Business Law –

BBA/BS/BF/BEC/BAC/BSP/BF 190

Course Overview

PART 1

- The Law – Branches of Government – Separation of Powers and the Rule of Law – Types of Law and classification of Law – Sources of Law – Lex Mercatoria – The Zambian Judicial System/ Courts of Zambia

Course Overview

PART 2

- Contract Law – Elements of a Contract – Legal Capacity – Content of Contracts – Vitiating Factors – Discharge of a Contract – Remedies

Course Overview

PART 3

- Sale of Goods – Sale of Goods Act (SOGA) – Obligations and Remedies of Seller and Buyer - Agency and its different relationships (Principal, Agent and Third Party)

Course Overview

PART 4

- Law of Tort – Trespass – Nuisance – Negligence – Defamation – Strict Liability – Vicarious Liability – Specific Business Torts

PART 1

Headnote

“In a fast changing Zambian political, economic and social environment, the centrality of the law cannot be overemphasized. An understanding of the law by those who will participate in the economic sphere/ business world in their professional capacities is not only necessary but imperative!“

What is Law? – Definition, Elements (1)

*"The **principles and regulations in a community established by some authority** and **applicable to its members** (individuals, businesses, private and public organization), and **enforceable by a judicial decision**."*

What is Law? – Definition, Elements (2)

- **Provision** of **Rights**, **Freedoms** and **Duties**
- **Protection against undesirable interference** of others (individuals, businesses, private and public organisations)
- **Prohibition** of unlawful activities

➢ ***„Law is a formal and organized mechanism of social control.“***

What is Law? – Approaches (3)

The question „What is Law?“ in the context of Business Law in Zambia could be approached in 3 ways:

- **Understanding of the government**
- **Look at the background of the Zambian legal system**
- **Understanding of the meaning of Business Law in the Zambian context**

State and *Government*

- ***State*** > 3 element doctrine (!)
- ***Government*** > Latin „gubernare“ = „to govern“ or „to manage“
  - group of persons, which was elected by a particular society
  - Sole purpose is managing and protecting the rights and freedoms of the said society in order to establish a fair and just society based on a sound economy

The 3 branches of Government (1)

- **The executive**
- **The legislative**
- **The judicial branch**

The 3 branches of Government (2)

➢ The executive

- Is supposed to identify aspects in society that need regulation
- Initiates policies to meet those requirements

The 3 branches of Government (3)

➢ The legislature

- to enact laws to regulate initiated policies
- done through Parliament as that is its sovereignty

The 3 branches of Government (4)

➢**The judicial branch**

- Interprets and ensures the enforcement of the enacted laws

Separation of Powers (1)

- *Model* of governing a state
  - 3 governmental branches are supposed to operate separately

- Why?
  - prevent a centralisation of too much power / abuse of power (*control mechanism*)
  - protect the rights and liberties of the citizens whilst the principle ‘Rule of Law’ ensures ‘Separation of Powers’

Rule of Law (1)

- Second fundamental principle in a democracy is the *Rule of Law*
  - Law should govern the nation (legal compliance)
  - Principle refers to the influence and authority of law within a society, particularly as a constraint upon behaviour, including behaviour of government officials

Rule of Law (2)

- Enlightment philosopher Locke was the one who said „**freedom in society means being subject only to laws made by a legislature that apply to everyone** “
- Rule of law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials as well as judges > “*everyone has to play by the same rules*”
- The Rule of Law stands in contrast to a dictatorship where the rulers are held above the law

Separation of Powers (2)

- Principle “Separation of Powers” is embedded in Greek Philosophy

  - Aristotle mentioned the „Mixed Government“ as a combination of **Democracy**, **Aristocracy** and **Monarchy** to make their respective degenerations impossible

Separation of Powers (3)

- Aristotle “Mixed Government” – Terms
  - Democracy = government by the people
  - Aristocracy = privileged people/ elite rules
  - Monarchy = supreme power held by a monarch

Separation of Powers (4)

- Later Separation of Powers was mentioned by the Enlightenment Philosophers John Locke and Baron de Montesquieu
  - They emphasized the need for an independent judicial system that conducted its functions independent of the executive
  - This was and still is fundamental in preventing the abuse of power by the executive

Separation of Powers (5)

- Courts became independent and could ideally provide „checks and balances“ on the executive‘s exercise of its powers

Functioning Government

- For a Government to reach an adequate level of harmony and for it to function effectively it needs laws
- In the case of Zambia, the **Constitution** being **Chapter 1 of the Laws of Zambia** is the highest law of the country

Constitution of Zambia (1)

Part I: Section 1 (1) **“This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.”**…

Part I: Section 1 (3) **“This Constitution shall bind all persons in Zambia, State organs and State institutions.”**

Constitution of Zambia (2)

- Constitution provides the people‘s rights and freedoms and **regulates the organization of the state, the parliament and the political parties** etc.
- Some important provisions for citizens: **The Bill of Rights** / **Citizenship** / **Right to vote** / **Privacy of the home and other property / Protection from deprivation of property without compensation**

Constitution of Zambia (3) – Bill of Rights

- **Rights and freedoms set out in the Bill of Rights are …**

➢ **inherent in each individual and protect the dignity of the person**

➢ **No discrimination (exception affirmative action)**

➢ **Freedom of conscience, belief and religion / Freedom of expression**

➢ **Economic and social rights (access to health care, decent housing, clean and safe water, education etc.)**

➢ **Choice of trade, occupation or profession**

➢ **Labour relations**

➢ **Consumer rights … etc.**

Constitution of Zambia (4)

- These rights are to be enjoyed by everyone regardless of his race, place of origin, political opinion, colour, creed, sex or marital status
- It is important to note, that each person‘s rights ends where another‘s person‘s right begins

Background to the Zambian Legal System (1)

- Zambia was a British colony (1888 – 1964)
- The Zambian legal system is modelled after the English legal system which is based on English common law and customary law
- English legal system goes back to the Norman Conquest in in the 11th Century

Background to the Zambian Legal System (2)

- Whenever the Zambian Law was silent on a particular principle, the *English legal system* became applicable as well as the *customary law* unless it was contradicting the rules of natural justice, equity and good conscience
  - Natural justice = duty to act fairly / fair procedure
  - Equity = based on the principle of *evenhanded dealing*
  - Good conscience = by any reasonable standard

Background to the Zambian Legal System (3)

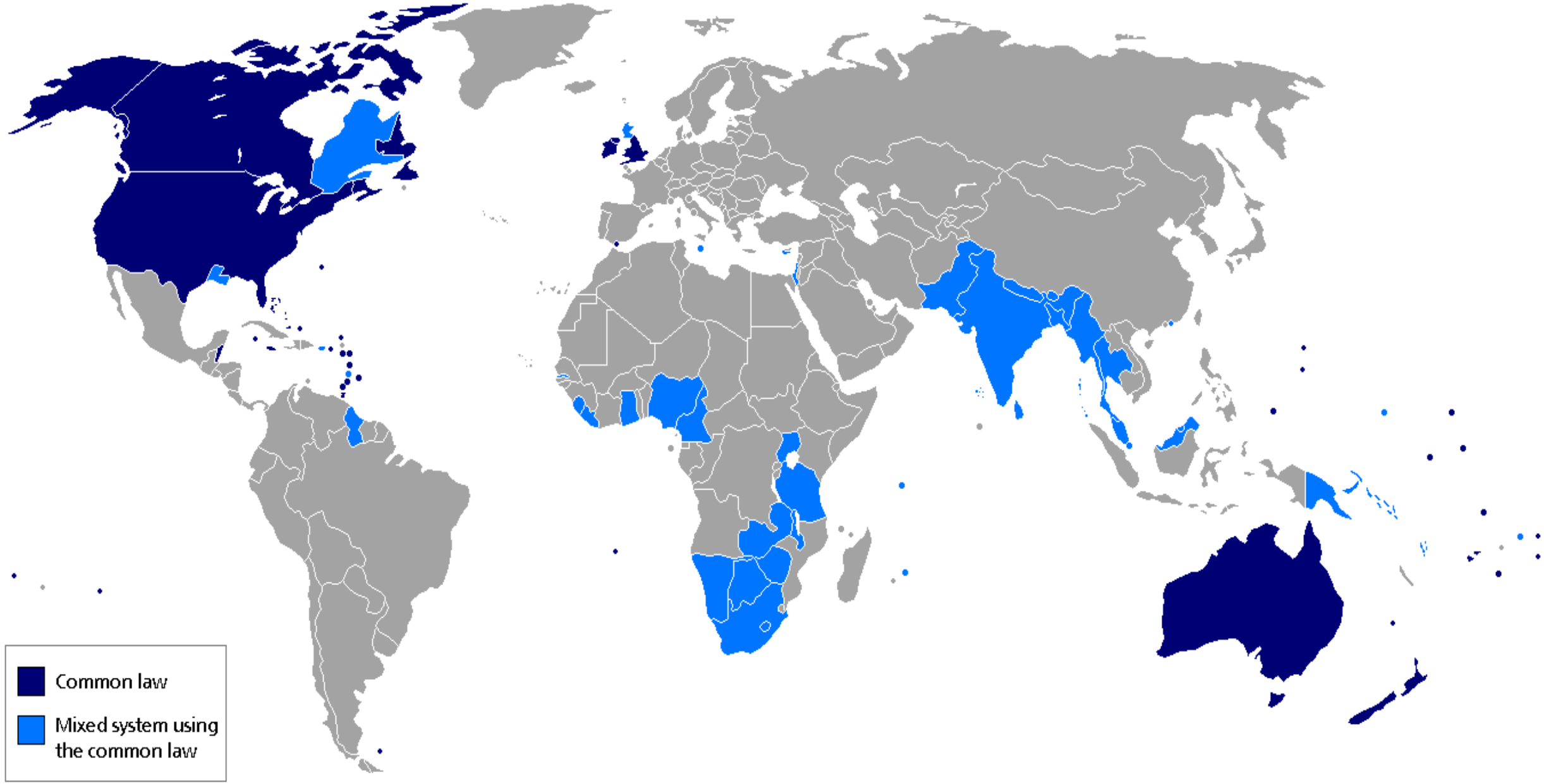
- Since Zambia's independence in 1964 there was a need to have an emphasis placed on home grown laws and less on foreign laws
- 2011 the Parliament enacted the **English Law (Extent of Application) Amendment Act** and clarified the extent of application of English Law in Zambia

Background to the Zambian Legal System (4)

„the English law in force in Zambia shall be the common law, the doctrines of equity, the statutes in force in England on the 17th August 1911 and any other statutes passed in England after 17th August 1911 which apply or shall apply to the Republic by virtue of an Act of Parliament“

Background to the Zambian Legal System (5)

- Zambian Legal system still has access to the practice and procedure pertaining in England albeit in a restricted manner as stated above
- Zambian Legal system therefore is called a “mixed legal system” (see the following chart)


Common law
Mixed system using the common law

Types of law (1)

International law and National law

- **International law:**
concerned with relations and disputes between nations

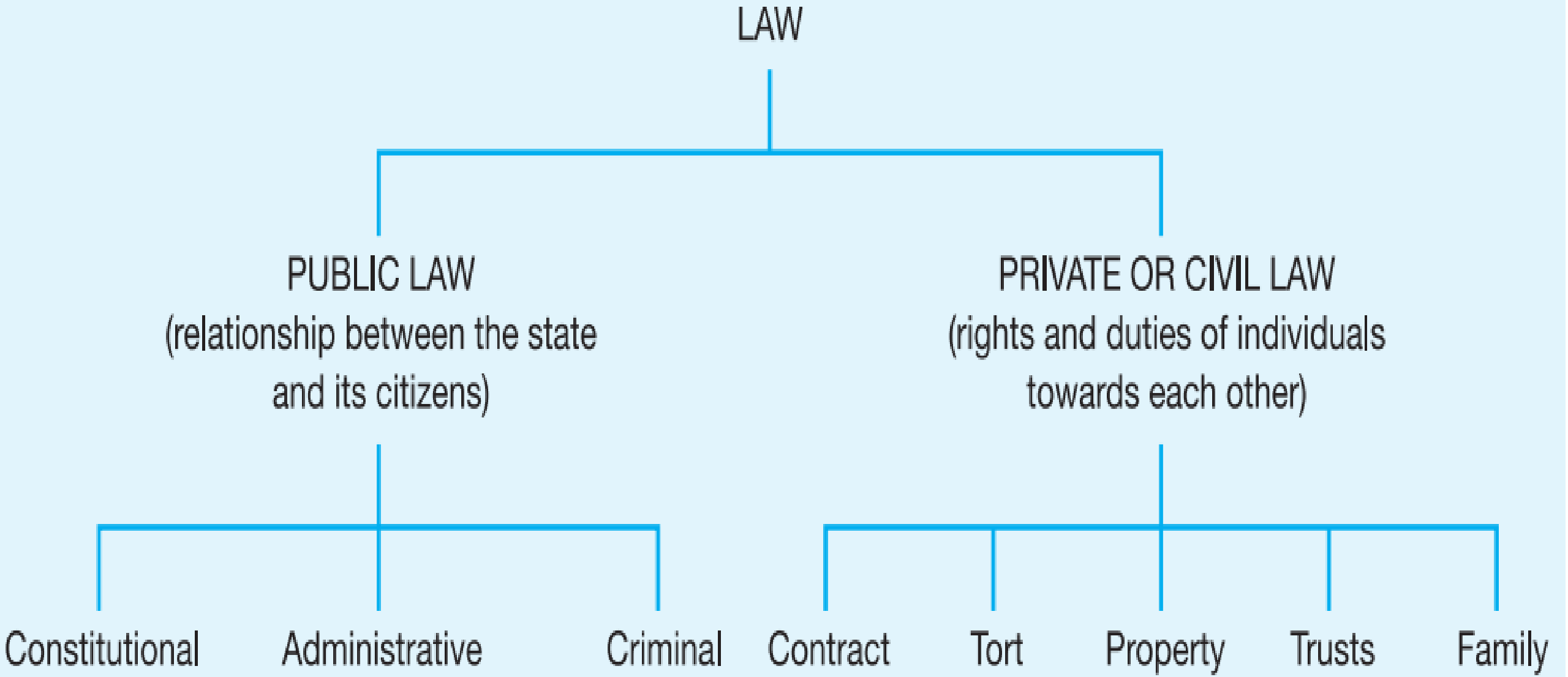
- **National law:**
applies within the country

Types of law (2)

National law

can be categorised as

Public law (incl. Criminal law) and Private law


LAW
PUBLIC LAW
(relationship between the state and its citizens)
PRIVATE OR CIVIL LAW
(rights and duties of individuals towards each other)
Constitutional
Administrative
Criminal
Contract
Tort
Property
Trusts
Family

Key role of Law in Zambia (1)

- Law plays a key role in establishing and maintaining **political**, **economic**, **social**, **organizational** and **legal structures** which serve also as checks and balances in every society respectively every business world

Key role of Law in Zambia (2) - Examples

- **Political –** Political Parties + Opposition; Anti Corruption Commission – ACC > *Anti Corruption Act*
- **Economic** – Board of Directors in companies = control committee
- **Social** – Laws restrict anti-social behaviour > e.g. sale of harmful products or misleading business practises (e.g. wrong labeling); controlled by the Competition & Consumer Protection Commission - CCPC > *The Competition & Consumer Protection Act*

Key role of Law in Zambia (3) - Examples

- **Organizational** – Companies allow labour unions to operate (organized association of workers formed to protect rights and interests)
- **Legal** – the failure to follow laid down procedures may be questioned and legally enforced by the public (e.g. through reports to the relevant commission or the courts)

What is Business law? (1)

- A substantive law that regulates businesses (including their registration, formation and their management) and oversees commercial transactions between business entities (B2B) and between business entities and their clients

"Provides the general principles of law relating to businesses and it defines the rights and responsibilities that a business may entail"

What is Business law? (2)

- Different relevant branches of business law result in **many statutory obligations** for Zambian business operators

What is Business law? (3)

- **<u>Business registration</u>**:
- Obligation to register every business in Zambia with the **Patents and Companies Registration Agency (PACRA)** accordingly to the *Companies Act Chapter 388* or the *Registration of Business Names Act Chapter 389 of the Laws of Zambia*

What is Business law? (4)

- **<u>Payment of taxes</u>**:
- Zambian businesses are obliged to pay various taxes to the **Zambia Revenue Authority** according to the *Zambia Revenue Authority Act Chapter 321*, e.g. the *Income Tax Act Chapter 322* and the *Value Added Tax Act Chapter 331 of the Laws of Zambia etc.*
- every business must obtain a Taxpayer Identification Number (so called TPIN) for tax purposes

What is Business law? (5)

- **Licences**:
- Businesses that require licences to trade or to manufacture must obtain the licences before they begin to conduct their businesses according to *The Trades Licensing Act* Chapter 393 of the Laws of Zambia

What is Business law? (6)

- **<u>Employment</u>:**
- Businesses that wish to engage human resources in Zambia have an obligation to abide by the provisions of the *Employment Act Chapter 268*, the *National Pension Scheme Authority (NAPSA) Act Chapter 256*, the *Workers' Compensation Act Chapter 271* and the *Minimum Wages and Conditions of Employment Act Chapter 276* of the Laws of Zambia

What is Business law? (7)

- **<u>Aim Business Law</u>:**
- to bring uniformity into the business world; all businesses are guided and governed by the same rules and regulations; in that way order is maintained and standards can be developed

Types of law (3) – Public Law

Public law

involves the state or government in some way, while private law is concerned with disputes between private individuals or businesses

Types of law (4) – Public Law

- **Constitutional law**

Bill of Rights; Organisation of the state and government; Elections; Disputes which arise over such matters

- **Administrative law**

Controls how ministers of state and public bodies such as local councils should operate; often a result of subordinated/ delegated legislation

Types of law (5) – Criminal law

- **Criminal Law**

- Describes the types of behaviour which are forbidden at the risk of punishment
- ***The Penal Code Act Chapter 87 of the Laws of Zambia*** defines numerous crimes and offenses and determines the respective punishment
- the state has the right to prosecute and the court will punish the defendant for the offense, because he/she has committed a crime (e.g. crimes such as murder, assault, robbery, theft, housebreaking etc.)

Types of Law (6) – Criminal Law

- **Procedure:** in court the parties are the prosecution, the accused and the judge; if the accused is found guilty, he/she is sentenced by the judge/magistrate; if he/he is not proved guilty, he/she is acquitted
- more serious criminal cases are dealt with by judges at High Court
- less serious offences (the overwhelming majority) are dealt with by magistrates at the Subordinate Court

Types of law (7) – Private law

Private law

- Involves the relationship between individual citizens, or between legal entities (e.g. companies), or between citizens and legal entities
- Legal mechanism through which individuals and legal entities can assert claims against each other and have their rights adjudicated and enforced

Types of law (8) – Private law

- Private law is concerned with private litigation, such as contractual issues, disputes concerning property, trespassing etc.
- Government‘s role in reference to private law is to establish and maintain the legal framework and institutions through which any legal issue or dispute arising may be adjudicated

Types of law (9) – Private law

- **Procedure:** the plaintiff/claimant issues a statement of claim, setting out the facts he alleges against the defendant and asking for damages or other remedies
- the defendant puts in his defences to the allegations of the complainant
- Judge considers the facts/ evidences and issues the judgement/ decides the verdict

Types of law (10) – Branches of Private law

- **Law of contract**
- **Law of tort**
- **Company Law / Employment Law / Competition Law / Intellectual Property Law etc.**
- **Family law / Law of Succession**

Sources of Law in Zambia (1)

- Zambia does not have a single codification containing its laws; Laws in Zambia are drawn from a variety of historical and modern sources, such as …
  - **Constitution**
  - **Legislation**
  - **Common law and Equity**
  - **Judicial precedent**
  - **Customary law …**

Sources of law in Zambia (2) - Legislation

- Refers to **written laws and statutes** that have been **passed by parliament** and have been **assented to by the President >** these laws and statutes establish certain courses of conduct which certain groups of people/parties must adhere to

- **Parliament** as the **law-making body** has been and is still a fundamental source of law

Sources of law in Zambia (3) - Legislation

- Term legislation covers also **subordinate legislation** (also called delegated legislation) which refers to laws passed by other bodies to which the parliament has validly delegated such legislative powers, these include local laws and municipal bye-laws etc.

