

## READING NOTES

### Chapter 3 – The Law of Torts

**Tort derives from French, meaning ‘wrong’. Tort is a wrong, an injury, done by one person to another whether intentional or unintentional. This injury could be physical or financial.**

#### Scope of Tort Law

- Role of law of **torts** is to compensate victims for harm suffered from the activities of others while punishment is generally left to criminal law
- Basic issue for society is to determine who should bear the loss
- Tort law is an instrument for apportioning loss, along with such others as insurance and government compensation schemes

#### Development of Tort Concept

- In early society it was common to have **strict liability**, where anyone who caused direct injury to another had to pay compensation, regardless of fault
- Gradually courts began to recognize indirect or consequential injuries
- Evolved in two ways
  - Took into account the fault of the defendant
  - Took into account the causation, whether the defendant’s conduct could be considered the cause of the harm

#### The Basis for Liability

- Fault
  - Fault refers to blameworthy or culpable (in the wrong) conduct, conduct that in the eyes of the law is unjustifiable because it intentionally or carelessly disregards the interests of others
  - Justification for liability on fault is in the hopes that it will act as a deterrent
- Strict Liability
  - As mentioned before, strict liability persists in some areas of modern law
    - People who collect potentially dangerous things on their land are liable for any resulting damage, even if they are blameless
    - Eg. *African Lion Safari* case or *Dog Owner’s Liability*
  - A person who undertakes a dangerous activity should charge for his service according to the degree of risk, and carry adequate insurance to compensate for possible harm done to others
  - Note that in Canadian negligence cases, standards of care increase proportionally with danger

- Social Policy
  - The basis of liability, whether fault or strict liability, is a question of policy
    - Policies change with social standards which consequently force the law to adapt in many ways
  - The most radical proposals (from the left) would eliminate lawsuits for all personal injuries and compensate victims through a government scheme
    - Eg. ‘**No fault insurance**’ which makes insurance compulsory and eliminates fault as a basis for claims
    - Eg. **Worker’s compensation** where industrial accidents are seen as inevitable and employers must contribute to a fund
  
- Vicarious Liability
  - Highlights an area where the law has responded to the pressure of social needs with respect to torts committed by employees in the course of their employment
  - **Vicarious liability** involves the liability of an employer to compensate for harm caused by an employee
    - Eg. If an employer instructs an employee to perform a dangerous task for which he knows the employee is not trained
  - The employer is liable even when he has given strict instructions to take proper care, or not to do the act that causes the damage
  - Justifications
    - Prevents legally harmful demands from being placed upon employees
    - Employees generally have limited assets available to pay compensations
    - Based upon fairness, the person who makes the profit should also be liable for the loss

## Negligence

- By far, negligence is the most common basis for legal actions in court
- Concept is quite simple, **negligence** involves anyone who carelessly cause injury to another should compensate the victim for that injury
  
- Elements of a Negligence actions
  - Defendant owed plaintiff a *duty of care* (value judgement)
  - Defendant *breached* that care (policy and fact)
  - Defendant’s conduct *caused injury* to the plaintiff (what is causal)
  
- Note: All three requirements must be established

- Duty of Care (Extended)
  - Principle criterion of **duty of care** is that the alleged wrongdoer should have foreseen that his actions might do harm
  - One cannot be expected to anticipate all possible consequences but, “would a normally intelligent and alert person have foreseen that this conduct would have likely caused harm?”
    - *Hunt vs. Sutton*
      - Christmas party with open bar ends with a paraplegic after a drunken employee refused a ride home
      - Woman drank a lot at the party, then went to the hotel bar after that
      - Hunt charged her employer with negligence because they knew she was drunk but didn’t do enough to stop her
  - Plaintiff must go further and establish a duty of care
    - Duty will arise only where the defendant could reasonably have foreseen a risk of harm to that plaintiff or someone in the plaintiff’s position
    - Eg. Courier company was not held liable for delivering an article of mail too late for a private sale to be completed as it could not reasonably foresee the delay would cause a loss to some third party outside its relation with the client (not allowed to read the mail!)
  - Courts have sometimes held that duty of care is owed to persons other than the individual who is directly injured
    - Eg. Court held driver liable when a mother died by emotional trauma of seeing son hit by the driver because that type of injury was foreseeable
  - Court will consider any statutes with respect to the matter
  
- Standard of Care (Extended)
  - Law places a general duty on every person to take reasonable care to avoid causing foreseeable injury to other persons and their property
  - Standard of care varies according to the activity in question such as a brain surgeon vs. person on the subway
  - Court must balance competing interests;
    - Degree of likelihood that harm will result from the activity as well as the potential severity
    - Social utility of the activity and the feasibility of eliminating the risk
      - Ie. Where there is danger of a major catastrophe it would be unreasonable not to take every *known* precaution
  - Increasingly, legislation not only imposes duties, but also sets out appropriate standard of care (regulations) for particular activities

- Eg. Motor Vehicle Owner's Act
  
- Causation
  - Must prove that the injury to the plaintiff is caused by the breach of duty
  - No matter how blameworthy a person's conduct may have been, he will not be able to be held liable for damage he did not cause
  - Also, a person will not be held liable for consequences of his acts that are considered to be too remote
    - Generally, the closer in time to the injury the more likely he is to be found to be the cause of the injury
  - Eg. A man and wife were hurt in a car crash where the wife was severely injured, after crashing the car 2 years later the husband claimed that he crashed his car as a result of depression from the first crash and claimed damages.... The claim was rejected because it was too long after the initial crash
  
- Remoteness of Damage
  - Foreseeability is a major element, it reappears again when the question of the extent of liability for negligence is considered
  - Until the 1960's, the actor was liable for all damage resulting directly from the act
    - *Wagon Mound* decision (leaky oil tanker causes fire in harbor) restricted liability to damage that was reasonably foreseeable
  - Subsequent decisions in Canada have largely restored the earlier position though
  
- Economic Loss
  - As noted before, the object of tort law is to compensate for loss suffered as a consequence of the wrongful act of another
  - The remedy of negligence is a sum of money by way of **damages**
    - Eg. a plaintiff injured in an auto collision may be compensated not only for physical injuries to herself and the car, but also for economic loss such as lost wages
  - Two types of cases can be distinguished
    - Economic loss without any physical damage
      - eg. Financial loss suffered as a result of negligent misstatement can be recovered
    - Physical damage, but not to the plaintiff or her property
      - eg. Tugboat owned by B collides with railway bridge owned by C. Railway company D suffered a loss of profit because it had to re-route traffic and was awarded compensation

- Burden of Proof
  - Burden is on plaintiff must prove his/her case by the balance of probabilities
    - Injured party need only establish that defendant's car or product physically caused the injury
  - Burden then shifts to defendant to show that he was not at fault, by producing evidence that on balance he was not in breach of a duty to the plaintiff (ie. Mechanical failure of brakes) as well as highlighting the plaintiff's own conduct (below)
  - **Res ipsa loquitur** means that "the facts speak for themselves"
    - Unless defendant can prove otherwise, the most likely cause was the negligent conduct of the defendant
  
- The Plaintiff's Own Conduct
  - **Contributory negligence** involves negligent actions of an injured party (plaintiff) that contributes to her own loss or injury
  - The difficulties that this presents brought about the idea of **apportionment** of loss legislation
    - Require courts to apportion damages according to the respective degree of responsibility of the parties
  - This two concepts allow courts to apply an appropriate standard of care to both plaintiff and defendant
    - Eg. Car accident where an injured person has contributed to their own injuries by failure to wear a seatbelt
  - **Mitigation**
    - It is important to note that a plaintiff is expected to act reasonably to minimize or mitigate any damage suffered
    - Involves subsequent actions by the victim which contribute to the extent of the original injuries
      - eg. refusing simple corrective surgery

### **The Relevance of Insurance**

- Modern reality is that in many tort cases the actual loss will fall on an insurance company
- Courts do not admit evidence about the existence or amount of insurance coverage in negligence actions because their decisions must be free of suspicion that the judgment has been biased by a knowledge of the amount of insurance the plaintiff chose to purchase
  - Eg. Uninsured driver is treated the same as an insured driver when insured driver is found negligent
- When an insured party recovers first from her insurance company, their right to pursue the claim against the wrongdoer passes to the insurance company
  - Ie. the insurance company 'buys' the claim from them

- The claim becomes **subrogated** to the insurance company who stand in the shoes of the victim to sue the defendant and collect
- Normally it is simpler for A to recover under their insurance policy and leave it to the company to decide whether to sue B. Why?
  - 'A' might have had damages reduced due to contributory negligence
  - 'B' might have insufficient funds to pay the claim
  - If both parties have insurance the companies will often settle through payment outside of court and avoid expensive litigation

## Specialized Forms of Negligence

### 1) Product Liability

- Retailers enter into a contract with manufacturers which makes the manufacturer liable for a breach of contract if the product is defective
- When a person has no relationship with the manufacturer (eg. Buying a car from the local dealer) contractual remedies are not available
  - If the injured parties are going to be compensated it must be by imposing liability in tort law or providing special statutory remedy
  - Not until 1932 did British courts recognize the duty of manufacturers to the ultimate consumers of their products as an obligation in tort law
  - *Donoghue v. Stevenson* involving a decomposing snail in a ginger ale causing severe illness and alters the standard of care in
    - \*Defendant now must prove it met the standard of care! Called a reverse onus
- Normally, an injured party will have no way of proving that the manufacturer was negligent
  - However, if the product is defective, then it may be reasonable to assume that there has been negligence in some stage of its design
  - The manufacturer will thus be liable unless it can show that the cause of the defect wasn't something it should be held responsible for
- Law appears to make manufacturers liable for all product defects of which (given present technology) they can be expected to be aware
  - Courts will not accept as a defence the excuse that eliminating the defect would add to the cost of production
  - Thus, manufacturers who choose to reduce costs by omitting necessary safety features or use sampling inspection become responsible for harm
- Also, with respect to pharmaceuticals etc... courts have ruled that manufacturers owe a duty to consumers to give proper warnings of such danges (eg. Cigarettes now)
  - **Duty to Warn**
    - **Who** – Consumer or intermediary (pharmacist)
    - **When** – Inherently dangerous? What language suffices?
    - **Causation** – Would the warning have stopped usage?

- A plaintiff whose claim is based on a failure to warn must also satisfy the court that had a proper warning been given, they wouldn't have used the product
- Implications of all this:
  - Manufacturers now give you the standard of care in a list
  - Users must adhere to this standard of care

## 2) Occupier's Liability

- Originally this was based on the different categories of visitors (invitees, licensees and trespassers) and the degree of duty owed differed with each category
- Must own the property or occupy it
- Different levels of duty of care
  - Highest duty goes to **invitee** such as a shopper, remove hazards that you're aware of or should be aware of
  - **Licensee** (any other visitor entering with implied permission) are afforded less duty by removing concealed dangers
    - These distinctions have been primarily abolished
  - **Trespassers** are those who enter premises unlawfully, and their owed duty is minimal where you must not deliberately harm the trespasser such as setting traps or firing a gun
- Standard of care involves permits, by-laws, building codes

## Intentional Torts

- **Inducing breach of contract** involves intentionally causing someone to breach his contract with another
- **Deceit** involves intentionally misleading someone for your own benefit
- **Conversion** involves the wrongful exercise of control over goods, inconsistent with the ownership
- **Nuisance**
  - **Public nuisances** involve interfering with other public amenities
    - Eg. Blocking roads, emitting dangerous substances in public places
  - **Private nuisances** recognize an occupier's right to the normal use and enjoyment of land, free from interference
    - The right to absolute freedom from annoyances depends on;
      - The degree of interference with the occupier's use of land compared to a regular level the community bears
      - The economic importance of the offending activity
  - Pollution is interesting because it can not often be tracked to a single offender, thus effective control can be obtained only through legislation that defines standards
- **Assault and Battery**

- **Assault** (threat of violence)
  - Often resolved in criminal court, but attackers might be liable to compensate the victim
- **Battery** (actual physical contact)
  - Since battery involves unlawful touching a surgeon who operates on a patient without consent commits battery
- **False Imprisonment**
  - Involves unlawfully restraining or confining another person
    - Eg. A security guard at a local store yells “You, stop!” and accuses you of shoplifting when in fact you have stolen nothing, you can charge them with false imprisonment
  - But, if a security guard calls the cops on suspicion of shoplifting his ass is covered regardless of whether they took anything
    - If he did not have an honest belief though that a crime had been committed he’d be guilty of **malicious prosecution**
- **Defamation**
  - Only defamation if other people hear it!
  - Consists of a statement that causes unjustified injury to the private, professional or business reputation of another person
    - Defence against these charges is that the alleged defamatory statements are true
    - Courts will not award damages unless the plaintiff can demonstrate significant injury to the respect and esteem that others hold them in
  - **Libel** (written)
  - **Slander** (spoken)
  - **Absolute privilege** involves complete immunity from liability for defamation and applies to law courts, inquests and parliamentary debate
    - Designed to promote candid discussion without fear

## Remedies

- The purpose of damages is to restore the plaintiff to the position they would have been in had the tort not been committed
- Objective is not to punish the wrongdoer, though **punitive damages** can be awarded in brutal physical attack
- **Special damages** refer to those items that can be quantified
- **General damages** are speculative items
- Not all remedies involve damages / cash though
  - **Restitution** is an order to restore a plaintiff’s property
  - **Injunction** is an order to restrain a person from continuing a particular act
  - **Mandatory injunction** is an order requiring a person to do a particular act (ie. remove fence)

## Managing Legal Risk

- Legal risk involved in contract and property law should be predictable and appropriate steps should be taken in advance to reduce or manage those risks
- Tort risks are unpredictable in comparison because of the wide-ranging tort liability
- Appropriate measures would include
  - Increasing business awareness of potential legal problems
  - Obtaining professional legal advice before undertaking new ventures
  - Insuring against damage to one's own property and against liability to others

## READING NOTES

### Chapter 4 – Professional Liability

**Primarily concerned with application of contract and fiduciary law to professionals**

#### Professional Liability: The Legal Dilemma

- Professionals are those with specialized knowledge and skills that clients rely on
- Greater exposure to liability for professional negligence has led to extensive use of liability insurance which consequently raises price (as well as client expectations) in a vicious cycle

#### Duty of Professionals

- Contractual Duty:
  - Agreement to provide professional services to a client contains a promise to perform those services with due care (whether stated expressly or not)
  - A breach of that promise is a breach of contract
- Fiduciary Duty:
  - In addition to tort liability, a principle of equity imposes a fiduciary duty of care where a person is in a special relationship of trust
    - Professional must do everything they can for the client
    - Why? Professional has upper hand because client is dependent upon them for service
    - Eg. *TD vs. Hunt* involving a non-discretionary sale of assets
      - Hunt argues that he did not tell the manager to sell BCE
      - Hunt won originally because of his old age and fiduciary duty
      - Case was appealed where the court ruled that Mr. Hunt was not in a fiduciary relationship because he had good health and demonstrated previous financial / business intelligence
  - Testing for imposing a fiduciary duty
    - Fiduciary has scope for exercise of power – fall in your grasp?
    - Fiduciary can use that power to affect the beneficiary's legal or practical interests – able to affect them?
    - Beneficiary is peculiarly vulnerable to or at mercy of the fiduciary

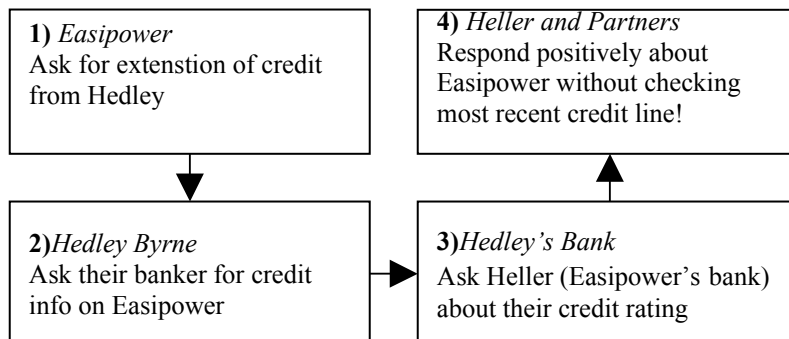
- Conflicts of interest
  - Situation where a duty is owed to two or more clients who may have competing interests
  - Requires complete fidelity and loyalty to the other party of the relationship
  - Why? A professional acting on behalf of two clients with competing interests may find it impossible to fulfill their duty to both
    - Eg. Remax agent who tries to combine buyers and sellers to save themselves time
    - Eg. Enron scandal where auditors had lucrative contracts and didn't want to risk them by judging directors too harshly
- Duty in Tort
  - **Third-party liability**
    - Important to note that a duty may be owed in tort to more people than just the client who is paying for the services
    - Eg. Engineers and architects design buildings that present risks to occupiers and others, not just the owners of the building itself
    - Same applies for insurance agents who's contractual duty lies with the insurance company however they still may develop close relations with persons they refer to as clients
- Choice of Action
  - How can you sue professionals?
    - Depends on situation, sometimes a professional may be liable in tort but not in contract, or liable for breach of fiduciary duty without having been negligent... choose the battle you can win!
      - Tort might prove more difficult in some cases due to aspects like contributory negligence
    - *Time limits* can affect decision because torts are calculated from the moment that a breach is discovered while contract is calculated from when the breach occurs
      - Determined by Limitation Act
        - Tort is from 2yrs upon discover of the tort, while contract is 2 yrs after breach
    - Form of action can affect *damages* as well
      - Tort's again, are designed to restore the person to their original state while fiduciary are more imaginative about what could have been had breach not occurred

### **Nature of Representation**

- Statement
- Silence when there is a duty to speak – Negligent omission
  - Eg. Lifeguard needs to warn when water is unsafe
- Expert opinion is treated like a factual comment
- Disclaimer or exculpatory clause or limitation on liability
  - Put something in contract that says you can't sue me!

## Liability for Inaccurate Statements

- Note: You can be sued for both what you say (via misrepresentation) or don't say (via omissions), and everything you say can be treated as fact unless protected by disclaimer
- **Misrepresentation**
  - In all cases, the statement must be inaccurate, the associated category depends on the reason it is inaccurate
  - **Innocent Misrepresentation** (Can't be used in Tort)
    - Mislead someone only due to some external force that is beyond your control..
      - Eg.. Telling someone the bank is open until 5, and upon arrival they find that it closed early after being robbed
  - **Deceit / Fraudulent Misrepresentation**
    - Involves a person making a false statement with the deliberate intention of misleading another person
    - Also committed when a person deliberately conceals or withholds information
    - I lied and I did it on purpose
  - **Negligent Misrepresentation**
    - Note: the elements are setup differently
    - Requires only a breach of the duty of care and skill
    - Should've known something that the rest of your colleagues knew
    - Involves an incorrect statement made without due care for its accuracy
    - Leads to discussion of *Hedley Byrne* below with respect to liability
- The *Hedley Byrne* Principle
  - Involves liability for negligent misrepresentation to third persons without contract and the scope of such liability
  - Originally, the court feared that an unexpected liability to third persons for advice given to (and intended for) a client might make the risk too wide and affect the freedom of professionals to practice
  - Development of *Hedley Byrne* case:



- House of Lords found although Heller neither dealt with, nor knew about Hedley Byrne, they should have foreseen that the info might be used by a customer of the bank that asked for the credit rating
  - Accordingly, this customer was owed a duty to take responsible care in expressing its opinion about Easipower (though the information did come with a disclaimer which saved Heller!)
- Result appears that anyone who makes a misstatement may be held liable for losses suffered by a wider group than the contractual relationship...
- Limits to the *Hedley Byrne* Principle
  - *Hercules Management vs. Ernest & Young*
    - Essentially modifies the *Hedley Byrne* definition of duty
    - Involves an action brought forth against the accounting firm by a third party, *Hercules*, that *Ernest & Young*'s audits had been negligently prepared which caused *Hercules* to incur investment losses
  - Two-Part Test is brought forward
    - 1) *Prima Facie* duty of care – Is there a sufficient relationship or proximity that the carelessness of one party might cause damage to another (same as *Hedley Byrne*)
    - 2) Essentially a policy issue in that a duty may be negated if it becomes socially undesirable to carry through on that duty such as creating an infinite liability to an infinite number of people
      - Examining the *Hercules* case there would be unlimited liability to anyone able to get their hands on a shareholder's report... More specifically as a matter of law shareholder's reports are not for the purpose of guiding personal investment decisions!
  - What does this all mean then?
    - Eligible plaintiffs must not only be foreseeable (objective) in a general sense, but also specifically foreseen (subjective) in relation to whatever transaction is happening
- **Omissions**
  - Duty to take reasonable care includes duty not to omit essential steps in providing professional services
    - Eg. Flower company sustains serious loss after failure of water pump in their heater. An inspector from the insurance company advised the agent that the insurance company would not cover such a failure, but the agent never informed the client of additional protection
      - Agent defended unsuccessfully on the grounds that such a duty of care was so broad as to make him strictly liable
  - Grounds for recovery in above case were classified as both negligent omission and breach of a special fiduciary relationship

- Another example includes informed consent in medicine
  - Informed consent means the surgeon should explain the entire procedure and possible risks
    - Negligence amounts in an omission of relevant information
    - Court must also consider whether a reasonable person would have decided against the procedure upon proper disclosure of risks
    - If the court is satisfied the patient would've still consented had the risks been explained, the physician will not be liable

### **The Standard of Care for Professionals**

- Usually substandard professional work is detected only after the occurrence of some unfortunate event
- Two Tests:
  - 1) Professional must exercise the same degree of skill and possess the same level of knowledge as is generally expected of members of that profession
    - a. Many professions publish a code of conduct / guidelines
    - b. Sometimes in court this test can break down as opinion can become divided between experts
  - 2) The degree of skill and knowledge must be commensurate with the particular task undertaken
    - Sometimes a professional undertakes a task that is beyond the usual skills of her profession, and cannot then fall back upon the normal professional standard
- Note: Where there is other evidence that can be understood by ordinary persons, that evidence can be taken into account by a court even if it contradicts the opinions of experts

### **Causation becomes reliance in fiduciary relationships!**

- Traditional tort is when you must establish that a breach of duty caused the injury
- The essence of causation in professional-client relationships is reliance
  - 1) Did the client rely and act upon the advice of the professional?
  - 2) Would the client not have acted in the way they did had they never received the advice of a professional?
- Eg. *Toromont Industrial Holdings v. Thorne, Gunn, Helliwell and Christenson*
  - Investment company was interested in purchasing business so it commissioned a report on buying it through a well known firm of investment analysts. The report made the business out to be a sound investment. Without having read the report the investment company decided to move quickly on rumor of another buyer and subsequently learned that the asset of their acquisition was worthless.
  - Result was that the judge did not find the analysts liable because the decision to purchase had already been made, and couldn't reason that the purchase would not have been completed .

