**X likely wants [remedy]. To get [remedy], X can rely on [doctrines]. If X wants [remedy] her best chance of obtaining it is through [doctrine]. Argue most likely doctrine…argue less likely**

**Parol Evidence Rule – when there is an oral component (applies w/ varying degrees)**

Since part of the K is written, it is debatable whether the oral promise is an enforceable promise/term in the K. The parol evidence rule states that when parties intend that the written evidence of their K contain the entire K, a court will not accept in evidence terms of that K which are oral and have not been reduce to writing (Gallen). If there is no contradiction, the court should try to interpret harmoniously.

* **Party that wants the rule to apply:** X can argue that in this case the written agreement reached between them was intended to contain the entire K, and therefore oral statement is NOT terms in K.
* **Party that doesn’t want the rule to apply:** Y will argue that it was not clear that the written K was intended to contain **all** of the terms of the K. For example [important stuff that were not included in the K] but Y would want to argue that it was clear that the written agreement was to contain the entire K. it contains all the important terms such as…

In Gallen, it is emphasized that it is a rule of evidence based on the unreasonableness of a situation whereby the same parties would enter into 2 agreement at the same time that would contradict each other. It is not an absolute rule, there may be cases where, particularly in the interests of justice, an oral assurance prevails over a contradictory written promise. The rule simply establishes a presumption that can be rebutted. A) Presumption is strongest when the oral representation is alleged to be contrary to the document, and somewhat less strong when the oral representation only adds to the document. B) The presumption would be more rigorous in a case where the parties had produced an individually negotiated document than it would be where a printed form was used, though it would be a strong presumption in both cases. C) The presumption is also less strong where there is a contradiction between a general exemption clause and a specific oral representation. **Presumption is strong when a) contradiction; b) individually negotiated**

Constraints: does not apply to misrepresentations and where terms are implied in K. it can also be excluded by statute.

**Content of K** **– not useful if you want to get out of K** (good if you want to terminate K) (might be useful to get out of K if time for performance of obligations has not come)

**If all obligations are performed then there is nothing to terminate!**

Another option for P is to argue that there has been a breach of term (condition or intermediate term) in this K. When there is a breach of condition or an intermediate term where breach is serious, party in breach is said to have repudiated the K and the other party gets an election to terminate K or affirm K (K continues to exist). The result of termination is prospective, meaning that anything that occurred before cancellation of K is valid, but all subsequent primary obligations go away. Secondary obligations remain and P will be able to make a claim for damage.

1. **Is it a term or a representation?** 
   1. **Term:** A term is a statement made for which that party intended to give an absolute guarantee. The test for whether a statement is a term or representation is the intention (Hielbut)
      1. **Express or implied terms? P.2** 
         1. Express: Terms that are clearly in the K b/c they are written or explicitly verbalized (court will recognize written terms)
         2. Implied: terms that must be in K by implication (not spoken, but legally there). Terms can be implied in 3 ways (Machtinger):
            1. Custom: there must be evidence that parties would have understood custom to be applicable. Can arise b/c of industry or local practice, or the type of K that it is.
            2. Necessity: implication of terms b/c they are necessary for business efficacy of K NOT based on reasonableness. One should look at the rest of the K, the parties, environment in which they are contracting and their purposes in entering the K. After considering all this, a term can be implied b/c it is necessary to make the rest of the K word.
            3. Operation of law: CL or statute
   2. **Representation:** is something that was said, usually about how something currently exists, that does not make it into the K as a term.
2. **Does P wants termination or rescission?**
   1. **Termination:** P will want to argue that the aspects of the K that D did not complete were terms rather than representations. More specifically, P wants to argue that the terms in the K were: … it is likely that P will be successful in arguing that these are terms as they are contained in the written K. P intended for these to be guaranteed strictly and have legal effect (Hielbut). It is important to note that it cannot be argued that the nature of a statement is both a term and a representation. Term would trump and govern what remedy P can get (Leaf). D probably would want to argue that these were representations rather than terms.
   2. **Rescission:** P will want to argue that these were misrepresentations to eliminate the existence of K. It is important to note that D cannot be liable in damages for an innocent misrepresentation (Hielbut).
3. **How important is a term? Condition? Warranty? Intermediate term?** If these are found to be terms then P will want to argue that they are conditions or intermediate terms with serious consequences rather than warranties (Hong Kong Fir). If there are found to be conditions or intermediate terms w/ serious consequences then their breach will lead to the option of termination and damages. But, if they are found to be warranties, the only remedy available is damages (have to prove harm) unless stipulated otherwise in K.
   1. A **condition** is a statement of fact that forms an essential part of K and a breach will deprive the innocent party of substantially the whole benefit of K. labeling something a condition does not necessarily make it a condition have to look at the surrounding clauses to construe intent (Wickman v Schuler)
   2. an **intermediate term** will be treated as a condition or warranty upon breach depending on the consequences of the actual breach (Hong Kong Fir)
   3. A **warranty** is a term which is not essential to the K and is collateral for the purpose of the K. does not deprive of the substantially the whole benefit of K. an affirmation at the time of sale is a warranty as long as parties intended it to be, or else it is a misrepresentation (Hielbut).

