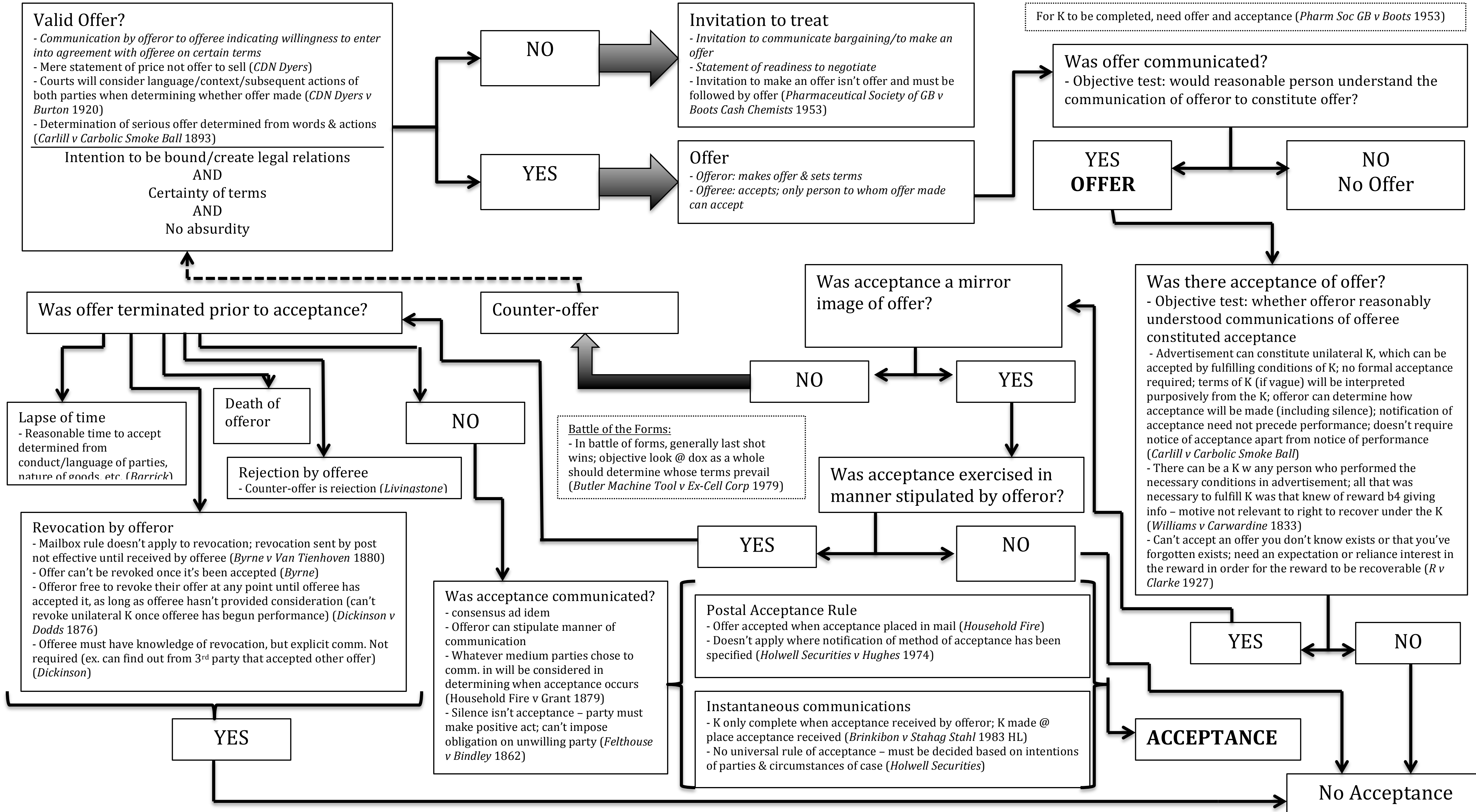
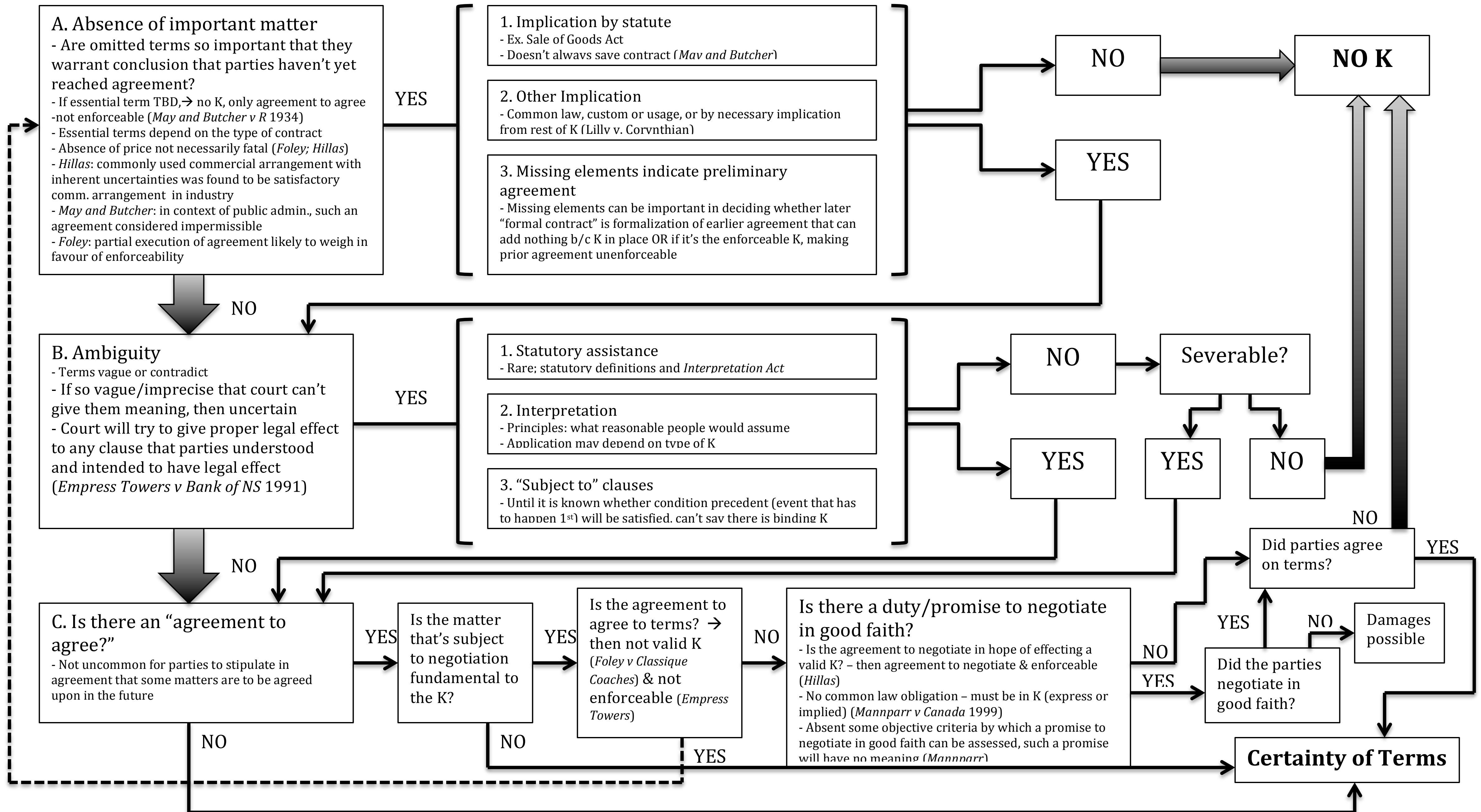
OFFER & ACCEPTANCE

