

Do you have a contract checklist?	3
How do you get out of the contract?	5
Hunter, Tercon, Bhasin....	5
Misrepresentation (voidable)	5
Mistake (void)(CL)	6
() Test for rectification (Sylvan):	7
Duress	8
Undue Influence	9
Unconscionability	10
Illegality	11
Remedies Checklist	12
Finding Damages	12
Quantifying Damages	13
Remoteness	14
Mitigate	14
Liquidated Damages	15
Deposits	15
Debt	16
Equitable Remedies	16
Adjusting the Contract Checklist	17
Escaping a Limitation or Exclusion of Liability Clause	18

What do you want? Checklist

- ()**(1)** To end the primary obligation of both parties (termination) or just get out of the contract.
()
Remember —
- ()**(2)** A money substitute for a broken obligation.
() **Damages** (go to page)
- ()**(3)** An order to pay a sum stipulated in the contract.
() **Debt** (go to page)
- ()**(4)** To keep the primary obligations alive and for an order for the other party to perform the contract.
() **Specific performance or injunction** (go to page)
- ()**(5)** A money substitute instead of an injunction or specific performance.
() **Equitable damages** (go to page)
- ()**(6)** A contract adjustment (go to page)
- ()**(7)** Other considerations (go to page)
- ()**(8)** To get out of a limitation of liability or exclusion of liability clause?

Do you have a contract checklist?

(1) Is it a term in the contract?

- (a) It must clearly be intended to be a term in the contract to be a term (reasonable person standard) (Heilbut).
- (b) When it both a term and representation, it becomes a term — you cannot wait to make this election (Leaf).
- (c) Terms can be implied into a contract (Machtinger).
 - It can be through fact — where there is intention to have the term implied.
 - It can be through law via:
 - (i) Law — statute.
 - (ii) Custom or usage.
 - (iii) It is necessary for business efficacy.

(2) Is it a warranty or a condition or an intermediate term?

- Look to the nature of the event and its practical effect — “Does it deprive the party of substantially the whole benefit of the contract?” (Hong Kong Fir)
 - If **yes**, it is a **condition**.
 - If **no**, it is a **warranty**.
- The word “condition” does not mean something is a condition — the contract needs to be interpreted as a whole and the word “condition” given an ordinary meaning (Wickman).
 - If it is intended to be a condition, it must be the clear intention of the parties.

(3) Has the obligation been severed or satisfied?

- Where there is a contract to do work for a lump sum, recovery is not available until the work is completed (Fairbanks).
- What is required to make the condition obligation enforceable can be the equivalent of "substantially completed."
 - Also, there must be evidence from which to infer a new contract has been accepted and should be paid for.
- Can a quantum meruit (substitute) contract be asserted? (Sumpter)
 - It needs to be a lump sum contract.
 - It needs to NOT be substantially completed.
 - A fair amount needs to be asserted (is evidence presented that could show a QM contract?).
 - An option needs to be presented to the other party to take/leave the benefit of the work (thereby providing an inference of a new contract).

(4) Is the written record the whole contract?

- For property, you need a written and signed contract (unless already executed?)(L&E Act, s.59).
- If you've convinced the court that the written contract is exhaustive, and evidence is in dispute, the court does not accept oral evidence of the contract — Parole evidence rule (Gallen) — Some exceptions are:
 - Show the contract was invalid b/c of fraud, misrepresentation, mistake, incapacity, lack of consideration, or lack of contracting intention.
 - To dispel ambiguities, establish a term implied by custom, or to demonstrate factual matrix of agreement.
 - In support of a claim for rectification.

() Establish a condition precedent to the agreement.

() Establish a collateral agreement.

() **Support of allegation that the document itself wasn't intended by parties to be the whole agreement. — What is it missing that**

can advocate for the PER? I.e. how are they getting paid, etc.

() In support of a claim for equitable remedy.

() If the terms are inconsistent, **try rectification** (pg.)

Remember — The parole evidence rule is not absolute and is not a tool to dupe the unwary. It establishes a presumption that can be rebutted.

How do you get out of the contract?

Hunter, Tercon, Bhasin....