P will argue that these are conditions b/c for a K for … the terms as to … are very important and essential to K. Alternatively, P might argue that these are intermediate terms which had serious consequences…

1. **Are there barriers to termination:**
   1. It is important to note that P must make an election within a reasonable amount of time, or affirm K. D might argue that P has elected to affirm the K. P can be said to have affirmed the K by …
   2. Is there an exclusion of liability clause

**Exclusion of liability clause (if not enough notice, then clause will be unenforceable)**

**(First, show other party knew part of the deal, second, is construction to show meant to apply to current situation)**

1. **Is document signed or unsigned?**
   1. **Signature** alone does not represent an acquiescence in unusual and onerous terms which are inconsistent with the true object of the K. If there are such terms, the party seeking to rely on them must take reasonable measures to draw such terms to the attention of the other party (Tilden). A signed release can be a defence if it can be said that P was misled or had been mistaken as to the nature of what she had signed (Karroll)
      * Some relevant factors in deciding whether the duty to take reasonable steps to advice of an exclusion clause arises are: length and format of K and time available to read and if effect is contrary to what party’s expectations (Karroll).
      * 3 exemptions: 1) non est factum, 2) inducement to agree by fraud or misrepresentation (these two set out in L’Estrange and reiterated in Karroll), 3) where party seeking to enforce document knew or had reason to know of other’s mistake as to terms, then terms should not be enforced (this one comes from Tilden) (Karroll) characterizes the third exception as being “in the spirit” of the other 2 exceptions.
   2. **Unsigned documents**: limitation of liability clause only binding if customer had reasonable **notice** of clause before entering into the agreement. More specifically, signing party must realistically have a choice to decline at the time notice is given (Thornton). However, if it can be shown that by virtue of earlier transactions there must have been knowledge of particular provisions, including exclusion and limitation clauses, then there can be shown to have been inclusion and notice of such terms on later occasions (McCutcheon).
      * In this case, the conditions are not seen until after K is entered. Hence, they are not binding as K has already been agreed to without the conditions (Thornton)
   3. **Fundamental breach:** In Karsales, Denning invented the doctrine of fundamental breach. Fundamental breach is a breach that goes to the root of the K and prevents a party from relying on an exclusion or limitation clause. The House of Lords rejected the doctrine of fundamental breach in Photo Production and held that if an exclusion clause is clear and unambiguous, it will protect the party relying on it from liability. British Parliament had recently passes a statute regarding this matter. The situation is more complicated in Canada since there is no equivalent statute. Thus in Canada, courts will look to see if another equitable doctrine applies. In Hunter, the SCC said that if the K at its creation allowed exclusion to apply, the court must look to subsequent events to see if it continues to be unfair. In Tercon, the SCC ruled that construction will decide the issue. The court set out 3 considerations: 1) did the clause apply to circumstances established in the evidence, 2) if so, was the **application unconscionable** at the time of K creation, 3) if the clause applies and is valid, should the court restrict enforcement based on public policy. The party seeking to avoid enforceability bears the onus. Binnie’s dissent discusses the tension between freedom of K and making bid processes open and transparent. Tercon may or may not be good law.
      * In photo production they rejected fundamental beach and just said that you must rely on construction of K. if exclusion clause is clear & unambiguous, even given reading clause against party wishing to rely on it, will protect party relying on it from liability, even in case of fundamental breach.

