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| **Parole Evidence Rule** |
| **Should a written document be considered to be the exclusive source of the terms of an agreement?**  **[1] Formalities:**   * **Informal – any K not under a seal – written, oral or both.** Writing is simply evidence of the K, the agreement is the real K itself.   **[2] Content Matters Affecting Written K’s: \***Can use Parole Evidence rule to say the written document contains the entire contract, but use rectification to modify the contract itself.  **Rectification –** extent the written document can be altered.  **Parole Evidence Rule -** When parties intend that the written evidence of the K contain the entire K, a court will not accept evidence terms of the K which are oral and have not been reduced to writing (***Gallen***).   * **SCC reaffirmed the rule** – any collateral agreement cannot be established where it is inconsistent w/ or contradicts the written agreement (***Hawrish v BMO***)   **As Per *Gallen*:** Parole evidence rule is a **presumption and not an absolute rule of law to only accept express written terms –** implied terms avoid the rule creating issue.   * If oral assurances are given as warranties, you read them and the contract together. * **If the oral warranty contradicts the written text in the contract, then the presumption is strongest, and leans more in favor of the written contract;** except if it is clear that the warranty was to prevail over a general exemption clause in the contract. * Attention to evidence shows PER is **not absolute**, or contradiction alone would satisfy PER. * This also holds true when considering whether or not the written contract is a whole contract. * **Presumption more rigorous when individually negotiated, instead of a form contract** (try not to use rule when terms weren’t negotiated) * **Also presumption is stronger if there is an explicit clause limiting liability for oral representations.** * **Can try to separate into 2 contracts** – 1 oral and 1 written but will be hard to convince court unless can truly separate matters & it makes sense to have a different contract for each --> will be rare (***Hielbut* 1913 EngHL**) b/c they are collateral Ks w/sole effect of varying or adding terms to principal K so will be viewed w/suspicion by the law – have to be proven strictly otherwise would be possible for parties to escape performance by asserting multiple collateral oral Ks on the basis of the same subject matter   **More flexible approaches:** If there are oral terms or assurances that contradict what has been put in writing the courts consider the context of the K as much as the actual words used – often they conclude that the writing alone could not have intended to represent what they agreed to.  **Restraints:** Parole evidence **rule does not apply to misrepresentations** and does not apply where terms are implied into a K. Oral evidence is admissible to determine if such terms should be implied or not.   * Can be excluded by statute - **abolished in consumer transactions in BC.** * If K induced by an oral misrepresentation that is inconsistent w/ written K, written K cannot stand. |

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| **Start by asking: what does the person want?** Outline the parties involved // Determine who you are representing // Provide them with all their potential solutions.  **Approach the Q with the Client in mind and use plain language.**  **Time period when bases for claims can be made:**  **Pre-Contract Period:** mistake, misrepresentation, duress, undue influence, unconscionability, and capacity.  **Contract Period:** Breach, frustration, Limitation period, unfairness (doubtful doctrine of Wilson J in *Hunter v Syncrude*).  **Pre and Post K Period:** Illegality is the only doctrine that applies both before and after the K came into existence. HOW TO APPROACH A K CASE:  1. **Construe the K to say what you want –** this takes the K as it stands, and interprets the ambiguity of the K in a way favorable to your client. 2. **If cannot get K interpreted in way one party wants, attempt to change the K through implied terms** 3. **Argue rectification of the written K – although the K did not say “X”, the court should rectify the K.** 4. **If cannot make K do what you want try and get rid of K (misrepresentation first try), if cannot get it to go away from misrepresentation, go to mistake (mistake is the most difficult argument to make).**   **Main Point:** Our goal is to classify a statement as a particular type of term, in order to gain access to a particular remedy that will provide a desired outcome.  **Steps:**   1. What does the P Want? 2. What remedies will get that outcome? (VOID/VOIDABLE/UNENFORCEABLE) 3. Which classifications of terms have those remedies? 4. Classify terms/statements into those categories.   Not all terms of a K are contained in a single K – can be collateral K’s to deal with particular situations not relevant to the rest of the K; or to save the main K if a minor issue arises. | | | | | | |