### **Ontario Securities Act**

- Section 38.2

- With respect to future value, no person or company with the intention of effecting a trade in a security shall give any undertaking, written or oral, relating to the future value or price of such a security
- Translation:
  - Can't tell customers that this stock is going to skyrocket in order to make sale
- Section 130
  - Liability for misrepresentation in prospectus
  - Protect the investor, makes it easier for them to sue
  - Investor doesn't have to prove reliance so long as there is a misrepresentation
    - Don't even need to discuss why the misrepresentation is incorrect
    - Anyone who had anything to do with the prospectus has a duty of care
  - If investor knew about misrepresentation but bought anyways, it doesn't work
- Section 138.3 (being introduced)
  - Liability for secondary market disclosure
  - Any document (no longer just the prospectus) from a corporation that contains a misrepresentation is liable now also sued regardless of whether the plaintiff relied on the information

## READING NOTES

### Chapter 5 – Formation of a Contract, Offer and Acceptance

**Focus on describing essential qualities of a contract, why it is enforceable in law, and how a contract is formed.**

#### Role of Contract Law

- Contract law is the prime example of law in its facilitative role
  - But, there is often great inequality between parties in terms of bargaining power, expertise and intelligence... many unfair contracts can be made
  - Contracts are also subject to human frailties, sometimes leading to unintended or unjust results

#### Nature of a Contract

- Contracts begin with promises, but not all promises are contracts
- Contract law is concerned with legally binding promises, “a promise or a set of promises which the law enforces”
  - Doesn't sneak up on you, voluntary set of rules that parties promise to follow
  - If parties don't follow them they may be forced to follow them by the courts
  - Breach of contract is the cause of action that's used to force someone to pay up to their promises or pay the price

#### Contract Analysis

1. Is there a contract?
2. Can I back out of it?

Breach of contract involves 1,3,4,5
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3. What does the contract mean?
4. Who should give me what I bargained for?
5. Did I get what I bargained for?

Rescission of contract involves 2

- Is there a contract?
  - Required elements are OACI:
    - (O)ffer – Offers and counter offers go back and forth until acceptance
    - (A)cceptance – One simple thing... “yes”
    - (C)onsideration –
    - (I)ntention

### The Nature of an Offer

- A contract doesn't come into existence until an offer has been made by one party,, and accepted by another
- **Offer** is a tentative promise made by the **offeror**, subject to a condition or containing a request to the other party, the **offeree**
- When the offeree accepts the offer by agreeing to the condition or request (ie. amount of money for a house) the offer is transformed into a contract
  - At this point the promise is no longer tentative, the offeror is bound to carry out their promise (move out of house) and the offeree is bound to carry out condition (pay for house)
- Invitation to Treat
  - A mere invitation to do business is not an offer to make a contract
    - For example, newspaper ads to sell goods are generally mere invitations for the public to visit your store, business' can't be expected to sell goods to everyone who reads its advertisement, too difficult to predict demand
    - If the ad were taken to be an offer and too many people accepted it, the business would be liable for a breach of contract to all those who accepted and whom were not given the good
    - But, ads can be offers if there wording favours this interpretation
      - Eg. An advertisement to sell a fixed number of items at a fixed price to those who accept first might be seen as a valid offer
    - Example of Pepsi ad with Harrier Jet where they felt that it was simply an invitation to treat

### The Communication of an Offer

- The form of an offer is not important as long as it is understood
- Offer must contain enough particulars to form the basis of a contract
  - Eg. If you make an offer to sell a car of yours for 'a lot of money', you must specify which car you wish to sell as well as an asking price
- It can be written, oral or by conduct
  - Eg. Taxi driver opening the door of her cab, bidder raising fingers at auction can be considered offers

- Oral contracts are not illegal, but are difficult to prove in court
- Acceptance must be unqualified
  - All counter-offers nullify the original contracts
  - Eg. In real estate, if you make any changes to offers and contracts, you nullify the agreement...
    - Remember Wayne Gretzky trying to buy a cottage and screwing around with the date of moving in and the placement of the people's old stuff.... His acceptance contained an additional clause to the agreement, thus viewed as a counter-offer which allowed the sellers to back out and sell the cottage to different buyers
- It's important to note that an offeree cannot accept an offer until he is aware of it
  - Eg. If you return a lost article with no knowledge of the reward for it, you can't go back and ask for the reward because you didn't act in response to the offer, and thus didn't accept it (but you're still a good person)
- Similarly, we cannot be required to pay people who do work for us without our knowledge
  - Entitled to receive an offer to do the work, which we may then accept or reject
  - Law was originally designed in the Consumer Protection Act to deal with unconscionable selling practices by people like Columbia House who try to bind you to goods you didn't request
    - Eg. If you don't want the CD's we sent to you then mail them back (by courier for \$5) within this much time, if you don't say anything we'll send you more for \$\$.. become bound!!!
  - Also the classic example of someone re-paving your driveway while you're away on vacation and you get back with a bill on your door.
    - But, had you been there and watched them paving your driveway without having paid for it, you are obliged to go out and tell them to stop or else you 'accept' the offer and are bound

### **An Offer Made by Tendering a Written Document to the Offeree**

- Standard Form Contracts: Risks and Benefits
  - **Standard Form Contract**
    - Offer presented in a printed document or notice, terms of which can't be changed by the offeree and must be accepted as is or rejected
  - With a standard form contract (eg. Tickets for theaters, airlines) there is no real element of bargaining, it is a 'take it or leave it' contract
  - Two means of protection from this inequality in bargaining
    - If the business falls within an area regulated by the government, the terms of such contracts are subject to approval
    - Courts can offer some protection with respect to required notice of terms
      - Courts presume that an unqualified acceptance of an offer is an acceptance of every term of that offer

- Suppose an offeree doesn't know that the offer contains a certain term (fine-print), is she bound by it?
      - If the court decides that steps to inform were insufficient he is not bound by the term... But each 'ticket' case is decided on its own facts
      - Signs disclaiming liability are another example, the sign itself might not be sufficient notice, often require a clear reference in tickets
- Unusual or Unexpected Terms
  - Unexpected terms such as liability for personal injuries while parking cars need to be brought directly to the attention of the offeree
  - Note: If the offeree signs a document, stronger presumption arises that she had accepted all the terms it contains
- **Negative option** means a contract is renewed automatically if a party does not give notice before current term runs out!

### **Lapse and Revocation of an Offer**

- **Lapse**
  - An offer may lapse in any of the following ways:
    - Offeree fails to accept within time specified in offer
    - Offeree fails to accept within reasonable time, if no time limit is specified
    - If either party dies or becomes insane prior to acceptance
- **Revocation**
  - An offeror may be able to revoke an offer at any time before acceptance, even when it has promised to hold the offer open for a specified time (Unless there is a use of an option)
  - Revocation must reach offeree before acceptance is filed
- **Options**
  - Offeree can bind an offeror to keep its offer open for a specified time by obtaining a written offer under seal, or by making an option (a contract itself)
    - Options often involve the offeree agreeing to pay a sum of money in return for offeror keeping offer open and not making contracts with other parties

### **Elements of Acceptance**

- Positive Nature
  - Acceptance must be made in some positive form, whether by words or by conduct
    - If acceptance is by conduct then the conduct must refer unequivocally to the offer made
    - An offeror cannot insist on silence as a mode of acceptance, thus forcing the offeree to act in order to reject the offer

- Note: Silence can only be used as a sufficient mode of acceptance only if the parties have habitually used this method to communicate assent, or if they have agreed on silence
- Communication to Offeror
  - *Carlill Case*
    - Carbolic Smoke Ball Company placed an ad promising to pay \$100 to anyone who used their balls and still contracted influenza
    - Miss Carlill used the balls, still contracted influenza and sued the company to pay her \$100
    - Company responded that she had never communicated her intention to accept
    - Court ruled in favour of Miss Carlill because it held the offer implied notice was not necessary
  - Similar to Pepsi Ad with Harrier Jet
  - Established that an offer may be made to an indefinite number of people who remain unknown to the offeror even after they've accepted
  - Moral of the story is that courts will often rule in favour of acceptance rather than revocation, thus don't make a promise you can't fulfill!
- Summary of ways in which an offer may come to an end:
  - Offer may lapse
  - Offeror revokes the offer before offeree has accepted
  - Offeror rejects the offer, or makes a counter-offer
  - Offeree accepts before any of the above, offer is replaced with contract

## Unilateral and Bilateral Contracts

- **Unilateral Contracts**
  - Contract in which the offer is accepted by an offeree who performs an act or series of acts required by terms
    - Acceptance is communicated by performance of the contract
    - Eg. If you hire someone for \$4000 to build you a deck for you in 60 days they can back out anytime in that 60 days... Acceptance occurs when delivering by that date, until then there is no contract
  - On the other hand the offer can be revoked at any time, thus the person performing a service faces a risk of revocation
  - Courts have tried to eliminate this unfairness by treating offers as bilateral (both parties must fulfill obligations) when the language of the contract can be fairly construed in that manner
    - Even when courts can't find it possible to construe a contract as bilateral they seek a **subsidiary promise** which is an implied promise that the offeror will not revoke once the offeree begins performance in good faith
- **Bilateral Contracts**
  - Two parties have traded promises, if either party refuses to perform its promise then the other has the right to sue
    - Each party is both a promisor and a promisee

- Eg. Credit Sale
  - At the time of the contract and for some time afterwards the goods may neither be delivered by seller, nor paid for by the buyer

## READING NOTES

### Chapter 6: Formation of a Contract, Consideration and Intention

**Before an agreement is binding in law, certain essential elements must be present, primarily there must be consideration, can be replaced though.**

#### The Meaning of Consideration

- In a unilateral contract, the price paid for the offeror's promise is the act done by the offeree
- In a bilateral contract, the price paid for each party's promise is the promise of the other
- This 'price' is called consideration, "price for which the promise is bought"
  - Can range from a number of dollars, to a single staple!

#### Gratuitous Promises

- Consideration is essential to make a contract binding
  - A person can still make a promise to another without bargaining for anything in return
  - Such a promise made in the absence of a bargain / price is called a **gratuitous promise** and does not become a contract, nor is it enforceable by law
  - Made void by lack of consideration (Never was a contract!)
- Law simply states that if the promisor does not perform, the promise has no legal remedy; cannot seek compensation for disappointed expectations
  - Can donors later change their mind and demand gift back on grounds of lack of consideration?
    - No, it is no longer their property unless there was undue influence

#### Adequacy of Consideration

- Consideration must have some value in the eyes of the law, but the court will not inquire into whether the promisor has made a good bargain
  - Courts take this stance because evaluating the adequacy requires a personal value judgment, no longer impartial
- Courts will only ever examine adequacy in instances where consideration is grossly inadequate pointing to fraud or undue influence exerted on promisor
- Can become a slippery slope:
  - Eg. A promise not to sue someone who's damaged your car in order to force them into paying you can be seen as consideration in a unilateral contract after a car crash

#### Past Consideration

- Remember, consideration is the price that makes the promisor's promise binding
- The reason for making the promise (motive) is irrelevant
  - For example, motive cannot change a gratuitous promise into a binding contract, nor reduce a binding promise into voluntary obligation

- If someone promises to reward another who has previously done an act the promise is not binding
  - Why?
    - Because that promise is gratuitous, just like the benefit that they received earlier
    - Moral of the story, if you want to be a good person and receive something for it... put it in paper first! After the fact doesn't matter!
- Benefit previously conferred upon the promisor is called **past consideration**, past consideration is no consideration

### **Relation Between Existing Legal Duty and Consideration**

- If someone is already under contract duty to me, a later promise by me to pay them extra to perform that same work is not binding
  - Eg. If I offered to pay someone twice as much to complete construction on time, I wouldn't be held to pay for that if they did so because they were already bound by the original contract to complete the work on time
- Not every change in contractual terms amounts to unfair exploitation such as when you pay workers more in hopes of easing hardship and increasing performance
- Third parties promising to pay a sum to perform already existing obligations are considered binding
  - Eg. If someone who is a principle leaseholder approaches a contractor in order to ensure the successful completion by a date binds the two because the contractor gives new consideration to the leaseholder

### **Gratuitous Reduction of Debt**

- *Foakes v. Beer*
  - Debtor owed a large sum of money that was overdue
  - Creditor agreed to accept a series of installments of principal, forgoing their right to interest, so long as the debtor paid promptly
  - Even though the debtor paid the principal in full the creditor still sued them for interest, argued it was a gratuitous promise and did not bind. Why? No consideration was made.
- This rule has been found unrealistic
  - Fails to recognize business reality, why?
  - Creditors may find it more beneficial to settle for a reduced amount than to insist on payment in full
    - The compromise might avoid placing debtor in bankruptcy, where creditor might never get any money back
    - Proposed reduction might enable debtor to get money from friends
    - Debtor may need the cash in a hurry
- How can *Foakes v. Beer* be avoided?
  - Payment before due date is sufficient consideration to make agreed reduction in debt
  - Rule in *Foakes v. Beer* applies only to payments of money, doesn't apply to transfer of goods or provision of services

- Creates paradox as a person can accept \$900 for a \$1000 and later sue for the balance successfully
  - But, if a person accepts \$500 and a naked picture of Nowak's mom in full settlement of a \$1000 debt, the creditor can't sue for the balance!
- Also, rule in Foakes v. Beer only applies to agreements between creditor and debtor
  - Third parties can offer to pay creditors lesser sums to cancel the debt
  - Eg. Buying accounts receivable, the original creditor loses all rights to the money
- Finally, this rule can be avoided if the creditor agrees in writing under seal to reduce the debt

### Equitable Estoppel

- Evolution of Principle
  - Make gratuitous promise, become unable to fulfill it while the promisee has reasonably relied on your promise and incurred expenses
    - US calls this **injurious reliance**, and forces the promisor to honour his promise to prevent an injustice
- Estoppel Based on Fact
  - When one person asserts a statement of fact and someone relies on this to their detriment the maker of the statement will be prevented from denying truth of original statement in court
    - Eg. Man asks if this is your stuff... You say no.. He throws it in garbage... If you later realize it was yours you can't go back and sue him.
- Estoppel Based on Reasonable Reliance
  - Courts eventually found themselves unable to ignore the plea of innocent parties who relied in good faith on gratuitous promises but were betrayed
  - Similar to chancery court in older England where vulnerable and exploited people could appeal unfair practices by the upper classes upon them
  - Can only be used as a defence if promisor goes after you
  - Situations which involve equitable estoppel:
    - 1) Some form of legal relationship exists between the two parties
    - 2) One of the parties promises to release the other from legal duties owed to him
    - 3) The other party relies on this promise and alters their behaviour in a way that makes them extremely vulnerable if the promisor reneges
- Highlighted by case of *Hughes v. Metropolitan Railway Co.*

- Metro Railway was supposed to make repairs within six months or lose lease
- Hughes asked railway to make repairs who responded by asking if the landlord was interested in buying back the remaining lease, serious negotiations ensued during which all repairs were consented to be delayed
- When negotiations broke down Hughes turned on the railway company and sued them for forfeiture of lease
- House of Lord's wouldn't let this happen, argued that Hughes couldn't do an about face like that
- Moral of the story:
  - You can't set a trap with a gratuitous promise, ie. prejudice the promisee in respect to reliance on the promise

### **Intention to Create Legal Relations**

- The law presumes that necessary intention is present in almost all situations
- Defendant may overcome this presumption by using test of reasonable bystander,
  - Look at the situation through the eyes of Joe Blow and see whether it appears that there is a lack of intention
- Return to *Carlill v. Carbolic Smoke Ball Company* or Pepsi Ad
  - Company pleaded that its promise to pay the \$100 reward was a 'mere puff', and shouldn't have been taken seriously
  - The problem was that this defense lost all credibility when the advertisement highlighted a reserve of funds specifically to demonstrate their sincerity.... Oops!

### **In-class Question**

How could the Farmer have changed his conduct to benefit from s. 16 of the **Mercantile Law Amendment Act**

- (a) Record the telephone conversation
- (b) Get the promise in writing under seal
- (c) Get someone else to promise to pay on his behalf
- (d) Actually pay the \$1200.00

Answer:

Section 16 makes reference to past performance and stipulates that if you make a new agreement with the promisor such as calling in debts below the principle owed consideration must be made in order to enact the new deal, or else it's just a gratuitous promise... Or you get the promise in writing under seal which would bind both parties.

Thus, the answer is b).

## **READING NOTES**

### **Chapter 7: Capacity to Contract & Legality of Object**

**Complete discussion of essential elements with two elements assumed to be present unless shown otherwise. First being capacity to contract and second being the way our legal system makes certain contracts unenforceable.**

**Note on Void vs. Voidable**

- **Voidable** – Refers to a contract that exists until set aside by the courts
- **Void** – In contrast to voidable, a void contract is treated as if it never existed
- If this happens the court will grant the remedy of rescission placing the parties back to their original positions

**Meaning of Capacity to Contract**

- **Legal capacity** to contract refers to the competence of someone to bind themselves to legally binding contracts
- Although the requirements of [o,a,c,i] may be satisfied, as a matter of policy the law may excuse a party from their obligations if they are found not to have the capacity to contract
- Burden of proof is on the party alleging a lack of capacity

**Groups to Consider**

- **Minors**
  - A **minor** is a person who has not of age of majority in their province (18 in Ontario)
  - Works in a one-sided manner where a contract is not binding for the minor, while still binding for the non-minor
  - But, following these above conditions minors could disregard contracts with impunity and consequently no one would ever contract with... that is why there are exceptions
    - Exceptions:
      - A minor is bound to pay for all **necessaries** (essential goods and services like food or clothing)
        - Minor's may always repudiate a contract for non-necessaries, even if those necessaries are beneficial... must return them though
        - When a minor is living at home and supported by his parents, his purchases are less likely to be considered as necessaries
        - Also, minors are not liable for necessaries that are ordered but not yet received
      - Minors are also bound by **beneficial contracts of service** (ie. employment or apprenticeship) when they are found not to be exploitative
    - Freedom from liability only applies to contracts, still very liable for torts unless they occurred as a result of a contract
    - What happens when they become age of majority?
      - In contracts of a continuous nature a minor must repudiate the contract upon turning 18 if they want to call it quits
        - Silence means the contract stands
      - In one-time contracts they must be ratified or acknowledged to remain in force, silence means the contract is over

- If the contract was originally unfair and prejudicial to minors it is considered void and thus doesn't matter that the minor ratified it
  - Eg. Girl Scouts selling cookies
    - Girls scouts go out and sell cookies, yet they are too young to be under contract, what happens if a girl scout oversells herself and wants her cookies back?
      - You've gotta give them back if you haven't eaten them already
- **Unsound Mind / Incapacitated**
  - Law protects people of unsound mind or incapacitated through drinking or drugs in same way as a minor
  - There is an additional burden for the party seeking to avoid the contract, they must show that they were incapable of rational decision **and** prove that the other party was aware of this condition
    - Ie. The tattoo guy had to know you were drunk out of your mind!
  - Party seeking to avoid must act promptly upon sobering up, unless repudiation comes within a reasonable time the privilege is lost
- **Corporations**
  - When you incorporate you form a separate legal entity, limits liability of the persons involved in the corporation
  - Date of incorporation is considered the birthday of your corporation
    - Therefore if you personally hire someone before the birthday of the corporation you accept all liability
    - Solve this by getting the corporation to ratify the contracts done before incorporating
  - Also, obligations that corporations purport to undertake but are outside the statute (with respect to their legislated contractual capacity) will be declared as *ultra vires* (beyond powers of) and thus void
- **Labour Unions**
  - In collective bargaining the labour union itself doesn't have capacity to contract, requires the support of the membership for ratification
  - If an employer doesn't implement the decision of an arbitrator the union may apply to a labour relations board for permission to prosecute
  - Also, if a union reject the arbitrator's decision and causes an illegal strike damages have occasionally been awarded against the union
- **Enemy Aliens**
  - If your country is at war with Canada, your capacity to contract may be adversely affected
  - Makes the contract void, rights and liabilities are wholly dissolved
- **Aboriginal Peoples**
  - Distinction between native's who live on-reserve and those who don't

- Legal position of native' living on reservations is set out in detail in the Indian Act
  - Those native's living off the reserve have the same contractual capacity as any other citizen
- **Bankrupt Debtors**
  - Process is quite complex
  - When you file for bankruptcy either you're pushed (by creditors) or jump (yourself)
  - Ironically, you need \$1500 to file for bankruptcy to pay towards a trustee
  - From the time that you start your bankruptcy until you are discharged you have no capacity to contract

### **Role of Legality in Formation of Contracts**

- The object of a contract must be legal, (not offend public good or violate law)
- In the absence of evidence to the contrary, courts presume that transactions are legal
  - Burden of proof is on the defendant
  - Defendants may introduce evidence to show this presumption was incorrect and thus void the contract
    - Eg. If you ask for marijuana and he gives you crack, you can't sue for breach of contract
- **Note: We are all expected to know all of the law**

### **Difference Between Void and an Illegal Contract**

- If a contract is void then the court will apply rescission in order to restore the parties to their original condition
- On the other hand, if a contract is found illegal it is unenforceable and the court will not intervene... "The loss falls where it lies"
  - Eg. National Enquirer
    - National Enquirer hires people to commit defamation, then promise to defend their writers in case if they get sued
    - The problem is that courts can't enforce this contract because defamation is illegal which nullifies the contract... Writer is hung out to dry!
  - Eg. Bricklayer stretching his UI
    - Bricklayer and owner get into dispute over money owed after agreeing to deliver payment in spring so that the bricklayer can collect UI during the winter
    - Problem in this case relates to public policy because it defrauds the government and is thus borderline illegal
  - Eg. Confidentiality Clauses and Public Policy
    - There are good reasons from a business perspective for these clauses because business' don't want their competitive position undermined by having information fall into hands of rivals



- Even more difficult to justify restraint in trade in this situation because courts feel that there is little equality in bargaining power
  - Employee has to sign agreement in order to be hired!
- From a public policy perspective in protecting employees the courts also protect mobility of labour, promote economic efficiency
- The law does recognize a full time employee's primary duty of loyalty to the employer though
- Slight exceptions:
  - Employees who have access to valuable trade secrets or processes
  - Employees who acted as a personal representative of the employer in dealings with customers (ie. Steal all your old favorite customers!)