Misrepresentation (voidable)

- (1) What is needed for operative misrepresentation? (Redgrave).
 - (a) A statement of fact.
 - (b) That is untrue. -- Did someone knowingly lie to you?
 - (c) That is material (substantial).
 - (d) That is relied on by the other contracting party as a reason to enter into a contract.
 - (i) There is no duty to check the accuracy of representation.
 - (ii) Failure to exercise due diligence is not relevant if a person is induced to enter into a contract by a false representation.

- (2) When is someone liable for a misrepresentation? (Smith).
 - The representor is more likely to be liable if he knows the fact better (making material statement of fact).
 - They have a lot of knowledge about the subject and there is unequal knowledge about the subject.
 - When facts are equally well known, what one party says is frequently an expression of opinion.

- (3) Can you get monetary compensation from a misrepresentation? (Kupchak).
 - The misrepresentation can provide monetary compensation when:
 - One party was at fault (Fraudulent misrep.).
 - A third party has acquired the rights.
 - Restitution in integrum is impossible.
 - The action to rescind was made in a reasonable amount of time.
 - The contract has been executed (not in the case of fraud).
 - The injured party has affirmed the contract.

- (4) How do you rescission for fraudulent misrepresentation? (Kupcak)
 - Rescission is practical and restitution possible?
 - Was the claim to rescind submitted in a timely fashion?

Remember — If both parties can't get back what they put in, you can't really rescind the contract — you need to show fraudulent or negligent misrepresentation to get some sort of damages! Innocent doesn't work!

Mistake (void)(CL)

Mistake with regards to fact or law.

- (1) When can mistake be used and render the contract void?
 - When parties are not ad idem on what the terms of the contract are, there is no contract (Hughes).
 - There is a mistake by both parties that is fundamental (Bell).

- (2) **Mistaken assumption** can be with regards to:
 - (a) Identity (see pg.)
 - (b) Fact or Law (Bell)
 - (i) It can be with regards to subject matter.
 - Before or at the time of contracting the subject has been destroyed, doesn't exist, or you already own it? (can be unilateral or bilateral).
 - (ii) It can be with regards to quality.
 - The subject matter is essentially different from what the parties thought they were contracting for (the essence) (bilateral).

- (3) Can equity play a role in mistake? (Solle)
 - Equity can make a contract voidable due to mistake.
 - (a) **Broad version**
 - (i) It can be unilateral **OR** common mistake.
 - (ii) It **CANNOT** create injustice for a third party.
 - (iii) It would be unfair (unconscientious) to enforce the contract.
 - (iv) The mistaken party can be at fault.

 - (b) **Narrow Version**
 - (i) There must be a common mistake as to the facts or respective rights.
 - (ii) They must be fundamental.
 - (iii) The party seeking to set it aside **CANNOT** be at fault.

- The party seeking to rely on equitable mistake cannot be at fault** (Lee/McRae).
 - The risk is allocated to the representing party (McRae).
 - Construe the contract to get it to say what you want first!

- Mistaken assumption can be common or unilateral.
 - The law of mistake cannot be used to place a risk on a party where the contract has allocated that risk to another party.

Mistake with regards to identity.

(1) Mistaken assumption can be with regards to **identity** (Shogun).

(a) It can be face to face

The contract was face to face and therefore comes into existence

You have contracted with the person in front of you -- although voidable.

(b) It can be at a distance and in writing.

Comes into existence - can be void.

You have a contract with the person named.

Remember -- The person named should argue non-est-factum

(c) When can you use non-est-factum? (Saunders).

Careless on its own, unless it amounts to fraud by the other party, will not allow you to use non-est-factum.

If a fundamental quality is different, you can use NEF.

Remember — After this, there is no more non-est-factum in equity.

The difference has to be significant and about the substance of the agreement for NEF (Marvco).

The other party must be culpable of fraud (awareness of its taking place).

Test for rectification (Sylvan):

(1) The contract is inconsistent with a prior oral agreement (Onus on P).

(2) You have shown that the writing does not correspond with the agreement and that the other party knew or ought to have known that the writing was an inaccurate reflection of the prior agreement (and that the plaintiff did not know).

(3) The plaintiff has shown the precise form in which the written document can be made to express the prior intention.

