**Offer**  
-Canadian Dyers Association: for there to be a contract, there must be offer and acceptance, otherwise void.  
-offer contains all the terms in the contract. May also stipulate the terms of acceptance.  
-Canadian Dyers Association: whether something is an offer is a reasonable person test: would a reasonable person situated in that context have thought it was an offer. Subjective intent is irrelevant  
-Offerer’s intention is assessed from the perspective of the offeree, who is a reasonable person situated in the offeree’s context  
-look at the context, circumstances, conduct, and the language to determine what reasonable person would think  
-Circumstances: things already in existence, history between the parties, the way they normally do things  
-Conduct: after the communication was made, the parties behaved as if there was an offer.  
-the test: would a reasonable person interpret that as an offer when put in the same surrounding circumstances.  
-Carlill: there can’t be too many offerees. You can make an offer to the whole world if you want, you’re the one making the offer so it’s in your control, only have yourself to blame. You can, however, revoke the number of offers once you get to a certain number of offerees or limit it.

**Communication**  
-may be express (written, oral) or implied (action, inaction, or silence)  
-Williams: offers that are not communicated are of no legal significance. We don’t care about motive, but we do care about knowledge and communication.  
-Clarke: having no knowledge of the offer means you cannot accept, what you do cannot lead to K  
-communication is purely optional, not compulsory

**Invitation to Treat**  
-not an offer, only “let’s do business.”  
-it is an invitation to give an offer.   
-Carlill: where it is clear that there is only a small number of an item, an offer may not be an offer but merely an invitation to treat.   
-may be a significant source of representation

**Acceptance**  
-saying yes to a particular offer, can be done through actions (Williams)  
-presumption is that saying yes is sufficient, though offer can stipulate terms of acceptance.  
-Livingstone: offer must come entirely from one party and acceptance entirely from the other  
-Livingstone: acceptance can only be “yes,” cannot add terms through your acceptance, otherwise it is a counter-offer and not acceptance.  
-Brinkibon: unless stipulated otherwise in the offer, the law of wherever the contract was accepted governs the contract, the place of acceptance is the place of the contract

**Communication of Acceptance**  
-an election, can only choose one option and if no choice is made, lapse of time, silence will be taken as choosing not to have a contract.  
-it is effective the moment it is communicated and doesn’t matter if the other party doesn’t do anything. You cannot retract it or change your mind unilaterally once you accept.  
-Felthouse: no contract if there is no communication of acceptance. You cannot waive communication of acceptance and impose silence as acceptance. No communication, silence, is taken as rejection  
-Carlill: if it’s a unilateral contract, must communicate directly to the other party. Not necessarily so for bilateral, where actions alone can be deemed communication.  
--Implied time limit or implied election is judged from behaviour, offeror must know about the offeree’s behaviour for implied election to work.

**Bilateral and unilateral contracts**  
-unilateral is where all the obligations are on one side. Bilateral is where there are obligations on both sides the moment contract comes into existence when offeree says yes  
-if you say yes and both sides have duties, it’s bilateral. If you say yes by performing an action, it’s unilateral

**Postal Acceptance Rule**  
-Household Fire: post office is an agent in a situation where both parties agree to communicate by mail. The moment the letter goes into a mailbox or post office is the moment of acceptance.  
-process is in control of offeror, they can specify to the contrary and if you don’t and clearly act as though mail is acceptable, rule applies.  
-giving a letter to someone isn’t enough, it must be a post office to trigger this rule.

**Revocation**  
-offeror can end an offer at any time, even if the offer says it will not be revoked  
-must be communicated so that the other party knows or ought to know that it’s revoked  
-if offer was made in mass distribution way, revocation may be done similarly  
-Byrne: no postal rule of revocation  
-Dickinson: revocation need not be actual words, nor direct communication. Person can get word through the grapevine that the offer is revoked and if he got word from a reliable person, it is effective communication.  
-Action can also constitute communication of revocation if the action is known by the other party and could only be interpreted as such.  
-Errington: you can’t revoke an offer for unilateral when they’ve already started performance of the terms of acceptance, unless they cease performing. Restitution: the offeror would be unjustly enriched.

**Rejection**  
-election of acceptance or rejection must be communicated  
-unilateral communication, how or if the other party responds doesn’t matter, so long as you tell the person some form of “no,” that ends the offer. Counter proposals often constitute a rejection

**Lapse of Time**  
-offer will always lapse after a particular period of time. Offer can contain this time period, otherwise it’s implied  
-Barrick: to figure out what “reasonable time” is, court puts self in shoes of the offeror and looks at the situation of the party: what was the offer for, whether it was a hot market or not, and the context of the offer. What would a reasonable offeror imply or put in as a time limit in that context?  
-Barrick: can also put in shoes of offeree, what is a reasonable period of time within which he’d accept, beyond which he’d have moved on.   
-Offeree’s behaviour can shorten the time limit.