| **Classification of Terms: at moment of acceptance** | | | | | | |
| **Mere Puff:** statement that has no legal consequence at all – by its very nature no reasonable person would rely on it.  **Representations:** Usually a statement of fact (ie. about the quality of something). Representation (irrelevant to K) = outside of the K, not a term of the K. This can be a tort and to get damages you have to go outside of contract law.   * If a representation can be characterized as a contractual warranty, the falsity of the statement constitutes a breach of a contractual term, so misrepresentee entitled to bring claim for damages calculated in the expectancy measure.   **Collateral K:** Under this collateral contract analysis, representation made prior to formation of contract is transformed into a term of a unilateral contract that is collateral to the “main” contract.   * You cannot imply a collateral contract: it has to be express. Whether something is a term in the K or not depends on the party's **intention.** * **To establish collateral warranty**: claimant must show that the representation made by the Ds was actually intended as a “warranty” (collateral contract), whereby Ds in consideration of the P taking shares, promised that the company was a rubber company **(*Heilbut, Symons & Co v Buckleton* 1913 English HL**).   Whether something is a term in the K (i.e. meant to create an obligation) comes down to intention of parties (***Hielbut, Symons & Co*** – statement about quality of shares).   * Look at context of the K: would it be weird for a party to make a promise in relation to that? (e.g. share quality – ***Hielbut***) | | | | | | |
| **Express Term or Implied Term** | | | To know contractual obligations (only terms are *contractually* binding and breach leads to remedy) | | | **Express:** deliberately agreed on by parties (writing, oral or both)  **Terms Implied by 3 ways:**   * ***Custom or Usage*** (***McCutcheon***) - where in particular trades/commercial contexts there are established customs, by virtue of the type of K, or consistency in past between 2 parties. * ***Necessity*** *(****Machtinger****) –* “officious bystander test” – terms implied if necessary for **business efficacy.** * ***Operation of law*** *–* Statute or CL can imply a term for a type of K.   + Acting in good faith – *(****Bhasin***)   + **Test:** whether the term sought to be implied is of necessary condition for contractual relationship? |
| **Primary and Secondary Obligation** | | | To know main obligations and remedial obligations and liabilities. | | | **Primary:** promises parties will perform if all goes according to plan.  **Secondary:** obligations if there is a breach of the K – provides remedies. |
|  | | | **Degree of Importance of Terms** | | |  |
| **[1] conditions**: terms essential to the K – go to the heart of the contract (***Leaf International***)   * can argue that in certain industries a term re: certain subject matter (e.g. ID of artist) will always be a condition (***Leaf International* 1950 EngCA**) * remedies available: damages for breach and/or power of termination (where other party deemed to repudiate --> no more primary obligations for either party and acan access secondary obligations)   **[2] Intermediate/innominate**: remedy based on seriousness of breach (***Hong Kong Fir* 1962 EngCA**)   * Test: do consequences of breach deprive party of substantially whole benefit of the contract? (***Hong Kong Fir***)   **[3] Warranties**: not essential to main intention of K. remedy: damages   * **Way around:** parties can try to label particular term as either condition/in/warranty but court willing to place its own labels even if expressly labeled by parties if leads to unreasonable result in light of the rest of the contract (***Wickman* 1974 Eng HL**) – particularly with warranty and condition because they have synonyms with other contractual concepts * if termination available the innocent party has an **IMMEDIATE** election to affirm K & sue on breach or to terminate obligations of both parties going forward & access available secondary obligations * passage of time will be deemed constructive affirmation of K (***Leaf International***) | | | | | | |
