Contracts 2021-22 [LAW 410]

Glossary

Acceptance: “An acceptance is a final and unqualified expression of assent to the terms of an offer.” It is an objective test based on actions of contracting parties.

Agreement to negotiate: agreements to agree in the future on essential aspects of a bargain. These are not contracts, but they constrain how parties can conduct themselves in respect of one another when negotiating a contract.

Anticipation of Formalization: arises when an agreement is reached with envisages a further formal document.

Bilateral contract: "Contract formed by the exchange of promises in which the promise of one party is consideration supporting the promise of the other." Both parties are bound to perform as both have made promises.
Boilerplate contracts: contracts where terms are preset by only one body, undermining the ideal that contracts are manifestations of the will of both parties and both parties have freely consented to the terms. *(see Pro CD v Matthew Zeidenberg)*

Business efficacy test: Tests to find intentions of the parties to determine if a term of contract was presumed. Asks "is this condition necessary for the contract to have business efficacy?" If yes, the term may be implied.

Clickwrap Agreement: a type of boilerplate contract where one must click "I agree" in order to use a particular service. Clicking "I agree" is sufficient to constitute acceptance. *(see Rudder v Microsoft Corp)*

Condition subsequent: the fulfillment of a condition or the occurrence of an event shall discharge either one or both parties from further liabilities under the contract. *see Dawson v Helicopter Exploration Co.*

Contract: an enforceable promise

Detrimental reliance: where the offeree gets so far into performance necessary for acceptance that revocation will create significant harm. Can amount to trickery. *See Flagpole problem; see Dawson v Helicopter Exploration Co.*

Doctrine of Mistake: emerges from *Ron Engineering.* Contracting party can avoid liability if they entered a contract on the basis of a mistake (false information) because a mistake makes it impossible to reach a true meeting of the minds. ***Mistakes stop acceptance: an offeree cannot accept an offer which they know included a mistake.***

The flagpole problem: "an offer in the form 'I will pay you $500 if you climb to the top of the flagpole' can, in theory at least, be withdrawn at any point during the offeree's attempt to climb the pole." *see Dawson v Helicopter Exploration Co.*

Forum selection clause: describes that all disputes must occur within a certain jurisdiction. As a general principle, these are common and provide certainty on where actions may happen.

Implicit collateral arrangement: an arrangement whereby a promise *will* occur following the performance of an action *(see Errington v Errington and Woods)*

Implied subsidiary obligations: when an agreement is subject to a non-promissory condition precedent, such as being conditional upon the approval of a third party or event, courts will often imply subsidiary promissory obligations on the part of one or both of the parties (to protect contract) *see Dawson v Helicopter Exploration Co.*

Incompleteness: type of uncertainty (1/2) when a term is left unspecified and the agreement is thus incomplete. However, the court does balance this with flexibility as some terms will sometimes be left open for good reason.

Instantaneous Acceptance Rule: Communication is considered to have occurred within a reasonable time of arrival within the offeror's control. *(see Brinkibon Ltd)*

Invitation to treat: an expression of willingness to do business/contract on specified terms. The party "does not make an offer but invites the other party to do so."

Lapse: An offer which does not expressly provide for how long it is open is said to lapse after a reasonable timeframe (defined by weighing circumstances and factors such as the nature, mode of communication, language, etc.). *(see Barrick v Clark)*

Mirror image rule: basic principle of acceptance that the acceptance must match the offer. If it's not a mirror, then the acceptance actually constitutes a counter-offer.

Offer: "an expression of willingness to contract on specified (clear and knowable) 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."

Officious Bystander Test: a test to find intentions of the parties to determine if a term of contract was presumed. The test imagines that if the contracting parties were interrupted by an official bystander and asked "excuse me, but did you mean to include this term but forgot it?", the parties would respond "of course!" If the test is met, the term may be implied.

Option Contract: "Contract made for consideration to keep an offer open for a prescribed period....An option is an agreement which gives the optionee the power to accept an offer for a limited time...An option to purchase or to sell is not a contract to purchase or sell, as optionee has the right to accept or to reject the offer, in accordance with its terms, and is not bound."

Postal Acceptance Rule: Acceptance takes effect when the letter of acceptance is posted. Upon delivery to the post office, the contract is complete. *(see Household Fire)*

Remedies: come into play when a valid and enforceable contract was breached. Remedies include: damages (monetary compensation), specific performance (requirement to perform an act), injunction (requirement to stop doing something). Specific performance and injunction are less common because they are harder to enforce.

Revocation: until accepted, the offeror can withdraw at any point. *see Dawson v Helicopter Exploration Co.*

Shrinkwrap (enclosed) license: a license enclosed under shrinkwrap. The terms and conditions cannot be read until the shrinkwrap is opened.

Tender: request for companies to submit a budget for a particular amount of money and period of time.

Unilateral contract: "an offer made to all the world… which is to ripen into a contract with anybody who comes forward and performs the condition." Form: "if you do X, I promise Y."

Vagueness: type of uncertainty (1/2) where the courts cannot determine on what terms the parties have purportedly contracted, due to vagueness, the agreement is unenforceable. However, the court still tries to be flexible insofar as if the parties have acted on an agreement in any way, the courts their best to avoid striking it down as too vague.

Introduction to the Study of the Law of Contracts

Elements of a contract:

1. agreement/promise/undertaking
2. Between two competent parties
3. Consideration (exchange of value)

4. Deliberateness (intention to create legal relations)
5. Certainty
6. Voluntariness
7. [sometimes] in writing

Values in contract law: freedom of contract (equality between parties to enact their respective wills), fairness, good faith.

Hobbes on contracts: Because we are originally in a SoN, we can't trust anyone to keep covenants (i.e., contracts); therefore, a state is needed to enforce contracts. *Contracts work because of simplicity vis-à-vis the state. Public law is present in the background of contract law.*

Intersection of public and private law in contracts: Contracts (private law) require a system of public regulation (public law) to function. Public regulation requires value judgments about which contracts are and should be enforceable.

Freedom of contract: background ideal backed by the assumption of equality between parties. This is an ideal but doesn't always happen irl. For this reason, the state steps in to even the playing field.

Introduction to Remedies

Types of remedies:
1. Damages (i.e., monetary compensation) (*most common)*
2. Specific performance (i.e., order from court to carry out the obligation that they promised to carry out when the contract was formed) *(less common)*
3. Injunction (i.e., court order to make someone stop doing something) *(less common)*.

Damages: in contract law, damages are forward looking (not backward looking).

Calculating damages: damages are calculated in one of three ways"
1. Expectation damages: plaintiff is entitled to put in the position she would have been in had the contract been performed)
2. Reliance (puts party in position they would have been in had they not been in the contract)
3. Restitution (returns what was given by the party)

Duty to Mitigate: The law imposes a duty on the plaintiff to mitigate loss. A plaintiff can only recover for unavoidable losses. "A plaintiff will not be able to recover to the extent that she has failed to act reasonably to limit or reduce her loss caused by the defendant's breach."

Formation of the Agreement: Offer and Acceptance

- Parties have to reach an agreement for a contract to exist
- Agreement is connected to the idea of free and voluntary exchange
    - This requires an offer + acceptance of that offer
    - Must be understood contextually. There are some technical rules, but context provides some flexibility.

- **Offer:** “an expression of willingness to contract on specified (clear and knowable) 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.”

Offer and Invitation to Treat

Invitation to treat: an expression of willingness to do business/contract on specified terms. The party “does not make an offer but invites the other party to do so”

Background idea in contracts: Meeting of the Minds (Consensus ad idem)

- “The basic idea running through the law of offer and acceptance is that the parties will be held to have reached an agreement when they have formed a mutual intention to enter into a bargain with each other and, further, are in agreement as to the terms of that bargain.”
- This is an objective test to determine whether the parties are on the same page about the presence of the contract (objectively measures indicators of the subjective thoughts in one’s mind). Tests whether a contract has been breached

Objective test of Intention = language + circumstances (action & context) (what did person A say? What did person X do? What is the context?)

Harvey v Facey (1893) / quotation is not an offer

Facts: Would-be purchasers (the plaintiffs, Harvey) sent a telegram asking the would-be vendors (the defendant, Facey) two questions: “Will you sell us B.H.P. [the name of the property]? Telegraph lowest cash price.”
The defendants responded by saying: “Lowest cash price for B.H.P. £900.”
Issue: Was there a contract?
Rule: There must be an offer in order for there to be a contract.
Conclusion: There was no offer, so there is no contract.
Ratio: A mere quotation of price is not an offer.

Canadian Dyers Association Ltd v Burton / offer is contextual, legal test of intention

Facts: Plaintiffs ask for the lowest price of property in May 1918. Defendant provides lowest price in June 1918. October 1919 plaintiffs ask if there is a lower price, defendant responds that this is the lowest price they are prepared to accept and that the price is specific to the plaintiffs. Plaintiffs send $500, defendant’s solicitor sends a draft deed. November 1919 defendant's solicitor claims there was no contract and returns the $500.
Issue: Is there an offer or merely an invitation to treat?
Analysis: Objective Legal Test for distinguishing intention between Offer and Invitation to Treat
Legal test of intention: (1) language used; (2) circumstances of the case.
“Prepared to accept”, “We quote you”, “if it were any other party I would ask for more” (i.e., specific quote to potential buyer)
Draft deed sent, specific close date described, cheque retained between Oct 23-Nov 5.
Conclusion: There was an offer. Contract breached.
Ratio: Although a mere quotation of price is not enough (*Harvey v Facey*), language and circumstances (legal test) can indicate presence of offer.

Contrast with Harvey v Facey: “there was here far more (it’s different circumstance) than a mere quotation of price…the reply of the 21st …was a statement of readiness to sell to the plaintiffs at the price already named.”

Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd / invitation to treat

Facts: Pharmaceutical Society of GB - Plaintiff and now appellant – i.e., they lost at trial
Boots Cash Chemists - Defendant and now respondent – i.e., they won at trial
Boots = self-service pharmaceutical store. Chemist department sold controlled substances (listed in Pharmacy and Poisons Act 1993) which required those substances to only be sold “by or under the supervision of a registered pharmacist.” To purchase item, pay at cashier (not pharmacist). 2 customers purchased a controlled substance (which was on the shelf for anyone to pick up).
Issue: Did the sale take place “by or under supervision from a pharmacist?”
Analysis:
Theory I:

Offer: display of goods on shelf.
Acceptance: when customer takes item and puts it in basket.
Legal conclusion: pharmacist not involved during contract. Offer and acceptance therefore not supervised.

Theory II

Invitation to Treat: display of goods
Offer: by customer when she presents items for purchase to cashier at till.
Acceptance: when cashier takes payment
Legal conclusion: statute is complied with.

Reductio ad absurdum if the conclusion is absurd don’t do it. It’s crazy to say that you can’t take something out of your cart before you check out.
Conclusion: Appeal dismissed. Required supervision present
Ratio: Display of goods in store is an invitation to treat, not an offer.
Contrast with *Dyers v Boots*: both cases ask ‘what constitutes a contract?’/when and where does it happen?’ However, in *Dyers,* language determines when/where there was an offer, while *Boots* uses circumstance to determine when/where there was an offer.

Unilateral Contract

Unilateral contract: “an offer made to all the world… which is to ripen into a contract with anybody who comes forward and performs the condition.” Form: “if you do X, I promise Y.”

In a unilateral contract, only the promiser has promised. The other party can accept by acting, but is **not bound to act.**

Note: it is **not** a promise for a promise, it is an **act for a promise** (only one person is making a promise and the other is completing an act. In this case, **performance = acceptance.**

Carlill v Carbolic Smoke Ball Co (1893) / creation of unilateral contract; ad as an offer, not invitation to treat

Facts: Smoke ball ad claims to prevent cold/flu. If user gets sick while using, company will reimburse with $100. P bought the ball and used it as directed 3 times a day for 2 weeks (starting Nov. 20, 1891). January 17, 1892, P caught influenza. She was using the smoke ball when she got sick. Judge ruled for P. D appealed.
Issue: Was the ad an offer and did Ms. Carlill accept it by conforming to the required procedure?

Analysis:

Argument 1: Too vague? Carbolic argues terms are too vague to be treated as definite (no time limit, no description of parties, etc.). Just an offer to the public.

> Judicial Response 1: There's a reasonable meaning that would be understood and taken seriously by normal people. *Objective test of intention:* they put money in the bank (circumstance) + words.

Argument 2: Mere puff? Carbolic argues that advertisements use "mere puffery" (meaning that they can be exaggerated and no reasonably person would take them seriously).

> Judicial Response 2: Depositing of money suggests it is not mere puffery and lends a level of seriousness.

Argument 3: Extravagance of promises? Promise was so extravagant that it wasn't meant to be serious and can't be interpreted as serious.

> Judicial Response 3: If you make an extravagant promise like this, you were okay with a gamble like this and you must also be okay with the risk.

Argument 4: Meeting of the minds? D argues P didn't write in that she was doing the condition and D couldn't have possibly known she accepted.

> Judicial Response 4: Judge says that acceptance is not necessary in the case of an advertisement. In fact, D wouldn't want everyone to notify them and this wouldn't be required to participate (compare to a lost dog poster: posters up to look for lost dog does **not** require notice, just that the dog is found).

Argument 5: Nudum pactum (no consideration)? D argues that they have offered to give an amount of money, but P didn't give anything up, so there is no consideration.

> Judicial Response 5: Judge says consideration is anything that is undertaken with some inconvenience.

Argument 6: Contract with the world? D argues they can't contract with whole world.

> Judicial Response 6: Judge says it isn't a contract with the whole world, but it is an offer to the whole world (**unilateral contract**). Performance constitutes acceptance of the contract and puts the contract into motion.

Conclusion: Appeal dismissed. Respondent (Carlill) recovers money).

Ratio: If the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

Goldthorpe v Logan (1943) / unilateral contract: ad as an offer, not invitation to treat

Facts: In a newspaper, Logan advertised laser hair removal that had a 100% guarantee for success. An employee confirmed they could remove the hair and then did the hair removal. It didn't work. Claims in tort and contract (she sued on both accounts). Contract : if defendant failed to fulfill the promise.

Issues:

[1) Was there negligence on part of defendants which caused loss or damages to plaintiff?]

2) Was there a contract between the Logan and Goldthrope?

3) If so, what is the result in law of a breach therefore on the part of defendant?

Application:

- What was the advertiser's intention (language + circumstances) in publishing it and using her chosen words? Language was "results guaranteed" and the circumstances included Goldthorpe submitting to treatment.
- Similar to *Carlill*, this is a unilateral offer. The ad was the offer and Goldthorpe's performance constitutes acceptance.

- Contrast to *Carlill* → P gets a consult before submitting to treatment (vs. Carlill submits to treatment on her own).
- Court also discusses *policy argument* → D exposed herself to this type of claim. D benefits from the promise and uses it to take advantage of P, and should therefore be held to it.

Conclusion: D liable. P granted expectation damages (P entitled to be put in position she would have had the contract not been breached) of $100. P also granted restitution damages (what she paid for the treatment) of $13.25.
Ratio: Most ads are invitations to treat. If there is an extravagant promise, such as "results guaranteed," it is a binding offer. Damages: The plaintiff is entitled to be out in the position she would have been in had the contract been performed.

Bilateral Contracts

Bilateral contract: "Contract formed by the exchange of promises in which the promise of one party is consideration supporting the promise of the other." Both parties are bound to perform as both have made promises.

Tendering Process Pre-*Ron Engineering*

1. Invitation to tender or tender call (invitation to treat)
    a. party submitting tender can revoke
2. Submission of bids (offer)
    a. party submitting tender can revoke
3. Choosing the 'best' bid (acceptance)
    a. Party submitting tender can no longer revoke.

- In traditional contracts party submitting tender **entitled to revoke prior to acceptance**, party call for tenders entitled to accept or reject each or all tenders

Tendering Process Post-*Ron Engineering*

1. Invitation to tender/tender call (offer of Contract A)
    a. Contract A contains the rules governing the bidding process
2. Submission of tender (acceptance of Contract A + irrevocable offer to enter into Contract B).
    a. Contract B (actual contract of the construction process) contains the terms of the main contract.

Tendering Process	Ron Engineering's Argument	SCC new argument
Call for Tenders	Invitation to treat	Offer of Contract A
Submission of Bids	Offer (mistake is allowable here)	Acceptance of Contract A
Choice of Bids	Acceptance	Acceptance of contract B (cannot have mistake as bound by contract A)

R v Ron Engineering & Construction (Eastern) Ltd (1981) / tendering contracts / doctrine of mistake in tendering process

Facts:

- Government calls for tender on terms that bid should be submitted by a particular deadline with deposit for $150,000, once submitted bids cannot be revoked. If there is a breach, tender forfeits the deposit.

- Ron submitted tender for $2.7 million and provided the deposit. Ron forgot to include an expense, immediately informed government of the error, and asked to remove tender. Government refused and took the deposit.
- Trial judge holds that Ron forfeited deposit. Court of appeal dismisses trial judge's ruling—you can't accept an offer made by mistake.

Issue: Is there a contract? If so, at what point did it take place? Can Ron get its deposit back?
Analysis:

- **Doctrine of Mistake:** contracting party can avoid liability if they entered a contract by mistake, subject to a very specific type of mistake where there is not a meeting of the minds. Ron claimed there was a mistake → no meeting of the minds → therefore the contract cannot be completed. ***Mistakes stop acceptance: an offeree cannot accept an offer which they know included a mistake.***
- **New tendering framework:**
  - Government places call for bids → offer of unilateral Contract A
  - Ron Eng. submits bid → acceptance of Contract A
  - Once government chooses someone for the job, this opens the opportunity for (bilateral) Contract B.
  - In the new tendering framework, the doctrine of mistake does not arise because it would only impact Contract B if/when Ron is selected for job.
  - Therefore Ron does not have to enter into Contract B, but they must follow the terms in Contract A, meaning that if they are chosen they must follow the contract's demands to forfeit deposit.
- Basis of the new tendering framework:
  - Estey J: "I share the view expressed by the Court of Appeal that integrity of the bidding system must be protected where under the law of contracts it is possible to do so." (CB 563) There has to be fairness in the tendering process, both parties need to conduct their business in the fair process.
  - McCamus: "The consequence of [the old framework]… was that there was no contract of any kind relating to the tendering process." → no rights if owner failed to follow rules or treat all tenders fairly.
- Criticisms of new framework:
  - Reliance and integrity of bidding system in question: if you make a promise and one party relies on the other, contract law aims to protect expectations entitled to protection. Since Ron almost immediately noted the error, R. didn't *really* rely on their tender.

Conclusion: Appeal allowed. Owner (i.e., R) can keep the deposit).
Ratio: Tendering contract consists of two contracts — Contract A and Contract B. Contract A (unilateral) creates an obligation to enter Contract B (bilateral) *if* chosen.

