Major Topics:

Personal property

Sale of Goods

Agency

Credit and Security

Personal property

Meaning: a right over something, 1. it must be definable, identifiable by third parties.2 . capable in its nature of assumption by third parties. 3. Have some degree of permanence or stability.

Types:

1. Chose(latin: thing) in possession – tangibles e.g. goods

2. Chose in action – intangibles e.g. debts, insurance.

Pure intangibles.

Documentary intangibles. E.g. bill of lading

3. Digital assets?(grey color, cuz crypto doesn’t transfer in the way as Chose in action)

Personal rights(in personam) – claim against the person, no delivery of identified asset.

Real rights(in rem) applies only on chose in possession–

Ownership

(legal) Possession

Real security

Ownership

Relative when someone else come up and compete the ownership with you.

Indefeasible title to the absolute(or greatest) interest in the personal property

Bundle of rights- right to possession, right to use or manage, right to alienate(sell), dispose or destroy, right to income

Residual rights in the property after granting lessor interests.

Possession

Exercise of control

The Tubantia(No.2)[1924] P78 - shipwreck

Intention to possess

Wilson v Lombank Ltd [1963] 1 WLR 1294

Car left ar garage for repair by buyer

Costello v Chief Constable of Derbyshire [2001] EWCA Civ 281

Stolen car kept by police

Constructive possession

Bailment – transfer of possession by a party(bailor) to another party(bailee) for a specific purpose and in accordance with instructions of bailor.

Requires consent of bailee

Bailee owes duty of care to the bailor

Attornment – a process whereby constructive possession is passed from one person to another.

**Chose in Action**

**Assignment**

“Immediate transfer of an existing proprietary right, vested or contingent, from assignor to assignee” (Norman v Federal Commissioner of Taxation (1963 109 CLR 9)

Does not require consent of original debtor

To be distinguished from ‘novation’ which replaces old contract with a new one

Make a new contract between the debtor and the assignee.

What can or cannot be assigned:

Bare right to sue(c.f. judgement debt can be assigned).

Personal agreement (e.g. employment agreement) -- slavery

Existing(yes) vs future(no) chose in action

Benefit(yes) vs burden(no, legal obligation to perform)

S9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap.23) (‘LARCO’)

“Any absolute(whole debt) assignment, by writing under the hand of the assignor (not purporting to be by way of charge only, only the assignor has to sign), of any debt or other legal chose in action, of which express notice in writing has been given to the debtor(assignor or assignee can both give notice)… shall be and be deemed to have been effectual in law (subject to all equities) … to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…”

**Equitable Assignment**

Intention to assign (Brandt’s Sons v Dunlop Rubber [1905] AC 454 )

No particular form of words is required so long as sufficient to establish a clear intention to transfer

No need to be absolute assignment

Consideration required (but usually not a problem)

No need to give notice but…

**Legal vs Equitable Assignment**

Both subject to contractual prohibition – non-assignment clause (Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd case)

A non-assignment clause in the construction contract. Construction company is the debtor. Between the assignor and the debtor, the assignment is invalid. But between the assignor and the assignee, the assignment is valid.

Both subject to equities(legal right/power) before notice is given to the debtor (e.g. set off(pay the difference))

Recourse to original debtor? Discharge of original debt?

Claims between rival assignees – issue of priorities

Normally, legal assignment (without notice of prior equitable assignment) will have priority

As between two or more assignments - the Dearle v Hall rule applies (i.e. whoever gives notice to debtor first)

lEC3

Unconditional-> the property is passing without any condition.

Lec4

Wont test **Exclusion/Restriction on Liability**

**Lec5**

**Duty to deliver**

‘... [T]he enormous practical advantages in certainty, not least in regard to string contracts where today’s buyer may be tomorrow’s seller. Most members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions’ (per Lord Lowry, *Bunge Corp v Tradax Export SA*) ->> presumption, can be rebutted.

*Charles Rickards Ltd v Oppenheim -> The buyer extend the ddl as the seller cannot deliver the good on time.Buyer is waiving the stipulation as to time is of the essence. However, the Buyer can still give reasonable notice to make time of the essence again.*

S31(2) reasonable time depends on the context.

S34(1) SOGO “the seller is authorized or required to send the goods to the buyer” cannot be agent of seller.