## READING NOTES

### CHAPTER 8: Grounds Upon Which a Contract May Be Implemented

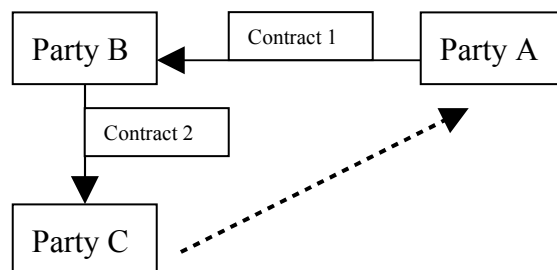
**Discuss what happens when a party realizes that the contract is not the one that was intended**

#### Review:

- **Impeaching Contracts**
  - 1) Mistake
  - 2) Lack of Capacity
  - 3) Illegality
- *Caveat Emptor* = Buyer Beware
  - Exceptions – Lack of Capacity, Mistake, Consumer (Consumer Protection Act)

#### Review Void vs. Voidable

- Void - Never existed, return parties to original state
- Voidable – Exists until set aside, no return to original state
  - Eg. If contract 1 is void, then contract two also becomes void (Thus, Party C needs to fully restored Party A or become liable, Party C needs to sue Party B if they wanna get anything back!)
    - Why? No contractual linkage to party A
  - Eg. If contract 1 was voidable, Party A only has until contract 2 is enacted to get their stuff back or else Party A is outta luck!
    - For Party C to be protected in this case, they must be innocent and have paid value for the goods



### Restricted Meaning of Mistake

- We must not confuse ‘legal mistake’ with ‘mistake’ in its more general, non-legal meaning
  - General mistakes (realizing a bad bargain was made) do not provide a legal basis from removing yourself from contract... would undermine all contracts!
- Mistake has to be something that is undiscoverable
- There are two main types of mistake:
  - *Mistake about the terms* of a contract
  - *Mistakes in assumptions* about important facts related to a contract, although not part of the contract itself

### Mistakes About the Terms

- Words Used Inadvertently
  - If, in the circumstances, it was reasonable for the second party to rely on them and enter into the contract, then the terms of the contract are binding
  - Eg. *Webster vs. Cecil*
    - Cecil accidentally counter offers with 1250 instead of 2150, doesn’t realize error until acceptance is already drafted, Webster sues to enforce the contract
    - Court concluded that no reasonable person could have believed such an offer to be made intentionally
  - Remedy is not complete, and is consequently voidable, meaning no protection from third party’s (punishes stupidity!)
- Errors in Recording an Agreement (Transcription)
  - Two parties reach an agreement in some form (orally, roughly written) but the final form does not accurately reflect the original statement
    - Term may have been left out or figures may be wrong
  - Party claiming that the arrangement was improperly recorded may ask the court for **rectification** of the contract if they meet the following qualifications
    - Court must be satisfied that there was a complete agreement between the parties, free from ambiguity or further adjustments
    - Parties did not engage in further negotiations to amend the contract
    - The change appears to be error in recording, easily explained as such
  - Often becomes a battle of credibility which is an imperfect art
- Misunderstandings About the Meaning of Words
  - Parties might place quite different meanings on those words
  - Court tries to keep contract alive by deciding which meaning is the more reasonable in light of the circumstances, including those things

- each party ought to have known about the subject-matter of the contract as well as intentions
- If this is not possible, they will argue that neither agreed on the same thing and void the contract
    - Eg. By a remarkable coincidence two ships called *Peerless* were sailing from Bombay, one in October, the other in December
    - A delay of two months in the shipment of an economically volatile commodity caused a major difference in terms whereby the seller sued for breach of contract
    - Defence succeeded because the court could not decide which ship *Peerless* was meant
  - Court will find contract void when:
    - i. Two equally valid interpretations exist
    - ii. Wording itself is ambiguous (ie. Parties were careless)

### **Mistakes in Assumptions**

- About the existence of subject matter of a contract
  - Court will find a contract to be VOID where subject matter does not exist at time of contracting (but parties believe it does)
  - Applies primarily for living things that can disintegrate or be destroyed
    - Eg. If at the time the contract was made the subject matter, a horse, had just died unbeknownst to both parties it is hard to imagine a fair way to enforce the contract
    - Have to hold contract void!
  - This rule as it applies to the sale of goods is incorporated into the **Sale of Goods Act** which argues that a contract is void in a situation like above
- About the value of the subject matter
  - Finding a solution that is fair to both sides is much more difficult when the qualities are radically different than from those contemplated by the two parties
  - Court will find contract VOIDABLE where subject matter exists but value is different from that contemplated by parties. Court will assess if risk of change was foreseeable
    - Eg. Say you wanted to buy a large bit of property that you've never visited or investigated. Upon trying to develop the land you learn that your area is far smaller than you thought. Consequently, the plaintiff will often sue to have the contract rescinded and have their money returned.
    - Contract is ruled voidable and rescinded, no return of money as punishment for not doing research
- Unforeseen Future Events

- Party to a contract may fail to foresee a crucial change in conditions under which it is to perform
- Performance may become legally impossible- such as if new government regulations prohibit delivery of a drug
- Performance may become pointless, such as paying for a seat reserved to watch a play that is cancelled

### **Mistake About the Identity of a Party to a Contract**

- Face-to-face
  - If someone lies face-to-face with you, you have options to investigate (such as asking for ID or seeking guarantor, thus it is only voidable)
- Existent Identity (At a Distance)
  - *Cundy vs. Lindsay*
    - Lindsay, a manufacturer in Ireland, sent goods on credit to thief Blenkarn who had signed an order with a signature resembling one of their regular clients but with a different address
    - Upon receiving the goods, Blenkarn sold the goods to Cundy whom were unaware of the fraud
    - Court decided that a mistake by the seller rendered the contract void, thus Cundy was required to return the goods or pay damages
  - Cundy vs. Lindsay offends the general principle that the loss should be borne by the more careless in a fraud case
- Non-Existent Identity (At a Distance)
  - *King's Norton Metal Co. v. Edridge*
    - A thief used the name of a non-existent firm to order goods and resold them
    - Plaintiff's claimed their contract with the non-existent firm was void and thus sought to recover the goods from the innocent purchaser
    - Action failed because they had to have intent to contract with someone, and that only person was the thief! Thus, it was only a voidable contract due to the fraud!
- Mistake About the Nature of a Signed Document
  - By signing a document that has been misrepresented either innocently or fraudulently, a person may induce an innocent third party to rely on the document
  - Person who signed may plead *non est factum* "It is not my doing", in this case the contract becomes void
    - Originated in medieval times where illiterate relied on the good faith of others
  - In 1978 House of Lords declared *non est factum* no longer could let someone avoid liability
    - Even if your illiterate or can't speak English you should seek legal counsel

- Not effective if party is relatively sophisticated

**Mistakes in Performance**

- Situation where a party receives benefit it is not contractually entitled to. The elements of Unjust Enrichment are:
  - The conferral of a benefit
  - Knowledge of benefit by recipient
  - Acceptance of the benefit
- Remedy is often found in restitution, where injured party is put into a pre-injury position
- Eg. “Landscapers accidentally give you a free driveway meant for your neighbor”
  - When recipient knows they’re not entitled a court will order them to restore it
    - If you stood at the door getting excited about your free driveway
    - Different story if you and your neighbor were away on vacation and you came home to a new driveway
    - If the company ripped out your fancy interlocking driveway then they need to return the customer to original, not just leave it as is for free!
  - If the recipient honestly believes they’re entitled to it the court often rules that it would be an unjust enrichment to allow the recipient to keep the benefit, order restitution
- A note with respect to the Consumer Protection Act
  - Protects you from being sent CD’s you don’t want and having to courier them back in order to avoid being trapped into a contract

**Summary:**

	Type of Problem	Void	Voidable
<i>Terms</i>	Mistake about Terms		X
	Mistake about Meaning	X	
<i>Assumption</i>	Subject	X	
	Value		X
<i>Identity</i>	Face to Face		X
	Distance	X (Existent)	X (Existent)

Impeaching Contracts

1) Mistake

- 2) Misrepresentation
- 3) Undue Influence
- 4) Duress

## READING NOTES

### Chapter 9: Grounds Upon Which a Contract May Be Impeached (Ended) **Misrepresentation, Undue Influence and Duress**

#### Misrepresentation and Torts

- Misrepresentations can provide a cause of action in both contract and tort
- Three types of misrepresentation
  - 1) Fraudulent
  - 2) Negligent
  - 3) Innocent
    - Note that an innocent misrepresentation becomes fraudulent or negligent if the party responsible fails to correct it when in a position to do so
- In tort, only 1) fraudulent and 2) negligent misrepresentation give rise to remedy, recover loss from wrongdoer
- In contract, all three forms of misrepresentation allow for the remedy of rescission
  - As soon as any misrepresentation is found, the court will provide rescission
  - But, in rescission you're put back to how you started, what if it involved an intangible product (ie. Hamburger)?
  - If it had been a tangible product you'd be able to return it

#### Misrepresentation and Contracts

- If a misrepresentation is innocent and **material**, that is could be expected to influence a party's decision in favour of entering a contract, a court may set the contract aside at request of innocent party
  - Remedy is restricted to right to rescind
  - Need to prove that a misrepresentation became a term of the subsequent contract in order for remedy based on breach of contract
- If the maker of the misrepresentation acted fraudulently or negligently then the court will grant damages against the wrongdoer
- Note: There is a general rule of law in that a plaintiff will not be granted a remedy he does not claim.
  - Thus, if you sue for damages as a result of fraudulent or negligent misrepresentation you may only receive damages and the contract will not be rescinded
  - If you fail to prove fraud or negligence above, you get nothing

#### Consequences of Misrepresentation in Contracts

- When a party who's relied on an innocent misrepresentation learns the true facts, they must renounce the agreement promptly
  - If you allow an unreasonable length of time to pass or take further benefits you lose your right to rescind

- If you sustained out-of-pocket expenses in performing the contract, or paid money to the other party before becoming aware of the right to rescind, then you are entitled to indemnity which is given as a supplement to rescission for losses sustained in the contract
- Purpose of rescission is to restore the parties as nearly as possible to their position before entering the contract, such as returning any out-of-pocket expenses in performing the contract
- But, in contracts for the sale of land, the right to rescission for innocent misrepresentation is lost once title to the property is transferred
  - Why? Purchaser's are expected to search title, exercise right to rescind before completion of transaction
- Note: Beware any standard form contract excluding representatives
  - Known as an entirety clause
    - Eg. WLU has small print in the calendar stating that "this is the entire contract, there are no collateral agreements, items..."
      - Covers all loopholes
    - Eg. VISA has a clause that allows it to change contract at any time

### **Opinion vs. Fact**

- Misrepresentations are not opinion, only statements of fact... experts are the exception
  - Law is lenient towards sellers who over-enthusiastically sell their wares "best textbook in the world", disillusioned people are left without remedy
- Law must distinguish between statements made as fact, and those as opinion
  - Eg. Merchant trying to sell foreign goods says that a certain good can be imported under low tariff rate in section # of a statute, buyer later learns they can't import under that section
  - Courts may find that seller merely gave his opinion, but if they are seen as an expert in the marketing of these goods (or told someone they were) then the court may find that he made a misrepresentation
- Thus, **expert opinion** is equivalent to a statement of fact... experts beware!

### **Misrepresentation by Omission**

- No hiding any nitty gritty's in contracts, must bring them forward to attention of signee
- Noted in Chap. 5 that signing a document creates a presumption that that signer accepts all terms
  - This presumption can be denied if a party can demonstrate that they were expected to sign a document hurriedly and without an opportunity to read or understand it
  - Also must prove that the other party has good reason to suspect that the signer may not fully comprehend the implications of the agreement
- "Special onus [responsibility] on the supplier to point out any terms in a printed form that differ from what the consumer might reasonably expect. If he fails to do so he will be found guilty of misrepresentation by omission..."

the signer is bound by the terms of the document only if the other party believes on reasonable grounds that those terms truly express the signer's intention."

### Contracts Requiring Disclosure

- When one party has special knowledge
  - Concept of misrepresentation also includes failure to disclose pertinent information because one of the parties has access to such information not available to the other
  - Party in superior position of knowledge has a duty to inform the other in order to demonstrate the risks of a proposed contract
  - It would be a mistake to assume that all contracts require the **utmost good faith** [duty owed when special measure of trust is placed in one party by another] simply because one party knows something that another doesn't
  
- Insurance contracts
  - Requires utmost good faith and full disclosure
  - Party seeking insurance must disclose all pertinent aspects of the risk he is asking the company to assume so they can properly adjust rate
    - Eg. If you have AIDS you must literally tell the insurance company, silence is not compliance!
  - Insurer can legally withhold insurance money to the estate or beneficiaries of if the insured person withheld such information while applying
  
- Sale of Corporation Securities
  - Directors naturally know more about the company's affairs and its future prospects than the investing public
  - Thus, when providing a **prospectus** [statement issued to inform public about new issue of share or bonds] securities statutes are strict and require sufficient details regarding the omission of pertinent information
  
- Sale of Goods vs. Sale of Land
  - **Caveat emptor** [buyer beware] applies only to the quality of the goods, not to ownership,
    - By offering goods for sale, a seller implies that they have the right to sell them and transfer full ownership free from any claims, any other claims floating around entitle buyer to rescission
  - Purchaser of land has less protection against undisclosed faults of property, purchaser can protect himself only by making a thorough investigation of title

### Relevant Legislation

- Consumer Protection Act
  - Overall, courts feel that consumer is disadvantaged, not at an equal footing as are the business'
  - Act operates in only one-way, only lets consumers leave contracts, only consumers receive remedy
  - Targets high risk industry's and provides a way to get out of the contract
    - Eg. Time shares where you are allowed to cancel after 10 days after receiving agreement
  - Each target industry has its own requirements for impeaching contracts
  
- Unconscionable Transactions Act
  - Primarily focuses on loans, highlights business transactions so inherently unfair that the consumer is totally taken advantage of
  
- Competition Act
  - Specifically targets marketing and advertising with respect to misrepresentation on issues like promotional contests, bait and switch selling, sale prices etc...
  - Allows consumer to sue as well as charging the company with a regulatory offence (non-criminal)
  - Eg. Goodlife receives \$75,000 fine for misleading advertising
    - Ads failed to disclose additional mandatory fees in 'six month free' memberships
    - Goodlife paid the fine and published apologies
  
- Better Business Bureau of Canada
  - Handles most violations of the above acts in Canada
  - Holds a great deal of the initiative to start class-action law suits

## Undue Influence

- Special Relationships
  - **Undue influence** is the domination of one party over the mind of another to a level that they deprive that person of making the decision themselves
  - Often arises when one party has a special skill or knowledge causing the other to place confidence and trust in them
    - Not necessarily a bad thing, rather they control so much of you that you can't escape them! (ie. Husband and Wife, especially earlier this century!!!)
  - Contracts formed as a result of undue influence are deemed VOIDABLE at the option of the victim
  - Victim may avoid the contract only if they act promptly once freed from the domination from the other party
  
- Dire Circumstances

- Sometimes undue influence occurs when one party is temporarily in dire straits and will agree to exorbitant or unfair terms because they're desperate for aid
  - Eg. "I'll save you for \$1000... deal?" = VOIDABLE
- Burden of Proof
  - Party alleging undue influence must satisfy the court that domination was probable under the circumstances... easiest when there is a special relationship
  - Courts always presume that undue influence was exerted advantageously towards the dominant position
  - Once the victim shows that they were under influence the burden shifts to the defendant to prove that they didn't exert undue influence
    - Most important factors in determining whether there is undue influence is the degree of domination of the strongest party and the extent of the advantage they received (ie. the unfairness of the bargain)
- Arrangements between Husband and Wife
  - Undue influence may arise, especially if one spouse is experienced in business and has persuaded the other (with no experience) to pledge their separate assets as security or as a guarantor
  - Donald Trump's marriage history has taught us that you need independent legal advice for both parties in order to hold up contract
    - Independent means that you need to choose your lawyer and pay for them with your own money!
    - Seems overly cautious, but it is the only sure method in order to avoid suspicions of undue influence
- Importance of Independent Legal Advice (ILA)
- Threat of Prosecution
  - Undue influence may arise through fear of prosecution of a family member
  - Similar to blackmail in that parents go to great lengths to save their child from prosecution for a minor offence
- Note on Guarantees and Undue Influence
  - Guarantee is when one party lowers their risk in getting a loan by having someone guarantee the debt, whereby they agree to pay the amount due if the principle debtor defaults on the loan
  - Guarantee of indebtedness is a contract, can be ruled invalid if obtained by undue influence
    - Eg. Boyfriend asks girlfriend to guarantee his \$20,000 debt assuring her that he is good for it. With no independent legal advice she also guarantees another \$46,000 . Unfortunately the boyfriend declares bankruptcy and disappears whereupon the bank sues the woman for the entire amount.

- Although the woman eventually reached a settlement in court, she should've pleaded under influence and thus wouldn't have had to pay anything towards the principal

### Duress

- Distinct from undue influence in that it is the extreme on the spectrum
- Duress consists of actual or threatened violence or imprisonment as a means of coercing a party to enter into a contract
  - The threat can be also indirect towards a family member etc... of the target
  - Could also include threats that "I will ruin you financially by calling the credit bureau"
- Duress renders a contract VOIDABLE
- Where do the categories fit?
  - Duress is very strict and limited in its application to circumstances described above
  - Undue influence is far wider in its coverage as it fills gap between fraudulent misrepresentation and duress

### Textbook Example

Shelley writes a textbook and sells it in a booth at the bookstore. A Student taking the class next term buys it. Three different circumstances:

1. Believes it will be text so buys it without discussion
  - *Caveat Emptor* – Buyer beware, no contract, no misrepresentation
2. Asks me if it will be text and I say yes. Returns the next day and buys it without further discussion.
  - Only a representation because the discussion happens before offer and acceptance. The statement does not form part of the offer. If the statement is part of the offer it becomes a term of the contract
  - Misrepresentation, gives right to rescind, get \$60.00 back and return book
  - No promise as term of contract
3. Asks me if it will be the text and I say yes. Returns the next day and offers to buy the winter 2004 text for Bus 231. I sell him my new book.
  - Breach of contract here because the statement is part of the offer
  - Get damages to put you in position had the contract been properly performed
  - Get \$100 for new book

### READING NOTES

#### CHAPTER 10: The Requirement of Writing

**There are also serious legal consequences for failing to keep written records of contract. The Statute of Frauds and Consumer Protection Act in Ontario require that contracts be put into writing to be enforceable.**

## **Distinction Between Substance and Form**

- Benefits of a written record
  - The substance – the terms of a contract – may have a variety of physical forms (written), or even no form at all (in the minds of the parties)
    - Categories of form
      - Entirely oral
      - Some terms are oral, others written
      - Entirely written, may be spread across multiple documents
  - The terms of a contract remain the same whatever form they take, but it's always best to have them in written form
    - Words are slippery, need to determine what parties agreed to, words have different interpretations
  
- Statute of Frauds
  - Designed originally in England in 1677, statute required written evidence to eliminate perjured testimonies in lawsuits concerning land
  - Courts keep trying to bend it instead of replacing it because it creates unfair results
  - Limited scope
  - Made judges unhappy from the beginning
    - Since been replaced in BC and Manitoba
  
- Consequences of the Statute of Frauds
  - Effect of the statute is in rendering certain types of contracts UNENFORCEABLE (loss falls where it lies), unless they are in writing... meaning that neither party may sue on contract GRRR!
  - Result is that parties to oral contracts are often able to avoid their obligations solely because the contracts fall within confines of the statute while perfectly valid in every other respect
  - It is for this reason that courts have tried to limit the application of the statute wherever possible
  - Eg. Guy buys girl car, fixed up her house, lives with her for four years...
    - Problem was that he understood they were long term until she dumped him...
    - When he wanted his stuff back there was no contract, (o/a/c/i) nor was there a written cohabitation agreement which would've saved his ass, see Agreements in Consideration of Marriage

## **Types of Contract Affected by Statute of Frauds (see explanations below)**

- Executor's Promise
- Guarantor
- Agreements in Consideration of Marriage
- Interest in Land
- Agreements Not to Be Performed by Either Party Within a Year
- Executor's Promise
  - If you want the executor to pay for something for him/herself then you need it in writing, otherwise you spend the deceased person's money until nothing is left

- Guarantor vs. Indemnity
  - In case of a guarantor a bank trying to collect on their debt needs to exhaust remedies on the first guy before going after the guarantor
    - Needs to be written for the Statute of Frauds
  - In contrast to this, a promise to indemnify someone makes you a primary debtor, whereby the bank can go for you or your friend first
    - Does not need to be written, outside statute
  
- Agreement made in Consideration of Marriage
  - Designed not with respect to the marriage itself, rather to the bringing together of assets as common property
  - Replaced in Ontario with regulations like the Cohabitation agreements which are long term and sticking with tradition.... must be in writing!
  