**Certainty of Terms**  
-Not enough in what’s said: something crucial is missing  
-too much is said: ambiguity, vagueness, too many possibilities  
-May and Butcher: statutes can imply terms into contracts where parties have forgotten them  
-May and Butcher: price is a crucial element where if missing, voids the contract  
-May and Butcher: where the parties made an attempt at the missing element, and didn’t leave it out altogether,t he Sale of Goods Act may not be able to imply and the K is void.  
-Hillas and Arcos: where there’s a missing element, if you can figure out where the parties are going, interpret what they meant, work through what parties thought to have meant in that contract, you can imply the missing term into the contract. Work out what the parties did say and what they meant in the context of the missing element. Say it’s an implied term that we just can’t see.  
-if we can’t do this, we’re at May and Butcher scenario: void, barring statutory aid.

**Ambiguities**  
-imply a term into the contract by looking at surrounding circumstances, history between parties, and the other terms provided  
-use canons of construction or statutes that may assist  
-courts can also ignore ambiguous terms and say they mean nothing if they don’t go to heart of K  
-Empress: terms can be made unambiguous if they can be measured against an objective standard – here, “good faith” and “bad faith” could be assessed by comparing to the market value  
-Mannpar: no benchmark like in Empress, so can’t measure “good faith,” it’s completly ambiguous, it’s meaningless, and goes to hard of contract, so void  
-Empress: can’t enforce an agreement to agree. Empress says, however, that there is an obligation to negotiate in good faith, while Mannpar says there isn’t. Likely because benchmark makes good faith less ambiguous in Empress, whereas lack of benchmark in Mannpar.

**Intention to Create Legal Relations**  
-social arrangements and domestic arrangements won’t lead to contracts (Balfour)  
-Rose and Frank: you can’t make an agreement to not take disputes to court or to take them somewhere else, but youc an prevent something by being a legal contract by making an agreement that it’s not legally binding.

**Enforceability**  
-void, you give everything back that was gotten under the contract. Enforceability is perfectly valid contract, just means that if someone doesn’t perform, they can’t be compelled by the court

**Seal**  
-no consideration if there is a seal: formal contract  
-Royal Bank: rules have been relaxed (don’t need foil or wax and can just draw one), but thereneeds to be some representation of a seal. Pre-printed form is not good enough unless it was printed by the promisor. It can be adopted though if there’s something to show this (initial, etc)  
-Royal bank: promising party must understand why the seal is there.  
-Royal Bank: the seal must be put there by the person whose promise is being enforced.

**Consideration**  
-something of value given by the promisee at the time the promise is entered into. Must be something of value.  
-can be an action, deliberate inaction, or promise, some action or promise that can be of benefit to the promisor or a third party, or a detriment to the promisee.  
-has to come at the time of acceptance.  
-must be intended to be consideration for the promise sought after  
-consideration is typically an action in unilateral contracts. It can be a promise as well in a bilateral contract, but usually an action in unilateral  
-Thomas: motive is not consideration, “natural love and effection” or a regard for someone’s wishes isn’t enough.

**Pre-Conditions**  
-Condition Precedent: describes an event that has to occur before something else is going to occur.   
-can be both a precondition and consideration “If you give me $5, i will give you coffee,” latter obligation is not enforceable until first obligation is met  
-Condition subsequent: a condition that ends something, that terminates an obligation  
-Concurrent conditions: independently enforceable, occur at the same time. Presumption is that conditions are concurrent unless stipulated otherwise.

**Forebearance**  
-constitutes consideration, a promise not to do something.  
-forebearance won’t work if it’s something that’s impossible anyway  
-Callisher: a promise not to take legal action is only effective if they really thought that their claim had some chance of success. If the person knew or ought to have known that there was absolutely nothing to the claim, then there’s no consideration

**Fresh Consideration**  
-Eastwood: past consideration does not work. Cannot use past actions/detriment as consideration for a promise in a contract.  
-Lampleigh: exception to this – if the party did something for the promisor in a situation where, due to an emergency or somesuch, the promisor was not able at that time to give something in exchange, the party can get a promise from the promisor in exchange for this past action.   
-for Lampleigh to work, the past action has to have been at the request of the future promisor and there has to have been something about that situation that was an emergency

**Pre-Existing legal duty**  
-pre-existing legal duties to the state or to the promisee do not constitute consideration.  
-Pao On: a pre-existing duty to a third party can constitute fresh consideration: it means that now, two people (the third party and the promisor) can go after the promisee, more damages.