Source of law in Zambia (4) – Legislation

- **Laws and statutes coming from legislation** are the sources of law which **can prevail Common law or Equity rules**, if there is a conflict between them
- They **can also be used as a tool** to abolish or amend Common law rules which have outlived there usefulness

Source of law in Zambia (6) – Legislation

- the method of **subordinate legislation is also relevant for the field of Business law**
- A number of company statutes, insolvency statutes and consumer statutes give **power to the government Ministers and their civil servants to make detailed rules and orders** (this work is not done in Parliament)

Source of law in Zambia (7) - Common Law

- The historical origins of the „Common Law“ lie in the legal system of England, which was established in 11th Century, after William the Conqueror conquered England (referred to as the Norman Conquest)
- William established a strong centralized power
- Judges were sent by the King around the country to administer justice **without an existing codification of law**
- The **judges** while administering justice **referred to customs which differed from region to region**

Source of law in Zambia (8) - Common Law

- It took time till the judges developed common general principles
- A slow formulation of the common law took place
- Judges started to look at previous decisions made by other judges for guidance in order to maintain consistency (cases with the same **subject-matter**)
- To maintain this consistency it was essential, that judges‘ decisions were recorded (beginning of the law reporting, which is still in practice today

Source of law in Zambia (9) - Common Law

- In former times, cases in the common law courts could only be started by use of a specific document referred to as a „**writ**“
- The plaintiff/claimant who had to procure the writ at an royal office was compelled/obliged to use this type of a claim form in order to commence a legal action
- For this purpose different writs were created

Source of law in Zambia (10) - Common Law

- System was very formal > Maxim was: **„No writ, no remedy!“**
- Problem: not all **causes of action** from people‘s real life were covered by an appropriate writ
- This led to a deficient system of legal protection
- Strict formalism resulted in injustice and hardship
- “**Doctrine of Equity**” was developed

Source of law in Zambia (12) - Equity

- **Equity** was a parallel to the Common Law established system of jurisdiction (before 1873)

- Administered by the Lord Chancellor on behalf of the Crown **to improve the harshness and rigidity of Common Law**

Source of law in Zambia (13) - Equity

- Common Law only recognized certain types of cases; special forms (“writs”) needed to be filled by plaintiffs/claimants

- Only remedy which Common Law Courts could give was „damages“ (a sum of money), which was just not practical enough

Source of law in Zambia (14) - Equity

- **Equity** brought more solutions and more fairness
- **Chancery Courts provided** now remedies in equity such as
  - **Order of injunction -** a judicial order that restrains a person from beginning or continuing an action threatening or invading the legal right of another, or that compels a person to carry out a certain act

Source of law in Zambia (15) - Equity

- **Order of specific performance -** order of a court which requires a party to perform a specific act (usually what is stated in the contract; e.g. supply of goods)

- **Order of rectification -** is a remedy whereby a court orders a change in a written document to reflect what it ought to have said in the first place (correction)

Source of law in Zambia (16) - Equity

- **Order of rescission –** is the defined as the unmaking of the contract or the unwinding of a transaction/ reverse transaction; is done to bring the parties, as far as possible, back to the position in which they were before they entered into a contract

- **Order of restitution -** is designed to restore the injured party or the party who suffered damages, to the position they were before the formation of the contract

Source of law in Zambia (17) - Equity

- **Conflict between the rules of Equity and Common Law** rules arose but the two **courts merged in 1873**
- Finally it was also decided, that in cases with reference to the same **subject-matter** the rules of Equity should prevail
- Equity maxims are still relevant today

Source of Law in Zambia (18) – Equity maxims

- **„Equity look to the intention and not the form“** - It would be fair to look at the intention rather than the fact that parties got formalities wrong

- **„He who comes to equity must come with clean hands“** - An equitable principle or remedy will not be granted to a plaintiff/claimant who has not acted fairly

Source of Law in Zambia (19) – Equity maxims

- **„Delay defeats Equity“** - This means that a plaintiff/claimant must not wait too long before making a claim as this might lead to unfairness to the other party

- **„Equity will not suffer a wrong to be without a remedy“** - This maxim allows Equity to continue to develop, e.g. new remedies when needed

Source of law in Zambia (20) - Judicial Precedent

- Judicial Precedent forms a crucial part of the law of Zambia
- Developed by judges who issued opinions and interpreted laws when deciding cases
- Creation of principles which became precedent for later judges deciding similar cases

Source of law in Zambia (21) - Judicial Precedent

- Decisions of superior courts are therefore binding to lower courts, not the other way around (!)
- Judicial precedent have been justified for bringing certainty and uniformity to the law and have been blamed for causing rigidity of legal systems, preventing development of the law

Source of law in Zambia (22) – Judicial Precedent

- the doctrine of precedent includes both *advantages* and *disadvantages*

- **PRO**: (1) **Efficiency** – same legal problem needs not to be solved twice, saving cost and time, (2) **Predictability** of legal decision-making, easier for lawyers to advise clients, (3) **Justice** – people are treated alike in parallel circumstances

Source of law in Zambia (23) – Judicial Precedent

- **CONS/ CRITICISIMS**: (1) **Unconstitutionality** – Violation of the principle of "Separation of powers", Parliament should decide/determine and reform the law, not the judges, (2) **Risk of judicial laziness** – Judges may be prevented from taking responsibility for thinking through solutions to legal problems, (3) **Risk of stagnation in the law** – It's a backward-looking rule in a way, could stifle creativity in decision-making

Source of law in Zambia (24) – Customary law

- Custom is a rule which is not written but has the traditional consent of a particular district, class or tribe > **“Custom is a traditionally accepted norm of conduct”** (e.g. Marriage contracted under Zambian laws and traditions, where “lobola” is paid and other required procedures has been followed etc.)
- In Zambia the **Local Courts use Customary law to administer justice**
- **Traditional courts in rural areas apply local customs as well** (these courts are not recognized as being part of the established court structure in Zambia)

Source of law in Zambia (25) – Customary law

- In early times in England custom was taken by judges and turned into Common law
- This **does not apply for mercantile customs** (customs of the merchants), which **were developed mainly independent from the Common law**
- Their customs developed for example into ***Lex Mercatoria*** or the new *Law Merchant*

Source of law in Zambia (26) – Customary law

Lex Mercatoria (1)

- **body of commercial rules and principles** used by merchants throughout Europe with local variation during the Medieval period
- commercial practices which responded to the needs of the merchants and was considered a best practice
- It was enforced through a **system of merchant courts** along the main trade routes
- A distinct feature was the reliance by merchants on **a system developed and administered by themselves**

Source of law in Zambia (27) – Customary law

Lex Mercatoria (2)

- States or local authorities did not interfere a lot in internal domestic trade (freedom of the market)
- Under *Lex Mercatoria* trade flourished and states took in large amounts of taxation
- **BUT:** the concept of Lex Mercatoria is by nature customary and solely consists of customary commercial rules and principles

Source of law in Zambia (28) – Customary law

Lex Mercatoria (3) – Disadvantages/Criticism (1)

- No binding force as it is not enacted in Parliament or endorsed in an international convention (it also falls from the traditional definition of law)
- Voices criticize that the concept is vague and incomplete
- No legal answers to relevant issues as validity, capacity and contract form

Source of law in Zambia (29) – Customary law

Lex Mercatoria (4) – Disadvantages/Criticism (2)

- *Trade usages (= trade customs)* fall under the party autonomy (freedom of contract) > parties might just exclude the application of *trade usages* in the contract
- In short: It‘s not a legal system

Source of law in Zambia (30) – Customary law

Lex Mercatoria (5) - Today

- Despite of the criticism crucial customs of merchants relating to negotiable instruments and contracts, including the Sale of Goods became part of the Common law and were later translated for example into **Sale of Goods Act** (1979), for the Business law a very relevant codification
- But a single codification/collection of rules called “Lex Mercartoria” does not exist today (different countries yet try to preserve some rules and principles and summarize them in books > e.g. “TransLex Principles” in Germany

The Zambian Judicial System (1) - Judicature

- The **judicature shall be independent** and subject to the constitution only
- It has **jurisdiction in all public, criminal and civil matters**, including matters relating to the constitution
- Distinguishing feature amongst the courts in Zambia is their jurisdiction and the procedural rules that tend to be different in each court

The Zambian Judicial System (2) – Ministry of Justice

- Ministry of Justice plays a key role in the dissemination of justice in the judiciary
- The Ministry has the Department of the **Director of Public Prosecution** that **prosecutes criminal matters in the High Court** as well as **Appeals in the Supreme Court on behalf of the People of Zambia**

The Zambian Judicial System (3) - Lawyers

- Lawyers who work **in the Ministry of Justice** are called **State Advocates** (no private practice permitted)
- **Lawyers in private practice** are referred to as "**Legal Practitioners**" or "**Counsel**" or "**Advocates**" > they need a practicing certificate required by the **Law Association of Zambia**

The Zambian Judicial System (4) - Lawyers

- Lawyers in private practice are playing a major role since they defend members of the public in all legal proceedings > Corporate entities more and more have *in-house lawyers* to handle their legal issues
- In court before the bench of the judge applies a strict dress code (e.g. sober colours; suits in black, grey or blue; shirts plain white) > Lawyers are expected to be polite and disciplined since they are officers of the court (e.g. genuflect before Judges and Magistrates)

The Zambian Judicial System (5) - Lawyers

- Lawyer who practices for 10 years qualifies to be a High Court Judge and can apply for the position
- Majority of the Judges are qualified lawyers > a few Judges are not lawyers but were magistrates and have “risen through the ranks”

The Zambian Judicial System (6) - Legal Aid Board

- Establishment of a Legal Aid Board under the *Legal Aid Act Chapter 34* of the Laws of Zambia > for members of the public without adequate means
- Legal Aid Board handles criminal and civil matters

The Zambian Judicial System (7) - Proceedings

- **Proceedings** that are commenced in the Zambian judiciary **have to be filed** in the relevant **registry** > Each court has got it's own registry
- Registries are run by clerks who charge an amount for each document that is filed
- Court documents are usually filed in "fours", meaning 4 copies > Court, Lawyer, Plaintiff/Claimant, Defendant
- Each court has got a civil registry and a criminal registry

The Zambian Judicial System (8) - Proceedings

- The common feature in all the courts is the fact that **all evidenced is adduced *viva voce***, and on oath or affirmation whichever is applicable
- Viva voce = “by word of mouth”
- Once the parties and relevant witnesses have testified, either the lawyers on both sides or the parties (if appearing in person) submit submissions (oral or written) to the bench which then prepares the judgement > in criminal matters a sentence is passed after judgement

The Zambian Judicial System (9) - Courts

- **Constitutional Court**
- **Supreme Court**
- **High Court / Commercial Court / Industrial Relations Court**
- **Subordinate Courts**
- **Local Courts**
- **Small Claim Courts**

Constitutional Court

- Establishment of the Constitutional Court is prescribed in Clause 127 of the Constitution of Zambia
- Youngest Court in Zambia > established in 2016
- Jurisdiction to hear matters related to a.o.
  - **Interpretation of the Constitution**
  - **Violation or contravention of the Constitution**
  - **President, Vice-President or an election of the President**
  - **Election of Members of Parliament and councillors …**

Supreme Court

- **Appellate court** under the **Supreme Court Act Chapter 25** of the Laws of Zambia
- Jurisdiction to hear and determine appeals in both civil and criminal matters
- Building in Lusaka (right next to the High Court), but the Supreme Court also sits in Ndola (uses the building of the High Court there)
- The **appeals** which are heard in this court are from the **High Court**, **Industrial Relations Court** and the **Commercial Court**
- **Chief Justice** is the highest Judge; Counsels can appear in this court after of 3 years of practice

The High Court

- Superior Court > Jurisdiction of the Judge is subject to the **High Court Act Chapter 27** of the Laws of Zambia
- High Court has got court buildings in Lusaka, Ndola, Livingstone, Kitwe and Kabwe, but sits also in Solwezi and other towns
- High Court hears both criminal and civil matters both in open court and in chambers, but as provided by the High Court Rules

The Commercial Court

- Specialized commercial court division of the High Court
- Jurisdiction to hear and determine commercial matters such as those relating to **insurance**, **competition**, **mortgage**, **contracts winding up of companies**, **taxation**, **bankruptcy**, **banking and financial services**
- When proceedings are instituted in the High Court, those matters that are supposed to be heard by the Commercial Court are transferred to the Commercial List accordingly

The Industrial Relations Court (IRC)

- Sole jurisdiction relates to the resolution of industrial relations matters or employment disputes > It‘s governed by the Industrial and **Labour Relations Act Chapter 269** of the Laws of Zambia
- The proceedings in the IRC are commenced by a **Complaint** and the respondent files an **Answer** > Complaint filed within 90 days of the occurrence of the event; and a judgement being delivered within one year after hearing the case
- IRC not bound to the rules of evidence in civil or criminal proceedings; Main objective is to do justice between the parties before it; Appeal at the Supreme Court possible

The Subordinate Court (1)

- Governed by the **Subordinate Courts Act Chapter 28** of the Laws of Zambia
- This court is constituted in each District in Zambia
- It can only exercise its jurisdiction within the limits of the district within it is constituted
- Subordinate Courts of the first class are presided over by either the Principal Resident Magistrate, a senior resident magistrate or a magistrate class one (mainly lawyers by profession) > Subordinate Courts of the second and third class are presided over by magistrates of the second and third class respectively (mainly passed magistrate‘s courses)

The Subordinate Court (2)

- Jurisdiction of the Subordinate Court of the first class in civil matters is subject to Section 20 (1) of the Subordinate Courts Act with the Principal Resident Magistrate (PRM) having the highest jurisdiction of not more than 30.000 ZMW (claims above this amount must be instituted in the High Court or Commercial Court)
- In criminal matters, the jurisdiction of the court is governed by the **Criminal Procedure Act Chapter 88** of the Laws of Zambia as well as the Subordinate Courts Act (Examples: Theft and smaller crimes)
- Decisions are Judgements or Rulings (Appeal to HC and then SC)

The Small Claims Court (1)

- Is governed by the **Small Claims Courts Act Chapter 47** of the Laws of Zambia
- Is composed of an arbiter sitting alone whose aim is to reconcile the parties
- It is therefore not bound by the rules of evidence but applies law and equity > evidence is given on oath or affirmation
- Proceedings in the SCC are commenced by a Notice of Claim filed before a clerk of court
- Its jurisdiction is limited to liquidated claims of not more than four thousand fee units and is exercised by way of arbitration

The Small Claims Court (2)

- The court has got the power
  - ➢to make final award, or order the restitution of any property or order the specific performance of a contract other than a contract of personal service; or make any other order which the justice of the matter requires
  - ➢To enforce its own award and may where applicable issue a warrant of distress

The Small Claims Court (2)

- Appeals at High Court on points of law only within 30 days of the decision
- Arbitrators are appointed by Judicial Service Commission > part-time > they must be legal practitioners of not less than 5 years standing at the bar
- No Legal representation since proceedings are simple and informal

The Local Court (1)

- Is governed by the **Local Courts Act Chapter 29** of the Laws of Zambia and administers the **African customary law** inter alia; and in so far it is not repugnant (widersprechend) to natural justice or morality or incompatible with the provisions of any written law
- Lawyers have no right of audience before local courts
- Jurisdiction is territorial in nature > Grade A LCs cases up to 3.020 ZMW > Grade B LCs cases up to 2.500 ZMW

The Local Court (2)

- Section 5 (1) of the Local Courts Act restricts the jurisdiction as follows: *„…no local court shall be given jurisdiction – **(i)** to determine civil claims, other than matrimonial or inheritance claims, of a value greater than one hundred and twenty fee units; or **(ii)** impose fines exceeding forty penalty units; or **(iii)** to order probation or imprisonment for a period exceeding two years; or **(iv)** to order corporal punishment in excess of twelve strokes of the cane.“*

The Local Court (3)

- The court shall be constituted by a presiding justice
- The court may hear a civil matter within its jurisdiction provided the defendant is a resident of the area or the cause of action has arisen in the area > Real property matters shall be heard in the local court situated in the area where the property is situated
- Jurisdiction over crimes committed in the area (not where death is alleged to have occurred or which is punishable by death); Appeal at the Subordinate Court

PART 2 – CHAPTER 1 - Contract Law

Introduction, Nature and Function; Formalities and Formation of a contract – Offer, Acceptance, Intention to create legal relations, Consideration

Headnote

*"The law of contract lies at the very **heart of contemporary civil law**. Its **practical significance** is enormous as contracts are everywhere **in our private and working lives**, ranging from daily shopping and using transport over living in a rented accommodation to our working relationship. "*

Introduction and brief history (1)

- Law of contracts aims at **enforcing agreements between members of society (Parties, Businesses etc.) with the help of a set of rules and remedies, in case those agreements are not fulfilled**
- With other words "*if things go wrong and the contract does not work well, the law of contract comes into play*" (!)

Introduction and brief history (2)

- In Unit 1 we learned, that the development of the English law is closely associated with the historical background of England
- English law is based on legal rules which were first developed in the Middle Ages, but **a contract in the modern sense did not yet exist** at that time

Introduction and brief history (3)

- Today, a contract may be defined as

"An agreement between two or more parties promising each other to give and to receive something with the intention to be legally bound"

- Under medieval English law, a claim based on such an agreement was not possible and not enforceable

Introduction and brief history (4)

- Even in Medieval times, goods were exchanged in return for payment
- But in the event of payment default, the seller could not just go to court and enforce the contract
- In the beginning an action for payment could only be brought for **two reasons (…)**

Introduction and brief history (5)

- **(1)** The claimant asserted that the defendant

  - Owed him a certain amount of money in return for delivered goods

    - Claimant got a **writ of debt**
    - Whereby the defendant was ordered to return the goods or to pay the money

Introduction and brief history (6)

Or….

- (2) The claimant asserted that the defendant

  - Made to him a solemn covenant to do something
    - e.g. the defendant gave him a promise under seal
    - Claimant got a **writ of covenant**
    - whereby the defendant was ordered to keep the covenant

Introduction and brief history (7)

- The thing is: **Both writs depended not on an agreement** (mutual consent) between the parties, which is entirely in contrast to our modern understanding of an enforceable contract
- **Writ of debt** was only issued when the goods had already been delivered
- **Writ of covenant** was issued because the formal promise from the defendant existed

Introduction and brief history (8)

- Only in the course of the 15th and 16th Century a legal action was allowed in the common law courts, which was based on an informal promise
- If the claimant could prove damages caused by the breach of a promise, he got now a "**writ of assumpsit**"
- whereby the defendant was ordered to effect performance (a total new dimension)

Introduction and brief history (9)

- Around the year 1600 the *writ of assumpsit* had spread out widely and took over the tasks of the older actions based on debts and covenant
- the term *contract* and the meaning of its proper modern sense of an agreement developed (“the contract was born”) > slowly rules, principles and exceptions were developed in the common law courts

Introduction and brief history (11)

- The majority of principles of English contract law were developed in the 18th and 19th centuries particularly under the classical doctrine of "**freedom of contract**", and contract law as a separate branch of law came into being
- Freedom of contract = the right to contract with whomever we want and on the terms that we want (referred to as the "heart of contract law")

Introduction and brief history (10)

- However, we can still find remains of the medieval differentiation in modern English law that distinguishes between two types of contracts:
  - **Simple (informal) contracts** (made in writing, orally or by conduct) > must be supported by consideration in order to be binding/ to be enforceable
  - **Formal contracts (contracts by deed)** which must be in writing and in addition "**signed, witnessed and delivered"** to effect a transfer of property > do not need consideration to be binding/ to be enforceable

Most fundamental principle (!)

- Ensuring the most fundamental principle of the law of contract

“pacta sunt servanda = pacts must be kept”

- Ensuring that rights and obligations created by parties under a legally binding agreement are complied with

What are the “terms” of a contract?

- **Provisions that compose a contract and that have to be conform to the rules and principles of the law of contract**
- **Terms** of a contract may be **express** (embedded in the contract orally or written) **or implied** (terms not expressly stated in the oral or written contract, but nevertheless form a provision of the contract; e.g. in a contract of sales of goods a court would imply that the purchased good is usable > that the good will serve the reasonable and expected purpose)

Definition

"A contract is an agreement

between two or more parties

promising each other to give and to receive something

with the intention to be legally bound."

What makes a contract? (1) (Checklist!)

- The 4 crucial elements in the formation of a valid contractual agreement are:

- **Offer**
- **Acceptance**
- **Intention to create legal relations**
- **Consideration**

What makes a contract? (2)

- The **absence** of one or more **of the elements** offer (1), acceptance (2), intention to create legal relations (3) and consideration (4) **makes the contract** either ***void*** or ***voidable*** or ***unenforceable***.

What makes a contract? (3)

- Besides the 4 crucial elements there are other necessary requirements, which will be mentioned now, but will be discussed later
  - **Legal capacity to contract (e.g. 18+, drunk, insane)**
    - **Mutual understanding to the terms of contract**
      - **Compliance with certain formalities**
    - **Absence of conflict with the law or public policy**

Classification - Unilateral contracts (1)

- Created when one party promises to do something **in return for an act** (not a promise) from the other party > could be called a ***"one sided contract"***
- The offeror will normally imply to have waived the need for communication of an acceptance, meaning a communication of an acceptance is not necessary
- The **Performance of the requested act** by the offeree will **suffice** and the **notification of an intention to perform is unnecessary**
- Only the party which made the promise is legally bound **(!)**

Classification - Unilateral contracts (2)

- ***Example:*** *The dog of A is lost. A puts a note at the mall. "100 ZMW will be paid to anyone who can find my dog Coco!" B finds the dog and returns it to A, in the moment he hands the dog over to A, B becomes entitled to the reward of 100 ZMW as promised. A becomes liable to honour his promise to B. If A fails to honour his obligation, B can sue A for the 100 ZMW.*

Classification - Bilateral contracts (1)

- Contract is created when the **promise made by one party is exchanged for the promise of the other party >** can be called a ***two sided contract*** because of the two promises
- Each party is obliged to honour his **rights and obligations** stated in the contract
- E.g. in a contract for sale of goods, the buyer promises to pay the price and the seller promises to deliver the goods > a failure to do so would render the defaulting party liable and the contract enforceable at law

Classification - Bilateral contracts (2)

- ***Example:*** *A is the owner of a small shop which provides technical equipment. B is a wholesaler and deals inter alia with laptops. A orders via e-mail 10 laptops from B for the price of 4.000 ZMW for each laptop. B delivers the laptops within 14 days as agreed and without default. A has to honour his promise and pay 40.000 ZMW to B, who kept his promise and delivered on time. If A fails to pay, B can sue A for the 40.000 ZMW.*

Void contracts (1)

- Void = not valid, not legally binding
- Void contract **imposes no legal rights or obligations upon the parties and is not enforceable by a court**; in fact it is not a contract at all
- The whole transaction is regarded as a **nullity** > at no time there has been a contract between the parties
- Any goods or money obtained under the agreement must be returned > Where items have been resold to a third party, they may be recovered by the original owner because the contract is void *ab initio (from the beginning)*

Void contracts (2)

- ***Example 1:*** *An example of a void contract would be a murder-for-hire. Assume that a rich business person pays a hitman to kill a competitor. The business person pays the hitman 1.000.000 ZMW in advance, but the hitman never kills the competitor. The business person cannot sue or take the hitman to court for not performing under the contract. No court would enforce this illegal contract.*

Void contracts (3)

- ***Example 2:*** *An agreement that was made between a drug dealer and a drug supplier to purchase a specified amount of drugs for a specified amount of money. The parties could not enforce the agreement since there is an unlawful objective which makes the contract invalid.*

Voidable contracts (1)

- **In principle a legally enforceable agreement**, but it may be treated as never having been binding on a party who was **suffering from some legal disability (e.g. not 18+, drunk, insane etc.) or who was a victim of fraud** at the time of its execution
- A contract which is voidable operates in every respect as a valid contract unless and until one of the parties takes steps to avoid it > it is **not void until one party chooses to treat it as such**

Voidable contracts (2)

- Voidable **contract can be ratified** either **expressly or impliedly** by the party who has the right to avoid it:
  - **Express ratification:** when that party who has become legally competent to act declares the he/she accepts the terms and obligation of the contract
  - **Implied ratification:** when the party, by his/her conduct, manifests an intent to ratify a contract, such as by performing according to its terms

Voidable contracts (3)

- **Ratification of a contract requires the same elements as a formation of a new contract** > there must be an **intent and complete knowledge of all material facts and circumstances of the agreement**

Voidable contracts (4)

- ***Examples:***
  - *Contracts where one party was **forced or tricked into** entering it*
  - *Contracts entered when **one party was incapacitated** (e.g. not 18+, drunk, insane)*
  - *Contracts which are **made by mistake** (Irrtum) are voidable, but if the mistake is material it can also be void*
  - *Contracts which are **made by misrepresentation** (Falschangabe) are voidable*

Unenforceable contracts (1)

- Unenforceable contracts are valid contracts but cannot be enforced in the courts if one of the parties refuses to carry out its terms

Unenforceable contracts (2)

- ***Examples:***
  - *An **unsigned contract** is generally unenforceable*
  - *Contract entered **without or in excess of authority***
  - ***Statute of limitations** has expired (e.g. 6 years for cases in contract)*
  - *An **employer forcing an employee** to sign a contract that forbids workers from joining a union*

Aleatory contracts

- A contract type in which the parties involved do not have to perform a particular action until a specific event occurs in the future
- Events are those which cannot be controlled by either party, e.g. such as natural disasters and death
- ***Example:***
  - *Aleatory contracts are commonly used in insurance policies. The insurer does not have to pay the insured until an event, such as a fire, results in property loss.*

Unconscionable contracts (1)

- **Unjust or unduly one-sided in favour of the party who has the superior bargaining power**
- Unconscionable implies **an affront to fairness and decency**
- Concerns contracts which **no mentally competent person would accept and that no honest person would enter into** (e.g. hidden complicated/technical clauses in a contract)

Unconscionable contracts (2)

- ***Example:*** *An experienced dealer asks a consumer to sign a contract. Within the contract is buried a very complicated, technical language that most people wouldn't understand.* ***The business dealer used very small font and inserted the clause in a way that would purposefully mislead the consumer into signing on unfair terms.*** *This contract would be declared unconscionable due to the unequal bargaining power between the parties, and the fact that one party used their knowledge and experience to take advantage of the other. If the court finds the contract unconscionable, it will be declared* ***void****.*

Executed contracts (1)

- Phrase is to a certain extent a misnomer because the completion of performances by the parties signifies that the contract does not longer exists > nothing remains to be done by either party

Executed contracts (2)

- ***Example:*** *X has been looking at a TV he wants to purchase. After deciding to go forward with the purchase, X walks into the electronics store and pays for the TV in cash. X walks out of the store with the TV and the store has the full payment. This contract is considered executed since the TV was paid for in full and all terms of the contract were met.*

Executory contracts (1)

- Is a contract in which some **future act or obligation at a future date remains to be performed** according to its terms

Executory contracts (2)

- ***Example:*** *X has been looking at a TV he wants to purchase. After some thinking he finally decides to sign a hire-purchase agreement that states the he will pay 500 ZMW per month until the purchase price has been paid in full. Until X makes the final payment, the contract has not been fulfilled.*

Elements of the contract in detail (Checklist!)