Doctrine of Mistake

- **Doctrine of Mistake:** emerges from *Ron Engineering.* Contracting party can avoid liability if they entered a contract on the basis of a mistake (false information) because a mistake makes it impossible to reach a true meeting of the minds. ***Mistakes stop acceptance: an offeree cannot accept an offer which they know included a mistake.***
- **Types of mistakes:**
  1. Both parties mistakenly believe they are in agreement. But they have different mistaken views about what the agreement contains.
     a. each party made a separate mistake

2. Unilateral mistakes as to terms: Only one party is mistaken and the other knows about it. (Distinguish from unilateral mistakes about external facts)
    a. mistake about the terms of the contract
3. Agreements made under mistaken assumptions: also called common mistake. Parties have reached agreement but both have made the same mistake about a central matter.
    a. the existence of the product (ex. vase). But vase did not exist.
4. Mistakes about the identity of a contracting party
    a. fraud
5. Documents mistakenly signed: non est factum (in certain special circumstances)
6. [Mistakes in reducing the terms to writing: can be rectified] - drafting error - this can be easily rectified - both parties agreed on terms but mistakenly wrote wrong.

MJB Enterprises Ltd v Defence Construction Ltd (1951) / tendering contracts

Facts: D invited tenders to construct pump house and water distribution system. MJB submitted tender in context of *privilege clause* which stated that "the lowest or any tender shall not necessarily be accepted." D awarded tender to lowest bidder, Sorochan, but Sorochan's bid was non-conforming to the terms of the bid—despite requirement that they do not include contingent prices, Sorochan submitted bid with one kind of material along with a note that if different material needed, price would change. P's bid was the lowest conforming bid.
Issue: Can D rely on its privilege clause as a defence to MJB's action? Did contract A arise, and if so, what obligation does it impose on the Owner (D)?
Analysis:

- *MJB* case follows SC's approach in *Ron*, but expresses doubt about the unilateral aspect of Contract A. Instead, SC argues Contract A is a bilateral contract.

Subanalysis 1:

- MJB argues that there is an implied term that the owner will accept the lowest compliant tender → SC doesn't accept this outright, instead says that "I find it difficult to accept that the appellant, or any of the other contractors, would have submitted a tender unless it was understood by all involved that only a compliant tender would be accepted." Therefore, they find that there is an implied term that the Owner will only accept conforming bids.
- Officious bystander test: SC determines that if an officious bystander had asked if the Owner and tenderer if the contract stipulated that the Owner would accept only conforming bids, the parties would have answered "of course".
    - Sub-conclusion 1: For this reason, SC determines there is an implied term that the Owner will only accept conforming bids.

Subanalysis 2:

- In determining whether the privilege cause overrides the implied term, the court asks if the two can be made compatible. They determine that the discretion of the privilege cause gives the owner is just a discretion to take a more nuanced view of costs, timing, etc. It is not discretion to accept a non-compliant bid.
    - Subconclusion 2: Therefore, the two terms can be made compatible.

Conclusion: Sorochan's bid was non-compliant. Therefore the implied obligation to accept only compliant bids is breached. We know that D would have awarded contract to someone, and on the balance of probabilities, they would have awarded it to MJB. MJB granted $387,121.27 in damages (profit had the work been carried out)
Ratio: There is an implied term in the contract of fair dealings. You cannot accept a non-compliant bid as it is unfair.

Implied Terms

Canadian Pacific Hotels Ltd v Bank of Montreal says we can imply terms in the following situations:

1. [Based on custom or usage]
2. [As the legal incidents of a particular class or kind of contract]
3. Based on the presumed intentions of the parties where necessary to give business efficacy to the contract, or as meets the officious bystander test.

Note that implicit terms do **not** override explicit terms, but should be made compatible.
Note that this requires business efficacy *or* officious bystander test, not both.

Communication of Offer

"To be effective, an offer must be communicated to the offerre. This much, at least, seems to follow from the basic requirement that there must be a *consensus ad idem* [i.e., meeting of the minds] between the parties."

- The motive in accepting does not matter, one simply must agree to it. For this reason, breaches in communication of offer rarely end up in court (except in unilateral cases like *Carlill v Carbolic* or *Goldthorpe v Logan*).
    - We presume in most cases that if you've seen the ad you've acted in reliance on it.

Acceptance

Acceptance: "An acceptance is a final and unqualified expression of assent to the terms of an offer." It is an objective test based on actions of contracting parties.

Basic principle of acceptance:

- Acceptance is unqualified: if a response attempts to vary the terms of the offer, there can't be acceptance. If terms are changed, a counter-offer is created which kills the original offer.
    - Clarification, however, may not kill the offer as it is distinct from a counter offer.
    - Mirror image rule: the acceptance must match the offer. If it's not a mirror, it's a counter offer.
    - An offeror can revive the rejected offer, including by implication, such that it can be accepted (e.g., in *Livingstone*, D refers to the price, indicating that he was still standing by the former offer).

Livingstone v Evans (1925) / clarification v counter offer

Facts:

1. D offered to sell land to P for $1800.
2. P responded "send lowest cash price. Will give $1600 cash. Wire".
3. D responded: "cannot reduce price."
4. P purported to accept original offer of $1800.

Issues:

1. Is P's response to the offer a request for information or a counter-offer?
2. Is D's response to P's a revival of the first offer or an implicit rejection?

Analysis:

D's response that he "cannot reduce prince" must refer to the original offer, meaning it is still open to acceptance. Court states: "His statement that he could not reduce that price strikes me as having but one meaning, namely, that he was still standing by it and, therefore, still open to accept it."

Conclusion: Court holds acceptance valid and orders specific performance (i.e., land must be transferred to P.
Ratio: A counter-offer kills the original offer, but the offeror can revive the rejected offer, including by implication, such that it can be accepted.
Ratio: a simple request for information is not a rejection (requires language such as "I am wondering," "just curious," etc.)

Battle of the forms

Battle of the forms: when two companies both have their own sets of pre-made forms.

Butler Machine Tool Co v Ex-Cell-O Corp (1979) / battle of the forms / last shot doctrine

Facts:

I. D inquires about price of specially made machine. P quotes price of £75,535, with delivery in 10 months. Back of quote including trumping clause stating that their clause will trump any of their clauses *and* a price variation clause that stipulates that if there's a higher price at delivery, purchaser must pay the higher price. *(For study purposes*, *this constitutes Form I).*
II. D places purchase order with their own form *(Form II).* Stipulates that order is subject to terms and conditions that are different from P's terms: no price variation + tear-off order form inviting P to accept the order "on the terms and conditions stated thereon."
III. P returns completed slip *(Form II)* with a letter stating the buyer's order was being entered in accordance with *seller's quotation of price* (as listed on Form I).
IV. Machine is delivered and P claims it is owed more money due to the price variation clause, but D claims no further money owed because price variation clause is **not** part of their contract of purchase and sale.

Issue: Which form can properly be the contract?
Analysis:
Classic position: Uses the 'mirror image' rule to argue that there is no meeting of the minds unless the acceptance is a mirror image of the offer (terms must match). On this view, a reply of a form would put forward different terms and conditions, thereby acting as a counter off and *not* acceptance. This position doesn't bring about a suitable outcome in this circumstance; neither party benefits from the contract dissolution, so the court looks for another option.
Last shot rule: if the last form is followed by conduct by the other side which amounts to acceptance, we can argue that there is a contract the terms of which are contained on that last form.

- D's inquiry → invitation to treat
- P's quote (with price variation) → first offer
- D's response purchase order (without price variation, but with tear-off form) → varies the terms so much that it cannot be an acceptance, but must be a counter-offer.
- P's return of tear off form (with letter retstating original terms) → 'last shot', Court rules P's actions amount to acceptance of the counter offer.

Conclusion: Appeal allowed. D not liable to pay P.

Lord Denning's alternatives to the classic view on battle of the forms

NOTE: On an exam, start with the common law analysis (mirror image rule) and then you can cycle through Lord Denning's three positions.

Lord Denning highlights three positions which you should review in turn on examination:

1. **Last Shot Rule/Performance Doctrine**

- Traditional method.
- Party prevails who puts forth the last/latest terms.
- If there is no objection from the other party, those last terms prevail.
- If last form is followed by conduct by the other party which amounts to acceptance, we can argue there is a contract the terms of which are contained on the last form.

2. **First Blow**
   - Party prevails who offers terms first unless the other side draws material changes in their terms to the attention of that first party.
3. **Shots Fired on Both Sides**
   - "The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If the differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication."
     - Note that the last part (scrapped and replaced) is something that some judges may disagree with as this is a hot take characteristic of Denning.

Tywood Industries Ltd v St Anne-Nackawic Pulp & Paper Co Ltd

Facts:
- 19 Sept 1977: D sends invitation to tender (no mention of arbitration)
- 26 Sept 1977: P responds with quote (no mention of arbitration; has a trumping clause)
- 7 Nov 1977: P sends revised proposal (no mention of arbitration; has trumping clause
- 6 Jan 1978 & 3 July 1978: D sends in purchase orders (**inserts arbitration clause**). Asks P to sign & return form. P does not sign and return form. Goods delivered.

Issue: Is the arbitration clause part of the contract?
Analysis: Similar to *Butler*, the mirror image rule would be unsatisfactory here because it would harm both parties.
Last shot fired? Does not represent the agreement at play (no signed return).
First blow? Arbitration wasn't part of the contract for the majority of discussion, only slipped in at the end.
Shots fired on both sides? Court uses Denning's "shots fired on both sides" doctrine, stating that "while the parties may have agreed to arbitration I am certainly not satisfied that this is so. I have the greatest doubt that the plaintiff put its mind to the question at all… the conduct of both parties seems to me to indicate that neither party considered any terms other than those found on the face of the documents (i.e., the specifications and the price) important."
Conclusion: Defendant's application for stay dismissed. Arbitration clause *not* part of the contract.
Ratio: In battle of the forms, courts must analyze the contextual factors underpinning the contract to determine precisely what the parties agreed to. In the context of an exam, do each of the types of analyses!