**Promises to Pay More**  
-Greater Fredericton: if this is in the context of a change to an existing contract, where that change is sincerely made and genuinely negotiated, there need not be consideration. But look out for duress  
-outside of existing contract, law traditionally says it’s unenforceable due to consideration issues  
-Folkes: one party is paying less and the other is promising to accept less. Not enforceable. Payment of a lesser sum in satisfaction of a greater sum cannot be enforced as satisfaction of greater whole  
-Foot: exception is where something is different – paying/accepting less, but done in a different method of payment in Foot, and this was deemed sufficient consideration.

**Part Performance** (estoppels – reliance, encouragement)  
-while a promise to accept less is not enforceable in itself, it is enforceable once the other party has started paying the creditor in satisfaction, even if there isn’t any consideration.  
-s.43: it’s not just the promise to pay less, there’s actual payment, then it’s binding. The part performance must be meant to extinguish the larger, earlier obligation. (Central London)

**Promissory Estoppel**  
-holds a person who made a promise to a promise, if the promise was made sincerely, intended to be legally binding, and the other party did something in reliance of it. It will be binding  
-person to whom the promise was made has an election to either hold the maker to the truth or to the falsehood. Must communicate this choice (like by starting an action).  
-Central London: where promise was made that was intended to create legal relations and it was intended to be acted upon, was acted upon, the promise must be honoured and person held to it  
-Central London: a promise to accept a smaller sum when you’re owed a larger sum is binding if that person pays or starts paying you. Estoppel is thus a defence here.  
-Central: unlike promises under contract, promises under estoppel are not permanent – can notify the other person that you’re ending the promise. But can’t retroactively go back and change your word, must give adequate notice. The promise was basically a suspension of an existing obligation to the extent that promise says so, but once you are held to that, it’s subject to reversion with notice if it’s equitable to do so. May be situations where it’s never equitable.  
-Burrows: for estoppels to apply, there must be an actual promise or assurance. You can’t translate a series of waivers or past behaviour into a promise.  
-Combes: a promise that amounts to an assurance that existing legal rights will not be used, almost always a reduction or elimination of obligations that would otherwise exist. Promissory estoppels does not create obligations and so cannot be the basis for a cause of action, it only reduces existing ones.  
-D&C Builders: must be equitable for it to be used. Person must have relied on the promise and it has to be fair (can’t have forced you or tricked you into making the promise)  
-you can go back on the promise up until the point someone relies on it.  
-it can’t be the basis of a cause of action, but it can be a part of one.  
-Walton Stores: goes against Combes and says that promissory estoppels can form the basis of a cause of action. M v. A says that if this is to be applied at all in Canada, the promise must have been considered binding in some way and there must be an intention to create legal relations.

**Privity**  
-must be a party to a contract to enforce a contract or have it enforced against you  
-Vertical privity: common in consumer situation: you only have a contract with the person above you (manufacturer, distributor, retailer, consumer, can only sue the person directly above). If the chain is broken, the upper party has immunity.  
-Tweddle: Horizontal privity: contract made by a and b for benefit of C. C is not a party to the contract so cannot so, not privy to it.

**Ways around Privity**-Specific Performance (Beswick): in horizontal privity, where someone else is getting the benefit, while they can’t sue, one of the contracting parties can sue for specific performance to ensure the other party performs the obligation for C’s benefit. Contracting party wouldn’t get damages since it is the third party, not him, that is getting a benefit. Contracting party suffers no loss.  
-Agency (Dunlop): the third party argues that he’s a principal and one of the contractin parties is merely his agent, thus he’s really the one who’s party to the contract.  
-Problems with agency: the agent is the one giving consideration (for nothing) or in bilateral, consideration is given to the agent and not the principal. Also, conflict of interest – the interests of the agent and principal must be identical  
-Assignment: the contracting party assigns/sells his contract position to the third party  
-London Drugs: where there is a clause between company and someone else, for the benefit of an employee(s), but they are not privy to a contract, the employees can use that term as a defence against any cause of action brought against them by one of the contracting parties.  
-Fraser River: removes the employee requirement (can be any form of contractual relationship). Now only applies to horizontal privity, where there’s a determinative contract that is a benefit to the third party, and the benefit has to be that it gives the third party a defence against some claim that could be brought against them.