| **Entire v Severable Obligations** | | | | | | |
| * **Entire:** obligation must be substantially performed (***Fairbanks* 1953 SCC**) to trigger other party’s obligation * Means that if close to complete performance will not want to argue that an obligation is severable! * **Severable**: can cut into smaller pieces & those parts can be enforced but not severed further * **If payment obligation not triggered and** innocent party takes the benefit of the work (***Sumpter, Fairbanks***) will be entitled to keep without payment if obligation is entire and there’s no substantial performance – more often with lump sum payments ***Sumpter* 1898 EngCA** so should argue 1) **severable** then: * 2) claim on quantum meruit * 3) try to get remainder through restitution if can prove unjust enrichment * **counterargument** to not being paid for part performance: mutual abandonment of old K and new K formed such that old K should be compensated on quantum meruit but will need an explicit agreement (***Sumpter***) and some fresh consideration (***Gilbert Steel***) | | | | | | |
| **Steps:** | | | | **EXCLUSION OR LIMITATION CLAUSES** | | |
| **1) Must be a term that exempts in some way one party from liability for failure to perform certain promises in the K or limiting liability for such failure to perform.** | | | | If No – not an exclusion/limitation clause | | |
| **2) NOTICE - Notice Requirement:** It is a general principle in law that party must draw attention to exclusion clause; to find if there is a duty to draw attention to, look at 1) effect of the clause in relation to nature of k; 2) length & format of the K; 3) time available for reading the K (***Karroll)***.  **\*If found to have notice move onto 3.** | | | | **Timing:** Notice has to come before or at time of agreement: K is held at time it is entered into at acceptance – cannot add more clauses on afterwards (***Thorton v Shoe Land Parking Ltd,* 1971**).   * 1. If “fine print” is unknown to weaker party then there is reason to say that the clauses are not part of the K.   2. **Unsigned Documents:**      + Knowledge of terms is **subjective test:** so prior relations are not enough to satisfy the notice provision unless there was actual subjective knowledge of the condition (***McCutcheon***).      + If clause is onerous then party seeking to enforce must show that that condition was brought to the attention of other party. What constitutes sufficient notice depends on sophistication of parties.      + **What constitutes sufficient note may depend on the sophistication of the parties.**   3. **Signed Documents:**       + Old way (Ruthless) – anything you sign you agree to, this is the presumption in Canada. Party is bound by any document they sign absent of fraud or misrepresentation, even if the party did not read or understand the document – satisfies the notice requirement (***L’Estrange***) (***Karroll BC*** – follows this doctrine with a few exceptions – BC often follows this)      + New Way (Kinder) – Limitation/Exclusion clause needs to be clear, especially when it is an onerous term (inconsistent with the over-all purpose for which the K is entered). What constitutes a reasonable attempt depends on nature of K and practical possibilities. Do not need other doctrines seen in *Karroll* – the doctrine of notice itself is capable(***Tilden Rent a Car, 1978* ONCA**).   + **Presumption 🡪 Bound by what you sign even if not read (absent fraud or misrepresentation) (*Fraser Jewellers* 1997 ON CA**)   + Exceptions to signature doctrine (L’Estrange) (Not liable) when (***Karroll v Silver Star Mountain Resorts* 1988 BCSC McLachlin**):     1. ***Non est Factum***– signature signed by mistake, thus not “your act.”     2. **Inducement to agree by fraud or misrep.**     3. **Mistake:** The party who seeks to enforce the K knows or ought to know of the other party’s mistake “quasi-exception.” (Characterized in ***Tilden Rent a Car, 1978* ONCA**).   + Not signing (a document which requires a signature)     - Can have *constructive notice* – custom or usage of implied terms (including exclusion and limitation) that will imply agreement to the terms despite lack of signature (***McCutcheon v David MacBrayne* 1964 English HL**)but need:       * 1) Knowledge of the terms (actual and not constructive)       * 2) Agreed to terms in previous dealings | | |
