**CONTRACTS CHECKLIST/MINI-CAN**

**Elements required to create an enforceable contract:**

* Offer and acceptance
* Consideration
* Intention to create legal relations
* Consensus ad idem – meeting of the minds

**Intention to create legal relations:**

* In cases of closely associated parties, it will be presumed that there was no intention to legal relations in the absence of clear evidence to the contrary (**Balfour**)
  + This is a rebuttable presumption
* Business and commercial agreements are generally assumed to intend binding contracts (**Rose and Frank**)
  + But this can be rebutted if there was clear intention to not create a legal relationship (eg. One can explicitly write into the contract that the agreement should not be bound legally (**Rose**))

**Offer: an indication of a willingness to enter into a contract on certain terms 🡪 objective test**

1. There must be clear and deliberate communication of the offer as an offer in order to be considered an offer that can be legally binding (**Blair**)

**Puff:** an advertising hyperbole; it is not intended to be taken seriously nor would a reasonable person believe it to be taken seriously

**Invitation to treat:** indication of a willingness to receive an offer

* If it is simply an invitation to treat, no obligations come from this
* Apply objective test based on the words and actions of the parties involved to determine if they constitute an offer or an invitation to treat

**Examples:**

* A quotation is merely an invitation to treat, not an offer (**Canadian Dyers**)
  + “lowest willing to sell at” deemed to be an offer (**Canadian Dyers**)
  + “lowest willing to consider” may be more likely to be invitation to treat
* Display of goods at a store is an invitation to treat **(Boots**)
  + Offer is made by customer at check-out, acceptance by employee, final say by owner/pharmacist

**Ads and unilateral offers**

A unilateral contract is a contract in which the act is exchanged for a promise; acceptance is the completion of the action required by the offer

* In general, an advertisement is treated as an intention to treat

In a unilateral offer, notification of performance is notification of acceptance (**Carbolic Smoke**)

* Thus, once there is performance, you are obliged to fulfill the promise

When reading an advertisement, it will be read in its plain meaning the way it would be interpreted by the ordinary and reasonable person (**Carbolic Smoke**)

* An advertisement can still be considered an offer if it can be interpreted that way by the general public (**Goldthorpe**)
  + *Look at the facts and determine/examine the circumstances and what a reasonable person could infer*

**Communication of offer in unilateral contract**

1. If performance is completed on a unilateral offer, that is sufficient to enforce contract (**Williams**)
   * It does not matter whether they were motivated to complete the offer or by the offer
2. It does, however, matter whether you had knowledge of the offer at the time of performing conditions of the offer or before valid acceptance can be made (**R. v. Clarke**)
   * You need to have had knowledge
   * **Williams** - the informer knew of the offer when giving information but did not perform on it in order to receive the offer vs. **Clarke** – the informer admitted to either forgetting about the offer or didn’t think about it when giving the information to Crown = no knowledge at time of acceptance

Offeror can only revoke unilateral contract if offeree did not live up to their side of the bargain

* Thus, they cannot revoke if substantial performance has been completed (**Errington**)
  + Note: one payment may not be sufficient to be called substantial performance

**Acceptance: statement or act given in response to an offer and occurs when offeree agrees to enter into a contract proposed by the offeror**

1. Mirror image rule - Acceptance must match the offer
   1. Thus, if you make a counter offer, this constitutes a rejection of the offer (**Livingstone**)
      1. However, an offer can be renewed after a counter-offer through ambiguous language + intermediate dealings between the parties; “cannot reduce price” constituted a revival of the original offer (**Livingstone**)
      2. An inquiry into the terms of an offer is not a counter-offer, and does not impede the ability to accept that offer (**Livingstone)**
2. If there is a battle of the forms, in general, the last shot wins
   1. However, you may also analyze it by taking all the relevant documents as a whole and applying an objective test of the conduct and language (**Butler**)
      1. In this case, signing of a receipt slip was a decisive document in determining that it was those terms that were to “win”