**Terms and Representations**  
-Terms: the obligations, the promises, what the parties have promised to each other that give one party a right and the other a corresponding duty  
-Representations: statements made, leading up to the contract, statement of fact (NOT promises) that were important for one of the parties’ deciding to enter the contract. Not statements of opinion (puffs)

**Operative Misrepresentation**  
-a statement of fact that the party relies on that turns out to be false.  
-leads to remedy of rescission, makes the contract disappear.   
-can hold the representor to the truth, which means there is no contract, or to the falsehood, which may lead to estoppel (this is an election)  
-**there** has to be a statement of fact, it must be untrue, it must be material (of importance, not a mere puff that no one would reasonably rely upon as basis for entering K), and it has to be relied upon by the other party as a reason to enter into the contract.  
-can be iimplied statements or silence. Implication is not the whole truth, but can be interpreted in a way that can be a misrepresentation (ask how much use bike has seen, and I tell you about two short trips I took with it).   
-If A doesn’t ask and B only tells a partial truth, it’s hard to make case for misrep. Silence is also rarely enough.  
-partially factual is okay, even if there is element of opinion. Only when it is substantially/mostly opinion is it disqualified. Something can be a statement of fact and opinion at same time (Constable painting).  
-only the representations that occur before contract exists.  
-Redgrave: no obligation on the part of the representee to check whether what is said is true or not  
-Redgrave: misrepresentation can be innocent. If the statement is untrue, but the speaker doesn’t realize it or intend for it to be untrue, it’s still misrep

**Rescission**  
-voidable: perfectly valid contract has been created and continues to operate unless representee elects to avoid it. Have to make a decision.   
-Laches: Lapse of time begins from the moment of discovery: if you make no choice, law assumes you want the contract to continue  
-undoes the contract and everything that occurs under it. Take back everything you gave under K and give back anything you got. If you can’t do this, can’t rescind.  
-also can’t rescind if the contract has been executed, all obligations performed.   
-can’t rescind if you’ve already elected to affirm the contract  
-Kupchak: complete restitution could not be made, parts of property couldn’t be returned, so court gave monetary compensation to substitute for that which couldn’t be returned. This goes against most cases which say that you can’t do this.   
-Kupchak only applies if the misrepresentation was fraudulent

**Simons (is something a term)**  
-found certain statements to be terms despite looking like casual statements. Courts can be cooperative in this manner.   
-test is “did they intend to contract by virtue of making that statement,” depends on intention

**Conditional/Intermediate/Warrantee (Remedy of Termination)**  
-breach of any condition leads to damages, but it must be a condition or an intermediate term deemed of sufficient importance to get termination  
-termination ends all primary obligations, but not secondary obligations (can still get damages)  
-does not terminate anything that’s already occurred under the contract  
-you affirm the contract if you use what you get under it  
-at time of acceptance, determine whether something is condition or warrantee.   
-Condition: important term that goes to heart of the contract, breach undermines the purpose of the contract and is a repudiation.  
-Warrantee: terms that are not that important, no breach could ever deprive a party of a substantial benefit of the contract  
-Intermediate Terms (Hong Kong Fir): terms you cannot predict at the time of acceptance whether a particular breach would be serious enough to merit termination. Wait till it’s broken before deciding, at which point you could get remedies as though ti were a condition, though it formally isn’t one.  
-Mercantile contracts generally won’t have intermediate terms and courts try to keep it to c and w.

**Primary and Secondary obligations**  
-equity requires performance of primary obligations  
-secondary obligations are either damages or debt, they are implied as terms into the offer  
-Leaf: if a statement is both a term and a representation, it loses its status as a representation

**Entire and Severable Obligations (only pertains to pre-conditions)**  
-with pre-conditions, the other party’s obligations rae only enforceable when the pre-condition obligation has been performed.  
-Entire obligation: whole of the pre-condition must be performed before the other party’s obligation becomes enforceable.  
-Severable obligation: you can break the pre-condition obligation into chunks and for each chunk that is done, the other party will have obligations triggered.  
-Cutter: presumption is that, where there are pre-conditions, the obligations are entire  
-Fairbanks: substantial performance can satisfy entire obligation. If it is substantially completed, other party’s obligation will be triggered, though they can still get damages for the performance not being complete.  
-Sumpter: if you don’t get substantial completion, only a little completion, other party’s obligation won’t be enforceable and, inc contract law, you are entitled to keep what you got and not pay for it as your obligation to pay hasn’t been triggered.  
-Sumpter (quantum-merit contract solution) court invents a contract that says that there’s an agreement that one party is taken to be obligated to compensate the other party for anything received. As this is an invented contract, there are problems of certainty: how much should be paid, given it can’t be whole amount. Court says “reasonable price.”  
-Quantum-merit may work because receiving party indicated in some way, words or action, that they ought to pay something and felt an obligation.  
-Restitution (better, more likely solution): orders compensation for unjust enrichment.

**Implying Terms**  
-where there’s a writing requirement, it’s always express terms.  
Machtinger’s only 3 bases for implying terms into contracts  
-custom or usage: history between the parties: they’ve always dealt in particular terms in the past, so why should it be different this time? Or people in this industry or geography usually deal in particular terms. Must be basis for this. Presumed intention leads to terms being implied (McCutcheon)  
-Law: because of what they agreed to, a statute puts terms into the contract. Law says they are there, regardless of whether or not there is presumed intention. A contract for sale of goods has terms put in it by the Sale of goods Act  
-Necessity: where it’s necessary based on what else the parties agreed to – presumed intention. Terms necessary to give efficacy to the contract.

