**Law Review**

**1) Discharge of Contracts**  
- the cancellation of the obligation of a contract (makes K null and inoperative)

a) Discharge by Performance  
b) Discharge by Agreement   
c) Discharge by Frustration  
d) Discharge by Operation of Law

**a) Discharge by Performance**  
- most common; both parties have performed their obligations under the contract satisfactorily

Tender of Performance – one party may attempt to perform, but the other party refuses to accept the performance; the attempt to perform is called a *tender of performance* whether accepted or rejected

**b) Discharge by Agreement**  
- parties agree not to proceed with the performance of a K already in existence

**Waiver** – an agreement not to proceed with the performance of a K already in existence  
- can only occur when neither party has fully performed  
- parties may agree between themselves not to perform their contract and discharge it  
- consideration becomes an issue where one party has performed

**Substituted Agreement** – out of court where one party offers to pay money in lieu of performance  
- could be ***novation*** where old K is discharged and a new K is entered in its place

Contract could provide for its own dissolution:  
a) **Condition Precedent**   
- neither party can perform unless a certain future event occurs   
- not free to withdraw from their promises until the condition precedent becomes impossible to fulfill

b) **Condition Subsequent**  
- an uncertain event that brings a promisor’s liability to an end if it happens  
- ex. an “act of god” – natural disaster – may be a condition subsequent if a shipment is destroyed

c) **Option to Terminate**  
- allows for termination of the K on providing notice to the other party  
- K may have a term which gives one party or both the option of bringing the K to an end before its performance has been completed, usually by giving notice

**c) Discharge by Frustration**  
**Doctrine of Frustration** - law excuses one party from performance when external causes have made performance radically different from that contemplated by the parties (ex. singer dies before a concert)

- must be unforeseen, outside of parties control, occur AFTER the agreement was made, and make performance impossible/purposeless

- if circumstances have changed and performance is now more difficult it is NOT frustration

**Self-Induced Frustration** – a party wilfully disables itself from performing a K in order to claim that the contract has been frustrated  
- this is NOT frustration – it is a breach of K

**d) Discharge by Operation of Law**  
- bankrupt debtors can be discharged from contractual liabilities

**2) Breach of Contract**  
- may discharge the contract, but not always  
- minor/major breaches

**Minor Breach**: a breach of a non-essential term of the K or an essential term in a minor respect  
**Major Breach**: a breach of the whole K or an essential term; purpose of the K is defeated

**Condition** – an essential term of the K  
**Warranty** – a non-essential term of the K

- breach of a condition allows the non-breaching party to opt for discharge of the K and the breaching party remains bound  
- breach of a warranty, both parties remain bound to the K, but the non-breaching party can sue for damages where it has incurred a loss

**A breach occurs by:**  
a) Express Repudiation - declaration of intention not to perform  
b) Rendering Performance impossible - self induced frustration  
c) Failure of Perform - can only happen when performance is due

**Doctrine of Substantial Performance** – performance that does not comply in some minor way with the requirements of the contract  
 - prevents the non-breaching party from avoiding their performance (must still pay if just a minor shipping error)

**Exemption Clauses** – clause that exempts a party from liability for failing to perform some or all of its  
 contractual obligations

**Defences to Exemption Clauses**:  
- inadequate notice  
- misrepresentation

**3) Remedies for Breach of Contract**

**Types of Remedies:**  
a) Damages  
 - to place the injured party in their pre-contractual position  
 - must be because of the breach; is the damage foreseeable?  
b) Equitable Remedies  
c) Quantum Meruit

**Mitigation** – an injured party can recover only for the losses resulting from the breach that could not be reasonably avoided. Damage arising from breach of contract must flow naturally from the breach.

