Contract Law Outline

FORMATION OF THE CONTRACT

OFFER

Indicates readiness to enter contract, if other party agrees. Sets terms of the contract.
Issues: Complete enough to form offer? Indicates readiness to be bound? To whom is the offer made? Has offer been terminated?

Test for presence of offer is intention. This is determined by looking at the language used and the context, using the standard of reasonable person (Canadian Dyers)

- All terms of the contract must be in the offer
- There must be an intention to be bound by the terms
- There must be certainty of terms present in offer
- Mere puff is an offer that no reasonable person would take seriously – not legally binding
- Transactions by automatic ticket machines are offers (Machtinger SCC 1992)

COMMUNICATION OF OFFER

- Acceptance must be made with the knowledge of the offer and intention to accept the offer – you cannot accept an offer you did not know existed (R v. Clarke Aus 1927)
- Motivation for acceptance of an offer is irrelevant. Intention to accept an offer is not necessary – knowledge without intention to accept is sufficient for there to be an offer (Williams Eng 1983) countered in (R v. Clarke Aus 1927) but likely for policy reasons

INVITATION TO TREAT

Quotation of price is an invitation to treat, not an offer (Canadian Dyers HL 1920)
- But if a reasonable person would have believed that the communication was an offer to sell and not merely a quotation of the price, the contract is enforceable (objective test) (Canadian Dyers HL 1920)

Display of goods, as in a store, is invitation to treat. Presentation of item to cashier is offer. Acceptance of money by cashier is acceptance of offer. (Pharmaceutical Society Eng 1953)
Advertisements are generally an invitation to treat unless the language can be interpreted as an offer by a reasonable person (Carlill Eng 1893)
- If an ad promises something (reward) in return for performing certain actions, it is an offer of a unilateral contract made to the public (not an invitation to treat) (Carlill Eng 1893, Goldthorpe ONCA 1943)
- Contract is concluded when conditions of the ad are fulfilled. Notification of acceptance is not required, performance is sufficient (Carlill Eng 1893)
- Must have all components of an offer (Goldthorpe ONCA 1943)

A submission of tender gives rise to contract A. Winning of tender gives rise to contract B. You can withdraw an offer before it is accepted (R v. Ron Engineering SCC 1981)
- Invitation to tender (to extent it promises certain rules/procedures will be followed) constitutes not just invitation to tender but also an offer to follow those rules and procedures. Would-be contractors then make an offer with respect to main contract, but are also accepting rules and procedures to be followed in selection process. Thus, if either party fails to follow those rules and procedures, he is violating a contractual obligation (R v. Ron Engineering SCC 1981)
- Whether there is a contract A/B situation depends on the interpretation/construction of the dealings between the parties – most useful to find this in construction industry contracts, where considerable time and expense is involved in preparation and review of bids that will constitute offers for the main contract and parties incurring such expense expect the procedure stipulated to be honoured (MJB SCC 1999)
- Presence of "privilege clause" does not allow the company to accept non-compliant bids but allows company to choose tender other than lowest one(MJB SCC 1999)
- Not every failure to comply with tender requirements invalidates a bid. Owner is not obligated to investigate bids – can take them at face value. Once you decide on winning bid, all other contract A's expire – company has right to negotiate for contract B (Double N Earthmovers SCC 2007)
- Vendor controls and specifies the form of auction with specific wording – form of sale may also be deduced from the presumed intention of the vendor (Harvela Eng 1986)

TERMINATION OF OFFER

REVOCATION

- An offer can be revoked any time before acceptance (Dickinson Eng 1876) however, part performance of a condition ought to be construed as acceptance (Dawson v. Helicopter Exploration SCC 1955)
- Revocation of an offer must be communicated to offeree to be effective. Until offeree receives it, he can accept the offer and create binding K (Byrne Eng 1880)
- Postal rule: if the offeror has expressly or implicitly agreed to treat an answer by posted mail as sufficient acceptance and notification, then acceptance is made when it is mailed – this does not apply to revocation of offer since there is no evidence of any authority given to original offeror to notify of a revocation merely by posting a letter – revocation must be received by offeree to be effective (Byrne Eng 1880)
- If there is knowledge of revocation (by indirect communication), the offeree has no remedy (Dickinson)
- A promise to keep an offer open is binding only if consideration is given (Dickinson Eng 1876)
- Offer of a unilateral K cannot be revoked once performance has begun (Errington Eng 1952)
- Offer is revoked upon one party dying (Errington Eng 1952)

REJECTION AND COUNTER-OFFER

- Counter-offer is a rejection of original offer (Livingstone ABSC 1925) – can only be done by offeree

LAPSE OF TIME

- Parties may agree on a time at which acceptance must take (or offer will lapse) (Barrick SCC 1951)
- An offer with no specified expiry date will expire in a reasonable amount of time depending on (1) nature and character of the offer, the normal course of business, and (2) the circumstances of the offer (including conduct of the parties) (Barrick SCC 1951) – *Ex: 1– Do prices fluctuate? Is it time-sensitive? Is it perishable? if its a slow market, then anyone would jump on a for-sure offer. 2– language used: "immediately" "asap"*
  - Reasonable person test applies (Barrick SCC 1951, Manchester Diocesan Eng 1970)
  - Must consider intervening events to determine what is reasonable (Manchester Diocesan Eng 1970) – *Ex. If the conduct of the offeree indicates an intention to accept and the offeror knew about this, the reasonable time may be extended*