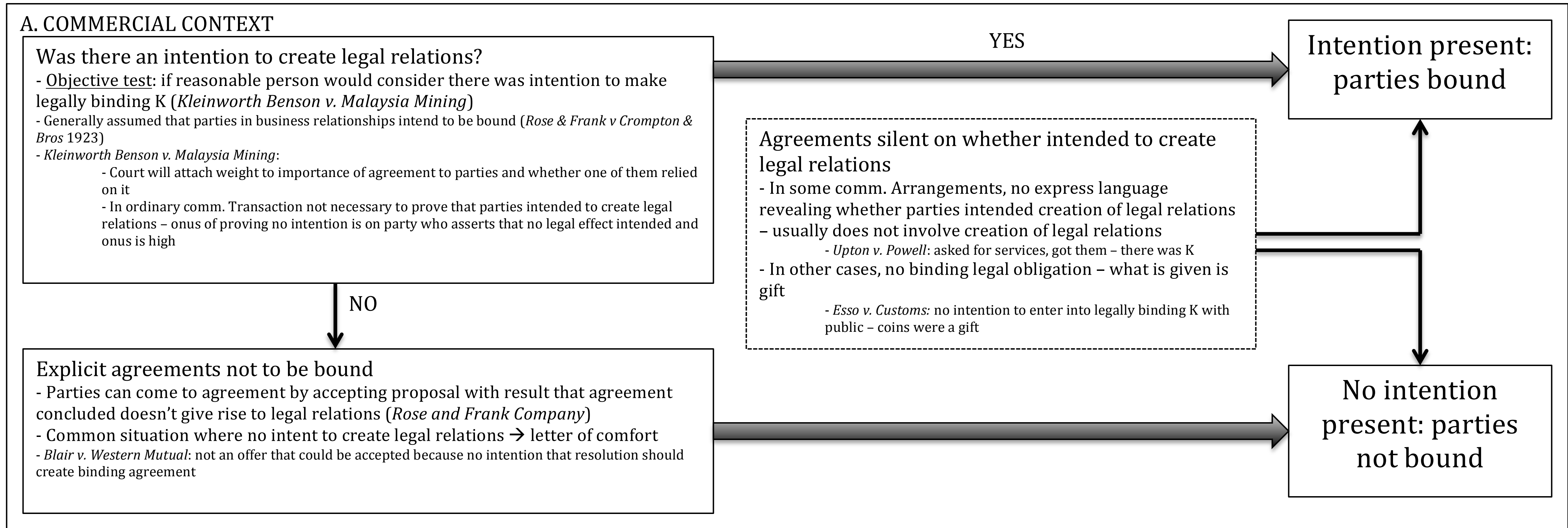


OFFER & ACCEPTANCE

CERTAINTY OF TERMS



INTENTION TO CREATE LEGAL RELATIONS

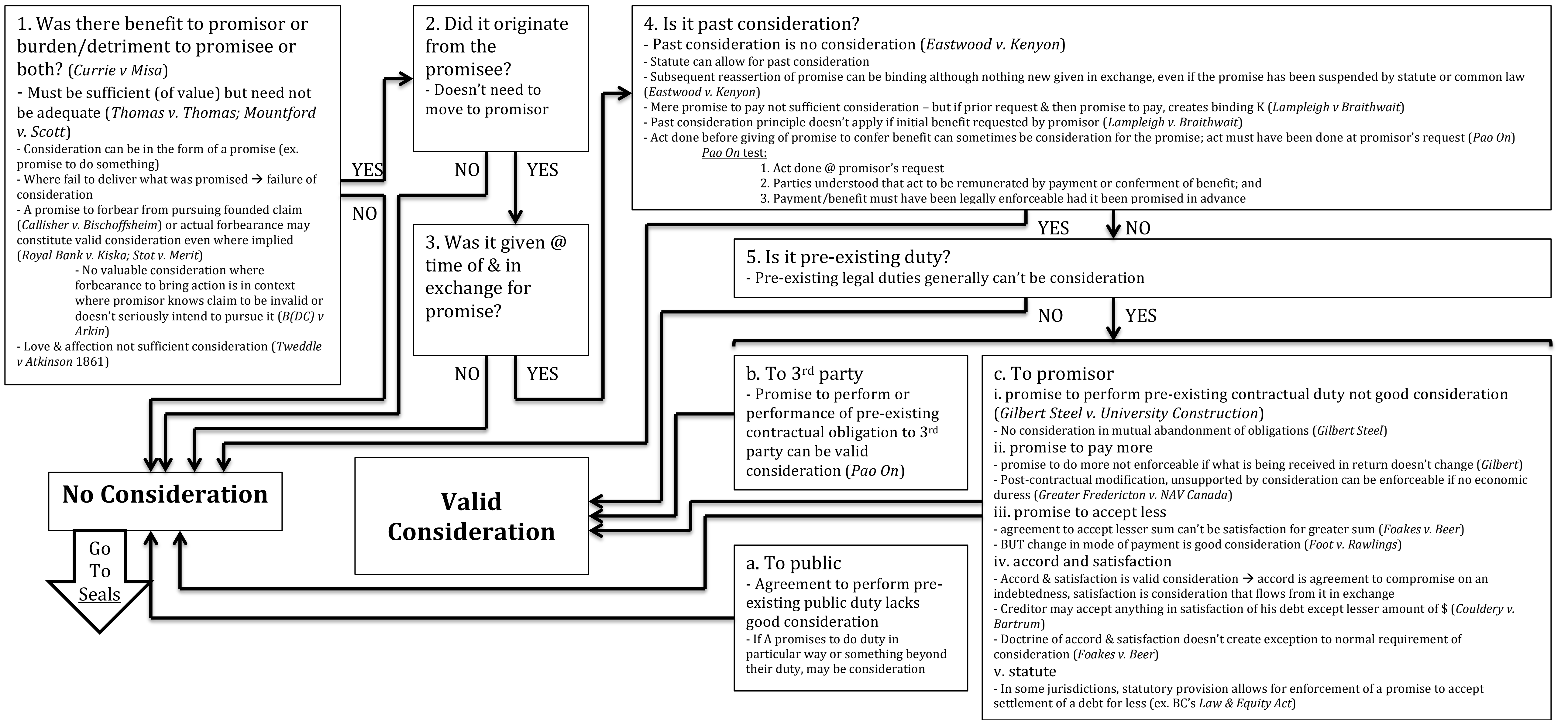


<u>B. SOCIAL/DOMESTIC CONTEXT</u>

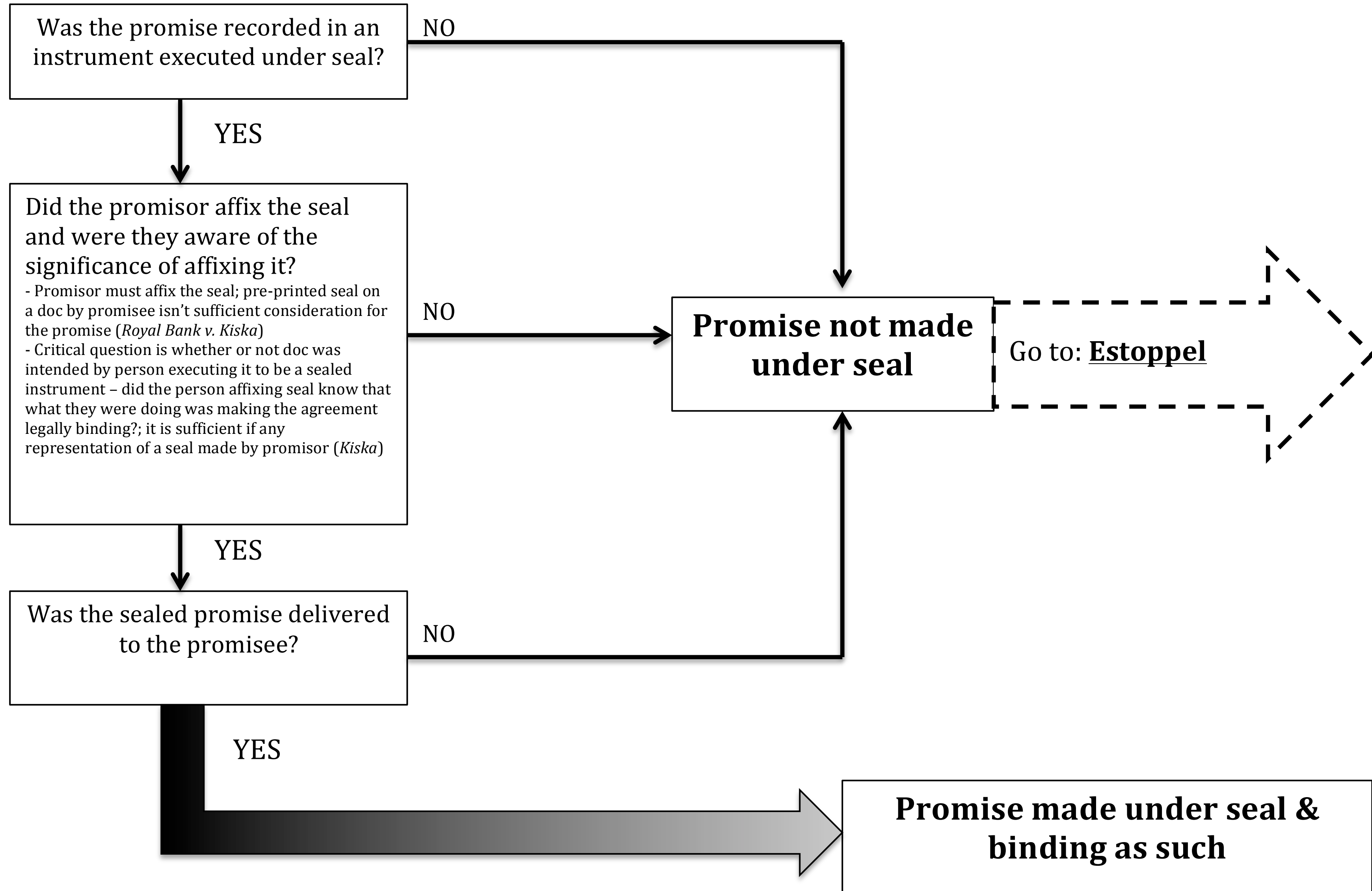
- Courts have generally assumed absence of intention to create legal relations in family and social settings
- Social arrangements often made without any intention that legally enforceable agreement created; arrangements made b/w spouses not generally Ks because parties don't intend to be legally bound by the agreements (*Balfour v. Balfour*)
- Context in which arrangement or promise made matters (*Merritt v. Merritt*):
    - If living together in amity → domestic arrangements ordinarily not intended to create legal relations
    - Where separated or about to be → intend to create legal relations

B. WAS THERE CONSIDERATION FOR THE PROMISE?

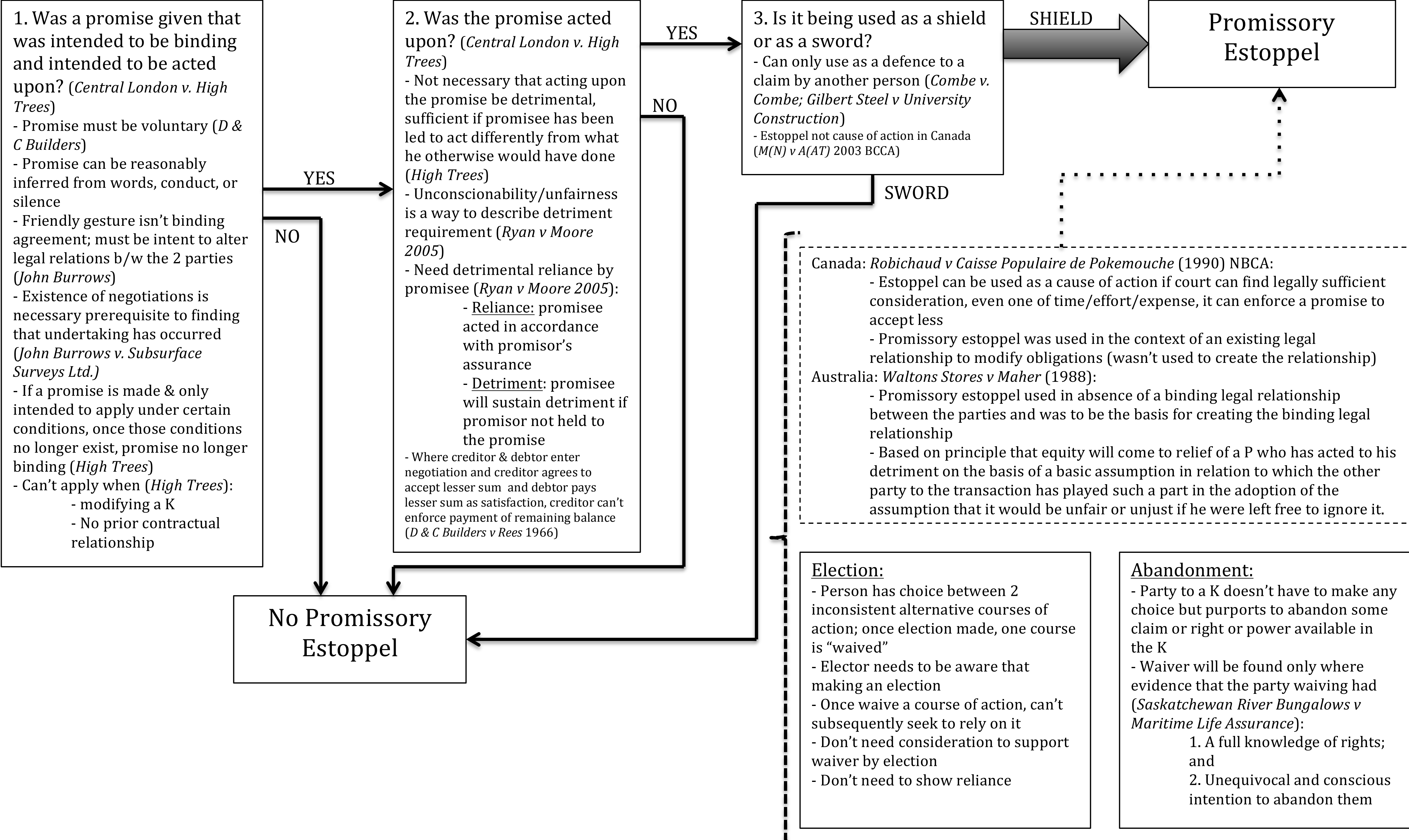
- To be enforceable, a promise must be given in return for something of value provided by the promisee, or for "good consideration"
- Motive is different from consideration (Thomas v. Thomas)
- Consideration assessed on promise-by-promise basis, not on whole-contract basis, except in unilateral K where only 1 promise (*Pao On*)



A. WAS THE PROMISE MADE UNDER SEAL?



C. ESTOPPEL



PRIVITY

- Multilateral Ks: several parties; each has agreement with each of others, on same terms
- Joint/several liability: >1 person on one side of contract; question is how obligations/benefits sorted out
    - Several: 2 (or more) parties each to pay/receive specified amount
    - Joint: single amount which 2 parties jointly responsible to pay/entitled to receive

