

Summary Notes

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Glossary

browsewrap agreement - an electronic contract covering access to and usage of a website's browsable material in which notice, actual or constructive, of terms must be given to the user and the user must consent

Clickwrap agreement - an electronic contract in which acceptance is signified by a party clicking a button which agrees to provided terms and conditions

anticipatory breach - an action which demonstrates one party's intention to not perform its contractual obligations

condition - a essential term on which a party can terminate the contract for any breach, irregardless of how serious the breach is

condition precedent - no contract will be enforceable until an event occurs

condition subsequent - the contract will end or be varied upon the happening of the nominated event

conditional sale - an immediate contract subject to condition subsequent which, when fulfilled, entitles parties to all benefits of the contract

consideration - a benefit which must be bargained for between the parties, and is the essential reason for a party entering into a contract

contingent condition - a condition which is outside the responsibility of either party and that neither party promises to ensure

dependent promise - a promise which becomes due for performance in the occurrence of a condition precedent

deviation rule - an exclusion clause does not apply if a carrier deviates from an agreed route

duress - wrongful pressure, involving unlawful acts, exerted upon a party in order to coerce that party into a contract that would not ordinarily or otherwise be entered

entire contract - a contract in which substantially completed performance is a condition precedent to recovery of the contract price

estoppel - the principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.

four corners rule - an exclusion clause does not apply where a bailee steps outside the 'four corners' of the contract

good faith - the parties to a contract will deal with each other honestly and fairly, so as to not destroy the right of the other party or parties to receive the benefits of the contract

Himalaya clause - a clause purporting to contract for oneself and as an agent for all employees and contractors

independent promise - a promise where the obligation to perform is not subject to the prior fulfillment of a condition precedent

intermediate term - a term on which a party may terminate the contract if the breach is sufficiently serious but may only claim damages for less serious breaches

invitation to treat - a legally meaningless concept in which a party invites another to make an offer

irrevocable offer - a sale offer that includes the offeror's commitment to keep it open for a stated period, characterised by the benefits of consideration; essentially creating two contracts

misrepresentation - the giving of false information on one or more provisions in a contract by one party to another to induce acceptance of the contract

novation - the process by which a contract is terminated and substituted by a new contract generally in exactly the same terms

offer - an expression of willingness to bound immediately on certain terms without further negotiation

option - a promise founded on valuable consideration to sell land on stated terms within a given time

options contract - a type of contract that protects an offeree from an offeror's ability to revoke their offer to engage in a contract

polity - a form or process of civil government or constitution

privity - a contract cannot confer rights or impose obligations upon any person who is not a party to the contract

puff - extravagant claims made by sellers in order to attract buyers which no reasonable person would believe to be a statement of fact

quantum meruit - 'what one has earned'; reasonable remuneration; a reasonable sum of money to be paid for services rendered or work done when the amount due is not stipulated in a legally enforceable contract

repudiation - one party refuses to perform an obligation owed to the other party under the contract

res judicata - a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties

severable contract - a contract in which payment obligations are apportioned to performance

unconscionable conduct - the party is subject to a special disability, known by the other party, which seriously impairs their ability to make judgements to their own self interest

undue influence - inequality of bargaining power between parties allows the stronger party to take advantage of the weaker party, vitiating their consent as they are unable to freely exercise free will

warranty - an inessential term on which a party cannot terminate the contract for any breach, but may claim damages

Principles of Contract Law

- Any person with the capacity to make a contract can bind themselves to it
- Doctrine of privity - only the parties which enter a contract can be bound to it and invoke its detriments and/or benefits
- Doctrine of consideration - every contract must be supported by some form of benefit which is gained by both parties
- Breaches of contract result in legal consequences
 - Damages, specific performance, termination
- All contracts are discharged
 - By performance - both parties fulfill terms
 - Termination - for a serious breach of contract
 - Agreement - both parties agree to end the contract despite performances not being completely fulfilled by one or both parties
 - Frustration - a unforeseeable change in conditions occur which causes a dramatic change in the provisions of the contract

Unilateral v Bilateral Agreements

- Unilateral - an executed agreement in which the contract comes into existence when one party has completely performed their obligation and, hence, accepts through conduct
Reward case - lost dog or information of missing persons
- Bilateral - an executory agreement in which the contract comes into existence when both parties exchange promises

Theories of Contract Formation

- Will theory - a contract emerges out of the free will and intention of autonomous parties to enter a binding deal
- Bargain theory - the contract is a bargain for an exchange between autonomous parties
- Promise theory - a contract is a promise and promises should be kept as their breach can cause loss beyond disappointment
- Reasonable expectations theory - parties have an obligation to perform a contract on the reasonable expectations induced by a promise and the disappointment of those obligations by breach

- Reliance theory - a contract arises whenever a promisee has relied upon a promise which would cause detriment were it not kept

Modern theories of contract law

- Realist view - in practice, the courts focus on policy objectives to decide in whose favour a legal rule should be applied
- Critical legal studies approach - contract law is itself indeterminate and used to legitimise both the system and the decisions of those who wield power
- Contract as promise thesis - the promise principle is the basis of contract enforcement

Classical Contract Theory

- Under this theory, a contract is a bilateral agreement between two parties, characterised by the exchange of promises, a clear offer and acceptance and the intention of creating a binding deal
- Based on four suppositions
 - Relies on intention over conduct
 - The exchange of promises creates a contract before any actions have been performed
 - Executory agreements create contracts
 - We rely on executory agreements because of reasonable expectation, on principle that promissory agreements invite reliance, as a deliberate exercise in risk allocation, and because of the morals of promises
 - Has an objective existence beyond the parties of the contract
 - The function of the courts is to enforce contracts
 - Unitary theory - a single model of contracts exists
 - Little content but many principles must be followed in the creation of a contract
 - All contracts go through a series of stages
Negotiation → formation → performance → discharge
- Classical contract theory is not robust for modern law
 - The classical theory does not reflect how most transactions occur
 - Standard form contracts - contract law assumes parties freely consent to their bargains, but many standard form contracts, such as mobile phone and broadband services, involve no negotiation over bargains by one party
 - Machine rule contracts - contracts involving the exchange of benefits managed by one or both artificial (machine/computer) parties, confiscating the autonomy and *consensus ad idem* required under the classical model of contracts
 - Legislatively required contracts - contracts that require acceptance by law, confiscating autonomy and free will
 - Notice and construction notice - contracts which parties, often mass consumers, have entered to, agreeing to terms that are not aware of or do not understand, confiscating the elements of agreement and certainty
 - Should be based on reasonable reliance, reciprocal benefits, and voluntary action of parties (will theory)

Objective theory of contract law

- Contracts are not interested in subjective intentions but, rather, what an objective and reasonable third party bystander would understand in the mutual exchange of promises
 - Reasonable expectations
- Promotes certainty, predictability, justice, equality, and efficiency in the resolution of contractual disputes
- Promotes good faith
- Limited in the modern era
 - Privity
 - Consideration