- **Privity:** Third party to K can't enforce its obligations b/c they haven't contributed consideration for its promises (***Tweddle***); Principal not named in K can sue if promisee was contracted as principal's agent and they gave consideration thru agent (***Dunlop***)
    - if K made for benefit of 3rd party w/ legitimate right to enforce it, they can enforce it in name of contracting party or themselves *(**Beswick** (CA))*
    - Naming someone as beneficiary in K doesn't= party to K w/ right to sue.***Beswick*** *(HL)*
  - Exceptions to privity:
    - ***London Drugs****:* Exception in employment context- court creates exception to privity allowing them to use that exemption from liability because it was intended for their use`
    - ***Fraser River****:* Affirms London Drugs principle outside of employment context.
- **Intention to create legal relations:**objective test- would a reasonable person think that there was an intention to make a legally binding contract? (***Balfour***)
    - assumed that parties in business relationships intend to be bound (***Rose&Frank****)*
- **Offer:**
  - Invitation to treat: K requires offer and acceptance, price quote generally ITT not offer (***Dyers***);
    - : Ad can be an offer if specifies terms of offer and how to accept. (2) Offeror can waive requirement of notice of acceptance.(***Carbolic***)
  - Communication of offer: Motive in accepting offer doesn't matter, only aware of offer and fulfilled conditions to accept (***Williams***); Knowledge of offer and intent to accept are required at time of acceptance (***Clarke***)
- **Acceptance:**
    - Counter-offer kills original offer; tho mere inquiry about offer doesn't kill it***(Livingston***.)
  - Communication of acceptance:
    - Silence can't constitute acceptance if offeree did nothing to accept offer. Tho offeror can waive notice of acceptance, can't do so if it burdens offeree(***Felthouse*****)**
    - *Household Fire:* PO acceptance rule- if you use post office to send offer you treat it as an agent- when acceptance given to PO contract is complete and binding, unless offeror made condition that he actually receive.
    - *Holwell*: PO rule won't apply to bind parties if (A) offer expressly requires acceptance reach offeror, or (B)if application produces clear absurdities or inconveniences.
- **Termination of offer**
  - Revocation:Revocation has no legal significance until communicated to offeree- no PO (***Byrne***)
    - Revocation must be communicated before acceptance to the offeree, though if offeree knows of revocation, no remedy.
      - Offeree not legally bound by a promise to keep an offer open unless there is consideration for that promise. (***Dickensen***)
  - Unilateral Ks: Offeror in unilateral contract can usually revoke offer, but sometimes not if offeree has begun steps to accept- as then it might harm them (***Carbolic***)
    - Once offeree has begun taking steps required to accept, unilateral contract cannot be revoked and is binding, unless offerees fail to complete the steps.(***Errington***)
  - Rejection + counter-offer:: Counter-offer rejects and 'kills' original offer, but offeror (and only) can revive original offer.(***Livingston)***
  - Lapse of time: if offer doesn't specify how long it will remain open, it remains open for a reasonable amount of time, according to the circumstances(***Clarke*****)**
- **Certainty of term:** No K if crucial term undetermined. K clause can't apply to fix terms if no K(***Butcher****)*
  - Business contracts often leave out certain things or are imprecise; courts should try to give effect to intention if its clear enough, particularly in future performance contracts (***Hillas)***
  - If clear intent to form K, court will try to fill missing terms (including price) to uphold K.(***Foley***)

- *Empress Towers:* Court willing to imply terms to ensure clauses clearly intended and agreed by both parties to have legal effect, are not struck down due to uncertainty. Requirement to negotiate in good faith allowed as a shield/defence to eviction.
- *Manparr*: No O to negotiate K renewal in good faith-(1) no objective way to assess parties actions against (rental rate in Empress) so its pointless, (2) Not certain that both parties intended clause to be binding b/c of potentially.

- **Consideration**: Mere motive isn't consideration; Consideration= something of value moving from promisee to promissor (***Thomas***)
  - Seals:Formal seal will be sufficient for binding contract even absent consideration, but seal must be formal, be attached by promissor, who must be aware of the legal implications. ***(Royal Bank)***
  - Forbearance to sue:
    - *Callisher*: forbearance to sue is valid consideration provided you honestly believe you have a right to sue sue and would have reasonable chance of success.
  - Past consideration:
    - Past consideration is not valid for in the present ***(Eastwood)***
    - Past consideration may be consideration if one party agrees to give the other party something in exchange for some action. ***(Lampleigh)***
  - Pre-existing legal duty:
    - *Pao On*: Promise to perform or performance of a pre-existing contractual obligation to a third party can be valid consideration, despite pre-existing legal duty,
    - *Gilbert Steel*: consideration for new K can't be something promisee already owes to promissor under pre-existing K, unless promisee offers something different or more as consideration.
    - *GFAA v Nav*: Post-contractual modification, even absent consideration can be enforceable, provided not procured thru economic duress.
    - *Foote*: Negotiable instrument/item of less value than debt can be consideration for agreement to relinquish debt, even if its worth less than debt
    - *Foakes*: Debtor paying part of a debt can't be his consideration for creditor's promise to not demand/expect full amount of debt. Promise to do less in exchange for same promise ≠ consideration. Overruled in BC by s.43 Law and Equity Ac