- Concerning Interest in Land
  - Land is immobile, permanent and indestructible, hence it is essential to have verified written records affecting interests in land available over many years
  - To this end, we have a system of public records in order to determine claim
  - Two interesting stipulations:
    - Agreements to build a house or obtain room and board are outside statute
    - Agreements for leasing land or houses are within the statute
      - Eg. Oral agreement to rent is unenforceable, while an oral agreement to repair the apartment is enforceable
  - Eg. Wayne Gretzky
    - Final agreement in a long series of agreements was agreed to orally rather than written, because of this the contract was considered unenforceable
  
- Agreement not to be performed by either party within one year
  - Parliament decided that a one year limit is the extent of trust on memory
    - Thus, oral applies for anything under a year, must have written for anything over a year
  - If a contract is designed to extend beyond one year then it is governed by the statute

### **Requirements for a Written Memorandum**

- Statute requires a 'note or memorandum' of the contract, signed by the party to be charged (ie. the defendant)
  - Fax copies are fine

- All essential terms must be included
  - Memorandum must contain all the essential terms of the contract, including the identity of the parties
  - Eg. If the contract is for the sale of land
    - Memorandum must name the parties
    - Adequately describe the subject matter (land)
    - Accurately set out consideration given for it such as \$50,000 up-front followed by \$100,000 upon receipt
  - Memorandum can be spread across several documents taken together to satisfy the requirements of the Statute
    - May involve some puzzle work if the documents do not refer directly to the others
- Signed by defendant
  - Note must be signed by the party to be charged, the defendant, and only that person
    - Doesn't matter if only the plaintiff has signed

#### **Effect of Statute of Frauds on Contracts within its Scope**

- Statute of Frauds makes oral contracts UNENFORCEABLE, meaning that a contract still exists, but neither side can obtain remedy through court action
- Not the same as void because while there is no action that can be brought on the contract itself, it may still affect the legal relations between the parties in several ways below
- Recovery of money
  - Recovery of money will depend on which party repudiates the contract first... the court will not permit the party who repudiates the contract to gain further advantage
    - Eg. Allowing P to recover their \$5000 after breaching the agreement
- Recovery for Goods and Services
  - Party who has accepted goods and services under a contract that is unenforceable due to statute is not permitted to retain the benefit received without paying for it
    - Eg. If there is an oral agreement for over 18 months to pay a contractor \$60,000 for work, the house owner can repudiate before contractor starts work, but after he begins the house owner must pay a reasonable price for the work done
- Effect of a subsequent memorandum
  - Written memorandum can come into existence after the contract has been formed and still satisfy the statute, as long as the memorandum comes into effect before action is brought on the contract
- Defendant must plead the statute

- A defendant who is sued upon an oral contract must expressly plead the statute as a defence

### **Doctrine of Past Performance**

- If the plaintiff could show that he had begun performance of the contract in reliance on it, the court would accept that performance as evidence of the contract in place of a written memorandum
- Used in the case of land
  - If the plaintiff has taken possession of the land with the acquiescence of the defendant and has begun to make improvements on it, the court considers this a sufficient act of part performance to satisfy the statute
  - Plaintiff must perform the acts
    - Eg. If a landlord and tenant go into an oral 21 year old lease, if the landlord does renovations on the building then they can offer evidence of part performance in lieu of written memorandum

### **Requirements of the Sale of Goods Act**

- Old Sale of Goods Act required writing for contracts over \$10, amended at different rates to each of the provinces
  - When a number of items are purchased at one time, the aggregate price of the order is the deciding amount for purposes of the act
- Evidence that satisfies the act
  - 1) Acceptance (recognition of sale) is any action by the buyer that acknowledges them as goods ordered, can't claim contract is unenforceable
  - 2) Part payment is a separate act that occurs after the formation of the contract (ie. pay amount after a down payment)
  - 3) Earnest is a token sum to seal a bargain
- Note: Both the Sale of Goods act and the Statute of Frauds may apply to the same contract, often with contradictory rulings

### **Consumer Protection Legislation**

- Ontario uses the Consumer Protection Act
  - Statute concerned with protecting only the buyer
  - Significant portions with respect to the requirement for writing involves a 'buyer' who purchases goods for consumption or services under an 'executory' contract (ie. Credit Card!)
- Written requirement is that every executory contract shall be in writing and contain information about the subject matter

- Executory contract is not binding on the buyer unless they sign it, duplicate copies given
- A new Consumer Protection Act has been proclaimed in force
  - A new comprehensive approach with regulations addressing individual businesses
  - It replaces the current CPA, the Business Practices Act, The Motor Vehicle Repair Act, The Travel Industry Act
- Targets specific Contracts between Business and Consumer – goods & services
  - Future Performance
  - Time Share - Lots of trouble here
  - Remote
  - Personal Development (Health Clubs)
  - Internet
  - Credit & Direct Sales
    - Necessary that company provides the breakdown of interest and principle
  - Leasing
    - Better off keeping a damaged lease than returning it early due to paying back the leases as well as the difference in value and administration fees
- Specifics
  - Threshold amount – \$50, need to give you a copy of the agreement
  - Writing – prescribed
  - Copy given – Two copies for a credit card
  - Disclosure – Must point out all the nitty gritty's
  - Cancellation right – example direct sales 10 day after or no copy
  - Rescission right only to the consumer – (VOIDABLE)

## READING NOTES

### Chapter 11: The Interpretation of Contracts

**Parties may disagree about the meaning of a contract once its formed. We now discuss the nature of these disagreements and how they are resolved.**

#### Relationship Between Formation and Interpretation of Contracts

- When two sides disagree they can either realize that the original terms were too ambiguous for acceptance, and thus void, or concede different meanings
- In **construing** we are not dealing with fraud or deceit, each party believes their interpretation of the contract is correct and the other party is wrong

#### Interpretation of Express Terms

- Two Approaches to Interpretation
  - **Strict / Plain – Meaning Approach**

- Restricts interpretation to the ordinary or dictionary meaning of a word, words can still have many different definitions
  - **Liberal Approach**
    - Looks to the purposes of the parties in drafting their agreement, what did they intend?
    - Stresses circumstances surrounding the contract as well as negotiations, knowledge of each party
- **How the Courts Apply the Approaches**
  - Eg. Does 'build' imply supplying the materials
  - To build literally means to construct, but in many circumstances it may include the supply of materials
  - Since there is an ambiguity the court will look outside the contract to surrounding circumstances
    - Hear evidence of previous transactions between the parties, investigate whether materials were previously supplied
    - Even look to whether there is evidence of discussing the cost of materials during negotiations
- **How Courts Choose Between Conflicting Testimonies**
  - Court is reluctant to accept direct testimony of one party rather than the other, it will seek a corroboration from a third party most often
  - As a last resort a court will choose between versions, basing its decision on the credibility of the parties themselves, which story seems more reasonable
- **Special Usage of Words**
  - Another important element is special usage of words in particular trades and in particular areas of the country
    - ie. 'Build' means strictly labour in carpentry in Ontario
  - Evidence of special usage is not necessarily conclusive, a court may decide that a word was used in its general manner, not special
- ***Contra Preferentum*** –
  - If one side wrote the whole contract, then we should favorably rule towards the person with no input,

#### **Goal of the Courts: To Give Validity to Contracts**

- Frequently it may seem easier to degree agreement unenforceable, but then courts would not encourage reliance on seriously made agreements
- Courts lean towards keeping an agreement alive
  - If at all possible the courts will assign a meaning to ambiguous words in order to make the contract enforceable

#### **Sale of Goods Act**

- Definitions
  - *Goods* - means all property personal, other than things in action and money, and includes produce, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale;

- *Sale* - includes a bargain and sale as well as a sale and delivery
- ***Caveat Emptor***
  - Buyer beware
- Implied Conditions and Warranties
  - Title – You have to own the good originally to sell it, have rights to sell it
  - Description – Goods should match description in catalogue
  - Quality – Previously used / refurbished...
    - If the buyer explicitly or implicitly demonstrates a need for a product from a seller of that type, there an implied condition that the goods will be reasonably fit for such purpose
  - Sample – Your product should be same as the sample, free of defects
  - Role of Exemption Clause –
    - Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract
    - If a party seeks to rely on one it should be brought to the attention of the other party
    - Likely to be upheld if it is industry practice
    - When dealing with the public sufficient notice needs to be given
    - Contra preferentum will apply

### **Parol Evidence**

- ‘**Parol**’ means ‘outside of’ original agreement
- Involves information about negotiations outside the written contract
- May shed light on choice of words in current contract
  - Look to earlier drafts for any patterns in dialogue of developing contract
- Examples: earlier drafts of the contract, previous offers, letters, emails, phone messages
  - Often used to prove misrepresentation, duress, mistake etc.

### **Parol Evidence Rule**

- According to this rule, a party cannot later add a term previously agreed upon between parties but not included in the final form of the contract
  - Eg. One party may persuade the other to leave a term out because it will be confusing or because the employer may object to it
- This evidence may not be used to add a term to an existing written contract.
- Exceptions:
  - Does not exclude evidence about the legality of the contract, the capacity of the parties, mistake, duress, undue influence or fraud. Why? Because these involve only the circumstances, not the written document itself

- Written contract is not the entire agreement
  - If a party can show that the writing was not intended to contain the whole contract, but merely a part of it, then you may introduce evidence of these oral terms
    - Eg. A Producing a small written document for the bank of B to the effect that they will deliver # units of x in order for B to begin production.. Doesn't matter if the written document goes against the original document because its not meant as entire contract
- Outside term is a collateral contract (has its own consideration)
  - Entirely separate undertaking agreed on by parties, but not included in the written contract, probably because written contract seemed inappropriate place for it
  - Collateral agreement may be enforced as a separate contract quite independent of written document
    - As such it needs its own o/a/c/i to be considered as collateral
- Condition precedent to the contract
  - **Condition precedent** is any set of circumstances or events that parties stipulate must be satisfied or happen before their contract takes effect
  - Doesn't need to be in writing, even if it falls within Statute of Frauds or Sale of Goods Act
  - If the party claiming that a condition precedent was agreed on and not met can produce evidence to support the claim, a court will recognize it and declare the large written contract void

### Implied Terms

- Second approach is to consider whether the intention of the parties can be achieved only by acknowledging the existence of an **implied term**
  - An implied term is a term not expressly included by both parties in the agreement, but would have reasonably included had they thought of the potential for problems in the future
  - Eg. *Moorcock Doctrine*
    - Defendants owned a wharf, contracted that for a fee the *Moorcock* would be loaded at their port
    - While the ship was docked there the tide went out and the hard ridge below the dock damaged the vessel
    - The owner of the boat sued and recovered damages on the grounds that it must be presumed the defendants implied that the facilities were reasonable safe... why? Because it was a necessary provision for carrying out the contract
- Courts try to restrict the circumstances for relying on the *Moorcock* decision, parties should bring up as many problems as possible before signing anything!

- As a general rule, when parties deal expressly with a matter in their contract, it precludes a court from finding an implied term that deals with that matter in a different way
- But, even in lengthy and complex contracts courts will reach a decision that a term may be implied so that the purpose of a contract will not be defeated
  - Eg. If a land developer gets Sobey's as an anchor for customers at its new shopping mall, Sobey's is expected to have the store open and not just lease the space by implication
- Often, implied terms result from a long-established custom in a particular trade or type of transaction

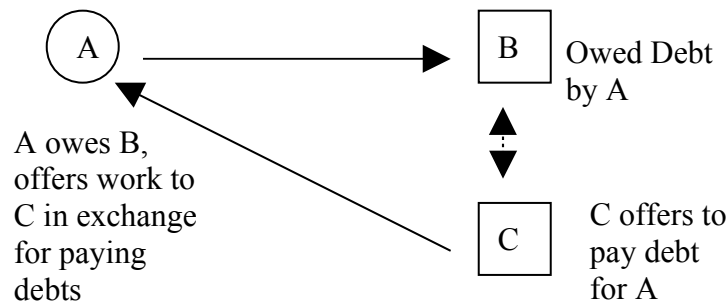
## READING NOTES

### CHAPTER 12: Privity of Contract and Assignment

**Contracts create rights and duties between parties entering into the agreement, these rights may carry values transferable to an outside party.... Or a party may want to arrange for their duties to be performed by another person.**

#### Privity of Contract – Who may I sue

- **Limits on the Scope of Contractual Rights and Duties**
  - General rule is that a contract does not confer any benefits or impose any obligations on a stranger to the contract
  - To succeed in an action in contract, the plaintiff must prove **privity of contract** with the defendant – must show they are both parties to same contract



- B cannot enforce C's promise because there is no privity of contract between them... promise exists between A and C
    - If C doesn't pay, then B can only sue A who consequently sues C for failure to carry out promise
  - Argument against permitting a third person to sue on contract is that she has not given consideration for the promise
  - Privity of contract can have harsh consequences when it prevents a third person from enforcing a contract especially when the whole object of the contract was to benefit the third party
- Liability of Sellers of Goods
    - If a mother buys a can of poisonous salmon that harms her and her family, only she can successfully sue the merchant for breach of implied term (contract), rest of the family has no privity of contract and cannot recover damages
    - Rest of the family as well as the mother could use tort law in a case of negligence against the manufacturer, but not the merchant

### Exceptions to Privity of Contract Rule

- 1) Tort
- 2) Vicarious Performance
- 3) Novation
- 4) Exemption Clauses
- 5) Trusts
- 6) Insurance
- 7) Land

### Tort

- Use tort whenever you do not have privity to the contract, alternative solution

### Novation

- How may a new party be substituted for the original party of the contract?
- **Novation** occurs when parties to a contract agree to terminate the original and substitute a new contract
- Two types:
  - a. Parties change the subject matter of the contract
    - i. Eg. Car dealer informs buyer that they can't deliver a particular car by delivery date, they agree to substitute a different one at a favourable price
    - ii. Eg. Moving from downstairs apartment to upstairs one
  - b. One of the parties to the contract leaves, and another replaces them

- i. Eg. The current owner of a business arranges advertising with a firm, when the current owner goes to sell their business the new owner arranges with the same ad firm to continue original contract
- ii. Current owner should make sure to terminate its contract with all future rights under it... no more obligations! Consistent with privity.

### **Vicarious Performance**

- How may an outsider perform a party's obligations under contract?
- How it Occurs
  - Promisor can't escape liability to the promisee by imposing a substitute for himself without consent of promisee
    - Need to undergo novation and assign liability with all in agreement
  - In many situations it is normal for a party, without altering terms of agreement to arrange for a subcontractor, though he still remains ultimately liable to promisee
    - Thus, the customer can only sue the subcontractor through tort
    - Customer would also try and sue the original party under breach of contract
  - **Vicarious performance** is when a third party performs on behalf of the promisor who remains responsible for proper performance
  
- When is it allowed
  - You may pass on work vicariously only when personal performance is not the reason why the promisee entered into contract originally (implied or explicit statement in contract)
  
- Exemption clauses
  - Employers often protect themselves from tort liability
  - Blocks any attempts to sue
    - Eg. By allocating the risk of loss to promisee (insurance) a storage company lowers its costs and reduces its price to the promisee
    - Extends to all employees who damage anything in the course of their work

### **Trusts**

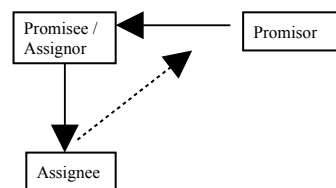
- How may rights be created for the benefit of an outsider to a contract?
- How a trust is created
  - Parents / Guardians can provide for their dependents should they die by leaving them funds with an administrator
  - The fund is a **trust** consisting of property and the person or company that administers it is called the **trustee**
  - The **beneficiary** is the person who is entitled to the trust
  - Problem is that if beneficiaries don't agree with the trustee they can't sue him because there is no privity of contract

- Under common law the trustee becomes legal owner of the trust, but the rules of equity recognize that the beneficiary has an interest because they are the trust's true owner
    - Equity has developed procedures by which a beneficiary may compel the trustee to carry out their duties faithfully
  - Application in business:
    - In bankruptcy cases, courts order the property of the bankrupt debtor are transferred to a trustee in bankruptcy who sell the assets and distribute them to creditors
  - Requirement that a trust cannot be revoked
    - A trust cannot be revoked by those who created it without the consent of a beneficiary
    - This applies to constructive trusts because the court will only enforce a one when the court is satisfied that the trust is permanently bound with no possibility of later revising or revoking the trust
- Relation of Trust Concept to Third Parties
  - **Constructive trusts** involve a relationship that permits third parties to obtain performance in a contract for their benefit
  - Evolved from courts of equity who felt that a promisee who has obtained a promise for the benefit of a third person can be regarded as a trustee for the third person
  - The contract then acts similarly to a trust by permitting a third party to enforce the contract in their favour
- Insurance
  - Husband pays premium in exchange for promise from insurance company to pay sum of money to a specified person after their death who is not a part of the contract (same for auto insurance as all drivers are covered)
- Undisclosed Principal
  - Undisclosed principal is when one party proves to be an agent of someone else, whomever the agent is working for (the **undisclosed principal**) may become privy to the contract
- Land
  - Idea of privity of contract does not apply to land
  - If owner leases land to tenant with responsibility of keeping it in good repair, if the owner sells it then the tenant must perform the promises to the new owner
  - Similarly, new owner must respect the tenant's rights to remain on the property until lease expires
- Special Concessions to Commercial Practice
  - Collateral Contracts

- Courts have been prepared to enlarge the sphere of a contract so that persons who are closely associated with a transaction, though not strictly a party, may find themselves subject to its terms
- Eg. Pier asks a paint company which paint to use, then hires a contractor who buys that paint and paints the pier... when the paint fails, the pier sues the paint company for breach of warranty (though they didn't actually buy the paint)
  - Court found that there was an implied collateral contract regarding the suitability of the paint for the pier
- Exemption Clauses
  - In transportation intermediate companies may successfully claim the protection of an exemption clause (contract with principal carrier) when the contract expressly states that they should be its beneficiaries and entitled to protection of the clause

## Assignment

- Nature of an Assignment
  - Other than land law, an assignment of liabilities to a third person is not possible
  - An assignment of unperformed contractual rights / promises to a third person is a common practice
    - Involves two separate contracts to join all three parties
  - **Assignor** is a party who assigns their rights under a contract to third party, the **assignee** accepts **assignment** and typically provides consideration
  - Contractual rights are often valuable and may be considered a type of personal property
    - Rights to tangible properties are known as **choses in possession**
    - Rights to intangible properties are called **choses in action**
      - Eg.(copyrights, patents, stocks, bonds, bank deposits)
- Note: 'Choses in action' give people the means of accumulating savings in banks, as well as ownership of shares and bonds
- Role of Equity
  - In an assignment, the subject matter is the transfer of contractual rights
  - Common law viewed choses in action as personal rights that could not be transferred
  - In the interest of commerce, courts of equity stepped in to enforce assignments of contractual rights
    - Require in every action that the assignee make the assignor a party as well (Three parties)
- Two types of Assignments
  - **Equitable Assignments**
    - Court will not decide a dispute unless all persons directly affected by its decision have been made parties to the proceedings



- For example, this would arrive if there was a partial assignment, the courts would require both the assignor and assignee
          - Eg. If something goes wrong, with a contract such as when a company (promisor) fails to deliver a TV for the price that was assigned... result is that the third party / assignee doesn't get their TV
          - Both the assignor (promisee/assignor) and assignee (third party) to need to go together to the court and sue the promisor
  - **Statutory Assignments**
    - Subject to the *Conveyancing Law and Property Act*
    - In many situations an assignor doesn't want to retain any rights under the contract; he assigns them entirely to the assignee
    - This can occur with the following conditions that the assignment is:
      - i. Absolute (unconditional, complete)
        - No balances remaining to be paid to assignor after assignee is paid
        - Amount assigned cannot vary according to state of accounts between assignee and his debtor, no ongoing sales
      - ii. In writing
        - No need to later call witnesses
      - iii. Promisor receives notice of it in writing
        - Promisor ignores a notice of assignment at their peril, may have to pay twice!
        - The assignee who first gives notice to debtor is the one entitled to payment
    - Eg. If the promisee sends a small letter to the promisor informing him that you have assigned away the TV, the assignee then can sue the promisor if they fail to deliver the TV
- Assignee's Title / "Subject to the Equities"
  - Assignee can never acquire a better right to sue the promisor than the assignor himself had
    - If a person takes an assignment under a contract originally induced under fraudulent misrepresentation by the assignor, the assignee has no better chance to enforce claim than had they been the perpetrator themselves
    - An innocent assignee of a chose in action is in a much more vulnerable position than an innocent purchaser of goods
    - Any defence that would have worked against the assignor works against the assignee as well
- The right to Set Off
  - Designed as a defence of a promisor with respect to debt owed to them by an assignor at time assignment is made

- **Set off** is the right of a promisor to deduct an existing debt owed to it by the promisee
- Credit Cards
  - You buy something at a store and give the clerk your master card to pay for the purchase.
  - You are the promisor, the store is the assignor and master card is the assignee
    - By doing this, the store avoids bad debt
    - Also interesting because VISA has a contract previously with both the promisor and assignee