**Types of Damages:**

|  |  |
| --- | --- |
| Expectation Damages | Expected profits from time of K formation |
| Opportunity Cost | Lost chance of making a similar contract with a different promisor |
| Consequential Damages | Reasonably foreseeable damages from the breach - ie. failure to repair heating system could cancel a concert and also the repairman would be liable to damage to building if pipes were to freeze |
| General Damages | Unquantifiable (pain/suffering etc.) |
| Reliance Damages | Damages for wasted effort |
| Liquidated Damages | An amount agreed to be paid in damages by a party to a contract if it should commit a breach |
| Nominal Damages | If loss sustained is negligible |

**Types of Equitable Remedies**:   
 (non-monetary remedies given when damages alone will not adequately compensate for a loss)  
a) **Specific Performance**  
- an order requiring a defendant to do a specific act (complete a transaction)  
- only for unique properties  
  
b) **Injunctions**  
- court order restraining a party from acting in a particular manner; such as committing a breach of K

**Quantum Meruit** – the amount a person merits to be paid for goods or services provided to the person requesting them

**Rescission** – setting aside K in order to put parties as close as possible to their pre-contractual positions

An aggrieved party must choose between an action for damages to obtain the benefit of the contract and one for rescission (cannot have both). Rescission often applies when durable goods fail to perform as required. If rescission is used, they may be able to get more money from the opportunity cost than damages would provide.

If you win your case, the parties become a judgement creditor and a judgement debtor. To enforce the judgement, the sheriff’s office could be used and a garnishment order could access bank accounts and wages. The payments are made to the Sheriff and the Sheriff distributes the money to creditors.

**Garnishee Order** – an order requiring the debtor’s employer to retain a portion of the debtor’s wages each payday and surrender the sum to the creditor

**Levy Execution** – seize and sell a debtor’s assets or arrange for a sale of his lands

**4) Bailments**  
- a transfer of possession of personal property *without* a transfer of ownership

**Bailor** – owner of goods  
**Bailee** – party accepting possession of goods

**Standard of Care**:  
Lowest – benefits the bailor  
Middle – bailment for value  
Highest – benefits the bailee

**Remedies:**  
Liens – gives the right to keep the good in their possession  
Right of Sale – provides the bailee/lienholder the right to sell the goods to cover costs  
 - only available by statute or by contract; not a common law right

**To obtain Right of Sale:**  
a) Period of Time  
b) Notice  
c) Advertise Sale  
d) Public Auction

**Special Types of Bailment**  
a) Storage and Safekeeping  
- storer can only obtain right to lien through statute or by contracting for the right

b) Repairers  
- failure on the part of the repairer to perform is breach of contract (normal contract remedies apply)  
- common law right to lien; only a statutory right to sell if payments are 3 months past due

c) Transportation  
- gratuitous carrier, private carrier, and common carrier (highest standard of care)  
- for common carrier: undertakes to indemnify shipper against loss regardless of fault  
- shipper must either demonstrate goods were delivered in good condition or the carrier failed to deliver goods/delivered them in bad condition

**Defences available to Common Carrier:** (a carrier who publicly states they are transporting for reward)  
1) An Act of God (but not fire)  
2) Inherent vice in the goods  
3) Default by shipper  
 - if shipper defaults, common carrier has the right of lien by common law but a private carrier has no  
 right of lien by common law or statute; can only obtain by K

**Innkeepers**  
Innkeepers must keep the goods of patrons safe and have an additional duty to protect the goods from loss and theft. Must show the guest was negligent to avoid liability. They are entitled to common law right of lien but right to sell is statutory.

**Pledge/Pawn** – a bailment of personal property as security for the repayment of a loan where possession passes to the bailee.

**Pledge:**  
Creditor is the pledgee, and the borrower is the pledgor. Pledgee obtains a lien on property and right to sell to recover debt and costs. Surplus funds belong to the pledgor (borrower).

**Pawn:**  
Pawnbroker obtains title to goods pledged. Must send notice of last opportunity to pledgor. Must advertise the final notice to pledgor in newspaper. However, pawnbroker then obtains absolute ownership over the goods.

