

Wk2-3: Law of Contract

MGM3352

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Wk2 Content

Law of contract and formation of contract

- **Contract and meeting of mind**

Important elements of contract

- **Offer and invitation to treat**
- **Acceptance of offer**

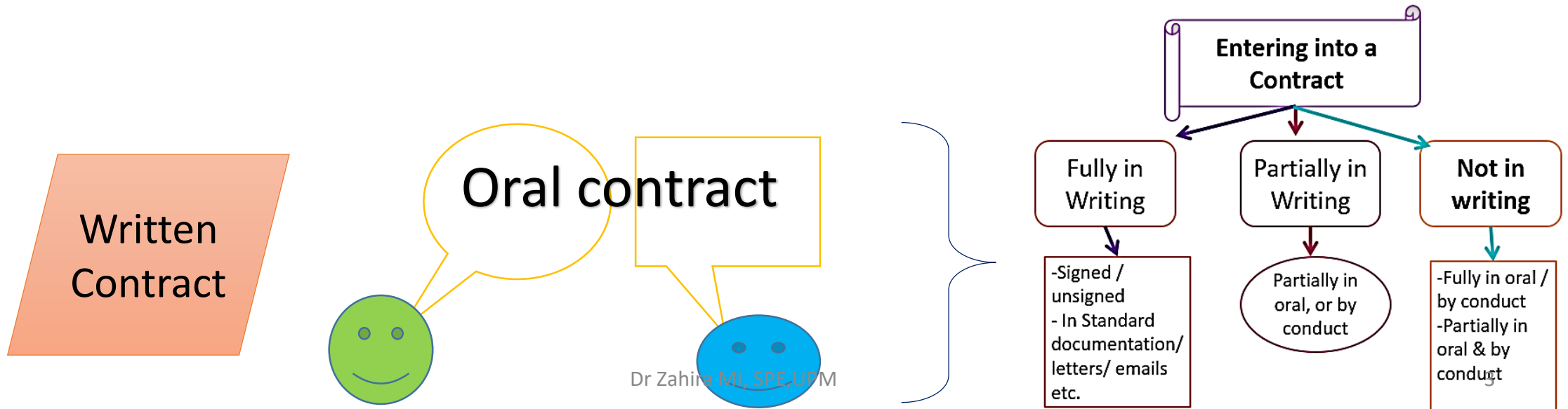
Contract: Definition

- An **agreement** between 2 / > **parties** which is **enforceable** by law

A promise or set of promises

Natural person: human being
Legal person: corporation

- Duty to perform
- If not performed, becomes a breach of duty



Bonanza Chemicals Sdn Bhd v Leaderpac Manufacturing Sdn Bhd [2011]

- **An oral contract** made between two parties, where plaintiff sold raw materials to defendant for making perfume.
- After a sale, plaintiff would send the defendant an invoice for payment.
- Defendant would package raw materials into air fresheners & invoice the plaintiff for work done.
- Plaintiff claimed > RM350k for goods sold & delivered to defendant by invoice.
- Defendant counterclaimed for RM210k for packaging materials bought on behalf of plaintiff.
- Plaintiff denied this & alleged that the packaging materials were left in defendant's factory where it was destroyed in a fire.

Held: An oral contract can be proven by:

- Invoices, delivery orders duly acknowledged & statement of accounts being records kept in the normal course of business.
- These were admissible evidence that goods were supplied between plaintiff & defendant.
- So, plaintiff entitled to sum owed to them – any sum owed to defendants.

G Percy Trentham Ltd v Archital Luxfer Ltd [1993]

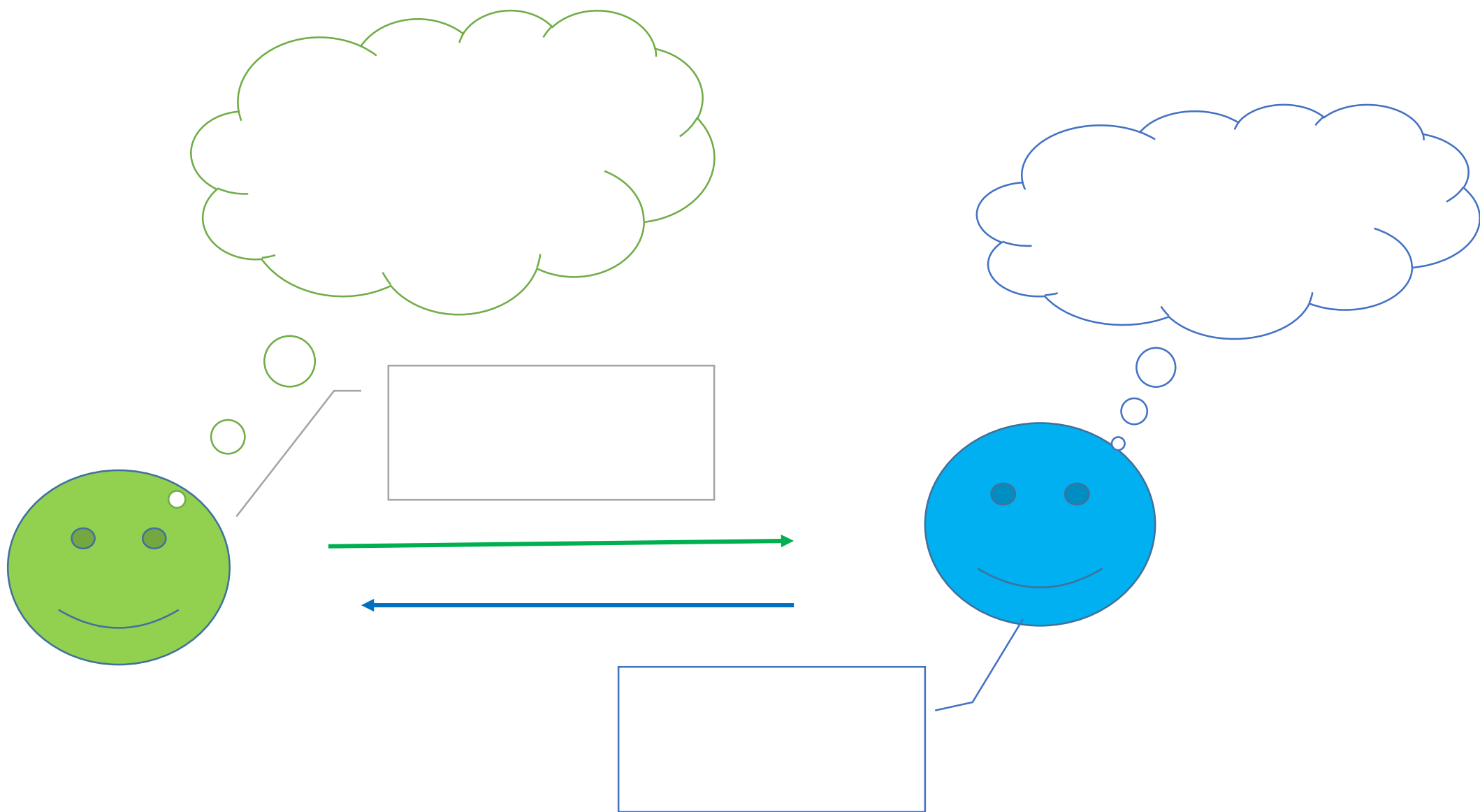
- Engineering work was completed without a written contract.