Duty to accept and pay

**Delivery of Wrong Quantity**

S32(1)&(2) SOGO

Both subject to *de minimis* exception - *Shipton, Anderson & Co v Weil Bros.* minigrams of rice(the buyer could not reject pursuant to s32) vs. minigrams of dimond(the buyer can reject)

**Delivery of Mixed Goods**

S32(3)&(4)

*Clegg v Anderson* – asking for further information – **is not acceptance of the good?**

**Warranty will not be tested.**

TT4

SOGO does not apply on Hire purchase agreement cuz the bailee(Susan) only has the option to buy. There is no sale agreement. Title does not pass in the agreement.

SOGO s23

Susan only have the possession of the good. She does not have title to pass to Elisa.

(c)

No title.

Exception:

*Buyer in possession. NO - National Employers’ Mutual General Insurance Association Ltd v Jones* – meaning of ‘consent of the seller’-> meaning the last owner-> company who never agree to transfer title.

Lec6

*PST Energy 7 Shipping LLC v OW Bunker Malta Ltd (the “Res Cogitans”)*

Buyer and Seller, selling fuel using vessel as transportation.The fuel that the vessel comsumed was also derived from the fuel to sell.There is only one price, so its only license to use the fuel rather than sale of good, which took the whole contract out of the scope of SOGO.

*Aluminium Industrie Vaassen BV*

*Agency*

Implied authority cannot override Express authority

Apparent (or Ostensible) Authority **:** can only be used by the third party; Form of estoppel by representation; For the protection of third party

* *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480:

First Energy v Hungarian Intl Bank -> communicated approval, not entering into contract, and that distinguish it from Armagas

Lec7

Agency part2.

Agency by Ratification

**Undisclosed Principal(TP never knows if there is a principal)**

Trumps the privity of contract if elements are satisfied.

* Agent must have intended to act for the principal
* Agent must have had actual authority
  + Apparent authority not relevant
  + Ratification not applicable
* *Keighley Maxsted v Durant* [1901] AC 240
  + - Agent does not intend to act for the principal
* Third party can only sue either the principal or the agent (can only elect one to sue)
  + *Priestly v Fernie* (1865) 3 H&C 977)
    - Agent(master of the ship) signed bill of lading(title document).
    - Goods not delivered and plaintiff successfully sued agent
    - Agent became bankrupt before judgment satisfied
    - PL have already sued the agent, cannot sue the principal.
* Third party cannot be deprived of the agent’s liability should he desire it (i.e. third party may raise defences he had against the agent prior to knowing about the principal(can set off debt. Relevant in case of insolvency))
* Subject to exception?

*Cooke & Sons v Eshelby* (1887) 12 App Cas 271)

* + sale of cotton by broker for undisclosed principal
  + third party buyer wanted to set off a debt owed to him by the broker
  + The broker sometimes act for himself, sometimes as an agent, and the PF knew about that practice.
  + The court held that the PF should enquiry whether the broker act for himself, while he didn’t , so D voluntarily took the risk.
* Contract not intended to be confined to original parties
  + Assumption in ordinary commercial contracts - willingness to contract with a duly authorised agent (*Siu Yin Kwan v Eastern Insurance Co*)
  + Except where identity of counterparty is important
* Contract ~~not intended to be~~ confined to original parties (cont.)
  + *Said v Butt* [1920] 3 KB 497
    - a tort case – wrongful inducement of breach of contract
    - identity of attendee
  + Principal liable for unauthorised act?
    - *Watteau v Fenwick* [1893] 1 QB 346 – controversial decision, never overruled in HK and UK. But overruled in AUS. Everyone is trying to distinguish this case.
    - *Manager was previously the owner of the hotel. Sell it to the new owner, remained acting as a manager. TP does not know the change of ownership.*
    - *Manager can no longer order cigar on credit terms(deferred payment). However, Manager did so.*
    - Under normal rules, new owner would not be bound given manager acted out of the authority. However, Court held new owner bound by the undisclosed principal because usually that is within manager’s authority as a agent.

**Between Principal and Third Party**

* Unidentified/unnamed principal (*Lai Wo Heung v Cheung Kong Fur Fty Co Ltd* [2004] 1 HKLRD 959 – employment related)
* Disclosed/Unidentified principal vs Undisclosed principal
  + For the former, contract between principal and third party – agent drops out
  + For the latter – principal needs to intervene; agent personally liable
  + Either the agent or the principal doesn’t want the TP to know there is a undisclosed principal.

**Between Principal and Agent**

* Gratuitous agency
* Contractual agency
  + Agent’s entitlement to remuneration(considertaion) and indemnification(cost/expenses)
  + Right of lien over goods held for principal if not paid
  + In either case, agent owes
* certain duties to principal

**Duties of Agent to Principal**

* Duty to perform his undertakings and obey instructions under contract
* Duty of care and skill (*Chaudhry v Prabhakar* [1989] 1 WLR 29)
* Fiduciary duties (*Bristol and West Building Society v Mothew* [1998] Ch 1)

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of the fiduciary. This core liability has several facets.”

