refer to any authorities at all (e.g. discussing the consideration issue without reference to *Williams v Roffey Brothers*, or not even using the terminology of ‘practical benefit’);
2. At the other extreme, some students spent far too long discussing authorities in depth (e.g., theoretical foundations of the duress doctrine), with far less time and space devoted to discussing how the rules related to the relevant facts in the hypothetical; and
3. Some students simply *assumed* that the relevant legal rules were applicable (e.g. ‘there is clearly a misrepresentation here’, without telling the examiner exactly what statement constituted the relevant misrepresentation).

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