**Limitations of Liability**  
-quantitative limitation of liability: if I break my obligations, you only get so much money  
-procedural limitations of liability: before you get damages, have to fill in these forms, have this time limit, can only pursue in this jurisdiction, etc.  
-exclusion: in breach of this obligation, no liability  
-generally found in standard form/adhesion contracts that are “take it or leave it” but courts can’t target adhesion contracts alone due to grey area between these and carefully negotiated contracts  
-response by court is often unenforceability. No such thing as freedom of contract for secondary obligations, as theya re meant to reflect the primary and you shouldn’t be better off under secondary than you would be under primary

**Methods of Restricting these Onerous Clauses**  
-Notice: other party must know of the term’s existence  
-Construction of contract: construe the contract such that this clause doesn’t apply to this situation  
-doctrine of fundamental breach (Karsales) – bad law.  
-Unconscionability: if it is unconscionable to apply the clause, won’t apply  
-Doctrine of unfairness: unconscionability is concerned with creation of contract while unfairness is not evident at creation, only started occurring after contract was entered into.  
-Control of public policy: is it against public policy for this clause to apply?

**Notice**  
-not treated as part of the contract unless party that will bear the burden had notice of its existence.  
-don’t have to understand all the consequences or even read it, just be aware of their existence and, if it chose, that they could examine them before entering into the contract.  
-Thornton: must know they existed befor entering the contract, must be given notice in a context where they actually had a choice to say no to entering into the contract.  
-notice requirement can be resolved by custom/usage if parties have always made contracts like this.

**Signature**  
-Tilden: must show that the signature represented the intention of the signer to agree to the onerous terms  
-Carrol: more traditional. Signature is determinative unless there has been some misrepresentation, fraud or deceit by the person presenting the terms. Otherwise, while not binding, signature will be very persuasive. Carrol distinguishes Tilden as being a case where the signature was given in a hasty and informal manner. Traditionally, signature meant signor was aware of the terms and had accepted them.

**Construction**  
-Tircon: onerous terms are interpreted against the party relying on it. They are construed as narrowly as possible and against the party relying on it.  
-all very specific situations and courts give narrow application. The more detail you put in the clause, easier it will be for court to give a narrow application. If you, for instance, give examples of what term applies to, the court will treat examples as the only uses for the term

**Unconscionability/unfairness**  
-Hunter(Dickson): unconscionability at the time of creation of the contract; unenforceable even where notice and construction apply. Unclear what constitutes unconscionability (Wilson says inequality of bargaining power  
-Hunter(Wilson): whether it was unconscionable if the exclusion/liimtatoin clause were to apply, can be enforced not just at creation of contract, but if the consequencse/context of the breach would be unjust and unfair  
-Tircon: favours Dickson’s test (creation of contract) and adds public policy test: has to do with the larger context, about how why they entered the contract and how it affects the party at large. No clear definition of public policy

**Parole Evidence Rule**  
-Bank of Montreal: if there is a written record of the contract and the parties meant for it to be the complete written record and it appears as such, then it is, no other evidence may be raised in a dispute. Written evidence is all court will consider, no oral evidence about what the contract contains.  
-weaker party will try to argue rectification to get around this  
-Lambert opinion: PER is only a hierarchy so that where there’s a conflict, written prevails over oral  
-generally there’s a lot of give around this rule, and it’s treated more as a nuisance.

**Rectification**  
-for court to change written evidence, requires a mistake other than misrep that can’t be attributed to the other contracting party  
-usually only works if there is a common mistake, but can work for unilateral (Sylvan Lake)  
-mutual modification may lead to void.

**Mistake types**  
Common mistake: both are wrong about what the contract says, but believe the same thing  
Mutual mistake: both are wrong, but believe something different  
Unilateral Mistake: one party is mistaken, the other is not.  
  
**Mistake leading to Rectification (Mistake as to Terms, usually common or mutual)**  
-mistaken assumption: misled about something significant that led you to enter into the contract, one you made yourself or was caused by a third party, not by the other party (that’s misrep)  
-mistake as to terms: I thought there were terms but there aren’t. This is where rectification is important; arguing that terms in a contract are of a particular sort, but what you’re mistaken about is the written record, which has mistaken record of the terms you agreed to  
-Bercodicci: court will look at evidence after the fact, see what the parties thought the contract said, look at how they are behaving. If mutual mistake, court has no choice but to rectify, otherwise void

**Rectification for Unilateral Mistake (Sylvan Lake)**  
-must show there’s a prior actual agreement, prior oral agreement between the parties that this written evidence doesn’t jive with  
-show that there is a mistake in the written record at least from one party’s perspective  
-show that the other party ought to have been aware of your mistake  
-must explain to court how the written document should be, must let court know exactly what the mistake was and it can’t be too significant or need a major rewrite  
-traditionally, party wanting rectification must show they were not careless in entering the contract, but Sylvan says this is not required.