UNILATERAL CONTRACTS

- Acceptance is communicated by fulfilling requirement (reward situations) (Carlil Eng 1893, Errington Eng 1952)
- Unilateral K does not exist until act is completed so offer can be revoked anytime before completion but it cannot be revoked once performance has begun (unjust enrichment, unfair, etc.) (Errington Eng 1952)
  - Part performance of a condition ought to be construed as acceptance (Dawson SCC 1955)
  - When possible, court will interpret K as bilateral/will construct contract in order to give some rights to the offeree if there was intention to create a contract (Dawson SCC 1955)
- Unilateral offer may be considered to have been revoked after reasonable amount of time, given circumstances of the offer has passed (Carlil Eng 1893)

ACCEPTANCE

Agreement to offer. Timing is important: (a) creates contract (b) timing for consideration, damages, mistake etc
Issues: is it an unqualified "yes"? Has it been communicated?

At the moment of acceptance, there must be: (1) Certainty of terms (2) Consideration (3) Intention to create legal relations

- Consensus ad idem – there must be meeting of the minds (Carlil Eng 1893)
- Acceptance that changes the terms is a counter-offer but inquiries are not (Livingstone)
- If in rejecting a counter-offer, you imply the original offer is still valid, you may be obliged to form contract with those terms if accepted. An inquiry about the offer is not a counter-offer (Livingstone ABSC 1925)
- In a battle of forms, the terms on the last form signed win (Butler Eng 1979)
  - If terms of contract cannot be reconciled, the contract cannot exist (Butler Eng 1979)
- Acceptance of an offer constitutes a legally binding agreement, regardless of the motives for acceptance (Williams Eng 1983)
- Part performance of a condition can to be construed as acceptance (Dawson SCC 1955)
- Acceptance may be inferred from conduct (St. John's Tug Boat SCC 1964) – even if not expressly agreed upon, if a party knows of and accepts the services of another party, they have given an implied acceptance of an offer. In this case, the D did not attempt to dispense of the services and did enjoy the benefits, so liable for payment.

COMMUNICATION OF ACCEPTANCE

- In a unilateral K, notification of acceptance is not required, performance is sufficient (Carlill)
- Silence does not constitute acceptance, even if stipulated by offeror (Felthouse Eng 1862) but silence can constitute acceptance if offeree makes it clear that performance is acceptance and no notice is required (Carlil Eng 1893)
- Postal rule: if the offeror has expressly or implicitly agreed to treat an answer by posted mail as sufficient acceptance and notification, then acceptance is made when and where it is **mailed** (Household Fire Eng 1879)
  - Postal rule does not apply when stipulated otherwise (Holwell Securities Eng 1974)
  - It does not apply when parties cannot have intended that there should be a binding agreement until the offeree had communicated acceptance (Holwell Securities)
  - If offer states acceptance must be received, Postal rule does not apply (Holwell Securities Eng 1974)
  - "notice of acceptance" suggests that acceptance must be received, Postal rule does not apply (Holwell Securities Eng 1974)
  - Instantaneous communication is not bound by Postal rule (telex). In instantaneous communication, K is made when and where the acceptance is **received** (Brinkibon HL 1983)
  - Generally: the mode used should not be less advantageous to the offeror than the one that the offeror has used

ELECTRONIC CONTRACT FORMATION AND RELATED PROBLEMS

- It may be possible to perform contract by clicking "I agree" on specific terms after money exchanged. A contract can be binding with terms unknown at time of purchase (ProCD US)
- Shrink-wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general. If buyer does not want to be bound by the terms contained in the box, they have the right to return the goods (unused) for a refund – otherwise, they will be bound by those terms (ProCD US 1996)
- Clicking "I agree" results in formation of binding contract, even if one did not read the content. Terms can be on multiple pages – scrolling = flipping pages. Users are expected to follow links and read terms before accepting K (Rudder ONSC 1999)

Electronic Transaction Act functional equivalency: digital form is equivalent to written form (excludes wills, etc.) s. 11 electronic signatures are valid s. 15 can contract electronically

CERTAINTY OF TERMS

Identifies clearly what was agreed.
Issues: Can terms be implied to help clarify? Can principles of interpretation or rest of contract help? Can some "terms" be jettisoned as irrelevant?

Contract is not formed until all essential terms are agreed on (Bawitko ONCA 1991)

INDEFINITENESS / VAGUENESS

- Court will look at surrounding words, actions and circumstances in determining if there was **intention** to create legal relations. Reasonable meaning of words considered. Objective test is used (R v. CAE Can FC 1986)
  1. Was there intention to create a K? (to help decide whether to try to save K)
  2. Is there uncertain language?
  3. Is the uncertain language too loose to enforce?