Boilerplate Contracts

Boilerplate contracts: contracts where terms are preset by only one body, undermining the ideal that contracts are manifestations of the will of both parties and both parties have freely consented to the terms. Despite this, boilerplates lead to numerous benefits, such as smooth commercial practice.

Why don't we read boilerplates? Radin suggests that we don't read them because we wouldn't understand the terms anyway and decide it's not worth it. She also argues that if we need the product and there is only one supplier, we are stuck with the terms they choose.

Pro CD v Matthew Zeidenberg and Silken Mountain Web Services Inc (1996) / Offeror is the master of her offer / shrinkwrap license / boilerplate / equitable remedy

Facts: D purchased the cheap version of a product (exclusively for consumers) but made copies available online contrary to shrinkwrap license & formed a company to make significant money. Shrinkwrap license states "If you do not agree to the terms of this License, promptly return all copies of the software, listing that may have been exported, the discs and the User Guide to the place where you obtained it." Pro CD sued for breach of contract and sought for an injunction. Failed at trial court (held licenses ineffectual because the buyer cannot agree to terms that are secret at time of purchase).
Issue: Is Zeidenberg bound by terms of the license when the terms were not known at the time of contract? → must find out *when* acceptance happened
Analysis:
Zeidenberg's argument:

- Offer = Package on shelf
- Acceptance = Paying the asking price and taking the goods
- Because you can't be bound by secret/hidden terms, he can't possibly have accepted the contract. Therefore, there is no contract.

Pro CD & court's argument:

- Vendor is the master of the offer and may stipulate what constitutes acceptance
- Acceptance = buyer using the software *after* having an opportunity to read the license (because the license states that if you do not accept terms you can return, it is clear that the purchase itself does not constitute acceptance).
- Therefore contract formed when D did not return the package.

Court's arguments follow four threads:

1. Economic arguments: ProCD needs to be able to charge different customers differently or else the prices would go up, harming some subset of consumers; shrinkwrap licenses may be a means of doing business valuable to buyers and sellers alike; payment in advance of terms serves buyers' interest (efficiency) and reduces transaction costs; interpreting the argument differently from present court would drive prices up; competition among vendors protects consumers in a market economy, not court decisions.
2. Practical arguments: full terms won't fit on outside of box; it is common to have exchange of money precede detailed terms; software is frequently delivered electronically and still includes terms.
3. Fairness arguments: D was given a fair change to return software if he didn't agree to terms (contrast with D's argument that it's unfair to have secret terms).
4. 'Legal' arguments: offeror is master of her own offer.

Conclusion: D held liable. Injunction granted (this is an equitable remedy because damages would require P to sue repeatedly because they would continually lose money).
Ratio: Offeror is the master of her offer and may stipulate what constitutes acceptance.
Ratio: An injunction is an appropriate equitable remedy when damages would result in repeated suits against D.
Ratio: In the context of shrinkwrap licenses where returns of product are permissible if buyer does not accept terms, acceptance occurs when a buyer does **not** return product.
Ratio: Court may appeal to threads of reasoning beyond legal arguments, including economic, practical, and fairness arguments.

Dawson v Helicopter Exploration Co. [1955] / flagpole problem / implied subsidiary obligations / preventing performance

Facts: Dawson (A) filed claim over mineral deposit which later lapses, 20 years later he contacts Helicopter (R) asking them to take him to the deposit. R says that if he finds a pilot ""I hereby agree that, if

you take us to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assesable interest." Dawson confirms that "If you inform me if and when you obtain the pilot, I will take a leave." R claims that conditions are unfavourable and that if A still wishes to go, he should make alternate arrangements. R then goes on to investigate the deposit without A. A later finds out and sues for breach of contract.
Issue: Is there a contract? If so, is it bilateral or unilateral?
Analysis:

- Note: it is important to distinguish whether the contract is bilateral or unilateral because of the revocation problem. With revocation, an offeror can withdraw offer at any point in time until accepted. Since unilateral contracts are accepted by performance, revocation can be fuzzy if a person is halfway through performance (which we see in this case when R does not find a helicopter).
- R argues that they forwarded a unilateral contract—they simply forwarded an offer that Dawson could accept by coming and locating the showings. This **flagpole** offer stipulated that if Dawson showed them the minerals, **then** they would be bound to stake them and pay Dawson. Until that was completed, R had no obligations.
    - Court rejects R's argument and says that *both parties had obligations*, making this a bilateral contract.
    - "It was the clear implication that Springer, controlling the means of making the trip, should fix the time and should notify Dawson accordingly."
    - "Springer impliedly agreed that the company would not, by its own act, **prevent the complementary performance** by Dawson."
    - When the bilateral contract is read reasonably, the court determines the parties did intend to be bound to one another → Dawson was bound to remain ready during a reasonable time to obtain a leave of absence and Helicopter Co implicitly agreed not to prevent performance.
- This particular bilateral contract can be called a contingent agreement—the contract was contingent on external events happening.
    - Condition subsequent: If no pilot could be obtained → contract would be at an end.
    - Condition required: If find pilot → contract ongoing.
    - Since Helicopter found a pilot, they had a duty to take Dawson along. Not doing so constituted a breach.

Conclusion: R (Helicopter Exploration Co.) held liable. There is a bilateral contract.
Ratio: Courts will endeavour to regard a contract as bilateral rather than unilateral in order to protect the offeree pending complete performance (flagpole problem antidote!)
Ratio: Courts will look for implied subsidiary obligations (in unilateral contracts to make them more difficult to revoke and in contingent agreements to ensure parties try to bring about the condition).

Flagpole problem

- Revocation allows for an offeror to withdraw an offer at any point in time before acceptance.
- Since an offer can be withdrawn, this creates the possibility of detrimental reliance by the offeree (more frequent in unilateral contracts where one party may get so far into performance that it creates significant harm if the performance—and therefore contract—are not completed).
- The flagpole problem: "an offer in the form 'I will pay you $500 if you climb to the top of the flagpole' can, in theory at least, be withdrawn at any point during the offeree's attempt to climb the pole", including at the very last inch!

Felthouse v Bindley / communication of acceptance rule, silence

Facts: Uncle messaged that if he didn't hear back from nephew, he would consider the horse his. Nephew did not reply. A month later the nephew told auctioneer not to sell the horse as it had already

been sold to uncle. Auctioneer forgot instructions and sold the horse at auction to someone else. Auctioneer admits error. Uncle brings suit against auctioneer for conversion, but D argues uncle can't sue because uncle didn't have the property rights in the horse at the time D made the sale.
Procedural history: Trial judge holds D liable (there was a contract).
Issue: Did the nephew's silence constitute acceptance for the purpose of the legal test of offer & acceptance?
Analysis:

- "It is clear that there was no complete bargain on the 2nd of January: and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for £30.15s. unless he chose to comply with the conditions of writing to repudiate the offer."
    - Although nephew considered horse sold, "he had not communicated … his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant."
    - Note that meeting of the minds is not a legal test to determine offer/acceptance, but a legal principle that informs legal tests.
    - Although there was a meeting of the minds, we don't rely on what the people wanted, we need **external evidence** of what they wanted (we need to see that they communicated their intentions).

Conclusion: D not liable; contract not present.
Ratio: silence does not constitute acceptance (general rule) **except**:

- Offeror waiver of the communication requirement in context of a unilateral contract (here, acceptance = performance)
- Offeror waiver of the communication requirement in context of bilateral contract (must be explicit)

Exam tip: In an exam, meeting of the minds isn't the test (but it's offer, acceptance, communication of offer, etc. use these as the test, meeting of the minds is just the background idea that inspires the rules of offer and acceptance that we have did the parties do the things they had to do to demonstrate that they actually made an offer and accepted that offer?)

Saint John Tug Boat Co v Irving Refinery LTD [1964] / silence as acceptance (exception to general rule of communication as acceptance)

Facts: Saint John supplied tug boats (on a stand-by service) to Irving and Irving needed more tugs. Saint John and Irving have phone conversation, followed by a letter from Saint John specifying prices for additional tugs. Not accepted by Irving in writing, but verbal arrangements made. Express contract takes place June 13-July 13 1961 according to prices in written correspondence. In August, Irving is headed by a new president and no formal extension of the contract period is approved. From mid-August to February, Saint John supplied tugs and invoiced Irving. Invoices not paid, but Irving continued to use tugs. Irving denied liability for charges after mid-August, claiming there is no contract over this period.
Procedural history: Trial court holds defendant liable.
Issue: Was there valid acceptance (despite silence)? Can **conduct** count as valid legal acceptance?
Analysis:

- We can use an objective legal test to determine whether there was valid legal acceptance. "The law attributes to a person the intention that her conduct bears when reasonably construed. Not what is actually in her mind."
- If A allows B to work for A under circumstances when no reasonable person would suppose B intended to work for free A liable to pay

    - If someone was paid to mow lawn all of June and I paid them, then July comes around and they continue mowing and I don't tell them that I am no longer paying them, then I am acquiescing to the benefit (they were previously employed to do it for the money!)
    - If you allow them to believe that you are okay with them doing it, then this can constitute acceptance of a continuing contract.
    - Burden to reject is not on the party accepting
- Acquiescence by offeree in receipt of the services permits the inference of an acceptance. The silence of the offeree actually communicates assent.
    - "The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied."
    - The circumstances arise when there is an ongoing understanding that X is going on and there is a reasonable expectation that the contract could have continued.
    - Silence alone is not enough, but in situations where it's clear the offeree knew it would benefit them and acquiesced in order to bring about the benefit, then they have been said to have agreed to the contract.