### Assignments by Operation of Law

- Operation of law means that the assignments do not occur voluntarily
- Upon Death of a Party
  - When a person dies the law will automatically assigns his or her rights and obligations on outstanding contracts to an **administrator** or a previously specified **executor**
  - Task of executor
    - Pay all just claims against deceased estate
    - Complete performance of outstanding contractual obligations
    - Pursue all claims the deceased had against others
- Bankruptcy
  - Creditor can force someone into bankruptcy by filing an order known as a **receiving order**
  - If they satisfy the court that the debtor is insolvent, the court will declare that person **bankrupt** and appoint them with a licensed trustee to take charge of their property

### Negotiable Instruments

- Nature and uses
  - **Negotiable instrument** is a written contract containing a promise (express or implied) to pay a specific sum to a person
  - Delivery of the instrument alone doesn't complete the promisor's obligation, if they do not honour the instrument (write a bad cheque) when it falls due the promisee can sue under the original contract or for failure to honour instrument
  - Not subject to the equities
  - No need for notice
- Negotiability compared with Assignability
  - Negotiation is a special type of assignment in which the new holder of instrument acquires the rights which the instrument has to convey
  - Payee may negotiate in two ways:
    - If instrument is payable to bearer, he need only deliver it to third party (write cheque to Andrew)
    - If instrument is payable in his name, he must endorse his name upon it and then deliver it (take paycheque to Money Mart)

- Notice does not affect the transfer of a negotiable instrument, bank doesn't need to call your employer when you cash cheque, promisor pays debt only once, to the holder of the instrument in exchange for instrument
- When it all goes wrong, Money Mart eg:
  - A bartender is fired, but manages to get his paycheque which he cashes in the middle of the night at Money Mart
  - When the manager learns that the bartender has gotten his cheque, he immediately puts a stop order on it
  - Money Mart is now stuck, forced to sue the bartender and employer
- Defences of Promisor
  - Even when a promisor is induced to sign a negotiable instrument due to fraud, they still may be sued by a subsequent innocent holder who gives consideration for the instrument
    - If you take fraudulent cheque and pay someone with it, you become responsible for that money

### Summary

- Parties who may play role in contract
  - Novation
  - Vicarious performance
  - Accepting responsibility as a trustee
  - Insurance contract,
  - Agent acting on behalf of an undisclosed party
  - Party acquiring interest in land subject to rights and duties
  - Commercial contract containing an implied collateral contract
  - Assignment

### READING NOTES

#### CHAPTER 13: The Discharge of Contracts

**Apart from breach, we examine the various ways in which a contract may be discharged.**

#### The Ways in Which a Contract May be Discharged

- To **discharge a contract** means to cancel the obligation of a contract, or to make an agreement or contract null or inoperative... all outstanding obligations are finished
- Now provide four ways in which discharge may occur

#### 1) Discharge by Performance

- The Nature of Discharge by Performance
  - Parties who enter into a contract expect it to be discharged by performance
  - Contract ends when they have performed their respective obligations satisfactorily
  - Note: For a contract to be fully discharged, both parties (not just one) must complete performance
    - Bilateral requires performance on both sides

- Unilateral is discharged when promisee performs
- Tender of Performance
  - One party may attempt to perform, but the other party refuses to accept the performance (for whatever reason)
  - The attempt to perform is the **tender of performance**
    - Eg. If a seller tenders delivery of goods and buyer refuses, the seller is under no obligation to attempt delivery again, may sue for breach
    - Eg. If a debtor makes an unsuccessful but reasonable attempt to pay is free from liability for interest (still responsible for principle)
      - To be sure of this the money should be **legal tender** (cash) and not in negotiable instruments (cheque)
  - Also, regardless of circumstances, the onus is on the debtor to find and pay her creditor

## 2) Discharge by Agreement

- **Waiver**
  - Parties may agree between themselves not to perform their contract
  - A **waiver** is an agreement not to proceed with the performance of a contract already in existence
  - Note on consideration:
    - If neither party has performed fully at the time the contract is called off, there is automatically consideration for the waiver
    - If one party has performed fully then the incomplete party requires a release under seal from the other party
- **Novation**
  - If parties agree to a material alteration of the terms (root of contract) they have discharged the original contract and replaced it
- **Accord and Satisfaction**
  - Sometimes a promisor finds it cannot perform its obligation according to the terms of the contract, or performance has become very difficult
  - Accord and satisfaction is a compromise (often out of court) between contracting parties to substitute new contractual obligation and release a party from the existing one
    - Eg. Seller finds it cannot obtain a certain imported goods to fill order, but may offer other goods of equal quality below cost if the buyer releases them from original promise
  - In material alteration of terms the discharge of the old contract is incidental in seeking a new arrangement, while it is the objective of accord and satisfaction
- **Contract provides for its own Dissolution**

- One party may express concern about a possible event affecting its ability or willingness to perform
- If the other party agrees, they may include an express term to allow for this event
- Condition Precedent
  - A future or uncertain event that must have occurred before the promisor's liability is established
    - Eg. Sale of real estate conditional on getting mortgage within 'x' days, or contract is null and void
  - Note that a contract subject to a condition precedent does have a binding force from the outset and that parties are not free to withdraw from their promises until condition precedent becomes impossible to fulfill
  - Parties that agree to do work on conditions that their work will be continually inspected expose themselves to judgment and the reasonableness of person designated to assess the work
- Condition Subsequent
  - An uncertain event that brings a promisor's liability to an end if it happens
    - Eg. A buyer of a ticket for baseball has the benefit of a term in contract that if game is rained out before 'x' inning then he gets a free ticket for another game
- Option to Terminate
  - Contract may include a term that gives one party, or both the option of bringing the contract to an end before completing performance... often by giving notice
    - Eg. Contracts of employment for indefinite times usually have an option clause entitling the employer to dismiss an employee by giving notice
    - Eg. Mortgages have an option clause entitling mortgagor to pay off principal sum before maturity by tendering additional interest.

### 3) Discharge by Frustration

- Effect of Absolute Promises
  - Common law originally held a party absolutely responsible for failure to perform, regardless of whether the failure had not been their fault
  - Courts now excuse parties for failure to perform in a wide variety of circumstances when not at fault
    - Courts don't bend in some areas such as tenant's covenants in commercial leases
    - Also, parties can outline their contract in such an absolute and unconditional way to rule out exemption from this benefits of frustration
- **Doctrine of Frustration**

- “Without default of either party a contractual obligation has become incapable of being performed because the circumstances have changed, made it radically different than those which were agreed on”
  - Keywords are that the contract becomes:
    - Impossible, purposeless
    - Important that events that render above occur after agreement or else it is void for mistake
    - Can’t be self-induced
  - Simplest cases are those where performance becomes literally impossible
    - Eg. Music promoter incurs expenses in preparing a concert and receives word from main act on day of that illness would prevent them performing. If the promoter sued the artist, the court would discharge the contract by frustration.
  - On the other hand, even substantial hardship may not be sufficient cause for failing to perform
- **Self- Induced Frustration**
    - Party to a contract cannot willfully disable itself from performing and then claim successfully that the contract has been frustrated, rather this action constitutes a breach of contract
- 
- Effect of Frustration
    - Harshness of Common Law
      - “Let the loss fall where it lies”,
      - *Chandler v. Webster*
        - A widow was unable to recover proportionate wages from her husband’s employer when he was to be paid on completion of his a voyage from Jamaica to Liverpool but died  $\frac{3}{4}$  of the way there... Employer cited that he had not ‘performed’ as promised
    - Court tried to reduce harshness with the *Fibrosa Decision*
      - If no benefit is conferred to buyer, then the deposit must be returned even if seller incurred expenses
      - If a seller has conferred even the slightest benefit on the buyer (deliver small advanced shipment) the seller can retain whole deposit
      - No deposit, no remedy
    - Most recent development with frustration

- If a party incurs expenses in connection with performance of contract, the court may allow that party to retain this money
  - Just can't retain any sum in excess of payment made
  - If there is no deposit or benefit conferred, then there is no remedy
    - Without deposit, you can only recover value of benefit already conferred
- The Sale of Goods
  - In contracts for the sale of goods with respect to frustration it is a special case with distinct conditions outlined in Sale of Goods Act
    - 1) Goods must be specific "identified and agreed upon"
    - 2) Risk must still be with seller
    - 3) Cause of frustration must be perishing of goods
  - If all three are satisfied, then the Sale of Good Act applies, and Frustrated Contracts Act doesn't
    - If the sale of goods act applies then it is treated as common law

#### **4) Discharge by Operation of Law**

- Bankruptcy and Insolvency Act
  - Debtor is discharged only if he qualifies for certificate stating that the bankruptcy was caused by misfortune and not by misconduct on their part
  - Remember, bankrupt people have no capacity to contract until they are discharged
- Statute Barred
  - Debt or other contractual obligation neglected by creditor for a long time becomes statute barred (lose right to action)
  - Exact 'window' or time is set out in Limitations Act
    - Gives effect to the legal principle that the public interest requires a definite end to the opportunity to sue
    - Time period is 2 years from date of default or date of discoverability to bring forth a lawsuit

#### **Review**

1. Performance
2. Agreement
3. Frustration
4. Operation of Law

## READING NOTES

### CHAPTER 14: The Effect of Breach

**Not all breaches of contract occur in the same way, nor do they share the same consequences. Aggrieved parties have choices to make, depending on how breach occurs and the seriousness of it.**

#### Implications of Breach

- Not every breach may discharge a contract
- Breach does not discharge a contract automatically
  - If breach is of a minor term the contract is still binding
  - If breach is of a fundamental term, party committing breach is still bound, but injured party may either discharge the contract or affirm it
- Minor Breach
  - Eg. Quantity to be delivered is a major term, but delivering 9995 of 10,000 bags would only be a **minor breach**, not entitle receiver to reject shipment
- Major Breach
  - Eg. If you only delivered 5000 of 10000 bags there would be a **major breach** and the receiver could reject shipment
- Essential terms are known as **conditions**
- Non-essential terms are known as **warranties**

#### How Breach May Occur

- A party to a contract may break it by:
  - 1) Expressly repudiating its liabilities
  - 2) Acting in a way that makes its promise impossible to perform
  - 3) Failing to perform at all, or tendering inadequate performance of its promise

#### Express Repudiation

- A declaration by one contracting to another that it does not intend to perform as promised
- Promisee is entitled to treat contract as being immediately at an end, find another party to fulfill promise, sue for whatever damages it incurs
  - It is prudent for the promisee to inform the repudiating party that it is treating the contract as terminated, reserving the rights to sue for breach
  - On the other hand, a promisee can still insist on performance and wait out until time in contract to sue for breach... but it does so at its own peril as the promisor may find intervening / frustrating events to provide an excuse

not to perform

- Whenever breach occurs before time agreed for performance, it is known as **anticipatory breach**
  - Remember that a contract exists and has legal effect from time of its formation, not just from time of its performance
- In some situations, one party repudiates only a minor term of the contract
  - Such a breach does not entitle the other party to treat the contract as discharged
  - Note: A wise manager will immediately notify the other party of its inability to perform exactly as promised so that the other party may take steps to reduce the losses that the breach may cause

### **Party Renders Performance Impossible**

- A deliberate or negligent act that makes performance impossible amounts to repudiation;
  - Rather than words in express repudiation this is often implied by conduct, such as a form of self-induced frustration
- Only a willful or negligent act of the promisor constitutes a breach of contract, doesn't include acts that are beyond their control

### **Failure of Performance**

- Failure of performance usually becomes apparent only when the time for performance arrives or during performance itself
- Types of Failure:
  - Degree may vary from grossly inadequate performance to a minor problem
  - Often a difficult question involving partial performance in determining whether what is performed constitutes sufficient breach to free the injured party
  - Often the injured party is left in a quandary when there is a suspected failure of performance.
    - Injured party should seek legal advice before claiming to be discharged of their own obligations, or risk being held liable themselves for wrongful repudiation
  - In contracts involving installments, the injured party is free from liability only if:
    - Good reason to suspect future performance will be equally defective
    - The expected or actual deficiency is important relative to the whole performance promised
- Doctrine of Substantial Performance / Test for seriousness of breach
  - Courts have grown more willing to recognize substantial performance by promisor

- Doctrine of **substantial performance** states that a promisor is entitled to enforce a contract when it has been substantially performed, even though its promise doesn't comply in some minor way with requirements
- Promisor's claim is subject to a reduction for damages caused by its defective performance
- Effect is that a promisor can't seize upon a trivial failure to avoid its own obligations
  - For example, when building a house "You broke the contract by putting on the wrong shutters..." doesn't entitle you not to pay for the whole house
  
- When the Right to treat a Contract as Discharged is lost
  - Two situations where an aggrieved party is entitled only to damages
    - When the aggrieved party has elected to proceed with the original contract and accept benefits from it despite the breach
    - Aggrieved party may have received benefits and not learned of the breach until performance was complete
  
- **Exemption Clauses**
  - In business, a party runs a significant risk of harm to another party through some failure in the course of performing its contract and thus it must plan to cover its potential liability
  - Firm may insist on an exemption clause, excluding itself from any liability for the risk and transferring the risk of harm to its customer
  - Several advantages
    - Permits a supplier of goods to keep its prices low
    - Ability to completely disclaim and avoid the difficult question of its liability for harm done
    - Advantage offered by standard form contracts that are rarely read thoroughly
  - Courts have developed techniques to cut down the advantage of parties drafting exemption clauses
    - Need to post adequate notice (from Pre-Midterm)
      - Unable to bind someone to a clause that is so unexpected and unfair that a reasonable signer would not think the contract contained such a term (CPA)
      - Burden is often shifted to defendant to demonstrate that it adequately informed the plaintiff
    - Strict interpretations
      - If an exemption clause squarely excludes liability for the breach that has occurred, the injured party has no remedy
      - However, clauses exempting suppliers on contract do not protect them in tort
      - Customers can sue individual employees in tort unless an exemption clause clearly protects them
    - Fundamental Breach

- To treat an exemption clause as excusing one party entirely from performance would be repugnant to the very idea of a binding contract
- Fundamental breaches cannot be protected by exemption clauses it can be proven that it should be inferred both parties so agreed
- Breach Defences
  - Inadequate notice – if not present clause can be removed (for exemption clauses). If it exists, courts uphold clause word for words preferentum against party that drafted it

### **Possible Criminal Consequences of Breach**

- Breach of contract may be criminal when parties break the contract with knowledge that their breach will:
  - Endanger human life, expose valuable property etc...

### **READING NOTES**

#### **CHAPTER 15- Remedies for Breach**

**Apart from treating contracts as discharged, aggrieved parties may seek other remedies to compensate for harm caused by breach of contract, typically damages. However other remedies are available when damage is insufficient.**

#### **Types of Remedies**

- Damages
- Equitable Remedies
  - Specific Performance, Injunction, Rescission
- *Quantum Meruit*

#### **\$Damages\$ (Pre-Midterm)**

- These are the primary remedy in contract
- Note: There are different calculations for damages in contract than for tort as well as limitations on when you need to sue by
- The purpose of an award of damages
  - Aims to place injured party in same position as if contract had been completed
  - Intended only to compensate injured party for loss caused by failure to perform, not to punish liable party
  - Simple fact is that liability acts as an economic deterrent
  - Additional intangible costs of a decision to break a contract include the risk of ruining good relations or damaging your reputation
- Mitigation of Damages
  - Parties that have suffered a loss as a result of breach are expected to do what they can to mitigate the extent of the loss
  - An aggrieved party can only recover losses resulting from the breach that they could not avoid by acting reasonably
    - Eg. Employee suing for wrongful dismissal should show that they made every reasonable effort to find alternative employment

- Prerequisites for an Award of Damages
  - To qualify for recovery, damages arising from breach must ‘flow naturally from the breach’
  - Losses resulting from breach must be within foreseeable limits of what parties would have expected as a likely consequence of failure to perform
    - Eg. If a carrier is not informed of the vital nature of a delivery to a production company, then they are not responsible for damages if the company must suspend operations
  - Should be considered from vantage of when contract is signed, not when contract is breached

### Common Law Damages

- **Expectation Damages**
  - Should a court include in its damages for breach an amount equal to the expected profits on the aborted transaction?
    - Yes, because damages are intended to put the innocent party into the position they would’ve been in had the contract been satisfied
  - Unlike tort, you don’t have to prove losses
  - Expectation damages are an amount awarded for breach of contract based on expected profits
    - “How good do you expect life to be?”
    - **Opportunity costs** of making a similar contract with a different promisor are an important reason for using expectation loss as a measure for damages
    - Why do we need expectation damages?
      - If a contract breaker were liable to pay only compensation for out of pocket expenses of the other party, they could ignore their obligations very often with little cost
  - Contracts of Sale
    - If seller has limited supply and the buyer breaches, then the buyer is liable for damages of initial profit as well as the expenses (and potential) losses in order for seller to find another buyer
    - Works the same way if seller breaches
- **Consequential Damages**
  - In a sense, consequential damages are one step removed from immediate effects of breach
    - Eg. “If you don’t deliver that part to me on time or I’m gonna sue you because I need to deliver to another company by Monday or they’ll sue me”
      - Owe potential profits rather than the extra cost of buying the ice cream elsewhere

- Same applies for defective goods
- **General Damages**
  - Non-economic losses
  - Describes an estimated amount that a court may award over and above specific losses that can't be quantified
    - Eg. Plastic surgeon who botches a nose- job
- **Specific Damages**
  - Just like the name, these are specific damages such as the expenses incurred as one party tried to perform contract
- **Reliance Damages**
  - If a consultant enters a contract and begins work before the client cancels the contract they are entitled to expectation damages if they can't get another consulting opportunity
  - If they are able to find another opportunity then the consultant may recover the costs of their expenditures and wasted efforts in preparation of the job
- **Liquidated Damages**
  - Liquidated damages can be any amount agreed to be paid if a party to the contract commits a breach (if terms are a genuine attempt to estimate a loss)
  - **Penalty clauses** are different involving a term specifying an exorbitant amount for breach of contract, intended to frighten other party into performance
    - If a clause is deemed to be a penalty clause, then the court will disregard it
- **Nominal Damages**
  - Occasionally courts may award nominal damages to acknowledge a breach of contract where losses sustained are negligible
    - Eg. A court award of \$1.00 establishes the validity of the plaintiff's claim where a question of principle is at stake
- Problems measuring damages
  - Anguish – where more than monetary losses are sustained
    - Ie mental distress – embarrassed
    - Jarvis vs. Swan Tours – ability to sue for breach causing mental anguish (bad vacation)

### **Equitable Remedies**

- Reasons for Intervention of Equity
  - Equity courts recognize the inadequacy of common law remedy and grant special remedies

- Failure to comply with equitable order places defendants in contempt of court and can lead to fine or imprisonment
- Equitable remedies are discretionary (must fulfill these criteria)
  - 1) Damages are inadequate
  - 2) Plaintiff must come to court with clean hands
  - 3) If plaintiff delays unreasonably, court will deny equitable remedy
  - 4) No innocent third party involved
  - 5) Will not grant remedy when plaintiff has not paid substantial consideration for defendant's promise (if its seal, you only receive damages)
  - 6) What would happen if it was the other way around?
    - Eg. Baby charges lawyer vs. Lawyer charging baby!
- **Specific Performance**
  - "Do what you promised"
  - **Specific performance** is an order requiring a defendant to do a specified act, usually to complete a transaction
  - When the subject matter is land, the court orders the vendor to complete and deliver all documents to transfer ownership and vacate premises
  - On the other hand, an artist who repudiates a concert contract will not be ordered to perform because they'd give a pissed off concert... only money damages
  - Unless the object is unique in terms of personal items, land is always considered unique, but no more... must demonstrate land is unique – cookie cutter houses
- **Injunction**
  - "Don't do what you promised"
  - **Injunction** is a court order restraining a party from acting in a particular manner, such as committing a breach of contract
    - For the remedy to be available the court requires the contract to have a **negative covenant**, which is a promise not to do something
      - Eg. When a bar owner signs a contract to buy all its beer from supplier exclusively and buys some elsewhere they can be ordered by injunction to stop doing that
  - Interlocutory Injunction
    - Temporary restraining order
  - Injunction against an Employee
    - Injunctions against an employee could involve non-competition agreements which could have unacceptable consequences if granted by the court, which makes them reluctant to grant them
  - Anton Pillar Order – allows for an applicant without notice to a respondent to enter the respondents' premises and inspect or seize documents or other items
  - Quatum Meruit – the amount a person merits to be paid for goods or services provided to the person requesting them

- **Mandamus**
  - Opposite of an injunction in that it is an order to do something such as apologize
- **Declaration**
  - Publicly declare that you are right from now on, essentially you demonstrate to the public that you've proven a point against a defendant or cleared your name
- **Rescission**
  - Setting aside or rescinding a contract to restore parties to the positions they would have been in had the contract never been made
  - Aggrieved parties must choose between an action for damages to obtain benefit of contract, or one for rescission to restore them to pre-contract position
    - Eg. If you receive a faulty dishwasher, your not very likely to get another one from the same company, probably buy another brand
  - Important to note that in some circumstances such as where a plaintiff was going to lose money on a contract, it is better to have the contract rescinded than to go for damages
- **Methods of Enforcing Judgment**
  - Plaintiff becomes judgment creditor when they obtain judgment for a sum of money
  - Defendant becomes a judgment debtor,
    - If they resist or are in financial difficulty the judgment creditor must move to enforce payment (not a criminal)
    - Most usual procedure is to request sheriff to **levy execution** against assets of debtor to satisfy debt (allows them to seize debtor's wealth)
    - Creditors may also obtain a **garnishee order** against a debtor's wages, requiring employer to hold back pay and surrender it to creditor

## READING NOTES

### CHAPTER 17: Leasing and Bailment

#### Bailment

- Definition
  - **Bailment** is a transfer of possession of personal property without a transfer of ownership
  - Transferor / owner of property is the **bailor**
  - Party that receives custody is the **bailee**
- Non-Contractual Bailments
  - Essential elements of bailment are:
    - Change in possession without change in ownership
    - Intention that the property shall be returned to the bailor