- The 4 crucial elements in the formation of a valid contractual agreement are:

- **Offer**
- **Acceptance**
- **Intention to create legal relations**
- **Consideration**

Offer (1)

- **Statement of willingness** to contract on specified terms
- **Offeror (also called promisor)** addresses his offer to the **offeree (also called promisee)** with the intention that the offer is to become binding as soon as it is accepted by the offeree
- An offer may be **express** (orally or in writing) **or implied from conduct** (e.g. putting goods on a cash desk)
- **An offer can be addressed to one particular person** (majority of the cases)**, a group of persons or the world at large**

Offer (2) – Offer of a reward

- An Offer addressed to the general public is *in principle* not legally binding (where there is a *principle* or *rule*, there is often an exception)
- However, if the offer contains elements which show that the offeror intends to create legal relations, he is bound to his words – classical example ***offer of a reward***
- The leading case in this context is ***Carlill Vs. Carbolic Smoking Ball Co (1893)***

Offer (3) – Offer of a reward

Carlill Vs. Carbolic Smoking Ball Co (1893)

The case: *The defendants manufactured a patent medicine the "smoke ball" which they advertised publicly in a newspaper as a miraculous cure for many ailments and as preventatives against influenza and colds. The company promised to pay 100 Pounds (a lot of money at that time) to anyone who contracted influenza within 14 days after having bought and used the smoke ball as prescribed. The company deposited 1000 Pounds with a bank to show its sincerity. The claimant, after buying and using the smoke ball as prescribed, nevertheless caught influenza and claimed the reward of 100 Pounds.*

Offer (4) – Offer of a reward

Carlill Vs. Carbolic Smoking Ball Co (1893)

The court's decision: *The court rejected the argument of the defendants that the advertisement was a "mere puff" (=statement without legal intention), terms were to vague to make a contract and that they could impossibly contract with the whole world. The advertisement constitutes an* ***unilateral offer to the world at large****, accepted by the claimant, who was entitled to the reward of 100 Pounds.*

Offer (4a) – Offer of a reward

- The parties each performed their part of the bargain as follows:
- ***Carbolic Smoke Ball Company*** **did the following**

  - It placed an advertisement to the whole world in the public media of its product
  - It gave instructions on the usage of the influenza smoke ball
  - It promised to pay a sum of 100 Pounds to anyone who responded to the advert, bought the flu ball, used it according to the instructions and still got the flu
  - Its sincerity to the arrangement confirmed by the company depositing a sum of 100 Pounds with the bank

Offer (4b) – Offer of a reward

- ***Mrs Carllil* on the other hand did the following**

  - She read the advertisement
  - She bought the influenza smoke ball
  - She used the product according to the instructions
  - She contracted flu after using the product

- **The action of the parties confirm the creation of a contract as all the essential elements of a contract were satisfied!**

Offer (4b) – Offer of a reward

Ratio/Principle this case stands for:

- *If there is an offer to the world at large, and that offer does not expressly or impliedly require notification of performance, performance of the specified condition in the offer will constitute acceptance of the offer and consideration for the promise.*
  (The three judges in this case agreed on this issue)

Offer (5) – Invitation to treat

- English law **differentiates** precisely between an ***offer*** in the legal sense and the ***mere invitation to treat***
- **Invitation** to treat is a statement made by a party inviting others **to make an offer** which he/she is then free to accept or reject (***invitatio ad offerendum***)

Offer (6) – Invitation to treat (Checklist!)

- Typical ***invitations to treat*** are:

  - **Advertisements** (for bilateral contracts)
  - **Self-service shop displays / shop window displays**
  - **Auctions**
  - **Invitation to tender**
  - **Mere statements of price**

Offer (7) – Invitation to treat – Advertisements

- **Ordinary advertisements** (1) are typical kind of an *invitation to treat, if they* not involve respectively fulfil the requirements of an unilateral offer (!) - remember the "*Carllil's Case"* as an example for an unilateral offer
- Usually **goods for sale** or **services** are advertised in newspapers, magazines, catalogues and price-lists distributed by traders > a contract will not be formed until the person seeing the advertisements has made the offer to buy, which has then been accepted by the advertiser **(!)**

Offer (8) – Invitation to treat – Advertisements

- The price marked on the **goods in the shop window** or **in the goods shelves of a supermarket** (2) constitutes **not an offer**
  > it's a mere invitation for the customer to make an offer
  > the priced amount is an indication of the acceptable price
- It is the supermarket customer who makes the offer to buy when presenting the goods at the cash desk
  > Shop is free to accept and not compelled to sell the goods at the price at which they are displayed
- The acceptance takes place when the cashier accepts the money

Offer (9) – Invitation to treat – Advertisements

- The following case demonstrates the impact of the *doctrine of invitation to treat* even on criminal law …

Offer(10) - Invitation to treat – Advertisements

Fisher Vs. Bell (1960)

The case: *The defendant, a shopkeeper, displayed in his shop window a flick knife, priced at 4 Shilling. He was charged with offering for sale a weapon what was prohibited by the Offensive Weapons Act 1959.*

The court's decision: *That according to the law of contract "the display of an article with a price on it in a shop window is an invitation to treat" rather than an offer for sale. Therefore the prosecution under the 1959 Act failed.*

Offer(11) - Invitation to treat – Sale at auction

- In a sale at auction (3), **the lot itself** and the **auctioneer's request for bids** is an *invitation to treat* > **each bid is an offer to buy the lot at the price offered**
- It is **accepted at the fall of the auctioneer's hammer**
- This rule was affirmed by Section 57(2) Sale of Goods Act 1979: *"A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer,…"*
- Advertisement of an auction is **no offer** (!)

Offer(12) - Invitation to treat – Sale at auction

Harris Vs. Nickerson (1873)

The case: *The defendant, an auctioneer, advertised that a sale of office furniture would take place at the town Bury. The claimant travelled down from London to Bury to attend the auction, but found the furniture had been withdrawn from the sale. He thereupon sued the defendant for his loss of time and his expenses.*

The court's decision: *That the advertisement was a mere declaration of intent and did not create a binding contract with the claimant.*

Offer(13) - Invitation to treat – Invitations to tender

- Invitations to tender (4) are normally *invitations to treat*
- The person making the invitation is **not bound** to accept any of the responses and can make a choice after checking all companies > **unless the person making the invitation to tender stated that he will accept the highest offer to buy goods** or **the lowest for the supply of goods or services** > than he is bound to the offer

Offer(14) - Invitation to treat – Invitations to tender

- ***Example:*** *A company wants it's office painted. It invites tenders and various decorators will respond with different prices for the work. The company is free to choose any of the decorators, not necessarily the cheapest. If, however, the company has in its advertisement agreed that the work will go to the tenderer with the lowest price, then it's bound to give the work to the person which gave the lowest price.*

Offer(15) - Invitation to treat – Mere statement of price

- Last type of *invitation to treat* is the mere statement of price
- That a party has indicated the price which he would find acceptable, e.g. to sell an item, does **not** make it **an offer**
- The last answer whether an offer is made or not depends on the construction of the precise words in the individual case (!)

Offer(16) - Invitation to treat – Mere statement of price

- ***Harvey Vs. Facey (1893)***

- ***The case:*** *The claimant wanted to buy the defendant's farm and sent a telegram stating: "Will you sell me Bumper Hall Penn? Telegraph lowest price." The defendants telegram replied: "Lowest price acceptable is 900 Pounds." The claimant argued that he had then accepted this (offer).*
- ***The court's decision:*** *The court held that the defendant's statement was merely a statement of price and was not an offer open to acceptance.*

Invitation to treat (Checklist!)

- **Advertisements** (for bilateral contracts)
- **Self-service shop displays/shop window displays**
- **Auctions**
- **Invitations to tender**
- **Mere statements of price**

Offer(17) – Communication of an offer

- Offer must be communicated to the offeree in order to be valid and before it can be accepted
- Therefore, no party can be bound by an offer of which they were unaware
- This is true for *unilateral* and *bilateral* offers
- The offeree must have a **clear knowledge of the existence of the offer**

Offer(18) – Communication of an offer

- ***Example:*** *If A, by public notice, advertises a 1000 ZMW reward to the finder of a lost valuable ring, and B without having read the advertisement containing the offer, finds the ring and returns it to the loser A, B is not entitled to claim the reward. The offer was not communicated to him; he was unaware of it. He did not return the ring as a fulfilment of a contract. Thus, where there is no offer there cannot be any acceptance.*

Offer(19) – Termination of an offer (Checklist!)

- **Acceptance by the offeree**
- **Express rejection by the offeree**
- **Lapse of time**
- **Failure to comply with precondition**
- **Revocation by the offeror prior to acceptance**
- **Extinction by a counter offer …**

Offer(20) – Termination of an offer

- **Acceptance by the offeree** > Contract is formed
- **Express rejection by the offeree** > Contract fails
- **Lapse of time** > particular date or after a certain fixed period or if there is nothing specified in the offer, it lapses after a reasonable time has passed (to consider the **circumstances in the given case**, especially the **subject-matter of the contract;** sometimes an offer has to be accepted immediately (e.g. the subject matter is perishable (food) or the offer is made fast by fax) or sometimes it can be accepted within a month or even longer

Offer(21) – Termination of an offer

- **Failure to comply with precondition** > an offer may also terminate if the parties had agreed to meet certain preconditions and then failed to do so > ***Example:*** *A offers to sell her bike for 500 ZMW if she manages to buy a car at the weekend.*
- **Revocation by the offeror prior to acceptance** > Contract fails; Withdrawal is possible at any time prior to acceptance when communicated to the offeree or even third party; > Where a notice of revocation does not come directly from the offeror but from a reliable source, it is deemed to be an indirect, but valid revocation

Offer(22) – Termination of an offer

Dickinson Vs. Dodds (1876)

The case: *The seller of a house (A) sent a letter to the offeree (B): "This offer is to be left over until Friday, 9 am". On Thursday, B heard from a third person (C) that the house had already been sold to D. Nevertheless, on Friday, 7 am, B handed to A his acceptance of the offer.*

Offer(22a) – Termination of an offer

Dickinson Vs. Dodds (1876)

The court's decision: *That there was no contract between A and B because the communication, although by an outside party, was good notice of the revocation. The revocation was communicated to the offeree before his purported (angeblich) acceptance. (Different, if the offeree pays money to the offeror to keep the offer open! The offeror is then bound to keep it open.)*

Offer(23) – Termination of an offer

- **Extinction by counter offer** > A response introducing new terms or attempts to vary the terms of the original offer is a *counter offer* which terminates the offer > contract fails > Counter offer means actually: ***"I do not accept your offer, will you accept my offer?"***

Elements of the contract in detail (Checklist!)

- The 4 crucial elements in the formation of a valid contractual agreement are:

- **Offer**
- **Acceptance**
- **Intention to create legal relations**
- **Consideration**

Acceptance (1)

- The final and unrestricted **expression of assent to all terms of an offer**
  > communicated by the offeree/promisee to the offeror/promisor
  > made with the **awareness of accepting**
- Like an offer, an acceptance can be expressed in **writing, orally or by conduct**
- Response which **introduces new terms or attempts to vary the terms** of the original offer **is a *counter offer*** which terminates the offer, rendering it incapable of acceptance

Acceptance (2) – Unconditional acceptance

Hyde Vs. Wrench (1840)

The case: *The defendant (W) offered to sell a farm to the claimant (H) for 1000 Pounds. H rejected the price and said he would pay 950 Pounds. After W refused this counter offer, H accepted the original offer of 1000 Pounds. Because W rejected it, H sued for specific performance.*

The court's decision: *That there was no contract and H's claim failed. The original offer was destroyed by H's counter offer, which W did not accept.*

Acceptance (3) – Unconditional acceptance

- ***Counter offer*** is to distinguish from **a *mere request for information***, attempting to clarify the extent and terms of the offer, or to ascertain whether the offeror would consider changing certain aspects of his offer
- In such in instance, the offer is still open to acceptance

Acceptance (4) – Unconditional acceptance

Stevenson, Jaques & Co. Vs. McLean (1880)

The case: *The defendant offered to sell iron to the claimants at 40 Schilling per ton. The claimant sent a telegram to the defendant asking "Please wire whether you would accept 40 for delivery over two months, or if not, the longest limit you could give". Later that day a further telegram was sent to the defendant by which the claimants accepted the original offer. The claimants sued for breach of contract. The defendant argued that the first telegram was a counter offer which destroyed the original offer.*

Acceptance (4a) – Unconditional acceptance

Stevenson, Jaques & Co. Vs. McLean (1880)

The court's decision: *That the first telegram was a mere request for information, not a counter offer. There was no attempt to introduce new terms into the contract as in Hyde Vs. Wrench, but a genuine inquiry by the claimants to see if the defendant would be willing to modify his terms.*

Acceptance (5)-Use of standard form contracts

- In business practice, the parties often used pre-prepared contract forms
- Every party declares *offer* and *acceptance* on their own forms containing their respective *standard business terms and conditions* and if there standard terms do not exactly correspond with each other – what regularly might be so – a conflict is generated, commonly referred to as ***battle of forms***

Acceptance (6)-Use of standard form contracts

- ***Battle of forms***: It was held that at this stage there is no contract, because the acceptor has made a *counter offer* submitting his standard business terms and conditions
- However, a contract may come into being if the offeror acted on the acceptor's communication, e.g. by delivery of goods or by conducting services
- In this case, the ***counter offer*** **of the acceptor was accepted by conduct** and the contract is valid on the acceptor's standard terms
- **This result is widely accepted as "theory of the last word"**

Acceptance (7)-Communication of acceptance

- In general, acceptance must be communicated to the offeror by the offeree *or* by an authorised person (e.g. agent)
- In addition, the acceptance must be clearly received by the offeror or an authorized agent
- Thus, in principle mere silence can never amount to acceptance **(!)**

Acceptance (8)-Communication of acceptance

Felthouse Vs. Bindley (1862)

The case: *The claimant (F) negotiated with his nephew John on the sale of John's horse. F wrote to his nephew offering an amount of 30 Pounds and added: "If I hear no more from you, I shall consider the horse to be mine!" The nephew did not reply but told the defendant the auctioneer B, who was selling the farming stock for him, to withdraw the horse from the auction. In error, however, the horse was sold by auction to another party. F sued B for his loss arguing that there was a contract between him (F) and his nephew for the sale of the horse.*

Acceptance(8a)-Communication of acceptance

Felthouse Vs. Bindley (1862)

The court's decision: *That the claimant action failed. Although the nephew intended to sell the horse to his uncle, he had never communicated his intention to accept to his uncle "or done everything to bind himself". Thus, there was no contract between F and his nephew.*

Acceptance (9)-Communication of acceptance

- It can be concluded from this case that, as a general rule, there must be **at least some doing, some conduct expressing the intention to be bound**, in other words there must be some objective or external manifestation of acceptance **communicated to the offeror**
- Therefore, **acceptance by conduct** is very well possible > acceptance needs not always be communicated expressly

Acceptance(10)-Communication of acceptance

- A special case is **acceptance in unilateral contracts**
- As seen in *Carlill Vs. Carbolic Smoke Ball Company* there is no need for the offeree to communicate actively the acceptance to the offeror because the offeror has *impliedly waived* the need for such a communication
- However, also in this case, the acceptance was ***implied from the conduct*** of Mrs. Carlill buying and using the smoke ball as prescribed > memorize *Carlill's Case* (!)
- The performance of the stipulated act constitutes acceptance

Acceptance (11) - Stipulated methods

- Generally, acceptance can be in any form, as long as it is communicated to the offeror
- Where, however, the offer **stipulates a particular method of acceptance**, such as *by return of post*, *by fax* or *by telegram*, the offeror may not be bound unless acceptance is made in the stipulated way

Acceptance (12) - Stipulated methods

Eliason Vs. Henshaw (1819)

The case: *The claimant (E) offered to buy flour from the defendant (H). The offer stated that acceptance must be given to the wagoner who delivered the offer. The acceptance was sent by post and arrived after the wagoner.*

The court's decision: *That there was no contract as the stipulated particular method of acceptance was not followed.*

Acceptance (13) - Stipulated methods

- If the offeror did not make it clear that no other method would suffice than the prescribed one, an equally advantageous method would suffice also
- ***Example:*** *If the offeror says "reply by letter sent by return of post" this may simply mean "reply quickly". In this case, a reply by fax instead of by letter is an acceptance improving upon the prescribed method. The contract is valid (Reason: Offeror aimed at a speedy acceptance.)*

Acceptance (14) – Agreement by use of post

- In the case of contracts made by correspondence, the general rule of communication applies to the **offer made by post** > no effect **until the offer reaches the offeree** – not before simply when the letter with the offer is posted
- Situation is different with an **acceptance made by post *(“Postal Rule of Acceptance”)*** > acceptance sent via the post takes effect **as soon as the letter is validly posted** rather than on delivery (!)

Acceptance (15) – Agreement by use of post

Adams Vs. Lindsell (1818)

The case: *On 2nd September Lindsell (L) made an offer by post to sell Adams (A) some wool on certain terms asking for a reply "in course of post". The letter was misdirected and reached a on 5th September whereupon A posted a letter of acceptance at once which reached L on the 9th September. L, who had assumed that his offer had been rejected, had sold the wool to a third party, on 8th September.*

Acceptance (15a) – Agreement by use of post

Adams Vs. Lindsell (1818)

The court's decision: *That there was a valid contract between A and L made at the time the letter was posted, because the offer was accepted at once on being received. The contract was thus in existence before the sale of the wool to the third party.*

Acceptance (16) – Agreement by use of post

- The **postal rule** for **acceptance made by post** even applies if the letter with the acceptance never reaches the offeror

Acceptance (17) – Agreement by use of post

Household Fire Insurance Co Vs. Grant (1879)

The case: *The defendant (G) applied for shares in the company. The company accepted the offer and posted a letter of allotment shares to G, but it never reached him.*

The court's decision: *The acceptance took place as soon as the letter was posted. The contract was made and G became a shareholder of the company.*

Elements of the contract in detail (Checklist!)

