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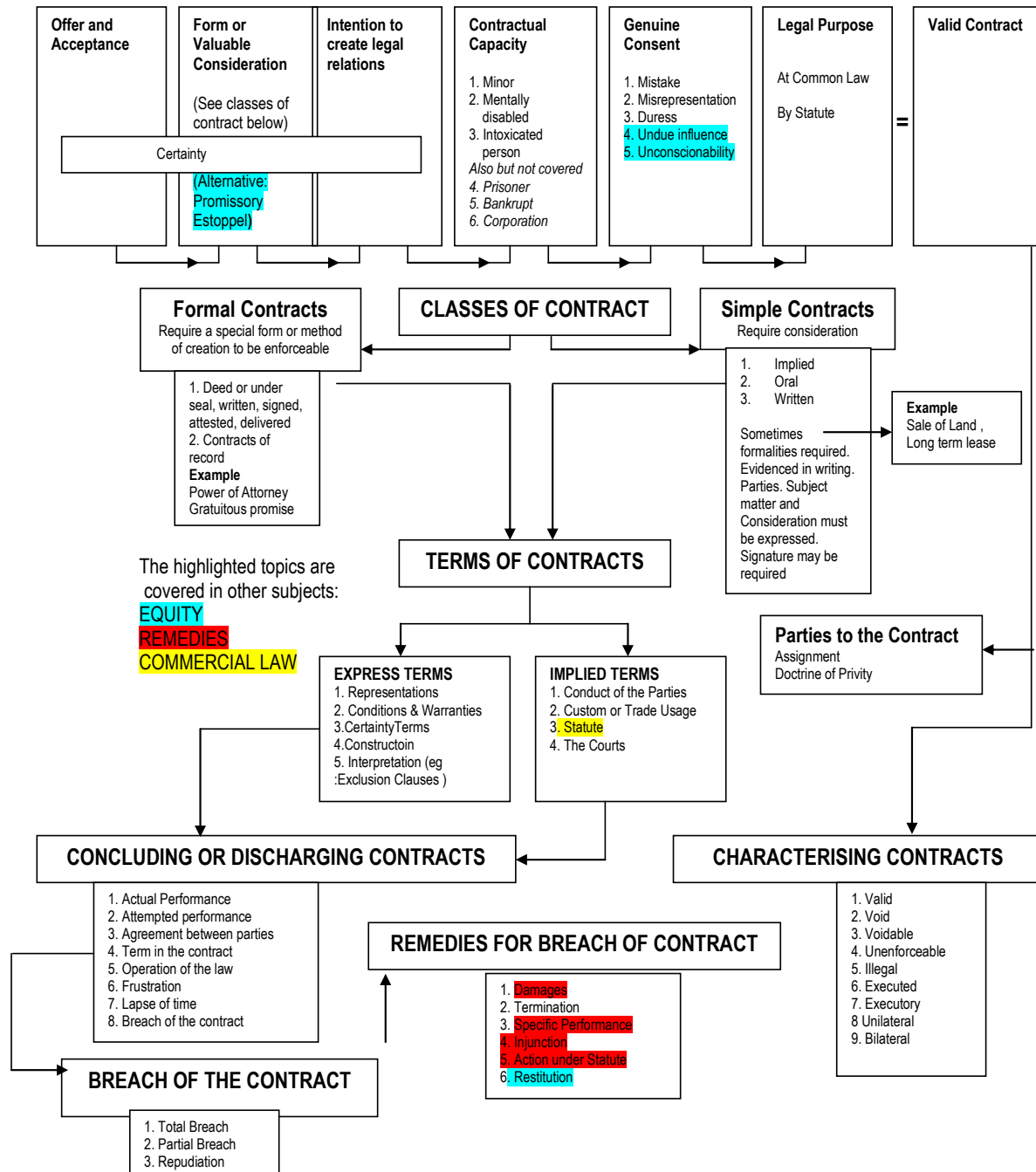
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A CONTRACT IS AN AGREEMENT BETWEEN TWO OR MORE PARTIES IN WHICH LEGAL OBLIGATIONS ARE CREATED WHICH ARE ENFORCEABLE BY LAW

Traditional approach: There are many different theories: See Lecture 1



a) Offer and acceptance

[3.05] – [3.70], [3.75] – [3.145].