- The intention that the object shall be returned need not be stated expressly between parties but may be presumed from circumstances
  - Bailment can occur involuntarily such as when someone forgets an object at your restaurant, you become a bailee
- Benefit of Bailment
  - Bailments may be for the benefit of the bailor, bailee or both parties
  - A **gratuitous bailment** may benefit both parties such as when a car is left with a friend for safekeeping, but the friend has permission to use it occasionally
  - A **bailment for value** can go both ways as well such as when a car dealership gives you a car to play with for a weekend (and hopefully buy) so you can enjoy it

### **Rights and Duties of a Bailee**

- Liability Under Contract and Tort
  - In contract often the terms (express or implied) outline the duties and liabilities of the bailee
    - Exemption clauses written into contracts for liability of bailees are construed very strictly by the court
    - If goods are damaged for any reason not related to performance related to the contract, bailee is not protected by the exemption clause
  - The standard of care required by the law of torts applies in circumstances not covered expressly or impliedly by the bailment contract
    - Also applies to gratuitous bailments
  - Law of bailment places the burden on bailee of showing they were not negligent, must offer a reasonable alternative explanation (**reverse onus**)
    - Eg. You send your car in for repairs and it gets blown up there, you need only establish the condition of the car when you dropped it off, and the condition it was in when you received it
    - As a result of this, it may be easier for a bailor to sue under the rules of bailment than tort
- Standard of Care
  - *Gratuitous bailment for benefit of Bailor*
    - Least strict
    - Bailee should not be under a particularly high duty towards bailor because the bailee is doing a favour for bailor
    - Still liable for gross negligence
    - Eg. “Can I put my car in your garage for the winter?”
  - *Gratuitous bailment for benefit of Bailee*
    - Most strict

- Bailor receives no consideration, thus the bailee should compensate the bailor when damage occurs to goods as result of any slight carelessness
    - Eg. “Can I borrow your lawnmower?”
  - *Bailment for Value*
    - Falls between the two above
    - A bailee for value is expected to take the same care of goods as a prudent and diligent person should take care of goods
    - “My car will be at your shop while you service it”
  - Note: The type of goods affects the standard of care, as very valuable and easily damaged goods require more care than otherwise
- Remedies of a Bailee for Value of Services Rendered
  - Main concern of a bailee is to receive compensation for services rendered, can’t undo a repair job
  - Usual remedy is an action for the contract price
  - If a carrier is transporting goods in several installments and only partly delivers the total cargo the carrier can sue *quantum meruit*
- Lien (*Repair and Storage Liens Act*)
  - **Liens** give the bailee a right to retain possession of goods until the bailor pays what is due for the services
  - Arises only when the service has already been performed and payment is past-due
  - A right of lien is available to bailees who perform services in nature of repairs or improvements to goods, innkeepers, common carriers and to lawyers and bankers
- Right of Sale (*Repair and Storage Liens Act*)
  - If a bailor is unable to pay off charges (such as when they become insolvent) the bailee is left with goods they can’t use
  - Bailees now have a statutory right to sell the goods
    - Certain time needs to elapse after payment is due
    - Advance notice must be given to bailor of the intention to sell
    - Sale must be advertised
    - Sale must be held by public auction
  - Note: The proceeds of the sale first go to reimburse bailee for costs of sale, then the overdue charges, any in excess goes back to original bailor
  - Thus if you sell the good too cheap, you become liable to the bailor

### Special Types of Bailment

- Storage and Safekeeping
  - Express and implied authority of bailment contract affects their liability
    - Terms of contract may reduce liability if customer (bailor) overrides a warehouse keeper’s usual discretion in handling goods, become liable only for complying with those instructions

- Not customarily obliged to insure goods against fire, but when expressly contracted to do so and they fail, they owe the bailor the insured value of the goods
  - If goods are **fungible** (identical substitutes may be bought) then the bailee's liability is discharged when they replace the goods
- Warehouse owners in Canada have a lien on goods, and may sell by public auction
  
- Repair
  - In accepting work, a repairer undertakes to do it in a competent manner employing the skills it professes and completing it in time, not doing this is a breach of contract
  - Standard of care is same for warehouse
  - Ordinarily, a bailor gives repairers implied authority to order replacement parts unless stipulated in contract
  - Lien on goods, some provinces allow sale
  
- Transportation
  - Gratuitous Carrier – Help Andrew move down the street
  - Private Carrier – Move a specific kind of thing, choose their clients
  - Common Carrier – “Move anything anywhere”
    - Liability:
      - Shipper (Bailor) need only prove that the carrier received the goods in condition, and delivered them in bad condition
      - Thus, the burden is on the carrier to establish cause of loss within a recognized defence
      - Unless otherwise agreed, common carriers are liable for the full value of the good
    - Defences against liability:
      - Act of God – Fire is not an act of god, unless lightning started
      - Inherent Vice – Latent defects make susceptible to damage
      - Default by Shipper
        - Contract contains implied promise that the goods are safe to carry, thus make the movers pack everything themselves!!!
  - Common law gives common carriers a lien
  
- Innkeepers
  - **Innkeepers** are any people who maintain a establishment offering lodging to any member of the public
  - Liability:

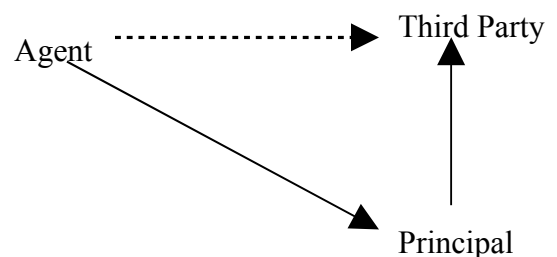
- Innkeepers are typically only liable where the goods have been stolen, lost or injured through the willful act, default, or neglect of the innkeeper or an employee, or where goods have been deposited expressly for safekeeping
          - If a hotel refuses to accept a guests goods for safe custody then it loses the benefit of reduced liability
        - Because hotel guest shares responsibility a hotel can avoid liability if it can show the disappearance or damage was due to carelessness of the guest
        - Burden is on hotel guest (bailor) to demonstrate carelessness of employees
        - Often less responsible for damages, therefore it is better to have something stolen than damaged
      - Only have a lien, some provinces can sell goods
- Pawn
  - **Pawn** is a bailment of personal property as repayment for a loan
  - Borrower is pledgor; creditor is pledgee (eg. Bank, pawnbroker)
    - Pledgee is similar to bailee for value in their exercise of a standard of care
  - Pledgee's obtain liens, and the pledgor gives authority to the pledgee to sell the pledged goods upon default
    - Pawnbroker may obtain absolute ownership of pledged goods after similar actions in right of sale

## READING NOTES

### CHAPTER 19: Agency

#### The Nature of Agency

- Agency is a relationship in which one person, known as an **agent**, is authorized to bring its **principal** into contractual relations with third parties
  - An exception to privity rule, allows insurance company to sue you for default of payment.
- **Dependent Agents** – Act exclusively for a single principal
  - Functions of agency and employment may be entirely separate, ie. an agent need not be an employee just as an employee need not be an agent
- **Independent Agents** – Not an employee and acts on behalf of several principals or clients. Eg. Lawyers or stock brokers who



act as agents for their clients when dealing with purchases of land, buildings, shares

- So called real-estate agent does not have authority to sell the property of a client and thus is not a true agent... role is only to introduce prospective purchasers and buyers who contract directly with each other
  - Real estate agent can also act on behalf of buyer and seller which creates a conflict of interest
- Note: Once a person begins to act as an agent in a particular transaction, that person is bound by all the duties of a contractual agent

### **Creation of an Agency Relationship**

- **Parties to the relationship**
  - Agent and Principal
    - Relationship between agent and principal is expressed in the form of an **agency agreement**
  - Principal and third party
    - Agent makes contracts between these two parties on principal's behalf
  - An agent's power to contract on behalf of her principal is limited to the capacity that the principal possesses
- **Express Agreement**
  - Agency agreement may be oral, written, or in writing under seal
  - Agreement should define the limit's of the agent's authority ie. how far they can go in making a contract with a third party without obtaining further instructions from principal
  - **Power of attorney** is a special type of express agency settlement
  - Agreements frequently contain implied terms which may supplement the express authority in the contract
    - ie. In a contract to buy goods internationally, the agent needs to have authority to have it shipped
- Ratification
  - Sometimes a person will pretend to act as an agent knowing they have no authority, but hoping that the proposed principal will later adopt this contract
  - **Ratification**, is exactly this subsequent adoption of by the principal
  - Need for ratification arises from:
    - Not actually being an agent of the principal
    - Because an agent has exceeded their limited authority
  - If a principal does ratify, the effect is establishing the contract with third party retroactively as if the agent had the power all along
    - Note: A principal need not ratify it expressly, it can do so impliedly by assuming the benefits of a contract
    - Note: Ratification cannot be partial, all or nothing
  - But, not all contracts can be ratified

- (i) Principal may not be able to ratify a contract made for them if they would've been unable to enter the contract themselves
    - Ie. Insuring a building after it burns down!
  - (ii) Cannot ratify when the rights of an outsider is affected
    - Ie. If someone else has acquired the rights to good before ratification occurs
  - (iii) Cannot ratify if the agent didn't notify the third party that they were acting as an agent
- Note: A conditional acceptance by an agent "subject to ratification" is not acceptance at all!
- Estoppel
  - When one party allows another to believe that a certain exists and the other person relies upon that belief, the first party will be prevented from stating afterwards that the true state of affairs was different
  - Apparent Authority
    - In **apparent authority**, circumstances may make it appear to third parties that an agent has authority to make the bargain, when in fact they don't have any real authority
    - Agents may exceed their real authority by venturing into sideline activities or act in violation of special restrictions
    - So when can a principal legally refuse to be bound by a contract?
      - Test is whether a third party should have been aware of the agent's lack of authority, or had reason to be suspicious
      - A third party is expected to act with a reasonable measure of business acumen and common sense
      - Eg. If the proposed contract is not within an area usually entrusted to such agents check with the named principal about an agents authority if you believe it could be exceeding
    - But it would be impractical to have to check on an agent's authority in every circumstance, thus a presumption of authority is established by trade
    - Result is that a principal seeking to abnormally restrict its agent's authority runs the risk that the agent will have an apparent authority exceeding their actual authority... and thus not be able to deny liability on those contracts
  - Holding out
    - **Holding out** is when a business impliedly represents someone to be their agent and will not be permitted to deny the existence of an agency
      - Eg. If a company describes someone as a 'director', they can't later claim that the person was not properly appointed and consequently not an agent
    - Holding out may arise when an agency agreement ends, thus it is the responsibility of a principal to inform third parties that the

agency has ended... if not they are bound by any contracts that agent creates

- Agency by Necessity
  - English does not recognize agency by necessity
    - Eg. Put a temporary roof on your neighbors house if it was blown off while they were on vacation
  - All but gone now, S.45 of the Family Law Act
  - While there may be a moral duty to ratify, as a general rule our law does not force liability on a person against his will

### **Duties of Agent to the Principal**

- Duty to comply with the contract
  - Determined by terms, explicitly and implied of the contract
  - Breach of any term gives the aggrieved usual remedies against the other for breach of contract
  - Agent has a duty to be diligent in keeping her principal informed about all important developments
- Duty of Care
  - Agent owes duty of care to principal
  - Degree of skill that principal expects depends on the nature of the agent's task and their known competence
  - An agent has a better chance avoiding liability for consequences if they can demonstrate they were unqualified and that the principal knew it
  - Note: It's important to note that an agent may withdraw before performing a gratuitous promise, but if you proceed to act on behalf of principal you are then bound to use reasonable care and diligence
- Personal Performance
  - General rule is that an agent can't delegate their duties
  - When an agent gets implied authority to perform through a sub-agent there is only privity between principal and agent, as well as agent and sub-agent... but none between principal and sub-agent
  - Thus a principal can only recover from agent, who must then turn to sub-agent
- Good Faith
  - Fiduciary Relationship
    - Parties are in a special relation of trust
    - Money should be put into separate bank accounts so that property in agent's possessions are not confused with principal's assets
    - Duty also requires that an agent inform the principal of any information that may influence the principal's decisions
      - If agent can get lower price, then they must inform principal of this and not reap profits from better deal!
  - Acting for two principals

- An agent can act for both parties in a transaction if they are aware of the arrangement and have agreed to it
- Ordinary business prudence argues against this though, as it is a conflict of interest
- Contracts between Agent and Principal
  - An agent's loyalty to principal is compromised when they make themselves party to a contract without approval of principal
  - Eg. An agent buys the property it had been given the task of selling

### **Duties of Principal to Agent**

- Non-fiduciary
- Ultimately, pay him his commission and expenses
- Remuneration
  - In the absence of an express term regarding an agent's fee, an agent is entitled to a reasonable fee to be determined by those who offer comparable services
  - In real estate, you offer to pay a fee in return for them selling your house, thus the agent only gets paid when they make the sale
    - Not fiduciary, you can have as many agents as you want to get you best house / best price
  - This is why real estate agents want an **exclusive listing agreement** and prospective sellers want a term that the agent only gets commission on sale (competing interests!)
- Expenses
  - There is an implied term in all agency agreements that the principal will reimburse the agent for all reasonable expenses incurred within the scope of their real authority

### **Rights and Liability of Principal and Agent**

- In agency there is sometimes a question of who is liable for the contract, agent or principal!?
- An agent should have no liability in a properly constructed contract because the contract is between the principal and third party
- Principal Alone is Liable
  - Agent incurs no liability on contracts when agency relationship is functioning as intended
  - To ensure this, an agent should make it clear to third parties and indicate that they are acting as one and identify the principal in all their actions
    - Don't have to reveal the name of the principal, only the existence
- Agent Alone is Responsible
  - In order to be held liable the agent must do more than merely fail to disclose existence of principle, they must contract on terms that they are the principle

- Either Principle or Agent may be held Responsible
  - If a third party discovers that an agent has been neglecting to mention that they are operating as such a they are able to sue the agent on the contract
  - If and when the third party discovers the existence of the principal, they have a choice, **they can only sue the agent or the principle... but not both**
    - If the principle isn't discovered until court, there can be fresh proceedings brought in and start a new case
- Liability for Torts
  - When an agent is guilty of fraudulent misrepresentation in making a contract (even if principal didn't authorize the misrepresentation) the contract becomes voidable and the third party may rescind it
  - If the agent was operating within apparent authority, the third party can sue the principal as well as the agent for deceit
    - If the principal was innocent, they can then sue the agent for damages
  - Breach of Warranty of Authority
    - There is no contract if a person holds themselves out as an agent but has no authority (actual or apparent) and principal doesn't ratify
    - In this case a third party can take the so-called agent to court for a tort known as **breach of warranty of authority**
      - This can also occur if an agent creates a contract after the principal has lost contractual capacity or ceased to exist
      - Thus, it is advisable for an agent to communicate frequently with the principle
    - Damages are awarded to put the third party in the position in which they would've been if representation was true

### **Terminating an Agency Relationship**

- Authority is terminated when:
  - End of time specified
    - With no specified time, you need notice
  - Completion of particular project for which agency was formed
  - Notice by principal or agent that they wish to end agency
    - Similar to employment, need adequate notice
  - Death or insanity of principal or agent
  - Bankruptcy of principal
  - Loss of capacity

### **READING NOTES**

#### **CHAPTER 20 – Contract of Employment**

#### **Relationship of Employer and Employee**

- Relationship of employer and employee is established by a contract that gives one party, the employer, the authority to direct and control the work of another party
  - Additional terms are implied relating to
    - Common law (termination, notice)

- Statute (Statutory minimums, worker's rights...)
    - Never start in position of strength as employee, laws are designed to protect you
  - Terms of Contract
    - Job Description (from HR)
      - Provides standard against which to evaluate your performance
    - Rate of Pay
    - Term – Option to terminate (discussed later)
- Compare with Independent Contractor
  - If an individual is found to be an independent contractor rather than an employee then the relationship is governed by the terms of the contract and the general principles of contract law
  - How recognize difference in assessing relationship?
    - Control of employee by employer
    - Ownership of tools of production
    - Use of time (by the hr.) vs. Delivery of result (complete project)
    - Risk of profit or loss (full liability for contractor)
    - Exclusivity and duration
      - Employees can only work for one business, often for an indefinite time, contractors are gone when contract is complete
    - Source deductions and expenses
      - Employer takes of EI, CPP
  - Contract may state nature of relationship
  - Distinction is important as it affects agency and vicarious liability
    - When a firm undertakes work as an independent contractor, any liabilities that it incurs are almost entirely its own
    - Small exceptions in that a firm may have responsibility to see that contractor takes reasonable precautions to avoid endangering third parties

### **Amending Terms of Employment Contracts**

- The ability of an employer to amend the terms of the employment contract will be impacted by the terms of the contract
- A unilateral substantial change to an important term (I.e. salary, job position...) can result in constructive dismissal
  - **Constructive dismissal** - an employee claims wrongful dismissal based on the unilateral change of the terms of employment which amounts to repudiation of the employment contract

### **Employer's Liability**

- Liability in Contract

- Employers are held responsible for improper work done by employees just as a promisor is liable for work that it subcontracts
- Liability in Tort
  - A business is vicariously responsible for damages to any third party for the consequences of any tort that an employee commits in their course of employment
  - All the injured party need establish is that the employee caused the damage while engaged at their work (ie. on-delivery etc...)
  - Employers can still sue the employee if it deems it worthwhile

### **Notice of Termination of Ind. Employee Contracts**

- First off, when an employer has hired an employee for a stated period of time, and that time has elapsed, no notice of termination is required
  - Considered probation
- If the hiring is general or indefinite reasonable notice depends on the circumstances of employment
  - In most provinces the minimum length of required notice is specified by statute, any attempt to undermine this is void
    - Often 1 wk / year of employment
  - Allowed to have an option to terminate, “terminate you at any time provided you give me \$###,###.00
- Employees leaving voluntarily also owe the same obligations to employers
  - Employees can leave without notice if work conditions are unsafe or if ordered to do an illegal act
- Note: An employer is not in breach of the employment contract when dismissing someone without notice if it tenders an additional amount of pay for period required of reasonable notice
  - Often you’re better off to pay someone to leave, then keep them after you fire them so they can poison the rest of your employees

### **Grounds for Dismissal Without Notice (For indefinite employment)**

- The Contractual Basis
  - An employer need not give notice when it can show that the employee was dismissed for cause (ie. when an employees conduct amounts to breach of the contract of employment)...
  - Employer then becomes discharged from any further obligations
- Accepted grounds for ‘cause of dismissal’
  - Misconduct
    - Anything illegal or immoral that would bring business into public disrepute, and or cause employer financial loss
  - Disobedience
    - Wilfully disrespecting reasonable chain of command, boss’ wishes
    - Whistle-blowing offers interesting new vantages, lots of protection

- Incompetence
  - Number one killer!
  - Need to prove that you warned the person, tried to fix you and that you were still lousy...ie. "You will be fired if this doesn't change"
  - Depends on the representations made by the employee when seeking the job and the degree of skill required, if they lied during interview its easier
  - Cause for dismissal becomes more difficult to justify the longer an employee is hired for
  
- Illness
  - You can fire people, but it looks bad... better to hand over to insurance
  - You also have a duty to accommodate, if you can accommodate the person (flex-time, accessibility) you must!
  - Note: Contract is discharged by frustration and not breach
  
- Note: Heed warning of 'court firing bumbled, if you don't warn someone about being late they will come back and sue you

### **Non-Competition Clauses**

- Courts are hesitant to enforce these as they often violate public policy with respect to restraint of trade
  - Exceptions are sale of business and employee/employer (trade secrets or using old contacts to better yourself)
- Terms of clause must be reasonable with respect to time, geography and the activity itself

### **Wrongful Dismissal**

- Damages
  - For an employee to succeed in an action against her employer for wrongful dismissal, they must show that the employer has broken the contract by failing to give employee notice they were entitled
  - Task of court is to first determine the length of time that should have been reasonable given circumstances
    - Employment Standards legislation is just a minimum
    - Consider:
      - Character of employment
        - For every CEO there's a 100 receptionists
      - Length of service
      - Age of employee
        - Older or younger then (30-49) is disadvantageous
      - Education / Experience / Training / Qualifications
        - Lots = more notice
      - Availability of similar employment
  - Next, court reviews whether **bad faith** adds to the harm caused, the court may award extra damages (*Wallace v. United Grain*)

- Finally, the court will consider any other damages flowing directly from breach, such as the transportation costs of finding a new job
- Note:
  - Party's injured by the breach of contract are expected to mitigate their losses by taking other (similar) job opportunities if possible

## Employee Welfare Legislation

- Employee Rights
  - Human Rights (*Human Rights Code – Ontario*)
    - Cdn. Charter of Human rights has not been applied to the private sector, but human rights legislation passed by provinces and federal applies to private sector
    - Can't ask questions during interviews about age, race, gender, disability
    - Have to hire people if they're capable of doing the work
      - Newest problem is the **wrongful failure to hire** when you feel you were discriminated against in some form when you really deserved to be hired
  - Pay Equity
    - “Equal pay for equal work”, prohibiting different levels of pay for the same kind of work in the same establishment
    - “Comparative value” with respect to skills / training in addition to the type of work – set up a scorecard on different aspects of jobs... “when jobs aren't identical but have equal value”
    - Most modern pay equity legislation do not require complaints to be issued but rather place obligations on employers to ensure compliance
  - Employment Equity
    - Employment equity act require employers with over 100 employees to obtain relevant information about personal characteristics of their employees in order to determine under-representation of designated groups, results in preferential hiring
  - Mandatory Retirement
    - Contentious issue now that baby boom is poised above us
    - Ontario human rights code applies to private citizens, contains the definition of age
    - Recent trial involved lawyers using the Charter of Rights to attack the Human Rights code in Ontario
    - No longer any mandatory retirement in Ontario
- Regulation of work conditions (*Employment Standard Act*)
  - General work conditions
    - All provinces now provide annual vacations with pay, stat holidays
    - 15 minute break, every 4 hrs
    - 1 yr. Maternity/Paternity leave