* Fiduciary duties (Examples are non-exhaustive)(origin->trust law, but also relevant in commercial law)
  + Must act in good faith
  + Must not, without informed consent of the principal: (proscriptive duties)
    - Place himself in a position where his duty and his interest may conflict
      * *Armstrong v Jackson* [1917] 2 KB 822 – Agent should buys shares for the principals. Agent sold own shares to principal.
    - Make secret profits
      * *Boardman v Phipps* [1967] 2 AC 46 – Solicitor (trustee of trust) acting in good faith. One of the trust asset is share of a company which is experiencing financial difficulty. Solicitor took up the share without telling the beneficiary in the case that beneficiary refuses to took up. It turns out solicitor’s act save the company and profits are for the trust, while the beneficiary sued the solicitor for secret profits and succeeded.
* Remedies for breach (e.g. setting aside of contracts; account for profits)
  + Common law remedies – damages (actual amount you are entitled to)
  + Equitable remedies – court’s discretion (only prove you are entitled to have remedies)

**Between Agent and Third Party**

* In general, agent not liable under the contract between principal and third party where:
  + agent acts within authority
  + unauthorised act has been ratified
  + principal being bound under doctrine of apparent authority
* However, depending on the circumstances, an agent may be personally liable
  + *The Swan* [1968] 1 Lloyd’s Rep 5 – repair of a vessel
    - Partly written, partly oral contract. Written contract only have Name + Director. p.s. ADD “**For and behalf of COMPANY NAME.”**
    - The court held that evidence is not sufficient to say the agent act for the principal.
* Agent liable for breach of warranty of authority where the agent was not authorized **没听**
  + *Collen v Wright* (1857) 8 E&B 647 – agent signed agreement of lease in favour of third party without authority
  + *Yonge v Toynbee* [1910] 1 KB 215 – unknown to the agent, principal became mentally incapacitated
* Undislosed principal/agency?

**Termination of Agency**

* Agent’s authority may be terminated by:
  + Mutual agreement
  + (unilateral right of )Revocation by principal. c.f. Irrevocable power of attorney.
  + Expiry of fixed period of appointment
  + Destruction of subject matter of agency
  + Frustration of agency rendering its performance illegal, impossible, or radically different from what the parties originally contemplated
  + Death, insanity or (for an individual) bankruptcy, or (for a company) winding-up or dissolution, of principal or agent
* Effects on liability
  + Liability of principal to third party – actual authority vs apparent authority
  + Liability of agent to third party – see *Yonge v Toynbee*
  + Termination of agent’s authority is prospective – accrued rights/liabilities not affected
* Outside agency law
* Principal estopped from denying existence of an agency relationship
  + *Spiro v Lintern* [1973] 1 WLR 100
    - sale of property by wife but property owned by husband
    - husband did not disclose the fact that his wife had no authority to sell to the plaintiff

TT5:

Q2: you cannot have security of your own goods, so lien is meaningless. Therefore s.42 applies. S.43 not.whethere there is an agreement is a missing fact. Depends on the sequence of knowing the fact of insolvency and their continuing on the delivery

TT6:

Whether clause is valid under law->

Clause1: valid under law. Legitimate retention of the title

Clause2: Assist clause 1 make sure good are claimable when condition is not fulfilled.

Clause3:

TT8:

Q1

Apparent Authority

Representation

Reliance on that representation

Suspicious circumstances(reliance is irrational)

Deemed to have. Constructive notice . Company should have enquiry into 不确定

Remedies

Go after the agent for Breach of warranty of authority.

Q2

Actual authority:

Express:50k

Implied: cannot exceed the express

Apparent authority:

Apparent authority of appoving the loan

Representation

Manager who oversees

Medium-sized finance company

Reliance

Suspicious circumstances

50k-100k

Apparent authority of communicating the decision from higher authority. (First energy)

Representation

Manager

Reliance

No suspicious circumstances.