Held:

- The evidence that work had been fully carried out showed a contract existing between the parties.
-

Concept of Meeting of Mind

- **A contract is a legally binding agreement made between two / > parties, with legal consequences.**
- **‘A meeting of minds’** (*consensus ad idem*) ~ both parties agreed together about the same thing
 - ~ **the same understanding of the term** of the agreement
 - ~ parties to a contract **must intend** that their agreement shall be legally enforceable;



- A contractual relationship exists on *consensus ad idem*.

“Consent”

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

Agreement void where both parties are under mistake as to matter of fact

21. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Contract caused by mistake of one party as to matter of fact

23. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Dr Zahira MI, SPE, UPM

Contracts
Act 1950

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ILLUSTRATIONS

(a) *A* agrees to sell *B* a specific cargo of goods supposed to be on its way from England to Kelang. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

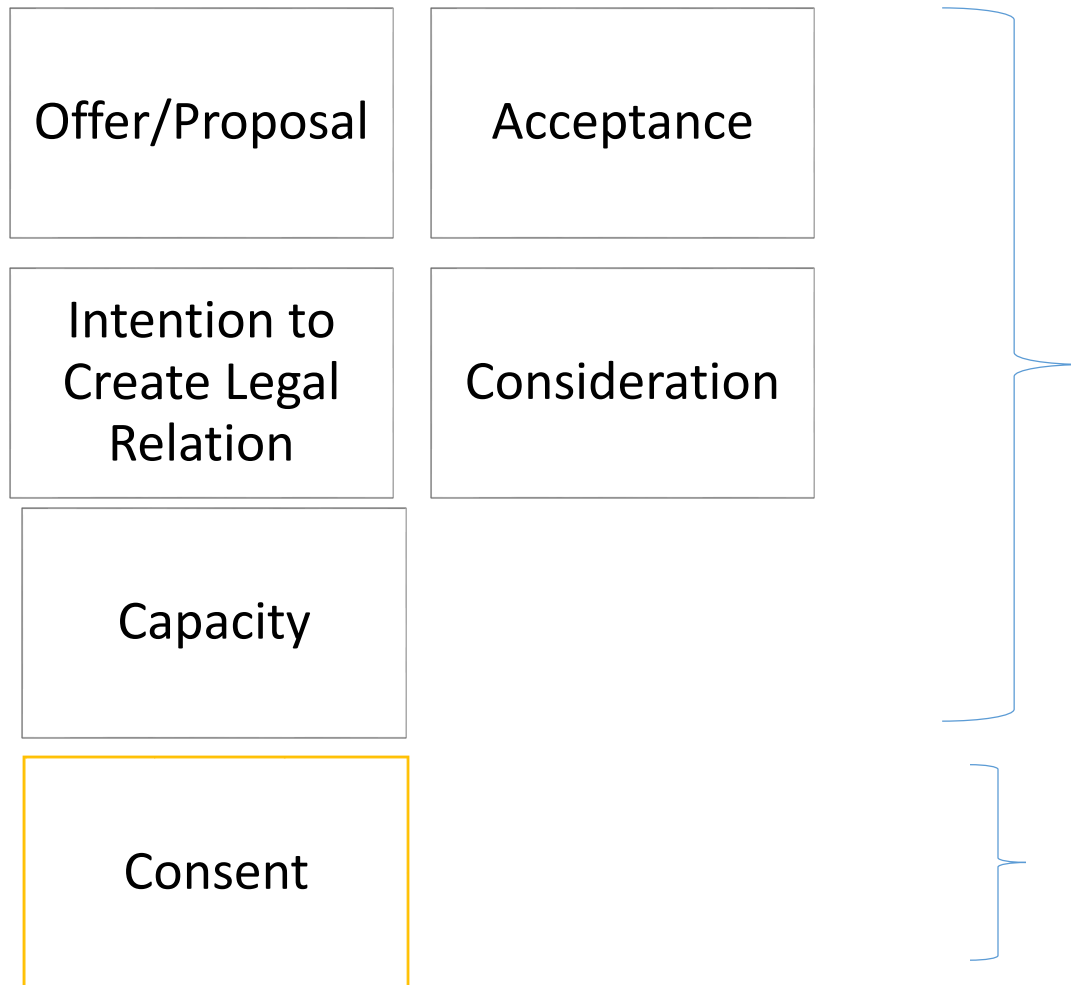
Tham Kong v Oh Hiam & Ors [1968]

- Oh Hiam/Respondent agreed in writing to sell 7 plot of lands at RM450/acre.
- Those land affirmed as land planted with rubber trees.
- Respondents later discovered one plot (1/2 acre) was not rubber trees land because there was an old house & a few rubber trees.
- Respondents claimed that that land plot was mistakenly included in the count of 7 plot & they wished to remove it from the sale by amending the contract.
- High Court decision: the ½ acre removed from the sale due to mistake of the seller. He thought it was rubber trees land but not.
- **Federal Court** decision: It is true that intention is determined by the act or statement of the parties, but the evidence of mistake negative the intention. It is important that **the mistake is such that it is fair to be regarded as mistake to a fundamental matter.**
 - There was no fraud or misrepresentation in this case, but only a one party mistake. A reasonable adult person would not make such a mistake. So, Respondents failed in their claim.

