

NATURE AND CREATION OF CONTRACTS

Introduction

- A **contract** is an agreement between two or more parties, creating legally enforceable rights and obligations.
- Contracts can be verbal or written, but most are in written form.
- The necessary elements for a contract are:
 1. Mutual intention to create a contract
 2. "Meeting of the minds" as the terms of contract through "offer" and "acceptance"
 3. Consideration (i.e., exchange of value) from each party to the other(s)

Breach of Contract

- A **breach of contract** is a breach of an express duty voluntarily entered into by two or more parties.
- Contractual duties arise only from a special relationship between the parties to a contract (the legal term for the special relationship being "**privity**").
- Damages for a breach of contract are intended to place the breached parties in the position they would have occupied if the contract had been fulfilled.

Mutual Intention to Create a Contract

- A **mutual intention** arises if a reasonable person would believe that the parties intended to create a legally enforceable contract.
- There are two "**rebuttable presumptions**:"
 1. **Commercial Context**: The rebuttable presumption is that the parties intended for an agreement to exist.
 2. **Family Context**: The rebuttable presumption is that no legally enforceable agreement was intended.

Offer and Acceptance

- In tandem to intend to create a legally binding contract, parties must go through offer and acceptance.
- Courts have developed criteria to determine what qualifies as a contractual offer:
 1. The presence of offer and acceptance is a contextualized, factual determination
 2. An individual does not have a contractual premise (it is a gratuitous promise) if the individual did not get anything of value in return of offering the premise

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- An offer must be communicated and received as an offer, but there is no particular form of communication required.
- An offer may be withdrawn at any time prior to acceptance (**revocation** must be communicated effectively to potential offerees).
- An offer is not revocable if:
 1. It included a promise to remain open for a prescribed period of time; and
 2. Either the promise was placed under seal (deemed consideration) or the offeree(s) provided “consideration” for a commitment that it would remain open.
- An offer may be expressly limited in time because otherwise it will lapse after a reasonable period.
- There are two forms of rejection of an offer:
 1. **Counter-Offer**: The offeree responded by offering to enter into a contract on different terms
 2. **Battle of the Forms**: Each party claims to have conducted under its own standard terms and conditions; a legal problem arises where the agreement has already been performed
- There are various forms of acceptance:
 1. **Acceptance by Promise**: A **bilateral contract** is a promise which is exchanged for a promise (i.e., a promise as an offer is exchanged for a promise as acceptance).
 2. **Acceptance by Performance**: An **unilateral contract** occurs when an act is exchanged for a promise and the act must be in response to the offer.

Offer versus Invitation to Treat

- An **invitation to treat** is an invitation to others to make an offer.
- The critical question to ask is: “from the perspective of an objective reasonable person, was the statement an offer or was it an invitation for others to make an offer?”
- The rebuttable presumptions are:
 1. Items in a store with a price are characterized as invitations to treat
 2. Advertisements in the media are characterized as invitations to treat

Consideration

- **Consideration** is the “exchange of value” by the parties to a contract, and it is a necessary ingredient for contract formation.
- Consideration must be provided by all parties to the contract and be sufficient (almost anything of value).

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- Consideration is interpreted as a thing having essentially the same value as the consideration for which it was exchanged.
- **Past consideration** (i.e., consideration provided beforehand) is not consideration.
- **Pre-existing public duty** (i.e., the fulfillment of a public duty) cannot be considered for a new contract.
- The flow of consideration can:
 1. Flow from an existing contractual obligation owed to another party; it can constitute consideration for a new contract
 2. Flow from an existing contractual obligation owed to the same party; it cannot constitute consideration for a new contract between the same parties

Enforceable Promises without Consideration

- Canadian law recognizes two ways for a promise to be legally enforceable without consideration:
 1. **Seal**: Mark on a contract confirming the party's intention to be bound, notwithstanding that the other party may not have provided consideration
 2. **Promissory Estoppel**: Legal rule that prevents a party from retracting a promise that the other party had relied upon; it is an exception to the general rule that a promise is not enforceable if there has been no exchange of consideration
- A promissory estoppel requires:
 1. A promise by the promisor
 2. Reliance by the promisee on the promise such that it would be unfair if it were retracted
 3. No evidence of "inequitable" behaviour engaged by the promisee
 4. An existing legal relationship between the parties within which the promise was made

Privity of Contract

- Contractual obligations cannot be imposed on anyone who is not a party to the contract.
- Contractual benefits cannot be received (with exceptions) by one not party to a contract.
- An **assignment** is a modification or exception to the privity of contract rule.
- A contractual party (assignor) may assign its rights to another party (assignee).
- A **statutory assignment** is an assignment that confirms to a statutory requirement:
 1. It must be in writing
 2. Written notice of the assignment must be given to the debtor
 3. The assignment must be absolute (i.e., cannot be conditional)