**There must be communication of acceptance**

1. Postal acceptance rule – a contract is completed upon mailing and posting of the acceptance letter, not when it reaches the destination (**Household fire**)
   1. Post office is treated as a common agent of both parties; the other party does not need to “receive the offer”
   2. The postal acceptance rule can be bypassed if the offeror specifies that a **notification** of acceptance is required (**Holwell Securities**)
      1. The rule may also be possibly bypassed if, looking at all the circumstances, negotiating parties cannot have intended that there be a binding agreement until acceptance was communicated
2. In cases of instantaneous communication, a contract is complete at the location when and where the acceptance is received by the offeror (**Brinkibon**)
   1. We can also look at Electric Commerce Legislation
      1. Message is deemed sent when it leaves the sender’s control
      2. Message is received when it reaches an information system that is in the control of whom it is sent
3. Offeree must generally accept in the manner stipulated; or if not stipulated, offeree must accept in the manner they received the offer, or in a manner that is thought to be reasonable
4. Most important, however, is to look at the facts 🡪 parties are able to stipulate the rules in advance
5. When looking at electronic agreements, if the offeree has reasonable notice of terms of a contract, contract is formed if you sign/click “I agree” (acceptance), regardless of whether you actually read them or not (**Rudder v Microsoft**)
   1. *Look at the facts to determine whether or not a reasonable notice of terms was provided – in this case – pressed “I accept” twice, scroll bar analogous to turning pages, no physical differences between terms that make some words more difficult to read than others*

**Termination of offers**

**If an offer isn’t accepted, it can end if there is revocation, lapse of time, rejection or counter-offer**

1. Offeror is free to withdraw/revoke offer at any point until acceptance, as long as offeree has not already provided any sort of consideration (eg. Deposit) (**Dickinson**)
   1. Revocation needs to be communicated to the offeree before acceptance (**Van Tienhoven**)
      1. However, revocation is effective even if it is communicated indirectly to offeree, such as through a third party (**Dickinson**)
      2. Postal acceptance rule does not apply to revocation – thus, if you mail a revocation letter to the offeree, but the accept your offer before they receive revocation, the contract is formed (**Van Tienhoven**)
2. A promise to leave the offer open is gratuitous unless some sort of consideration is provided from the offeree (**Dickinson**)
3. Offer can lapse if not accepted in a reasonable time (**Barrick**)
   1. The reasonable time to accept an offer can be determined from the conduct and language of the two parties, the nature of the goods and other reasonable indications (**Barrick**)
   2. Also look to see if there are any dates 🡪 if none, then lapses in a reasonable time

**The case of bids and tenders**

Historically, call for tenders was an invitation to treat and the submission of bids were offers by the different bidders 🡪 when issuer selected a winning bid, this constituted acceptance of the offer and obliged that bidder to proceed with the project

* However, this meant that since there was no contractual agreement about how the tender process was conducted, project owners could abuse the process

**Ron Engineering** changed the structure of how we view the tendering process

* A call for tenders may constitute an offer which is accepted by the submission of a bid (Contract A arises – offer to conduct a fair and transparent bidding process in exchange for an irrevocable bid)
* This submission of the bid, at the same time, acts as an offer to enter into a contract (B) to build the stadium on specific terms
* The tenderor awarding the project to the contractor constitutes acceptance of offer B

Violation of contract A entitles the bidder to damages (**MJB**)

**Possible issues:**

* **Privilege clause:**
  + Tenderors are allowed to make privilege clauses that allow them to say that they will not necessarily always pick the lowest tender or they may not pick any tender at all (**MJB**)
    - However, a privilege clause is only compatible with accepting compliant bids (**MJB**)
    - If the bid is incompliant, then it cannot be accepted
* In the absence of a privilege clause, you are most likely to be bound to accept the lowest offer (**MJB**)

**Standard forms and exclusion clauses**

1. Start analysis with **L’Estrange** – when a document containing contractual terms is signed, then, in the absence of fraud/misrepresentation, party signing it is bound
   1. Reflects the principles of freedom of contract
2. If there are unusual or particularly onerous terms on a standard form contract, party seeking to enforce the contract must take reasonable steps to provide notice (**Tilden**)
   1. In **Tilden**, an exemption clause that was inconsistent with the overall purpose of the contract (to provide insurance) was deemed to be unusual or particularly onerous term
      1. In this case, they took no steps to alert the plaintiff despite knowing that the plaintiff did not read the contract
      2. Exemption clause was on reverse side of contract, small print
   2. We cannot say that there was true acceptance of the contract or meeting of the minds
3. Requiring that the party must draw attention to an exclusion of liability clause is not a general principle **(Karroll**)
   1. Two step test:
4. Would the reasonable person know that P did not intend to agree to the release they signed?
   1. Look at whether release is consistent with purpose of contract, was it short (did it fit on one page?), easy to see (capital letters, no fine print), easy to read, was the P familiar with the type of contract, did they know that it bounded legal rights
5. In these circumstances, did they fail to take reasonable steps to bring it to attention of P?
6. How long was the contract vs. how long did P read it vs. were they given the opportunity to read it