Short assignment

- Analyse the case of Raffles v Wichelhaus and write a report about the effect of the case

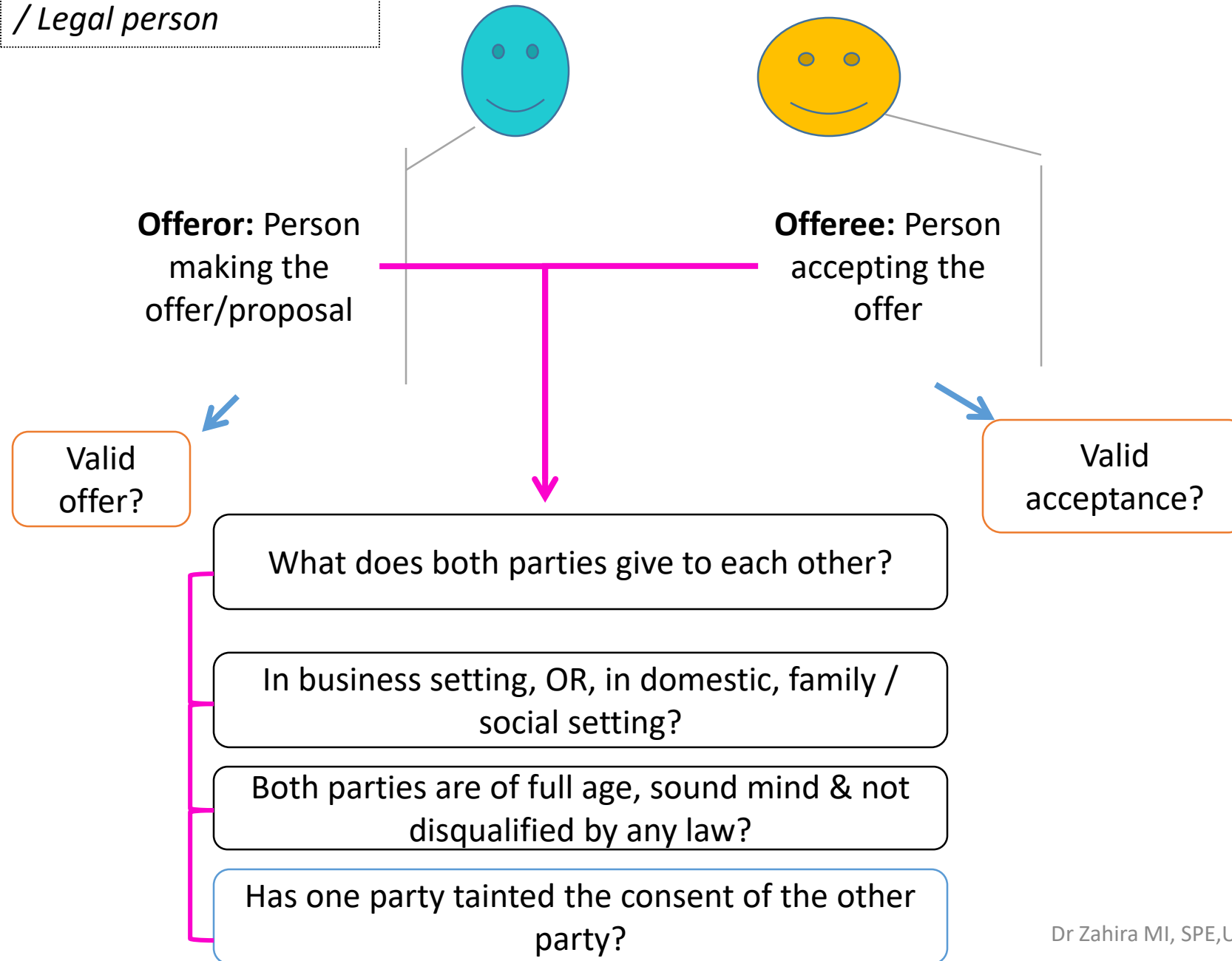
Elements of Contract

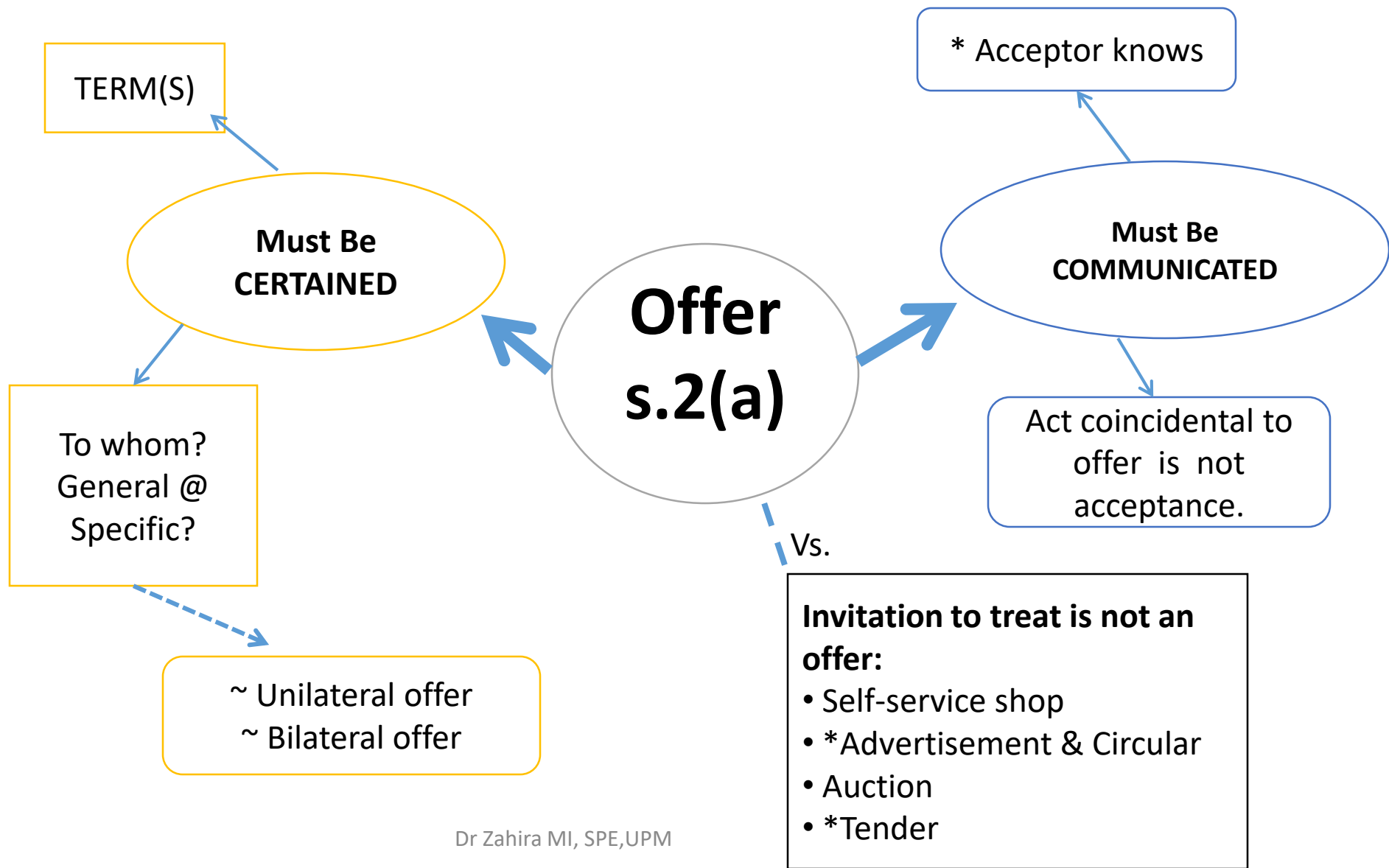


- Lacking it, contract does not exist.