Conclusion: Appeal court restores trial judge's decision. D liable. Awards damages. Irving knew the tugboats were there if they needed them and took comfort in that, so they did accept the offer.
Ratio: an offeree's silence may be construed as acceptance if three conditions are met:

1. Offeree receives benefit of service
2. Offeree has reasonable opportunity to reject service
3. Offeree knows (or should have known) that the provider of a service expects to be paid.

O'Neill v Kings County Construction [2019] / acceptance exception: conduct constitutes acceptance

Facts: Parties entered into an arrangement: P develops D's land for commercial blueberry production. P incurs expenses of developing the land, and D would then pay back when farm began to yield blueberries. D sells property and P can't get back expenses.
Issue: Was there valid acceptance (despite silence)? Can conduct count as valid legal acceptance?
Analysis:
Applies test to see if conduct, instead of silence, can be construed as acceptance:

1. Offeree receives benefit of service → Yes, D benefitted from P developing land.
2. Offeree has reasonable opportunity to reject service → Yes, D could have told P to stop.
3. Offeree knows (or should have known) that the provider of a service expects to be paid → Yes.

- If someone knows the thing is done for their benefit with an expectation of payment, then accepting the act and taking its benefit will implicitly count as requesting that it be done, and that will be seen as a promise to pay.
- Since D acquiesced and allowed P to do the conduct, D's conduct functions to accept the contract, binding D to compensate P for expenses in developing the land.

Eliason v Henshaw [1819] / acceptance must match offer

Facts: D mails P offering to buy flour from P. Letter stipulates acceptance must be made on 'return wagon' to Harper's Ferry the next day. P receives letter and writes a letter purported to accept. P sends letter to Georgetown by mail ***instead*** of by return wagon to Harper's Ferry. A week later, D returns a letter saying "not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested answer by return of wagon the next day, and as we did not get it, had bought all we wanted." P delivers flour anyways and D refuses delivery, claiming no contract.
Issue: Can offeree accept an offer if they do not follow directions stipulated by offeror?

Analysis:

- "Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it." CB 82
    - "The place…to which the answer was to be sent, constituted an essential part of the plaintiff's offer." CB 82
    - "an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them".
    - In *Eliason*, the place constituted a mandatory part of the offer. The method, according to the court, was not essential as long as it was comparable. The crucial factor was getting the acceptance within a time predictable to the offeree.
        - Deviation from mode of acceptance → doesn't necessarily invalidate the acceptance
        - Deviation from the location → essential, invalidating the acceptance.

Conclusion: D not liable. No acceptance because offeror is 'master of their own offer' and offeree must follow stipulations to accept an offer.
Ratio: offeror is the master of their own offer
Ratio: acceptance must be compliant with any mandatory method of acceptance specified (note that if offeree deviates from acceptance stipulated, offeror may still accept but also has the right to decline).

Communication of Acceptance

Mailed Acceptances

Household Fire & Carriage Accident Insurance Co v Grant / Postal Acceptance Rule

Facts:

- 30 Sept 1874: Grant applied for shares in Household Fire Co and stated that he had paid a £5 deposit, requested an allotment of 100 shares, and agreed to pay the remainder owed within 12 months of the date of allotment. [**offer**]
- 20 Oct 1874: Household Fire made out the letter of allotment, posted it to Grant, and added him to the shareholder register. [**acceptance of offer?**] Despite this, Grant **never** received the letter.
- Grant actually hadn't paid the £5 deposit, but Household Fire Co had owed him £5 and simply placed that £5 in his account. This was done on the Household Fire books and Grant was never made aware.
- July 1875/Feb 1976: Dividends were declared on the shares and Grant's account was credited.
- 7 December 1877: Household Fire Co goes into liquidation and the liquidator applied for the balance of the purchase price of the shares from Grant (i.e., the money he claimed he would pay with 12 months of date of allotment). Grant declined to pay on account of never receiving acceptance. Grant was then sued for the balance.

Issue: Did acceptance by Household Fire Co. take place? → to figure this out we must ask → does posting count as communication, or does the acceptance have to actually reach the party?
Rule: Postal Acceptance Rule: Acceptance takes effect when the letter of acceptance is posted. Upon delivery to the post office, the contract is complete.
Analysis:

- When the postal service messes up, it must inconvenience someone. It is better for the offeror to be inconvenienced than inconveniencing both parties.
- The onus to ensure acceptance is therefore placed on the offeror. The offeror has the ability to make inquiries, or require that formation of the contract is dependent on actual communication of

acceptance. The court argues that Grant could have followed up to see if his proposal was accepted, particularly because he still owed the cost of the share price if it had been accepted.
- The Postal Acceptance Rule is fair because the offeror is the master of their own offer and therefore has the power to make it mandatory that the communication reach them.
- PAR is better than the alternative approach (that the letter actually has to reach the offeror) because the alternate approach opens the door to fraud and delay in commercial transactions.

Dissent:
- Claims that communication of acceptance is necessary and it is inconsistent (and arbitrary) to take the view that you can bind someone via one method but not another (i.e., if acceptance was sent by hand and not delivered, it would not be binding).
- While PAR is harder on the offeror, alternative view is harder on the offeree.
- Majority view requires *parsing words in arbitrary ways*. (Majority accept its arbitrary, but say that it is simply the best way).

Conclusion: Grant held liable.
Ratio: Postal Acceptance Rule: Acceptance takes effect when the letter of acceptance is posted.
Ratio: You must either contract around the Postal Acceptance Rule or require receipt.

Option Contract

"Contract made for consideration to keep an offer open for a prescribed period....An option is an agreement which gives the optionee the power to accept an offer for a limited time...An option to purchase or to sell is not a contract to purchase or sell, as optionee has the right to accept or to reject the offer, in accordance with its terms, and is not bound."

Essentially, an option contract includes paying for the privilege that the offer is held open for you. During this period, one has the option to accept the offer or the option to decline the offer.

Optionee/grantee is akin to an offeree, and optioner/granter is akin to an offeror.

Holwell Securities Ltd v Hughes / option contract / PAR exception

Facts: Holwell held an option for the purchase of real estate. He posted a letter to exercise the Option, but it was never delivered. Hughes claimed the Option wasn't properly exercised as the Option says it shall be exercisable by 'notice in writing.'
Issue: Has the option been exercised according to the terms of the option? → In exercising the option, was it accepted by posting or was actual notice required to reach the optioner?
Analysis:
Short Path: Looks strictly at the <u>language</u> used.
- "Notice" → derives from Latin word for 'knowing' and therefore requires that the thing is actually known/communicated to the offeror. Since the letter was lost, notice was never provided.
- "The plaintiffs were unable to do what the agreement said they were to do, namely, fix the defendant with knowledge that they had decided to buy his property. If this construction of the option clause is correct, there is no room for the application of any rule of law relating to the acceptance of offers by posting letters since <u>the option agreement stipulated what had to be done to exercise the option</u>." CB 87

Roundabout Path: Considers the Postal Acceptance Rule.
- P argued that Option was exercised when the letter was posted because the parties must have contemplated acceptance via post. They cite a case that says if it is within the contemplation of the parties that the post will be used, that is enough to make the postal rule apply, and acceptance will be complete when the letter is posted. However, the court says the rule is narrower than that.

- Rules for when the Postal Acceptance Rule may not apply:
  1. PAR can be excluded by the terms of the offeror (e.g., “acceptance must reach the offeror”
  2. PAR doesn’t apply if it would produce an inconvenience and absurdity.

Conclusion: The option was not exercised according to the terms of the option. Hughes not liable.
Ratio: Rules for when the Postal Acceptance Rule may not apply:

1. PAR can be excluded by the terms of the offeror (e.g., “acceptance must reach the offeror”
2. PAR doesn’t apply if it would produce an inconvenience and absurdity.

Compare: *Household Fire and Holwell*

In Household Fire, the offer was made in circumstances which implied that Grant authorized the offeree to send acceptance by post. That is, the offeror contemplated that the post office would be the agent to receive the offer versus merely being a conduit to carry acceptance. In Holwell, notice in writing to the Optioner was mandatory (it’s not up to contemplation of the parties to determine whether simply posting it would constitute receiving the offer).

Summary: Postal Acceptance Rule

- Rule about *communication of acceptance*.
  - It does **not** apply to other parts of contracting.
  - It is **not** about the correct mode of acceptance.
- Applies if it ‘appropriate’ or ‘contemplated’ for the offeree to communicate acceptance via mail.
- Waives the ordinary communication rule and says acceptance is effective upon posting the letter, not upon receipt.

Postal Acceptance Rule:

1. Is post an accepted method according to the terms of the offer?
   a. Is it ok to post at all?
2. If so, does the postal acceptance rule apply such that communication isn’t necessary and offer is accepted when letter is mailed?

*In exam: *make sure to pull the two steps apart — be clear, is posting ok? Then, is communication needed or is mailing good enough?*

Why the Postal Acceptance Rule (PAR) Matters:

- It matters if something gets **lost** in the mail.
- It matters even if it doesn’t get lost, if we are concerned about a **timely** acceptance – we want to know when acceptance takes place – on mailing or on receipt?
- It matters for **disputes** about when a purported **revocation** has taken place: before or after acceptance?
  - If revocation is possible up until acceptance, then we need to know whether acceptance or revocation came first (postal acceptance rule will be important when a contract was formed and revocation is purported to have taken place).
- It matters for **where** a particular contract was formed: the **jurisdiction** of posting or the jurisdiction of receipt?