4. With automatic ticket machines, contract is formed when the ticket is received (**Thornton**)

1. Thus, conditions must be seen before when ticket is received in order to be binding

**Consideration**

1. Consideration must be something of value in the eyes of the law moving from the promisee to the promisor (**Thomas**); the courts will not look at the adequacy of consideration (Peppercorn theory)
   1. 1 pound for lease money was deemed to be good consideration, but motive (“in consideration of someone’s wishes) was not (**Thomas**)
   2. A bare naked promise unsupported by consideration is not enforceable (**Brantford, Dalhousie**)
2. Consideration must be requested – it must have been agreed upon by the promisor as a condition of, or to be in return for, the promisor’s promise (**Brantford, Dalhousie**)
   1. Look at who offered what to see if there is consideration (eg. If promisee is the one that proposes something, it may not be found to be good consideration – **Brantford**)
3. The case of donation pledges:
   1. A signed pledge to make a donation cannot be enforced without consideration
      1. This is held even if donor dies and they expressed intention to fulfill their promise (**Dalhousie**)’
   2. “in consideration of the subscription of others” was not good consideration (**Dalhousie**)

**Past consideration**

1. Past consideration is no consideration at all (**Eastwood v Kenyon**)
   1. Past consideration: when promise is made after performance – check to see if it looks more like a gratuitous act that was never requested (Sarah in **Kenyon**)
   2. Generally, infants’ contracts are not enforceable. However, if an adult guardian provided the necessities of life for them + infant promise to pay back after full age, then consideration can be found (**Cooper v Martin**)
   3. Exceptions:
      1. Where the earlier act was performed at the express or implied request of the promisor AND it was understood that payment would be made, then promise made after performance may be enforced (**Lampleigh**)

**Pre-existing legal duty**

1. A promise to perform or performance of a pre-existing contractual duty already owed to the promisee does not constitute good consideration to support another promise to the same promisee (**Stilk**)
   1. However, pre-existing duty can be good consideration to a THIRD PARTY if (**Pao On**)
      1. Act is done at promisor’s request
      2. Parties understood act to be remunerated/conferment of some benefit
      3. Promise must have been capable of legal enforcement had it been promised beforehand
2. A prior duty owed to the promissor or variation of an existing contract is not legally sufficient consideration (**Gilbert Steel**)
   1. You can rescind an initial contract and modify it into a new contract to get around the consideration issue, but there must be clear intent from both parties (**Gilbert Steel)**

**Pre-existing legal duty (Part payment/promises to accept less)**

1. Starting analysis is **Foakes** – an agreement to accept less than you are owed is not binding unless there is some consideration (payment of a lesser sum in satisfaction of a larger amount does not constitute consideration)
   1. This was applied in **Selectmove**, where a promise to vary a contract by accepting less was deemed to be bad consideration, even despite the promisor potentially receiving a practical benefit from the performance
      1. NOTE: however, this case was decided on the fact that there was no acceptance
2. **Foakes** was modified so that it only applies to payments of money
   1. Thus, if there was a change of method of payment, it is good consideration for accepting less
      1. Examples: payment of a lesser sum before the due date, providing post-dated cheques (**Foakes**)
      2. Substitution of something else may be of more benefit to the creditor even where it is objectively of lesser value such that it will constitute good consideration in satisfaction of an existing debt.

**Judicature Act, RSA 2000, c J-2, s. 13(1)**

1. Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation
   1. When expressly accepted by a creditor in satisfaction, or
   2. When rendered pursuant to an agreement for that purpose though without any consideration