**5) Agency**

**Agency** Relationship - the agent acts on behalf of the principal to bring 3rd parties into a contractual relationship with the principal

**Dependent Agent** – an agent who acts exclusively for a single principal  
**Independent Agent** – an agent who carries on an independent business for several principals

There is a contractual relationship between the principal and agent. There is a contractual relationship between the principal and 3rd party contractor. There is **no** contractual relationship between the agent and the 3rd party.

**Agency Agreement** – the K between principal and agent whereby the agent undertakes to act on behalf  
 of the principal  
 - the K should set out limits to Agent’s authority (whether express or implied)

**Power of Attorney** – a type of agency agreement authorizing the agent to sign documents on behalf of the principal (commonly used)

**Ratification** – where an agent exceeds his/her authority, principal must ratify the contract  
 - this will establish the contract as valid

The breach of any term in the agency agreement gives the aggrieved party the usual remedies against the other for breach of contract. An agent owes a duty of care to her principal, even when she acts without payment. Because of the high degree of confidence and trust implicit in an agency relationship, the general rule is that an agent cannot delegate her duties without the principal’s agreement.

A fiduciary relationships exists between principal and agent. The duty of good faith requires that an agent inform the principal of any information coming to her attention that might influence the principal’s decisions. If she has been authorized to buy property at a certain price and learns that it can be obtained for less, she is bound to inform the principal. If she buys at a lower price, she must pass the savings to the principal.

**Actual Authority** – the authority given to the agent by the principal

**Apparent Authority** – authority that is not real, but acquired from a past manner of transacting business  
 - it is the authority that the 3rd party is entitled to assume that the agent possesses  
 - **test**: should the 3rd party have been aware of the agent’s lack of authority or at   
 least been suspicious? Is it reasonable to assume from the type of business that the agent is engaged in, that the agent had the authority in question?

**Holding Out** – representing by words/conduct that a person is one’s agent or has a particular authority  
 - making it look like they have authority

**Duties of agent to principal:**  
- just like a K, binding on both parties  
- principal can sue for breach of K where agent acts outside authority  
- agent has the duty to keep principal informed (if anything occurs, principal should be aware)  
- duty of care: at minimum reasonable care, diligence and skill  
- standard of care depends on agent’s own knowledge and skill and the nature of the task  
- generally there is also a duty of personal performance; but can sometimes use a sub-agent  
- duty of good faith: fiduciary relationship – agent must put principal’s interests ahead of their own  
- agent must disclose all relevant information

If an agent were to act for two principals:  
- there is a conflict of interest and a breach of duty of good faith  
- must obtain consent from both parties but it is never a wise decision

**Duties of principal to agent:**  
- remuneration – obligation to pay as per contract (usually on commission)  
- expenses: implied term that the principal will cover the reasonable expenses of the agent when acting in his/her real authority

**Rights and Liabilities of Principal and Agent:**

|  |  |
| --- | --- |
| Principal alone is liable | - agent acting with real or apparent authority - agent must make clear to 3rd party they are acting for a principal (even if an undisclosed principal) - payment or delivery must be made to the 3rd party and not the agent |
| Agent alone is liable | - agent representing themselves to be the principal - the principal has no rights or liabilities under the K |
| Either principal or agent is liable | - agent didn’t disclose status as an agent; 3rd party can sue either the agent or the principal - if agent is sued, the principal has no liability - if existence of principal becomes apparent, 3rd party can have the action discontinued against the agent and brought against the principal instead |

**Rights of the Undisclosed Principal:**  
- right to enforce the K against 3rd party where they can show that the K was made with his authority  
- the authority must be real and not apparent  
- exception: the undisclosed principal cannot enforce a K that is personal in nature  
- 3rd party cannot hold undisclosed principal liable in a situation where the agent acted without real authority

**Fraudulent Misrepresentation** (Deceit) – 3rd party can rescind K and sue both agent and principal for the  
 tort of deceit