INCOMPLETENESS

- Agreements to agree are not contracts. Price is an essential element of K. An agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is not a contract at all (May & Butcher HL 1934)
- Definite agreements on price may not be necessary for contract to be enforceable, if it has been operating successfully without them for a time (Foley Eng 1934)
- SO: Agreements to agree are generally not enforceable (May) but can be if a formula and machinery for fixing uncertainty is provided (Foley)
- If there is a mechanism for making determination with respect to questionable term, the court will work to find the term. If courts decide the parties believed they had a K – they will work to enforce it (especially in commercial transactions) (Hillas HL 1932)
- SGA only applies when parties are silent on price, not when they simply don't agree on a price (May & Butcher HL 1934))

AGREEMENTS TO NEGOTIATE, GOOD FAITH, LETTERS OF INTENT

- In common law, "good faith" is not a legal obligation (in civil law, it is). Whether it is enforced depends on fine distinctions between cases (*ex. long term relationship, evidence of intent, presence of formula/ mechanism*) – courts reluctant to enforce it
- Agreements to negotiate price are not binding (*landlord was not compelled to renew tenancy*) but it is an implied obligation to negotiate in good faith and not withhold agreement unreasonably (Empress Towers BCCA 1991) – *very fact-specific case though*
- A bare agreement to negotiate in good faith is not sufficient to enforce a contract – "good faith" is not legally binding. If the contract specified clear, objective mechanisms for parties to follow, then the process could be enforceable (Wellington NZCA 2002)
- Agreements to negotiate do not imply a duty to negotiate in good faith if there is no objective benchmark towards which duty of good faith could be interpreted (Mannpar BCSC 1997)
- Agreement to agree cannot be binding if the essential terms are not agreed upon (Bawitko ONCA 1991)

Sale of Goods Act (BC) s. 12 ascertainment of price (*if price not set, buyer must pay reasonable price*) s. 13 agreement to sell at valuation

INTENTION TO CREATE LEGAL OBLIGATION

Shows intention of parties to have a legally binding agreement.
Issues: Is there policy reason to not/allow intention to create legal relations in given context?

- Agreements between spouses/family presumed to not have been intended to create legal relations unless there is clear intention (Balfour Eng 1919)
- Agreements between commercial actors presumed to have been intended to create legal relations but this can be rebutted by clear intention (Rose & Frank Eng 1923)
- Courts not willing to enforce something not intended to be legally enforceable – consider all factors: intent, certainty, consideration, sophistication of parties (TD Bank ONCA 1999)

CONSIDERATION

May consist either 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 (Currie v. Misan)

NATURE OF CONSIDERATION

- A consideration of some legal and economical value is required (unless contract is formally made under seal, ex. a deed) (Thomas Eng 1842)
- Must be sufficient but not necessarily adequate (must have some economic value, but doesn't need to be the realistic price for the promise it buys) (Thomas Eng 1842) (the law doesn't care about balancing economic interests)
- Must move from the promisee – can be a benefit given to promisor or detriment to promisee (doesn't necessarily have to go to the promisor) (Dalhousie SCC 1934)
- Must be "fresh" – may be executory (future promise) or executed at time of contract (present act or forbearance) but must not be in the past (some exceptions to this)
- If there is evidence of duress, fraud or undue influence, there is not good consideration

PAST CONSIDERATION

- Past consideration is not valid consideration for a promise made today. Moral obligation is a voluntary promise without consideration (Eastwood Eng 1840)
- Past consideration may be valid if (1) act is done at promisor's request (2) parties understood that act would be remunerated by payment/benefit (3) the payment/benefit would have been legally enforceable if made in advance (Lampleigh Eng 1615)

FORBEARANCE

- Forbearance to sue is good consideration, and monies paid for a promise not to sue is a valid and enforceable legal K. But if the party threatening to sue knew that they had no legal right to do so, then the consideration is void (B(DC) MNCA 1996)

ADJUSTMENTS OF EXISTING OBLIGATIONS

DUTY OWED TO A THIRD PARTY

- A promise to perform or performance of a pre-existing duty to a third party can be valid consideration as long as the promise has not been fulfilled (Pao On Eng 1980)

DUTY OWED TO THE PROMISOR

- Pre-existing contractual obligation is not sufficient consideration for new terms to a contract. A unilateral promise to increase price is unenforceable because there is no clear agreement to rescind the existing contract (Gilbert Steel ONCA 1976)
- Pre-existing contractual obligation can serve as consideration if the promise to fulfill the pre-existing obligation confers a "practical benefit" on the promisee (provided there is no economic duress) (Williams Eng 1990) – confirmed in Canada in NAV Canada NBCA 2008
  - 6 elements: (1)A has entered into contract with B (2) Before A has completely performed, B has reason to doubt that A will complete performance (3) B thereupon promises A additional payment in order to ensure performance in time (4) As a result of giving his promise, B obtains a practical benefit *(Ex. actual performance of continued work, avoidance of penalty of contract with 3rd party, avoidance of additional expense of finding others to do the work)* (5) B's promise is not given as a result of economic duress or fraud on part of A (6) The benefit to B is consideration
- Post-contractual modification, unsupported by consideration may be enforceable if no economic duress. "Commercial reality needs to be recognized/considered – parties frequently vary/modify contractual obligations, law has to protect their legitimate expectations that they will be regarded as enforceable (NAV Canada NBCA 2008)

PROMISES TO ACCEPT LESS

- Promise to pay less than total amount of debt is not valid consideration (Foakes HL 1884)
- Law and Equity Act 1996 s. 43: part performance can extinguish an obligation

WAIVER AND PROMISSORY ESTOPPEL

Promissory estoppel renders gratuitous promise enforceable (High Trees HL 1947)

1. There must be a clear promise or representation made by words/conduct, establishing intent to be bound by what was said
2. There must be reliance on the statement/conduct (by party raising estoppel against whom estoppel is raised) – not necessary to show detriment, only inequity
3. It would be inequitable and unconscionable for promisor to go back on promise
4. There must be an existing relationship between parties at time the promise on which estoppel is founded was made (M(N) BCCA 2003)
5. Shield, not a sword – estoppel cannot stand alone as a claim (Combe Eng 1951)