Mistake: Minor point put it last 55:00

Lec8

Credit worthiness – credit

Credit period – by the expiry of that period you need to pay

Finance leasing charges = purchase price

Types of Loans

Fixed sum loan (e.g.$100, fixed amount of money, once drawn down, cannot reboroow)vs revolving load($100, drawn down 60$,40 left, if paid, can borrow $100 again. E.g. credit card )

* Fixed term loan (e.g.10 years)vs ‘On-demand’ loan(immediately repayable)

(Term loan vs Demand loan)

* Secured loan(backed by security) vs Unsecured loan

**Loans and Security**

* Loan agreements/debentures/loan notes/bonds(if you buy bonds, then you are the lender)
  + Personal claim only, pretty useless when the borrower is bankrupted.
* Form of security - financial collateral that the creditor could have recourse to (can sue under loan(personal claim), or enforce the loan by security)
  + Real security – creditor has proprietary claim
    - Unsecured creditor at the bottom of hierarchy, share what’s left. If you are secured creditor, you can remove the assets(not shared), and if you sell the assets, you can use that to pay the charges. 100 sell 60, left unsecured 40. 100 sell 200, should return 100 to the company.
  + Personal or quasi security (technically not regarded as ‘security’ but a contractual right, and lender is still an unsecured creditor)
  + Retention of title clause?

**Real Security**

* Creation
  + Type and nature of security interests created
* Perfection
  + Making known to the outside world of the existence of the security interests
* Enforcement
  + Method of enforcing security

**Pledges (oldest+strongest) 要重新听一下第一部分，onwer啥啥的**

* Bailment for the purpose of security
  + Pledgee would hold the goods for the pledgor.
* A form of possessory security
  + Can only be created on chose in possession.
* Created by contract - subject to pledgor’s right of redemption and no right of foreclosure(can only sell the goods)
* Types of property that can be pledged
  + Chose in possession- Yes
  + Intangible property - No
    - *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41 (a lien case)
      * Database management company claiming a lien over database in electronic form
      * Refused to release the information contained in the database until outstanding fees are paid
      * Court held no, you can’t create lien over Intangible property, which is data in database in this case.
  + Chose in action – No, Intangible
    - *Keller v Ying Wah Tak Holdings Ltd* [1997] 3 HKC 301
      * Pledge over a bank account as security for a loan
  + Documentary intangibles – Yes, physical title document which gives you title to the underlying goods(an exception)
    - *The Odessa* [1916] 1 AC 145
      * German purchaser of goods pledged the bill of lading to a bank
      * Bank made payment to the seller
      * Goods seized by the Crown at the outbreak of the Great War
  + Classic example of operation of pledge – pawnbroking (governed by the Pawnbroking Ordinance (Cap 166))
  + Perfection – by delivery of possession of pledged goods. The outside world would know that asset is no longer with the owner.
  + Enforcement
    - Sale of pledged property
    - No right of foreclosure - need to account to pledgor for surplus c.f. shortfall, unsecured debt.

**Liens**

* A right of a person to retain property which is in his possession but belonging to another, until certain demands(usually payment obligation) of the person in possession are satisfied
  + offers no rights in the property itself; no right to sell
  + lien is lost once possession is returned to the owner
* Types of lien
  + Common law(legal lien) or contractual lien(can include right to sell)
  + Statutory lien (e.g. unpaid seller’s lien under SOGO)
  + Equitable lien(under rules of equity)
  + Maritime lien
* Lien can be specific or general
  + 42:00 没听懂
* Perfection – by possession (obtained by creditor under a contract for purposes other than the creation of security interest) when lien is created, it has been perfected already.
* Enforcement
  + Right of retention only
  + No power of sale unless otherwise agreed in contract or provided for in statute(SOGO)

**Shortcomings of Possessory Security**

* Cannot be created over intangible assets
* Owner needs to part with possession of the relevant assets
  + cannot use the assets in their ordinary course of business
  + such locking-up of assets is economically inefficient

**Non-Possessory security interest**

**Mortgages – personal property(45:00没听到)**

* A transfer of ownership/title to a creditor by way of security subject to equity of redemption
* S62(4) of SOGO  
  “The provisions of this Ordinance relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.”
* Creation
  + By contract
  + A type of security which involves transfer of ownership/title of the relevant property/asset to creditor subject to the equity of redemption
  + Until redemption, mortgagor is entitled to possession of property
* Legal or equitable mortgage(intention to transfer but not yet comply with all the … 51:40没听到)
* Perfection – registration under Companies Ordinance (Cap.622) (“CO”) (to be explained in next lecture)
* Enforcement(53:00)
  + Taking possession
  + Sale (including right to appoint a receiver) (没听到)
  + Right of foreclosure (court order required to foreclose the property)
    - Can keep surplus, cannot claim shortfall.
  + Why the court reluctant to give right of foreclosure
    - Debt restructing.

Lec9

[[1]](#footnote-1)

1. [↑](#footnote-ref-1)