**Remedies**

**Have to calculate for each breach**

1. **Damages:** P has to prove breach of K, resultant loss and that loss is not too remote. P probably wants to make a claim for damages based on the breach of the following terms… the main damage that P suffers as a result of these breaches is…//It is possible that P will be required to claim in one area where the claim in the other is difficult to establish or speculative (Sunshine Vacation).
   1. Expectation interest: parties expected each other to follow K obligations. Damages in the expectation interest put the injured party to the state they expected to be in had the K not been breached. Damages compensate no more and no less. A party cannot profit from a breach and end up in a better position than they would have been in if the K had been performed.
      1. Loss of profit: when breach of K prevents the person from carrying on business and making a profit. In McCrae, claim for lost profit was rejected as too speculative.
      2. Goods not delivered (including those delivered and rejected): can assess damages in 2 ways:
         1. Difference between K price and market price
         2. Difference in market value of what was delivered and what ought to have been delivered under K (Defective)
   2. Reliance interest: The reliance interest returns P to an earlier position before expense or losses were incurred. It is useful when establishing expectation would be impossible, as was the case in McCrae (claim for wasted expenses was accepted, but claim for lost profits was rejected). Also, in Sunshine Vacation P was restricted to a claim for expenditures since claim for lost profit was too speculative.
      1. Compensation for wasted expenditure is a reliance interest. P may waste money relying on obligations D failed to perform. It should be noted that money has to be truly wasted (meaning it could not have accrued another way)
      2. The reliance interest undoes the loss P would have avoided if she had not entered the K in the first place. It returns P to an earlier position before the expenses were incurred.
   3. Restitution addresses D’s gain. A restitution remedy requires D to disgorge what he or she wrongfully gained (Blake). Restitution is rarely applied w/ success.
2. **Remoteness:** a claim for damages might fail on the basis of remoteness. Hadley articulates the test for remoteness and sets out the two general categories for damages…in this case P will want to make claims under …for damages P has suffered. P will want to argue that these are not too remote b/c D was make aware of the special circumstances…the question is … D will want to argue that the damages … were too remote. In particular … imply that the consequences would not be so serious if…
   1. General damages: the first part of the test allows for damages arising naturally, that is, damages that any P would suffer, whatever the surrounding circumstances, assuming it would be within the reasonable contemplation of the parties. The more explicit and detailed the terms the greater the number of factors that can be brought into an assessment under the first part of the test.
   2. Special damages: the second branch of the test allows for claims flowing from the special circumstances that need to be known at the time K was entered into to properly assess risk. Knowledge of the circumstances does not need to be specific.// Damages which can reasonably be supposed as those that the parties would have contemplated at the time the K was made as a probable result of the breach.// If these circumstances are in the K, they were clearly w/in the contemplation of the parties. Many of the special circumstances will be known implicitly from what the other patty ought to be aware of. Both parties must be aware of the circumstances at the time of K creation (Victoria Lanudry, Koufos).
      1. The critical question is whether, on the information made available to X when K is made, X or a reasonable man in X’s position, would have realized that such loss was sufficiently likely to result from breach of K to make it proper to hold that loss flowed naturally from the breach or that a loss of that kind should have been within his contemplation (Koufos)
3. **Quantification:** P will likely want to make a claim based on expectation interest or reliance interest. P bears the burden of establishing the right to damages and the quantum of damages. D will want to argue that the damages are too speculative (McCrae). May also argue that damages can’t be assessed w/ certainty. Even if damages cannot be assessed w/ certainty, wrongdoer is not relieved of paying for damages for breach (Chaplin). When there are different figure available for awarding a damage, which damage award P gets depends on characterization of the obligation (Groves)? Damages for mental distress are awarded when K was for a certain mental estate (ex. K for a holiday or any other K to provide entertainment and enjoyment). According to Jarvis, in a proper case, damages for mental distress can be recovered in a K – damages can be given for disappointment, distress, upset and frustration. Mental distress damages are calculated based on the difference between K price and value of received experience (Jarvis)
4. **Mitigation:** P must take all reasonable steps to mitigate as a reasonable person would do in his own interests. If P does not make a reasonable effort to mitigate even where there does not appear to be truly comparable property available, the damages for breach of K will be reduce if not eliminated (i.e. election can be taken away in case of an anticipatory breach where it is clear that the other party might not be able to perform the obligation) (Southcott).
5. **Time of measurement of damages**: Damages at CL are to be calculated at the time of breach. Damages in lieu of specific performance are to be calculated at the time of judgement (Semelhago).

**Are the liquidated damages enforceable? Can claim if there is a termination; can’t claim if there is a rescission**

One issue is whether the provision establishing … counts as a penalty clause. The test is whether the amount is a reasonable pre-estimate of the actual loss resulting from breach (Shatilla). If this is found to be a penalty clause it will be struck down and replace by an actual loss.

**Liquidated damages** are damages that the parties have agreed to in advance, at the time K is entered into, in the event of a breach. If they overcompensate the wronged party, the court deems the clause a penalty and disallows it. It should be noted that the weaker party can ask equity not to enforce penalty clause and that this option is not available to the stronger party. So, if the weaker party is content w/ the provision, even though it is a penalty clause, that party can continue to affirm K and the clause (Collins). [**Stronger party** who wants to get rid of the clause might want to argue that it is a limitation clause put in on the request of party who is going to pay. They’ll have a better chance of winning by claiming being disadvantaged through a limitation clause and not a penalty clause]

* **Payment of lump sum:** As illustrated in Shatilla, a covenant that provides for payment of a lump sum upon occurrence of any one of a number of things differing in importance (some serious and some trivial in character) will be a penalty clause. [pay attention to the $ amount]
* **Formula:** A formula that gives a varying figure depending on the seriousness of consequences of the breach is favorable when clauses can be breached w/ varying degree of severity in terms of consequences. UNLESS, it is clear that whatever figure the formula generates is an excessive amount (Clarke).