Instantaneous Methods of Communication

Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH / instantaneous method of communication

Facts: Brinkibon (appellant) sues sellers for breach of contract to supply steel and seeking specific resolution available in UK. The acceptance was sent through telex from the buyers (appellant) in London to Vienna.
Issue: Where was the contract formed? → to find this out, we must determine when it was formed → For the purposes of determining the relevant rule, is telex communication instantaneous or not (do we use instantaneous communication rule or should we use PAR)?
Analysis:
Argument 1 (judgment of the court):

- 3 May 1979: Telex **counter offer** from sellers in Vienna to Buyers in London.
- 4 May 1979: Telex **acceptance** from Buyers in London to Sellers in Vienna.
    - If acceptance by postal rule, acceptance is communicated upon "posting." This means that the contract is made in ENGLAND and buyers will get their order.
    - If acceptance by instantaneous communication rule, acceptance occurs when received in Vienna. This means that the contract is made in VIENNA and the buyers will NOT get their order.
    - Judgment: court determines that communication via telex is instantaneous. Therefore, the contract was made when and where the acceptance was received (i.e., in Vienna)
- Conclusion: Contract formed in Vienna. Buyers do not get their order.

Argument 2:

- 3 May 1979: Telex **counter offer** from Sellers in Vienna to Buyers in London.
- **Acceptance by conduct** on the part of the buyers (i.e., opening a letter of credit).
    - On this argument, the contract was formed in London (because the conduct happened in London)
    - Court rejects this argument because the instructions were given to the bank in the UK, and the bank gave instructions to the Vienna branch, "but these steps were between the buyers and their agents only." Therefore, this doesn't amount to acceptance

The court's judgment also notes that the instantaneous communication rule requires that the communication actually reaches the other person, but the offeror can't stand in the way of that by simply failing to check their messages.
Conclusion:
Ratio: "the general principle emerging from the reasoning in Brinkibon is that, in the case of instantaneous communications, the traditional rule will normally apply unless the failure of the offeror to receive the communication of acceptance sent by the offeree results from the fault of the offeror or from a defect in the communication with respect to which the offeror should be deemed to have assumed the risk."
Ratio: Acceptance is effective when communicated (this means ensuring that communication got to the party within a reasonable time).
Ratio: "The present case is...the simple case of instantaneous communication between principals, and, in accordance with the general rule, involves that the contract (if any) was made when and where the acceptance was received. This was on 4 May 1979 in Vienna."

Instantaneous Communication Rule

Rule: Acceptance has to actually be communicated and takes force upon successful receipt.

- "The postal rule does not apply to acceptances made by some instantaneous mode of communication, e.g. by telephone or by telex. Such acceptances are therefore governed by the general rule that they must have been communicated to the offeror."
- Communication is considered to have occurred within a reasonable time of arrival within the offeror's control.
    - This may mean on their inbox, their assistant's inbox, etc.
    - There is an expectation that the person manages their office to be informed of any messages that go through their assistant.
    - Once it's in the realm that the offeror could've accessed it, we will consider it to be accepted.
    - If the message doesn't get sent because of a technical error, that means communication hasn't occurred.
    - Personal errors on the side of the offeror may result in court deeming acceptance has occurred based on reasonable time (which varies based on method of communication).

Statutory Intervention into the Instantaneous Communication Rule:

- There is a statutory provision that defines what counts as **sending** a document: 'a document is sent when it enters an information system outside the sender's control.' Electronic Commerce Act, 2000, s 22(1)
- Deemed to be **received** 'when it enters the addressee's information system and is capable of being retrieved by the addressee.' (ECA s22(3))
- Deemed to be **sent** from sender's location of business and received at receiver's business location (ECA s22(4))
- But establishing rules of when and where something is sent and received does not settle whether the ordinary or postal rule applies – for that we still look to Brinkibon.

Pro Transport Inc v ABB Inc (2017)

Ratio: Instantaneous communication rule applies to emails.

Rudder v Microsoft Corp / clickwrap agreement, forum selection clause, instantaneous communication rule

Facts: MSN users were required to sign a clickwrap agreement (boilerplate agreement, non-negotiable, sign or don't use). P claimed D breached MSN agreement by taking unauthorized payments from subscribers and attempts to sue D in Ontario. MSN seeks permanent stay based on the clickwrap agreement that such contracts are governed by the law of Washington and all disputes arising are to be heard in Washington's courts (forum selection clause).
Issue: Is the forum selection clause part of the contract and therefore enforceable?
Analysis:

- P argues clickwrap is unenforceable because ppl do not read whole Member Agreement and therefore didn't have notice of the forum selection clause which was in fine print/not visible at the top of the page (based on doctrine that anything unexpected, surprising, or that requires the giving up of a legal right should be brought to the attention of the person signing).
- Court states that the forum selection clause is dispositive (i.e., it settles the matter and remains the case that you can only sue in Washington). Court states that the contract was formed by clicking on the "I agree" icon.
- Court further says that the fine print argument is ineffective because all of the contract was legible.
- Finally, court says there is nothing unusual about the form of this contract that would justify not applying the ordinary signing rule to this context.
    - MaCamus says the court is simply "apply[ing] the normal rules of contract formation applicable to agreements in writing to an agreement in an electronic format."

Conclusion: Microsoft not liable.
Ratio: It is possible to accept a contract merely by clicking 'I agree' unless the parties specifically agree otherwise.

Termination of Offer

Revocation

Dickinson v Dodds

Facts:
- Wed. June 10: Dodds makes written offer to sell property to Dickinson. Promises that the offer will stay open until 9am, Friday, June 12.
- Thurs. June 11: Dickinson hears from Berry (Dickinson's agent) that Dodds had been offering or agreeing to sell the property to Allan. Later that night Dickinson delivers written acceptance to Mrs Burgess (Dodds' MIL), as Dodds was staying with her. This acceptance is never received as she forgot to give Dodds the acceptance.
- Fri. June 12, 7 am: Berry finds Dodds at the railway station and hands him a duplicate of Dickinson's acceptance. A few minutes later, Dickinson finds Dodds and hands him the same acceptance. To both, Dodds responds: "You are too late. I have sold the property."

Issues?
1. Was Dodds required to hold his offer open for the duration promised?
2. If he wasn't required to hold the offer open, was Dodds' offer revoked prior to acceptance?

Analysis:
Issue 1 → general principle stipulates that you can always revoke your offer until it has been accepted (*unless there is consideration*).
- Mellish L.J.: "[T]he law says...that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. **He was not in point of law bound to hold the offer** over until 9 o'clock on Friday morning." CB 100
- Dickinson did not pay consideration, so there is no obligation for Dodds to hold it open (recall consideration/option in *Holwell)*.

Issue 2 → learning of a revocation indirectly can still count as effective revocation
- Meeting of the minds is not possible if the offeree knows that the offeror has sold the property to another party. If this happens, the offeree cannot bind the offeror by accepting.
- Even though he learned indirectly, Dickinson did still know that the offeror sold the property to another party. Therefore, effective revocation still took place.

Conclusion: D was not required to hold his offer open and D's offer was revoked prior to acceptance by P. D not liable.
Ratio: Revocation has to be communicated to the offeree, but that communication need not be direct from the offeror—it can come from a reliable third party source.

General Principle of Revocation

- An offer can be revoked at any time before it is accepted.
  - Unless there is consideration and/or an option contract.
- If you revoke an offer before it's accepted, then it is just dead. You always have the option to revoke as long as you revoke before the other party accepts.

Byrne v Van Tienhoven

Facts:

- October 1: Defendants, Van Tienhoven, (in Cardiff) mail an offer to sell tin plates to Plaintiffs, Byrne, (in New York).
- October 8: Defendants mail a revocation of this offer.
- October 11: Plaintiffs receive the offer and immediately accept by telegram (they accept before they receive the revocation). They then contract to sell the tin plates to a third party.
- October 20: Plaintiffs receive the letter of revocation of October 8.
- Plaintiffs bring an action for breach of contract (failure to deliver).

Issue: *When* is a revocation effective? → two questions arise

Analysis: To determine when a revocation is effective, we must explore to questions:

1. Whether a withdrawal of an offer has **any effect until it is communicated** to the person to whom the offer has been sent?
   - Rule: revocation needs to be *actually communicated* (we can't have an offer revoked merely by communication that never reaches the other party.
   - But, does posting a letter constitute communication in cases of revocation?
2. Whether **posting a letter of withdrawal is a communication** to the person to whom the letter is sent?
   - Rule: Postal Acceptance Rule does **not** apply to withdrawal/revocation. P did not authorize D to notify withdrawal merely by posting a letter.
   - McCamus calls justification of PAR when dealing with withdrawal 'unconvincing.' It is better to appeal to the worry about detrimental reliance on an offer that the offeree doesn't know has been revoked. (Detrimental reliance occurs when one *thinks* they have accepted an offer and relies on that fact that they think they are in contract).
   - Thus, revocation only took place on October 20 when it was actually communicated to P by the letter reaching them. Before that date, on October 11, P had already accepted the offer.
     - If we allowed revocation in these circumstances, then we wouldn't know for sure who actually accepted an offer because we'd wait for the revocation to come in the mail. Further, if revocation was lost, we'd never know if we had actually accepted.

Conclusion: Withdrawal inoperative. D liable.

Ratio: Revocation must be actually communicated to be effective (PAR does **not** apply to revocation).

Subsection Summary

- An offer is terminated by withdrawal/revocation (withdrawal and revocation are the same thing in our class)
- An offer can be revoked at any time before it is accepted (but it actually has to be communicated to the offeree)
- Revocation has to be communicated to offeree (Byrne)
- Communication of revocation need not come from the offeror (Dickinson v Dodds)
  - It can come through a third party like when Dodds finds out through Dickinson.

Errington v Errington and Woods / unilateral contract exception, inability to complete conditions

Facts:

- A father bought a house for £750 pounds of which he borrowed £500. He allowed his son and daughter-in-law to live there.
- The down payment of £250 was a present for the couple, and they were responsible for the mortgage payments.