- Habitual non-enforcement does not give rise to promissory estoppel – waiving rights in the past ≠ waiving rights in the future (John Burrows SCC 1968)
- Promissory estoppel does not operate if promisee is found to have acted unfairly – it must be fair to enforce the promise (D&C Builders Eng 1966)
- Promissory estoppel is a shield, not a sword – i.e. it can't be a cause of action (Combe)
  - Controversial recognition by the court of use of promissory estoppel as a sword (Walton Stores Aus 1988)
- Estoppel only applies to cases where parties are engaged in legal relations – if there is no intention for promise to be binding and no unconscionable behaviour, then promise will not be enforced (M(N) BCCA 2003)

- **Waiver –** must have: (1) full knowledge of the rights, and (2) an unequivocal and conscious intention to abandon them
  - Can retract the waiver and revive waived rights if not inequitable and give reasonable notice (John Burrows SCC 1968)

PRIVITY OF CONTRACT

- A third party can generally neither sue nor be sued on a K, even if K was intended to operate for his benefit. Love/affection are not sufficient consideration. Consideration must move from the party entitled to sue upon the K (Tweddle Eng 1861)
- Only parties to a contract can sue on it. Even if contract provides a third party with enforceable rights, there must be consideration (confirms Tweddle) (Dunlop HL 1915)
- A third party who has a legitimate interest in enforcing the contract may do so in the name of the contracting party (acting as agent) (*wife could sue for husband under her role as executor of his estate*) (Beswick Eng 1966)
- Third party beneficiaries can be covered by liability clauses in a contract if they are employees of one party (will look to intention) 3 conditions: (1) clause expressly or impliedly extends to employees (2) employee is acting in course of employment (3) employees performing contract services at the time of loss (London Drugs SCC 1992)
- The London Drugs exception can apply to other scenarios (Fraser River SCC 1999)

FORMALITY

Sometimes required by statute. Useful for evidentiary purposes.
Issues: is the written record complete?

Statute of Frauds
Electronic Transactions Act (BC) s. 5 requirement for a record to be in writing s. 11 signatures
Law and Equity Act (BC) s. 59 contracts for land must be in writing and signed / a guarantee is no enforceable unless it is in writing

- Courts have gone a long way in finding a memorandum in writing sufficient to satisfy the *Statute of Frauds*. Court will try to construct the contract by referring to the conduct of the parties and making reasonable adjustments. But the description of an object must be precise enough to identify it (Dynamic Transportation SCC 1978)

CONTENT OF THE CONTRACT

MISREPRESENTATION AND RESCISSION

Mere puff: no legal consequences (no reasonable person would act in reliance on it)
Innocent misrepresentation: misstatement of fact where the intent is to induce, but no active deception took place – effect: rescission only (equitable remedy) (Redgrave Eng 1881)
Must show that:
- Misrepresentation was material
- Statement was made to induce
- Statement did in fact induce P to enter into K

Fraudulent misrepresentation: statement was made knowing it was false, without believing it to be true, or acting in a reckless manner as to whether the statement was true or false. The intent is to induce and deceive (Derry) – effect: rescission (K) and/or damages (tort)
Negligent misrepresentation: a party having a duty of care makes a false statement (Hedley Byrne Eng 1963). Some sort of special relationship between the representor and representee is needed to be able to make a claim in tort – effect: rescission (K) and/or damages (tort)
Collateral warranty: if misrepresentation was made prior to contract – effect: damages

Test for determining which category a misrepresentation falls under:
1. Starting point – intention of the statement maker
   - Look at objective points of reference (words, conduct)
   - Generally, one can't make misrepresentation by silence – must be active
2. Courts will look at importance of the statement for the recipient of statement
3. Special knowledge of the statement-maker on the subject matter of the contract

- **Must be a statement of fact** – not opinion, or future
  - When both parties are **not equally aware** of certain facts, then a statement of opinion by the one who knows the facts, or is in a position where he would know them, may be implied as a statement of fact (Smith Eng 1884)
  - If one party holds themselves out as an **expert**, then a statement of opinion may be implied as a statement of fact (Esso Eng 1976)
- There can be **concurrent liability** in contract and tort. Misrepresentation may constitute both negligence misrepresentation (torts) and collateral warranty (contracts) (Sodd ONCA 1977, BG Checo SCC 1993)

RESCISSION

- Where there has been fraudulent misrepresentation but rescission is not possible because the party cannot be restored to pre-contractual condition, the court may award compensation to restore plaintiff to pre-contract position based on market value (Kupchak BCCA 1965, *court awarded part rescission and part compensation in lieu of rescission because property in question had been torn down*)
- Rescission for innocent representation is not available if the contract has been executed (Redican SCC 1924)

- **Doctrine of laches** – a delay or lapse in time, during which the representer is put in a position where it would be unreasonable to seek a rescission (Kupchak)
- **Affirmation** – the party seeking rescission has elected to adhere to the contract (proof by words, conduct, etc.) (Leaf Eng 1950 i*f you don't reject within a reasonable time, you are deemed to have accepted the goods and have lost a claim to rescission*)