**Breach of Warranty of Authority** – 3rd party can sue if agent has no real or apparent authority (no K)  
 - 3rd party will have an action in deceit against a fraudulent agent (no K)  
 - 3rd party will have an action in negligent misrepresentation where agent negligently   
 misrepresents his/her authority (no K)  
 - if agent innocently exceeds authority there is no contract

**Warranty of Authority** – where a person purports to act as an agent represents that they have the authority to contract on behalf of a principal

**Agents authority is terminated:**  
- at the end of a time specified in the agency K  
- at completion of the particular project  
- upon notice by either party  
- upon death/insanity of either principal or agent  
- upon bankruptcy of principal  
- upon a frustrating event

**6) Employment Law**

A contract between parties = employment agreement

Employment Law: a contractual relationship whereby one party, the employer, is authorized to direct and control the work of another party, the employee.

**Differences between employment and an independent contractor:**  
- employment has a degree of supervision and control over worker and benefits  
- independent contractor owns their own tools, there is exclusivity, and risk in profit/loss

**Torts**: **Contracts**:  
- vicarious liability - vicarious performance  
- negligent hiring  
- wrongful referral

**Duties of Employee**:  
- duty to obey, exercise skill and care, and to have good faith

**Duties of Employer**:  
- duty to pay and provide a safe workplace

Employment contracts are discharged by way of notice (notice=time=$$). Some factors that determine the reasonable notice for termination include trade practice, duration of employment, intention at time of K formation, and level of position.

No notice is required if the work is unsafe or told to do something illegal.

**Dismissal for Cause** – dismissal without notice by the employer when the employee’s conduct amounts to a breach of the contract

**Dismissal for Cause**

1) **Misconduct** – doesn’t have to cause economic loss  
 - crimes – embezzlement/theft  
 - bad behaviour  
- employee can no longer be trusted; good faith and fidelity is gone

2) **Disobedience** – wilfully disobeying a reasonable and lawful request

3) **Incompetence** – need for implied or express term of competence  
 - express: stating in a resume that one possesses certain required skills  
 - implied: applying for a job that requires certain specific skills

4) **Illness** – not a breach of K; frustrating event

Misconduct, disobedience, and incompetence are breach of contracts. Illness discharges the contract by frustration.

**Employer’s Role with regards to Dismissal for Cause:**  
- need for warnings to employees  
- adequate training and assistance  
- document activities of both employer and employee

**Damages**  
- must show that the employer has broken the contract, as when it fails to give the employee the notice to which she is entitled  
- an employer often defends its actions either by claiming that the employee was dismissed for cause or that reasonable notice was given

**Wrongful Dismissal Defences for Employer:**  
a) Employee was *dismissed for cause*  
b) Adequate notice was provided  
 - length of service, availability of similar employment, experience, and training are all factors  
 considered by the court

Contract law is used to place the injured party in a pre-contractual agreement. A reasonable timeframe it required to fulfill this purpose. Once the court sets the reasonable notice period, they can determine the damages: (Rate of pay \* Benefits) \* Notice = $$$

Mitigation is also important:  
- must act reasonably to reduce losses; try to obtain reasonably comparable employment  
- damages will be reduced if there is a failure to mitigate  
- however, mental anguish (pain/suffering) could result in extra general damages

Reinstatement is an equitable remedy for wrongful dismissal.

**Pay Equity** – equal pay for equal work  
- law prohibits different levels of pay for essentially the same kind of work

**Comparative Value** – equal pay for work of equal value

**Workers’ Compensation**  
- no fault scheme (injured on the job); employers are required to pay into the fund  
- injured employee can apply to the fund except if it was the employee’s wilful misconduct that caused the injury (with the exception of death or permanent disability)

**Defences to Workers’ Compensation:**  
a) Contributory negligence  
b) Negligence from another employee  
c) Assumed risk

**7) Internal Affairs of a Corporation**

**Sole Proprietorship** – personally liable for the debts of the business  
**Partnership** – partners liable for debts personally unless limited partners (joint liability)  
**Corporation** – single entity, solely liable; investors liable up to their contribution