- Statutes for minimum wage, minimum age for labour
- Employment Insurance
  - Employment Insurance act requires employers and employees to contribute to the government controlled fund
  - Employer must account for all contributions and send them to the government
  - These benefits then become available except when people are on strike
- Worker's Compensation (*Workplace Safety & Insurance Act*)
  - **No-fault system**, keeps employer-employee relations better after injury
  - Employers must contribute to the fund which is then used to pay claims
  - To succeed an employee must only prove that the injury was caused by an accident in the course of employment
  - Claim only fails if it can be demonstrated that the injury was the result of willful intent
  - Easier when you die or are severely disabled
- Occupational Health (*Occupational Health and Safety Act*)
  - **Proactive / preventative approach** to preventing dangerous situations
  - Growing concern as growing concern over environmental hazards to health are more sensitive
  - Now easier to track occupational conditions to adverse medical conditions
  - Proactive system, if management doesn't resolve a situation you can just call people who come and investigate and lay necessary charges

## READING NOTES

### CHAPTER 26 – Sole Proprietorships & Partnerships

#### Sole Proprietorship

- Come into existence without formalities, can occur just by actions
- Subject to many regulations that apply to all forms of business
  - eg. Municipal license is normally required for electricians, plumbers etc.
- If the name of business is different from the owner its must be registered (applies to all forms of businesses)

#### Partnership

- Formed by two or more persons
  - natural – individuals; legal – corporations
- Advantage in that you can pool resources and knowledge together

- Disadvantages can result from disagreement (time to reach agreement), dishonesty

### **Nature of Partnership**

- “Partnership is the relation which subsists between persons carrying on a business in common with a view of profit”
- Persons can be found to be partners even though no written or oral agreement exists... if they acted as partners
- Four Elements in a partnership
  - 1) Relationship
    - a. Consensual, contractual
    - b. Normally formal written partnership
  - 2) Between Persons
    - a. “Partnership” refers exclusively to joint business enterprises carried for profit (excludes charities, joint trustees of an estate, or public boards)
    - b. For example, a group of investors holding securities are not carrying on a business (unless trading and dealing)
  - 3) Carrying on Business in Common
  - 4) With a view to profit
    - a. Court considers profit sharing that coincides with ratio of capital contribution as strong evidence of partnership
    - b. Evidence of whether person receiving share of profits has taken an active role in the business

### **Creation of a Partnership**

- Partnership Agreement (Written or oral)
  - Main purpose is to set out as carefully and clearly as possible, the entire terms of the relationship:
    - Identity of partners, name of firm
    - Nature of the business to be carried on
    - Duration of the relationship, method of terminating the partnership
    - Division of profits
  - The *Partnership Act* sets out implied terms that fill in any gaps in a partnership agreement ...
    - If you forget to state how profits are divided, the act will make it fifty-fifty
    - Partners are entitled to be indemnified for expenses or personal liabilities by the firm
    - No change can be made in the nature of the partnership without unanimous consent of the partners
    - No member may be introduced to the partnership without consent of all existing parties
    - Partners owe a fiduciary duty to render true accounts and full info regarding anything affecting the partnership... disclose everything, duty not to compete or to pay over those profits

- In order to draft an effective partnership agreement, parties must consider the most likely events that will lead to disagreement and upset the partnership
- Registration
  - In Ontario, you don't need to register if your business name is the same as your own
  - Simple, only need to file in local registry office the names, addresses of partners, name under which they intend to carry business
  - Limited partnerships have a great deal of formalities

### **Liability of a Partner**

- As a general rule, a person who is held to be a partner becomes personally responsible for the debts and liabilities of the partnership
- Agency:
  - Any acts done by a partner w/i scope of apparent authority and relied on by outsider bind the firm and all partners
  - Restriction placed on authority same as restriction placed on authority of agent by his principal (affects only those outsiders who have knowledge of restriction)
- Joint Liability
  - Each partner is fully & personally liable for the full amount of the firm's debts
  - Thus, the partner with the least assets has the least to lose, they will probably be the last person creditors will go after
  - This is why creditors need to know who the partners are in a partnership, best to have a cause of action in the firm's name so that all partners will be involved
    - If an outsider sues the firm, then any partner is liable to contribute their share or may be sued by the firm for that share
    - If an outsider sues an individual in the firm, that individual is entitled to be protected by the firm and can sue the firm or his co-partners personally
  - A person admitted as a partner into existing firm does not become liable to creditors for anything done before he became a partner
  - To remove yourself from this liability when you retire:
    - Ensure all existing clients of the firm are notified
    - Place notice to province
    - Ensure name is removed from register
    - Letterheads w/ his name are destroyed
- Tort Liability
  - Works the same as vicarious liability but relating to the firm rather than a company, often seen with negligence, breaches of trust, defamatory statements

### **Limited Liability Partnership (LLP)**

- Partner remains liable only for his own negligence and for those under their direct supervision or control
- Under Ontario law this protection appears only to extend to negligent acts, and not other torts or contractual liability of partners
- LLP is formed when two or more persons enter into a written agreement that designates the partnership as an LLP... name must have LLP abbreviations
- Most important restriction is that an LLP may carry on business only for purpose of practicing a profession governed by statute
  - In Ontario this is CA's and lawyers

### **Termination of a Partnership**

- As noted before in the absence of agreements, the Partnership Act states that:
  - Where no fixed term is agreed upon for duration of partnership you have to give notice
  - Partnership terminates upon the death or bankruptcy of a partner

### **Joint Venture**

- Agreement that two or more parties make to contribute a part of their respective resources to a specific project, spreads risk among participants
- Contractual joint venture
  - Contractual relationship among the participants for a specific undertaking
- Equity joint venture
  - Incorporate a separate corporation, with each participant holding shares
  - Subject to general rules of corporation law
- Profits are not retained, but distributed according to agreement
- Co-venturers in a joint venture have a fiduciary duty to each other

### **Limited Partners**

- Need to have a general partner with unlimited liability
- Limited partners lose what they have invested, nothing more
- Limited partners cannot take an active part in the mgmt of the partnership

## **READING NOTES**

### **CHAPTER 27 – Nature of a Corporation & Its Formation**

#### **Nature of a Corporation**

- A 'legal person' formed by incorporating according to a prescribed legal procedure
- A legal person is an entity recognized by law as having its own rights and duties of its own, entirely a creation of the state

#### **Characteristics of Corporations**

- Liability
  - Corporation is liable for its own debts, but shareholders can only lose the value of their shares
  - Value of limited liability are often overlooked in small corporations where banks require personal guarantees or pledge property

- Transfer of Ownership
  - Shareholders may sever by transferring their shares to another person
- Duty of Good Faith
  - Shareholders have no such obligation to the corporation, may carry out multiple businesses

### Consequences of Separate Corporate Personality

- Capacity
  - Under the *Canadian Business Corporations Act* (CBCA) a corporation has the capacity and all the rights, powers and privileges of an individual
  - Corporation can act only through its agents (employees), who must have authority
  
- Separate Existence
  - *Salomon's Case 1897*
    - Man owned every share of his company, but six... when the business went bankrupt creditors claimed that corporation was a sham
    - Court upheld Salomon's claim as a corporation and recognized the separate legal personality of the "one-man company"
  
- Limitations on the Principle of Separate Corporate Existence
  - Exceptions to Limited Liability
    - Shareholders of small private companies are often required to provide security or personal guarantees for loans made to their corporations
    - CBCA provides further exception as shareholders are liable for corporations debt if they've received improper distribution of assets (dividends paid out even when no profits made)
    - Owners of corporations are not protected from personal liability, even if the corporation is vicariously liable
  
  - Lifting the Corporate Veil
    - Courts have sometimes been prepared to disregard the separate existence of corporations
    - In order to identify an individual with a corporation there are three conditions that must be met:
      - 1) Individual must control the corporation
      - 2) Must use that control to commit a fraud, a wrong, breach of duty
      - 3) Misconduct must be cause of injury

### Methods of Incorporation (OBCA and CBCA)

- Corporations Act
  - Requires **articles of incorporation** which are the basic constitutional document of corporations that set out essential terms of agreement and are reviewed by the government which grants a certificate (discretionary)
- Jurisdiction

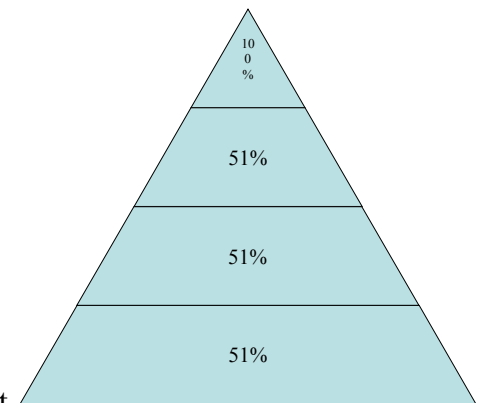
- Choice to incorporate either federally (CBCA) or provincially (OBCA), thus you must decide if you are going to work in one province alone or not
- If you are not incorporated within a certain province you must comply with certain registration requirements to operate there

### Constitution of Corporation

- Articles of Incorporation
  - Must include name of business, location of head office, classes and number of shares, number of directors
- By- Laws
  - These are the internal working rules of a corporation
  - While articles of incorporation are entrenched (permanent), by-laws are rather flexible, requiring a majority of shareholders to make alterations
  - Include issues such as the qualifications and election of directors, how to post notice of shareholder meetings
  - Also provides job descriptions of officers, quorum (min. # of directors necessary to be present at a meeting), authorization of directors (what needs shareholder approval)

### Types of Corporations

- Public and Private
  - Private companies are those with a restricted number of shareholders, prohibited from issuing its shares to the general public (no IPO)
  - CBCA and OBCA have rendered these private corporations irrelevant, now permit single person corporations, prefer making distinctions between widely held corporations and closely held one's
- Widely held corporations
  - Subject to securities acts, require prospectus for IPO
  - Discuss more in CH. 28
  - Large Canadian corporations are often structured similarly to this pyramid where apex company owns 51% of the shares in each subsequent company so that it can exert influence
  - American companies are often much more divided with free-standing firms structured horizontally between public shareholders
  - Widely held corporation shares are easily transferred between parties
- Closely Held Corporations
  - Same legal significance and corporate independence as a widely held corporation
  - Vast majority of Canadian corporations (90%) are closely held
  - Many subsidiaries are closely held corporations



- Owners are often also managers
- Share transfer often requires consent from the board of directors, allows them to approve new entrants
- Professional Corporations
  - Special type of corporation that may be formed by members of a profession
  - Must be a listed profession as well as permitted by the rules of that particular profession
  - With respect to liability PC is similar to an LLP in that the owner remains responsible for their own negligence or misconduct
  - Principle advantage is not limited liability, but rather tax advantages that are not available to sole proprietorships or partnerships

### Corporate Capital

- Share Capital
  - **Authorized capital** is the max. number of shares a corporation is permitted by its charter to issue
  - **Issued capital** is the shares that have been issued by a corporation
  - **Paid-up capital** are the shares that have been issued and paid for
  - **Stated capital account** is the amount received by a corporation for the issue of its shares
- Types of shares
  - **Preferred shares** carry preferential treatment with respect to dividends,
    - Often have no right to vote, unless owed dividends in arrears
    - Ability to accrue dividends
  - **Common shareholders** are the true equity owners of businesses, have voting powers, also take the greatest risk,
    - no legal requirement for dividends
  - Class Rights (Depends on particular agreements)
    - **Cumulative right** – the right of a preferred shareholder to be paid arrears from previous years before any dividend is paid on the common shares
    - **Participating rights** are the right for common shareholders to participate in a surplus profit in addition to their dividends
    - **Pre-emptive right** – protects your percentage of the business when more shares are issued, gives you first shot at buying more.
  - **Bond** holders are creditors, legal requirement to be paid interest,
    - Bondholders are entitled to be paid before shareholders
- Priority of Payment on Liquidation
  - 1) **Secured creditors** – Have assets (collateral) against their debts
  - 2) **Unsecured creditors** – Have a piece of paper acknowledging their debts
  - 3) Preferred Shareholders
  - 4) Common shareholders

### READING NOTES

#### CHAPTER 28 – Internal Affairs of Corporations

## **Structure of the Modern Business Corporation**

- Power originates with the general meeting of shareholders
- The shareholders appoint a board of directors to manage the corporation
  - The board of directors are responsible for the management of a corporation's business (outside) and affairs (inside)
- Directors in turn appoint a CEO who is in charge of the day-to-day running of the corporation
- In closely held corporations shareholders are often directors, blurs distinction
- In widely held corporations, there may be as many as fifteen members

## **Directors**

- Section 102 of CBCA outlines that the most important powers given to director for internal affairs are:
  - Issue Shares
  - Declare dividends
  - Adopt by-laws
  - Call meetings of shareholders
- A corporation is required to have one or more directors
- Publicly held corporations must have more than three directors, two of whom must be outsiders
  - At least 25% of the directors must be resident Canadians
- Directors are elected by simple majority, once shareholders have elected the BOD they have virtually no say in the management of the corps. Business and affairs with small exceptions discussed later

## **Duties of Directors**

- According to Section 122 a) of CBCA:
  - “Every director and officer of a corporation in exercising his powers and discharging his duties shall”:
    - Act honestly and in good faith (best interest of corporation)
    - Exercise care, diligence and skill in comparable situations
    - Must comply with the CBCA, by-laws, unanimous shareholder agreement
  - Ultimately, they owe a fiduciary duty
- To the Corporation
  - Directors must act with a view to the best interest of the corporation
- To Shareholders
  - The interests of the corporation are normally taken to mean the interests of the general body of shareholders, present and future
  - Directors generally owe no duty to individual shareholders under corporate law
- To the public
  - Apart from statutory obligations, the courts have generally resisted the notion that directors owe a duty to the public
  - But, it often is good business sense to have a good relation with the public

- Duties of Care and Skill
  - Negligence (S.122b)
    - Director owes a duty to the corporation not to be negligent, this diligence is often only that required of an average person
    - Entitled to rely on information received from officers of the corporation, but cannot willfully close their eyes to mistakes or misconduct, liable if they do
    - Employees (officers) owe a professional duty of care
  - Strict Liability
    - Directors are more likely to be held liable for their acts than their omissions
    - CBCA, OBCA makes directors liable to their corporation when they vote at meetings of the board on specific matters that cause financial loss to the corporation
    - Note: If the corporation becomes insolvent, directors are personally liable to all employees for six months wages
    - Director may raise the defence of due diligence, show that they used reasonable care and skill, hired experts
  
- Fiduciary Duties
  - Duty of good faith imposes a high standard of conduct on a director
  - General duty on directors to avoid any conflict of interest
  - Note: duty is imposed on both the directors and officers / senior employees, any breach allows them to be personally liable
  
  - Contracts with the corporation (S.120 CBCA)
    - Disclose any interest that the director may have in contracts with corporation
    - Director must disclose this fact at a meeting of the BOD that considers the contract, must not vote on matter
    - Contract is binding if the other directors still decide to go through with it
    - Failure to disclose gives the director's corporation the right to rescind the contract and they become personally liable
    - Eg. "Royal Group"
      - Zen (BOD) and Dunsmuir (CEO) set up a numbered corporation to buy land that the corporation was considering buying
      - The two proceeded to hide behind this veil and re-sell the property to the corporation at a profit
    - Important to have independence in the board in order to create an air of objectivity, make corporation transparent... this is why it is necessary to have outsiders on the board
  
  - Interception of Corporate Opportunity

- If it is a directors duty to acquire a particular item of property for the corporation and the director acquires it personally, then they have intercepted an opportunity for the company and are in breach of duty
  - Corporate Information
    - Duty to reveal information about profitable ventures when that information has come to you in your capacity as a director
    - Make a dangerous assumption if you assume that the corporation wouldn't want a certain property and acquire it in your own name
    - Again, forms a breach of duty
  - Competing
    - Director may not carry on a business competing with her corporation, except with permission of the corporation
    - This rule cannot be circumvented by simply resigning, can't just make use of personal information obtained as a director... have to turn in any profits
  - Consequences of a Breach of Fiduciary Duty
    - Personally liable for damages for any loss sustained by corporation
    - Corporation is entitled to rescind a contract in which director has material interest that she did not disclose
    - Injunction may be obtained to restrain her from continuing to compete with corporation
    - Have to turn in any profits from side-ventures etc...
- Insider Trading
  - Insider trading occurs when a director or officer (or any person) buys or sells the corporation's shares or other securities making use of confidential information in order to either make a profit, or avoid a loss
  - In the absence of common law remedies / punishments, the CBCA has stepped in to fill the void making insider trading a criminal offence punishable by fines or imprisonment
  - CBCA has strict disclosure requirements whenever a director, or other insider trades in securities of their own corporation
  - Insider includes a director, officer, an employee, any shareholder who holds more than prescribed percentage of the corporation's securities, as well as the spouses / family of the above
  - The "tippee" is a person who knowingly receives confidential information from an insider
  - How do you fix this? Disclose all information ASAP, eliminate the potential risk
- Summary of Director's Liability

- To the Corporation
  - Damages for loss suffered by the corporation for the breach
  - Rescission of contracts where a director had an undisclosed interest
  - Constructive trust of property acquired under the director's mandate
  - Accounting for profit improperly obtained by director
- To others
  - Liability to employees for unpaid wages
  - Liability for unpaid taxes
  - Liability for CPP
  - Compensations to persons suffering direct loss from insider trading
- Criminal Liability
  - Insider trading
  - Environmental breaches (EPA)
- Note: Section 122.3 of the CBCA says that directors cannot use exemption clauses to protect them from the liability of being sued
  - But, directors are still allowed to have director's liability insurance

### **Rights of Shareholders**

- Right to vote
  - Typically granted to common shareholders, some preferred shareholders
  - **Ordinary resolution** – Requires half of the vote
  - **Special resolution** – Requires more than two-thirds of the vote
- Right to Information
  - Disclosure of relevant information enables investors to evaluate the effectiveness of mgmt., may be effective deterrent to mismanagement
- Auditor
  - Appointed auditor represents the shareholder's interests and must be an independent person who is not employed by the corporation
  - Auditors have the duty to investigate all the records and accounts of the corporation, check the fairness of statements
  - Those directors that are independent should be in charge of the audit committee
  - Only the auditor, as the representative has the right to examine the books of account, shareholders aren't allowed to see these books
  - Closely held corporations may waive the necessity for an auditor
- Documents of Record
  - Corporation must maintain certain documents of record at its head office that may be inspected by any shareholder
  - These documents of record include:

- Minute books of the proceedings at meetings of the shareholders
- Register of all transfers of shares
- Register of shareholders and directors
- Copy of charter and all by-laws

### **Duty of Shareholders**

- Majority shareholders owe no positive duty to act either for the welfare of the corporation, nor for the welfare of other shareholders

### **Protection of Minority Shareholders**

- Minority shareholders can often find themselves ‘frozen out’ by the other directors, especially in closely-held corporations... this can occur without breaking any laws
  - Transfer of shares are restricted, difficult to sell minority shares
  - Majority may fire the minority director, remove them from the BOD or may increase their salaries in order to remove profit
  - Special statutory remedies have greatly improved the situation of the minority
- **Appointment of Inspector**
  - If after auditing is complete and shareholders still think something smells fishy they may apply to a court for an inspector to be appointed
  - The inspector will investigate into the affairs of the corporation and audit its books, inspectors have sweeping powers of inquiry and the remedy can be very effective
  - It is necessary to make out a *prima facie* case, meaning that they must produce sufficient evidence of the probability of mismanagement to warrant further investigation
- **Appraisal Remedy (CBCA Sec.190)**
  - Shareholder doesn’t like the fundamental changes being made to the corporation
  - Procedure whereby a dissenting shareholder may have their shares bought out by the corporation
    - If a price cannot be agreed on the court will fix a fair price
  - Need to establish that the company is no longer what you originally invested in
  - This remedy is limited to the majority performing the following actions:
    - Amalgamating or merging with another corporation
    - Selling, leasing substantially all assets of the corporation
    - Changing restrictions on the issue, transfer or ownership of shares
- **Derivative Action (CBCA S.239)**
  - Shareholder acts on behalf of the corporation, to bring action against anyone for wrongs done to the corporation
  - Necessary when dealing with directors because an action on behalf of the corporation must e started by them... not going to turn themselves in!