**Mistake (not contract, but to get out of K in general – mistaken assumptions)**-generally occurs before acceptance  
-Bell: example of common mistake “subject matter not existing/destroyed,” contract is void. Another example is of ownership by buyer, again contract is void.  
-Bell: mistake as to quality doesn’t affect contract unless it is a mistake of both parties and it’s a mistake of some quality that makes thing essentially different from what it was thought to be.  
-Bell: only option is void, and no unilateral mistake.  
-Soling: says remedy is voidable when it is unconscionable or unconscientious for one party to continue with that contract (unilateral).  
-Soling: contract is void where the mistake has been adduced by a misrepresentation, even if innocent, by one of the parties. Also if the unilateral mistake as to terms or identity where it is fraud.   
Soling: Also if the parties are under a common misapprehension as to facts and their relative rights, a common mistake about something fundamental and the party that wants to make it voidable was not at fault.  
-McRae: where the parties have allocated the risk such that this is simply how the K was meant to unfold, even if one party gets left with impossible obligation, can’t claim mistake.  
-McRae: cannot use mistake, even where common, if it’s attributable to one of the parties, who can be said to have taken on the responsibility for the facts being correct. If you’re offering salvage, and it’s not there, you can’t get out of the K by claiming mistake.  
-McRae: for unilateral mistake, just knowing of my mistake is not enugh, has to be some duty for you to correct my mistake, an element of unsavoriness or sharp dealing  
-Shogun: mistakes of mistaken identity: if in person, you have a K with that person regardless of who they say there are. If documentary, you have no K with the person named and K with fraudster is voidable.  
-Great Peace Shipping: barring a mistake about identity, the mistake, to have an effect on the contract, must be a common mistake by both parties about something fundamental, with K made void as result.

**Non Est Factum**  
-I didn’t put my signature on the K, that’s not mine, so I’m not a party  
-can work where I did sign, but had no idea what it was, couldn’t be expected to realize it was a contract or one of that sort.   
-can’t get out through NEF if it’s really your own fault for signing a contract without knowing what it was, have to argue that couldn’t reasonably be expected to know what was being agreed to.  
-must argue that you weren’t negligent or careless in signing

**Frustration**  
-contract is fully effective up to the point of frustration, after that, ,primary and secondary are gone.  
-Davis: unexpected events occur that aren’t caused by the parties and destroy nature of what contract is supposed to be.  
-response of law itself: contract is at an end when event occurs  
-Davis: circumstances must be unforeseen (Merchant Marine), have to cause profound change to the K  
-largely broke up into natural, political, and economic phenomena. Hard for these last two to be unforeseeable. More frequent is where someone dies.  
-Industry standards affect foreseeability, as does whether you have insurance.  
-if the risk was allocated in the K for the possibility of this event, no frustration (Capital Quality), but may work where there is no such allocation (Victoria Wood)  
-Maritime National: if one of the parties causes the event, that party cannot argue frustration

**Frustrated Contracts Act**  
-doesn’t apply to pre-1973 contracts and only applies to extent that contract doesn’t say what happens in the event of frustration.  
-if any part of the contract has been wholly performed and it can be severed, that is treated as separate  
-compensation for anything that was done by the party that is claiming restitution by fulfilling some obligation or taking necessary step in fulfilment of obligation.  
-doesn’t matter that it wasn’t received by the party who has to pay for benefit  
-figure out what the benefits are that were created and owner must pay restitution for them.  
-do not take into account loss of profits or insurance money.  
-give credit for any benefits remaining in the hands of party claiming restitution  
-in determining value of the benefits given pre-frustration, can only claim for reasonable expenses, if you hugely overpaid for materials, not reasonable.  
-if part of performance was delivery of property and this is returned to the party making claim in reasonable time, claim is reduced by value of that property. Affected by fair market value. Can choose to keep the property  
-if frustrating event itself or circumstances giving rise to it cause total or partial loss in value of the benefit, then that loss is split between the parties. If damage is subsequent to the event, doesn’t matter

**Duress**  
-if someone is coerced into a contract, it doesn’t exist – a threat of physical harm, threat to property, pressure can also be one stage removed. Void, voidable for economic duress.  
-Pao On test for duress: Did somebody protest? Was there an alternative course open to that person? Was the person independently advised? Did you take timely steps to avoid the contract?  
-Universal Tank Ships (adds extra step for econ duress): look at the legitimacy of the pressure/threat. Look at nature of what the person threatens to do and examine the bargain that’s entered into as result  
-Greater Fredericton: where it’s a change to an existing contract, just increased obligation (pay more), even though it’s econ duress, can skip the Tank Ships test.   
-Greater Fredericton test for econ duress in existing contracts: promise must be extracted as a result of pressure and must be such that coerced party has no practical alternative. If these are satisfied, see whether promise was supported by consideration (if it is, less likely to be duress), whether coerced party made promise under protest, and if not, whether party tried to disaffirm the promise ASAP.