| **3) Construction – does the clause apply given the situation?**  **\*** Application of exclusion/limitation clause depends on the construction of the K.  **At Common Law the analysis stops at 3 – Equity comes after CL but prevails over the CL** | | | | A) **Interpret the clause (and the rest of the K)**   * Context of Exclusion/Liability clauses, courts have a tendency to construe such terms in a K **strictly against the party wishing to rely on them;** *Contra proferentum Principle* (***Tercon***) * Any ambiguity in context of K requires the clause be interpreted against the party trying to enforce it. * **If a clause states something general followed by a specific example, courts most likely to only enforce the specific examples as opposed to general.** * Must read the clause in the context of the entire K (***Tercon***).   B) **Exclusion versus Express Term: Courts tend to favour the clause that retains liability for breach.**   * Ex) Parking attendant told a car owner that the attendant will lock the car (but did not) that express statement was held to negate a clause on the back of the ticket that purported to exclude liability for any content loss from the cars.   C) **Does statute prohibit application**? **If statute prohibits = clause not applicable**   * UK has *Unfair Contract Terms Act* * Canada does not have this statute – may be consumer statutes, but for this course we do not need to know if there is a statute or not. | | |
| **4) If (2) and (3) are okay - Is it unconscionable to apply the clause?** | | | | Denning attempted to create **doctrine of fundamental breach**: in event of exclusion clause in a K it does not operate if there has been a breach of a condition or a breach of an intermediate term. When there is a breach of a K that denies the other party completely what they wanted (goes to heart of K) this is such a fundamental breach that you cannot exclude liability because then one party has no obligations (***Karsales v Wallis* 1956 England**)   * **Fundamental Breach no longer exists in England –** simply a matter if parties intend the clause to apply **(*Photo Production*).** * **There is no such doctrine of fundamental breach in Canada - *Hunter v Syncrude* 1989 SCC (UK):**    + Just because there is an exclusion clause and it goes to heart of K – does not mean that the exclusion clause does not apply**.**   ***Hunter Engineering:*** SCC has held that the doctrine of unconscionability may be employed in the context of “disclaimer” or “limitation of liability” clauses to render the unfair/unreasonable clause itself unenforceable with the result that the remainder of the agreement could be enforced.   * + Dickson 🡪 replace Fundamental breach with unconscionability (**applies at the time of the K formation**) – if it is unconscionable to have clause then the clause is not enforceable – unconscionable is not defined. * ***Tercon,* in applying Dickson’s reasoning from *Hunter Engineering:*** was the exclusion clause unconscionable at the time the K was made (such that might arise from unequal bargaining power between the parties)?   + Has to do with formation of K not breach. * **2 requirements:** a) an inequality of bargaining power existed between parties and b) the exculpatory clause constituted an unfair exploitation of that inequality. | | |
| **5) (According to Wilson J. in *Hunter Engineering*, but now of doubtful authority) Does the clause operate unfairly in the context of the actual breach?** | | | | Binnie in ***Tercon*** seems to suggest there is no such doctrine.   * This creates situations where parties do not have assurance on how the K will unfold in the future as an exclusion clause may not apply later on – this creates uncertainty in K law, especially in commercial transactions. There has been no direct answer on this issue from other cases. | | |
| **6) Is the clause contrary to public policy?** (***Tercon Contracts Ltd v BC (MoT)* 2010 SCC**) – Dissenting judgment of Binnie J (these tests were affirmed by the majority). | | | | **The last analysis, as per *Tercon* is whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the exclusion clause that outweighs the very strong public interest in the enforcement of contracts.**   * Contrary to public policy = illegality, thus K is unenforceable. * Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and substantially incontestable considerations of public policy that may override the countervailing public policy that favors freedom of K. Such misconduct may disable the D from hiding behind the exclusion clause. * Up to party who seeks to avoid the effect on an exclusion clause to ID the public policy and how it outweighs the public interest in enforcement of the K. | | |
| **Remedies**  **What is available when other party wrongly fails to perform?** | | | | | | | |