- **Estoppel**
    - *Central London*: A promise to accept a smaller amount in discharge of a larger, if acted upon, is binding despite the absence of consideration
      - A promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply
    - *John Burrows*: To apply promissory estoppel, there must be actual promise intended to have legal impact. Restricts use of promissory estoppel- explicit promise requires- courts hesitant to apply doctrine to implicit/inferred promises iven the circumstances- would make commercial K very difficult requiring very careful enforcement of all obligations lest it be taken as waiver of K rights.
    - *D&C Builders*: Creditor barred from legal rights only if inequitable to insist on them- no true accord, debtor threatened creidtor into accepting less, debtor can't use promissory estoppel to enforce promise received through duress
    - *Combe*: Promissory estoppel only precludes party from enforcing strict legal rights if it would be unjust to let them do so, given the negotiations b/w parties. Estoppel= shield not sword
    - *MN v AT*: Testing Walton Stores principle in BC- rejected- Promissory estoppel requires promisee to assume a legal relationship- more than just failure to perform voluntary

promise. PE requires (1) P thinks legal relations b/w P and D, or that there would be one that D can't withdraw from freely, and (2) D makes P think that or assume it

- *Walton Stores*: Discards sword and shield restriction for promissory estoppel- creditor barred from asserting rights only if inequitable to insist on them.
    - Promissory estoppel can directly enforce a non-K promise on which promisee has relied to their detriment. Australian case not binding.
    - Must show detrimental reliance, promise or assurance AND that unconscionability would result if promise not enforced

**Purposes of K law: risk allocation, caveat emptor, freedom of K.**

→ K law is a frameowkr to allow people and parties to form agreements with each other about their respective rights and responsibilities and provide remedies when these arrangements fail for whatever reasons

- thus it incorprates a desire to make amends for detrimental reliance- when a party relies on another party's word and suffers because of it, and a means of imposing a measure of predictability and certainty on dealings between parties, allowing people to make plans. (green book)
- though part of what makes it legally binding is that the power of the state, through the courts, may help to enforce the promises or responsibilities that are created within the framework of contract law,
- the complex nest of legal rules that has developed around contract law helps to impose a relative deree of predictability and certainty as to the results of dealings between people, with regards to the highly complex possibilities that arise when parties agree to make corresponding promises wiht respect to their powers, rights and obligations.

**Law of obligations**

→ Basically legal relationships between persons consisting of corresponding obligations and rights

- tort obligations different in that they are imposed by law- needn't be created by parties
- restitutionary obligations- when context between parties is such that one party may need to be compensated for the other party being unjustly enriched, even absent K relationship

**Offer and Acceptance**- though acceptance is vital b/c it creates the K, there needs to be an offer- and this is where the terms are placed.

⇒ Acceptance important because that is when K comes into existence- eg this is when you test consideration, the various beliefs/assumptions/knowledge present may be relevant to mistake, ICLR tested here, damages often tested here

**Role of internet contracts?** rise of increasingly instantaneous contracts makes these traditional issues of formation of K quite problematic- unsettles them

**Consensus ad idem**: generally there must be a meeting of the minds of the two parties entering the K at least up until the point of acceptance, though this isn't as strict at common law as you might suppose

**Certainty of terms issues:** Where does this problem arise- is in the offer? Absence of important part (imply terms)? Or simply ambiguity which might result in failure due to ucnertainty(interpret the contract)

**Exclusion and limitation clauses:** though contracts generally assumes that both parties have a real choice with respect to creating a contract and its contents, law will scrutinize certain forms of contracts more closely

→ when one party has signiicantly more power it may be able to decide what terms will be included in K, and the weaker party, has no real option but entering into the K.