I. Doctrine of Privity

- Only parties who have created K (offeror & offeree) are parties to the contract & only they can enforce the obligations in it or have obligations imposed on them by it (*Tweddle v Atkinson; Dunlop Pneumatic Tyre v Selfridge*)
- 3rd party can be recipient of benefits under the K, but can't enforce the obligation that benefits him/her (*Beswick v Beswick* 1968 HL)
- Privity operates independently of consideration
- Test for employees party to K (*London Drugs v Kuehne & Nagel* 1992):
    - a. Clause must expressly or impliedly extend benefit to employees; &
    - b. Employees must have been acting in course of employment; &
    - c. Performing services provided for in K when loss occurred

2 Types

Horizontal

- A enters K with B for something that benefits C → if B doesn't perform obligation, C can't bring contractual action for remedy & A can't sue for damages suffered by C (*Lyons v Consumers Glass Co 1981 BCSC*)

Vertical

- Each person in chain has K with person above and below but not others, so can't bring contractual claim against the other parties (*Dunlop Pneumatic Tyre v Selfridge*)

III. Exceptions

Abolition

- Many jurisdictions have abolished horizontal and/or vertical privity by statute

Limited Exception

- Modification to horizontal privity: ability of person not party to K to use a defence against tort claim where that defence exists in K of 2 other parties
- 1st developed in employment context (*London Drugs v Kuehne & Nagel*)
- Then extended to 3rd parties in Ks generally → "Principled exception" (*Fraser River Pile v Can-Dive Services*)
- In order for exception to apply, must show:
    - a. Parties to K intended to confer the benefit of the contractual defence on 3rd party; and
    - b. 3rd party was performing services contemplated in the K
- If 3rd party not intended to benefit, then not available (Edgeworth Construction v ND Lea 1993 SCC)

II. Circumventing Privity

a. Suit by party to K

- Have someone who is party to K to take action to obtain satisfaction for person who's not party (*Beswick v Beswick*)
- When P makes contract for group, only P can bring an action, but can claim for all losses in group (*Jackson v Horizon Holidays* 1975 CA)
- Contracting party can only recover damages suffered by 3rd party when @ time of contracting, parties contemplated that that breach would cause identifiable loss to 3rd party and 3rd party would have no other means of recourse (Alfred McAlpine v Panatown 2000 HL [UK])

b. Reconstruct as agency situation

- Say when A enters K with B that benefits C that A acting as C's agent and so K is actually between B & C
- Where party named in K was acting as agent of 3rd party, the 3rd party can be sued (*Dunlop v Selfridge 1915*)
- Can be agency situation even though parties didn't acknowledge in agreement (*McCannell v Mabee* 1926 BCCA)
- Court reluctant to find agency where A & C have potentially conflicting interests from the K (*Dunlop Tyre v Selfridge*)

c. Collateral K

- When A & B entered K that affected C, came into being a collateral K between A & C, not necessarily through B as agent for C (*Shaklin Pier v Detel Products* 1951 KB)

d. Assignment & Subrogation

- Legal device for effecting transfer of entitlement to intangible – K right is intangible
- C buys/is assigned A's position between A and B → C takes over A's contractual position
- Problematic: C can't get any more from B than A could have
- Some Ks (personal services) can't be assigned (*Griffith v Tower Publishing* 1897)

e. Transfer of obligation

- Civil Law:

Object & claims against manufacturer keep being passed along, by K, with each new sale

- Common Law:

Doesn't give original contractor any positive rights against owner, only claim for injunction for interference with contractual rights

Operates only in context of existing burden that a new owner has express knowledge of (*Lord Strathcona Steamship v Dominion Coal* 1926)

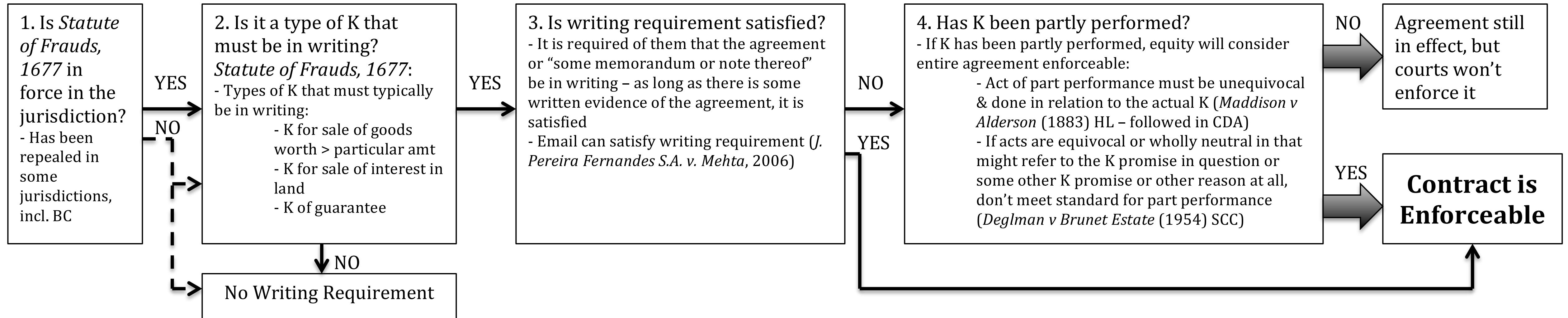
f. Trust

- A settles property on B, trustee, to hold for benefit of C, beneficiary; arrangement between A & B created through K – if B uses property in way not in conformity with trust terms, trust law allows C to bring claim against B for breach of trust (*Vandepitte v Preferred Accident* 1932)
- Not legitimate to import into K the idea of a trust when parties have given no indication that such was their intention (*Re Schebsman* 1944 CA)

WRITING REQUIREMENT

2 types of contracts:
- Formal (sealed): promises made under seal; WILL be in writing
- Informal (simple): any K that isn't sealed; can be written and/or oral; the agreement is the K, the writing is simply evidence of the K

A. Does K Meet Writing Requirement?



B. Does Parol Evidence Rule Apply?
- Determines whether court will only look at written record to determine a K dispute

Parol Evidence Rule:
- When parties intend that written evidence of their K contain entire K, court won't accept in evidence oral terms of that K if not reduced to writing
- Rule raised by other party to argue that oral terms can't be accepted whether in the one K or separate K, so as to vary what appears to be complete agreement in writing
- In certain circumstances, party wishing to rely on oral undertaking may be prevented from introducing evidence of oral understanding that supplements or is inconsistent with written agreement
- *Hawrish v Bank of Montreal* (1969) SCC: oral undertaking inconsistent with provision in the guarantee – court allowed claim to enforce the guarantee; judge not convinced that evidence established that there was a clear intention on the part of the bank to give a binding undertaking of the kind alleged; collateral agreement can't be established where it is inconsistent with or condradicts the written agreement
- *J. Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* (1976) CA: court gave effect to collateral oral warranty – court said parol evidence rule didn't apply because K was partly oral, partly in writing, and partly by conduct – all evidence and terms together formed totality of the agreement
- ****Gallen v. Butterley*** (1984) BCCA: CDN approach is to create presumption in favour of written agreement; presumption is strong:
  - Strongest when alleged oral misrepresentation contrary to written terms; less strong when merely adds to them
  - Stronger where parties themselves negotiated and prepared written agreement; less strong where printed form used
  - Less strong where contest was between specific oral representation and general exemption/exclusion clause, in which case can read specific representation as intended to be exception to more general stipulation
- Under *Gallen*, evidence relevant to determination of whether an agreement occurred is admissible & if prior oral undertaking intended to be binding, may prevail over written agreement

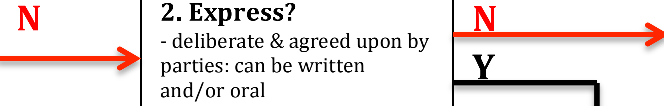
Exceptions to Rule:
- Misrepresentations
- Where terms implied into a K
- If excluded by statute (ex. *Business Practices and Consumer Protection Act*, SBC 2004)
- Exceptions per *Gallen:*
- To show K was invalid b/c of fraud, misrep, mistake, incapacity, lack of consideration, or lack of contracting intention
- Dispel ambiguities, establish term implied by custom, or to demonstrate factual matrix of agreement
- Support of a claim for rectification
- To establish condition precedent to or a collateral agreement
- Support of allegation that doc wasn't intended to be the whole agreement or claim 4 equity

Notice of all terms has to come b4 or @ time of agreement (*Olley v Marlborough*)

1A - CLASSIFICATION OF TERMS

1. Is it a term? (significance: only terms are contractually binding and breach leads to remedies)
- test is one of **intention**: depends on the **conduct** of the parties, their **words & behaviour**, rather than thoughts – if intelligent bystander would **reasonably** infer that it's a term, that will suffice (*Oscar Chess v Williams* (1957) CA)
- the more important a statement is to a particular contractual aim, the more likely it is that it is a term of the K
- **skill & knowledge of maker of statement** sometimes considered in deciding whether a statement has become a term (*Esso Petroleum v Mardon* (1976) CA)
- statement can't be a term if it's **expected that recipient would verify accuracy** (*Ecoy v Godfrey* (1947) KB)

Y → Term; N → 2.



2. Express?
- deliberate & agreed upon by parties: can be written and/or oral

Y → Term; N → 3.

3. Implied? (Machtinger) (Imply terms sparingly and with caution)

a) Custom/Usage (*Machtinger*)
- where there is evidence to support an inference that **parties to K would've understood such a custom/usage to be applicable** (terms implied in this manner on basis of presumed intention)
- where in **particular trades or comm. context**, established customs/usages relating to terms on which parties deal w each other, it may provide basis for implied term but must relate to the terms on which parties deal w each other in the particular comm. context
- where there has developed a practice b/w 2 parties to imply such a term in the k (needs to be consistent past practice)
- might be industry or local practice in which context parties are operating (*British Crane Hire v Impswich Plant Hire* (1975) CA) – ex. shipping Ks
- *parties can expressly exclude a custom/usage from operation or its exclusion can be implied from the rest of the K

b) Necessity (*Machtinger*)
- where it is necessary (Canadian courts: "**reasonably necessary**" rather than "absolutely necessary") to make the rest of the K work or obvious in light of the particular circumstances of transactions b/w parties – implied terms **must be reasonable & capable of clear expression**
- where it is **necessary for the business efficacy** of the K – officious bystander test (*Reigate v Union Manufacturing* (1918) CA)
- in **deciding whether necessary for business efficacy**, look at rest of K (incl. other implied terms), parties, environment in which they are contracting, and purposes for entering K (to extent known @ time of contracting)
- not to be confused with reasonableness, which isn't correct basis for implying a term into a K (*Machtinger v HOJ Industries* (1992) SCC)

c) Law (*Machtinger v HOJ Industries* (1992) SCC)
- **test** is **necessity**: where necessary in a practical sense **to the fair functioning of the agreement, given the relationship** b/w the parties (*Machtinger*)
- in some Ks, the only terms that will be enforced by Courts are those in writing - BUT implication still possible, even where parol evidence rule applies - may be inconsistent w intentions of parties, but are implied to ensure that agreement is fair and reasonable
- By CL or statute, **where the law includes it in that type of K or in all Ks**
  - CL: depends on parties' intentions wrt type of K
  - statutory: implied by virtue of that particular type of K being governed by a statute (ex. *Sale of Goods Act*)
- courts may lean against an interpretation of an explicit term that renders it plainly inconsistent w the term that otherwise would be implied in law (*Machtinger v HOJ Industries* (1992) SCC)
- requirements for **reasonable notice in employment Ks** are in this category (*Machtinger*)