- Lacking it, contract exist but voidable.

•Person: Natural person
/ Legal person





Offer : Definition

s.2 (a): *“When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal”*

An intimation, by words or conduct, of a willingness to enter into a legally binding contract, and which in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance or return promise on part of the person to whom it is addressed (Anson, p.25).

Preston Corp Sdn Bhd v Edward Leong [1982]

Appellant: in business of publishing books

Respondents: the printers of appellant's books publishing books

Problem: Respondents claimed ownership over the original film positives of the books because a **clause in their quotations had stated so.**

Appellant rejected respondents' claim; claimed they need not pay for the reproductions.

Held: Respondents' quotations were not proposals. Language of the quotations showed that respondents, at the time they issued their quotations to their customers, had no intention to make a proposal.

Whether quotations were offers and printing orders constitute acceptance?

Findings: Contract entered into by exchange of letters.
1st: R's quotations;
2nd: A's printing orders;
3rd: R's confirmation
4th: A's payment for the printed books

Legal principles of Offer

- a) **An offer made to a particular person, only that person can make the acceptance: class of persons or public at large:**

~ *Specific Offer: Boulton v Jones (1857)*

- b) **An offer made to a class of persons or public at large, only person(s) in that class / those intended public can make the acceptance:**

~ *General Offer : Carlill v Carbolic Smoke Ball Co. (1893)*

- c) **Not an invitation to treat (ITT)**

- ITT: inviting other(s) to make an offer
- The 'promise' under ITT made by a person is not binding

* *Consider at what point an offer exist; an acceptance exist. When will the contract occurs?*

Merely an ITT if:

1. Goods displayed at self-service shop

a. Pharmaceutical Society of Great Britain v Boots Cash Chemist (1953) : without price tag.

b. Fisher v Bell (1961): with price tags in a shop window

2. Auction

a. Payne v Cave (1789): offer by bidder can be retracted before the fall of the auctioneer's hammer.

b. Harris v Nickerson (1873): ad. by auctioneer that a sale of certain articles will take place on a certain day does not bind the auctioneer to sell the goods, nor does it make him liable upon a contract to indemnify persons who have been put to expense in order to attend the sale.

Merely an ITT if:

3. Advertisement and circular

- a. *Coelho v The Public Services Comm.*(1964)
- b. *Majumder v Att. Gen. of Sarawak* (1967)
- c. *Patridge v Crittenden* (1968)
- d. *Carlill v Carbolic Smoke Ball Co.*
- e. *Lefkowitz v Great Minneapolis Surplus Store* (1957)
- f. *O'Brien v MGN Ltd* [2001]
- g. *The John Leonard Saga* (2000)

Becomes Offer

4. Application for a membership:

~ *Abd Rashid Abdul Majid v Island Golf & Properties Sdn Bhd [1989]*.

- Offer or ITT:

- ~ buses

- Wilkie v London Transport (1947)*

- ~ 'pay on exit' car parks

- Thornton v Shoe Lane Parking (1972)*

- ~ vending machine

- ~ Company's prospectus (public offering) v issues of shares to existing shareholders (*ANZ Nominees Ltd v Lennard Oil [1985]*).

Legal principles of Offer (cont'd)

d) The terms of an offer cannot be vague

Guthing v Lynn (1831): 'lucky' horse?

Ahmad Meah & Anor v Nacodah Merican: build a 'suitable house'?

Kam Mah Theatre Sdn. Bhd. v Tan Lay Soon (1994) : 'usual terms & conditions'

Sou Yong v Yuzin bte Abdullah @ Ho Yuzin [1999]:

Letter signed by both parties saying:

- Defendant agreed to sell the land, &
- Plaintiff's solicitor will draw up a formal SPA pending a search to be done on the land

Defendant repudiated the sale.
Plaintiff sued the defendant

Problem: letter stated Plaintiff as purchaser; but almost all documents drawn up by P's solicitor suggested the actual purchaser was Country Homestead Sdn Bhd.

Held: No agreement to sell to plaintiff at the price of RM200k because the terms of the proposal were not clear and certain.

Legal principles of Offer (cont'd)

~ **Vague term is capable of being made certain: by implying terms; reference to previous dealings between the parties or within trade.**

Hillas v Arcos (1932): contract for the sale of timber 'of fair specification' between persons well acquainted with timber trade

Dr. Satwant Singh Gill v Hospital Assunta(1998) 4 CLJ 47: 'as long as he wishes'

Legal principles of Offer (cont'd)

(Additional)

e) Must be communicated.

s. 3: communication of proposals is deemed to be made by any act or omission of the party proposing by which he intends to communicate the proposal, **or** by which has the effect of communicating it.

s. 4(1): communication of proposal is complete when it comes to the knowledge of the person to whom it is made.

R v Clarke: although he knew but forgotten at the time of supplying information, it means he had not known the reward at all.