- Derivative action allows a shareholder to obtain leave from the court to bring an action in the name and on behalf of the corporation, acting in good faith, and appear to be acting in the best interests of the corporation
- **Winding Up**
  - Courts have the discretion to make an order ‘winding up’ / liquidating a corporation where it is just and equitable to do so
    - Similar to partnership law when there is an impasse and one partner can insist on a dissolution
  - Not often used on large flourishing businesses, more often available where the corporation is a small family business
- **Oppression Remedy (CBCA S.241)**
  - Canada takes a very liberal interpretation
  - “I’m not being treated fairly, order them to do what is fair!”
  - Very flexible remedy in that where a complainant feels that they’ve been treated unfairly or oppressively it can make any order it feels just,
  - CBCA allows the court to make any order it sees fit (rescind contract, remove board) but the most common remedy has been to make the majority buy out the minority at a fair price, similar to appraisal remedy
  - Quickly becoming the most widely used shareholder remedy

### **Shareholder Agreement**

- Shareholder agreement is formed outside the constitution of the corporation or by-laws
  - Must not impinge on their roles as directors
  - Each agreement must be tailored to the needs of the individual business
  - Right to employment
    - Each shareholder may enter into employment with the corporation
  - Right to participate in mgmt.
  - Right to a fair share price for a share interest
- **Unanimous Shareholder Agreement**
  - Articles of incorporation statutes recognize unanimous shareholder agreements as valid, allow them to govern relationships among shareholders in closely held organizations

## **READING NOTES**

### **CHAPTER 29 – External Responsibilities of a Corporation**

#### **Three External Responsibilities**

- Creditors
- Investors

- Public

### **Protection of Creditors**

- Implications of Limited Liability
  - In a corporation a creditor's rights are limited to the assets held by the corporation, if those assets are inadequate then the creditor normally has no further remedy
  - For this reason, legislatures and courts have evolved some of the following rules to assure creditors that those assets are not wasted
  - Primary concern of the law has been to ensure that corporations capital is not allocated to shareholder's before responsibilities to creditors are met
- Protection Under CBCA
  - CBCA solves the above with two kinds of rules:
    - Prohibit payments to shareholders if it renders a corporations liquid assets insufficient to pay creditors
    - Restrict dividends even when the corporation might still be left with sufficient liquid assets to pay creditors
- **Solvency Test**
  - "No paying out dividends etc... unless you have enough \$\$\$"
  - A corporation can either provide shareholders with dividends or buy back shares
  - If either of the above are performed when
    - i) the corporation is insolvent already, or
    - ii) the above actions will make the corporation insolvent,
    - ...then the directors become personally liable to the corporation for the deficiency
- **Maintenance of Capital Test**
  - Goes beyond the solvency test, provided for by s.42 of the CBCA
    - Stipulates that dividends can only be paid if net assets will still exceed stated assets after the dividends are paid out... ie. only pay dividends out of profit or if assets increase in value
    - Only buy back shares if your assets will still equal or exceed your liabilities and stated capital

### **Protection of Investors**

- Securities Legislation (Ontario Securities Act)
  - Objectives of securities legislation
    - Prevent and punish fraudulent practices in the securities industry
    - Require full disclosure of financial information in prospectus when dealing with IPO's
  - Two devices for achieving this

- Licensing (persons engaged in securities industry)
  - Renew on an annual basis, revoke, suspend
  - Criminal offence to be unlicensed
- Prospectuses
  - Note merely a formality, commission will refuse a prospectus if they believe it is misleading or omits data
  - Require:
    - Full description of securities (voting rights etc...)
    - Nature of business carried on
    - Names, addresses, occupations of directors
    - Recent audited financial statements
    - Proposed use of proceeds from issue of shares
- Continuing disclosure
  - One of the most important innovations gives securities commission control over stock exchanges
  - Thus control exists over initial, as well as subsequent trading
- Misrepresentation
  - Investigate for misrepresentations in financial statements etc..., where corporations have civil liability for both primary (ISO) and secondary markets

### **Civil Liability of Corporations**

- Civil liability
  - Liability towards plaintiff, typically to pay damages for harms done through committing a tort or breaking a contract, punished by fines
- Negligence
- Contractual Liability
  - A director or an officer of a corporation acting within their actual authority binds the corporation to contracts made w/ 3<sup>rd</sup> parties
  - **Indoor management rule**
    - Everything that appears regular on its face may be relied upon by an outsider and will bind the corporation
    - Just an application of the apparent authority principle
- Strict Liability
  - To pay wages and taxes

### **Criminal Liability of Corporations**

- Criminal liability – Conviction for an offence, typically punished by imprisonment or payment of a fine or both
- **Regulatory Offences**
  - A corporation can be charged with and convicted of an offence under the Criminal code in the same way as a natural person

- Far more common for corporations to be prosecuted for regulatory offences which involve government regulations that prohibit certain kinds of conduct and punish those who ignore these
- Requirement of fault:
  - Prosecution must prove that not only the accused committed the offence, but did so with *mens rea* or “a guilty mind”
- Types of offences that corporations can be charged with:
  - *Mens Rea* Offences:
    - Prosecution must demonstrate the existence of a guilty mind, consisting of intent or knowledge
  - Offences of strict liability
    - No necessity to prove *mens rea*, only defense is to avoid liability by proving that you took all reasonable care
  - Offences of absolute liability
    - You’re screwed, simply doing the act makes one guilty
    - Enough for the prosecution to just prove that you committed the wrongful act
- Nature of Corporate Criminal Liability
  - Corporations are also liable to be punished under criminal law, can’t go to prison though, often they are dissolved
  - Prosecution can also lay charges against BOD or officers
  - ‘Directing Mind’ Principle
    - Refers to the how deep responsibility can go into the chain of command in a corporation
    - Canadian courts have tended to find an act committed by an employee (head of a dept.) to be an act of the corporation itself
    - The courts consider the wrongful act by an employee whose responsibilities are significant to be an act of the corporation itself much like the directing mind senior officials.
    - Courts won’t hold act of low level employees accountable

### **Personal Liability of Directors and Officers**

- Question we address here is whether directors and officers should be held criminally liable for offences committed by their corporation under their supervision
- “The threat of jail sends a clear message to corporate executives that they are not immune to criminal sanctions... Incarceration is one cost of business you can’t pass to the consumer.”

## **Basis for Liability Imposed on Enterprises and Their Officers: Environmental Legislation**

- What standard of skill and care must be met?
  - When an offence such as improper disposal of hazardous waste occurs, a presumption arises that the activity was carried on negligently
  - Cannot escape liability by delegating responsibility to an employee
    - If they blame the employee then the employee may be found to be a directing mind or the corporation will be guilty of not having sufficient control / procedures
  - Expertise Required of Directors and Senior Officers
    - Courts seem to expect greater diligence from the corporation's experienced senior officers
  
- Who should be found liable?
  - Those in charge of an activity?
    - Apart from the liability of an enterprise itself, any person who actually commits an offence is personally liable even when authorized by the corporation (vicarious)
    - Two kinds of people are liable
      - Those who cause or permit a hazardous substance to be discharged
      - And those who directed, assented to do the above
    - Prosecution must persuade a court that a person had effective powers and responsibility
  - Outside directors?
    - Since the law is not intended to punish the innocent and diligent, it seems that ordinarily an outside director ought not to be personally liable (so long as they do not turn blind eye etc...)
    - Virtually all charges brought under Cdn. legislation have been against inside directors
  
  - In extreme cases directors and officers can receive prison terms in addition to fines
    - Severity of sentence:
      - Nature of the environment affected (sensitivity)
      - Extent of damage inflicted
      - Deliberateness of offence
      - Attitude of defendant (report after happened?)
      - Attempts to comply with regulations (any?)
  
- Business consequences

- Businesses must review their practices, learn whether there in danger of breaching anything
- Must seek best advice possible to stay up to date with regulations
- Review insurance coverage

## READING NOTES

### CHAPTER 33: International Business Transactions

#### Law and International Business

- Initially firms establish themselves locally, then become international as when they engage in business with customers in foreign countries
- As the foreign market grows a business may appoint an agent or representative office
- Eventually, operations may develop into full scale manufacturing and a **branch** or **subsidiary** (discussed later) may be established
- Questions of private law and public now arise, now in the realm of **public international law** (relations between states)

#### Foreign Trade

- Export Contracts
  - Contract of Sale
    - Much of our earlier material regarding contracts still applies
    - However, international contracts with an international element present special problems due to longer times requiring transportation, insurance
  - Proper Law of Contract
    - The **proper law of contract** is the law of the country or jurisdiction that the parties intend to govern
    - Clearest method of establishing the proper law is for the parties themselves to make express provision
    - Where proper law is not expressly stated the court will attempt to determine the intentions from circumstances
  - Contractual Terms (Terminology)
    - A standard set of terms known as **Incoterms** have come to be widely used
    - Also the publication and widespread adoption of standard form contracts published by global trade associations (UNECE) in order to harmonize international laws
  - Shipment and Insurance (Good for multiple choice)
    - *Ex Works*  
Seller's responsibility is only to make goods available to the buyer at the sellers own warehouse... no responsibility
    - FOB  
Buyer arranges shipment and seller is responsible to deliver the goods to the carrier... responsibility ends there
    - CIF

Seller assumes responsibility for shipping the goods to the country of destination... responsible for delivery and insurance

- DDP  
One step further as seller does all of the above and pays the import duties
- Payment
  - The currency used to denominate the price and to make payment is important
  - Generally, seller does not mind in which currency the price is paid, so long as the currency is freely convertible meaning no restrictions such as in protectionist third world countries like Cuba
- Countertrade
  - **Countertrade** is a form of barter where a seller agrees to accept payment in the form of goods produced or acquired by the buyer
    - An example is for a corporation selling machinery to a firm in a developing country in return for a part of that firm's production as a price
- Licensing
  - You should only license someone in a foreign country if that country's government and courts have the integrity to protect your trademark
- Government Regulation of Trade
  - Export Promotion
    - Canadian embassy staff collect commercial information and disseminate it to Canadian businesses
    - Export Development Corporation is a crown corporation that facilitates and develops Canada's exports
      - 'Rock stars' of Canadian business who tour / party with other countries in order to open doors for everyone
    - International aid is essentially disguised bribery, but helps in dire situations
  - Import Duties / Tariffs
    - Setting of tariffs is no longer determined independently by governments, but is largely regulated by GATT, NAFTA, WTO
    - Various preferences are granted depending on who your friends with
    - Determining origins of goods becomes very important now since goods may be manufactured in one country from raw materials in another, and pass through a third party country before arriving
  - Import Restrictions / Quotas
    - Known as **non-tariff barriers**

- Generally, Canada has a relatively liberal policy towards imports from other countries and adheres to GATT... primarily put quotas on agriculture and textiles
    - Canada is especially good at quietly discriminating against foreign goods by use of French / English labeling requirements
  - Dumping and Subsidies
    - **Dumping** occurs where a firm sells goods abroad at prices lower than those at which similar goods sell in a domestic market
      - The firm uses profits on domestic sales to subsidize its exports and undercut competitors
    - **Subsidies** occur where the government provides special benefits to its exporters in order to assist them in exporting
      - Eg. Recent WTO conflict between Brazil and Canada over Bombardier vs. a Brazilian aerospace firm
- International Law of Trade
  - Intl. law of trade is based upon a great deal of reciprocity, where one country scratches another's back or vice versa
  - GATT and WTO
    - GATT was originally created after WWII, and is now superseded by the WTO in 1995
    - In addition to providing a forum for negotiations and for resolution of trade disputes, the GATT and WTO are in the process of harmonizing custom rules and reducing customs duties
      - Fundamental principle of WTO is non-discrimination whereby goods from all countries should be treated equally... everyone treated as a **most favoured nation**
      - **National treatment** is when foreign investment should be treated just like any other Canadian company, enjoy full legal protection and protection against arbitrary or discriminatory measures that interfere with its management
    - Prohibits quotas and export subsidies, and anti-dumping duties
  - NAFTA
    - NAFTA like the EU is an exception to this principle of non-discrimination within custom duties may be eliminated entirely
  - Note that NAFTA and GATT are both treaties between governments, thus private citizens are not privy to these contracts...
    - Require their respective governments to approach the panels of NAFTA and WTO on their behalf

## Foreign Investment

- Foreign Direct Investment (FDI) occurs as part of active business operations, may involve acquisition of property (factory or hotel) or a substantial part of shares in a hosting country
- Forms of Foreign Investment
  - **Branches** are when an investor carries on business in a host country in its own name, with the assets of the branch owned by the foreign investor
  - **Subsidiaries** are a separate corporation incorporated in a host country, while the parent company owns the shares in the subsidiary, it does not own the assets
  - **Joint ventures** are formed by two or more parties, at least one of which is from the host country
- Government Regulation of Foreign Investment
  - Firms wishing to invest and carry on business in another country must comply with the laws of that country
    - Consider this, a firm attempting to open operations in Cambridge must satisfy requirements set out by:
      - *City of Cambridge*
      - *Region of Waterloo*
      - *Government of Ontario*
      - *Federal Government of Canada*
    - The more industrialized a country is, the more it will be regionalized in such a manner
  - If an investor wishes to incorporate a subsidiary in Canada it may be required to have a certain number of directors who are residents in Canada
  - All acquisitions or investments in cultural sectors such as the media are subject to review
    - Designed to protect dilution of Canadian culture
    - Eg. CANCON on radio's and TV are an exception to NAFTA
  - Governments can impose **performance requirements** when granting approval to foreign investment such as the use of local materials... not legal under NAFTA

### Legislation

- Treatises between governments GATT, NAFTA
- Investment Canada Act (FDI requirements), Canada Customs Act (import duties)
- Copyright Act, Patent Act

### Resolution of International Disputes

- Disputes may arise due to conflicts of public law between governments and importers, or questions of international public law may be arise if a country is accused of being in breach of treaty obligations
- Court Proceedings
  - Jurisdiction
    - Courts insist that the issue must have some 'connecting factor' with the country that seeks to bring the action

- As a general rule, courts of a country consider that they are entitled to assert jurisdiction in circumstances when:
      - Torts, contracts or damages were sustained in an area
      - Contract stipulated that it should be governed by that area
    - Courts may decline jurisdiction if it considers that there is some forum that is more appropriate or more closely connected, known as the *forum non conveniens* principle
  
- Standing
  - Although parties need not be residents of a country to have access to its courts there are some exceptions
  - Foreign corporations who are not licensed in Canada cannot be a plaintiff in Canadian courts
  - Difficult to prosecute absent defendants
  
- Choice of Law
  - Proper law of the contract
  
- Enforcement
  - If the defendant has assets within the jurisdiction, judgment may be levied against those assets, of little effect if losing party has no assets in that region
  
- Commercial Arbitration
  - Mediation is lovey-dovey, arbitration is mandatory to follow
  - Often, rather than risk a loud public dispute, parties consider it preferable to provide for a hearing before a ‘neutral’ body
  - Why Go for this?
    - You get to pick the arbitrators, potentially more neutral
    - Arbitrators often have more experience in international law than public courts
    - Non-public nature, less issues of confidentiality with respect to trade secrets that may become divulged
    - Lower costs and often speedier
    - Often consensual, as a result of contract which means parties are more likely to pay up
  
- International Government Disputes
  - Again, private parties are not privy to treaties, must approach their governments to go to WTO on their behalf
    - Consultations can occur, in which diplomatic solutions occur
    - Also Panels to adjudicate disputes

## READING NOTES

### CHAPTER 34 – Electronic Commerce

**Increasingly business is being conducted through the internet and through other electronic means. This creates problems of applying existing legal rules (tort, contract, privacy) and principles to new situations, also raises entirely new legal issues.**

#### What is e-commerce?

- Broadly defined as the “delivery of info, products, services or payments by phone, computer, or other automated media.”... not just the internet
  - Electronic retailing eg. real goods, electronic goods, services (both)
  - Business to business (B2B) transactions account for 85% of all e-commerce

#### Establishing an Online Business

- 1) Negotiate a website development agreement
  - 2) Website hosting agreement with ISP
    - ISP thus has liability for interruption of service if ‘the system’ goes down
  - 3) Negotiate an Internet access agreement
  - 4) Register a domain name (trademark conflicts often erupt here)
- Precautions when establishing an E-commerce Site
    - Become familiar with the laws of other countries whom you do business with
    - Customize contract terms for each country
    - Design the website so that the terms of the contract are brought to the attention before any contract is concluded (click wrap / web wrap)
    - State which law and jurisdiction applies to any contracts formed
    - Don’t give customers freedom to amend terms, just have yes / no, accept decline
    - Maintain full back-ups of all your contracts made online

#### E-Commerce and the Law

- Contract Law
  - Formation of Contracts
    - Has any contract been made when you visit a website and add items to shopping cart etc., if so, when?
    - It has become common practice to use **web-wrap agreements** or click-wrap agreements which set out contractual terms and require the consumer to click on the appropriate box to indicate agreement with terms of sale
      - Need to be designed with care to ensure all intended conditions are brought to the attention of potential customers

- The Law Governing the Contract
  - Proper law of contract
  - Law of contract can affect:
    - Capacity of parties to contract, legality of contract, formal requirements of the contract (Statute of Frauds – in writing), applicability of consumer protection (CPA)
  - Many of these problems may be avoided by a clear statement of the law that is intended to govern, won't always protect merchant though... eg. CPA may still apply although contract states otherwise
    - Eg. CPA in Ontario applies to any contract when the customer is in Ontario. Thus, Ontario is attempting to regulate what US businesses can do online when dealing with Ontario such as a 10 day cooling off period, browse wrap agreements
- Proof
  - Important for corporations doing e-business to retain evidence such as e-mails or confirmations
- Amending Contracts
  - *Kanitz v. Rogers Cable*
    - Rogers Cable stated that “all we have to do to amend our contract is to post a notice on our website”, court upheld this
    - Thus, it is the consumers responsibility to periodically check-in at websites and look for postings
- **E-Commerce Act (2000, Ontario)** addresses many of these issues:
  - **S. 5 & 6** – Legal requirement for writing
    - Requirement is satisfied so long as electronic copies are made accessible and usable for future reference / retainable by customer
  - **S. 11** – Legal requirement for Signatures
    - Satisfied by an electronic signature meeting particular requirements of jurisdiction
  - **S.19** – Formation and acceptance of Contract
    - Can be expressed by electronic documents or by acts such as clicking on an appropriate icon or by literally speaking (phone)
  - **S.3** – Legal Recognition of Contracts
    - Contracts aren't unenforceable for reason of being electronic

- Tort Issues
  - Tort most closely associated with the internet is defamation, which is usually personal rather than commercial
    - Eg. If you post comments online on a blog, the number of people you owe a duty of care to gets huge
  - Fraud Issues
    - Internet often robs you of the ability to actually see products, touch them
  - Privacy Issues
    - Duty to protect information from hackers or people who would steal directly from your hard-drive
    - Addressed more specifically with PIPEDA

## Intellectual Property

- Copyright
  - Expression of idea, 'work' of art, essay, music
  - Concept underlying copyright is that the advancement of society comes from the building of ideas, develop by sharing knowledge
    - Yet, there is no incentive to generate new works if they are freely shared immediately... Can't feed your family with good ideas
  - Copyright duration is often the life of the person + 50 yrs.
  - Don't need to officially register things for them to be copyright, just need to put the © on the work
  - Plagiarism vs. Copyright Infringement
    - Plagiarism is when you claim someone else's works as your own
      - Duty to give credit tot the author
    - Copyright infringement is when you acknowledge the author of the work but make copies or use too much of the authors work without getting their permission first
  - Internet users have embraced the view that information wants to be free, that is for personal use... but if material is posted on the internet for commercial purposes or in a manner offensive to the copyright owner, legal proceedings are more likely
  - *BMG vs. Jane Doe*
    - Music labels don't know exactly who's illegally downloading in Canada
    - When they approached ISPs for users, the ISPs refused to divulge customer information because of PIPEDA
      - Without people to charge the court cases couldn't proceed... no defendants!
    - Thus, peer to peer downloading (Kazaa) is allowable as its considered the same as borrowing a book from a friend, but a pool to peer (downloading from website inventory) is still illegal in Canada

- This marks a distinction with the US whose ISP providers readily gave up the names of illegal music downloaders
- Trademark
  - Think brands, brand recognition and the goodwill of those brands
  - Once a trademark is claimed as your own by registering it (®<sub>TM</sub>) it's yours to renew every 15 yrs.
    - Eg. MacDonalds is zealous about suing anyone with 'Mac' in their name or anything to do with golden arches
  - Trademarks may be infringed by passing off, or any use of a confusingly similar mark, whether or not intentional
    - “**Passing off**” is a tort liability when a company misrepresents itself in such a way as to deceive the public into believing that they are another business (feed off someone else's goodwill)
  - Main problem is that the internet greatly increases the probability of infringements as well as their detection
    - Now it becomes a problem if there are three small-town florists with the same name if they all sell goods online
  - Domain names
    - Trademark infringement often occurs as a result of the similarity of domain names
    - Registering domain names is cheap, so there's a strong likelihood of confusingly similar names
      - Become common practice for corporations to now buy up domain names resembling their name in any way
    - While a domain name doesn't constitute a trademark itself, it is common for the domain name to represent a trademark
    - Individuals will often use confusingly similar names in hopes of drawing people accidentally so that they get more hits, and thus advertising dollars
      - eg. [www.fatalbert.com](http://www.fatalbert.com) which was a porn site
    - **Cybersquatting** is when a person registers a domain name containing a well known brand name, hoping that they will later be forced to purchase the domain from them
      - It is often more practical for companies to just pay the fee rather than spend the time and effort to win an injunction

### Privacy Issues

- Electronic commerce greatly increases the amount of information that is made available and disseminated
- Federal government has initiated **PIPEDA Act** which is overseen by the Privacy Commissioner
  - Personal Information Protection and Electronic Documents Act imposes restrictions on the use, and misuse of personal information
  - Will eventually apply to every organization that collects data, but textbook states it currently only applies to federally regulated business' such as banks and airlines

- Most important feature is the requirement to obtain an individual's consent to use or disclose information that is collected
- Business' should now make sure to have someone in charge of privacy and ensuring compliance
- One gap in PIPEDA appears to be that the act doesn't require you to advise people when security is breached
  - Eg. Scotia bank repeatedly was sending faxes with sensitive customer information to a scrap yard in Georgia with a similar number to their head office
    - Scotia bank knew that this had happened but was under no duty nor did it take action to notify the affected individuals until the breach of security become public knowledge on the news
- As mentioned before there is now a tort liability for inadequate security of information from hackers / misuse

### **International Business Issues**

- Too often you don't know the jurisdiction you are doing business in
  - Which laws apply?
  - How do I collect?
    - If the person your suing has no assets in the jurisdiction that the court proceeds within, how do you get your damages!?
  - Unless specified in a contract, as a general rule the courts of most countries accept jurisdiction if the defendant is domiciled there
    - Problem is that an electronic retailer could find itself to be sued anywhere in the world, unless it stated that its offer to sell was restricted to certain countries / regions
    - Why? To do business internationally the retailer would have to comply with the consumer laws of multiple jurisdictions which may regard above disclaimers as ineffective