**Directors**  
- must act honestly/in good faith with a view to the best interest of the corporation (fiduciary)  
- must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (professional standard of care)  
- cannot be negligent, can rely on information provided to them as long as they are not wilfully blind  
- can be held personally liable if a director consents in situations of misconduct/negligence  
- can be held personally liable if they vote for a decision that is detrimental to the corporation and the corporation becomes insolvent

**Defences to Breach of Duty**  
a) **Due Diligence**  
 - acted diligently; establishing that an acceptable standard of care and skill was exercised

b) **Good Faith Reliance**  
 - reliance on audited financial statements is a defence to breach of fiduciary duty or duty of skill/care

**Fiduciary Duties**  
- must place corporation ahead of own interests and avoid conflicts of interest  
- must declare a conflict of interest and cannot vote on the matter  
- may not carry on business in competition with the corporation or intercept a corporate opportunity

**Breach of Fiduciary Duty**- held liable to corporation for loss sustained arising from breach  
- any property acquired by the director from the breach will be held in the name of the corporation  
- if involved in insider trading, the director is liable for any loss to corporation/profits earned

**Shareholder Rights**  
- right to vote at any of the meetings  
- right to receive any divided declared  
- right to receive remaining property on dissolution

**Voting is the passing/defeating of resolutions**  
Ordinary Resolution: requires a majority vote, ex. approval of any amendments, election of auditor etc.  
Special Resolution: requires a 2/3 majority, ex. approval of alterations to articles of incorporation

**a) Appraisal Remedy** – the right to have one’s shares bought by the corporation at a fair price  
- a minority shareholder who dissents on changes to the corporation has the right to have the corporation buy back their shares

**b) Derivative Action** – proceedings brought by one or more shareholders in the name of the corporation in respect of a wrong done to the corporation

**c) Winding Up** – dissolution for liquidation of a corporation  
- courts are often reluctant to do this if the corporation is viable and of a reasonable size (to protect stakeholders)

**d) Oppression Remedy** – statutory procedure allowing individual shareholders to seek a personal remedy if they have been treated unfairly  
- plaintiff must show that the action complained of has been oppressive or unfairly disregards the interests of the complainant  
- the remedy is usually to have the corporation buy back the complainant’s shares at FMV

**Shareholder Agreement** – an agreement between two or more shareholders that is distinct from the corporation’s charter and by-laws (may include terms such as right to employment)

**Unanimous Shareholder Agreement** – shareholder agreement to which ALL shareholders are parties

**8) External Responsibilities of a Corporation**

Corporation owes a duty to:  
- employees, creditors, investors, general public, environment

**Maintenance Test:** the need for maintaining capital in the corporation  
Corporation cannot declare a dividend where:  
a) the corporation is unable to pay the liabilities as they become due; and  
b) If the realizable value of the corporation’s assets would be less than the aggregate of its liabilities AND stated capital

**Civil Liability**  
Torts: Vicarious Liability  
Contracts: Breach of K, Rules of agency law

**Criminal Liability**  
Standard: beyond a reasonable doubt  
Actus Reus and/or Mens Rea must be present

“The Directing Mind” – any person who has policy making authority can be construed as the “directing mind” and can therefore fulfill the mens rea requirement for the corporation to be convicted

**Strict Liability** – an offence where there is a presumption of guilt unless the defendant can show they took reasonable care

**Problems in Punishment**  
a) Fines - tax write-off, increases costs to consumers  
b) Incarceration - can’t imprison the corporation, difficult to determine the person responsible (actus reas & mens rea) beyond a reasonable doubt

**Liability for Environmental Offences**  
Corporation must demonstrate due diligence:  
- effective system to prevent offences  
- regular monitoring of the system  
- implement improvements where ever identified  
- keep up to date on technological and scientific advancements

**Standard of Care of Directors and Officers for Environmental Offences**  
Directors and Officers are held to the higher standard of the specialized skill and knowledge in the area and if they don’t have this skill and knowledge, they must employ the necessary expertise.