Williams vs Carwardine : motive is irrelevant. D did act with knowledge of the reward.

s. 5 (1):Revocation of Offer

- Offeror is not obliged to open his offer indefinitely
- Offer cannot be revoked after acceptance is made

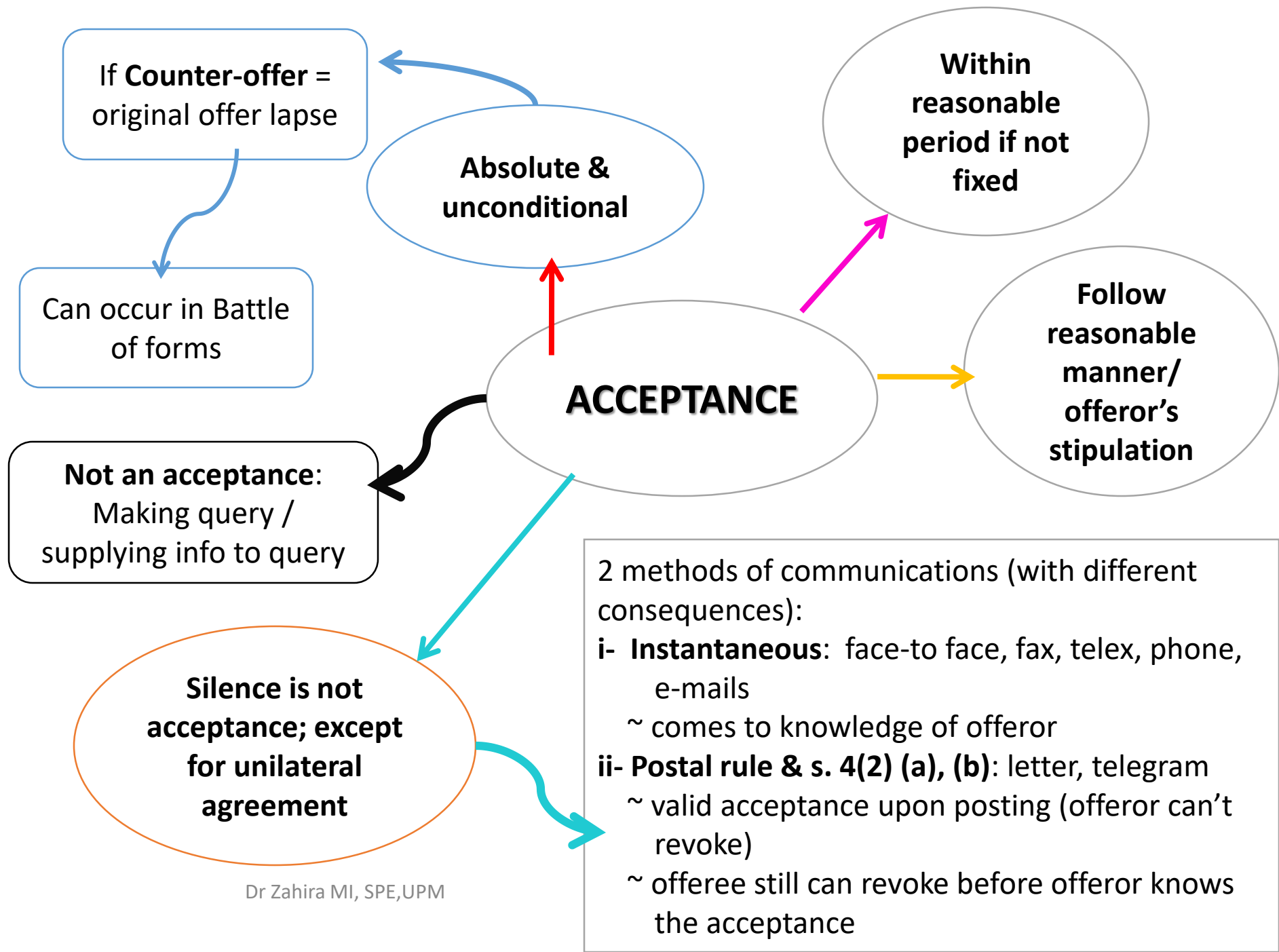
Eg : X offered Y his house for sale. Y requested for time to think about it. X agreed to give Y 3 days to think. However, X revokes his offer later that day. X can validly revoke the offer and Y cannot claim having any rights.

- So, how could a prospective offeree bind an offer?
: Option contract: a contract whereby the offeror, after receiving a consideration, promise to open the offer for an agreed period.

Ways of Revocation of Offer: s.6

(Additional)

- (a) by the communication of notice of revocation by the proposer to the other party;
Byrne v Van Tienhoven
Dickinson v Dodds – communicated by 3rd party?
- (b) by the lapse of the time prescribed in the proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
Ramsgate Victoria Hotel Co. Ltd v Montefiore
Macon Works & Trading Sdn Bhd v Phang Hon Chin
- (c) by the failure of the acceptor to fulfil a condition precedent to acceptance; or
Aberfoyle Plantation Ltd v Khaw Bian Heng
Industrial Concrete Products Bhd v Concrete Engineering Products Bhd
- (d) by the death or mental disorder of the proposer, if the fact of his death or mental disorder comes to the knowledge of the acceptor before acceptance.



Acceptance

- **S. 2(b): when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise.**

- **Legal Principles:**

1. Only the person to whom the proposal is made can make the acceptance

If bilateral offer : only that person offered can accept.

If unilateral offer: ?

2. Within reasonable time: *Fraser v Everett*

“Failure to accept within reasonable time implies rejection by the offeree” per Hashim Yeop A Sani in *Macon Works & Trading Sdn. Bhd* case.

3. S.7(b): Expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

Eliason v Henshaw: P prescribes the mode of acceptance, but D use another mode, thinking that this would reach P more speedily. D was wrong, & his letter arrived after the time that the reply might have been expected. Held: P can refuse to purchase.

4. Acceptance must be communicated :s.7(b)

Brinkibon Ltd v Stahag Stahl GmbH

- “Silence/ mental assent is no acceptance” :
Felthouse v Bindley
- ~waiver of communication: ***unilateral offer*** as in
Carlill’s case : performance of the required act is enough as acceptance.
- ~ Acceptance is effective/complete **when it is communicated** to the offeror.

Types of communications:

a) “Instantaneous communication”

Inter praesentes (face to face), telephone conversation, fax & telex

* ***Entores v Miles Far East Corp.***:

“...the parties are to all intent & purposes in each other’s presence just as if they were in telephonic conversation...”

* ***Brinkibon v Stahag Stahl und StahlWarenhandels-gesellschaft***

mbH: “...messages may be sent out of office hours, or at night, with the intention, or upon assumption, that they will be read at a later time. There may be some error or default at the recipient’s end....”

b) Mailbox Rule / Postal Rule

* *Adams v Lindsell*

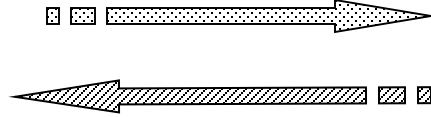
2/9/1817



9/9 {7/9}

sold to 3rd party 8/9

Offeror



5/9



5/9

Offeree

:Acceptance is complete as soon as the letter is put into the post box, even though the letter delayed or lost

* *Entores v Miles Far East Corp.*

* *Ignatius v Bell*

s. 4(2) The communication of an acceptance is complete:

- (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and
- (b) as against the acceptor, when it comes to the knowledge of the proposer.