(4) The plaintiff has established this by proof, somewhere higher than the civil standard.

(5) (Optional?) The plaintiff was not careless - the fraudulent party shouldn't prevail over the careless party.

Duress

- () Is it **traditional duress**? (Pao On).
 - () Must ask with regards to the creation of a contract - illegitimate pressure (threat to person or property):
 - ()**(1)** Whether the person alleging protested
 - ()**(2)** Whether an alternative course was open
 - ()**(3)** The person was independently advised.
 - ()**(4)** Whether steps were taken afterwards to avoid it.

Remember — This is common law and therefore void.

- () Is it **economic duress**? (NA Can)When there is a change with regards to a contract (5 step test):
 - ()**(1)** Two conditions precedent:
 - ()**(a)** Contract variation **MUST** be extracted as a result of the exercise of **PRESSURE** whether demand or threat;
 - ()**(b)** Exercise of pressure is such that the other party had no practical alternative to agree.
 - ()**(2)** Factors deciding economic duress:
 - ()**(a)** Whether promise supported by consideration;
 - ()**(b)** Whether coerced party made agreement under protest;
 - ()**(c)** Whether coerced party made steps to disaffirm the promise as soon as practical.

Remember — Illegitimate pressure is not a factor.

- The introduction of consideration - traditionally duress did not care about what was in the contract.
- Economic duress only operates in equity (rare that is even works) and is therefore voidable.

Undue Influence

- () Is it a situation of undue influence? Establishing undue influence (equitable = rescission)
 - () **(1)** There needs to be a relationship capable of giving rise to the necessary influence:
 - () **(a)** Relationships of presumed UI (irrebuttable).
 - OR**
 - () **(b)** Relationships of UI established on the facts - go through the nature of the relationship and the evidence.
 - () **(2)** Contents of the contract (possibly?)— the influence generated by the relationship must have been abused.
 - () For contract(not a commercial transaction) need to establish an unfair contract (Wilson in Geffen).
 - () **Result:** contract is presumably voidable - defendant has to rebut.

Remember — La Forest rejects the unfairness aspect — traditionally, UI did not care about what was in the contract.

- Argue relationship or both relationship and unfair contract!
- Saving the contract as a stronger party from undue influence - require them to consult with an independent third party (to rebut the influence).

Unconscionability

() How do we argue unconscionability?

() Involves the assessment of the circumstances surrounding the creation of the contract "unconscientious use of power" and an examination that resulted (not just lopsided contract).

() Overtly about the contents of the contract — some possible reasons:

() An advantage was unfair or very unfair.

() Consideration was grossly inadequate.

() Bargaining power was grievously impaired.

() Divergent from standards of commercial morality.

Remember — Argue for what you want, but don't expect a judicial adjustment.

- Voidable (more likely)

- Unenforceable (more likely)

- Judicial adjustment (less likely)

() Doctrine of unconscionability (Old Test)(Morrison):

() (1) One party is weak and a strong party takes advantage of this (prove weakness).

() (2) There was ignorance or need or distress.

() (3) There was substantial unfairness in the bargain obtained (need strong proof).

() Once proven, presumption of fraud is on D to prove fair, just, and reasonable.

Remember — Success is more likely if it doesn't affect third parties.

() New Test: Need to show whether the transaction as a whole is seen as sufficiently divergent from the commercial standard of morality (Kreutziger).

() Canadian cases get priority.

Remember — No need to call one party "weak" or "ignorant"

- Does this make it possible to look at what happens after the contract is in existence?

Illegality

() The modern approach to illegality involves a consideration of what the statutory purpose is and whether making a given contract illegal, considering all the surrounding circumstances of that particular contract, will further the objects of the statute.

- () The making of the contract can be illegal.
- () The purpose or performance of a contract can be illegal.
- () You need to consider the intentions and knowledge of the parties.

() **(New Approach)** Where a contract is impliedly or expressly prohibited by statute, a court may refuse to grant relief to a party when, in all circumstance of the case, including regard to the objective and purposes of the statutory prohibition, it would be contrary to the public policy to do so (Still).