| **WAS THE REMEDY LOST (If lost there is no remedy): Loss can be express or constructive.**   * A remedy can be lost. *Sales of Goods Act* - if a buyer has accepted part of the goods, or if property has passed in specific goods, the K cannot be terminated. * Another way to lose a remedy of termination is the passage of time (**constructive affirmation**) – what constitutes sufficient passage of time depends on the circumstances. | | | | | | | |
| **If Remedy is not lost consider the seriousness of the breach:**   * Need to discover **intention** as disclosed by **K as a whole** in determining whether breach will lead to rescission (***Wickman Machine***) – use of the word “condition”: can indicate such an intention but is not conclusive. * If **deprives of substantially whole benefit** that was intended, then can rescind, otherwise only damages (***Hong Kong Fir*).** | | | | | | | |
| **Remedy** | **When Available** | **Who Can Claim** | | | **Nature and Effect** | | |
| **TERMINATION**  (Common Law remedy)  \*Breach of K must be sufficiently serious to justify the remedy | **Repudiatory Breach:** breach of a term that is properly classified as:  a) condition or  b) an intermediate term where on basis of ***Hong Kong Fir***the particular breach deprives the party not at fault of **substantially the whole benefit** of the K. | Party not in breach  [Party in breach is the one who ***repudiated*** the contract b.c breach makes the result of the K essentially different from that contemplated when the parties made their bargain]   * “innocent” party has to “agree” by accepting the repudiation and electing to terminate * innocent party can choose not to use the remedy and therefore to affirm the K (may not have choice where party refuses any further performance) * Repudiating party cannot force termination of the aggrieved party | | | Ends primary obligation (no further performance) of both parties from moment of termination   * Secondary obligations remain alive [the remedy of termination does NOT terminate the whole contract] * Unusual to combine remedy of termination with a claim to damages * Contract is NOT rescinded (***Photo Production***)   + If K truly were rescinded, there would be nothing left of the K to make a damages claim   + If nothing has been done under K at moment of termination, it may look like rescission because nothing will have been done under the primary obligations of the K (but it’s not)   + Also, where something has been conferred under the K that is later terminated, there may be restitutionary remedies allowing for recovery (that also looks like rescission, but also is not) * **Remedy of termination can be easily lost by:**    + Electing to affirm the K (either expressly or constructively)   + Acceptance of goods means K cannot be terminated (***Sale of Goods Act***)   + Passage of time (example of constructive affirmation) | | |
| **DAMAGES**  (Common Law remedy) | Upon breach of any primary obligation in the contract | **Party not in breach can claim damages upon showing**:   * **1)** That the other party broke obligation in the K (proving the right to damages) * **2)** How much the damages will be: Quantum (*Hadley*) * **3)** That the damages are not too remote (*Hadley*) * **4)** That the P mitigated | | | Money substitute for a primary obligation not performed, quantified by reference to:   1. Pre-agreed amount (“liquidated damages”) 2. Common law rules and principles 3. Combination of a and b  * **Damages are the most usual remedy for breach of K**   **[A] – Rationale for Damages (*Fuller and Purdue article*)**  **[B] Quantification Problems**  **[C] Remoteness – Was the D Legally Responsible?**  **[D] Mitigation: P must have suffered the loss, but should they have?**  **[E] Time Assessment of Damages**  **[F] Liquidated Damages**  **[F2] Deposits and Forfeiture** | | |
| **Duty of Honest Performance (*Bhasin*)** | \*This is not a term in a K but a new Duty | 1) There is a general organizing principle of good faith contractual performance and 2) there is a further common law duty of parties to a K to act honestly in performing of K obligations. | | | **Content of duty of honest performance:** this means simply that the parties must not lie or otherwise knowingly mislead each other with matters directly leading to the performance of the K.  **Breach of this duty = breach of K (thus damages).** Essentially parties cannot lie or mislead each other – this is open to be used before parties are in a K or even after a period of time while in the K. The outer limits to the duty were not described (***Bhasin v Hrynew*).** | | |

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| **To stay in the K**  **(to gain benefit of the K)** | **To get out of the K as it current is (contesting the K)** | |