- **Termination** is the right of a party, when contract is breached, to terminate contractual obligations – not seeking to undo contract, seeking damages to enforce contract
- **Rescission** is the right of an innocent party who has been induced into a contract by misrepresentation to seek by the court to undo the contract

REPRESENTATION AND TERMS

The test for whether a statement is a **term** or a mere representation is intention – a **term** in a K is a statement made where the party intended the statement to be an absolute guarantee. In order to be a collateral warranty, the parties must have intended to include it in the K. Test is objective standard (words, conduct, surrounding circumstances) (Heilbut HL 1913, *the rubber company that wasn't*)

PAROL EVIDENCE RULE

Parol evidence rule – when parties to a K have set down terms of a K in a written document, outside evidence is inadmissible to modify/vary the contract

- Parol evidence in a collateral agreement is admissible as long as it is not inconsistent with the written terms of the K (Harwish SCC 1969)
- Any collateral oral agreement cannot stand in the fact of the written terms of the K (Bauer)
- Modern approach to the parol evidence rule (Gallen BCCA 1984): the rule is not absolute – establishes a presumption that can be rebutted:
  - Strongest presumption when: Oral representation contradicts written document. Parties negotiated a document.
  - Weak presumption when: Standard form used. There is a contradiction between general exclusion/ exemption clause and specific oral representation. Oral representation adds to, subtracts from, or varies written agreement

Business Practices and Consumer Protection Act (BC) s. 187 admissibility of parol evidence

CLASSIFICATION OF TERMS

Test for deciding whether something is a term – **intention.** Consider: Words, conduct, behaviour (intelligent bystander standard). Skill and knowledge of maker of statement can be taken into account (person with special access to information more readily thought to have guaranteed its accuracy). The more important a particular statement is to a particular contractual aim, the more likely it is that it is a term.

- **Conditions:** more important terms – if breached, can terminate and seek damages
- **Warranties:** less important terms – if breached, can't terminated but can seek damages
- **Innominate term:** for some terms, one has to wait until actual breach to determine if consequences are so serious that the innocent party should be able to terminate the contract. Once a breach occurs, court will decide how serious the consequences of the breach were. If serious – can terminate, if not serious – can't terminate. Court will ask: Was the party deprived of the whole benefit of the contract? Does this breach go to the root of the contract? (Hong Kong Eng 1962)

DISCHARGE BY PERFORMANCE OR BREACH

- An obligation must be substantially performed to be complete (Fairbanks SCC 1953)
- If the innocent party takes the benefit of the work done, he may be liable for the value of the work that's been done through **quantum meriut** (*reasonable compensation for the value of the work that's been done*) (Sumpter Eng 1898)
- If a deposit is actually shown to be a part payment of the price, the buyer does not forfeit the payment. The seller must return it if he terminates the contract, subject to his right to damages for the buyer's breach (Stevenson ONCA 1961)

STANDARD FORM CONTRACTS & EXCLUSION/LOL CLAUSES

- Terms can be implied into a contract based on custom or usage, business efficiency or presumed intention (or terms implied by law) (Machtinger SCC 1992)

UNSIGNED AGREEMENTS

Step 1. Incorporation of terms in the K:

- Incorporation of term can help courts to determine whether the surprised party actually had knowledge of the clause and understood it (unsigned contracts)
- How were the terms incorporated? How did they appear? Where were they? Were they easy to find? What font was used?
- Was the term that would exclude liability presented to injured party before, at the time, or after ticket had already been issued and K concluded?

- A limitation of liability clause is only binding if the customer had reasonable notice of the clause before entering into the agreement (Thornton Eng 1971)
- A person cannot be bound by limitation of liability clauses unless they saw or knew of their existence (Parker Eng 1877)
- A statement can be imported into a contract if previous dealings show that a party knew or agreed to the term in previous dealings (McCutcheon HL 1964)

SIGNED AGREEMENTS

Step 2. Interpretation of content of the K:

- How severe is the limitation of liability? If you are removing liability for just about everything, you better make sure the other party knows about it.
- When you have a term that has such an onerous limitation of liability, the one who wants to rely on it has to bring other party's attention to it (Tilden ONCA 1978, *unless reasonable measures are taken to draw party's attention to terms in a standard form document, terms are not enforceable*) – it must be reasonable to believe they consented to the terms
- Formatting and labeling of the release form can render it suspect (Delaney BC 1983)
- Previous dealings and signings of the form will undermine P's claim that they were not aware of the exclusion clause (Schuster BCSC 1988, *experienced skiier signed, had plenty of time to read lol*)
- Karoll BCSC 1988: *experienced skiier, lol was in big capital letters*

Step 3. Adjudication related to their validity:

- Even if the term is properly incorporated and it is clear, it could still be void due to invalidity – contrary to statute, unconscionability

E-CONTRACTS

- You want to tell us that the word cancelled doesn't actually mean cancelled, but it means phone and check? (Zhu BC 2002, *Zhu was entitled to treat notation received on screen as confirmation that his cancellation had been completed – its not appropriate that someone using a computer facility should have to telephone to confirm activities conducted*)
- Higher duty of care because you are not providing ordinary services, it is a very specific activity and you are inviting people to use the computer to get a prompt transaction but then you're balancing out the risk for that transaction in such a way that you are not taking any responsibility