- () Public policy considerations:
 - () **(1)** Restraint of trade — restrictive covenants are prima facie unenforceable (less restrictive ones are more likely to be accepted).
 - () **(2)** Contract to commit a crime or do a legal wrong.
 - () **(3)** Contracts prejudicial to good public administration — when it adds to corruption.
 - () **(4)** Contracts prejudicial to the administration of justice — i.e. bribing witnesses.
 - () **(5)** Contracts prejudicial to good foreign relations — i.e. raising money against a foreign government.
 - () **(6)** Morals.

Remember — The law will generally permit restrictive covenants in a sale (competition), but will be suspicious of employment ones (imbalance).

- Illegality can operate on both sides of acceptance, unlike the other options.

() **Effects of Illegality:**

- () Void, voidable, unenforceable (tends to be isolated), whatever the statute says, or no consequence.
- () It can be hard to recover property.

() When there is plain statutory illegality, the purpose of the illegality has to be taken into account. - How does the effect further the purpose of the law? (Still).

- () Illegality can have no effect at all if it does not further the purpose of the law it goes against.

() Illegality does not have an all or nothing character. Be prepared to argued the whole contract is illegal or a part of it is illegal.

- () Ambiguities must be resolved and will be interpreted against the creator.
- () Relevant factors in fairness: time, geographic area, competition in the area, etc.
- () Test for severability (Shafrom):
 - () **(1) Blue pencil:** Strike out a particular part - you can only strike things out.
 - () Does everything make perfect sense? — Sometimes too much is done.
 - () **(2) Notional severance:** Re-write the part that causes illegality - only to extent it removes it.
 - () Need a bright line (can't perpetuate ambiguity) to draw and it only reads down — needs to be minimal, in Shafrom it was too

much.

Remedies Checklist

Finding Damages

- Is the term a warranty or a condition?
 - Does the word "condition" mean something is a condition? (Wickman).
 - The contract interpreted as a whole and the word "condition" given an ordinary meaning.
 - If intended to be a condition, it must be the clear intention of the parties.
 - Look to the nature of the event and its practical effect — "Does it deprive the party of substantially the WHOLE benefit of the contract?" (Hong Kong).
 - Yes (**Condition**).
 - No (**Warranty**).

Remember — Consideration is always on an obligation by obligation basis, i.e. two obligations broken = two remedies.

- Damages are compensatory for loss and are not to put you in a better position.

- You should consider the expectation interest first — but how do you determine it? What are your options?
 - (1) Expectation Interest:** The difference between what was expected and what was delivered.
 - Ex. pay \$35, receive \$17, expecting \$53 = damages \$36
 - (2) Reliance Interest:** Costs and wasted expenditure - take into account what P still has.
 - When it's impossible to tell what the expectation damages are, you can switch to reliance interest (McRae).
 - Go through considerations - quantity + quality (i.e. buying equipment, wages lost, paying for licenses, etc.)
 - Must be considered whether something is really "lost."
- Generally you cannot get both reliance and expectation interest - this is not absolute (so long as you are not in a better position) (Sunshine VV).
 - The plaintiff can decide which damage — generally, when one method more certain, go with that.
 - You are likely to get what produces a justifiable figure.
- (3) Restitution Interest:** What D unfairly gained.
 - Ex. employment contracts, fiduciary relationships, interest from money.
 - Restitutionary interest can be awarded to prevent people from profiting even though the P is not harmed (Blake).

Quantifying Damages

- There are **three majors issues** in quantifying damages.
 - (1) No certainty - there is a loss, but what exactly was it and the figure?
 - Common law damages are at the time of the breach (Semelhago).
 - Equitable remedies are at the time of the trial.
 - You don't have a right to equitable damages until the court gives it to you.
 - Equitable damages are generally awarded for unique items.
 - (2) When you have more than one figure to choose from, which one do you go with?
 - When there is guesswork involved, the judge/jury must do the best they can with the info they have (Chaplin).
 - The plaintiff can decide which damage — generally, when one method more certain, go with that (Sunshine VV).
 - You are likely to get what produces a justifiable figure (Sunshine VV).
 - What value do you get — the property or the cost to fix it? (Groves).
 - In Canada usually you get the lower amount.
 - Courts require the plaintiff to show that they would use the higher amount to actually fix damages — all in how you frame the contract and situation.
 - (3) Quantifying the unquantifiable - how do you compensate for something that can be purchased?
 - Equitable remedies are at the time of the trial.
 - You don't have a right to equitable damages until the court gives it to you.
 - Equitable damages are generally awarded for unique items.
 - General damages are ones that everyone would be awarded (Jarvis).
 - Special damages are peculiar to the plaintiff.
 - They have to fall under the second Hadley branch.
 - Emotional damages or non-quantifiable damages can (need to) be awarded here.