| **NEED:** | **Can you ELIMINATE the K?** | |
| **Valid K:** offer/acceptance; consideration | **Is it VOID?** | **Reasons it would be void:** |
| -> makes it so there’s NO contract  -> both parties can use  **Rescission:** party can treat the K as void.  \*In rescinded K, whole K rescinded and nothing left on which to claim damages - secondary obligations **do not remain.** | **COMMON MISTAKE:** Both parties are mistaken about the K (both parties share the same mistake). **One party thinks X and the other thinks Y.**  ***Great Peace v Tsavliris Salvage, 2002, ENG* –** **following elements have to be present for common mistake to avoid a K**:  1) **common assumption** as to existence of state of affairs;  2) **no warranty** by either party as to existence of a state of affairs – mistake must be to an assumption not a term in the K;  3) non-existence of the state of affairs **must not** be attributable to fault of either party;  4) non-existence of state of affairs must render performance of K impossible and  5) State of affairs may be existence or a vital attribute of consideration to be provided or circumstances which must subsist if performance of K is to be possible.  ***Lee:*** Must consider if someone is to bear the risk of the relevant mistake, because if they have, that will govern.  \* **Mistaken assumption of title:** Misapprehension as to their relative & respective rights. This is a COMMON LAW doctrine with no equitable portion.   * Where purchaser later discovers that at the time of contracting he/she already owned the subject matter of the sale.   \* **Existence of the subject matter of the K** (***McRae***) - Parties mistaken as to whether subject matter of the K exists – typically dealt w/ by statute (such that a K is held void if for the sale of a good the good has perished w/o the knowledge of the seller).  \* **Mistaken assumption as to Quality** (***Bell v Lever***) - Mistake of both parties and as to the existence of some quality which **makes the thing w/o the quality essentially different from the thing as it was believed to be** (***Bell v Lever Bros***).  **\*\*COMMON MISTAKE CAN ALSO BE ADDRESSED IN EQUITY – If not VOID at CL (see below).** |
| **Breach of Condition or Possibly Intermediate Term** |
| **Classification of Terms:**  More important it is, the more likely it is a term.  Test of Intention (***Heilbut***)  If it’s a term it can’t be a representation (***Leaf***)  Intermediate term? (***HK Fir***)  Just cause you call it a term (***Wickman v Schuler***)  **Is it an Implied term**? (***Machtinger*)** *Custom or usage, law, necessity*  **Not terms:** Mere Puffs (has no legal significance) // Representations (outside of K, not a term – usually about quality) |
| **NON EST FACTUM:** Party can claim Non Est Factum when document is **fundamentally, radically or totally different** than the document they thought they signed **(*Saunders v Anglia Building (1971) HL*)*.* –** Mistake has to go to the very essence of the type of K (ex. You thought it was an assignment but it was a mortgage). |
| **SOME MISTAKEN IDENTITIES MAKE THE K VOID:** Extremely unlikely to affect K.  **[1] Mistaken ID in writing (Transaction by Correspondence):** If the person named isn’t the person who they say there are then the K is ***void*** (***Shogun***).   * + Starting proposition is that a written K is with the person named in the K.   + To the extent that there is a K only binding on parties named in the K (***Shogun***).   + Only have a K if you were not misled 🡪 Party can argue ***Non Est Factum* – a K is void because of the doctrine of non est factum (**ex. Rogue writes someone else’s name (as Patel in ***Shogun***).   **[2] *Non Est Factum* (CL Doctrine) *=* “that is not my doing” – renders agreement VOID @ CL**  **As per *Marvco* NEF can only be used when**:   1. There is NOT carelessness on behalf of parties trying to assert NEF; AND 2. There has been a mistake as to nature of docs that renders them “fundamentally different”  * Party can claim Non Est Factum when document is **fundamentally, radically or totally different** than the document they thought they signed **(*Saunders v Anglia Building (1971) HL*)*.* –** Mistake has to go to the very essence of the type of K (ex. You thought it was an assignment but it was a mortgage). |
| **ILLEGALITY (often)**  \* Statutory  \* CL (different categories in CL illegality)  \* Still v Minister, Shafron  1. Quantum of Illegality  2. Actual Relief |