**Deposits** relate to both primary and secondary obligations. If a party fails to make a full payment after paying a deposit, then he forfeits the deposit. However, according to Stockloser, equity can intervene if 2 conditions are met: 1) the forfeiture clause must be of a penal nature, in the sense, that the sum forfeited must be out of all proportion to the damage and 2) it must be unconscionable for the seller to retain the money. There are also statutes that confirm an equitable ability of the courts to provide relief from forfeiture (Law & Equity Act). According to s.24 of the Law and Equity Act, the court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

* If there is no forfeiture clause, as long as the seller says buyer can still finish K, buyer can’t get his $ back. If seller rescinds, buyer can get his $ back.

**Money Claims Other than Damages**

Debt is a claim to enforce K promise to pay money. The claimant must show that the other party had an obligation to pay a fixed sum. Debt claims are not subject to mitigation b/c they are not money substitutes for not performing a primary obligation, but are primary obligations themselves.

* There is no foreseeability, remoteness or mitigation b/c the amount is already there

Recovery for work done or goods transferred: P has transferred something other than money, but obligation of D has not yet arisen before K is terminated. P can try 3 things:

1. Severe the obligations so as to trigger a payment obligation for that part of the work or delivery that has been performed
2. Argue that an amount should be paid under the contractual quantum meruit claim ( arises in a situation where a K has been breached or abandoned and a party has received a substantial benefit from the K. the individual must have the option to take the benefit or work done or reject (Sumpter))
3. Make a claim in restitution based on unjust enrichment

**Equitable Remedies for breach of K (if specific performance or an injunction then K cannot be terminated)**

1. **Specific Performance:** specific performance is an order by a court to a k party to perform K obligations (like an injunction to perform the whole K). Specific performance can be ordered for purchase of a unique property (i.e. quality especially suitable for its proposed use cannot be reasonably duplicated elsewhere) (John Dodge). Courts are unwilling to order specific performance in an employment context (i.e. labour) (Warner Bros).
2. **Injunction:** an injunction is an order of the court to a party to K to do or not to do something.
   1. **Negative injunction:** not to break K -> a negative injunction is not tantamount to an order of specific performance of personal service (Warner Bros). BUT courts will not grant an injunction to enforce negative covenants if the effect of doing so would be to drive D either to starvation or specific performance of a positive covenant (Warner Bros).
3. **Equitable damages:** money that serves are a replacement for specific performance/injunction that court cannot make usually b/c it would cause hardship to a 3rd party. Damages in lieu of specific performance are to be calculated at the time of judgement (Semelhago).

**Making K Voidable (have the option of affirming K or elect rescission) if the thing is gone/destroyed then hard to argue misrepresentation**

There has to be some sort of a statement, can’t make an assumption and then try to use misrepresentation. **Absent any special relationship, there is no duty to discharge information (if buying land no duty to reveal info unless there is a fiduciary duty).**

1. **Misrepresentation: (not a term in K)** misrepresentation occurs when one of the parties enters into the K on the basis of a lie. The party would not have entered into the K had they been told the truth. **Operative misrepresentation** must be a statement of fact (there might be a duty to speak when one party owes outmost good faith to the other), that is untrue, that is material, and that is relied on by the other contracting party as a reason to enter into a K. More specifically, party who relied on the statement wouldn’t have entered into K had they been told the truth (so if the misrepresentation occurs after the K has been entered into, party can’t argue that this was relied on as a reason to enter into K) (Redgrave). Innocent misrepresentation can be misrepresentation and the recipient of a misrepresentation has no duty to verify the veracity of the statement of material fact, even if they are given an opportunity to do so. Also, burden of proof is on the representor to show that the representee did not rely on misrepresentation or had knowledge to the contrary (Redgrave). The misrepresentation does not have to be the sole reason for entering the K. misrepresentation w/in the K itself will be treated as terms (Leafs). Opinions or beliefs are not factual unless they are made by a knowledgeable party (i.e. knowledge is asymmetrical) since he impliedly states that he knows facts which justify his opinion (Smith v Land). In Kupchak, the court held that the P did not affirm K b/c they didn’t have other options but to continue running the motel.
   1. Remedy: rescission is an equitable remedy and hence its application is discretionary. Equity may not award rescission if restitution is impossible, the K has been partially/fully executed, it would cause hardship against either party, if the wronged party has affirmed the K, of if a laches delay applies.
   2. **Bars to rescission:** 
      1. **Impossibility of restitution in integrum:** in case of a fraudulent misrepresentation substitution of money for property so as to effect the remedy of rescission is available (Kupchak). Not clear whether applicable to other situations, equity is more likely to intervene when there is fraudulent behavior. **Davey JA statements in Kupchak do not seem broach enough to cover non-fraudulent misrepresentation.**
      2. **Execution of K:** it is possible that a court will not order restitution if the K has been executed, at least in the case of an innocent misrepresentation. Denning in Solle thought it would be unfair not to allow rescission for an innocent mirespresenation just b/c lease has been executed. **There might be no rescission in case of an executed K except in cases of fraud.**
      3. **Affirmation:** unavailable if P knowing of the misrepresentation nonetheless proceeds w/ the K as though it was unproblematic.
      4. **Delay:** rescission not available if the P does not act in time. P usually does not have a lot of time to act, but much will depend on the subject matter of the K and the surrounding circumstances. In Kupchak this was no problem.