EVALUATING THE APPLICATION OF LOL CLAUSES

- The doctrine of fundamental breach has been "laid to rest" in Canada, but there is an established test to determine if an exclusion or limitation clause applies (Tercon SCC 2010)(1) evaluate lol clause in the factual context – does the clause apply to the circumstances? (2) evaluate whether lol clause was unconscionable at time of incorporation, thus invalid (3) evaluate whether the lol clause should not be enforced on policy grounds

EXCUSES FOR NON-PERFORMANCE OF CONTRACT

PROTECTION OF WEAKER PARTIES

These doctrines rests on presumption that one party has taken advantage of their position of superiority over another party – usually award rescission (equity)

DURESS

Focuses on the conduct in the process of agreement – one of the parties has used physical or economic compulsion/persuasion/threat during the process of a transaction to get other party to enter into K – leaves no practical alternative (rooted in CL) // weaker party usually aware of the pressure // contract becomes **voidable – rescission**

- Economic duress is a valid cause of action in equity. Pressure must be such that the victim entered K against there will (no consent) (Pao On Eng PC 1980) – **Factors:**
  1. Did the party protest?
  2. Did he have an alternative course open to him (ex. adequate legal remedy)
  3. Did he have independent advice? (importance is helping party figure out if there is an alternative)
  4. After entering K, did he take timely and reasonable steps to avoid K

- Don't necessarily need to show all 4 steps – flexible (Nav Canada NBCA 2008) – **Test:**
  1. Promise must be extracted as a result of the exercise of pressure, whether characterized as a demand or a threat
  2. The exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer's demand

Until Nav Canada, Canadian courts followed the approach from Pao On, however Nav Canada suggests that it is not necessary to show all 4 factors – see 2 part test above (no SCC decision)

The line between actionable economic duress and acceptable hard bargaining is thin!

UNDUE INFLUENCE

Focuses on relationships of parties in a K – innocent party has put their trust into someone within the context of a particular relationship who has induced them into a K they otherwise would not have entered into (rooted in equity) // falls short of duress – unfair use of persuasion // weaker party usually not aware that other side has advantage // contract becomes **voidable – rescission**

- Evolved around presumption that certain relationships create risk to undue influence
- If pre-recognized relationship is present and transaction is questionable, undue influence will be inferred unless evidence to contrary is provided
- If no pre-recognized relationship, must prove that actual undue influence was exercised

Test: (Geffen SCC 1991)

1. Whether there is potential for domination in nature of relationship itself
   - Trustee/beneficiary, solicitor/client, doctor/patient, parent/child, guardian/ward, future husband/fiancee) // husband/wife, employer/yee do not always raise presumption – only if one party rested trust and confidence in the other
2. Nature of the transaction: (a) commercial – P must show K worked unfairness (either P was unduly disadvantaged or D was unduly benefited by it (mere fact that P seems to be giving more than he is getting is insufficient – freedom of contract) (b) gifts/bequests (no consideration) – concern: such acts of beneficence must not be tainted – enough to establish presence of dominant relationship (requirement of manifest disadvantage makes so sense)
3. Onus moves to D to rebut

- If a third party has notice of undue influence, they must take reasonable steps to ensure that party to K is aware of risks of transaction (Etridge Eng 2001)

UNCONSCIONABILITY

Focuses on the reasonableness of the transaction itself (rooted in equity) // looking at immoral or inequitable bargains – abuse of superior bargaining position // contract becomes **voidable – rescission**

- Undue influence attacks sufficiency of consent / unconscionable bargain invokes relief against unfair advantage gained by an unconscientious use of power by a stronger party against weaker party (Morrison BCCA 1965)

Test: (Morrison BCCA 1965)

1. **Procedural element**: inequality of bargaining powers (and abuse of power) is such that one party suffers from severe inability to engage in effective bargaining
2. **Substantive element:** fairness and reasonableness of transaction – person enters into a K under oppressive terms and grossly inadequate considerations

- These requirements are cumulative – both elements have to be met and there has to be some causality (Marshall ABSC 1968)
- It is not necessary to show that the party who gets the benefit was aware of the other side's weakness – equity: the point is to protect the weaker party not punish the bad guy(Marshall ABSC 1968)

Test: (Harry BCCA 1978)

- Single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded.

In Harry, one judge established new test, one judge followed Morrison test, third judge agreed with both. Both tests address the problem of one party abusing their superior bargaining position. Both are valid approaches.

Business Practices and Consumer Protection Act (BC) ss. 5–10: statutory unconscionability – expand the range of remedies that are available for courts in cases of unconscionability governed by statute – but only applies to consumer transactions

ILLEGALITY

The law is usually reluctant to interfere too much with what parties can and cannot agree to.