**Relationships of Undue Influence**  
-presumptoin that stronger party is in control over the other and thus whether contract between them is enforceable.  
-need to establish there is a relationship of undue influence. Stronger party can then rebut conclusion that contract is voidable or unenforceable  
-there are established relationships where undue influence is irrebuttably presumed.   
-if not established, must show nature of the relationship and way it functions  
-Geffen: if it is a commercial relationship, have to establish whether or not the contract is disadvantageous to the party claiming undue influence  
-in non-commercial relationship, disadvantageous aspect is not relevant, only have to establish the relationship of undue influence  
-other party can then rebut: usually is stronger praty showing that weaker party got independent advice before entering into the contract, or that it was a straightforward/low-stakes contract

**Morrison (test for unconscionability)**  
-relief against an unfair advantage gained by unconscientious use of power by stronger party over the weaker party  
-show proof of inequality of the parties arising out of ignorance, need, or distress of the weaker party leaving it in the power of the stronger  
-proof of the unfairness of the bargain   
-these two requirements create presumption of unfairness that stronger party can rebut  
-remedy is flexible, but typically unenforceability  
-has to do with formation of the contract (not like Wilson’s unfairness in Hunter)

**Illegality**  
-contract contrary to public policy. Decide whether the contract is illegal and why then, if it is, what the consequences are.  
-Statutory Illegality: statute just says a contract cannot exist or such a method of doing something is prohibited.  
Common Law illegality: restraint of trade is common one. Contract to commit a crime or legal wrong. Contract prejudicial to good public administration or the administration of justice. Contract against morals.  
-void, voidable, unenforceable, or rewrite the bargain. If it’s only a small part of contract, relunctant to give remedy. Common to just sever this portion so that impact of illegality only affects that part.  
-Illegality is a doctrine of last resort. Tends to be unenforceability if you can get it, void if egregious

**Restraint of Trade (Shaffurn)**  
-balancing between freedom of contract and societal interest.  
-have to protect the weaker party (usually the one that agreed to this.  
-notionally severed and rewritten – restraint was too wide and was an unsaveable ambiguous clause  
-Still: remedy is determined by how best to further public policy in dealing witht he contract.

**Anticipatory Breach**  
-time has not yet arisen for party to perform but that party makes it clear there will be no performance.  
-Election: proceed to secondary obligation now or affirm the contract and wait till the time comes.  
-in order to claim damages you must show that you were ready to perform what youw ere supposed to have done, which may be a reason to affirm.

**Remedies (reasons for) (Fuller) (losses or profits)**  
-Restitution Interest (Blake): I should give back the profit I got from breaking the contract, plaintiff lost nothing, but defendant got something by breaching. Problem is that means plaintiff benefits from the breach.  
-Expectation Interest: damages are meant to put you where you were supposed to be but are not because of the breach. Expectation tends to be associated with lost profits, that you’d be better off.  
-Reliance Interest: incurred costs you shouldn’t have and damages return you to the position you were in before the breach. Deals with waste: incurred expenses you shouldn’t have due to breach that other party must compensate for.  
-most cases say you must choose between between losses or profits, can’t get both  
-Sunshine Vacation: when making this choice, where one figure is obviously fanciful and the the other is more defensible/certain, the court will pick the latter for you.  
-McRae: expenditure is not same as wasted expenditure. If you acquired something of value, you won’t get the whole amount back.

**General Damages**  
-damages (lost profits or expenses, for instance) that anyone with that contract and that breach would suffer. Need only look at contract itself and its terms to arrive at damages, don’t need to know the special circumstances of the parties.   
-Just look at contract/terms, reach, and market value to assess

**Hadley Test for Special Damages**  
-it has to be in the **reasonable contemplation** of the parties upon entering the contract as a **probable result** of a breach.  
-look at motive for entering the contract and surrounding circumstances to determine what you will get in breach of it. If breach prevents you from getting where you wanted and you knew at time of contract creation that that was why I entered into the contract. (recital is important)  
-it’s only the nature of the loss that has to be known, not the specifics of it.  
-contemplated as the probable result of a breach that that loss would occur.