**Mistake (void: void, parties restored to position just before K existed (no claim for damages); voidable (electing to rescind)**

It’s ok that you can’t return the property (you are in CL not equity)

Legally operative mistake is rare. Mistake upsets risk allocation. Excusing a party for its own incompetence violates fundamentals principles of K law. **Caveat Emptor** requires parties to bear any risks at their own expense. Mistakes are not attributable to third parties.

1. **Common mistake:** occurs when both parties are mistaken about the same thing not contemplated in the K. there must be a common assumption to the existence of a state of affairs. If the mistake results from fault of either party, misrepresentation applies. The nonexistence of the state of affairs must render the K impossible. **Common mistake as to title** is when the buyer already owns what the seller purports to convey. **Mistake as to subject matter** occurs when the thing is destroyed or never existed (McCrae, year is a term that the seller is responsible for). **Mistake as to quality** is only operative if both parties make the mistake and mistake is about the existence of some quality which makes the thing without that quality essentially different from what the parties think it is and makes K void(Bell; Great Peace).
   1. Great Peace sets out a test for avoiding K in the event of a common mistake: 1) must be common assumptions as to existence of state of affairs, 2) must be no warranty by either party that the estate of affairs exists, 3) non-existence of the state of affairs must not be attributable to fault of either party, 4) non-existence of the state of affairs must render performance of K impossible, 5) state of affairs may be existence, or vital attribute, of consideration to be provided of circumstances which must subsist if performance of the contractual adventure is to be possible. If P is successful in arguing that K should be void due to common mistake as to quality, then P will get the money he has paid back but will not be able to bring a claim for damages.
2. **Mutual mistake:** mutual mistake occurs when parties are both mistaken about different things and the mistakes are reasonable. They tend to relate to terms of K. Courts will normally try to interpret mutual mistake as a unilateral mistake wherever possible.
3. **Unilateral mistake:** a unilateral mistake entails only one party misapprehending terms or assumptions that are not terms. Unilateral mistake is only legally relevant in the context of snapping up or mistaken identity. If there is a unilateral mistake, a court will likely refuse to order specific performance **(saying just had I had this info the outcome would have been diff is not a mistake that goes to the heart of the K *Bell*)**.
   1. **Mistaken assumption:** a mistaken assumptions about the subject matter is not enough to trigger the doctrine of unilateral mistake unless they are tantamount to fraud. If other party knew of the mistaken assumption (must know other party is mistaken) and its conduct was fraudulent, the K is avoided (Smith v Hughes). As illustrated in Bell, a mistake made by one party not relating to k term (i.e. unilateral mistaken assumption) cannot affect K. The rule in Solle states that a court can rescind the K if it is unconscionable for other party to benefit // in Solle, Denning stated that equity can effect an ongoing K even if there would be no mistake at CL. The test in Solle finds mistake if it relates to fundamental facts or rights and would be unconscientious (i.e. gives one party unfair advantage) to maintain. English courts overruled Solle with respect to common mistake (Great Peace), but Canadian Courts have applied Solle (in Miller which is cited in Lee). Great peace does not deal with unilateral mistake, but did not say so specifically.
   2. **Mistake as to terms:** relates to one party knowing the offer contains a miscalculation and “snapping up” the offer b/c it is a good deal. The non-mistaken party does not have to have subjective knowledge. Showing they ought to have known the offer contained mistake is sufficient. Might be able to set aside K in equity (Solle).
   3. **Mistake as to identity:** distinguished between remote Ks and face-to-face dealings. Where parties deal personally, the court presumes that they intended to deal with one another (Shogun). If mistaken identity, it must relate to the very identity, not a characteristic.
4. **Non est factum (void):** NEF is in the context of written K where one party disputes whether she is responsible for any K obligations b/c their signature was forged or they did not know or could not have known the document was a K or that it was a particular type of K. any carelessness vitiates the disputing party’s claim (Marvco). The disputing party must establish a fundamental difference between the signed document and the belief in what the document was supposed to be (Saunders, Marvco). As set out in Saunders you ask: would a reasonable person with traits similar to the party have taken the same action as the party pleading non est factum?
5. **Rectification:** P might argue that there was a mistake as to the terms in the written K that should be rectified. It refers to a mistake in the written record of the K. both parties will generally agree that there is a K. in **common mistake**, the disputing party must prove what was executed was not the agreement. In **mutual mistake**, neither party agrees with the written record but may advance different arguments. In **unilateral mistake,** one party is content while the other is not. Sylvan Lake\* sets out four considerations in this situation. There must be existence of prior oral K that is determinable and ascertainable. The claimant must show the oral terms were not recorded properly and D knew or ought to have known about the error at the time of execution. The claimant must also show D’s attempt to rely on written document is tantamount to fraud.
   1. In Sylvan Lake, Binnie J states that the traditional rule was to permit rectification for mutual [i.e. common] mistake but rectification is not available for unilateral mistake. Rectification is predicated on the existence of a prior oral K whose terms are definite and ascertainable subject to the following 4 conditions: 1) P must show the existence and content of the inconsistent **prior oral** agreement, 2) P must show that the written document does not correspond w/ the prior oral agreement but that D knew or ought to have known of the mistake in reducing the oral terms to writing, 3) P must show the precise form in which the written instrument can be made to express prior intention, 4) all of the foregoing must be established by convincing proof.