Y → Term; N → Statement, Not Term

Term

Statement, Not Term

4. Is it a promise that the parties will perform if everything goes according to their good faith expectations? (*Photo Production*)

N → **Does it provide a remedy for the breach of primary obligations/become enforceable or arise upon failure to perform others?** (can be modified by agreement but not totally excluded) (*Photo Production*)

Y → Secondary Obligation (*Photo Production*)
- becomes **enforceable upon nonperformance of primary obligation** (breach of K)
- ex. CL damages principle (where not inconsistent w other terms parties have agreed to)

Y → Primary Obligation (*Photo Production v Securicor Transport* (1980) HL) - a promise something will be done

What type of primary obligation? (Classified @ time of formation)

a) Warranty – less important; all breaches won't deprive of substantially whole benefit (*Hong Kong Fir*)

b) Condition – more important – strikes heart of K (*Leaf v International Galleries*); all breaches will deprive of substantially whole benefit (*Hong Kong Fir*)

c) Intermediate (*Hong Kong Fir*)
- in determining if consequences serious, look @ whether deprives party not in breach of substantially the whole benefit which it was intended that they should obtain from the K (*Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* (1962) CA)
- factors to consider in determining whether breach substantial or minor (968703 Ontario v Vernon (2002)): 1) how much of obligation remains unperformed, 2) seriousness of breach to innocent party, 3) likelihood of repetition of breach, 4) seriousness of consequences of breach for the K, and 5) relationship of part obligation performed to whole obligation

Warranty – if breach, can't terminate K – innocent party must continue performing its primary obligations; BUT can claim damages (*Leaf*)

Condition – if breach, repudiation: party not at fault can terminate K and claim damages (*Leaf*)

Intermediate term – can have same consequences as condition or warranty, depending on seriousness of breach

Condition precedent
- may trigger a particular obligation (where no 1 party can unilaterally cancel the deal) or the whole K (then nonenforceable agreement b4 CP is met) - which of these it is depends on the intention of the parties as expressed in the K itself & as shown by surrounding events (*Wiebe v Bobsien* (1984) BCCA)
- courts prefer to conclude that a CP is to an obligation not to an entire K
- party has duty to do what is reasonable to facilitate the fulfillment of CP (*Dynamic Transport v OK Detailing* (1978) SCC)
- one party can waive fulfilment of a CP in a K, triggering enforcement of other party's obligations right away (unilateral abandonment) where the CP was a promise made by the other party to do something which is for the benefit of the party who later purports to waive the CP (Turney v Zhilka (1959) SCC; and s. 54 Law and Equity Act, RSBC 1996, c 253)

Condition Subsequent

Severable
- then there is enforceable obligation
- Did party B complete their obligation? No→breach; Yes→did party A continue w K and therefore forgo the claim? If Yes→affirmed new K

Entire
- law only requires "substantial performance" – the meaning of this depends on the facts (Fairbanks Soap Co v Sheppard)
- ex. 1st party has to perform work of some sort & only when that work is completed is the other party required to pay (Cutter v Powell)
- if not substantially complete, nothing to enforce, therefore party B is not in breach of obligations subsequent to party a's lack of completion of obligations

Consider:
1) Quantum Meruit - Party A can claim in quantum meruit – BUT prob. Not best way to deal w it b/c of the need for a new implied K for it to apply (*Sumpter v Hedges*)
2) Restitution - more clear & straightforward, BUT must result in unjust enrichment so equity steps in * ARGUE WHICHEVER BETTER DEPENDING ON FACTS & CLIENT

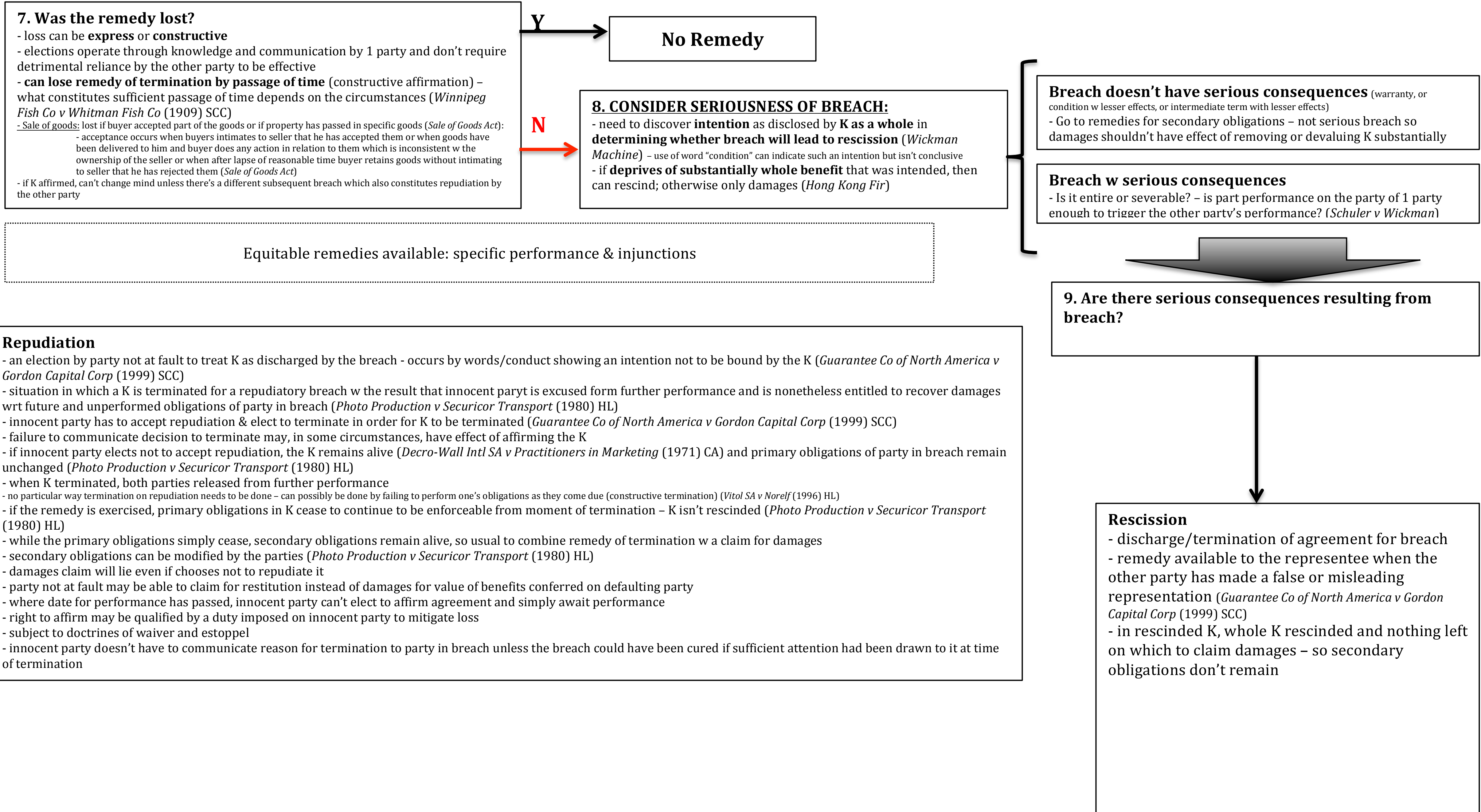
5. Was there a breach?

YES → **Go To 1B for Remedy**

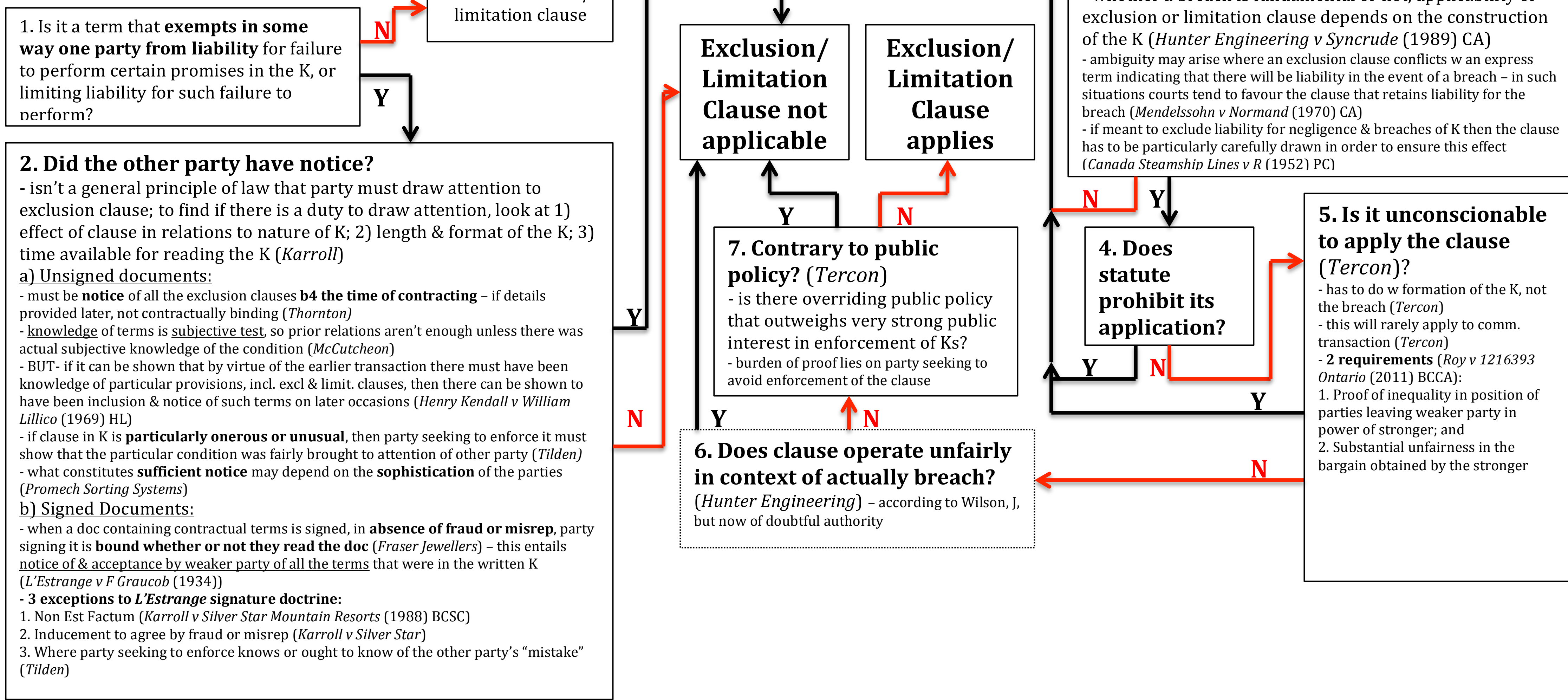
N → Anticipatory Breach?
- just need to **show an intention not to go w K** (words and/or conduct) (*Universal Cargo Carriers* (1957))
- **Subsequent acts of innocent party** including his/her own failure to perform contractual obligations can be taken as **evidence of acceptance of repudiation** (*American National Red Cross* (1920) SCC)
- innocent party can **either accept breach and proceed to remedies** right away or can not accept breach and **proceed to remedies only when the other party fails to perform** @ the time when K calls for performance (*Hochster v De La Tour* (1853) QB)