~ The communication of the acceptance is complete as against offeror, when the letter is posted; as against offeree, when the letter is received by offeror.

- Postal rule is not operable when requirements of posting is not followed (no stamp, wrong address) or when offeror put a term that “proof of postage is not proof of acceptance”.

6. Acceptance must be made with the knowledge of the offer:

a. R. vs Clarke: reward for info leading to arrest & conviction of murderer. D forgotten the offer = ignorance

b. William vs Carwardine : motive is irrelevant

- Lessons Learnt: Provide 10 points

Wk3 Content

Important elements of contract (cont'd)

- Counter-offer and cross offer**
- Valid and invalid consideration**
- Intention to create legal relation**

Acceptance

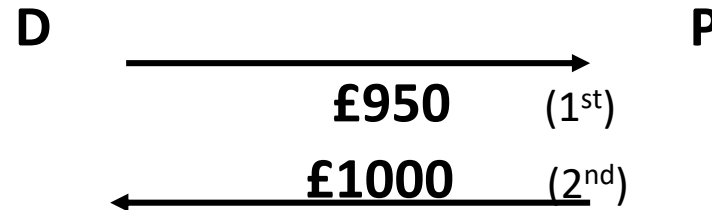
- **S. 2(b): when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise.**

2. S.7(a): Absolute and unqualified.

If not: Counter-offer

Hyde v Wrench (1840)

£1000



“Battle of the forms”: *Butler Machine Tool Co. v Ex-Cell-O-Corpn.*

No counter-offer if:

- ▶ Requesting further information

Stevenson Jacques & Co. v McLean; Harvey v Facey

- ▶ Parties still in process of negotiation

Lau Brothers & Co. v China Pacific Navigation Co. Ltd.

- Contract not yet concluded also if:
 - there is conditional acceptance.
- eg: qualified by the term “subject to contract” /
“subject to formal contract being drawn by solicitors”
- Low Kar Yit & Ors v Mohd Isa & Anor*
- Ayer Hitam Dredging M’sia Bhd v YC Chin Enterprise Sdn Bhd*

- Lessons Learnt: Provide 5 points

Valid & Invalid Consideration

Consideration: Definition

- Lush J. in ***Currie v Misa***:

“A valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.”

Forbearance: ***Osman b. Abd. Ghani & Ors v UABB***

Pollock: Detriment is the price for which the promise of the other is bought.

Cockburn CJ in *Callisher v. Bischoffsheim* [1870] LR 5 QB 449 at 452 observed that:

“Every day a **compromise** is effected on the grounds that the party making it has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his **forbearance to sue** will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it.”



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**Forbearance
to sue is a
good
consideration**

Statutory definition

s. 2 (d): when, at the desire of the promisor, **the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing**, something, such act or abstinence or promise is called a consideration for the promise;

Types of Consideration

1. **Executory:** A promise given for a promise, i.e mutual promise, e.g, a promise to do a work in return for a promise of payment
2. **Executed:** An act or forbearance given for a promise, i.e when one of the 2 parties has, either in the act which constitutes an offer or an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on one side only.
3. **Past:** The promise is subsequent to the act , e.g A saves B from drowning, and B later promises A a reward.

Valid Consideration

1. At the request of promisor
Lampleigh v Braithwaite
Kepong Prospecting Ltd. v Schmidt
2. Move from the promisee or any other person
Venkata Chinnaya v Verikataramayya
Compare: Common law's *Price v Easton*
3. Need not be adequate
Explanation 2 of s.26
Sturlyn v Albany
Chappel v Nestle
Phang Swee Kim v Beh I Hock

Legal principle:

- An agreement made without consideration is void
- Gratuitous promise is generally unenforceable,

- Malaysia Law: 3 circumstances where **promise** without consideration **becomes contract**

~ s. 26 (a), (b) & (c)

Exceptions to requirement of consideration

- **S. 26:** An agreement is void if without consideration, unless:

(a) Written + registered (if required) + natural love & affection between parties standing in near relation



Re Tan Soh Sim [1951]; Tang Meng Hock v Tang Ming Seng [2010] 1 CLJ 208

(b) Compensate wholly/in part + promisee voluntarily done something for promisor

J.M. Wotherspoon

(c) Written + signed statement by debtor to pay a debt barred by limitation law

~ Limitation Act 1953 : 6 years time limit to take legal action in contract (run from time the cause of action arise).



“The expression “natural love and affection” has not been defined in s. 26(a), supra, and so the ordinary popular dictionary meaning applies.

....

In my considered opinion, in the case of the **natural parents and their children, a presumption of natural love and affection arises so that **a valid consideration** is constituted in law for the purposes of s. 26(a), supra.**

For s. 26(a) to apply, two requirements must be fulfilled, viz the agreement is in writing and registered; and there must be natural love and affection between parties standing in near relation to each other.” (per Low Bing Hop JCA, p.219)

J.M. Wotherspoon & Co Ltd v Henry Agency House, per Suffian J:

“The Contracts (Malay States) Ordinance itself does not define "voluntarily". According to note (d) on page 204 of the 8th edition of *Pollock & Mulla* on the Indian Contract Act, Whitley Stokes who had a hand in the drafting of the Indian Act was of the **opinion** that this word means "**otherwise than at the desire of the promisor**". The *Shorter Oxford Dictionary* defines voluntary acts as being acts "performed or done of one's own free will, impulse or choice; not constrained, prompted or suggested by another."

In view of this, giving the word "voluntarily" its ordinary every day meaning, I am of the opinion that **the act done** by the plaintiff for the defendant firm **at the latter's suggestion** had not been done voluntarily and **therefore the promise made without consideration by the defendant firm to compensate the plaintiff is not a contract."**

Invalid Consideration

Past Consideration

- The promise is subsequent to the act
- Common law : Past consideration is no consideration

Re Mc Ardle, Roscorla

Lampleigh v Braithwaite

- Note: Section 26 (b) of CA : Promise to compensate wholly/in part + promisee voluntarily done something for promisor

J.M. Wotherspoon & Co Ltd v Henry Agency House [1962]

Raja of Venkatagiri v Sri Krishnayya (AIR 1948)

Tv Krishna Iyer v The Official Liquidator (AIR 1952)

Performance of duty

- An express promise to perform/performance of an existing public duty will not amount to consideration.