**Protection of Weaker Parties (Make K voidable)**

* **Duress (K voidable):** duress involves the circumstances surrounding the creation of the K that impact the ability of the pressured party to make a choice. The notion that coercion of the will prevents true consent grounds the doctrine. Historically, only duress to the person or good/property were under the doctrine. However, modern courts have accepted economic duress (Pao On). The older test for duress is test for legitimacy: threat of unlawful action is illegitimate. Greater Fredericton articulates a test for economic duress in K modifications. P must show (1) that the k variation was extracted under a demand or threat, (2) that there was no practical alternative other than compliance. The court then examines whether there was consideration, whether the coerced party made the promise “under protest” or “without prejudice”, if not, whether the coerced party took steps to disaffirm the promise as soon as practicable.
  + The older test of illegitimate pressure seems to apply when there is economic duress in creation of K
  + If there is a change to the K use both the GFA and illegitimate pressure test (there is nor SCC decision yet telling us which one is the better one)
* **Undue influence (K voidable):**  undue influence relates to the context of the K parties’ pre-existing relationship. If the relationship is demonstrably imbalance, any K between the parties might not represent true assent. FIRST ASK WHETHER POTENTIAL DOMINATION INHERES IN THE NATURE OF THE RELATIONSHIP ITSELF, THEN EXAMINE THE NATURE OF THE TRANSACTION.
  + If the relationship falls into a pre-existing category in which the law would take a protective attitude, there is an irrefutable presumption of UI. These relationships include solicitor/client, trustee/beneficiary, and doctor/patient.
  + Establish on the facts: The English approach states that if the situation does not fall into an analogous category, the claimant must show proof that she placed trust in another along with proof that the K transaction was questionable in nature. In Canada, to give rise to the presumption of undue influence, ability of the stronger party to dominate the will of another through manipulation, coercion, or abuse of power will be considered (Geffen). As set out in Geffen to establish undue influence, the claimant must show that the relationship and K worked unfairness in undue disadvantage or that the other party unduly benefited from the disadvantage. Once P established UI, the burden shifts to D to show P entered the K of his own informed will. Therefore, evidence that P obtained independent legal advice is important. There will only be a finding of UI exercised by a 3rd party if that party was acting as an agent.
* **Unconacionability (an equitable doctrine, probably makes K voidable)** related to the creation of the agreement and looks at a situation in which one party has a substantial negotiating advantage. P must **show proof of inequality** arising of his own ignorance, his need or distress, and **proof of substantial unfairness** in the agreement (Morrison). These elements create presumption of fraud. The burden shifts to D to show agreement was fair and just // Denning attempted to amalgamate the protective doctrines into the doctrine of inequality of bargaining power (Lloyds). His doctrine required proof that the weaker party’s bargaining power was impaired by reason of needs/desires, ignorance or infirmity, and proof of UI or pressures from other party. This approach oversimplifies subtle differences between the protective doctrines. The SCC also attempted to streamline the protective doctrines in Hunter where Wilson J. linked unconscionability with the inequality of bargaining power.
  + in the context of unconscionability, to do justice equity will not necessarily be bound to the traditional responses of rescission and unenforceability (Morrison)
  + **Reformulation of unconscionability:** in Kreutzinger, two judges applied the test from Morrison, but Lambert attempted to reformulate the test: the single Q is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. His reformulation in this case makes the doctrine more open ended and less structured.