N → **No Breach = No Remedy**

1B – CLASSIFICATION OF TERMS



2 – EXCLUSION AND LIMITATION CLAUSES



Interpretation:
- words normally construed in accordance w their natural/ordinary/plain meaning
- contra proferentum: ambiguous provisions are to be construed narrowly against the interests of the party who drafted or proferred the ambiguous term
- trying to determine what parties actually intended the agreement to mean – consider surrounding circumstances or comm. context of agreement
- look @ parties' aims & objectives in entering the agreement; can consider subsequent conduct of the parties
- various parts of the K are to be interpreted in the context of the intention of the parties as evident from the K as a whole (*BC Checo International v BC Hydro & Power Authority* (1993) SCC)
- the more unreasonable the result of the particular construction, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make the intention abundantly clear (*Schuler v Wickman Machine Tool Sales* (1974) HL)
- evidence of prior negotiations of parties is inadmissible for purpose of construing eventual agreement, BUT may be admitted to establish that a fact which may be relevant as background was known to the parties

3 – ELIMINATING OR ALTERING THE CONTRACT

ELIMINATING THE K:

1. Is the K void @ CL?
- typically for:
  - missing ingredient for formation (Ex. no acceptance)
  - **common mistake**
  - non est factum
  - some mistaken identities
  - **illegality** (often)
  - **duress** (historically)
  - incapacity (sometimes)

Y → 3a. Void; N → 2.

2. Is the K voidable? (protected party would use this option)
- typically for:
  - **misrepresentation**
  - **duress**
  - **undue influence**
  - **unconscionability** (sometimes)
  - **mistake** (scope uncertain)
  - incapacity (sometimes)

- K exists but flawed from formation to disadvantage of 1 party who's given opportunity to undo K if can be done w/o undue hardship/unfairness (to other K party or 3rd party) or delay

Y → 3b. Voidable; N → 4.

3a. Void
- consequences:
  - **no K remedies**
  - **no basis for claim to CL damages**
  - generally whole K is either void or not void
- BUT may be able to sever part off & only that part void & rest not void

3b. Voidable
- consequences:
  - **neither party is any longer responsible for or liable to do anything under the K**
  - damages likely not available but depending on reason for voidability, damages may be available in **tort**
- might be able to sever so that 1 part avoided (usually seen as unenforceable, not avoided), while other remains fully effective

4. Is the K severable?
- Often where breach that could lead to termination, law allows K to be divided so termination only affects part of the K – other part unaffected and remedy remains fully in effect
- severance can be used to prevent the whole of the agreement from being frustrated – Frustrated Contracts Acts allow for severance of parts of K that have been performed or performed but for payment, and such severed parts treated as not severed

i) Removing part of a K; or
- typically b/c of illegality or unconscionability
- terms taken out b/c offend legal principle – severed parts treated as void (BUT commonly treated as unenforceable) – BUT whether void or unenforceable depends on reason for severance:
  - nonsense clause or clause about which party didn't have notice → void
  - severed to protect one of the parties (ex. unconscionability) → that party can elect for it to be severed & deemed unenforceable or continue w K as it is

1. Peripheral Terms Only
- only peripheral terms can be removed (not heart of K) – severance isn't used to create significantly different agreements for the parties
- whether peripheral depends on interpretation of offending clause in context of whole agreement

2. Blue-Pencil Test
- even if peripheral, still have to determine whether technically possible to sever
- **test:** remove the words/clauses and see if what left makes sense (blue pencil test) (*Transport North American Express v New Solutions Financial Corp* (2004) SCC)
- not appropriate for court to make the K for the parties

3. New Approach
- Court allows term to be severed in conjunction w rewriting part of K for parties to make what is left have a meaning consistent w original intent of parties (notional severance)

4. Abuse of Process
- Court may choose not to sever terms from K if thinks it's abuse of Court Processes (*Canadian American Financial Corp (Canada) v King* (1989) BCCA)

ii) Treating as 2 or more Ks
- typically to meet form requirements, to treat K as terminated for breach or frustration, or to resolve privity problems (in which case treat as 2 Ks w 2 parties ea.)
- usually effected by saying that parties have entered into 2 Ks: main K (often in writing) and collateral K (often oral)
- agreement treated as though it was always 2 Ks (can give rise to legal fiction)

Y → **Severable**; N → 5.

5. Is the K unenforceable?
- court refuses to order performance or give remedy for non-performance
- anything transferred under the unenforceable K is **legally transferred**
- **court can declare all or part of the K unenforceable** – but p**referred to sever offensive portion** and declare only it unenforceable (rest of K effective & enforceable)
- **result: unenforceable obligations that are performed are effective as intended in the K; unenforceable obligations that aren't performed won't be enforced by Court**
- Commonly result of: no consideration, unfair/unconscionable exclusion & limitation clauses, illegality, incapacity (sometimes), expired limitation period, penalty clause

Y → **Unenforceable**; N → 6.

6. Can the terms of the K be judicially adjusted?
- Court goes into the K and adds to it what the parties haven't put expressly or impliedly

1. Assist in creating terms
- terms implied in K

2. Setting aside on terms
- allowing a remedy for substitution of 1 set of obligations to be replaced by different set (*Solle v Butcher* (1949) CA) – some doubt as to continued authority of this case
- for **mistake in equity** (if still good law), or **unconscionability** (to remove unconscionability)

3. Severance
- reconstituting the agreement after removing part (notional severance) (*Transport North American*)
- **Not available** in respect of **restrictive covenants in employment Ks** (*Transport North American*)

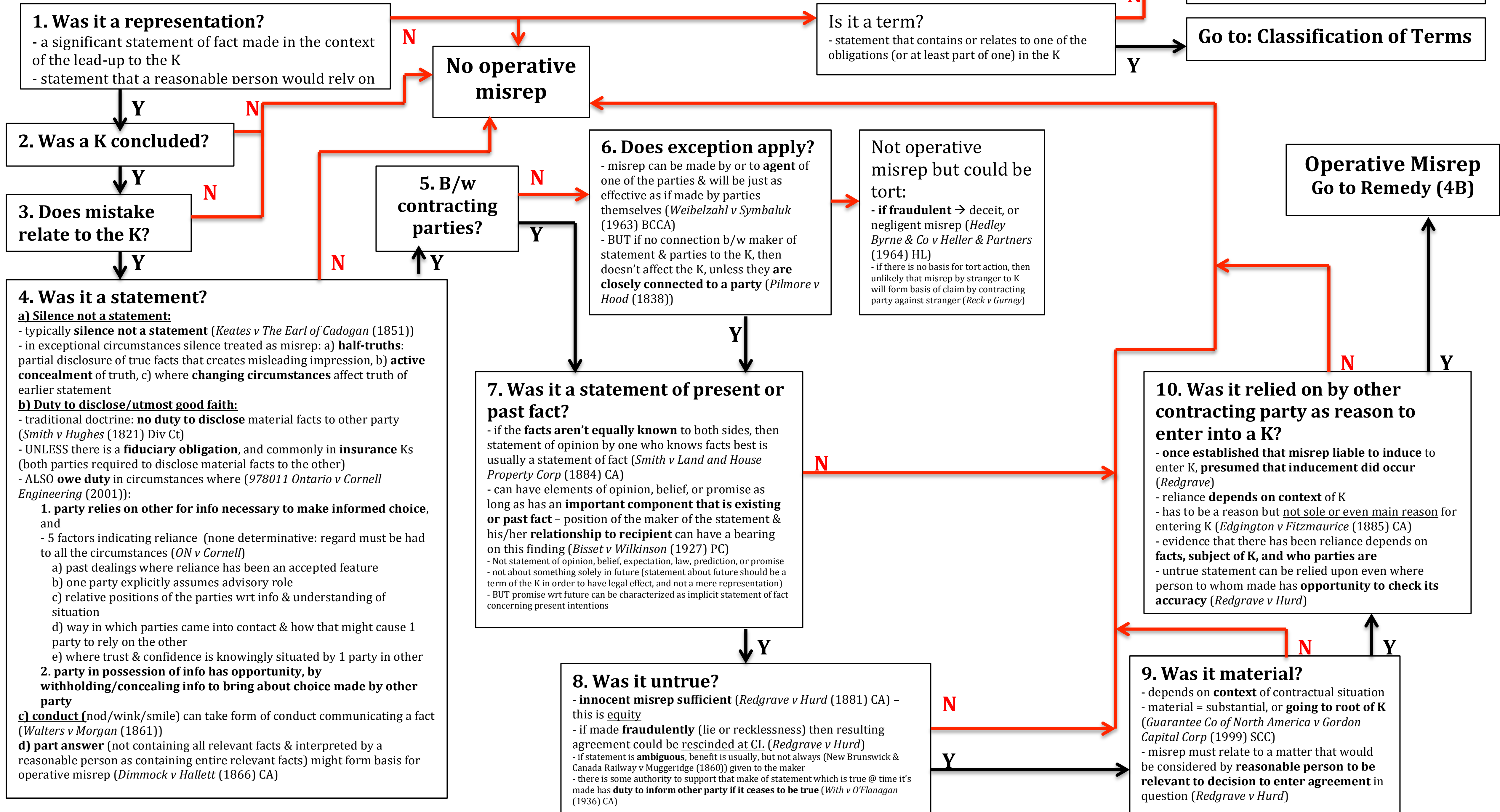
Y → **Judicial adjustment of terms**; N → 7.