- When the mortgage was paid off, the father would transfer the house to them. (before mortgage paid off, the father owned the house)
- They did in fact make the payments regularly, but much remained to be paid upon the father's death. As a result, they were part way through accepting a unilateral contract. Because it wasn't finished, they weren't entitled to own the house. As a result of the father's death, the estate was trying to get out of the agreement (because administrator was trying to get as much money for the estate as possible)
- This was a unilateral contract: if and only if you pay every mortgage payment, then I will transfer to you.

Issue: Can the administrator of the deceased father's estate renege on this arrangement?
Analysis:

- Court points out that this is a unilateral contract → father promised house in return for their paying the installments.
    - Court calls back on the **flagpole problem**: revocation is possible in a unilateral contract even once there has been detrimental reliance on the offer. (Offeree could be almost to the top of the flagpole when revocation occurs). In this case, it would be up to the father to withdraw the offer at any point prior to the completion of the payment schedule. This would cause hardship to the son & DIL who have paid the contract so far and expected the late father to carry out the contract.
    - Court claims that the unilateral contract **could not be revoked by him once the couple entered on performance of the act** because the couple was in a position analogous to purchasers and this remains true even after the father's death.
- Solutions to flagpole problem:
    - (1) interpret the contract as bilateral if possible (*Dawson*)
    - (2) when you can't interpret it as bilateral, find an **implicit collateral arrangement** relating to the firmness of the offer (*Errington, this case*).
- Denning holds the second solution to the flagpole problem: "in addition to the father's undertaking that he would transfer title to the children if they completed the mortgage payments, there was a collateral understanding under which the father implicitly promised that as long as the children made the payments to the mortgagee they would be allowed to remain in possession of the premises."
- Based on their analysis of the flagpole problem and the facts of the case, Denning and Court find the father made 2 different promises:
    - (1) **Express promise** to transfer title once mortgage was paid in full; and,
    - (2) **Implied promise** that the couple could remain in possession as long as they paid the instalments.

Conclusion: Couple may stay in the house and continue to make payments. Once all payments are made, the house will transfer title to their names.
Ratio: When encountering the flagpole problem, try first to interpret the contract as bilateral. If this is not possible, find an implicit collateral arrangement relating to the firmness of the offer.

Lapse

Barrick v Clark / lapse of offer

Note: offers can end in two ways (1) revocation (*Dickinson*, *Byrne*); (2) lapse (*Barrick*)
Facts:

- Oct. 30, 1947: Clark offers to purchase land from Barrick for $14,500 with possession at anytime between Jan. 1 and March 1, 1948. Asks for telegram reply.

- Nov. 15: Barrick replies by post; counters (i.e., new offer) with $15,000 with transfer of clear title on January 1, 1948.
- Nov. 20: Letter is delivered but Clark is absent on a 'big game hunting trip'.
- Mrs. Clark responds, asking Barrick to keep the offer open. Explains her husband would be back in about 10 days and she would try to locate him (this is a mere request; no legal significance)
- No reply from Barrick.
- November 28 & 30: Hohmann enquires about land & Barrick makes him an offer
- December 3: Hohmann accepts; Barrick and Hohmann enter into contract for the purchase and sale of the land.
- Dec. 10: Clark returns and purports to accept Barrick's counteroffer (via lettermail)
- Dec. 11: Clark telegrams Barrick because he had heard of a third party purchase (tries to make it quicker)
- Dec. 12: Barrick writes back that he had waited for some time and when he didn't hear from Clark he sold to someone else.

Issue: Did Barrick's offer lapse prior to Clark's purported acceptance?
Analysis:

(1) Did the parties specify a time for acceptance? (if yes, this is determinative. If no, the offer will lapse after a 'reasonable time', proceed to Q2).
(2) Define 'reasonable time' paying attention to relevant factors:
    (a) Modes of past communication (speed of mode)
    (b) Nature of the subject matter (e.g., farm lands can't be farmed until spring which could change the 'reasonable time')
    (c) Words and actions of the parties
    (d) Contemplated closing date will indicate the need for an acceptance date of a few weeks before
    (e) Demand for the property in question

Conclusion: Appeal allowed. Barrock's argument that Clark's acceptance was not within a reasonable time succeeds.
Ratio: An offer which does not expressly provide for how long it is open is said to lapse after a reasonable timeframe (defined by weighing circumstances and factors such as the nature, mode of communication, language, etc.).

Formation of the Agreement: Certainty of Terms

Key Principle: Contracts must be sufficiently certain if they are to be binding.
→ Justification: Parties must actually reach a meeting of the minds: so we must be able to determine their obligations with certainty, or else it is hard to say their minds have met.

Tension when dealing with certainty (i.e., making it binding while not going too far and imposing something to which the parties didn't agree):

1. Courts should not impose an agreement on the parties.
2. If something can be made certain, it should be interpreted so that it is.

Two types of uncertainty:

1. Vagueness → where the courts cannot determine on what terms the parties have purportedly contracted, due to vagueness, the agreement is unenforceable. However, the court still tries to be flexible insofar as if the parties have acted on an agreement in any way, the courts their best to avoid striking it down as too vague.

2. Incompleteness → when a term is left unspecified and the agreement is thus incomplete. However, the court does balance this with flexibility as some terms will sometimes be left open for good reason.

Vagueness

R v CAE Industries Ltd

Facts:

- R= appellant, CAE = respondent
- R attempted to keep the air industry open in the Winnipeg area, by selling to a private firm.
- To incentivize CAE to purchase and run an aircraft maintenance base, the Minister of Transport sent a letter to CAE dated March 26, 1969. The letter stated the following in relation to giving CAE aircraft maintenance work contracts:
  - Government "agrees that 700,000 manhours of direct labour per annum is a realistic target"
  - Government "can guarantee no more than 40,000 to 50,000 direct labour manhours per year...as "set-aside" (specifically for CAE) repair and overhaul work, but... [the government] will employ its best efforts to secure the additional work required from other government departments and crown corporations to meet the target level of 700,000 direct labour manhours"
- CAE purchased the base but within 2 years, the maintenance workload fell.
- CAE sued for breach of contract, claiming the government hasn't met the targets they said they'd meet.

Issue:

1. Is there an intention to create legal relations? (Court holds that there was, but the reasons are unimportant to the current topic).
2. Is the contract vague and uncertain or incomplete?

Analysis:

- CAE claims the government breached its obligation to CAE, but the government says there was no contract in the first place because there was too much uncertainty (government can't break obligations if they never had them.
- Analysis of incompleteness of contract:
  - The government claims that subsequent contracts would be necessary to form an agreement, but the court states that incompleteness is about if there is a lack of determinativeness to a term within the first contract not whether subsequent contracts would offer completion.
  - Court holds that "[i]t is in itself an entire contract capable of standing on its own feet"
- Analysis of vagueness of contract:
  - Vagueness occurs when two parties agree on a term, but that term is expressed so vaguely that it's not a commitment that can be understood as having a true content.
  - The court finds vagueness in "looseness of language" of the contract:
    - "Assurances" → although this word would be vague on its own, the contract refers back to the assurances, calling them 'commitments'
    - "Guarantee" → it is "a binding commitment guaranteeing provision of "set-aside" work." The court finds that there is a guarantee of 40,000 manhours.
    - 'Set-aside' → while it seems unclear, the court finds certainty by looking at the parties' intentions.
    - 'Best efforts' → appellant argues it is 'so lacking in precision as to render it incapable of creating legal rights and obligations.' The court, however, disagrees with the appellant here,

arguing that it is equivalent to 'leaving no stone unturned' and doesn't require the government to neglect any public interest thereby making it sufficiently certain.

Conclusion: Agreement is not vague and uncertain or incomplete.
Ratio: If parties have expressed themselves in language sufficiently clear as to have created rights and obligations, the court will enforce the contract, especially where the contract has been partly performed.
Ratio: We should make every effort to find a meaning in the words actually used by the parties

Incomplete Terms

Complex case trio demonstrating how incomplete terms work, dealing with the tension between needing certain, binding obligations, and needing to leave certain elements of an agreement open to future specification.

May & Butcher Ltd v R

Facts:

- There was an agreement between parties for plaintiff to buy surplus tentage from defendant up to December 1921
- This agreement was evidenced by letter dated June 1921
- Jan. 1922: Agreement above renewed to March 1923, on same terms
- Later in the month, there was a dispute as to price.

Definitions:
S.3 of the Sale of Goods Act: "The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission."
Issue: Have the terms been left too incomplete to amount to a binding contract?
Analysis:

- P argues that the parties have agreed that a *reasonable price* would be paid per the Sale of Goods Act.
    - Court holds that according to the price statute, if a price is to be fixed by a third party, and that third party doesn't provide the valuation, then the agreement is to be voided.
    - The third party failed to fix the price. In fact, court holds that having a third party fix the price is no different than the two parties fixing it.
    - Because no price was set, there is no contract.
- P argues that the arbitration clause can be used to fix the price.
    - Court holds that the clause is for settling disputes only *after* an agreement has been made.
    - Arbitration clause cannot be used to set the terms of the original bargain.

Conclusion: There is no binding agreement. R not liable.
Ratio: Agreement to agree where some critical part of the bargain remains undetermined is no contract

Hillas & Co v Acros Ltd

Facts: Hillas had an option (i.e., paid an amount of money for privilege to choose to enter contract or not) to enter a contract to purchase wood at 5% less than what Acros's official price list stated/what normal people would buy it at. Timber was to be "of fair specification." Acros enters a contract with a different company to sell all of the season's wood. Hillas tried to exercise their option, but Acros claimed the

agreement was cancelled and would not sell. Hillas sued; Acros argued option clause was too uncertain to form the basis of contract.
Issue: Is the option clause enforceable or is it too uncertain?
Analysis:
Option clause: Hillas "shall also have the option of entering into a contract with the sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent on the [Freight on Board] value of the official price list at any time ruling during 1931. Such option to be declared before the 1st Jan. 1931."