→ often governed by consumer protection statutes but CL rules also impact it

**Mistake: (p197)**

→ Problematic because it interferes with assumption of freedom of K

→ assumed that if you freely make promises you should be held to them- whereas misrep you didn't freely make a promise- it was due to the other party, mistake (and particularly unilateral mistake) seems odd to allow you to be permitted to escape K promises simply due to your own

→ *Mistake and Risk allocation*: 1 of main objectives of K law is to add an element of certainty and predictability when planning for the future- this includes a significant amount of risk allocation- it assumes that each party agrees to bare the risk they have promised to bare under the K- and presumably they have been compensated

for that. To allow them to escape the consequences of promising to account for that risk, which they presumably received consideration for, does not sit easily with risk allocation under K. Thus your own mistake doesn't give you permission to remove your K obligations, if you were mistaken due to your own recklessness.(Mcrae v CDC)
→ *Mistake and caveat emptor*: absent some fiduciary-type relationship b/w parties, generally contracts assumes you aren't responsible for protecting the interest of other parties, unless, as with misrepresentations, your statements mislead the other party about something relating to the K.

**Protecting Weaker Parties:** seems to almost a policy decision
→ Law may decide to step in, if based on the relationship between the parties or the particular circumstances of a party, one party is significantly disadvantaged through a K.
→ Law willing to interfere in a fairly significant manner with freedom of K, caveat emptor, and risk allcoation
→ theoretiicaly most of these doctrinesgo to consenus ad idem- and true consent
→ *numerous doctrines developed to protect weaker parties- why not merge into 1?*

**Inequality of bargaining power-** attempt to merge all these doctrines into a general one
⇒ though rejected in some courts, has played a role in some Canadian decisions- see *Hunter, Tercon*.

**Frustration**- originally absolute liability for any losses even if fault of neither party (*Paradine*)
⇒ eventually, if the very foundation of the K was destroyed, parties could be removed from obligations

**Classical theories of contracts:**
→ law should allow people to maximize their own profit/wealth/desires within framework of contracts
→ stict liability for K

**Reality/regulatory response to this**:
→ effect of inequalities in society and K- sexual, racila discrimination etc
→ Eg. duty to negotiate in good faith
→ law has always recognized some limits on the freedom to K- eg issues of capacity, doctrines to protect weaker parties
→ this can often lead to problems with predictabiltiy

The doctrine of ICLR isn't a particularly necessary legal tool except in circumstances involving significant disparities in power, knowledge, or sophistication. This is in line with the tendency in modern jurisprudence for courts to permit significant variance in the lenience they show when considering freedom of contract, caveat emptor, and other public policy matters, depending on the parties involved in a particular transaction

For the purposes of commercial transactions, courts generally assume that given the sophistication and relative parity between the parties, when these parties deal with each other they are sufficiently capable of making clear when they intend for their agreements or discussions to have legal implications and thus courts needn't interfere in these issues. Generally courts are only needed to consider ICLR involving multiple commercial parties of relatively equal power, etc, when there are disagreements involving the construction of contracts that aren't sufficiently clear whether they are not intended to create legal relations. In such cases courts may need to construe clauses to determine whether the presumption has been rebutted that such parties intended to create legal relations through the agreement, transaction, dealing, etc.

For non-commercial parties of relatively equal power, sophistication, knowledge (eg. w/i the family) courts generally assume that parties don't intend to create legal relations in their dealings with each other. This is partly a matter of practise- such parties deal less commonly with the law and legal interests like complex property transactions and thus you can assume that normally they don't want to create legally binding agreements- and partly a historic hesitancy for courts to involve themselves absent explicit invocation (and particularly in the social sphere).

One large shift in the 2 centuries of law is the willingness of courts to interfere with dealings/transactions between parties, whether commercial or noncommercial- of significantly different power, sophistication, knowledge, etc. Owing to the rise of standard form contracts, modern corporate bodies, and a liberalizing of attitudes about freedom of contract and the role of the judiciary, courts have become far more willing to alter the effects and interfere with contracts when they believe an injustice is being wrought on weaker parties, through legally binding contracts, owing to their relative lack fo knowledge compared to the other contracting parties. (*Morrison)* It would be in line with this trend in judicial attitudes, for courts to reconsider the doctrine of ICLR and possible re-enervate it as a means of protecting the weak from the strong in the context of contracts.

It's possible courts should be more willing to consider, given significant disparities between parties, whether in certain circumstances a weaker party (in terms of wealth, knowledge, legal acumen, etc) can truly consent/assent (?) to creating legal relations with much stronger parties- or at least whether the courts will employ their powers to enforce the results of these relations. To some extent equity fulfills this role, but courts have been more willing- and perhaps should be even more so- to recognize this disparity and its affects on true intent to create legal relations, in more novel contexts.

*Is there a K?* ICLR, offer and acceptance, certainty of terms,

*Are the promises enforceable*? good consideration,

*Who can enforce them*? privity

*How are terms significant*?

- categorizing terms for different purposes
- exclusion and limitation clause issues
- exhausting the K (performance) or terminating the K in response to repudiatory breach.

*Contesting the K*:

- misrep.
- mistake
- duress, UI, uncons~
- illegality
- frustration