- The 4 crucial elements in the formation of a valid contractual agreement are:

- **Offer**
- **Acceptance**
- **Intention to create legal relations**
- **Consideration**

Intention to create legal relations (ICLR)

- Parties to the contract must intend it to be legally bound
- Case law distinguishes agreements that should be legally enforceable and those which should not:
  - **Domestic and social agreements** are presumed not to be intended to be legally binding, unless the contrary can be proved
  - In **commercial agreements** there is a strong presumption that the parties intend to be legally bound, unless the contrary can be shown
  - **Advertisements** do not generally create legal relations and are such treated as “mere puff”

ICLR - Domestic and social agreements (1)

- As a **general rule**, agreements of a purely domestic nature are not contracts > they are mostly not intended to be binding at law but instead **rely upon bonds of mutual trust and affection** > Courts generally don't want to interfere in this private spheres (courts would be full of domestic disputes)
- ***Examples:*** *Housekeeping allowance; Promise to buy a TV; Promise to do a holiday trip, Offer of a lift etc.*

ICLR - Domestic and social agreements (2)

Balfour Vs. Balfour (1919)

The case: *A husband who was posted abroad as a civil servant came to England on leave with his wife. When he had to return, he promised his wife, who on the doctor's advice had to remain in England, a monthly housekeeping allowance of 40 Pounds. Later the parties separated and the wife sued for the allowance.*

ICLR - Domestic and social agreements (2a)

Balfour Vs. Balfour (1919)

The court's decision: *That there was no enforceable contract because in this sort of situation – agreement of domestic nature between husband and wife living together as one household – it must be assumed that the parties did not intend to be legally bound, unless the agreement states to the contrary.*

ICLR - Domestic and social agreements (3)

Merritt Vs. Merritt (1970)

The case: *A husband had stroken up a relationship with another woman and the spouse intended to separate. They negotiated about certain arrangements for the future. The wife insisted that the husband gave her a written statement in which he agreed to transfer the ownership of the house to her when she had completed paying all the mortgage repayments on the house. The wife paid the mortgage and sued for the transfer of the house.*

ICLR - Domestic and social agreements (3a)

Merritt Vs. Merritt (1970)

The court's decision: *That this case is distinguishable from Balfour Vs. Balfour, because there the parties lived in amity, whereas the Merritts had decided to separate and for this purpose made an agreement – at that time no longer living together in amity – which reasonable persons would regard as intending to be binding in law. Above all, the wife had given consideration by paying the mortgage, so that she was entitled to the house.*

ICLR - Domestic and social agreements (4)

Jones Vs. Padavatton (1969)

The case: *A mother who lived in Trinidad, a Caribbean island, wanted her daughter to study English law and, after completion of her studies, to practise as a lawyer in Trinidad. At a time when mother and daughter were very close, the mother bought a house in London to enable the daughter to reside there during her studies. Later, differences arise and the mother claimed possession of the house.*

ICLR - Domestic and social agreements (4a)

Jones Vs. Padavatton (1969)

The court's decision: *That the arrangement in relation to the house was made without contractual intent and that the mother was entitled to possession of the house.*

ICLR – Commercial agreements (1)

- For commercial agreements there is a **strong presumption** that the parties intend to create legal relations and that the agreement should be enforceable in court
- This strong presumption may generally only be **rebutted by express terms of the parties** excluding clearly the formation of legal relations

ICLR – Commercial agreements (2)

Rose & Frank Co Vs. Crompton Bros Ltd. (1925)

The case: *R & F made an agreement with C whereby they were appointed agents for sale of paper supplied by C. The agreement included the following clause: "This arrangement is not, nor is this memorandum written as a formal legal agreement and shall not be subject to legal jurisdiction in the law courts."*

The court's decision: *That there was no legally binding contract because the clause sufficiently excluded an intention to create legal relations.*

ICLR – Commercial agreements (3)

- Where there is no such an express provision excluding contractual intention, the strong presumption/rule that legal relations are intended in commercial agreements applies > However, the onus/duty of rebutting contractual intention is a heavy one (!)

ICLR – Commercial agreements (4)

Petroleum Ltd Vs. Commissioners of Custom and Excise (1976)

The case: *At a time when the English national football team was winning the World Cup, Esso petrol station proprietors displayed posters supplied by Esso stating: "The World Cup coins – one coin given away for free with every four gallons of petrol." Millions of coins were distributed. The Commissioners claimed that the coins were liable for purchase tax under the Purchase Tax Act on the grounds that the coins had been "produced in quantity for general sale". Esso argued that the coins were subject of a gift, not a sale. The question was whether or not there was a contract of sale – did a motorist who bought four gallons of petrol have a contractual right to one of the coins?*

ICLR – Commercial agreements (4a)

Petroleum Ltd Vs. Commissioners of Custom and Excise (1976)

The court's decision: *Esso was clearly trying to gain more business from the promotion, there was an intention to be bound by the arrangement. The whole transaction took place in a setting of business relations. Coins themselves may have been of little value, but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage in which the garage proprietors would also share.*

ICLR – Commercial agreements (5)

McGowan Vs. Radio Buxton (2001)

The case: *The claimant entered a radio competition for which the prize had been stated to be a Renault Clio car. She was told that she had won the competition but was given a four-inch scale model of a Renault Clio. The defendant argued that there was no legally binding contract.*

ICLR – Commercial agreements (5a)

McGowan Vs. Radio Buxton (2001)

The court's decision: *That there was intention to create legal relations. The claimant entered the competition as a member of the public and that "looking at the transcript of the broadcast, there was not even a hint that the car would be a toy".*

ICLR – Advertisements (1)

- For the purpose of attracting customers, tradesmen/businessmen often may make vague and exaggerated claims in advertisements
- As already mentioned, **advertisements** are generally treated as mere statements of opinion or “mere puffs” with no intention to create legal relations
  > Usually, they include only an **invitation to treat**

ICLR – Advertisements (2)

- *Mrs Carlill's Case* formed an **exception** because the court considered that the advertisement was intended to be an ***offer to the public at large*** as the company had stressed the sincerity of its contractual intention by depositing 1000 Pounds in a bank (it qualified as an offer)

Elements of the contract in detail

- The 4 crucial elements in the formation of a valid contractual agreement are:

- **Offer**
- **Acceptance**
- **Intention to create legal relations**
- **Consideration**

What is a consideration? (1)

- Consideration is a **fundamental and necessary element** in the formation of a valid contract
- English law will not enforce gratuitous promises (!)
- Definition: *"Something of value given by both parties to a contract that induces them to enter into the agreement to exchange mutual performances."* > with simple words: ***"Consideration is the benefit that each party gets or expects to get from the contractual deal"***
- Normally consideration takes the form of a money payment but could also consist of some other service

What is a consideration? (2)

- How does consideration work in the real world?
  Example: *Let's say you backed into your neighbor's golf cart and damaged it. Your neighbor is legally permitted to sue you for the damage but instead agrees not to sue you if you pay him 1,000 ZMW. This agreement provides adequate consideration for the contract, because each party is giving up something in the exchange -- you're giving up some of your money while your neighbor is giving up the right to sue you.*

Types of consideration (1) - Executed consideration (valid)

- **(1) Executed consideration** arises when one party performs an act in fulfilment of a promise made by the other/the promisor > typical situation is the **unilateral contract** (one-sided contract) like an *offer of reward (Case: Lost dog and the reward for returning the dog)*
- *Another example: S goes to a bakery and asks the baker to make a birthday cake for her and S pays for the baker's services in advance then we can call the payment "executed consideration" for the baker's promise to make the cake.*

Types of consideration (2) - Executory consideration (valid)

- **(2) Executory consideration** arises when promises are exchanged *to perform acts in the future*, for example a **bilateral contract** for the supply of goods
- ***Example:*** *S sells his old mountain bike to B for 50 Pounds and promises to deliver the bike to B at a future date and B promises to pay on delivery. S promised to hand over the bike to B; he says "We have made a contract by which I am obliged to hand over the bike to B when he pays 50 Pounds".*

Types of consideration (3) – Past consideration (not valid)

- **(3) Past consideration**: when the promise was made *after* the act was done; in such a case the promise is not given in return for the other promise and the principle of consideration is *not complied*
- Consequently a *guarantee* made in respect of something *after* it has been sold is not binding because there is no consideration for the guarantee – the payment of the purchase price is *past* and therefore cannot constitute valid consideration

Consideration must not be past (1)

Roscorla Vs. Thomas (1846)

The case: *R bought a horse from T for 30 Pounds. As R was leading the horse away, the previous owner T promised that if the horse was not sound, he would return the price. The horse was in fact not sound.*

The court's decision: *The promise by T was not supported by consideration from R. The sale had already taken place when the warranty as to the soundness of the horse was given. Thus, the consideration was past.*

Consideration must not be past (1a)

Re McArdle (1951)

The case: *A son and his wife lived in his mother's house which, on her death, would be inherited by her son and her three other children. The son's wife paid for substantial repairs and improvements to the property. The mother then made her four children sign an agreement to reimburse the daughter-in-law out of her estate. When the mother died and the children refused to keep this promise, the daughter-in-law sued them.*

The court's decision: *The daughter-in-law sued unsuccessfully. Her consideration for their promise was past. It came before they signed the agreement to repay her.*

Consideration must not be past (2) – Exception to the rule

- The general rule that *consideration must not be past* is however broken in cases of **services rendered on request** > Even though the service is carried out without any mention as to payment, a promise to pay after the service is performed will be enforced by the courts (!)

Consideration must not be past (3) – Exception to the rule

Lampleigh Vs. Braithwaite (1615)

The case: *Brathwait killed a man called Patrick Mahume unlawfully. He asked Lampleigh to ride to the King and petition for a pardon. Lampleigh was successful. Braithwait promised 100 Pounds to Lampleigh. But he never paid up. Lampleigh sued. Braithwait said that because the service had been performed in the past, there was no good consideration at the time for the promise, regardless of the fact that Lampleigh was successful in securing a pardon.*

Consideration must not be past (3a) – Exception to the rule

Lampleigh Vs. Braithwaite (1615)

The court's decision: *That there was an implied understanding (i.e. implied assumpsit, or "assumption of obligation") that a fee would be paid. Where a past benefit was conferred at the beneficiary's request, and where a reward would reasonably be expected, the promisor would be bound by his promise.*

Consideration must move from the promisee (1)

- Bringing an action to court the promisee must prove that he *himself* has performed consideration or made a promise of consideration
- The promise of the other party can not be enforced if the consideration was provided from a *third party*
- The other way around, a person is not able to sue on a contract to which he is not a party
- Therefore this rule relating to consideration is interchangeable with the **rule of privity of contract**

Consideration must move from the promisee (2)

William Tweddle Vs. Atkinson (1861)

The case: *The groom's father, John Tweddle, agreed with the bride's father, William Guy, that William Guy would pay the groom, William Tweddle (also the claimant), 200 Pounds for marrying his daughter. William Guy died, and Guy's executor (Atkinson) would not pay. So William Tweddle sued for the 200 Pounds.*

Consideration must move from the promisee (2a)

William Tweddle Vs. Atkinson (1861)

The court's decision: *The son could not enforce the promise made to his father, as he himself had not actually given consideration for it – it was his father who had done so instead. The son didn't receive any consideration, so he cannot enforce the promise. The court rules further that a promise cannot bring an action unless the consideration from the promise moved (came) from him. Consideration must move (come) from the party entitled to sue upon the contract. No legal entitlement is conferred on third parties to an agreement. Third parties to a contract do not derive any rights from that agreement nor are they subject to any burdens imposed by it.*

Consideration need not to be adequate but must be sufficient (1)

- In the context of consideration *adequacy* and *sufficiency* have very different meanings
- **Adequacy** means that the parties are promising **things of fairly equal value** what – as a consequence of freedom of contract – is to be **decided only be the parties** themselves and not by the courts (!) > *"Let the buyer beware"*

Consideration need not to be adequate but must be sufficient (2)

- **Adequacy >** ***Example:*** *If you buy a picture for 100 Pounds which turns out to be a real Picasso, you are lucky, the seller is not. The contract is nevertheless good. On the other hand, if you were the seller, you could not seek assistance from the court merely because you made a bad bargain.*

Consideration need not to be adequate but must be sufficient (3)

Thomas Vs. Thomas (1842)

The case: *Before his death a husband expressed the wish that his wife be allowed to remain in their house, although this was not written in his will. After his death, his executors carried out his wish and charged the widow a nominal ground rent of 1 Pound per year. They later tried to dispossess her.*

Consideration need not to be adequate but must be sufficient (3a)

Thomas Vs. Thomas (1842)

The court's decision: *The dispossession failed. The moral obligation to carry out the husband's wish was not consideration, but the payment of the "peppercorn" rent, however small and apparently inadequate, was.*

Consideration need not to be adequate but must be sufficient (4)

- **Sufficiency** means that what is promised as consideration must be
  - **Real/ tanglible** - Consideration must be real or the promise has to be realisable (something which is impossible or prohibited does not give consideration)
  - **Legal valuable** – Consideration must be of some actual value; this means the parties are actually gaining in some way from the arrangement, even where things have no apparent worth like in the following case

Consideration need not to be adequate but must be sufficient (5)

Chappell & Co Ltd Vs. Nestlé Co Ltd (1960)

The case: *The claimant owned the copyright of a dance tune called "Rockin' Shoes". As part of an advertising campaign the defendants ran a special offer involving a record of this song. Customers could get a copy of the record by sending in 5 Pounds – normally the record was retailed at 35 Pounds – and three wrappers from the defendants' bar of chocolate. The claimant sued to prevent the promotion because of infringement of the copyright. (…)*

Consideration need not to be adequate but must be sufficient (5a)

Chappell & Co Ltd Vs. Nestlé Co Ltd (1960)

(…) *They claimed that royalties for the copyright should be paid on the price of the record. To calculate the royalties due, it was necessary to establish that price the defendants were charging for the record, and the claimant alleged that this price – the consideration for the promise to send the record – included the three wrappers. The defendants argued that the consideration was only the 5 Pounds, and that they threw away the wrappers on receipt.*

Consideration need not to be adequate but must be sufficient (5b)

Chappell & Co Ltd Vs. Nestlé Co Ltd (1960)

The court's decision: *That the wrappers did form part of the consideration since the offer was to supply a record in return not simply for money (the 5 pounds), but for the wrappers of the chocolate bars as well. The fact that the wrappers were of no real worth to the defendants was irrelevant.*

Consideration need not to be adequate but must be sufficient (5c)

Chappell & Co Ltd Vs. Nestlé Co Ltd (1960)

The statement of Lord Somervell: *"The question is whether the three wrappers were part of the consideration…I think that they are….They are so described in the offer. 'They', the wrappers, 'will help you to get smash hit recordings'…It is said that, when received, the wrappers are of no value to the respondents, the Nestlé Co Ltd. This I would have thought to be irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn."*

Consideration - Performance of existing duties (1)

- The *basic rule:* where a party merely does something by which he is already legally bound this can *never* be sufficient to amount to consideration for an entirely fresh agreement
- The rule applies to any **public duty** as well as to **contractual duties**

Consideration - Performance of existing duties (2)

Collins Vs. Godefroy (1831)

The case: *A police officer was under a court order to attend and give evidence to a trial. It was important to the defendant that the officer attended so he promised to pay him a sum of money to ensure that he did so.*

The court's decision: *The promise to pay was not contractual and was unenforceable. There was no consideration for it. The police officer had a public duty to attend anyway.*

Consideration -Performance of existing dut. (3)

Stilk Vs. Myrick (1809)

The case: *Two members of a ship's crew of 11 deserted. The captain promised the remaining crew that they could share these two men's wages if they got the ship safely home. When the ship returned the ship's owner refused to make the extra payments and was challenged in court.*

The court's decision: *It was held that the promise was not binding on him. The sailors were held to be bound by their contract to cope with the normal contingencies of the voyage, and these could include desertions, so there was no consideration for the captain's promise and no contract to enforce.*

Consideration - Performance of existing duties (4) -Exceptions to the basic rule

- As with every rule there is an **exception** > Where a public or *contractual duty is exceeded* and the party gives more than he had to give, this additional detriment may suffice for consideration

Consideration - Performance of existing duties (5) -Exceptions to the basic rule

Glassbrook Bros Vs. Country Council (1925)

The case: *During a strike a pit owner asked for extra protection from the police and promised a payment in return for this service. When the strike was over the owner refused to pay, claiming that the police were bound by their public duty to protect his pit.*

The court's decision: *His argument failed. The court found that the police had provided more men than they would normally have done and there was consideration for the promise. (duty is exceeded!)*

Consideration - Performance of existing duties (6) -Exceptions to the basic rule

Hartley Vs. Ponsonby (1857)

The case: *This case involved similar facts to Stilk Vs. Myrick, but here only 19 members of a crew 36 remained. A similar promise to pay more money to the remaining crew was enforced because the reduction in numbers made the voyage much more dangerous.*

The court's decision: *The agreement to continue in these circumstances meant that the men had provided good consideration for the promise to pay them extra money.*

Consideration - Performance of existing duties (7) -Exceptions to the basic rule

- The most recent, and in some ways the most significant, exception to the basic rule occurs where the party making the promise to pay extra is said to receive an extra benefit from the other party's agreement to complete what he was already bound to do under the existing arrangement

Consideration - Performance of existing duties (8) - Exceptions to the basic rule

Williams Vs. Roffey Bros & Nicholls (Contractors) Ltd (1991)

The case: *The defendant was a firm of builders contracted to renovate a block of flats. Because of the penalty clause for late completion in the contract they were interested to terminate the work on time. They sub-contracted the carpentry work to the claimant, which fell behind schedule, arguing that the price was not high enough (under-quoted). The defendant promised the claimant to pay an additional charge for completing the carpentry on time. Afterwards the defendant refused to pay the additional sum, claiming the new agreement was void for lack of consideration.*

Consideration - Performance of existing duties (8a) – Exceptions to the basic rule

Williams Vs. Roffey Bros & Nicholls (Contractors) Ltd (1991)

The court's decision: *That the claimant had provided consideration by completing the work on time and therefore the defendant's promise to ay the additional payment was binding, even though, at first glance, this proposition seemed incompatible with the basic rule that contractual duty already binding the party cannot constitute consideration.*

Consideration - Performance of existing duties (9) – Exceptions to the basic rule

The principle from the case

Wherever two parties, A and B, are engaged in a contract under which A is to supply goods or services to B and it becomes apparent to B that A will be unable actually to complete his contract, then if B promises A an additional payment for completing his contract, it will be enforceable providing that:

- *This later promise is not gained as the result of economic duress by A; and*
- *B will gain an extra benefit by having the contract completed*

Problems with consideration - Part payment of debt (1)

- Problematic is whether a promise to pay less then the amount due can ever be sufficient consideration
- ***Example:*** *A owes B a sum of money and promises to pay part of it in return for B's promise to forgo the balance. B then wants you to pay the balance. Is B's promise to you to forgo the rest of the money enforceable?*
- *Basic rule:* At common law the payment of a lesser sum does *not* discharge the obligation to pay the full amount – the debtor has only done what he/she was legally obligated to do under the pre-existing contract

Problems with consideration - Part payment of debt (2) – *Pinnel's Case (1602)*

Pinnel' Case (1602)

The case: *Cole owed Pinnel 8 Pounds. At Pinnel's request, Cole paid 5 Pounds one month before the full sum was due. Cole claimed that Pinnel had agreed to accept that this part payment would discharge the full debt.*

Problems with consideration - Part payment of debt (2a) – *Pinnel's Case (1602)*

Pinnel' Case (1602)

The court's decision: *That a payment of a smaller sum than the debt itself on the due date in satisfaction of a greater sum cannot be consideration for the whole and can never relieve the liability of the debtor to pay the whole debt. Thus, the creditor can normally sue for the balance of the unpaid debt. In the end, in this case Pinnel was unsuccessful in claiming the balance because he gained some BENEFIT by part PAYMENT having been made EARLY:* ***this was sufficient consideration*** *to enforce his promise to forego the balance of the debt.*

Problems with consideration - Part payment of debt (3) – *Pinnel's Case (1602)*

- In other words, a promise by a creditor to accept less then the full sum owed does not discharge the debtor from the legal obligation to pay the full sum unless the debtor gives some additional consideration (benefit) to the creditor – even if it is just a chattel (an item) > ***"The gift of a horse, a hawk or a robe etc. in satisfaction is good."*** Lord Coke in *Pinnel's case*

Problems with consideration – Part payment of debt (4) - Doctrine of promissory estoppel (1)

- **Common law rule of *Pinnel's Case*** was confirmed in other cases and then heavily criticised as harsh and rigid
- Equity developed a new *fairer* doctrine ***"Promissory Estoppel"*** **>** The effect is to estop the claimant from changing his mind about a made promise (even without consideration) because it would be unfair und inequitable to do so (!)

Problems with consideration – Part payment of debt (5) - Doctrine of promissory estoppel (2)

- ***Example:*** *If A owes B 10 Pounds and B agrees to take 9 Pounds to discharge A from his debt, why should B be allowed afterwards to breach his promise to take only 9 Pounds and succeed in action on the full amount of the debt against A? Simply because A give him no consideration? So where part payment has once been accepted, the* ***promissory estoppel acts as a defence to a claim by a creditor for the remainder of the debt.***

Doctrine of the *privity of contract* (1)

- Doctrine provides that a **contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it**
- Only those who are parties to a contract can enforce it or have the rights under it
- Other people might benefit indirectly from the contract, but the third parties cannot bring legal action in their own name to have it enforced

Doctrine of the *privity of contract* (2)

- ***The problem:*** *If A and B agree that A will pay B a certain price if C performs some service for A then why should C be bound when he has not been a party to the agreement in the first place?*

Doctrine of the *privity of contract* (3)

Price Vs. Easton (1833)

The case: *Easton had agreed with another party that if that party did specified work for him he would pay 19 Pounds to Price, a third party to the contract. While the work was completed by the other party, Easton nevertheless failed to pay Price who then sued to try to enforce the contract.*

The court's decision: *Price's claim was unsuccessful. He had given no consideration for the arrangement and was not therefore a party to the contract either and gained no enforceable right under it.*

Doctrine of the *privity of contract* (4)

Dunlop Pneumatic Tyre Co Ltd Vs. Selfridge & Co Ltd (1915)

The case: *In a contract Dew & Co, who were wholesalers, agreed to buy tyres from Dunlop, who were tyre manufacturers. They expressly stated in the contract that they would not sell the tyres below certain prices fixed by the manufacturers. Dew obtained the same price-fixing agreements with clients to whom they sold on. Dew then sold tyres on to Selfridge on these terms. However, Selfridge broke the agreement and sold prices at discount prices. Dunlop sued Selfridge, the third party, and sought an injunction.*

The court's decision: *The action of Dunlop failed for lack of privity!*

Doctrine of the *privity of contra*ct (5) – Consequences and problems of the rule

- Unpractical and unfair consequences > ***Example:*** *A person who receives goods as a gift will be unable to sue personally where the goods are defective > help of the purchaser would be necessary*
- Doctrine does not sit comfortably with the reality of modern commercial contracting (!)

Doctrine of the *privity of contract* (6) – *Contracts* (*Rights of Third Parties) Act 1999*

- This act now provides some reform for this area of law which has been criticised by judges and academics as unfair in parts
- **The acts states:**
- *1 (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of a contract if (a) the contract expressly provides that he may, or (b) subject to subsection (2), the term purports to confer a benefit on him.*
- *1 (2) Subsection (1) (b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party*

Doctrine of the *privity of contract* (7) – *Contracts* (*Rights of Third Parties) Act 1999*

- This means that a person who is named in the contract as a person authorised to enforce the contract or a person receiving a benefit from the contract may enforce the contract unless it appears that the parties intended that he may not
- The law has been welcomed by many as a relief from the strictness of the doctrine, however it may still prove ineffective in professionally drafted documents, as the provisions of this statute may be expressly excluded by the draftsmen (freedom of contract) (!)