- Court notes three potential uncertainty issues: price, quality of timber, timing in relation to shipping dates and ports of delivery.

1. Price ('conditions of the contract')
    - D argues that "whatever the conditions of the contract are" is uncertain and means the parties are only in preparation stages of entering contracts and can't have agreed on anything.
    - Court rebuts. 'Conditions' refers to conditions of the trade generally and clearly fixes a price. Price is fixed by Acros's price list -5%
    - D further argues that maybe they wouldn't have published a price list that year. The court rebuts this as fantasy because D always makes a price list.
2. Quality of timber ('of fair specification', '100,000 standards')
    - D argues 'of fair specification' is too vague as it is valuative and could be interpreted widely. Court rebuts. Parties applied this wording without issue last year and should be able to do it again this year. Further, the industry standard of 'fair specification' is certain — anyone in the industry would be able to settle the manner.
    - D argues '100,000 standards' is too vague. Although it looks uncertain on its own, when it's put into perspective with the rest of the contract, it is clear that it refers to Russian softwood. Can also use officious bystander test to confirm the parties were talking about Russian softwood.
3. Timing for shipping/delivery
    - Nature of this contract means it makes sense to have some things determined later. Because it is an installment contract, the parties will have to wait and see what the dates/weights/etc. May turn out to be when shipment is ready.

Conclusion: The option clause, when construed with the entirety of the contract, illustrates that the option clause is enforceable.
Ratio: 'verba ita sunt intelligenda ut res magis valeat quam pereat' → words should be understood such that the aim can actually be carried out and not frustrated.
Ratio: if a common commercial transaction would be undermined by not upholding the contract, then the contract should be upheld.
Ratio: if there is detrimental reliance, the court is more likely to uphold the contract as enforceable.

Foley v Classique Coaches Ltd

Facts: Foley sold their land to Classique Coaches so long as Classique agreed to buy their gas from Foley. Price of gas was left unspecified ("to be agreed by the parties from time to time"). Arbitration clause included in case they cannot agree to price. Classique bought their gas from Foley for three years, but subsequently attempted to get out of the deal. Foley sues claiming the agreement is binding, seeking injunction.
Issue: Is the agreement so incomplete that it is not a valid contract?
Analysis:

- P argues the arbitration clause applies to remove uncertainty regarding price → court agrees.

- P argues the parties intended that a reasonable price be paid for the gas → Court agrees , analogizing this case to a tied house (place that only sells one brand of beer). It's an implied term of the contract that petrol should be supplied at a reasonable price and be of a reasonable quality.

Conclusion: Classique held liable. Agreement is enforceable. Court notes that Classique doesn't intend to give the land back and are just trying to void the part of the agreement that doesn't suit them.
Ratio: Arbitration clauses can remove uncertainty regarding price and when combined with implicit agreements about the quality and price of particular items, contracts may be complete enough to be binding

Making Sense of the Trio

May & Butcher put forward a general principle: "agreement to agree where some critical part of the bargain remains undetermined is no contract." This principle is honed by Hillas and Foley, which provide limits and descriptions of what is meant by 'underdetermined.'

- Leaving matters open: Hillas states that in some contexts, having particular matters settled is routine. While in other contexts, leaving matters open is standard.
    - In Hillas, not upholding the contract would undermine a common commercial arrangement; in May & Butcher, not upholding the contract only impinges on the conferral of a private monopoly and this form of contracting is not standard.
- Detrimental reliance & fairness: if there is detrimental reliance, the court is more likely to honour the agreement as enforceable.
    - In Hillas and Foley, both had partly performed the contract, but in May & Butcher we are looking at a new shipment. Hillas and Foley had detrimental reliance on the contract while May & Butcher did not (they stood to benefit, but would not be harmed by the finding of no contract).
- Criteria & Mechanisms for Determining Price: if there are criteria or a mechanism to determine price, this can prevent the agreement from failing for incompleteness.
    - In these cases, the parties may not agree on the price itself, but they agree on a particular criteria for the price or a particular mechanism to determine the price.
    - If machinery fails, then the court may be able to step in and determine what is reasonable (*Foley* and Foley notes)

Agreements to Negotiate

Agreement to negotiate: agreements to agree in the future on essential aspects of a bargain. These are not contracts, but they constrain how parties can conduct themselves in respect of one another when negotiating a contract.

Empress Towers Ltd v Bank of Nova Scotia / implied terms of good faith and not unreasonably withholding contract

Facts: Scotia Bank rented its premises from Empress Towers and had a lease renewal clause. SB wanted to use the renewal clause and proposed a rental rate of $5.4K two months before the end of the term. SB follows up twice and Empress claims to be 'still thinking.' On the deadline for the old term to expire, Empress proposes a month-to-month tenancy at $5.4K/mth +15K up-front.
Issue: Is the renewal clause void for uncertainty? If not, what does it mean?
Analysis:
Court recognizes three options in answering the question:

1. Where rent is 'to be agreed', clause is normally not enforceable (agreement to agree =/= contract, *May & Butcher*).
2. Where rent is to be established by a formula but no machinery for application of the formula is provided, courts will supply the machinery.
3. Where formula is set out but defective and machinery is provided for application of the formula, machinery may be used to cure defect in the formula.

The contract stated that the renewal rate would be market rate *as mutually agreed* between the landlord and tenant. Court says the effect of this is that the landlord could just decide that they don't agree with the market rate, which would give the landlord a lot of power over something the parties treated as objective. Thus, the court says that there is an **implied term** of good faith with the aim of reaching an agreement and an implied term that agreement will not be unreasonably withheld under both the officious bystander and business efficacy tests. If they were fine with the landlord just deciding, they wouldn't have included the renewal clause in the first place.
Conclusion: Implied terms of good faith and and not reasonably withholding agreement prevent the renewal clause from being struck down as uncertain. Petition dismissed.
Ratio: courts will try to give effect to clauses that parties intended to have legal effect.
Ratio: When clauses have an implied term of good faith and an implied term that parties won't unreasonably withhold a contract, those clauses cannot be determined invalid.

Mannpar Enterprises Ltd v Canada / exception to Empress

Facts: Manparr tried to renegotiate a contract to remove and sell sand from Skway FN based on a clause that stated they could renegotiate for a further five years. Manparr attempted to renegotiate but CA and Skway were unwilling to renew. Mannpar argues CA repudiated the contract by refusing to negotiate the renewal. At the same time, CA has a fiduciary obligation to act in the best interests of Skway FN.
Issue: Is the renegotiation clause uncertain? Should there be an implied term requiring CA to negotiate in good faith for the renewal?
Analysis:

- When a renewal clause is too broadly worded, it fails because there is no objective measure. This means we only have an agreement to agree which doesn't carry legal wait (*May & Butcher)*. But, some agreements to negotiate have implied terms of good faith like in *Empress*.
- Mannpar differs from Empress because:
    - Empress had a 'benchmark' that could have been capable of objective assessment (i.e., market rental)
    - Continuing leases are different from an 'anticipation' that an arrangement may continue (i.e., there was no guarantee that Mannpar could renew after 5 years)
    - Contextual difference: the Crown negotiates on behalf of Skway FN & has fiduciary obligations that affect how it conducts negotiations.

Conclusion: Renewal clause is too uncertain. Manparr does not succeed in its claim.
Ratio: There is a duty to negotiate in good faith if:

1. There is already a contract between the parties (duty to negotiate only arises when there is an ongoing agreement).
2. A duty to negotiate in good faith is consistent with the parties' intent.
3. There is an objective benchmark against which the court can assess whether the party in question is in breach or not.

Ratio: Good faith operates to make some agreements to negotiate enforceable. It is certain enough to give content to some agreements.

Anticipation of Formalization

Anticipation of Formalization: arises when an agreement is reached which envisages a further formal document.

Key issue in anticipation of formalization: distinguish between the situations where parties intend to be bound at once, and situations where they do not anticipate being bound until after the document is executed.

Bawitko Investments Ltd v Kernels Popcorn Ltd

Facts: Passander approached Kernels wanting to become a franchisee. Kernels provided Passander an information package including the 'draft' or 'standard' franchise agreement. One month later, Passander met the Kernels representative and reached an agreement on a number of alterations to the draft agreement. At the end of the meeting, Kernels rep says "you've got a deal"
Issue: What is the legal effect of an oral contract? Does it constitute a 'complete and legally enforceable contract' or was its enforceability 'subject to and dependent upon a formal written franchise document being settled, approved, and executed by the parties?'
Analysis:

1. **Were the terms of the contract settled during the meeting, or not yet?** → no
   - Terms of a long-term relationship such as a franchise agreement have to be certain. Judge argues they hadn't settled all of the terms, many of the essential terms remained open to negotiation.
   - Parties' conduct after meeting suggests no agreement → comments on the draft were requested.
2. **Even if the terms were certain, might one think the parties considered their legal obligations deferred until the creation of the written contract?** *anticipation of formalization
   - Anticipation of formalization issue: the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed. In this case, the original or preliminary agreement cannot constitute an enforceable contract.
   - "Subject to contract" → This indicates that there is an anticipation of formalization, but a contract hasn't taken place yet (EXCEPTION: language or conduct that indicates the individuals meant to be bound to one another)

Conclusion: The parties are not bound by virtue of the April 18th meeting. The Trial Judge's determination is overturned.
Ratio: "subject to contract" indicates anticipation of formalization; no contract in place yet.
Ratio: an original or preliminary agreement cannot constitute a formal contract if the understanding or intention of the parties is that legal obligations are to be deferred (this can be true even if there is certainty of terms).