**Assessing Damages**  
-Chaplin: there has been a breach and the person has been deprived and if that’s the only basis for assessing, you just come up with something.  
-Groves: if there are too many ways of assessing, look at the purpose of the contract and why you entered into it, purpose of damages here. Fact-specific. Courts usually go for the lower amount (Ruxley Electronics)  
-Jarvis: can claim for disappointment/emotions if you can show that the point of the contract was to get one emotion and the breach led to the opposite emotion.  
-what the damages are can be determined when you go into the market and when you take steps to mitigate. Market value used to determine amount of damages is usually at time of breach.

**Mitigation**  
-party claiming damages must have taken any steps that are reasonable to stem the losses.  
-market value: if I buy a replacement that was exorbitant, I may not recover those costs, market value is used to calculate mitigation.  
-have to act reasonably quickly, can’t delay getting a replacement and then hope to recover for lossess incurred due to that delay. Doesn’t matter if you have no money.  
-if the party at time of entering contract, knew you had no money and knew you could not mitigate, then this can be taken into account.  
-Asamera: fluctuations in market – you’re allowed to wait a little bit before going to the market to mitigate, but must mitigate within a “reasonable” amount f time. Can wait longer if you got absolutely nothing than if you got something.

**Liquidated Damages**  
-if cannot be justified as a legitimate, reasonable pre-estimate of the loss, equity will say it’s a penalty clause and is unenforceable (illegal). Will still get damage, but will be assessed by usual principles.  
-Collins: even if a provision is a penalty clause, it’s up to the party to make that argument, not required-Collins: it’s the person who pays that argues it’s a penalty clause, the one receiving the liquidated damages cannot contest the clause as a penalty clause.  
-no freedom of contract for secondary obligations – they are meant to mirror the primary obligations. If they do not, they will be struck down by equity. Meant to compensate for primary obligations and if overcompensate, they are penalty clauses.  
-Shatilla: dangers of picking a figure that bears no resemblance to what the losses are. Penalty clauses are typically a single amount payable regardless of what consequences of breach are, picked out of air  
-Clarke: can get around this by creating a formula for assessing damages, but this formula must be reasonable and one that the law accepts (like isn’t based on restitutionary principle)

**Deposits**-payment of money, often required to accept the contract or could be a first payment/part of oblig  
-Stockloser: case is probably wrong’; there is on such thing as relief of forfeiture from a primary oblig

-where there is no forfeiture clause and payments jutst come in instalments, as long as seller doesn’t rescind the contract, he can keep the payments.  
-if there’s a forfeiture clause, the money can be kept, if it’s paid as a deposit, buyer can’t recover at all.  
-In Stockoser, Denning tries to say equity demands return of the deposit, but gives no explanation  
-if you pay deposit and then break contract and I sustain losses, I can claim damages in addition to the deposit, but deposit converts into part of the secondary obligations. If damages are same as or less than deposit, you’ll get no more. If deposit is more than damages, Denning says equity says it puts in you in a better position than you’d’ve been in.

**Equitable Remedies**-specific performance: an order to perform the whole contract  
-injunction: relating to a specific obligation  
-must first say what you’re entitled to under common law and argue that it isn’t satisfactory, always look to common law first though equity prevails where it’s different.  
-cannot get both common law and equitable remedy for the same provision – equitable enforces the primary obligation, and common law is a secondary provision that only kicks in when primary is breached.  
-Specific goods: contract is entered into for identified property, the only goods that can be delivered under the contract and not lead to breach.  
-Clean hands: if the reason I’m not performing is that you’re a fraudster who tricked me into the contract or asked for too much money or didn’t tell me everything I needed to know, court won’t give you equitable remedy  
-Own conduct: if you’ve been running around breaking contract, it’s unlikely court will give you equitable remedy against other party  
-Timely request: too much hardship on the other party if you wait too long to ask for equitable remedy, as you’ll be taken as having elected to proceed to secondary obligations instead of going for primary.  
-3rd party involvement: if the goods have been transferred to third party, can’t award SP  
-complexity: anything complicated or time consuming, court has to monitor that their order is complied with and wont’ want to monitor something of complexity that would take time, like if there’s an obligation to perform a personal service, do work (Warner Bros), unlikely to get court order.  
-Balance: what’s going to happen if they do and if they don’t grant these remedies (Zipper), who’s worse off? May just get injunction for a part of a contract where SP is too onerous or complicated.

**Interim and Permanent Injunctions**-interim is where court hasn’t had time to fully here the case, but there’s an urgency to it, so give interim, and then come back later and make permanent after arguments, or discharge.

**Equitable Damages (Semelhago)  
-**where court wants to give SP or injunction, but can’t (usually doue to third party involvement), court may give money instead....though also possible court would just reject you or tell you to go to CL