PART 2 - CHAPTER 2 - Contract Law

Persons in law; Legal capacity to contract; Content of contracts; Letter of intent; Exemption clauses

Persons in Law (1)

- Distinction between:
  - **Natural persons** = individuals/human beings
  - **Juristic persons** = legal personality is not restricted to human beings, also bodies and associations of persons can constitute a *person in law (*e.g. companies) > so called **artificial personality**

Persons in Law (2)

- The **juristic personality** allows one or more natural persons to act as a *single entity* for legal purposes, endowed with a legal name, rights, privileges, responsibilities and liabilities under law > completely independent from the persons behind > **companies** (various kinds exist > see “Basics of company law”)

Legal capacity to contract (1)

- Legal capacity is an **indispensable requirement** for a contract to be valid
- Purpose of *rules on capacity* is to **protect the persons who lack legal capacity** *or* to **protect the contractual partner**
- The law prescribes different legal consequences in the event lacking full capacity, for the party without the necessary capacity and for the contractual partner

Legal capacity to contract (2)

- In the case of **natural persons** the issue of capacity concerns three different classes:

  - **Minors**
  - **Persons of unsound mind** (e.g. insane)
  - **Drunkards**

Legal capacity to contract (3) – Minors (1)

- General rule: all persons of full age (18) have contractual capacity
- As today in times of high mobility young people may enter contracts as much as adults, the law is therefore seeking to **protect** these people from contracts to the detriment/disadvantage of the **minor**
- Basic common law rule is, that contracts made by a minor with an adult are binding the adult, but **do not bind the minor**, unless he ratifies the contract after reaching 18

Legal capacity to contract (4) – Minors (2)

- It's necessary to precisely distinguish as follows: some contracts are *valid* binding on minors others are voidable and some are *void*
- **3 categories:**
  - **Valid contracts** binding on the minor and therefore enforceable against the minor
  - **Contracts voidable by minors**, a minor may enter but can also back out if he wants to
  - **Void contracts**, which are unenforceable against minor

Minors – Valid contracts

- Valid contracts > according to the *Minors' Contracts Act 1987* there are 2 categories of such valid/binding contracts
  - **(1) Executed contracts for necessaries**
  - **(2) Contracts of service for the minor's benefit**

Minors – Valid contracts - Contracts for necessaries (1)

- **Executed contracts for necessaries >** ***"goods suitable to the condition in life*** *of the minor…and* ***to his actual requirements*** *at the time of the sale and delivery" > this can vary from minor to minor (!)* > If the contract corresponds to this **two-part test**, they are necessaries in the legal sense

Minors – Valid contracts - Contracts for necessaries (2)

Nash Vs. Inman (1908)

The case: *The claimant was a Tailor. The defendant, the son of an architect, was a minor undergraduate at Trinity College, Cambridge. He ordered clothes (including 11 fancy waistcoats) to the value of 122 Pounds. The claimant sued the defendant for payment.*

Minors – Valid contracts - Contracts for necessaries (2a)

Nash Vs. Inman (1908)

The court's decision: *Although the court was prepared to accept that the supply of such clothing could be suitable to the condition in life of the undergraduate, the action failed. The father of the defendant could prove that his son was already adequately supplied with clothes and did not require more at the time the contract was formed. Therefore,* ***what the tailor supplied could not be classed necessaries.***

Minors – Valid contracts - Contracts for necessaries (3)

- Further the **contract must be executed**, that means the minor is only liable to pay for goods actually delivered to him
- The minor is **only obliged to pay a reasonable price**
  > if the price is not reasonable, the contract is indeed enforceable but the supplier may be only able to recover a reasonable amount rather than the contract price

Minors – Valid contracts - Contracts for necessaries (4)

- **Summary** (Checklist) :
  - Goods or services suitable to the particular minor's station in life
  - Goods or services answering to the minor's actual needs at the time of the sale and delivery
  - Delivery of goods or services to the minor
  - Reasonable price

Minors – Valid contracts - Contracts of service for the minor's benefit (1)

- Common law recognizes that the minor may need to support himself financially, he must have the capacity to enter valid contracts of service > minors therefore are also bound by contracts of service, on condition that the terms of contract are **on the whole beneficial** to them
- But, some terms of detriment/disadvantage of the minor will not automatically invalidate the contract, if it operates still **mostly for the minor's benefit**
- Practically concerned are contracts of employment giving the minor some training experience or instruction for an occupation (e.g. **apprenticeship**)

Minors – Valid contracts - Contracts of service for the minor's benefit (2)

De Francesco Vs. Barnum (1890)

The case: *By deed, a 14-year old girl entered into a seven-year apprenticeship with De Francesco to be taught in stage dancing. The deed provided that the whole period she should be entirely at the disposal of the master; that he was under no obligation to maintain or employ her; that he could send her abroad; that he could terminate the contract without notice; that she was not allowed to marry without his permission and that she would accept no professional engagement without his express consent. The girl accepted a professional engagement with the defendant without the master's consent. The master took action to prevent the engagement.*

Minors – Valid contracts - Contracts of service for the minor's benefit (2a)

De Francesco Vs. Barnum (1890)

The court's decision: *That the master could not sue the defendant for inducing a breach of the apprenticeship contract as it was unreasonably harsh and thus invalid. In other words, as the apprenticeship deed was not for the minor's benefit it could not be enforced.*

Minors – Contracts voidable by minors (1)

- Contracts of this category are entered valid but they are not binding and could be disaffirmed at the minor's discretion > that means that the minor is free to continue the contract or to avoid it before reaching 18 or within a reasonable time after
- The common feature of such contracts is that they **involve a subject-matter of some permanency** (contracts of continuous or recurring obligations) > involve long-term interests
- There are four principal classes:
  - **Contracts to purchase shares in a company / Contracts to lease property / Contracts to enter a partnership / Contracts of marriage settlement**

Minors – Contracts voidable by minors (2)

- These contracts cannot be enforced against the minor during minority, but the **minor can force an adult to perform** the contract
- If, however, a minor repudiates/disaffirms a contract which has been partly performed by the other party, the minor has to pay for the benefit received (!)

Minors – Contracts voidable by minors (3)

- When a minor refuses to perform a voidable contract the other party can recover from the minor any property acquired under the contract
- ***Example:*** *A minor receives goods under a contract and then refuses to pay for the goods, the court may order the minor to return the goods to the claimant to prevent the minor's* ***unjust enrichment.***

Minors – Void contracts

- **Void contracts are *un*enforceable** against minors
- Formerly, classes of such contracts were listed under s.1 of the *Infants Relief Act 1874* (now *Minors Contracts Act 1987*):
  - *Contracts of loan* (e.g. for the repayment of money lent or to be lent)
  - *Contracts for goods supplied other than necessaries*
  - *Promissory notes* (e.g. IOUs – "I owe you")

Persons of unsound mind and drunkards (1)

- Where *necessaries are matter of contract* with **persons of unsound mind** as well as **drunkards**, then s.3 of the *Sales of Goods Act 1979* applies once again, the contract is binding, but the person deserving protection (mentally disordered or drunken) has to *pay only the reasonable price*
- In the case of other contracts the following is true for both groups of persons: **if they are incapable of understanding the nature of their act** at the time the contract was formed and this was evident to the contractual party, the **contracts are voidable rather than void**

Persons of unsound mind and drunkards (2)

Imperial Loan Vs. Stone (1892)

The case: *There was an action on a promissory note. The defendant pleaded that, at the time making the note, he was insane, and that the claimant knew that he was it. The jury found that he was, in fact, insane but could not agree on the question of whether the claimant knew it. The judge of the lower court rendered judgement for the defendant.*

Persons of unsound mind and drunkards (2a)

Imperial Loan Vs. Stone (1892)

The higher courts decision: *That the judge of the lower court was wrong. The High Court overruled the lower court. The defendant, in order to succeed, must convince the court on both issues. (1. being insane and 2. that the (sober) contract partner knew about it)*

>>> This means that the mentally disordered person or the drunkard not only have to prove their disability, but also have the burden of proving the other party's knowledge (!)

The contents of contract

- Starting point is that the parties have fulfilled all described requirements for a valid contract and the questions which arise now are:

What is part of the contract and what are the obligations under the contract?

The contents of contract

- **Problems can arise in a number of ways:**
  - *Pre-contractual negotiations* > different statements > What is part of the contract?
  - There may be a *contract in writing*, but one party may allege that it does not correctly reflect their intentions
  - There may be a *pure oral contract*, and the parties may dispute as to what was said or promised and by whom

The contents of contract – Contractual terms - Definition

- Promises and undertakings contained in a contract are known as the **terms of contract**
- First precondition for a term is to be *reasonably certain* **(certainty of terms)**
- Terms of contract have to be distinguished from other pre-contractual statements like **“mere puffs”** or **representations** (here: statements)
- Terms of the contract can be divided into *express terms* and *implied terms*

The contents of contract– Contractual terms - Express terms (1) – Written contract (1)

- In order to ascertain the express terms of the contract we have to look at the **intention of the parties** and the **importance of the statement**
- Written contract usually considered as *terms* rather than *representations*
- Pre-contractual statements not transferred in the written document are regarded to be *mere representations*
- If the written contract is additionally signed, then even if the parties have not read it, they are assumed to have agreed everything it contains
- In contrast, anything that has not been stipulated in the contract has never been intended to be included

The contents of contract – Contractual terms - Express terms (2) – Written contract (2)

- More complicated is the situation where a **contract is partly in writing and partly oral** > this time, the written contract is not complete and does not, in fact, represent the whole transaction > the court has to consider the **intention of the parties** and therefore to **look at all the facts/evidence**, even oral, to prove a collateral agreement

The contents of contract– Contractual terms - Express terms (3) – Written contract (3)

- If the purchaser relies on a statement of a seller with *specialist's skills* or *expertise* the statement is normally considered to be a term of contract
- However, where the purchaser himself is an expert, the statement may be a *representation* only, especially in the case of a private seller without specialist knowledge like in the following case

The contents of contract– Contractual terms - Express terms (4) – Written contract (4)

Oscar Chess Ltd Vs. Williams (1957)

The case: *In May 1955, the defendant acquired a new car from the claimants who were motor car dealers and who took the defendant's Morris (Car type) in part exchange. The defendant said it was a 1948 model, as per the registration book, and the claimants gave him an allowance of 290 Pounds. The registration book had been altered by an unknown third party and the car was, in reality, a 1939 model worth 175 Pounds. The lower court judge held that the construction year of the car was a term of contract (more precisely a condition of the contract).*

The contents of contract– Contractual terms - Express terms (4a) – Written contract (4a)

Oscar Chess Ltd Vs. Williams (1957)

The higher court's decision: *That the defendant's statement as to the age of the car was a mere representation, not a term of contract. The defendant had no special knowledge as to its age and the claimants knew that he was relying on the date in the registration book. Moreover, they themselves were perfectly capable as car dealers to determine the true age of the car.*

The contents of contract– Contractual terms– Implied terms (1)

- Freedom of contract gives the right to contract with whomever we want on whatever terms we want > parties include terms in a contract of their own choice
- However, in some cases the law may **imply terms** into the contract although the parties have **not expressly mentioned** the issue

Example: *If you buy a new pair of shoes, which then fall apart, such case in point constitutes a breach of contract by the seller. Normally he may not have stated expressly that the shoes are in good condition, but the term is* ***implied*** *into the contract by the* ***Sale of Goods Act 1979****.*

The contents of contract – Contractual terms – Implied terms (2)

- There are three ways certain terms can be implied into contracts:
  - **By statute** (e.g. *Sale of Goods Act 1979* > Goods must belong to the person selling them; condition of the good shall correspond with the description; good shall be of satisfactory quality; goods must be fit for the purpose for which they are sold etc.)
  - **By the court** (***Example:*** *If you rent a flat at the top of the house, "it goes without saying" that you can walk through the house to reach it.)*
  - **By custom** (e.g. Terms may be implied by custom if they are *certain, reasonable* and *well-known* to all affected by them, and if they do not offend any statute)

The contents of contract – Contractual terms – Classification of terms (1)

- If a particular statement is a term of contract it can be either a **condition**, a **warranty** or an **innominate term** > this distinction is important in relation to the different consequences and remedies in the case of breach of the different terms

The contents of contract – Contractual terms – Classification of terms (2) – Conditions (1)

- **Condition** is a **term of major importance** and forms the main and vital basis of the contract
- It is so essential to the very nature of the contract that if it is broken, the innocent party can repudiate the contract, e.g. treat the contract as discharged and furthermore may claim damages
- He will not be bound to do anything further under that contract

The contents of contract – Contractual terms – Classification of terms (3) – Conditions (2)

Poussard Vs. Speirs and Pond (1876)

The case: *Madame Poussard had entered into an agreement to play a part in an opera. One day before the first performance she was taken ill and was unable to appear for 11 days. The defendants had hired a substitute, and discovered that the only way in which they could secure a substitute to take Madame Poussard's place was to offer that person the complete engagement. This they had done, and they refused the services of Madame Poussard when she represented herself after the end of her illness. She then sued for breach of contract.*

The contents of contract – Contractual terms – Classification of terms (3a) – Conditions (2a)

Poussard Vs. Speirs and Pond (1876)

The court's decision: *That the failure of Madame Poussard to perform the contract as from the first night was a* ***breach of condition****, and that the defendants were within their rights in* ***regarding the contract as discharged.***

The contents of contract – Contractual terms – Classification of terms (4) – Warranties (1)

- **Warranty** is a **term of minor importance**, which means that it is only collateral or subsidiary to the main purpose of the contract
- Therefore, the contract might be able to continue as well after the breach of warranty > it is not so fundamental as to effect a discharge of the contract
- Such a breach of warranty **only gives right to an action for damages**

The contents of contract – Contractual terms – Classification of terms (5) – Warranties (2)

Bettini Vs. Gye (1876)

The case: *The claimant was an opera singer. The defendant was the director of the Royal Italian Opera in London. The claimant had agreed to sing in Great Britain in theatres, halls and drawing rooms for a period of time beginning on 30 March 1875, and to be in London for rehearsals six days before the engagement started. The claimant was taken ill and arrived on 28 March 1875, but the defendant did not accept the claimant's service, treating the contract as discharged.*

The contents of contract – Contractual terms – Classification of terms (5a) – Warranties (2a)

Bettini Vs. Gye (1876)

The court's decision: *That the rehearsal clause was subsidiary to the main purpose of the contract, and its breach constituted a* ***breach of warranty*** *only. The defendant had no right to treat the contract as discharged and therefore had to compensate the claimant, but had a counterclaim for any damage he had suffered by the claimant's late arrival.*

The contents of contract – Contractual terms – Classification of terms (6) – Innominate terms (1)

- Very recent development in the courts to look first at the effect of the breach on the injured party before determining the class of the term > could be characterised as a ***wait-and-see approach***
- This method gives the court some flexibility in relation to the appropriate remedy which will be decided by the court according to what seems **fair to both parties** > either to entitle the innocent party to rescind the contract or otherwise to entitle him only to claim damages, depending upon circumstances

Letters of Intent (1)

- *Letter of Intent* is used when parties want or need to start a project but drawing up a relevant contract would take to long
- Allows the parties to start their work quickly and with a view to finalising the contract shortly afterwards
- Disputes can arise regarding the legal rights of the parties when the actual contract has not been finalised while the work has started

Letters of intent (2)

- Whether or not a *Letter of Intent* is considered to be a contract in its own right it needs to be ascertained in each case
- To be a binding contract, the *Letter of Intent* must have all the characteristics of a contract; in particular, the parties have to provide *consideration*, have an *intention to create legal relations* and there must be *sufficient certainty* as to the contractual terms

Letters of intent (3)

RTS Flexible Systems Vs. Mueller (2010)

The case: *A letter of intent was drawn up between M manufacturing dairy products, and R to supply and install some machinery for packaging its products. This letter of intent was due to be in force for four weeks setting out the contractual price for machinery and stating that the final contract would be on M's contractual terms with amendments. R thus started with installing the machinery, but after the four-week period expired, the final contract had not been agreed. A dispute arose R refusing to finish installing the machinery and M refusing to pay for the machinery. As a consequence, R sued for payment.*

Letters of intent (3a)

RTS Flexible Systems Vs. Mueller (2010)

The court's decision: *That the parties' conduct – after the letter of intent had expired – suggested their intention to enter into a contract which they had done so although no written document had been signed. R won the case and could claim the money. The drafted letter of intent fulfilled the necessary requirements!*

Exemption clauses (1)

- Often times, contract terms may try to exclude or to (financially) limit one party's liability for breach of contract, misrepresentation or negligence > these terms are called **exclusion and limitation clauses**, also referred to in general terms as ***exemption clauses > Example:*** *"The vendor shall not be under any liability to the purchaser for any defects in the goods or for any damage, loss, death or injury."*
- Exemption clauses can be found almost everywhere > e.g. notices on walls, back of tickets, shop counters etc. > ***Example:*** *If you join a health club or gym, it is common for the contract to say that the gym owner will not be responsible if your injured while exercising.*

Exemption clauses (2)

- ***Exemption clauses*** may be fair or unfair and therefore need to be controlled > different ways to control them
  - (1) firstly, by **common law** rules
  - (2) secondly, the **control via legislation** (e.g. *The Competition and Consumer Protection Act 2010*)

Exemption clauses (3) – Control at common law (1)

- Frequently, *exemption clauses* attempt to discriminate against the vendee (customer) > Vendor and vendee are mostly not on equal terms and selling is often done on a "take-it-or-leave-it" basis
- In order to be valid, an exemption clause must basically fulfil two essential requirements at common law: it must be
  - (1) *incorporated into the contract* and
  - (2) as a *matter of construction, must cover the damage in question/ the clause must extend to the loss that was caused*

Exemption clauses (4) – Control at common law (2) – Incorporation by signature

- **Incorporation by signature** > when a document with contractual terms is *signed, all* contained terms – inclusive the *exemption clauses* - are incorporated into the contract *even* if the parties did not read or understand them

Exemption clauses (5) – Control at common law (3) – Incorporation by signature

L'Estrange Vs. Graucob (1934)

The case: *Shopkeeper L bought a slot machine from G. L signed a sales agreement containing the following clause: "Any express or implied condition, statement or warranty statutory or otherwise, is hereby excluded". L did not read the relevant clause, which was in small print. The machine did not work and L sued for damages.*

The court's decision: *That the exclusion clause was binding on L because he signed the agreement and there was no case of fraud or misrepresentation. It is of* ***no account whether the party has read the document or not****. (!)*

Exemption clauses (6) – Control at common law (4) – Incorporation by notice

- If the document is not signed, the party subject to the *exemption clause* must have actual knowledge of it
- This requirement of notice must be given either ***before or at the moment*** with the making of the contract
- An *exemption clause* printed on a **receipt** typically *after* the forming of the contract is consequentially not valid (!) > a receipt is not a document which is reasonably considered to contain contractual terms

Exemption clauses (7) – Control at common law (5) – Previous dealings (1)

- It is also possible that an exclusion clause may be incorporated, even where there has been insufficient notice, for example in the case of a **previous course of dealing between the parties** on the same terms
- The *previous dealings* must have been regular and consistent > as in the care of a consumer, a considerable number of past transactions may be required

Exemption clauses (8) – Control at common law (6) – Previous dealings (2)

Patrotrade Vs. Texaco Ltd (2000)

The case: *The parties have orally agreed the sale of cargo and later the claimant sent a telex to the defendant confirming the contract and setting out some additional terms and conditions. The claimant contended that these terms were incorporated on the basis of five previous transactions in the previous 12 month on the same terms.*

The court's decision: *That the terms were indeed incorporated.*

Exemption clauses (9) – Control at common law (7) – Construction of exemption clauses

- After the successful incorporation of the exemption clause in the contract, the next step is to check if the clause extends to the loss that was caused > therefore a valid exemption clause is still able to fail
- The basic approach is that **liability can only be excluded by clear words > ambiguous term in wording** of an exemption clause will be construed *against the party that attempts to rely upon the wording (**contra preferentem rule**)*

Exemption clauses (8) – Control at common law (8) – Construction of exemption clauses

Andrews Bros. Vs. Singer & Co. (1934

The case: *Here, the contract was for the sale and purchase of what were described in the contract as "new Singer cars". The contract contained a clause excluding "all conditions, warranties and liabilities implied by statute, common law or otherwise". One car delivered under the contract was, technically speaking, a used car because a prospective purchaser had used it. The dealer was then sued for damages and tried to rely on the clause in defending the claim.*

Exemption clauses (8) – Control at common law (8a) – Construction of exemption clauses

Andrews Bros. Vs. Singer & Co. (1934

The court's decision: *Decided that the supply of "new Singer cars" was an express term of the contract. Since the exclusion clause actually applied to "implied terms", the* ***contra preferentem rule*** *would prevent it being used in relation to express terms. The exclusion clause could not be relied on and the defence failed.*

PART 2 - CHAPTER 3 - Contract Law

Vitiating factors; Discharge of a contract; Remedies

Vitiating Factors (1)

- ***Imperfections in contract making*** which could be discovered later and which entitle a party to legal rights and remedies > known as ***vitiating factors***
- *Vitiating factors* may invalidate an otherwise validly formed contract > vitiated contract can be either **void** or **voidable**

Vitiating Factors (2) (Checklist!)

- The *vitiating factors* are divided into four classes:
  - **(1) Mistake:** a contract formed on the basis of a mistake concerning the contract is ***void*** at common law if the mistake is operative **or** it may be ***voidable*** in equity in certain circumstances
  - **(2) Misrepresentation:** a contract formed as a result of false information about its substance is ***voidable***
  - **(3) Duress and undue influence:** a contract entered into not voluntarily because of pressure applied to one party is ***voidable*** at the option of the victim
  - **(4) Illegality:** a contract illegal by statute or illegal at common law is ***void***

Vitiating Factors – Mistake (1)

- Generally a mistake does not affect the validity of a contract
  > there is no general “doctrine of mistake”

Example: *If B buys a painting for 100 ZMW from S and, after the sale, discovers that the painting is a Picasso worth 100.000 ZMW, B is fortunate, S is not. S merely sold a painting, not knowing that it was a real Picasso. He mistook its real value, and the law will do nothing to assist him. The mistake of S did not affect the validity of the contract, so was not operative because S underlay a mistake only as to the value.*

> No mistake in regard to his contract partner, the price or the painting (=subject-matter) itself, which would have been operative (!)