**Prospectus** – document that a corporation is required to publish when inviting the public to subscribe for its securities  
- full description of the securities to be offered  
- nature of business carried on, directors’ information etc.

**9) International Law**

**Export Contracts** – additional parties to the contract include insurers, shippers and financiers  
- export houses are created to simplify these problems by providing specialized services such as dealing with money, insurance and shipping

**Proper Law of the Contract** – the law of the country or jurisdiction that will apply to the contract

If the contract does not state the Proper Law of the Contract, courts will look to surrounding circumstances and the intentions of the parties. Will also look at the system of law that is most closely connected to the contract.

**Import/Export Documentation**  
a) Bill of Lading - acknowledgement that goods have been delivered  
b) Certificate of Insurance - insuring goods against loss or damage  
c) Invoice - name/address of buyer and seller, date, details, price etc.

**Import/Export Financing**  
a) **Letters of Credit** – bank is financing the transaction for a fee  
b) **Collection Arrangements** – vendors would deposit documents with a bank who would pay vendor and collect later from purchaser for a premium

**Countertrade** – consideration for contract would be other goods; not currency

Foreign Investment  
**Passive Investment** – buying shares in foreign companies or foreign government bonds  
**Active Investment** – purchasing foreign property, setting up office in foreign country, joint ventures

Courts in different jurisdictions have different procedures. Something must be connected to the jurisdiction (ie. a tort committed in the jurisdiction).

Doctrine of **forum non conveniens** allows a court to decline jurisdiction where there is no real of substantial connection to that jurisdiction. A court may also decline jurisdiction where it believes another country/state/province will not recognize its judgement.

No obligation for one jurisdiction to recognize the judgement or another jurisdiction. Need to apply to the court in the jurisdiction where assets reside and request recognition.

**Alternative to court actions:**  
**Commercial Arbitration**  
- neutral, international third party set up to arbitrate disputes  
- often forms a term of the contract – binding arbitration  
- advantage: court will recognize an arbitrator’s judgement as it was previously agreed to by the parties that they would be bound by the decision  
- both parties must agree to arbitration to avoid going to court

**10) Electronic Commerce**

**E-Commerce** – the use of computer networks to facilitate transactions involving the production, distribution, sale and delivery of goods and services in the marketplace

**Web-Wrap Agreements** – a web site document setting out contractual terms, the acceptance of which is indicated by “clicking” on the appropriate icon  
- terms of the agreement must be clear to the potential customer  
- Internet contract = SFC; onerous terms must be brought to the attention of the customer

**Jurisdiction**  
- courts will set jurisdiction where the defendant resides, or where there is a “real and substantial connection” to the jurisdiction  
- where is the defendant located? How do you locate the assets of the defendant  
- how do you enforce a judgement against a defendant  
- Defamation: sue in the place where the tort was committed

Statute of Frauds applies:  
- electronic signatures are valid  
- electronic document = “writing”

**Tort Law**  
a) **Computer Malfunction – Negligence**  
- reliance on severs  
b) **Defamation**  
- to “publish” on the internet  
c) **Intellectual Property Infringements**  
- copyright/trademarks  
d) **Intellectual Property Rights**  
- abstract property rights owned be people who have the sole right to licence the use of the property  
e) **Copyright**  
- right to “copy” a literary or artistic work, lasts for life of author + 50 years  
- “Fair Dealing” is the reproduction for the purpose of criticism/private study (need to cite author)  
f) **Trademark**  
- a word/design used to identify the goods or services of a person/organization  
- registration of a trademark – good for 15 years and renewable ever 15 years  
- “Passing off” tort becomes an issue  
- Cybersquatting domain names is trademark infringement  
- Cybersquatting is illegal but usually cheaper to pay them off than to pay for the court costs