7. Can the K be discharged by frustration?
- frustration: unforeseen catastrophic event making K impossible
- primary/secondary obligations discharged
- BUT up to point of frustration, K treated as being perfectly valid
- dealt w by statute in most jurisdictions

Y → **K subject to discharge b/c of frustration**

4A – MISREPRESENTATION & RESCISSION (EQUITABLE)

Once a representation is in the K it's a term, not a representation



4B – MISREPRESENTATION AND RESCISSION

11. Are there Bars to Rescission?

11a. Impossibility of Restitution?
- when what has been transferred **can't be returned or can't be returned in the condition it was in** when it was transferred (*Clarke v Dickson* (1858) QB)
- in certain circumstances (esp. where fraudulent misrep) property that can't be returned can be substituted by $ compensation (*Kupchak v Dayson Holdings* (1965) BCCA)
- BUT **equity** will effect rescission in some cases by making use of **money compensation** to allow for the use of property & deterioration (*Carter v Gilland* (1937))

Y → Can't Rescind; N ↓

11b. Is execution of K a bar to rescission?
- possible that court won't order restitution if the K has been executed **at least in the case of an innocent misrep** (*Kupchak v Dayson* (1965)), but **not all courts agree** with this (*Solle v Butcher* (1949) CA)
- innocent misrep might provide ground for rescission even after execution, but **right to rescind for misrep can't survive beyond when right to terminate K for breach would expire** (*Leaf v International Galleries* (1950) KB CA)

Y → Can't Rescind; N ↓

11c. Is affirmation a bar to rescission?
- not available if P, knowing of the misrep, nonetheless **proceeds w the K as though it were unproblematic** – this includes continuing to use the subject matter of the K or making other arrangements w other contracting party to take into account the consequences of the misinformation (*Long v Lloyd* (1958) CA)
- affirmation can only arise **after innocent party becomes aware of misrep** AND affirmation must constitute **informed choice** (requires knowledge that falsehood gives rise to right to terminate transaction)
- affirmation may be **communicated by words or inferred from conduct** (conduct that leads misrepresentor to reasonably believed that affirmation has occurred)

Y → Can't Rescind; N ↓

11d. Is delay a bar to rescission? (laches)
- need to act w/in reasonable time - if unwarranted delay in claiming remedy, then party guilty of laches (affirmation by passage of time)
- reasonable amount of time **depends on subject matter of the K & surrounding circumstances**
- rests on the weighing of **appropriateness of the relief** from misrepresentee's perspective **against length of the delay** and any **resulting prejudice** to the misrepresentation (*Kupchak v Dayson Holdings*)

Y → Can't Rescind

Can't Rescind

12. Rescission Available
- **K is voidable:** innocent party can choose to rescind & parties taken back to position they were in just when K was entered into (requires restoration of benefits transferred under the agreement)

BUT

13. Is Rescission exercised?
- notice must be given (can be done by return of property delivered)

14. Remedies – K is voidable
- **Innocent misrep:** rescission in K law (Hielbut) (+compensation where full rescission impossible (*Kupchak*) – **NO damages; BUT** if can be shown to be **collateral K**, damages recoverable (*Hielbut*)
- **Fraudulent misrep:** rescission in K law, damages in tort law (tort of deceit)
- **Negligent misrep**: rescission in K law, damages in tort law (tort of negligence)

Alternative: Can you characterize the misrep as a collateral K or warranty?
- LAW VIEWS THESE TYPE OF AGREEMENTS WITH SUSPICION
- **Collateral Contract Analysis:** pre-K statement as a collateral K to the main K (collateral K = if you promise me X, I promise to buy Y; main K = I promise to buy Y, in exchange for Z) – if **innocent misrep can be characterized as collateral K** then damages recoverable (Hielbut)
- **Collateral Warranty Analysis:** where representor has expertise, superior knowledge, or privileged access to information, presumption that their pre-K representations are warranties (statements that become terms of the main K) - **affirmation @ time of sale** is warranty, provided it appear on the evidence to be so **intended** (*Heilbut, Symons & Co v Buckleton* (1913) HL) – claimant must show that representation made by D was actually intended as a "warranty" (*Hielbut*)
- statement made prior to K formation but **intended by both parties to be a term** of the K (something between a pre-K representation and a term) - representation made prior to formation of K is transformed into a term of a unilateral K that is collateral to the "main" K - if characterized as simple **warranty** that statement is true, **strict liability** & not dependent on finding of fraud or negligence
- **innocent misreps** only referred to as **warranties** if they have clearly been **intended** to be warranties by the parties (*Heilbut, Symons & Co v Buckleton* (1913) HL)

If YES, can claim K damages (purpose of damages is to substitute money for performance of K)
- usually entitled to amount that would place P in position he would have been in if the promise of the truth of the statement had been fulfilled (**expectancy measure of relief**)

5A - MISTAKE

Caveat emptor: mistake might not affect a K b/c K law often expects parties to look out for their own interests & not have other parties, in the absence of some special relationship, bear a responsibility for protecting their interests.

Critical Q is whether parties have reached *consensus* – may be achieved on objective basis & then K enforceable (*Smith v Hughes*)

1. Does the mistake relate to matters before or at time K was made?

Go To Frustration

No Mistake (consider breach of term)

2. Did the parties contemplate the risk & provide for it in their agreement? (MacRae)

Consider tortious liability (ex. negligent misrep)

3. Is mistake attributable to a 3rd party?

4. What is the mistake about?

Written Record
- Unilateral
- WRT terms
- consider: **Non est factum or rectification**

Go to 5B

Identity of Other Party
- Unilateral (except comm. context – this can be common)
- typically mistaken assumption

Face to Face Transaction
- issue is whether **lack of consensus ad idem**, precluding formation of K, in which case void @ 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 person whose identity he/she is assuming

Transaction by Correspondence
- to extent that there is a K, only binding on parties named in the K (Shogun)
- So if you are not that person, K can be void due to non est factum

- where mistake of identity, K liable to be set aside at instance of mistaken person (voidable for misrep) as long as he does so b4 3rd parties have in good faith acquired rights under it (b/c title to goods can pass & under equity right to rescind lost once goods have been purchased in good faith by 3rd party) (*Lewis v Averay*)
- BUT if initial transaction void for mistake, no property legally passes to 3rd party – in that case innocent party prevails; if voidable in equity, prior to rescission, 3rd party prevails

assumptions

4. Is it a common mistake? (both parties share the same mistake (*Bell v Lever Bros*))
- in considering whether to apply doctrine of mistake @ CL or equity, Court should look to K to see **if parties have provided for who bears risk** of relevant mistake, b/c if they have, that will govern (*Miller Paving v Gottardo Construction* (2007) ONCA)

Common Law - mistake in **CL renders K void** (b/c prevents formation of K) (*Solle v Butcher*)
- mistake will be as to an **assumption**, not a **term**: both parties made same mistake about factual circumstances of the K, and that mistake doesn't make it into the K as a term
- if mistaken assumption about **future fact**, look to see whether it is "in the contemplation of both parties **fundamental to the continued validity of K**" and "a **foundation to its existence**" (*Bell v Lever Bros*)
- if mistaken assumption is of **present fact, K void**

a. Mistaken Assumption: misapprehension as to their relative & respective rights (ex. where buyer is owner of that which seller purports to sell to him/her (*Cooper v Phibbs*) – then agreement liable to be set aside

b. Mistaken Assumption as to Existence of Subject Matter: parties mistaken as to whether subject matter of the K exists – typically dealt w by statute
- agreement for sale of goods void where parties unaware that goods have ceased to exist @ time of contracting (*Bell v Lever Bros*)
- non-existence may relate to object that exists but is completely different from what parties think it is (*Sherwood v Walker* (1887) SC)
- important to distinguish b/w misapprehension as to substance of what was bargained for (which could affect K) and misapprehension as to quality (which can't affect K) – if affects whole substance of agreement then misapprehension as to substance (*Sherwood v Walker* (1887) SC)

c. Mistaken Assumption as to Quality:
- 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* (1932) HL)
- if parties agree in **same terms on same subject matter**, CL doctrine is inapplicable (*Solle v Butcher*)
- different from situation where parties have put **quality of the thing in the K as term** in such way that one party bears risk and responsibility of subject matter not having that quality (*Bell v Lever Bros*)

Equity:- K not void for mistake @ CL can be set aside by court of equity
– liable to be set aside (b/c unconscientious) if parties were under common misapprehension either as to facts or as to their relative & respective rights, provided that **misapprehension was fundamental & that party seeking to set it aside not at fault**, & if can be done w/o injustice to 3rd parties (*Solle v Butcher*)
- in equity, mistake can be about anything to do w "facts" or "rights," provided it's **fundamental & also unconscientious** for other party to avail self of legal advantage which he had obtained (*Solle v Butcher*)
- if there is mistake operating in equity, Court can set aside K on such terms as Court thinks fit – can roll back K, part of K, add conditions, or impose new obligations (*Solle v Butcher*)

- *Great Peace v Tsavliris Salvage* (2002) CA (which hasn't been accepted or rejected in CDA) rejected equitable doctrine of common mistake; 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; 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
- in *Miller Paving v B Gottardo Construction* (2007) ONCA it was suggested that *Solle v Butcher* should be kept as good law in CDA – equitable mistake doctrine from *Solle v Butcher* accepted

Mistake as to Quality (Bell):; 2 elements:
1. Common mistake (both share same mistake); and
2. About a **profoundly significant quality** of the subject matter of the K

If both are met, K VOID

terms

terms

5. Is it a mutual mistake? – then no consensus ad idem
- both parties have **different & reasonable interpretations** as to what has been agreed
- tends to relate to **terms** & not **assumptions**
- mistake as to terms that are **ambiguous, vague, or imprecise** so that each party can reasonably have a different understanding will result in a finding that **no K existed b/c no consensus ad idem** (*Raffles v Wichelhaus* (1864))
- Courts will tend to **find a K where possible** – must decide what reasonable 3rd parties would infer to be the K from the words & conduct of parties who entered into it; only where circumstances are so ambiguous that reasonable bystander couldn't infer common intention will Court hold that no K created (*Staiman Steel v Commercial & Home Builders* (1976))

6. Is it a unilateral mistake? – RARE – needs to amount to equivalent of fraud (*Smith*)
- where **one party is mistaken & the other isn't**
- if parties have "**to all outward appearances** agree w sufficient certainty on the same terms on the same subject matter" the agreement should be considered enforceable @ CL (*Solle v Butcher*)
- **issue is whether lack of consensus ad idem**, precluding formation of K, in which case void @ CL (*Shogun*)
- K will be set aside in **equity** if one party, knowing that the other is mistaken about the terms of an offer, or identity of the person by whom it is made, **lets him remain under his delusion & conclude a K on the mistaken terms** instead of pointing out the mistake (snapping up an offer) (*Solle v Butcher*)
- in tender cases, can proceed to enforceable K B, despite the mistake (*Calgary (City) v Northern Construction* (1985))

5B - Mistake

7. Is Rectification Available? (Equitable remedy, so discretionary)

- have to show that parties were in **complete agreement on terms** of K but **wrote them down wrongly** (Bercovici)
- **look to their actions to ascertain intentions**: if can state w certainty what their K was & that it was wrongly expressed, then can rectify (*Frederick E Rose (London) v William H Pim Junior & Co* (1953) QB CA)
- parties seeking rectification must establish proof of the antecedent agreement w **convincing proof** (higher than BOP, lower than BRD) (*Sylvan Lake Golf* (2002) SCC)
- rectification won't be granted where unfair to 3rd party
- undue delay or affirmation may lead to denial of this relief

if party seeking rectification can't **point to prior agreement** that was departed from when K was written down, there can be no rectification (*Shafron v KRG Insurance Brokers* (2009) SCC)
- alleged **lack of due diligence no defence** to rectification claim & P seeking rectification not subject to demonstrate due diligence in reviewing the doc, BUT <u>conduct of P is relevant consideration</u> to be taken into account when <u>determining whether it would be unjust</u> to impose this type of relief on D in a particular case (*Sylvan Lake*)
- parol evidence admissible (exception to parol evidence rule) BUT where just a bare assertion w/o corroborating evidence, claim for rectification likely to fail (*Bercovici v Palmer* (1966) SK CA)
- modern practice has moved away from insistence on documentary corroboration (*Sylvan Lake*)

Rectification – common mistake

- D argues existence of mistake, P bears heavy onus of showing that there was such a mistake – must prove that what was executed was not the agreement made & must also prove what the outwardly expressed continuing common mistake actually was (*Fraser v Houston* (2006) BCCA)

Rectification – mutual mistake

- both parties say that there was a mistake but argue for a different mistake
- a court may have no choice but to rectify the K, as both parties are agreed that it needs rectification (*Bercovici v Palmer* (1966) SK CA)

Rectification – unilateral mistake – **USE THIS TEST FOR RECTIFICATION**

- necessary *preconditions (Sylvan* Lake (2002) SCC):