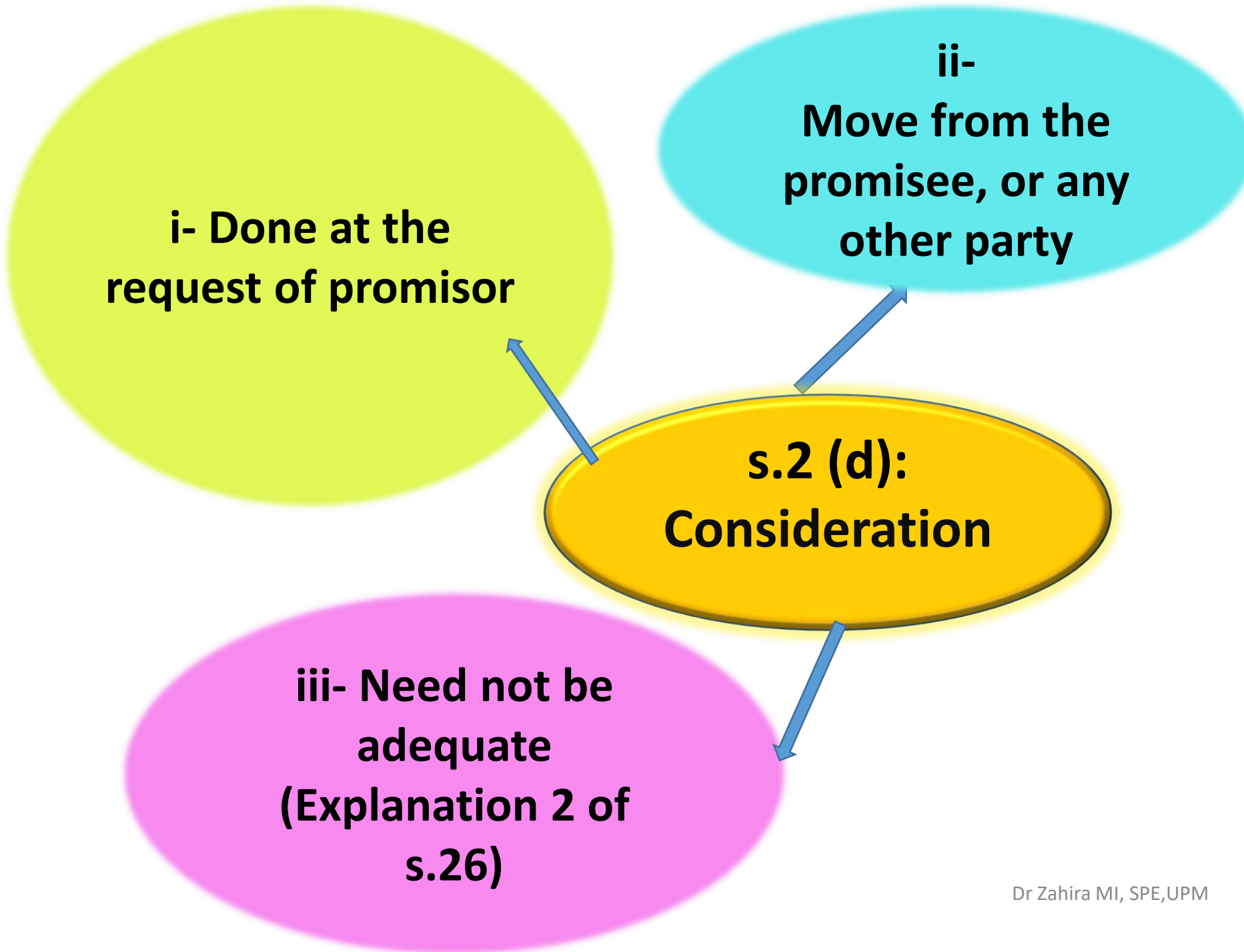
Collins v Godefroy

Glasbrook Brothers, Ltd. v. Glamorgan County Council

- Promisee merely undertakes to fulfil the conditions of existing contract with the promisor

Stilk v Myrick

- Unless the existing contract is terminated and a new agreement substituted at a higher rate of pay, or if the promise had been made to compromise a dispute or if unanticipated risks had arisen



Summary on Consideration

- Consideration must be something of value before the eyes of law. This is further noted in rules of adequacy of consideration.
- The law of consideration in Malaysia differs from that of common law by the following rules:
 1. s.2(d): allow 3rd party to give consideration. Not so at common law.
 - II. s.2(d): consideration which is past but done at the promisor's request is a valid consideration. At c/l, this becomes an exception to past consideration.
 - III. S.26(b): promise made for a voluntary past consideration (not done at anybody's request) is enforceable. Not so at c/l.