The elements of a contract

A **valid contract** is an agreement between two or more parties whereby legal rights and obligations are created which the law will enforce.

- Entered into freely by the people, the law creates the framework for the contract
- Contracts hardly ever go to litigation because they will likely break down – relational theory

All of these definitions stress the concepts of '**agreement**'

and '**enforceability**'. There needs to be these 6 requirements to be a valid contract

- **Offer and acceptance**
- **Consideration**
- **Intention**

Can be affected by

- **Capacity** – whether I can make the choice to join the contract
- **Legality** - eg cant have a legal contract about marijuana
- **Consent** – mistake, misrepresentation, duress, undue influence,

Terms of contract: express terms and implied terms

Breach of contract and remedies available – remedies won't be covered in this subject

Not covering **estoppel** in the textbook

We are studying the law of simple contracts (requires consideration, can be oral or implied, fits the top line of the flow chart), not really formal contracts (which are deeds under seal, have to be in writing, formal method)

Some definitions

- **Valid:** The essential elements are present – the top six elements in the flow chart
- **Void:** No legal validity – cross in top line of chart, cannot be enforced, there is no contract
- **Voidable :** Validly formed but inherent defect – eg if the person was unable to give consent previously, but can be later accepted by an aggrieved party. The offeree can't remove the right however, only the person who made the offer.
- **Unenforceable:** Validly formed but with a technical defect – contract without stamp duty paid
- **Illegal:** 'The court will not lend its aid to a man who founds his cause of action in an immoral or illegal act.'
- **Executed:** Where a party has performed their promise – one party has performed, courts reluctant to interfere
- **Executory:** Where all the parties have done is exchange promises – have had the agreement but haven't performed yet
- **Express:** By written or spoken word
- **Implied:** By conduct
- **Formal:** Some must be in writing – not studying
- **Simple:** Six essential elements from the flowchart (can be written or oral or both)
- **Doctrine of privity:** involving third parties who do not have a right in the agreement, even though they may be involved

Agreement

Not always easily ascertained – agreement happens after an offer and acceptance, and this agreement happens at that moment

- **The traditional approach** to answering the question: have the parties reached agreement? is to apply the rules of **offer and acceptance**. When a properly constituted offer has been made by one party and

accepted by the other, then there is agreement at the moment of acceptance or, more precisely, at the moment of *communication* of acceptance – the offeror must know of the acceptance

- Offer and Acceptance of the offer. The need for a meeting of the minds (**consensus ad idem**) (Smith v Hughes 1871) – the oats and horses contracts, summarise

For a contract we also need

- Consideration: the agreement is essentially the exchange of promises.
- Intention: is a key factor – did they intend to be contractually bound?
- Certainty: is a requirement – needs tight terms, cannot be too vague.

Objective approach is used – what a reasonable outsider would think

As we look at the cases we will see these features being considered

Offer and acceptance: (p55)

- The traditional approach to establishing an agreement between two parties is to identify an offer made by one party and an acceptance of that offer by the other. Under that analysis, a contract is said to come into existence when acceptance of an offer has been communicated to the offeror. (*Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93,110)
- The courts can find it difficult to fit the facts of some cases within the offer and acceptance framework (p56)
- A contract can be established without an identifiable offer and acceptance if the parties have manifested mutual assent and have reached a concluded bargain.

Objective approach – very important

Clients will always give a subjective approach

The **objective theory** of contract requires an outward manifestation of an intention to form a contract.

Taylor v Johnson (1983) 151 CLR 422

- (Aus High Court) High court has recently affirmed objective approach
- “It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.”
- *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165

Applying the rules

- Rules about contract formation were developed in the 19th century when there was a concern for certainty and a reasonable degree of precision. Hard to fit these rules to the current times – different contracting environment due to new technologies and means of communication.
- The rules are precise but as a consequence it is often difficult to fit the precise model to what people actually do. The courts sometimes have had difficulty in applying the rules of offer and acceptance into what people actually do. Good example for trying to apply old rules to new situation
- See for example *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* 1975 - (an example of the Ticket cases.) trying to work out if an airline ticket was an offer or agreement – wasn't a contract because there was so many exclusion tickets, essentially the same as a voucher – was not a contract
- The traditional approach has been criticised:
 - See for example *Brambles Holdings Limited v Bathurst City Council* [2001] considered later in the course