Statutory illegality:

Traditional approach: automatically rendered contract void/unenforceable if: (1) formation of contract was illegal (type of conduct) or (2) performing the contract is illegal (purpose)

- Was there intent to break the law at time K was entered into or being performed? Yes on both sides = not enforceable. Yes on one side = that party unable to enforce K

Modern approach: does not so readily deem a K illegal and therefore void or unenforceable

- Consideration of what statutory purpose is and whether making a given K illegal, considering all surrounding circumstances of K, will further objects of statute
- **Policy reasons:** contract could be declared illegal but relief still granted (Still FCA 1997, *contract was illegal but allowing an exceptional relief would not be contrary to public policy, wouldn't jeopardize general purpose of statute since P acted in good faith*)

Common law illegality: Restraint of trade

- Must balance society's interests in competition and availability of talents with principle that parties should be free to contract to protect their own interests (JG Collins SCC 1978)
- *Restrictive covenants generally are restraints of trade and contrary to public policy. But freedom to contract requires an exception for reasonable restrictive covenants. Reasonableness of a covenant will be determined by its geographic and temporal scope as well as the extent of the activity sought to be prohibited (KRG Insurance SCC 2009)*
- Reasonableness cannot be determined if a covenant is ambiguous w.r.t. activity, time or geography – prima facie unreasonable an unenforceable (KRG Insurance SCC 2009)
- Restrictive covenants in employment contracts are scrutinized more rigorously than restrictive covenants in a sale of a business because there is often an imbalance in power

REMEDIES

DAMAGES

Interest to be compensated determines the measure of damages payable:

Expectation interest: compensation for lost profit or cost of substitute performance – compensation necessary to put P into position he would have been if K performed
Reliance interest: compensation for expenditures made towards performance of K – compensation necessary to put P into position he would have been in before K

- Must prove: (1) expenses (2) expenses were made in reliance of promise (3) expenditures were wasted because of breach (McRae Aus 1951)
- Expenses must be made to perform the K. If the loss is not due to the breach, P gets nada (Bowlay BCCA 1982)
- Loss in anticipation of a K not usually recognized (some exceptions)
- *Note: when P claims reliance interest, D will argue that the K wasn't profitable and that the money they spent in anticipation of the K would be wasted* (Sunshine Villa BCCA 1984, D argued that K would not have been profitable but couldn't prove it)

Restitution: restoration to P of a benefit conferred on D to which D is not entitled (unjust enrichment) – purpose is not to compensate P but to deprive D of benefit (equity)

- In rare cases, courts will award restitution damages to deprive D of unfair profits (AG v. Blake Eng HL 2001)

Claims can be combined but both reliance and expectation damages cannot be awarded if it will overcompensate (Sunshine Villa BCCA 1984)

- Damages (non-delivery) = [market price *paid for substitute*] – [contract price]
- Damages (defective delivery) = [market value of what was supposed to be delivered] – [market value of what was actually delivered] (Sale of Goods Act)

QUANTIFICATION

- If there is a breach of K, P has a right to damages even if they are impossible to calculate (Chaplin Eng 1911, *D's breach prevented P from being in final stage of beauty contest, 12 finalists/50 would get reward. Court awarded damages for loss of chance = 25% of winning*)

When K not performed to satisfactory level, can award damages in two ways:

1. Cost of getting the work done that was not done by D
2. Difference in value of what was performed and what should have been performed

- Consider: what was the main point of the K? Agreement to have work done (#2) or agreement with a particular value at the end(#1)
- Courts tend to choose lesser amount (#2) (Groves US 1939, Ruxley Eng 1996) but #1 may be reasonable I a situation where the K breaker entirely failed to achieve objective of contract (*I wanted a 7' pool because Shaq is coming over*)

NON-PECUNIARY LOSSES

- In proper case (ex. K for a holiday or any K to provide entertainment and enjoyment) damages for mental distress can be recovered in contract (Jarvis Eng 1973, Denning)
- Not generally accepted in commercial transactions because usually not within reasonable contemplation of parties (fails remoteness test from Hadley) – unless P can satisfy court that the object of the K was to secure psychological benefit so mental distress upon breach would be within reasonable contemplation of parties – doesn't need to be the very essence of K, just "a part" of the bargain (Fidler SCC 2006)

MITIGATION

- P is required to act reasonably to **mitigate** effects of breached contract– extent of compensation may be limited if P does not mitigate – evidentiary burden is on D (Nu-West Homes ABCA 1975, Asamera SCC 1979)

TIME OF MEASUREMENT OF DAMAGES

- General rule: damages assessed at date of breach (Johnson)
- Damages in lieu of specific performance – calculated at time of judgment, esp when dealing with interest in land (*practically: assessed at date of trial, since date of judgment unknown*)

CAUSATION AND REMOTENESS

Loss must be direct cause of breach. If loss is not due to breach, P gets nada (Bowlay BCCA)

Test for remoteness: (Hadley v. Baxendale Eng 1854)

(1) Damages should be such as may fairly and reasonably be considered either arising naturally from such a breach (according to usual course of things) or

(2) Such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the K as the probably result of a breach

- The two branches of the test differ in the type of knowledge D must have had: (Victoria Laundry Eng 1949)
  (1) Imputed knowledge – objective standard – reasonable person is taken to know the ordinary course of things
  (2) Actual knowledge – subjective standard – K-breaker is **assumed** to possess knowledge of special circumstances outside ordinary course of things
- Remoteness in contract ≠ remoteness in torts. **Tort** imposes wide liability based on standard of reasonable foreseeableness. **Contract** question is whether, on info available to D when K was made, he should, or a reasonable person in his position would, have realized that such loss was **sufficiently likely** to result from breach(Koufos Eng 1969)

AGGRAVATED AND PUNITIVE DAMAGES

Aggravated damages: a type of compensation for intangible injuries (even in cases where K is not providing peace of mind as in Jarvis)

- Test: independently actionable wrong (Vorvis SCC 1989)

Punitive damages: a punishment for misconduct for purposes of retribution, deterrence and denunciation – applicable where there is a gross and marked departure from decency and morality – must be harsh, vindictive, malicious, reprehensible (Whiten SCC 2002)