- Lessons Learnt: Provide 5 points

Intention to create legal relation

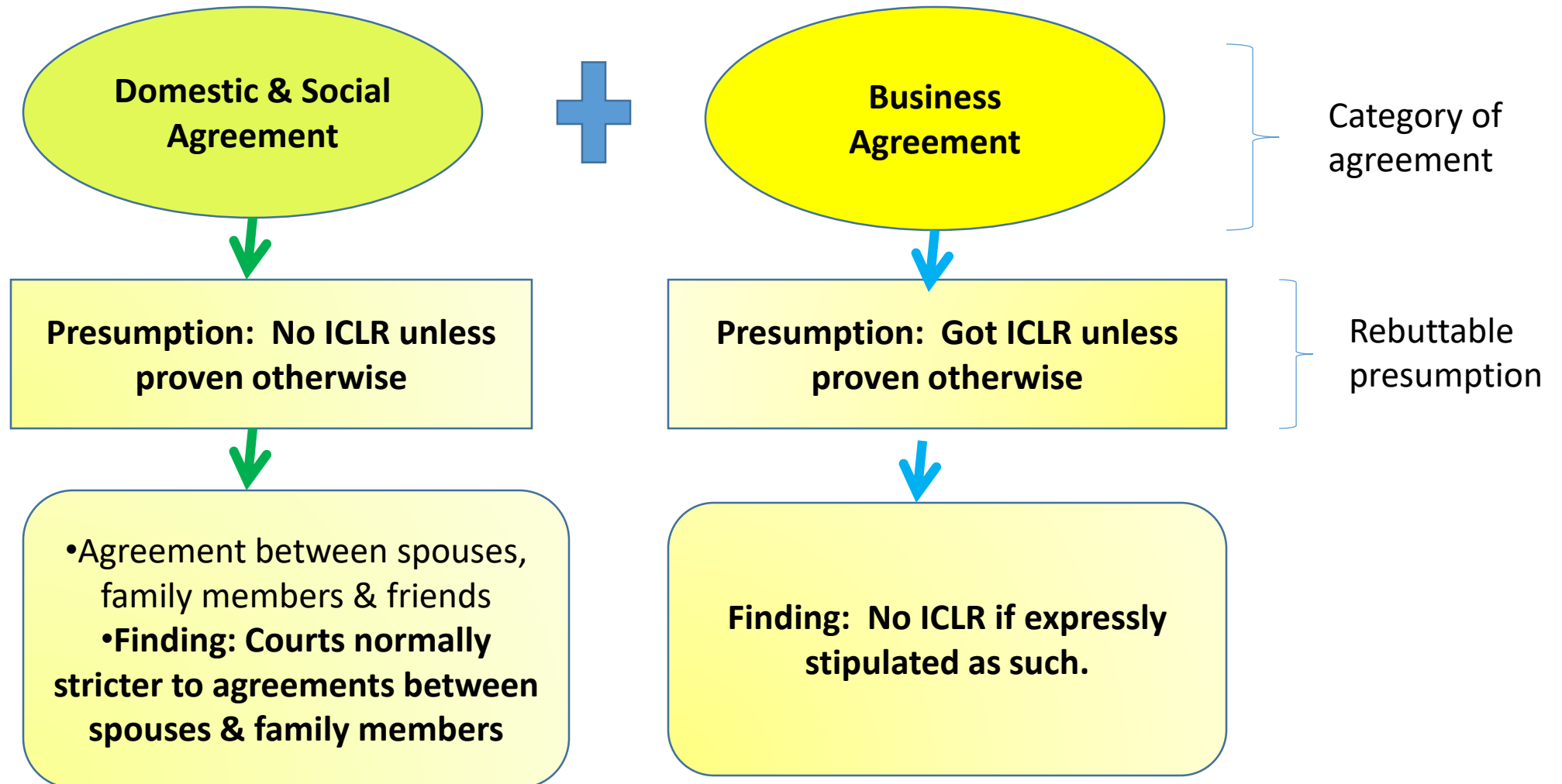
Intention to create legal relation

- Intangible matter: you cannot see the mind of others.

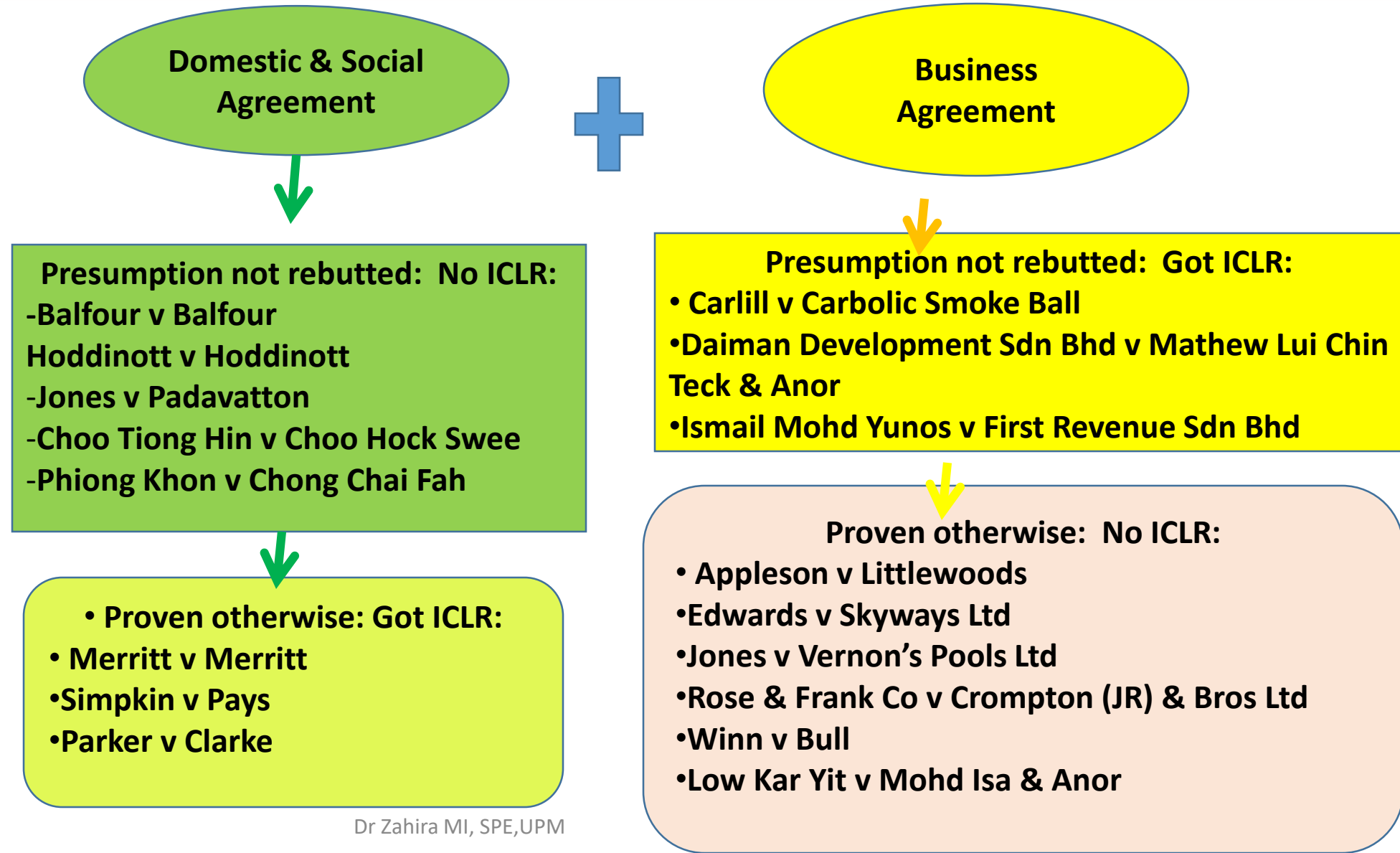
A's promise + B's Promise = Valid agreement/Contract?

- When a promise is made, do the parties expect any legal consequences?
- Law makes two different presumptions of promises made **among family members** (husband- wife, brother/sister, parent-son/daughter) or among friends, & in **business circumstance**.

Intention to Create Legal Relation



Intention to Create Legal Relation: Case examples



- Lessons Learnt: Provide 5 points

Q & A