**Illegality (severance)**

The law may declare a K inappropriate or intolerable. Illegality can apply to the whole K or a portion of it.

* The older approach: the older approach to illegality emphasized whether the making of the K was illegal, whether purpose/performance was illegal, and the intention/knowledge of the parties.
* The modern approach: the modern approach considers statutory purpose and all surrounding circumstances.
* **A restrictive covenant (is the restrictive covenant enforceable? Whether the restrictive covenant is characterized as being contained in an employment K or a K for sale of a business?)**: Restraint of trade is among common public policy concerns. Restrictive covenants exemplify the issues surrounding restraint of trade. Restrictive covenants give rise to a tension in CL between the concept of freedom of contract and public policy considerations against restraint of trade. Rothstein in Shafron stated that despite a presumption that restrictive covenants are prima facie unenforceable, a reasonable restrictive covenant will be upheld. As a general rule, the geographic coverage of the covenant and the period of time in which it is effective have been used to determine whether a restrictive covenant is reasonable. The extent of the activity sough to be regulated is also relevant (Shafron; Collins).The terms of the restrictive covenant must be unambiguous otherwise party seeking the enforcement will be unable to demonstrate reasonableness (Shafron).
  + In Shafron a distinction was drawn between restrictive covenants in relation to K for sale of business and **restrictive covenant in employment K**. Absence of goodwill and imbalanced relationship warrants stricter scrutiny of restrictive covenant in employment Ks. A restrictive covenant in an employment K found to be ambiguous or unreasonable will be unenforceable. Blue pencil might be resorted to sparingly and only in cases where the part being removed is clearly severable, trivial and not part of the main purport of the restrictive covenant. **Doctrine of notional severance does not apply in respect of restrictive covenants in employment contexts.** 
    - **Notional severance** involves reading down an illegal provision in a K that would be unenforceable to make it legal and enforceable.
  + **Are the liquidated damages enforceable?** Restrictive covenant plus liquidated damages refer to Shatilla
* Receiving a statutory benefit: the potential effects of illegality are considered in the context of the purpose of the statute. Such a purposive approach can also be used to fashion a remedy more in keeping w/ the purpose of the statute. If a K is expressly or impliedly prohibited by statute, the courts may refuse to grant relief to a party if the circumstances of the case are such that granting such relief would be contrary to public policy (Still). The court considers serious consequences resulting from invalidating the K, the social utility of these consequences, and determination of the persons affected by invalidating the K (Still).

**Effects**

* + 1. **Void**
    2. **Voidable**: if illegality would affect the weaker party then K void
    3. **Rescission:** consequences maybe harsh b/c have to give everything back
    4. **Unenforceable**: can get back whatever is done already
    5. **Fine/damages**
    6. **No consequences**