1. Existence and content of prior oral agreement: Existence of prior oral contract whose terms are definite and ascertainable - P must establish that terms agreed to orally not written down properly; Error may be fraudulent or innocent

2. Fraud or equivalent: At time of execution of written document, D knew or ought to have known of the error and the P did not; attempt of D to rely on the erroneous written document must amount to fraud or the equivalent of fraud

3. Precise terms of rectification: P must show the precise form in which the written instrument can be made to express the prior intention

<u>**4. Existence of "convincing proof":**</u> The standard of proof is convincing proof: proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil BOP standard

- where would be unjust to impose on D a liability that ought more properly to be attributed to P's negligence, rectification may be denied (*Sylvan Lake*)

8. Is non est factum available? (renders agreement void @ CL)

- parties must take such precautions as they reasonably can; critical Q is whether doc signed is **fundamentally/radically/totally different** from doc understood (*Saunders v Anglia Building* (1971) HL)
- where signature induced by fraudulent representation as to nature of doc, signatory may defend an action brought to enforce undertaking given in doc on basis that **signing wasn't consensual**
- **burden place on signer** who's aware of lack of knowledge & intention w which doc is signed & therefore has burden of establishing that it was signed w/o negligence on his/her part (*Saunders v Anglia Building Society* (1971) HL)
- law must take into account the fact that **P was completely innocent of any negligence (negligence=carelessness), carelessness, or wrongdoing**, whereas D by their careless conduct have made it possible for wrongdoers to inflict loss (*Marvco Color Research v Harris* (1982) SCC)
- negligence=carelessness – the <u>magnitude & extent of carelessness, circumstances</u> which may have contributed to it, & all other circumstances are to be taken into account – most obvious case of carelessness is when **party declines to read doc** they're signing (*Marvco Color Research*)
- *Gallie v Lee* broadened application of doctrine: must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have w/o explanation any real understanding of the purport of a particular document, whether that be from defective education, illness, or innate incapacity

Common Mistake
- Mistake in CL renders K void
- May also be set aside by court of equity, on such terms as Court thinks fit

Mutual Mistake:
- K might be void (no consensus ad idem)

Unilateral Mistake:
- issue is whether lack of consensus ad idem – this could prevent formation of K
- BUT if so all outward appearances agreed on same terms on same subject matter, then enforceable
- BUT can be set aside in equity if one party knew the other was mistaken

6 – PROTECTION OF WEAKER PARTIES

Sometimes, simply "doing justice" appears to be sufficient basis for intervention by courts (*Goertner v Fiesta Dance* (1972) BCSC)

1. Does Doctrine of Duress Apply? (CL)

- Coercion of the will so as to vitiate consent (*Pao On*)
- K voidable @ option of weaker party where no prejudice to 3rd party (*Stott v Meritt Investment* (1988) ONCA)
- consider: whether party protested, had alternative courses of action, whether he was independently advised, benefit received, & whether after entering K, took steps to avoid it ; so must be shown that <u>not a voluntary act</u> (*Pao On*)
- more emphasis on legitimacy of pressure placed on weaker person than their will – is pressure such that Court can tolerate the resulting K?
- problem: may not be possible to avoid K if it has been performed & restitution not possible
- where stronger party has taken advantage of weaker in course of inducing weaker party's consent to an agreement
- doctrine also provides basis for restitutionary recovery of benefits conferred in absence of formation of agreement

a) Duress to Person

- occurs when there is, from contracting 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 & possibly the person's near relative (possible that other close relationships sufficient) (*Saxon v Saxon*)
- threat must be believable & believed – it is sufficient if coerced party learns of existence of threat from 3rd party
- pressure constituting duress doesn't have to be sole reason why pressured person entered the K – only has to be 1 of the reasons – burden is on party issuing the threat to establish that the threat didn't contribute to decision to enter into agreement (*Barton v Armstrong*)

b) Duress to Goods/Property

- threat to damage or take other party's property – this can affect the K (*Knutson v Bourkes*)

c) Duress to Economic Interests (rare – try illegality instead)

- need more than "commercial pressure" – need coercion which vitiated consent – must be shown that K entered into wasn't a voluntary act (Pao On) – overborne will theory

Pao On Economic Duress Test:

1. Did the person protest?
2. Did he have a practical and reasonable alternative course open to him?
3. Was he independently advised?
4. Did he take timely steps to avoid the contract?
5. Greater Fredericton: Added 5th Element: Examining the legitimacy of the threat. Is there a legal reason for exerting the pressure?
   - To be illegitimate, it doesn't need to be illegal, but legal does not necessarily mean legitimate.

<u>Test for establishing economic duress in context of post-K modification, per ***NAV Canada***</u>

1. The promise (post-K variation) must have been extracted as a result of <u>the exercise of express or implied pressure</u> (whether characterized as a "demand" or a "threat").
2. The exercise of that pressure must have been such that the coerced party had <u>no practical alternative</u> but to agree to the coercer's demands to vary the original K.
3. Need to consider whether the coerced party "consented" to the variation:
   a. Was the promise supported by consideration?
   b. Did coerced party agree to modification "under protest" or "without prejudice"?
   c. Did coerced party take reasonable steps to disaffirm promise as soon as practicable?

2. Does Undue Influence Apply? (Equity)

- Remedy is equitable rescission (consider barriers to rescission)
- provides basis for setting aside transaction where transfer of value has been induced by an "unconscientious use by one person of power possessed by him over another" (*Earl of Aylesford v Morris* (1873)) – duress falling short may constitute undue influence
- rooted in influence, not threat: does relationship create situation such that party will agree to whatever other party suggests?
- where transaction doesn't call for explanation, party alleging undue influence must establish existence of relationship

- 2 part test (Geffen):

1. Relationship capable of giving rise to necessary influence;

- burden of establishing UI falls on person claiming to have been wronged; evidence reqd to discharge the burden of proof depends on: nature of alleged UI, personality of parties, their relationship, extent to which transaction can't readily be accounted for by ordinary motives of ordinary persons in the relationship and all the circumstances of the case (*Etridge (No 1)*(2001) HL)
- party alleging UI may rely on presumption to shift burden to other party where it's established that transaction not readily explicable by their relationship BUT possible to establish abuse of relationship of trust & confidence had occurred w/o reliance on presumption (*Etridge 1*) so a P alleging UI could succeed in cases where presumption inapplicable (like where transaction doesn't call for explanation (*Etridge 1*)

3 situations:

a) Irebuttable presumption of undue influence

- ex. parent/child, trustee/beneficiary
- law presumes, irrebutably that 1 party has influence over other
- sufficient to prove existence of the type of relationship
- no automatic presumption b/w spouses (*BMO v Duguid*)
- burden on stronger party to show that they didn't unfairly exploit their influence

b) Rebuttable presumption of undue influence in relationship

- where transaction results from abuse of relationship of trust & confidence, then existence of UI is presumed
- influence is the ability of 1 person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power (*Geffen* (1991) SCC)
- need to demonstrate that 1 person placed his/her confidence/trust in other along w proof of questionable nature of transaction
- rebuttable & just some sort of confidence/trust where one relies on other can be enough
- courts look for transaction that itself was wrongful in that it constituted advantage taken of person subject to the influence which, failing proof to contrary, was explicable only on basis that UI had been exercised to procure it
- presumption arises where history of a particular relationship b/w 2 parties can be characterized as establishing a relationship of trust & confidence (*Geffen* (1991) SCC)
- important element is existence of degree of influence that undermines influenced party's capacity for independent action
- willingness of courts to find that circumstances of particular relationships support the presumption will be influenced by degree of vulnerability of influenced party (*Geffen*) and by level of intimacy of the relationship b/w parties (*Barclays Bank* (1993))
- the presumption should arise only in a case where one party is in a position to dominate the will of another (*Geffen*)
- for UI to be exercised by 3rd party, they must be acting as agent for King party or w notice of that party (*Bank v Aboody* (1990) QB CA)
- in comm. transaction P should be obliged to show, in addition to reqd relationship b/w parties, that K worked unfairness in that D was unduly benefitted by it (manifest disadvantage) (*Geffen*) – this req't uncertain; scholars prefer it not be adopted

c) Relationship of actual undue influence (basically equity's version of CL doctrine of duress)

- situations that don't fit other 2 categories
- manifest disadvantage prob not reqd b/c effect of UI is to vitiate consent (*CIBC Mortgages plc v Pitt* (1994) HL)

2. Influence generated by relationship must have been abused

- burden shifts to D to show that P entered into transaction as a result of his own full, free & informed thought (maybe by showing no influence or that P had independent legal advice) – magnitude of disadvantage or benefit is evidence going to issue of whether influence was exercised (Geffen v Goodman Estate (1991) SCC)

3. Does Doctrine of Unconscionability Apply? (Equity)

- UI attacks sufficiency of consent whereas unconscionability invokes relief against unfair advantage gained by unconscientious use of power
- when facts show that one party has taken undue advantage of other, a transaction resting upon such unconscionable dealing will not be allowed to stand (*Slator v Nolan* (1876))
- an unconscientious use of the power arising out of the circumstances and conditions allows the K to be set aside – involves an assessment of the circumstances surrounding the creation of the K & an examination of the K that resulted (*Earl of Aylesford v Morris* (1873))
- also concerned w situations that are tantamount to fraud
- this doctrine holds that resulting K is proof of inequality of position of parties (Morrison v *Coast Finance* (1965) BCCA)
- rescission is the remedy but not granted where would interfere w 3rd party rights (*Morrison v Coast Finance* (1965) BCCA)
- sometimes dealt w by statute (*Consumer Protection Act*)
- **single Q is whether transaction, viewed as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded (*Harry v Kreutziger* (1978) BCCA)**
- unconscionability has traditionally looked only @ circumstances in existence @ time of formation & before (same as duress & UI)
- clause can be separated from a K & made of no force if it's unconscionable - but this can only apply to exemption/limitation clauses (*Hunter Engineering v Syncrude* (1989) SCC)
- BUT in *Tercon*, Court rejected ability of Court to interfere w terms of valid K on vague notions of equity or reasonableness
- some statutes deal w unconscionability (sometimes differently than CL)
- if 3rd party knows of vulnerability of one of the parties, unconscionability might apply even though that 3rd party negatively affected (*Morrison v Coast Finance*)
- defences/barriers to rescission tend to be interpreted generously in favour of weaker party
- 2 part test (Morrison v Coast Finance): (these 2 elements form single Q – above *Harry v Kreutz* test)

1. 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

- on proof of those circumstances, creates presumption of fraud which stronger party must repel by proving that bargain was fair, just, and reasonable, or by showing that no advantage was taken (*Morrison*)
- *use *Morrison* & *Harry* together
- if stronger party brought action specially to enforce impugned agreement against weaker party, equity will refuse to grant such relief

7 - ILLEGALITY

K is illegal b/c law disapproves of its making, purpose, or performance in some way – law can make this disapproval known by statute, regulation, or CL

1. Is the formation of the K illegal?

- Statute may make formation of certain type of K illegal (*Re Mahmoud* (1921))
- Great reluctance by Court to conclude that impliedly prohibited by statute

Y → Illegal K

N → 2.