Remoteness

- Damages as may be fairly and reasonably considered — for the plaintiff to establish, but often used by the defendant (Hadley) :
 - (1) It arises from the contract, is known to the parties, and would have happened to anyone (only terms are relevant).
 - (2) The party must have been able to recognize the **probable** (not foreseeable) result of the breach — the other party knows why you wanted it performed (what is not in the contract) at the time the contract was entered into.
 - What is a probable result?

Broad

- What was reasonably foreseeable at the time depends on the knowledge then possessed by the parties, or at all events, by the party who commits the breach (Victoria Laundry).
 - Knowledge can be both actual or imputed.
 - Imputed:** everyone is expected to know the "ordinary course of things" — (i.e. can include profits)(VL).
 - Actual:** Knowledge of special circumstances outside the ordinary course of things (attracts 2nd branch) (VL).
 - Need not actually contemplated the consequences, just that a reasonable man would have concluded that the loss in question was liable to result (objective test).
 - (Maybe) It's enough the reasonable man could foresee the damage was likely to result (no actual knowledge needed) — a serious possibility or real danger that's likely to occur.

Remember — Does Victoria Launder lower the bar for foreseeability? - "on the cards" — a broadening!

- These two cases disagree with each other. Is it enough to simply see the loss? Or, do you have to be concerned with whether it is likely to happen as well?

Narrow

- You cannot award damages where something is foreseeable and yet unlikely to occur (Koufos).
 - Must have a substantial possibility within contemplation of occurring.

Mitigate

- You should take all reasonable steps to mitigate — don't have to be perfect — not expected until the breach is learned about (or soon after).
 - Make an argument as to what is reasonable (i.e. market prices).
 - Mitigation is very fact specific.
 - Being poor is not an excuse (unless you tell them).
- In breach, you can elect for damages (CL) or specific performance (Equ.) — the mitigation principle can constrain this (Southcott).
 - You can't go for specific performance only to allow the damages to pile up and then get a damages claim.
 - This may apply to anticipatory breach.
 - Must let other party know your situation (i.e. if can't mitigate).

Liquidated Damages

- How do you know when it was liquidated damages or when it was a penalty clause? (Shatilla).
 - No freedom of contract for liquidated damages (they are a secondary obligation).
 - A liquidated damage must be a genuine pre-estimate of damages.
 - A lump sum is presumed to not be good because it doesn't take into account the severity of the breach.
 - For an intermediate term, how do you know what the damages will be?
 - Liquidated damages must be fair and reasonable (even in a formula) (Clarke).
 - When liquidated damages become a penalty clause, the defendant can still choose to pay the penalty clause. - it is an equitable remedy.
 - The person receiving damages cannot argue penalty clause (JG Collins).

Remember — Although harder to win, can argue limitation clause to get around a penalty clause.

Deposits

- How do you know it's a forfeiture clause? (Stockloser).
 - Generally a term in the contract (construe it).
 - Has the characteristic of a primary obligation payment, but also a condition precedent to the other party's obligation becoming enforceable.
 - If A makes a deposit and fails to complete the rest of the payments, the deposit is forfeited to B.
 - A can make a damages claim, but credit would have to be given for amount forfeited — deposit is part of remedies of party who paid it.
 - Parties can decide on what is a deposit, but its default is forfeiture.
- There is no remedy at common law for forfeitures clauses.
 - If deposit is handed as part of payment, then as long as the contract remains open and the plaintiff can finish payments, then the plaintiff cannot get the money back.
 - If a contract is rescinded as a result of the buyer's default of payment, the buyer is entitled to get his payments back subject to damages claim.
- There is an equitable remedy for forfeiture clauses — but needs:
 - (a) Forfeiture clause must be of a penal nature.
 - (b) It must be unconscionable for the seller to retain the money.