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| **Entire/Severable:** On the one side, argue that they breached by not performing their obligation (not substantially performed) or not severable.  On other side: you haven’t been paid when it was substantially performed or it could be severable therefore breach | **DURESS:** Historically the K would be VOID, and in certain cases it does if there are egregious threats, but there has been a modern shift to make the K VOIDABLE as the party who has received the pressure can elect to keep the K or have the K rescinded.  **DURESS TO PERSON:** Occurs when there is, from K’ing party or person associated w/ him/her, physical compulsion of the person or threat to person’s life/limb, threat of physical beating or imprisonment – may also take into account threats of a wrongful imprisonment or prosecution of the person and possibility the person’s near relative (or other close relationship is arguably sufficient).  **DURESS TO GOODS:** Threat to damage or take other party’s property – can affect the K (*Knutson v Bourkes*)   * Example: Threat to burn down house unless sign lease (*Occidental Worldwide Investment Corp v Skibs A/S Avantie*) |
| **Is it VOIDABLE?** | **Reasons it would be voidable:** |
| -> contract gets undone  -> only protected party can use  -> no damages because there remains no secondary oblig  -> **RESCISSION:**  **equitable remedy**  \* aggrieved party can elect to rescind when there’s been a misrepresentation  [as opposed to repudiation where a party in breach evinces an intention to not be bound by the K]  **BARS TO RESCISSION**  1. When complete restitution is impossible  2. Execution of K (obligations performed -> K can’t be undone)  3. Affirmation  4. Delay – laches  \*If Rescission exercised notice must be given (such as returning property) | **MISREPRESENTATION:** Operative misrepresentation ->  1. Is it a statement of Fact [can be mixed fact and opinion]? (***Smith v Land***)  2. That is Untrue? (***Redgrave***)  3. Material (operative) – about substantive detail and goes to the heart of the K? (***Redgrave***)  4. Relied Upon by other K’ing party (no due diligence req’d) – induced the other party to enter into the K?  5. Are there bars to rescission?  **Innocent Misrepresentation –** rescission in K law (*Heilbut*) (+compensation where full rescission is impossible (*Kupchak*) – NO DAMAGES but if can be shown to be a collateral K, damages recoverable (*Heilbut*).  **Negligent Misrepresentation –** rescission in K law, damages in tort law (negligence)  **Fraudulent Misrepresentation –** rescission in K law, damages in tort law (tort of deceit) |
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| **Was K affirmed despite breach?**  **(Delay, Acceptance?)**  \*Delay – cannot be caused by other party. |
| **ECONOMIC DURESS:** Need more than “commercial pressure” – need coercion which vitiated consent.  (Pao On as per *Greater Fredericton*) – economic duress in the **creation of a new K**  1. Protest // 2. Alternative Course // 3. Independent Advice? // 4. Timely steps to avoid K?  (***GFAA***) – economic duress in **modification of existing K**  1. Pressure // 2. No reasonable alternative  THEN, did protesting party consent:  1. Consideration; 2. Under protest? 3. Did coerced party take reasonable steps to disaffirm promise as soon as practicable? |
| **Rectification** of written K to Stay in K:  **Test** (Sylvan)  1. show prior oral agreement  2. mistaken in written record  3. easily changed  4. existence of convincing proof |
| Consider Entire & Severable Obligations (*Fairbanks / Sumpter*) | **UNDUE INFLUENCE (Equity – allows rescission):**  **2 Part Test to determine Undue Influence:** the relationship and then of the context of the particular K (***Geffen***) – the relationship can be proved or presumed.  **[1] Relationship capable of giving rise to undue influence; one party must be said to unduly influence the other.**   * **Irrebutable Presumption (recognized relationship);** * **Rebuttable presumption of undue influence; OR** * **Relationship of “actual undue influence) –** situation that does not fit in other two categories.   **[1][b] Nature of the transaction: Unsure if have to examine content of the K - MacDougall thinks it is an unnecessary requirement to examine the K.**   * In **Commercial Transaction** P should be obliged to show, in addition to req’d relationship b/w parties, that K worked unfairly in that the P was unduly disadvantaged or in that D was unduly benefited by it (manifest disadvantage) (***Geffen* (1991) SCC) –** this req’t is uncertain; scholars prefer it not be adopted – dissent (La Forest) in ***Geffen*** says that manifest disadvantage should not be required to set a K aside simply because it is a commercial K) * **In gift or similar transactions (will)** - requires only evidence of a dominant relationship, anything generated out of relationship is presumed to be affected by undue influence.   **[2] D must then rebut that the K was okay: Influence generated by relationship must have been abused** |