2. Is the method of performing the K illegal?

- Statute can make a particular purpose unlawful
- OR may make manner of performance unlawful, though not the purpose itself (*Archbolds v Spanlgett*)
- a party who doesn't have the **illegal intent** @ outset **can acquire it later** if that party knowingly participates in the illegality (*Ashmore, Benson, Pease v Dawson*)
- distinguish b/w the 2 situations by determining whether the K is **capable or incapable of being lawfully performed**; if **incapable**, then intrinsically illegal; if **capable**, illegality turns on whether the parties can be said to have intended to break the law in performing the K (*Machinenfabrik v Presswood*)
- if both parties have intent to break the law @ time K was entered into or when K being performed, K probably not enforceable; if illegal intention one side only, then only that party will be unable to enforce the K

Y → Illegal K

N → 3.

3. Does it fall into a category of public policy that makes it illegal under common law?

1. Restraint of Trade (*Shafron* 2009)

- 1 party agrees to a restrictive covenant not to work in or use his/her talent, skills or knowledge in a given area (possibly everywhere) for a given period of time (possibly forever)
- there is a **presumption that restrictive covenants are prima facie unenforceable** (*Shafron*) – SO, absent a reason for the restriction agreed to, covenant not to compete will be illegal
- BUT enforceable if **ancillary** to some main transaction K, or arrangement and be **reasonably necessary** to render that transaction, K, or arrangement **effective** (*Vancouver Malt & Sake Brewing*)
- **2 conditions for valid restraint** (*Herbert Morris v Saxelby* (1916) HL):
  1. Must be reasonable in the interests of contracting parties (must afford adequate protection to the party in whose favour it's imposed); and
  2. Must be reasonable in the interests of the public (not injurious to public)
- restrictive covenant in employment K will be subject of more rigorous scrutiny than one in a K for sale of business (*Shafron*)
- **Onus is on party seeking to enforce** restrictive covenant to show that it's reasonable; an ambiguous restrictive covenant will be prima facie unreasonable b/c party seeking enforcement will be unable to demonstrate reasonableness in the face of ambiguity (Shafron)
- **Outright ban** on competition can be justified in only exceptional circumstances (*JG Collins Insurance*)

a) Postemployment restraint:

- postemployment restraint designed to serve legitimate interests of employer will only be valid if it is designed to protect legitimate "proprietary" interests of the employer & does so in a manner that isn't excessive – the covenant must provide **merely reasonable protection to trade secrets, confidential information, and trade connections of the employer** (*JG Collins Insurance v Elsley* (1978) SCC) - in measuring reasonableness of postemployment restraints, courts will consider question of whether unavailability of services of particular former employee will have a negative impact on consumers (*JG Collins Insurance*)
- In postemployment restraint, severance only permitted where party being removed is clearly severable, trivial, and not part of the main purport of the restrictive covenant (*Shafron*)
- Notional severance not allowed in postemployment restraint (*Shafron*)

2. K to Commit a Crime or do a Legal Wrong (*Byron v Tremaine*)

- @ CL, an agreement to do that which the law forbids is illegal (*Beresford v Royal Insurance*) but can also involve a K to do another wrong that falls short of a crime (*Alexander v Rayson*)
- no court will lend its aid to the enforcement of illegal, immoral, or fraudulent Ks (*Byron v Tremaine*)

3. Ks Prejudicial to Good Public Administration (*Carr-Harns v Canadian General Electric*)

- where individuals have K to corrupt public officials or otherwise undermine good govt

4. Ks Prejudicial to Administration of Justice

- includes Ks to stifle a prosecution (*People's Bank of Halifax v Johnson*) and Ks to pay witness extra (*Hendry v Zimmerman*)

5. Ks Prejudicial to Good Foreign Relations

6. K Against Morals (*Pearce v Brooks* (1866))

- incl. Ks prejudicial to family life and marriage (*Lowe v Peers*); what is immoral changes

Y → Illegal K

N → **K Not Illegal**

Illegal K

→ 4.

4. Effect of Illegality

MODERN APPROACH:

- enforceability of K depends upon **assessment of legislative purpose/object** underlying the statutory prohibition & whether non-enforceability would further it; **if enforcement would undermine** policy objectives of statutory scheme, courts refuse to enforce; if wouldn't undermine, courts exercise discretion to enforce (***Still v Canada***)
- **2 characteristics modern approach (*Still v Canada*):**
  1. **Rejects understanding that simply b/c a K is prohibited by statute it's illegal & therefore void from start**
  2. **Enforceability of K (and therefore availability of restitution) dependent upon assessment of legislative purposes/objectives underlying the statutory provision**
- *remember: CL favours enforcement of agreements

a) Recovery of property:

- illegal K is effective to transfer property, so property (incl. $) that has been transferred under an illegal K can't be recovered (*Tinsley v Milligan*)
- So no restitutionary remedy (*Holman v Johnson*), but 4 exceptions:
1. Party seeking to recover is genuinely unaware of factual circumstances leading to the illegality
2. If parties not equally blameworthy, Court will allow "innocent" party to recover what was transferred under the K (*Kiriri Cotton*)
3. Where D engaged in wrongful conduct such as fraud, oppression, or undue influence
4. If party repents of illegality b4 performance of the K is completed, there can be recovery of any property transferred- what is important is that they abandoned their participation in the schemed b4 the illegal purpose was carried out in any substantial way (*Ouston v Zurowski*) – motive doesn't matter, merely withdrawing sufficient (*Tribe v Tribe*)
- property can also be recovered where claim to the property doesn't depend on relying on illegal K (*Bowmakers v Barret*) – consider claims in tort or another (legal) K

↑

5. BUT, is severance available?

- usual effect of restrictive covenant in restraint of trade is to render entire K unenforceable if restrictive covenant is the essence of the K; OR (more typical): to have the **restrictive covenant severed if possible**
- **blue pencil test** (Deletion of words from agreement): may only be resorted to in **postemployment restraints** sparingly, and only in cases where the part being removed is clearly severable, trivial & not part of main purport of agreement (*Shafron*)
- 2 part test:
  1. Can remainder of agreement, after excision of offending term, be sensibly enforced?
  2. Is the nature of the illegality such that enforcement of remainder would be inconsistent w policy considerations underlying the rules that renders the provision illegal & unenforceable?
- SCC: notional severance – provision may be rewritten so as to avoid conflict w the rule that rendered the original version unenforceable (*Transport North American*)

8 – FRUSTRATION (Common Law)

Frustration: the termination of a K consequent upon an unforeseen catastrophic even that makes the K impossible, or prevents the K from being performed in a manner at all similar to what was contemplated by the parties who entered the K
- deals w assumptions concerning future events
- Development:
  - Historically, CL didn't recognize that such a catastrophic event was possible (*Paradine v Jane*) – thought that K set out allocation of risk definitively
  - Then, idea that K could come to complete halt (foundation of K ceased to continue to exist) upon happening of an unforeseen event thought to arise by virtue of implied term in the K (*Taylor v Caldwell*)

1. Was the event unforeseen?

- Has to be unforeseen, **considering the parties' situation** and what a **reasonable person in their position would have contemplated** when entering the K (*Canadian Government Merchant Marine*)
- need to construct the terms in light of the **nature of the K** & **relevant surrounding circumstances** when K was made – critical Q is **determination of allocation of risk** – if the risk was assigned to party who wishes to be excused from performance, no frustration; if risk assumed by other party or neither party, doctrine of frustration may apply (*Davis Contractors*)
- If parties **ought to have foreseen** event, K might not be frustrated (*Walton Harvey*) BUT not necessarily fatal to claims of frustration (*Ocean Tramp*)
- performance rendered more onerous by **changing circumstances that are foreseeable** not likely to ground frustration defence (*Canadian Government Merchant*)
- in land transfer cases, in absence of unusual circumstances, likely that risk of supervening events will be imposed on purchaser (*Victoria Wood*)
- Rare that frustrating event will have to do w certain economic events (*Ganadian Government*)
- Possible to be frustrated b/c of political events (*Bayer Co*) BUT have to be unforeseen (*Petrogas Processing*)

a) Force majeure clause: states what is to occur under K upon occurrence of certain events
  - in the event force majeure clause ends K, not due to frustration – BUT if covers unusual circumstances but not the one that occurred, can be proof that event unforeseeable (*Dover Corp v Maison*)
  - Force majeure clauses relieve from consequences of non-performance so interpreted strictly (*Atlantic Paper*)

Y → 2. Was it the fault of the parties?

N → No Frustration

2. Was it the fault of the parties? (*Maritime National Fish*)

- where effect of frustrating event is that **party can only partially perform** contractual obligations, so chooses to perform some but not others, will be characterized as **self-induced frustration** (*Maritime National Fish*)

N → 3. Did it make the purpose of the K impossible or drastically more difficult to achieve?

Y → No Frustration

3. Did it make the purpose of the K impossible or drastically more difficult to achieve?

- **frustration** occurs whenever the law recognizes that w/o default of either party **a contractual obligation has become incapable of being performed b/c the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the K (*Davis Contractors* (1956))**
- prevailing view in CDA: constructing the agreement in light of the radical change in the nature of the obligation (*Capital Quality Homes* (1975))
- **destruction of essence** of K after K comes into existence can frustrate it (*Taylor v Caldwell* (1863))
- whether frustrated depends on whether both parties entered into the K on basis that that particular method of performance – now impossible – and only that method would be used (*Tsakiroglou & Co*)
- **disappearance of purpose:** where purpose for which performance is agreed no longer exists or has disappeared through no fault of the parties (*coronation cases*) – depends on whether that was the only purpose of entering the K
- **change in law:** whether frustrated depends whether foundation of agreement destroyed (*Capital Quality Homes*)
- doctrine of **frustration of commercial purpose** is accepted feature of CDN law (*Capital Quality Homes*)
- mere fact that there has been an **unexpected** turn of events, which **renders the K more onerous** than the parties had contemplated isn't by itself a ground for relieving a party of the obligations he has undertaken (*Davis Contractors*)
- in extreme case of increased expense of performance CDN courts may recognize commercial impracticability rather than literal impossibility as threshold
- Death of one of the parties, or certain illnesses may lead to frustration (especially service Ks)
- may be technically possible but performance contemplated impossible and alternatives burdensome (*Suez canal cases*)

Y → Doctrine of Frustration Applies

N → No Frustration

Doctrine of Frustration Applies

4. Consequences – CONSIDER FRUSTRATED CONTRACT ACT

- K wholly discharged from point of frustration – after that point there are no further enforceable primary or secondary obligations
- BUT doesn't undo or avoid, so anything done b4 that time continues to have legal effect
- payments that were due b4 the frustrating event are still payable (*St Catherines v Ontario Hydro-Electric*)
- BUT if what has been done b4 frustrating event is payment for which nothing yet done b4 frustrating event, can recover $ on failure of consideration (*Fibrosa Spolka* (1943))
- ***Frustrated Contract Act** – to relieve of harsh consequences; in BC: allows severance, and provides right to restitution for any benefit conferred prior to frustration; changes as a result of the Act:
  - 1. Creates straightforward entitlement to recover, as of right, in restitutionary claim, the value of benefits conferred prior to frustrating event
  - 2. Act imposes a loss apportionment scheme to deal with any case where the expenditures of one party haven't conferred value on the other party or, though value has been conferred, the value has been destroyed by the frustrating event
  - 3. Recovery may be denied in case where circumstances of particular case, including prior course of dealing b/w parties or trade custom, suggests that party who has endured the expenditures should bear the risk of their loss

No Frustration