Remember — 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 (Law and Equity s.24).

- Even though deposit is made as part of primary obligations, it allows court to intervene if it is too high. Very rare event of court effecting primary obligations.

Debt

- A debt is a claim to have a contractual promise enforced — for one party to pay money to the other.
 - The common law compels the promisor to do the thing he promised to do (this is different than damages).
 - Debt is directly related to primary obligations (it may still provide damages and they are usually claimed together).

- Compensation for amounts paid and value transferred.
- Recovery of amounts of paid are essentially restitutionary claims.
 - Total failure of consideration results in a recovery of the price paid.
 - Recovery where no total failure of consideration may be allowed when the other party is responsible for one party's inability to complete performance.
- Recovery for work done or goods transferred has three options:
 - **(1)** sever the obligations so as to trigger a payment obligation for that part of the work or delivery obligations that has been performed.
 - **(2)** argue that an amount should be paid under a contractual quantum meruit claim.
 - **(3)** make a claim in restitution based on unjust enrichment.

Equitable Remedies

Remember — Equity follows the common law and therefore you must explain why the common law is not adequate.

- This often boils down to that there is no market to get what you want (it is unique).

- Specific performance is an order by the court for a contracting party to perform the contract obligations.
 - A court will not order specific performance unless it knows exactly what it is ordering.
 - An applicant will have to come with clean hands.
 - The plaintiff can't be in breach of his own obligations or in an agreement which involves continuing or future acts to be performed (unless he can show he is ready and willing to carry out those obligations).
 - It has to be a timely request (laches).
 - It can't cause hardship to anyone else.
 - Generally the court avoids obligations extending over a period of time and labour/personal service obligations.
 - If you elect for the common law, you don't get an equitable remedy (?)
 - There has to be mutuality, a court won't order if both parties can't get the same remedy.

For real property, specific performance can be granted if person seeking it can show that the property in question was unique at the date of the actionable wrong (John Dodge).

Injunction for personal services...

Adjusting the Contract Checklist

(1) Construe

Try the parole evidence rule (pg).

(2) Imply

Express or implied term (pg).

(3) Rectify

Try rectification (pg).

(3) Sever or Contract Not Substantially Complete

Try severance — i.e. illegality (pg).

Try a quantum meruit contract (pg).

(4) Judicial Re-Adjustment

Try unconscionability (pg).

Escaping a Limitation or Exclusion of Liability Clause

- (1) Was there notice?
 - Was it an unsigned document? (pg).
 - Was it a signed document? (pg).
- (2) Can the signature of the other party serve conclusively as evidence of notice?
 - Go to page .
- (3) Does the clause even apply in the given situation?
 - Try fundamental breach and its aftermath.
 - Try unconscionability (pg).
- (4) Construe/interpret the clause (and the rest of the contract)
 - Try fundamental breach and its aftermath.
 - Try unconscionability (pg).
- (5) Is it unconscionable to apply the clause?
 - Try fundamental breach and its aftermath.
 - Try unconscionability (pg).
- (6) Does the clause operate unfairly in the context of the actual breach? (Wilson (doubtful authority))
 - Try duress (pg).
 - Try undue influence (pg).
 - Try illegality (pg).
- (7) Is the clause contrary to "public policy"?
 - Try duress (pg).
 - Try undue influence (pg).
 - Try illegality (pg).

Hunter

- If on the true construction of the contract, liability is excluded for the kind of breach that occurred, the party in breach will generally be saved from liability, unless the contract/clause is unconscionable.

Tercon Contractors v BC

- Unfairness can be considered - this comes after the creation of the contract.

-- Test:

- (1) Construe the contract to see if it is meant to apply
 - (2) Test it for unconscionability (and therefore unenforceable)
 - (a) Inequality of bargaining power
 - (b) exclusion clause constituted an unfair exploitation of that inequality.
 - (3) (Maybe) Consider unfairness in the contract (comes after creation of contract). — tantamount to fraud?
- Are there public policy reasons to not allow the contract?