Vitiating Factors – Mistake (2)

- To be *operative* the *mistake* **has to be one of a fact** > the situations where the courts have rendered contracts void as a result of a mistake by the contractual partners can be classified into three groups of mistakes:
  - **(1) *Mutual mistake* as to the terms or the subject-matter**
  - **(2) *Common mistake* as to the existence, the title or the quality of the subject-matter**
  - **(3) *Unilateral mistake* as to the terms of the contract or the identity of one party**

Vitiating Factors – Mistake – Mutual mistake (1)

- Both parties are at cross-purposes, but each of them believes that the other is in agreement > the parties do not realize the existence of the **misunderstanding**

Vitiating Factors – Mistake – Mutual mistake (2)

Raffles Vs. Wichelhaus (1864)

- ***The case:*** *The defendants agreed to buy cotton from the claimants ship "Peerless" in Bombay. Two ships of the same name were due to leave Bombay; the defendants had in mind the ship leaving in October and the claimants that one leaving in December.*
- ***The court's decision:*** *That the* ***mutual mistake*** *was operative and the contract was void as the agreement was too ambiguous. The objective test to consider whether a reasonable third party would interpret the terms of the contract in line with the understanding of one of the parties failed here. There was no way of finding a common intention between the parties. The contract could not be completed and the court declared the contract void for mistake.*

Vitiating Factors – Mistake – Common mistake (1)

- Both parties make the **same mistake/ they under the same error**, for example the same mistaken belief that a particular **thing is in existence** when, in fact, it has ceased to exist > generally, this kind of mistake renders the contract **void**

Vitiating Factors – Mistake – Common mistake (2)

Couturier Vs. Hastie (1856)

- ***The case:*** *A contract was made for the sale of Indian corn which was being shipped and on the way to Europe. Unknown to both parties, the cargo had already become overheated and fermented during the voyage and it became unfit to be carried further. The captain of the ship sold the cargo at port according to customary practice.*
- ***The court's decision:*** *That the contract was declared* ***void****, since* ***the corn*** *– the subject-matter of the contract –* ***was not really in existence at the moment the contract was made****, thus the contract did not exist neither.*

Vitiating Factors – Mistake – Common mistake (3)

Cooper Vs. Phibbs (1867)

- ***The case:*** *C agreed to lease a fishery from P. It subsequently transpires that, unknown to both parties, C had been already the true owner of the fishery.*
- ***The court's decision:*** *That the mistake as to the title was a mistake of fact (ownership). The contract was* ***void.***

Vitiating Factors – Mistake – Unilateral mistake (1)

- **One party** is entering the contract under **a mistake** and the other party is aware of the mistake and will be seeking to take advantage of it > two categories:
  - Mistake concerns the **terms of the contract** or
  - Mistake concerns the **identity of the other party** to the contract > two categories: *"Not face to face" and "Face to face"*
    > Mistakes as to identity are generally induced by fraud in that one of the parties is claiming to be someone who they are not

Vitiating Factors – Mistake – Unilateral mistake (2) – Mistake concerns the terms of the contract

- ***Example:*** *In a contract for the sale of screws, one party may incorrectly believe that the word "screw" refers to "Phillips-head screws", when in fact the term refers to standard-type screws. If only one party holds this mistaken belief, but the other is clear on the meaning of "screw", then this could be called a unilateral mistake.*
- On the other hand, if both parties believed that the word "screw" referred to nails, then this is an example of a *mutual mistake*
- Unilateral mistakes frequently involve prices, quantities, dates, and the description of goods or services (!)

Vitiating Factors – Mistake – Unilateral mistake (3) – Mistake “not face to face”

- **Mistaken identity, <u>not</u> face to face:** here the parties are not physically present when the contract is made, e.g. where the contract is made through dealings through the post, telephone or over the internet, the courts will only make a finding of mistake **if the claimant can demonstrate an identifiable person or business with whom they intended to deal with**

Vitiating Factors – Mistake – Unilateral mistake (3a) – Mistake "not face to face"

The case: *Crook (A) ordered goods from the claimant (B) using a printed letter head claiming to be company (X) with offices in Lusaka and Livingstone. In fact no such company existed. The claimant (B) sent out the goods on credit. Crook (A) sold the goods on to the defendants (C) who purchased them in good faith. The crook (A) then disappeared without paying for the goods. The claimant (B) brought an action against C to recover the goods based on their unilateral mistake as to identity.*

Vitiating Factors – Mistake – Unilateral mistake (3a) – Mistake "not face to face"

The court's decision: *The contract between crook (A) an claimant (B) was* ***not void for mistake*** *as they could not identify an existing company called company (X) with whom they intended to contract. The mistake was only as to the attributes of the company. The contract was voidable for misrepresentation but that would not stop title passing to the crook (A) and the defendants (C) therefore acquired good title to the goods.*

Vitiating Factors – Mistake – Unilateral mistake (4) – Mistake “face to face”

- **Mistaken identity, face to face:** party contracts in person with someone who claims to be someone else = not an operative mistake, mistaken party deemed to be contracting with person in front of him

  > for a party to claim that the identity of the other party is *material* to the making of the contract he/she must have taken adequate steps to ensure the true identity of the other party (!)

Vitiating Factors – Mistake – Unilateral mistake (4a) – Mistake “face to face”

The case: *Crook (A) purchased some items from the jeweler (B) claiming to be the celebrity X. Crook (A) paid by cheque and persuaded B to allow him to take a ring immediately as he claimed it was his wife's birthday the following day. He gave the address of celebrity X and the jeweler (B) wrote down name and address. Crook (A) then pawned the ring at C’s pawn business in the name of Mr. Y and received 5000 ZMW. Crook (A) then disappeared without a trace. B brought an action based on unilateral mistake as to identity against C to recover the ring.*

Vitiating Factors – Mistake – Unilateral mistake (4) – Mistake “face to face”

The court’s decision: *The contract between jeweler (B) and the crook (A) was* ***not void for mistake. Where the parties transact “face to face” the law presumes they intend to deal with the person in front of them not the person they claim to be.*** *The jeweler B was unable to demonstrate that they would only have sold the ring to celebrity X.*

MISTAKE

Generally, a mistake does *not affect the validity* of a contract.

Exceptions, where a mistake renders a contract ***void***:

Mutual mistake

Misunderstanding...

- as to the terms
- as to the subject-matter

Common mistake

Same error of both parties…

- as to the existence of the subject-matter
- as to the title of the subject-matter
- as to the quality of the subject-matter

Unilateral mistake

One party mistaken and the other is aware of the mistake…

- as to the terms of the contract
- as to the identity of one party

Vitiating Factors (Checklist!)

- The *vitiating factors* are divided into four classes:
  - **(1) Mistake:** a contract formed on the basis of a mistake concerning the contract is ***void*** at common law if the mistake is operative **or** it may be ***voidable*** in equity in certain circumstances
  - **(2) Misrepresentation:** a contract formed as a result of false information about its substance is ***voidable***
  - **(3) Duress and undue influence:** a contract entered into not voluntarily because of pressure applied to one party is ***voidable*** at the option of the victim
  - **(4) Illegality:** a contract illegal by statute or illegal at common law is ***void*** and unenforceable

Vitiating Factors – Misrepresentation (1)

- Misrepresentation contains different elements:
  - *Statement of fact* (in writing, communicated orally or by conduct)
  - Made *prior* to the contract by one party to the other
  - Which is *false* or *misleading*, and
  - Which *induced* the other party to enter into the contract

Vitiating Factors – Misrepresentation (2)

Spice Girls Vs. Aprillia World Service BV (2000)

The case: *Aprillia, moped manufactures, contracted with the Spice Girls to sponsor a concert tour. The group had appeared in promotional material before Aprilia entered into contract on 6 May 1998. The contract was based on the representation (made at the promotional photo-call) that all five members of the band, each with their distinctive image, would continue working together. Geri Halliwell (Ginger Spice) left the band on 29 May 1998.*

Vitiating Factors – Misrepresentation (2a)

Spice Girls Vs. Aprillia World Service BV (2000)

The court's decision: *That there had been misrepresentation by conduct, since the participation of all five band members in the commercial had induced Aprilia into entering the contract.*

Vitiating Factors – Misrepresentation (3)

- Misrepresentation must be a statement of fact, not opinion

  Example: *If a seller offers a car as being "accident-free", it would be a misrepresentation if, in fact, the car had had an accident. If the car, however, was offered by the seller who "thought it is accident-free", there is no misrepresentation. It would be the buyer's responsibility to check whether it may have been involved in any accidents.*

Vitiating Factors – Misrepresentation (4)

- Effect of misrepresentation on the contract is less serious than that of mistake, because the contract is not void, but becomes **voidable**
- **3 types** of misrepresentations:
  - **Fraudulent misrepresentation**
  - **Negligent misrepresentation**
  - **Innocent misrepresentation**

Vitiating Factors – Misrepresentation – Fraudulent misrepresentation (1)

- This is a false statement made *knowingly*, *without belief in its truth*, or *recklessly*, *not caring whether it is true or false*
- ***Example:*** *A party advertises a used car as having "new breaks, new tires, and a new engine." In actuality, everything is 5 years old. A buyer relies on the representation that the car has new parts and buys the car, but she wouldn't have paid the price she had if she knew the parts were actually five years old. In this scenario, the seller misrepresented the condition of the car.*

Vitiating Factors – Misrepresentation – Fraudulent misrepresentation (2)

Derry Vs. Peek (1889)

The case: *A tramway's company was entitled by statute to run trams by animal power, or, with official consent, by steam power. D was one of the directors of the company issuing a prospectus inviting the public to subscribe for shares. The prospectus stated that the company had permission to run trams by steam power and assumed that the official consent would be granted as a matter of course. But this permission was officially refused and the company was liquidated.*
P, a share subscriber, sued the directors for fraud.

Vitiating Factors – Misrepresentation – Fraudulent misrepresentation (2a)

Derry Vs. Peek (1889)

The court's decision: *That D and the other directors were <u>not</u> fraudulent because the honestly believed the statement in the prospectus to be true. They had not made the false statement knowingly or without honest belief in its truth.*

Vitiating Factors – Misrepresentation – Negligent misrepresentation (1)

- This is a **non-fraudulent** but **false statement** which the maker had **no reasonable grounds for believing it to be true**, otherwise the representation would be innocent
- ***Example:*** *A salesman claims a cell phone that they are trying to sell has specific features without knowing if it does or not. He would be liable for committing negligent misrepresentation if the plaintiff was harmed by the misleading fact.*

Vitiating Factors – Misrepresentation – Negligent misrepresentation (2)

Hedley Byrne & Co Ltd Vs. Heller & Partners Ltd (1964)

The case: *The claimant was an advertising agency and had a client (X) who was a customer of the defendant merchant bank. The claimant, who intended to give X credit, asked the bank for a reference as to the creditworthiness of X. The bank gave a positive reference, but under the reserve: "in confidence and without responsibility on our part". When X went into liquidation, the claimant suffered a loss of 7.000 Pounds. They sued the bank for the loss, alleging that the defendants had given a misleading reference, had not informed themselves sufficiently about X, were therefore liable in negligence.*

Vitiating Factors – Misrepresentation – Negligent misrepresentation (2a)

Hedley Byrne & Co Ltd Vs. Heller & Partners Ltd (1964)

The court's decision: *That the claimant failed because the defendant bank had given the reference "without responsibility" on their part. Without this exemption clause the reference would have been negligent.*

Vitiating Factors – Misrepresentation – Innocent misrepresentation

- This is a **non-fraudulent** but **false statement** which the maker believed to be true
- ***Example:*** *A party sells a computer and markets it as "good as new", when in fact it may be several years old with many internal defects.*

MISREPRESENTATION

… is the statement of fact made prior to the contract by one party to the other, which is false or misleading and which induced the other party to enter into the contract.

… renders a contract **voidable.**

Fraudulent misrepresentation	**Negligent misrepresentation**	**Innocent misrepresentation**
False statement made knowingly or recklessly.	Non-fraudulent, but false statement which the maker had no reasonable grounds for believing it to be true.	Non-fraudulent, but false statement which the maker believed to be true.

Remedies

Recession or damages	Rescission and/ or damages

Vitiating Factors (Checklist!)

- The *vitiating factors* are divided into four classes:
  - **(1) Mistake:** a contract formed on the basis of a mistake concerning the contract is ***void*** at common law if the mistake is operative **or** it may be ***voidable*** in equity in certain circumstances
  - **(2) Misrepresentation:** a contract formed as a result of false information about its substance is ***voidable***
  - **(3) Duress and undue influence:** a contract entered into not voluntarily because of pressure applied to one party is ***voidable*** at the option of the victim
  - **(4) Illegality:** a contract illegal by statute or illegal at common law is ***void*** and unenforceable

Vitiating Factors – Duress and Undue Influence

- Contract law typically presupposes that the parties entered into the agreement voluntarily > therefore, a party who has been coerced/forced into contracting should be able to set aside the contract
- The law developed *two doctrines* to deal with this issue: **common law doctrine of duress** and **the equitable one of undue influence** > both render the contract ***voidable*** at the option of the victim

Vitiating Factors – Duress (1)

- There are *three sorts of pressure* amounting to duress:
  - (1) actual or threatened **violence to the person**
  - (2) **threats to property** (duress of goods) and
  - (3) **economic duress**

Vitiating Factors – Duress (2)

- Actual or threatened **violence to the person:**
  - ➢includes not only threats of physical harm to the contracting party or those near and dear to him but also threats of dishonour and unlawful (or false) imprisonment

Example: *A former chairman of a company threatened the current managing director that he would have him killed unless the manging director paid over a large sum of money for the former chairman's shares. It was shown in the case that the managing director was actually quite happy to buy the shares and would have done so even without any threat being made. Nevertheless threats had been made and the court held that these were therefore sufficient to amount to duress, vitiating the agreement they had reached as a result. The agreement was set aside for duress.*

Vitiating Factors – Duress (3)

- **Threats to damage or remove property:**
  - ***Example:*** *A person coerced/forced into a contract by the threat of having his house burnt down or a valuable painting slashed could plead duress.*

Vitiating Factors – Duress (3)

- **Economic duress:**
  - ***Example:*** *If one party says to the other "I will not do business with you in future anymore unless you reduce the price by half".*

Vitiating Factors – Undue influence (1)

- *Undue influence* is an **equity remedy** and therefore available *at the court's discretion* > it operates where one party has gained an unfair advantage over the other by applying improper pressure (not amounting to duress at common law)
- A precise definition of *undue influence* does not exist, but it can be classified into different categories:
  - (1) *actual* undue influence
  - (2) *presumed* undue influence in case of a **special relationship** between the parties, and
  - (3) *presumed* undue influence **without special relationship, but in relationships of trust and confidence**

Vitiating Factors – Undue influence (2)

- **(1) Actual undue influence** > the party alleging it is required to prove the undue influence; it must be shown that the coercion/force really occurred and that it amounted to a clear dominance hindering the claimant to exercise free will or act

Vitiating Factors – Undue influence (2a)

Example: *A wife transferred her interest as tenant in common on a farming property to her husband. The property was owned jointly be the husband and herself. There was evidential proof that there was a long history of brutal domestic violence inflicted by the husband on the wife, whereby he ended up murdering her. There was a presumption that the wife only transferred her interest to the husband because of undue influence and evidence proved that the transfer resulted from actual undue influence. It was because of the history of violence that resulted in the judge setting aside the transfer.*

Vitiating Factors – Undue influence (3)

- **(2)** In cases of **special relationships** between the parties there is a **presumption of undue influence** > such special relationships are for example obviously given between a *lawyer and client*, *doctor and patient*, *parent and child*, *religious leader and disciple*

Vitiating Factors – Undue influence (4)

Allcard Vs. Skinner (1887)

The case: *The claimant belonging to a religious order was persuaded to join a closed sisterhood, taking vows of poverty, chastity and obedience. Accordingly, she gave the sisterhood all her property. When she later left the order she tried to recover money to the value of the property handed over alleging that she was subjected to the undue influence of the mother superior, her spiritual leader to whom she owed obedience.*

Vitiating Factors – Undue influence (4a)

Allcard Vs. Skinner (1887)

The court's decision: *That undue influence existed in this case, since the claimant was bound not to seek independent advice whilst in the order. However, the claimant's action failed because she waited five years after leaving the order before claiming and "**delay defeats equity**".*

Vitiating Factors – Undue influence (3)

- **(3)** step by step, the courts developed a **second category** of presumed undue influence where there is a **relationship of trust and confidence** between the parties > most common case here is the relationship of *husband and wife,* but also the relationship between the *bank and its client* belongs to this category

Vitiating Factors – Undue influence (4)

Lloyds Bank Ltd Vs. Bundy (1979)

The case: *The defendant, an elderly farmer, his son and his son's company were all customers of the same bank for many years. The defendant was persuaded by the assistant bank manager to use his farm, his major asset, as security for a loan to the son's company. The bank manager said that the bank could not continue to support an overdraft for the company unless the defendant entered into a guarantee of the account. The defendant received no independent advice, nor did the bank manager suggest that he should do so. In fact, the loan was well in excess of the actual value of the farm. When the company defaulted on the loan and the bank sought possession of the farm, the farmer pleaded undue influence.*

Vitiating Factors – Undue influence (4)

Lloyds Bank Ltd Vs. Bundy (1979)

The court's decision: *That the farmer succeeded. There was a clear conflict of interest and duty because the bank represented all parties. The court identified that the proper course of action for the bank in the particular circumstances would have been to direct the farmer to take independent advice before allowing his farm to be used as security for the loan to the son's business.*

DURESS AND UNDUE INFLUENCE

A party who has been coerced into contracting has the option to render the contract ***voidable.***

Common law doctrine of duress

Three sorts of pressure...

- actual or threatened violence to the person
- threats to property
- economic duress

Equitable doctrine of undue influence

One party gains an unfair advantage over the other by applying improper pressure (no duress), e.g.:

- actual undue influence
- presumed undue influence in case of a special relationship between the parties
- presumed undue influence without special relationship, but in relationships of trust and confidence

Vitiating Factors (Checklist!)

- The *vitiating factors* are divided into four classes:
  - **(1) Mistake:** a contract formed on the basis of a mistake concerning the contract is ***void*** at common law if the mistake is operative **or** it may be ***voidable*** in equity in certain circumstances
  - **(2) Misrepresentation:** a contract formed as a result of false information about its substance is ***voidable***
  - **(3) Duress and undue influence:** a contract entered into not voluntarily because of pressure applied to one party is ***voidable*** at the option of the victim
  - **(4) Illegality:** a contract illegal by statute or illegal at common law is ***void*** and unenforceable

Vitiating Factors – Illegality

- The courts will not enforce contracts that are considered to be illegal > the contract may be **illegal by statute (1)** or **illegal at common law (2)**
- (1) where the contract is illegal by statute, the impact of this illegality will depend on the terms of the statute
- (2) in the case of illegality at common law the contract is generally void and unenforceable except for certain exceptions developed by the courts

Vitiating Factors – Illegality – Contracts illegal by statute (1)

- **Contracts forbidden by statute:** some types of contract are *expressly declared void by statute*

Example 1: *A contract between two parties to evade tax. This contract is aimed at breaching the law requiring persons conducting businesses to pay tax which is mandatory and statutory obligation.*

Example 2: (Cope Vs. Rowlands, 1836) *A stockbroker did some work for another party who failed to pay. Under statute, it was an offence for a stockbroker to work without a licence. The stockbroker had no licence. The statute prohibited him acting as a broker. He could not enforce the contract because it was void.*

Vitiating Factors – Illegality – Contracts illegal by statute (2)

- **Contracts performed in an unlawful manner:** a contract perfectly legally formed may be illegal because of the way of its performance

Example: *(Anderson Ltd Vs. Daniel, 1924) A seller of artificial fertilisers had failed to deliver the statutorily required invoice detailing the chemical breakdown of the fertiliser. The other party failed to pay the 10 tons of fertiliser and the seller sued for the price. The seller's action failed because the contract was unenforceable due to statutory invalidity. The contract was* ***illegal in its execution****.*

Vitiating Factors – Illegality – Contracts illegal at common law (1)

- The concept of an illegal contract at common law covers a "multitude of sins" > in the most general sense the *formation, purpose or performance* of a contract can be illegal because of involving the **commission of a legal wrong** or because it is **contrary to public policy**

Vitiating Factors – Illegality – Contracts illegal at common law (2)

- **Contract to commit a crime or tort**: contracts containing a *criminal wrong* are illegal

Example: *If A made a contract with B to steal C's car for 100 ZMW, the court would not award A a remedy if B later refuses to carry out the contract.*

Vitiating Factors – Illegality – Contracts illegal at common law (3)

- **Contracts contrary to public policy**: refer to matters of public policy/ injuries to society

Example 1: *An agreement to stifle a prosecution of a criminal offence in return for payment is illegal because the public has an interest in proper administration of justice.*

Example 2: *A contract tending to corrupt the public service, for example in order to procure a public honour or a public office are considered illegal.*

ILLEGALITY

The courts will not enforce contracts that are considered to be illegal.

Contract illegal by statute

The *impact depends* on the terms of the statute.

- Expressly declared *void* by statute are contracts in restraint of trade
- Contracts *illegal* because of its unlawful performance

Contracts illegal at common law

Contracts are *generally void* and *unenforceable*.

- Contracts involving the commission of a legal wrong (crime or tort)
- Contracts contrary to public policy/ Injuries of society

Discharge of a contract (Checklist!)