| Duty of Honest Performance? (*Bhasin*) |
| **If yes, then TERMINATION** [for breach of condition/intermediate term. For party not in breach]  - > primary obligation ended, secondary in place  **/ DAMAGES** [for breach of any primary obligation. For party not in breach]-> calculate damages OR consider equitable remedies | **UNCONSCIONABILITY: Allows for rescission or creative remedy (***Morrison v Coast Finance)*  **2 part test (*Morrison v Coast Finance*):**  **[1] Proof of Inequality of bargaining power – one party incapable of adequately protecting his/her interests**  **[2] Undue advantage/benefit secured as a result of that inequality by stronger party (unfair bargain).**  Reformulation of *Morrison***: Single Q is whether the transaction, viewed as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded? (*Harry v Kreutziger* 1978 BCCA –** the idea of a single doctrine to protect weaker parties, including unconscionability was argued by Denning in ***Lloyd’s Bank v Bundy*** and the principles from ***Morrison*).** |
| **MISTAKEN ID IN PERSON (Face to Face Transactions) (*Shogun*):** Where it is FACE to FACE, favor the application of a strong presumption that each intends to contract with the other   * Can argue ***voidability*** but the extent to which isn’t clear – whatever you thought about the other party is that the K exists. **Voidable –** voidable can be an issue as a rogue person could transfer to a third bona fide purchaser w/ value. * Issue is whether **lack of consensus ad idem,** precludes formation of K, in which case void at CL (***Shogun***). * **Strong presumption** in favour of finding that an agreement (albeit a voidable one) was entered into w/ the **physical person** w/ which was dealing (***Shogun***).   + Will have a K with the person you are dealing w/, not the identity he/she is assuming. |
| **COMMON MISTAKE IN EQUITY (Equitable Remedy):**   * If parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension **was fundamental & that the party seeking to set it aside was not at fault,** & if can be done without injustice to 3rd parties (***Solle v Butcher***). * In equity, mistake can be about anything to do with **“facts” or “rights” (as opposed to only assumption, quality or existence of subj matter – as per *Bell*  in CL)** provided it is **fundamental and unconscionable** for other party to avail self of legal advantage which he had obtained (***Solle v Butcher***). * **Even the mistakes as to quality that did not meet the requirements in *Bell* might meet this test.**   ***Solle v Butcher* –** **Can allow courts to not only “roll back” on K’s, but also broadens their ability to roll back part of it, add conditions, or even impose new obligations (there are some adjustments the court can make “terms the court seems fit”) (Rejected in England (*Great Peace Shipping*) – Has been applied in Canada (*T-D Bank, Miller Paving*).**  ***Acceptance in Canada***   * ***Solle v Butcher*** has been applied in Canada – can still argue mistaken assumption in equity and can mean that a K can be rescinded and at least be rescinded on terms. * **But Acceptance of this case is now in doubt:**   + ***Great Peace Shipping*** appears to have rolled back the law of mistake to its position pre-Solle.   + This case says that *Bell v Lever Bros* is the definitive and exhaustive law of common mistake. * ***Miller Paving****, CND* seems to suggest that ***Solle*** is still good law despite the decision in ***Great Peace Shipping.*** Great Peace was described as creating a loss in flexibility needed to correct unjust results in eliminating the equitable doctrine of common mistake would be “a step backward.” |
|  |  | **Can you ALTER the K?** |
| **Methods** | **How:** | **Why?:** |
| **Severance** | *Remove part of K OR* | \* Illegality  \* unconscionability |
|  | *Treat as two contracts* | \* to treat one K as terminated for breach or frustration |
| **Judicial Adjustment of Terms** | *Assist in creating terms* | \* Rectification of K  \* Not clear what was in the K (Parol Evidence Rule)***Gallen*** |
|  | *Set aside K on “terms”* | \* Mistake in equity (IF still good law)  \* unconscionability |
|  | *Severance* |  |
| **Unenforceability of All or Part of the K** | *Court refused to order performance or give remedy for non-performance* | \* Illegality  \* Expired limitation period  \* Incapacity  \* Exclusion or limitation clause  \* Penalty clause |