**Terminology**

**Void = K never existed**

**Voidable = have an election to affirm or make void**

**Rescission = undoing of K, meaning that both parties are put back to the position they were in before K existed**

**If you want part of the K to be enforced and other not enforced then illegality**

|  |
| --- |
| **Bhasin**  It established a general doctrine of good faith between parties and specific duty of honest performance. The decision states that “there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations… the organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting party.”  **H:** can am liable for breach of duty of honest performance “when it failed to act honestly w/ Bahsin in exercising the non-renewal clause”. Hrynew was not found liable for breach b/c not a party to the K.   * Downside: opening up the civil courts to a **potential wave of law suits** based on perceived deceptions; the decision **lacks a specific test** (decision mainly focuses on broad statement of principle rather than concrete practical guidance)for what constitutes dishonesty at courts discretion to decide in the context of each case. a lot of grey area about the **definition of honesty** and creates uncertainties that are bound to result in a waive of law suits; **adds contractual risk**, have to be careful that they are not doing anything that may be perceived as being dishonest when exercising their rights. Does not necessarily create a more open and honest exchange between the parties. They may go out of their way to keep quiet about intentions. Specially in the context of exercising termination of non-renewal right, parties may feel compelled to be silent as to the reasoning for b/c they don’t want to risk being challenged that it was not a truly honset explanation or description of disclosure of that reasoning. Characterizing as a **general principle** what else falls under duty of hoenst performance/.   + [66]      This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. –   + The duty of honesty in contractual performance flows from there, falling “under the broad umbrella” of the good faith principle (paras 72-73). This duty “applies to all contracts” (para 33). It “should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance” (para 74; emphasis added). - * The ruling creates a new law around an overarching doctrine of good faith from which may specific duties may extend. No limits specified this can be an issue. In this case one of those duties was a duty of honest performance (can’t lie or knowingly mislead each other with respect to the performance of their contractual obligations). * An organizing principle of K that you don’t have to write in. there is an obligation of good faith and that includes at least honest performance.   *While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary.  Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.*  We do not yet know what “appropriate regard” means, or what “legitimate interests” are, or what “bad faith” means, or what kind of conduct fills the spectrum between fiduciary obligations and good faith performance. And, again, it is unclear how far the parties can go in contractually modifying their obligations in this respect (see para 77).  *Bhasin* , the issue being considered was whether there is an obligation to act in good faith in K. in other words, dealt with the duty of honest performance post K. It focuses on the performance of the K and if party becomes somehow dishonest then that constitutes a breach of duty. This looks like misrepresentation after K is in place.  There is **no implied term** in the K that you have to act in good faith, **but there is a duty in K: duty of honest** **performance**: when you perform a K, you have to carry that performance in way that does not frustrate the whole purpose of the K. this is a duty and not a term so can’t contract out of it.  **Duty of honest performance in Bahsin is a post K duty (p.21 case chart). If you somehow become dishonest, then that constitutes a breach of duty.** |

Lambert’s approach in *Harry* v Kreutzinger, K conforming to commercial morality (could start as commercially moral and become commercially immoral) **Lambert trying to reformulate unconsiconability p.238-239**

Wilson in *Hunter* (where the doctrine of fundamental breach was abolished), was concerned that the K became unfair because of the way the world evolved. So she thought that we need another doctrine: doctrine of unfairness. She is of the opinion that we need two doctrines: unconscionability (focuses at the time of the creation of the K), unfairness (for what happens after the k in place).

Denning thought that there should be one doctrine for all = doctrine of inequality of power

Doctrine of fundamental breach: denning created in *karsales.* After that there were a series of cases that said we are not going to create doctrines that protect consumers. It is for the parliament to protect consumers by passing statute. But Denning tries to resurrect the doctrine in a later case.

In *Tercon,* the entire SCC accepted Wilson J’s formulation of unconscionability (treating it as equivalent to inequality of bargaining power) in *Hunter.* (p.240 green book)

Cromwell J

* Holds that the exclusion clause does not apply, so do not need to address other stuff

Binnie J – dissenting

* Exclusion clause does apply (talks about the test this clause has to pass through)
* Unnecessary to have a doctrine of unfairness, but he does not overrule it
* Added the public policy test – if clause contrary to public policy then it is unenforceable (p.545)
* Rejected any ability of a court to interfere with the terms of a valid K on vague notions of “equity or reasonableness” (p.239 G)
* Although Binnie is dissenting what he says about the exclusion clause is valid law

The law is complicated! Statute is a good way of dealing with these matters, but the problem is that it often freezes the world at a particular time and the law does not go further.

**Test for determining if exclusion/limitation clause applies** (***Hunter via Tercon***):

1. Is the clause part of the secondary obligations or is it characterizing the primary obligations?
2. Is there a statute that prohibits or regulates this clause?
3. Was there notice of it?
4. Construe it – what does it mean?
5. If having construed, you can still say that it was intended to apply then consider unconscionability (inequality of bargaining power at time of acceptance) and unfairness (what occurred subsequent to K and, in context of exclusion clause, if it would be unfair to apply it to the particular situation)

**Wilson J in *Hunter*** thought the court should retain discretion to refuse to enforce EC when pre-breach unconscionability didn’t apply but that as a general rule, courts should give effect to EC despite a FB. She tried to revamp FB for post-breach analysis of (i) whether there was a fundamental breach and (ii) ct should assess the circumstances to see if the EC should be given effect, not necessarily stopping at a determination of their intent (through construction) but possibly interfering with clear intent if the court should not aid the party seeking to enforce the EC (on policy grounds).

**Dickson CJ’s response in *Hunter*** was that FB as a doctrine spawned huge difficulties in characterization and distracted parties from the real question of what agreement was actually intended. Better would be to use unconscionability to assess issues at the time the K was made, allowing courts to interfere with an agreement in situations such as unequal bargaining power. Such a technique would protect weaker parties from contracts which are contrary to public policy without relying on an artificial and problematic doctrine of FB.