**1st Route to getting around consideration = practical benefit + no economic duress**

1. Start with **Stilk/Gilbert** – we need fresh consideration – pre-existing duty =/= good consideration
   1. **Gilbert** suggest there are ways around notion of Stilk: abandonment of original contract, obtaining something different
2. Look at **Roffey Bros** new exception/rule for consideration:
   1. If there is a pre-existing contract between A and B
   2. B does not believe A will perform; AND
   3. B promises more money to A for A to do the very thing they are already bound to do
   4. THEN, as a result, B can be said to gain a practical benefit. As long as the promise wasn’t made under economic duress, this practical benefit is good consideration
3. Economic duress is where the promisor (victim) had no practical alternative but to acquiesce the promise of the promisee who exercises coercion (**Nav Canada**)
   1. Threshold conditions for economic duress:
      1. Exerting pressure by making implicit threat to breach contract by withholding performance unless contractual variation – must be extracted from pressure in the form of a demand or threat
      2. Coerced party is left with no practical alternative but to comply
   2. Once these are met, look at consent (eg. **Nav Canada** – letter said “under protest”)
      1. They may look at whether there was consideration

**2nd Route to getting around consideration = promissory estoppel**

1. A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply – only as a shield (**Central London**)
   1. Reinforcement of estoppel as a shield - Promissory estoppel can't create new rights, but can stop party from insisting on their strict legal rights (**Combe**)
   2. The test for promissory estoppel as a shield:
      1. Existing legal relationship
      2. Promise or assurance – intention to be binding and acted upon
      3. Reliance and detriment to the promisee
      4. Equities in the promisee’s favour
2. In order to make out PE, there needs to be some inequitable outcome; clean hands doctrine – need to be deserving of assistance (**D&C Builders**)
   1. In this case, D knew P desperately needed money or would risk bankruptcy; took advantage of that and made him sign a promise to take smaller payment
3. A friendly gesture is not a binding agreement and if it is relied upon, estoppel will not be available as a defence + series of waivers does not constitute estoppel (**Borrows**)
   1. In order for a promise to be capable of being relied upon and invoking PE, it must be a promise either by words or conduct and its effect must be clear and unambiguous – there must be clear intent to change legal relationship (**Borrows**)
   2. It is important to note that waivers can be determined through examining the conduct of promisor (**Saskatchewean River Bungalows**)
      1. In this case, conduct that implied that they were still willing to accept late payments
      2. On the other hand, waivers can also be retracted with sufficient notice AND if it can be done without prejudice to the other party
4. Promissory estoppel as a shield (**Walton**) – AUSTRALIA
   1. Assumption or expectation of a particular legal relationship
   2. D has induced P to adopt the assumption/expectation
   3. P acts or abstains from acting in reliance on the expectation/assumption
   4. D knew or intended P to do so
   5. P’s action/inaction will occasion detriment if assumption/expectation not fulfilled
   6. D has failed to act to avoid detriment by fulfilling the expectations or otherwise

**Privity: Third Party Beneficiaries**

The Rule

1. Third parties to a contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it (even if contract was for their benefit) (**Tweddle**)
   1. This overturned the older **Provender** decision – Court held that “the party to whom the benefit of a promise accrews may bring his action”
   2. Natural love and affection is not sufficient consideration in law (**Tweddle**)
2. Only a person who is a party to a contract can sue on it, unless the party named in the contract was acting as an agent of an unnamed party; in that case, the unnamed party can sue (**Dunlop**)

The Exception

1. Trust
   1. The estate of a promisee can sue a promisor, but the third beneficiary cannot sue (**Beswick**)
      1. Thus, if the third party benefitting from the contract is also the administrator of the estate of one of the parties of the contract, you can bypass privity rule (**Beswick**)
   2. There must be clear intention to create a trust in order for trust relationship to be found (**Vandepitte**)
      1. A beneficiary of a trust can sue on a contract made by the trustee for their benefit
2. Agency
   1. The principal can sue when an agent is the promisee (**McLaren Motors**)
   2. **Test for agency**
      1. Party is meant to be covered by provisions
      2. Promisee is clearly acting as agent for the party; and
      3. Promisor has authority to do this
      4. Agency agreements still need consideration
      5. Then consideration moves from party through agent to promise

Test for Employee Exclusion from Liability (**London Drugs**)

1. Limitation of liability clause must, either expressly or implied, extend its benefit to the employee(s) seeking to rely on it, and
2. Employees must have been acting in the course of their employment and must have been performing the very services provided for in the contract between their employer and the other contracting party when the loss occurred

If both of these provisions are met, then employees are excluded from liability 🡪 limited to employment situations + can only be used as a shield + this doesn’t affect previous exceptions to privity rule

When a third party is not explicitly mentioned in an exclusion of liability clause, and the protection is not intended for their benefit, the third party is not protected (**Edgeworth**)