- Test: independently actionable wrong (breach of implied term to act in good faith (Vorvis SCC 1989, Whiten SCC 2002: *$1 mil against insurer who breached implied contractual duty to handle claims with standard of good faith and fair dealing*)

Wallace damages: If someone is fired in demeaning way, notice period is longer, therefore, there has to be more compensation (avoids aggravated damages by extending number of weeks for compensation rather than dealing with mental distress) (Wallace SCC 1997)

LIQUIDATED DAMAGES, DEPOSITS, FORFEITURE

- **Liquidated damages:** genuine pre-assessment of losses made by parties at time of K providing a fixed amount/formula to calculate damages in event of breach
- **Penalties:** stipulated sum that is not a genuine pre-estimate of the loss suffered in the event of breach, but designed to be a threat to compel other party to perform K
- Courts only enforce liquidated damages – will look to reasonableness and conscionability of the clause in the context of the agreement as a whole
- **A fixed sum damage is presumed to be punitive**, unless there is an explicit agreement that it is liquidated damages, and the sum is not grossly proportionate (Shatilla SK 1923)
- Liquidated damages amount has to be reflective of actual loss suffered (HF Clarke SCC 76)
- Courts will not interfere with a liquidated damages clause if the amount that it calls for is too small (JG Collins SCC 1978)
- If the pre-estimate of damages is commercially reasonable, it does not have to reflect the actual amount of damages suffered (Coal Harbour Properties BCCA 2006)
- **Forfeiture clause:** deposit will be forfeited on breach – unconscionable for party to retain deposit (don't care if it was a genuine pre-estimate

EQUITABLE REMEDIES

- Specific performance: P must prove subject matter of K is unique (Semelhago SCC 1996)
- Even in context of land transfers, must show something special about land that would be irredeemable with damages – quality must relate to proposed use of land and make it particularly suitable for the purpose for which it was intended (John E Dodge ONCA 2003)
- Injunctions only given when there is an irreparable harm that cannot be cured by monetary damages (Zipper Transportation MNCA 1998)
- Injunction not to do something easier than injunction to do something (WB Eng 1937)

Is there a contract?

Yes: *It is clear on the facts that there was an initial agreement between A and B. The agreement was for A to do this and B to do that. Neither party contests the formation of this agreement. There was a clear offer and acceptance, the terms were clear and unambiguous and the parties intended to create legal obligation. Consideration is not an issue since there was an exchange of promises.*

No:

Offer
- Invitation to treat p. 1
- Invitation for tender p. 1
- Offer terminated p. 2

Acceptance
- Postal rule p. 3
- Unilateral K p. 2

Certainty of terms
- Ambiguity, vagueness? p. 4

Intention
- Business: presumed yes
  - Can rebut: clear intention p. 4
- Family/social: presumed no
  - Can rebut: nature of relationship, other circumstances, detrimental reliance p. 4

Consideration
- Past consideration p. 5
- Promissory estoppel p. 6

Privity p. 6

Formality p. 6

Was there some performance?
- Substantial performance = quantum meriut p. 8
  The K between the parties was not one for sale of goods but for work to be done and materials supplied. The construction was incomplete. What remained to be done required skill and knowledge. On this evidence, it cannot be said that there was substantial completion of the contract.

Was there a breach?
- What was breached? (classification of terms) p. 8
  - Condition = terminate + damages
  - Warranty = tough luck
  - Innominate term:
    - Serious consequences = terminate + damages
    - Not so serious = tough luck
- Was there an exclusion/limitation of liability clause? (standard form) p. 9
  - Incorporation of terms in the K (unsigned documents)
  - Interpretation of content in K (and application to facts)
  - Adjudication related to validity (unconscionability)
  - Policy

Does plaintiff regret the K?
- **Misrepresentation?** p. 7
  - Innocent misrepresentation = rescission
  - Fraudulent misrepresentation = rescission (contract)/damages (tort)
  - Negligent misrepresentation = rescission (contract)/damages (tort)
- Was the statement a term or a representation? – intention p. 8
  - Term = rescission
  - Collateral warranty = damages
- *parol evidence rule* p. 8

- **Duress**
  - Fcus on conduct – p. 11
    There was commercial pressure to contract but this is normal business practice and experienced commercial parties should be able to handle it; there was no fraud, coercion or undue duress so as to vitiate consent.
- **Undue influence**
  - Focus on relationship – p. 11
- **Unconscionability**
  - Focus on reasonableness of transaction itself – p. 12
- **Illegality**
  - Statutory/common law (restraints on trade)
    Restrictive covenants generally are restraints of trade and contrary to public policy. But freedom to contract requires an exception for reasonable restrictive covenants. Reasonableness of a covenant will be determined by its geographic and temporal scope as well as the extent of the activity sought to be prohibited (KRG Insurance SCC 2009)

Was there a subsequent change to the agreement? p. 5

- Duty owed to third party
- Duty owed to promisor
- Promise to accept less

What remedies are available?

- Was there a liquidated damages clause?
  - Punitive
  - Liquidated damages
  - Deposit forfeiture? p. 8

- Rescission (misrepresentation)
- Termination (breach of condition)

- Damages
  - Expectation
  - Reliance
  - Restitution
  - Non-pecuniary (mental distress)
  - Aggravated
  - Punitive
  - *mitigation*

- Injunction
- Specific performance