- A contract is said to be discharged when it comes to an end which is possible in four ways:
  - (1) By **performance**
  - (2) By **agreement**
  - (3) By **breach**
  - (4)By **frustration**

Discharge of a contract – Performance (1)

- **Performance**:
  - the basic rule/*strict rule* is that a contract is generally discharged when it is **performed precisely and exactly** to its terms (!)
  - On the other hand, the strictness of the rule also means that if there is any deviation from complete performance where a party fails to meet all of his obligations then the contract is not discharged but breached and this can have harsh consequences

Discharge of a contract – Performance (2)

Example 1: *(Cutter Vs. Powell, 1795) A seaman in Jamaica agreed to serve on a ship and to "do his duty as second mate in the said ship from hence to the port of Liverpool". His wages were to be paid at the end of the voyage. Unfortunately the seaman died mid-voyage and his widow attempted to claim his wages. Her action failed because the contract was construed to be entire, i.e. for the whole journey and the seaman did not complete performance of his whole obligation.*

Discharge of a contract – Performance (3)

Example 2: *A contract for the sale of 3,000 tins of peaches described the tins as being packed in cases of 30. When they arrived the tins were packed in cases of 24 although the agreed overall number of tins was supplied. The purchaser was entitled to reject the goods as they were not as described.*

Discharge of a contract – Performance (5)

- **5 Exceptions to the strict rule:**
  - **(1) Divisible contracts** > contract with various parts and separate obligations > *If obligations are "divisible" then payment should be made for part performed.*
    Case: *Premises were leased to a tenant for rent. A term in the lease required the landlord to keep the premises in good repair. In fact the landlord failed to maintain the premises and the tenant then refused to pay the rent. In the landlord's action the court held that the contract had* ***divisible obligations****: to lease the premises, and to repair and maintain. The contract was thus not entire and the tenant could not legitimately refuse payment.*

Discharge of a contract – Performance (6)

- 5 Exceptions to the strict rule:
  - **(2) Acceptance of part-performance** > where one of the parties has performed the contract partly, but not completely then, if the other party has shown willingness to accept the part performed, the *strict rule* will usually not apply and he may be sued if he fails to pay or to honour his own obligations under the contract > *Where a party has accepted part-performance then this should be paid for.*

Discharge of a contract – Performance (6a)

- 5 Exceptions to the strict rule:
  - **(2) Acceptance of part-performance**

    Case: *A builder was hired to build two houses and stables. The builder had completed some of the work when he then ran out of money and was unable to complete the work. The landowner then had the work completed, using materials that the builder had left on the land. The builder then sued for the price of the work. While the builder was awarded the value of the materials that he had provided and which had been used, his argument that part-performance had been accepted by the landowner was rejected. The landowner had no choice but to find an alternative way of completing the work. His only alternative would have been to leave the partly completed buildings as an eyesore on his land. He had not accepted part-performance and the court would not accept the builder's claim for payment.*

Discharge of a contract – Performance (7)

- 5 Exceptions to the strict rule:
  - **(3) Doctrine of substantial performance** > if a party has done substantially what was required under the contract then the doctrine of substantial performance can apply > *Where there has been substantial performance then the full price will be paid, less the sum appropriate to what has not been done. BUT it will not be classed as substantial performance if too much remains to be done under the contract.*

Discharge of a contract – Performance (7a)

- 5 Exceptions to the strict rule:
  - **(3) Doctrine of substantial performance**

    Case: *Here, under the terms of a contract a builder was bound to complete major repair work to a building. He did in fact complete all of the work that was required under the contract. However, some of it was carried out so carelessly that the owner of the building refused to pay, on the ground that performance was in effect incomplete. The builder then sued for payment. The court held that he was able to recover the price of the work less an amount representing the value of the defective work which obviously would have to be put right, causing extra expense to the other party.*

Discharge of a contract – Performance (8)

- 5 Exceptions to the strict rule:
  - **(4) Prevention from performance** > where a party to a contract prevents the other party from carrying out his obligations under the contract because of some act or omission (Unterlassung) then the strict rule cannot apply > *A party can sue for damages where his performance has been prevented by the other party.*

Discharge of a contract – Performance (8a)

- 5 Exceptions to the strict rule:
  - **(4) Prevention from performance**

    Case: *A publisher was planning to produce a series of books on a particular theme. The publisher then hired an author, the claimant, to write one of the books in the series. When the publisher decided to abandon the whole series, the author was prevented from completing the work through no fault of his own and despite the fact that he had already done a lot of work for the book. The court held that the author was entitled to recover half his fee for his wasted work.*

Discharge of a contract – Performance (9)

- 5 Exceptions to the strict rule:
  - **(5) Tender of performance >** refers to a similar situation to the above (prevention from performance); it occurs where a party has offered to complete all of his obligations under the contract but the other party has unreasonably refused to accept the performance > *in situations like this the party "tendering" performance is entitled to sue and to recover under the contract*

Discharge of a contract – Performance (9a)

- 5 Exceptions to the strict rule:
  - **(5) Tender of performance**

    Case (1843): *The contract was for 10 tons of linseed oil to be delivered by the end of March. The seller in fact delivered at 8.30 pm on 31st March, which was a Saturday, and the buyer refused to accept delivery. The court held that the seller was able to claim that he had tendered performance and to recover damages as a result. (The answer might be different now under the Sales of Goods Act 1979 since delivery should be at a "reasonable hour" and this would ne a question for the court to decide in the individual case.)*

Discharge of a contract (Checklist!)

- A contract is said to be discharged when it comes to an end which is possible in four ways:
  - (1) By **performance**
  - (2) By **agreement**
  - (3) By **breach**
  - (4)By **frustration**

Discharge of a contract – Agreement

- Since a contract can be made by agreement, it goes without saying that the parties may also end the contract by mutual agreement

Discharge of a contract

- A contract is said to be discharged when it comes to an end which is possible in four ways:
  - (1) By **performance**
  - (2) By **agreement**
  - (3) By **breach**
  - (4)By **frustration**

Discharge of a contract – Breach (1)

- A *breach of contract* is "*committed when a party without excuse fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing*"

Example: *A seller fails to deliver the goods in due time. … A party fails to carry out the contract properly because the goods delivered are not up to standard as to quality or quantity.*

Discharge of a contract – Breach (2)

- **Repudiatory (fundamental) breaches** are more serious and therefore entitle the innocent party – in addition to claim damages – to consider himself as discharged from his obligations under the contract > the innocent party has the choice between accepting the breach as repudiation or affirming the breach in order to continue with the contract
- **Anticipatory breaches** occur before performance is due > this happens where one party makes the other party aware of their intention not to perform their contractual obligation

Discharge of a contract – Breach (3)

Hochster Vs. DeLaTour (1853)

The case: *In April 1853, D agreed to engage H as a courier for a European tour to commence on 1 June. In May, D informed H that he no longer required his services. Still in May H sued for damages because of breach of contract.*

The court's decision: *That H succeeded. D had broken his contract by express repudiation, and H could, because of this anticipatory breach of contract, bring the action immediately (still in May).*

Discharge of a contract (Checklist!)

- A contract is said to be discharged when it comes to an end which is possible in four ways:
  - (1) By **performance**
  - (2) By **agreement**
  - (3) By **breach**
  - (4)By **frustration**

Discharge of a contract – Frustration (1)

- Courts developed the *doctrine of frustration* in order to help parties whose failure to perform was beyond their control
- In order to this doctrine a contract may be discharged if subsequently and without the fault of either party an event occurs rendering further performance **impossible**, **illegal** or bringing about a **radical change of circumstances** of the contract

Discharge of a contract – Frustration (2)

- **Categories:**
  - **Destruction of the specific object essential for performance** (e.g. concert hall burns down)
  - **Personal incapacity** (e.g. medical condition)
  - **Non-occurrence of a specified event** (e.g. booking of a room in a hotel with a view for a special event)
  - **Interference by the government** (e.g. timber control order)
  - **Delay** (e.g. inordinate or unexpected delays)

Discharge of a Contract

Performance

General strict rule: A contract is discharged when it is performed precisely and exactly to its terms.

Agreement

Consideration is required to enforce the agreement to discharge or vary the contract.

Breach

Repudiatory breach entitles the innocent party to damages and to choose between repudiation or continuation of the contract.

Frustration

A contract is discharged if subsequently and without the fault of either party an event occurs: > rendering further performance impossible; > rendering further performance illegal; > radical change of circumstances

Remedies

- In the event of an actionable vitiating factor or a breach of contract the crucial question arising is whether the party can enforce the contract
- There are a number of possible remedies available depending on the circumstances of the particular case
- They may be either at *common law* or *equitable in character*

Remedies (Checklist!)

- (1) **Damages**
- (2) **Specific performance**
- (3) **Injunction**
- (4) **Rescission**

Remedies - Damages (1)

- At *common law*, the aim of *contractual damages* is to put the injured party into the same financial position they would have been in *had the contract been properly completed*
- This contrasts with *damages in tort* where the purpose of the award of damages is to put the claimant into the position he would have been in *had the tort never occurred*

Remedies - Damages (2)

- Contractual damages represent an actual financial loss > the normal reason for awarding damages in contract law is to compensate for the claimant's loss > But *for what* and *how much* can the claimant recover?
- The court has to asses three requirements:
  - (1) the loss must be the consequence of the breach
  - (2) the loss suffered should be fair and reasonable foreseeable (some how expected) and
  - (3) mitigation of loss

Remedies - Damages (3)

Hadley Vs. Baxendale (1854)

The case: *The claimant, a mill owner, engaged the defendant, a carrier, to transport a broken crankshaft as template to an engineer in order to make a new one. The claimant informed the carrier that the matter was urgent and there should be no delay. But he did not make the defendant aware that the mill would be inoperable without the crankshaft. The carrier had no reason to believe that the crankshaft to deliver was the only one the claimant possessed. The defendant was then late with delivery by several days. The claimant sought damages to compensate for the losses sustained whilst the mill was idle.*

Remedies - Damages (3a)

Hadley Vs. Baxendale (1854)

The court's decision: *The defendant was not liable because* ***the loss was too remote****. The carrier was unaware of the importance of prompt delivery.*

- This famous judgement gave rise to the so called *"foreseeability test":*
  - *(1) There must be common knowledge of the loss arising in the ordinary run of things*
  - *(2) there must be actual knowledge in the case of abnormal loss*

Remedies - Damages (4)

Victoria Laundry Vs. Newman Industrie Ltd. (1949)

The case: *The claimants run an laundry business. They purchased a second-hand boiler due for delivery in July. The boiler was damaged whilst being dismantled. The necessary repair delayed delivery until November. The claimants had made the defendants aware that they needed the boiler to expand their business and they wanted for immediate use. They claimed damages for loss of usual profits that would have been made from their additional laundry business if the boiler had been delivered on time and also for the loss of government contracts that they had been unable to fulfil.*

Remedies - Damages (4a)

Victoria Laundry Vs. Newman Industrie Ltd. (1949)

The court's decision: *That the loss of the usual laundry profits as a* ***natural*** *and* ***reasonable foreseeable*** *consequence of the breach were recoverable. The action for the loss of revenue from the intended government contracts, however, failed because these contracts were unknown to the defendants; this* ***loss was abnormal****.*

Remedies - Damages (5)

- The third requirement is **mitigation of loss** > the party suffering damages must do all in his powers to mitigate his losses

Examples: 1. *An employee is dismissed from his job, he should try to find other suitable work.* ***2.*** *In the same way, a hotel owner is obliged to relet the room, if possible, to other guests if the booking of a room is cancelled.* ***3.*** *If a buyer refuses to accept the ordered goods, the seller must try to sell them to another person and, if he succeeds in getting the same price, he has suffered no loss. If, however, he obtains a lower price, he can claim the difference as damages.*

Remedies (Checklist!)

- (1) **Damages**
- (2) **Specific performance**
- (3) **Injunction**
- (4) **Rescission**

Remedies - Specific performance

- The *equitable remedy of specific performance* is a court order which **makes the party in breach carry out his obligations** under the contract > this remedy is generally positive in nature because it compels a person to do something which was agreed on anyway
- (!) Thus, specific performance will generally not be awarded in the case of a contract for the sale of goods, because goods normally are not “one-off” (unique) > If goods are specific or ascertained, specific performance is available at the court’s discretion (*S.52 Sale of Goods Act*)

Remedies (Checklist!)

- (1) **Damages**
- (2) **Specific performance**
- (3) **<u>Injunction</u>**
- (4) **Rescission**

Remedies – Injunction (1)

- The *equitable remedy of injunction* is a court order **compelling a person to refrain from doing something** which breaches a term of a contract > in contrast to the specific performance, an injunction is generally **negative or prohibitory in nature**

Remedies – Injunction (2)

Warner Brothers Pictures Vs. Nelson (1937)

The case: *The young film actress Bette Davis had entered into a contract to work in films exclusively for the claimants for twelve months. She was anxious to obtain more money and so she left America and, in breach of her contract, agreed to act in a film for a rival company in England. The claimants asked for an injunction restraining the defendant from carrying out the English contract.*

Remedies – Injunction (2a)

Warner Brothers Pictures Vs. Nelson (1937)

The court's decision: *That an injunction would be granted. The contract contained a negative stipulation not to work for anyone else, and this could be enforced.*

Remedies (Checklist!)

- (1) **Damages**
- (2) **Specific performance**
- (3) **Injunction**
- (4) **<u>Rescission</u>**

Remedies – Rescission

- The *equitable remedy of rescission* is a court order **seeking to put the parties back into their pre-contractual position** > the contract would be set aside on the application of one of the parties who has the right to avoid the contract because of some defect in it > the parties are no longer bound by the contract and it endeavours to place them in the position to return goods or money to the original owners

Remedies

Damages

Aim: to put the injured party into the same position they would have been in had the contract been properly completed.

Requirements for compensation:

- Causation of fact
- Remoteness of damage
- Mitigation of loss

Specific performance

Equitable remedy making the party in breach carry out his obligations under the contract

Only available:

- If damages are not adequate remedy
- At the discretion of the judge
- For certain types of contract

Injunction

Equitable remedy compelling a person to refrain from doing something

Recission

Equitable remedy seeking to put the parties back into their pre-contractual position

At the discretion of the judge

PART 3 - CHAPTER 1 - Contract Law

Sales of Goods – Sales of Goods Act 1893/1979 – Contract of sale; Obligations and Remedies of Seller and Buyer

Contracts under the Sales of Goods Act? (1)

- The law affecting ***contracts for the sale of goods*** was largely codified by the Sale of Goods Act 1893 > later it was amended several times, and has now been replaced by a consolidating Act, the Sale of Goods Act 1979
- The Act covers the ***obligations and remedies of the parties***, and the ***transfer of ownership and risk*** > other matters, however, such as *offer* and *acceptance*, *intention to create legal relations* and *consideration*, are still governed by the ordinary *law of contract* (see Unit 2 Part 1-2)

Contracts under the Sales of Goods Act? (2)

- *Seller* transfers or agrees to transfer the property (=ownership) in *goods* to the *buyer* in exchange for a consideration called the *price* (!)
  - ***"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them in accordance with the contract of sale."*** (Section 27 SOGA – Performance of the contract)
- This applies both to a ***sale***, where ownership passes immediately to the buyer, and to an ***agreement to sell***, where the parties agree now that ownership shall pass later

Contracts under the Sales of Goods Act? (3)

- The Act does not apply to barter or exchange (because there is no “price” in money itself)
- The Act does not apply to hire (because no ownership passes to the hirer)
- The Act does not apply to contracts for “work and materials”, where the goods supplied form only a fairly small part of the consideration

Examples: *Act would not apply to the vaccine provided by a vet as a small part of his treatment of the animals; Act would not apply to the filling which a dentist puts into a tooth > What the consumer in these cases principally pays for is the professional service.*

Contracts under the Sales of Goods Act? (4)

- **Contract of sale** may be *oral, in writing* or *implied*
- **Implied terms** in **contracts of sale** are for example
  - goods to be sold are free from any charge or encumbrances not disclosed or known to the buyer before the contract is made and until the property in the goods passes
  - goods to be sold ought to correspond to the given description etc.
- Goods which may be subject of the transaction may be either ***existing goods*** (owned or possessed by the seller) or ***future goods*** (to be manufactured or acquired by the seller)

Contract of sale – Existing goods

- A contract pertaining to **existing goods** may be void when the goods perished at the time of the transaction but without the knowledge of the seller (!)

Contract of sale – Future goods

- A present sale of **future goods**, is called an *agreement to sell* > an *agreement to sell* may be voidable in two circumstances
  - (1) where the goods perish due to no fault of the parties but before the risk in the goods passes to the buyer (e.g. before the sale but after the agreement to sell has been executed)
  - (2) where the price of the goods is to be fixed by the valuation of a third party, and he cannot or does not make the valuation, the agreement to sell may be avoided
- It is important to note that the risk in the property passes when ownership in the property is passed > once risk passes to the buyer, the seller is relieved of liability for loss of or damage to the goods, unless caused by the seller's negligence (!)

Obligations and Remedies - Checklist

1. **Obligations of the seller?** – Title (= right), description , quality, sample, delivery, exclusion of the seller's obligations
2. **Remedies of the buyer?** – Damages for breach of contract, rights to reject the goods and end the contract, specific performances
3. **Other sanctions against suppliers of goods?** – Actions in tort, criminal liability of seller
4. **Obligations of the buyer?** – Payment, acceptance
5. **Remedies of the seller?** – Action for the price, damages for non-acceptance, unpaid seller's rights over the goods

Obligations of the seller – Title (1)

- **Title**
  - Section 12 (1): "*an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods, and in the case of an agreement to sell, he will have such a right at the time when the property is to pass*"
  - if the seller has no right to sell the goods (e.g. because they have been stolen, or he only holds them on hire or hire-purchase), then he will be liable to the buyer for breach of condition

Obligations of the seller – Title (2)

Rowland vs. Divall (1923)

The buyer of a car used the car about three month, but then found that it was stolen and had to return it to the true owner. He was held entitled to recover from the (innocent) seller the full price which he had paid even though, when he had to part with it, the car was worth probably less after it had been used. He had paid to become owner, and he was, therefore, entitled to the return of his money.

> If the buyer obtains *no title*, he will be bound to return the goods to the true owner (!)

Obligations of the seller – Title (3)

- Section 12 (2) also applies two *warranties* (remember difference between *warranty* and *condition*!) into contracts for sale:
  - (1) that the goods are free from encumbrance (such as a mortgage) not disclosed or made known to the buyer before the contract is made, and
  - (2) that the buyer will enjoy quiet possession of the goods

Obligations of the seller – Title (4)

Microbreads A.G. vs. Vinhurst Road Marking Ltd. (1975)

Shortly after the sale a third party obtained a patent which interfered with the buyer's right to use the machines (i.e. with his quiet possession). There had been no breach of Section 12 (1), because the seller had a right to sell. However, the buyer was entitled to recover damages for breach of Section 12 (2).

Obligations of the seller – Description (1)

- **Description**
  - Section 13 (1) provides that: "*Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description*"
  - Goods ordered through a catalogue, or a new car ordered from the manufacturers through a dealer, will always be sold by description, because this is the only way to identify what is required
  - Even goods seen and specifically chosen by the customers can be sold by description, and a customer is entitled to expect, for example, that goods which he chooses from the shelf in a supermarket will correspond to the description on the tin or packet

Obligations of the seller – Description (2)

Beale vs. Taylor (1967)

A car was advertised as a "Herald Convertible, white, 1961". The buyer saw the vehicle before buying it, but only discovered some time later that, while the rear part had been accurately described, the front half had been part of an earlier model. The seller was held to be in breach of Section 13.

Obligations of the seller – Description (3)

- **Description** covers a wide variety of matters > statements as to quantity, weight, ingredients and even packing have been held to be part of the description > Compliance with the description must be complete and exact > BUT microscopic deviations may sometimes be ignored (common-sense shall apply)

Obligations of the seller – Description (4)

Re Moore & Co. and Landauer & Co.

The buyer described in the contract how he wished the consignment of canned fruit to be packed. When the seller supplied fruit which was not packed as stipulated, the buyer was entitled to reject the goods.

Obligations of the seller – Description (5)

Arcos vs. Ronaasen (1933)

The contract was for half-inch wooden staves. Some of the staves supplied were as much as nine-sixteenths of an inch thick, and it was held that the buyer was entitled to reject the consignment.

Obligations of the seller – Quality (1)

- **Quality:** unlike the obligations imposed by Sections 12, 13 and 15, which apply to all sales of goods > **Section 14** applies only where the seller sells ***in the course of a business***
- **1. Merchantable quality**, Section 14 (2): *"Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality."*
  - *"merchantable"* means *"as fit for the purpose for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price and all the other relevant circumstances" (e.g. cheaper goods = lower quality)*

Obligations of the seller – Quality (2)

Bartlett vs. Sidney Marcus Ltd. (1965)

A second-hand car was sold with a defective clutch. The seller had warned the buyer of the defect, and the price took account of this. The car was held to be of merchantable quality in the circumstances, even though repair cost more than the buyer expected.

Obligations of the seller – Quality (3)

Rogers vs. Parish Ltd. (1987)

The vehicle was an expensive new one. Although driveable, it did have mechanical and bodyworks faults. It was not of merchantable quality. At that price (16000 Pounds) it should have been usable "with the appropriate degree of comfort, ease of handling and reliability and, one may add, pride…"

> This obligation regarding merchantable quality does not apply (a) as regards defects specifically drawn to the buyer's attention before the contract is made, or (b) if the buyer examines the goods before the contract is made, as regards defects which examination ought to reveal

Obligations of the seller – Quality (4)

- **2. Reasonable fitness for the purpose made known**, Section 14 (3) > this subsection only applies, therefore, if the buyer has expressly or impliedly made known to the seller the purpose for which he requires the goods
- Where the goods only have one or two obvious uses, it will be assumed that the buyer has impliedly indicated that he wants them for their normal purpose > thus, if someone buys foods, it will be taken to indicate that he wants it to be reasonably fit for eating

Obligations of the seller – Quality (5)

Grant vs. Australian Knitting Mills (1936)

A customer bought underpants from a shop. The garment still contained a chemical substance which had not been removed after manufacture, and this caused dermatitis (skin condition). It was held that the buyer had impliedly made known that he intended to wear the underpants, which were not reasonably fit for that purpose. Furthermore, the garment was not of merchantable quality.

Obligations of the seller – Quality (6)

- The goods supplied need only be *reasonably* fit, however, and then only for the purposes made known

Griffiths vs. Peter Conway Ltd. (1939)

A lady with abnormally sensitive skin suffered dermatitis from contact with her new tweed coat. The garment would not affected normal skin, and the lady's action against the seller, therefore, failed. The garment was reasonably fit for normal purposes, and the buyer had not made known her special circumstances.

