Introduction to American Contracts

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Contracts

- Formation
  - offer & acceptance
  - capacity
  - consideration
- Performance
  - Condition
  - Discharge
  - Breach
- Remedies
  - Termination
  - Damages
  - Injunctive Relief v. enjoin

Terms

- Words – phrase – clause – sentence– subparagraph– paragraph– section – article –chapter cf. "provisions"
- Life of a Contract: execution/entry/signing (formation)– effective date – performance – cancellation (rescission)/termination – expiration
- Termination = termination + expiration + cancellation
- Termination = termination for cause + termination at will
- cancellation (rescission) vs. other terminations – return to pre-signing?
- expiration vs. other terminations

Contracts – Formation 1

- Offer & acceptance: mirror rule cf. "인지상정" "1줄만 바꿔도 모두 바꾸어야 할 수 있음" e.g. "purchase order", "pro forma invoice", "offer sheet"; e.g. signing one's own copy, okay?
- Consideration: "no gift contract" cf. promissory estoppel

Contracts – Formation 2

- Capacity of Offeror and Offeree
  - Express authority **e.g. anyone can go to the signing ceremony!!!**
  - Implied authority **e.g. buying a chair for the company**
  - Apparent authority – EA, IA가 없어도 위임이 있는 것으로 간주될 수도 있음. reasonable for 3rd party to rely upon? – EA, IA는 증명 불가능하므로 AA에 의지해야 함.
  - e.g. sales manager signing technology transfer agreement → no apparent authority → ask for replacement

Contracts – Performance 1

- Conditions: If not fulfilled, CANCELLATION
  - Condition Precedent to EFFECTIVE DATE: e.g. "c.p. to EFFECTIVE DATE is delivery to me"; 또는 최후서명 주장

  - Condition Subsequent to EFFECTIVE DATE: e.g. **"The effect of this Kn is subject to a condition subsequent that G approves it."**

  - CP와 CS의 선택의 차이: 서명해놓고 cp 충족되기 전에는 계약이 없는 것인가? 없다. 서명 cp 충족 전 부인을 막기 위해서는 condition subsequent를 달 것.
  - Condition Precedent/subsequent to PERFORMANCE : 진정한 Condition은 아니고 계약의 진행순서일 뿐임. e.8g., "c.p. to purchaser's obligations is delivery of financial statements. . . " in a share purchase agreement.

Contracts – Performance 2

- Discharge: (1) CANCELLATION if occurring before PERFORMANCE. (2) TERMINATION (and partial cancellation) if occurring during PERFORMANCE.→ 효과도 계약조항으로 변경가능. e.g. Suspension했다가 90일 복구 안되면 cancellation
  - "Impossibility", "Impracticability", "Frustration": force majeure 없이도 discharge 효과를 내는 원칙들 →F.M.조항으로 더욱 확실히 할 수 있음.
  - Force majeure의 내용? No general rule: Need to state each of FM conditions. Except 지진 홍수 (force majeure의 기본 의미) 와 act of Government (민법상 불법계약 원칙)는 포함.

Contracts – Performance 3

- Breach: If condition fulfilled and discharge did not occur, Kn MUST be performed. If not, BREACH.
  - Concepts limiting breach: (1) time to cure (contractual) (2) divisible contract (3) de minimus or material breach (계약서에 명시 없이도 적용가능한 원칙들→ 시간엄수조건 "Time is of essence."

Contracts – Remedies 1

- Contract breached → Remedies
  - Termination: Who terminated correctly? ("A wrongful termination is a breach of contract.)
  - Damages:
    - Liquidated damages – difference from "penalty" – actual damages not easily ascertainable; reasonable relationship to actual damages
    - Consequential damages – contemplated at the time of formation of the contract – Hadley v. Baxendale
    - Special damages (= "specifiable damages" such as medical bills, loss of contract(=value of contract), etc.) vs. general damages – most contract damages are special damages

Contracts – Remedies 2

- Injunctive relief –
  - Difference b/w law & equity → preference for damages vs. negative injunction vs. affirmative relief (e.g. applied to contracts = specific performance) [국제집행력도 위의 순서]
  - Additional proof for injunction: inadequacy of $ damages
  - Why go for injunction? Contempt of court.
  - waiver of injunctive relief – usually requested and obtained by the big Licensees to the Licensor
  - Waiver of defense to injunctive relief – usually requested and obtained by the big Licensors to the Licensee

Third Party Issues

- Intended beneficiary: A-B계약위반에 대해 C가 소송제기할 수 있는가? C의 인지 요건
- Assignment: 일반적으로 통지만으로 okay. "불리한 변화(detrimental change)"가 있으면 동의 필요.
- Delegation: 원래 당사자의 의무를 위임
- Novation