Obligations of the seller – Quality (7)

- The subsection contains one exception to this implied condition, namely, where the circumstances show that the buyer does not rely, or that is unreasonably for him to rely, on the seller's skill judgement

Example: *The buyer is an expert in certain goods, and gives detailed specifications as to what he requires.*

Obligations of the seller – Quality (8)

- **3. Terms implied by usage**, Section 14 (4) > provides that implied conditions and warranties as to quality or fitness may be annexed by usage

Geddling vs. Marsh (1920)

Mineral water was sold by the manufacturer to a retailer in bottles which had to be returned to the manufacturer. The buyer was injured when a defective bottle burst. He recovered damages under Section 14 because, even though the bottles were not sold under the contract, the section applies to all goods supplied.

Obligations of the seller – Quality (8a)

Wilson vs. Ricket (1954)

The plaintiff (claimant) ordered "Coalite" from the seller. The consignment contained a detonator, which exploded when put on the fire. When sued, the seller pleaded that the detonator was included by mistake, was not part of goods sold, and, therefore, was not subject to Section 14. The court of Appeal rejected this defence; the detonator had been supplied under the contract, albeit by mistake.

Obligations of the seller – Quality (8b)

Frost vs. Aylesbury (1905)

A dairy supplied milk which contained typhoid germs. The dairy showed that it had taken all reasonable care to prevent this.

Obligations of the seller – Sample

- **Sample**, by Section 15, if goods are sold by sample, there are implied conditions (a) that the bulk will correspond with the sample in quality, (b) that the buyer will have a reasonable opportunity of comparing the bulk with the sample, and (c) that the goods will be free from any defect, rendering them un-merchantable

Godley vs. Perry (1960)

A boy bought a plastic catapult from a retail shop. The catapult broke almost immediately, and the boy lost one eye. The retailer had bought his catapults by sample from a wholesaler. The retailer had tested the sample by pulling back the elastic, and no defect was apparent at that stage. It was held that (a) the boy could recover damages from the retailer for breach of sections 14 (2) and (3), and (b) the retailer could recover damages from the wholesaler for breach of section 15 (2) (c).

Obligations of the seller – Delivery

- **Delivery**
  - In the absence of agreement to the contrary, it is for the buyer to collect the goods from wherever the seller has them, not for the seller to dispatch them to the buyer
  - Where the seller does agree to dispatch the goods, he must do so within a reasonable time and, in any event, demand or tender of delivery must be at a reasonable time of day
  - The buyer is entitled to delivery of all goods at once, and need not accept delivery by instalments

Exclusion of the seller's obligations

- General rule: Although as a general rule the parties can make whatever bargain they please, any clause purporting to exclude Sections 13 to 15 will be void as against a person buying as a *consumer*
- On the other hand, the parties are quite free to exclude or vary provisions if they wish so

Obligations and Remedies - Checklist

1. **Obligations of the seller?** – Title, description , quality, sample, delivery, exclusion of the seller's obligations
2. **Remedies of the buyer?** – Damages for breach of contract, rights to reject the goods and end the contract, specific performances
3. **Other sanctions against suppliers of goods?** – Actions in tort, criminal liability of seller
4. **Obligations of the buyer?** – Payment, acceptance
5. **Remedies of the seller?** – Action for the price, damages for non-acceptance, unpaid seller's rights over the goods

Remedies of the buyer

- Where the seller breaks one of his express or implied obligations under the contract, the buyer may have the following remedies
- **Damages for breach of contract**
  - Basic rule is, that "*the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract*"
  - Second rule, no compensation for all of the consequences which might logically "result" from the breach (e.g. Hadley vs. Baxendale, 1854 "*loss of profits was disallowed*")

Remedies of the buyer

- **Rights to reject the goods and end the contract (Basics!)**
  - Where the term broken by the seller is a condition (not a mere warranty), the buyer has the right to reject the goods and treat the contract as repudiated (sections 12 to 15 are conditions (!)), as well as *late delivery* >>> The rights to reject the goods and treat the contract as repudiated are lost as soon as the buyer has *accepted* the goods, or part thereof
  - Buyer is deemed to have accepted the goods: (1) he intimates to the seller that he accepted them, or (2) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or (3) after the lapse of reasonable time, without communicating rejection

Remedies of the buyer

- **Specific performance**
  - This remedy becomes applicable in situations where time is of the essence and conditional to the contract
  - Further the goods to be supplied ought to of a sufficiently unique nature (e.g. an original painting) > mere rarity is not normally enough
  - In such a case, the failure by the seller to deliver the goods as specified would amount to a breach of the condition of sale and attract the remedy of specific performance

Obligations and Remedies - Checklist

1. **Obligations of the seller?** – Title, description , quality, sample, delivery, exclusion of the seller's obligations
2. **Remedies of the buyer?** – Damages for breach of contract, rights to reject the goods and end the contract, specific performances
3. **Other sanctions against suppliers of goods?** – Actions in tort and criminal liability of seller
4. **Obligations of the buyer?** – Payment, acceptance
5. **Remedies of the seller?** – Action for the price, damages for non-acceptance, unpaid seller's rights over the goods

Other sanction against suppliers of goods – Actions in tort (1)

- **Actions in tort**
  - Sections 12 to 15 of SOGA merely imply terms into the contract between the seller and buyer, and therefore, because of *privity of contract rules*, have serious weaknesses when it comes to protecting consumers > Thus, where the goods have passed through several hands, the SOGA only gives remedies against the immediate seller, not previous owners or the manufacturers > if the immediate seller is not worth suing, the buyer's only right of action may be in tort if he can, for example, prove negligence by the manufacturer

Other sanction against suppliers of goods – Actions in tort (2)

Example: *A dangerous good is supplied (for example a defective car) and injures someone other than the buyer himself. The person injured cannot sue on a contract to which he is not a party (privity of contract), and the Sale of Goods Act is, therefore, of no help, but tort might be.*

Other sanction against suppliers of goods – Actions in tort (1)

- **Criminal liability of seller**
  - Sellers are prohibited to sell products of low/unsound quality which can be dangerous/hazardous to consumers (e.g. Food and Drugs Act)

Obligations and Remedies - Checklist

1. **Obligations of the seller?** – Title, description , quality, sample, delivery, exclusion of the seller's obligations
2. **Remedies of the buyer?** – Damages for breach of contract, rights to reject the goods and end the contract, specific performances
3. **Other sanctions against suppliers of goods?** – Actions in tort and criminal liability of seller
4. **Obligations of the buyer?** – Payment and acceptance
5. **Remedies of the seller?** – Action for the price, damages for non-acceptance, unpaid seller's rights over the goods

Obligations of the buyer

- **Payment**
  - The amount of the price is normally fixed by the contract
  - Alternatively, it may be determined by the course of earlier dealings between the parties, or may be left to be fixed by a valuer or referee
  - Time for payment is on delivery of the goods (later date may be agreed where credit is allowed)
  - Section 10 provides that, unless otherwise agreed, delay in payment is only a breach of *warranty*, not *condition* (!)

Obligations of the buyer

- **Acceptance**
  - A buyer, having ordered goods, breaks his contract if he then refuses to take them > he can only validly reject the goods if the seller is in breach of condition

Obligations and Remedies - Checklist

1. **Obligations of the seller?** – Title, description , quality, sample, delivery, exclusion of the seller's obligations
2. **Remedies of the buyer?** – Damages for breach of contract, rights to reject the goods and end the contract, specific performances
3. **Other sanctions against suppliers of goods?** – Actions in tort and criminal liability of seller
4. **Obligations of the buyer?** – Payment and acceptance
5. **Remedies of the seller?** – Action for the price, damages for non-acceptance, unpaid seller's rights over the goods

Remedies of the seller

- **Action for the price**
  - Where the ownership of the goods has passed to the buyer, or where a specified date for payment was set and has passed, the seller can sue for the contract price

Remedies of the seller

- **Damages for non-acceptance**
  - Where the buyer refuses to accept or pay for the goods the seller may claim damages, the measure being "*the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract*" (Section 50)
  - Where, between the contract and the date of delivery, the market price of such goods has fallen, so that the seller will get less on a re-sale, the damages will be the difference between the contract price and the market price at the time when the goods should have been accepted

Remedies of the seller

- **Unpaid seller's rights over the goods**
  - A common reason for non-payment is because the buyer has no money > in these circumstances, the seller's right to sue for the price or damages may be worthless, and he will often prefer simply to keep the goods (!) > SOGA gives him certain rights…

Remedies of the seller

- **The right of lien** – A lien is the right of one party to hold on to goods for another party until that party has discharged a debt
- The seller may exercise the right of lien on the goods or a right to retain them for the price while in possession of the goods in following circumstances:
  - (a) Where the goods have not yet been paid for and there are no arrangements for credit; (b) Where the goods have sold on credit but the term of credit has expired; (c) Where the buyer is insolvent
- This right may be lost in the following circumstances:
  - (a) when the price is paid and the buyer obtains possession of the goods; (b) when the seller delivers the goods to a third party for delivery to the buyer and does not reserve the right to dispose of them; (c) when the lien or right of redemption is waived

Remedies of the seller

- **The right to stop the goods in transit**
  - ➢This remedy is only available if the buyer becomes insolvent
  - ➢In such a case, the seller may stop the goods in transit and resume possession of them
  - ➢The seller may retain the goods until payment or tender of the price
  - ➢The right of stoppage may not be applicable if the carrier of the goods is the agent of the buyer > this is because transit relates only to the period when the goods are in the hands of a carrier and ends when the buyer or its agent takes delivery of the goods > the right to stoppage is therefore lost once the goods in transit fall in the possession of the buyer

Sale of Goods – Risk and Ownership

- *It is important to note that the risk in the property passes when ownership in the property is passed > once risk passes to the buyer, the seller is relieved of liability for loss of or damage to the goods, unless caused by the seller's negligence (!)*
- If the intention of the parties cannot be determined by looking at the contract then **Section 18** contains rules 1 - 5 for determining when property passes:
  - ➢ if the goods are specific, you look at rules 1 - 4
  - ➢ if the goods are unascertained, you look at rule 5

Sale of Goods – Risk and Ownership

- **RULE 1:** Where there is an unconditional contract for the sale of specific goods in a deliverable state the property (=ownership) in the goods passes to the buyer when the contract is made. *(> It is immaterial whether payment or delivery or both are postponed.)*

Example: *A buys from B 10 boxes of tomatoes which are in a deliverable state. Ownership and risk are transferred from B to A the same moment the contract is made.*

Sale of Goods – Risk and Ownership

- **RULE 2:** Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property (=ownership) does not pass until the thing is done and the buyer has notice that it has been done. (> This essentially prevents property passing in specific goods where the goods are not in a deliverable state at the moment the contract is created. The seller is bound to do something to the goods for the purpose of putting them into a deliverable state.)

Example: *A buys from B this time 100 cabbages which are partly harvested (still dirty) and partly still in the ground. To be in a deliverable state the cabbages need to be harvested, cleaned and packed. The moment B informs A about the fact that the cabbages are in a deliverable state the ownership and risk are transferred to A.*

Sale of Goods – Risk and Ownership

- **RULE 3:** Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property (=ownership) does not pass until the act or thing is done and the buyer has notice that it has been done. *(> The property does not pass initially because we don't know how much the buyer has to pay. The seller has to do something to ascertain the price. It says that the 'seller is bound to weigh, measure, test or do some other act or thing for the purpose of ascertaining the price' – in this case, the property won't pass until he's done it.)*

Sale of Goods – Risk and Ownership

- **RULE 4:** When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:
  (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
  (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time. *(> This deals with goods that are on sale or return.)*

Sale of Goods – Risk and Ownership

- **RULE 5: (1)** Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property (=ownership) in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.
  (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to the carrier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract. *(> deals with unascertained goods. For the passing of property in unascertained goods you need unconditional appropriation. Appropriation is attaching the goods to the contract and ascertaining goods is identifying them. Appropriation is where both parties say that those goods are the contract goods; it is a bilateral agreement – they have allocated their contract to those particular goods.)*

Sale of Goods – Risk and Ownership

Transfer of title by a non-owner

- As a *general rule* no one can give what they do not have > further, a seller who does not own the goods or who sells the goods without the owner's authority cannot transfer ownership to the buyer (***Nemodat quod non habet*** *= the good title can only be passed by a party who has good title*) > if goods are stolen, the buyer does not get ownership even if there was no indication that they were stolen (!)
- *Several exceptions* to the general rule exist: i.a. (1) Estoppel (Section 21); (2) Sale under a voidable title (Section 23); (3) Sale by seller in possession of the goods or title documents (Section 24)

PART 3 - CHAPTER 2 - Contract Law

Agency – Principal and agent, Principal and third party, Agent and third party, Termination of Agency

Agency – Parties

An agency situation involves three very specific parties:

- The **principal** – this is the person on whose behalf the contract is made for whatever reason
- The **agent** – this is the party who is actually a party to the formation of the contract with a third party with whom he has a direct relationship (but no contract), but the agent merely makes the contract on behalf of the principal and not on his own behalf
- The **third party** – this is the party with whom the agent contracts on behalf of the principal and who as a result of the very special rules enjoy a series of mutual rights and obligations with the principal, but there is no contractual relationship with the agent

Agency – Examples (1)

- ***Examples:*** *A **real estate agent** is engaged by the householder to find a buyer for the house; A **travel agent** brings about contractual relations between the would-be holiday maker and the airline and hotel companies; An agent may be an employee of his principal, as where a firm employs **salesmen** or **buyers**, or the agent may be an independent contractor such as an estate agent*

Agency – Examples (2)

- There are other possible relationships between principal and agent
  Examples: *A family member on behalf of another family member (e.g. the child sent to the shops on an errand for his parents); A company director may have authority to make contracts on behalf of the business; A partner may have power to act on behalf of his fellow partners* > a corporate body, having no physical existence, can only act through its organs or agents
- Normally there will be a contract between principal and agent, and the agent will be paid by way of salary, commission or fees
- As a general rule, an agent can be appointed orally or in writing, with no formal requirements, and anyone, even a minor, can validly be an agent

Agency – Relationships

AGENT – The agent is given AUTHORITY by the PRINCIPAL to enter contracts with THIRD PARTIES by which the principal will be bound – provided that the agent acts within his authority

The agent also has a contractual relationship with the principal and can sue for the work done

THIRD PARTY – The THIRD PARTY is bound by the contract with the PRINCIPAL and enjoys both rights and obligations within the contract created by the AGENT on behalf of the principal

The third party has no contractual relationship with the agent

PRINCIPAL – THE PRINCIPAL is bound by the contractual relationship with the THIRD PARTY entered into by the AGENT on his behalf

The principal is also in a contractual relationship with the agent and enjoys mutual rights and obligations

The Creation of agency (1)

- Agency arises in different ways and the extent of the authority that the agent has depends on how the agency relationship arises (!)

The Creation of agency – Express agreement

- **(1) Express agreement** between agent and principal ("express authority"): the extent of the authority given to the agent is identified in the express agreement between the parties

The Creation of agency – Implied agreement

- **(2) Implied agreement** between the agent and principal: the authority of the agent to bind the principal to a contract is identified by an objective test of the intention of the parties, and the agent will have the authority to carry out all such acts as are incidental to the performance of his duties

The Creation of agency – Implied agreement

One way that the authority arises is because of the conduct of the parties:

Hely-Hutchinson vs. Brayhead Ltd. (1967)

Here, the directors of a company allowed the chairman to act so he was in fact the managing director, although he had never been appointed to that role and so had no express authority to bind the company. The company was held to be bound by transactions entered into by the chairman as a result.

The Creation of agency – Implied agreement

The agent also has implied authority to act in any way that is incidental to the performance of his duties, even where there is no express authority given for the act in question:

Mullens vs. Miller (1822)

An estate agent was held to have implied authority to give details and make warranties in respect of properties that he was selling.

The Creation of agency – Implied agreement

Sometimes the agent is given what is known as customary authority or usual authority:

Watteau vs. Fenwick (1893)

Here, the agent was the manager of a public house and had express authority to buy goods for the business. His principal had instructed that the manager should not, however, purchase cigars which the owner would be supplying himself. The manager then bought cigars from the claimant who then sued the principal for the price. The court held with the claimant since he was unaware of the instruction to the manager and it was customary in the trade for managers to buy in all stock.

The Creation of agency – Operations of law

- **(3) Operations of law:** The agent's authority to bind the principal comes from a number of possible sources
  - ➢ could be from **statutory law** (e.g. Consumer Credit Act where the dealer setting up a transaction on credit is deemed to be the agent of the finance company)
  - ➢ out of **necessity** (e.g. in shipping contracts where a ship's captain will be identified as a having the authority to sell the cargo in certain circumstances)
  - ➢ from a **presumption** in a particular type of relationship (e.g. in cohabitation)
- also referred to as ***apparent authority*** or ***agency by estoppel***

The Creation of agency – Operations of law

Spiro vs. Lintern (1973)

Here, a wife instructed estate agents on her husband's behalf to sell his house. The estate agents found a purchaser and a contract of sale was passed to the purchaser, although with no authority from the husband. However, the husband then sold the house to another party and original purchaser sued, claiming that the wife was the husband's agent and that a contract therefore existed. The court held that the husband by his acquiescence (permission) had represented that his wife was indeed acting for him and was thus ***estopped*** *from denying that the wife had been given the authority to sell the house on his behalf.*

Duties of an Agent (1)

- (1) He has the **fiduciary duty to exercise and use reasonable care** to protect the interests of the principal (in contrast: Agents who act in their own interests violate the fiduciary duty and may be financially liable to the principal for any losses)
  Example: *An agent who accepts a bribe to purchase only the goods from a particular seller breaches his fiduciary duty by taking the money.*
- (2) An agent **must carry out the principal's orders within the limits of the agent's authority**.
- (3) An agent **must perform his duties with reasonable care and skill** and may be liable in breach of contract, or negligence, if he fails to do so

Duties of an Agent (2)

- (4) An agent **must account for any profits resulting from the exercise of authority** and transfer to the principal any monies or financial benefits received from performance of his duties.
- (5) An agent **must avoid conflict of interest** and ensure that the principal's interest take priority over his own.
- (6) An agent **must not exploit his relationship with the principal** for his own profit.

Rights of an Agent

- (1) Under common law the **right to remuneration** or to payment for services rendered as agent
- (2) The **right to be reimbursed** by his principal for all expenses and to be indemnified against all losses and liabilities incurred by him in the performance of his duties to the principal. The right to reimbursement might be lost, if
  - The agent is unauthorized and his acts are subsequently not authorized by the principal
  - The agent is negligent or otherwise in breach of his duties under the agency agreement
  - If the act carried out by the agent is unlawful
- An agent has a **right of lien and possession of goods or chattels** that are lawfully in his custody if the principal fails to remunerate him as per agreement or fails to reimburse him for the agent's reasonable expenses

The rights and duties of the Principal

- The principal's rights and duties largely mirror the duties and rights of the agent > therefore, the principal is entitled to the benefits to be derived from the agent's performance of his fiduciary duties > in return the principal may make any necessary payment to the agent

Position of Principal in regard to third parties (1)

- To distinguish is here first of all the **disclosed principal** and the **undisclosed principal**

Position of Principal in regard to third parties (2)

- **Disclosed principal:**
  - ➢only the principal can sue and be sued by the third party if the agents acts within authority or if the principal validly ratified an unauthorized act of the agent
  - ➢if the principal is bound by the acts of his agent under the doctrine of apparent authority the principal is contractually liable to the third party
  - ➢A principal who represents to a third party that the agent has authority to act for him in certain matters when in fact the agent has not, will be estopped from denying such agent's authority if that third party has relied and acted on such agent's authority

Position of Principal in regard to third parties (3)

- **Undisclosed principal:**
  - Existence of the principal is unknown to the third party > in the eyes of the third party the agent is the principal
  - Common law doctrine on undisclosed principals confers rights and imposes liabilities on the undisclosed principal, notwithstanding that he is not made a party to the relevant contract > this doctrine is an exception to the general rule that only a party to a contract may sue and be sued thereon *(the rules under this particular doctrine may be illustrated by considering the respective relationships between the principal and the agent, the principal and the third party, and the agent and the third party)*

Position of Agent with regard to third parties

- **(1)** When an agent makes a contract on behalf of a disclosed principal and within is actual authority, he is not liable to third party on the contract nor can he sue the third party on it as the agent is not a party to the contract *(not problematic!)*
- **(2)** Where an agent, by words or conduct, represents to a third party that he has authority to act on behalf of a principal, and the third party is induced by such representation to enter into the contract with the agent, the agent is deemed to have warranted that the representation is true, and is liable for any loss caused to such third party by breach of that warranty of authority, even if the agent is under mistaken belief that he had authority *(the agent is a problem!)*

The termination of agency

- The agency relationship can be ended either by the parties themselves or by operation of law. In the case of the latter this automatically terminates the agent's authority:

  - **Termination by an agreement –** writing or orally
  - **Termination by acts of the parties** – performance; revocation by the principal at any time possible – however, unilateral revocation otherwise than in accordance with the provisions of the agency agreement may render the principal liable to the agent for the breach of the agency agreement; renunciation by agent (unilateral – see before)
  - **Termination by operation of law** – frustration (e.g. becomes impossible); death of either party; insanity of either party; bankruptcy of either party

PART 4 – Basics of Tort Law and Business Torts

Meaning of the term tort (1)

"The law of tort – the word derives from the French for 'wrong' – is the law of civil liability for wrongfully inflicted injury… ."

TRESSPASS / NUISANCE / NEGLIGENCE / DEFAMATION / STRICT LIABILITY / VICARIOUS LIABILITY

Trespass

- Trespass comprises several torts
- The three types of trespass are:
  - **Trespass to the person**
  - **Trespass to goods**
  - **Trespass to land**

Trespass to the person

- This tort covers a selection of ways in which in *individual* may suffer interference from others
- At common law, it comprises *three forms*: **civil assault** –as distinguished from criminal assault-, **battery** and **false (unlawful) imprisonment**

Trespass to the person - Civil assault (1)

- Contrary to common belief, to assault someone is to cause him intentionally *to expect* immediate harm or offensive physical violence
- Touching a person is *battery*
- A legal definition of civil assault is that it is *"an act of the defendant which causes the claimant reasonable apprehension/fear of the infliction of a battery on him by the defendant"*

Trespass to the person - Civil assault (2)

Examples:

- *Threatening words ("Your money, or your life!")*
- *Shaking your fist in a threatening manner as a boxer*
- *Pointing a weapon at someone*
- *It is also possible to assault someone with a harmless object, since the essential element in assault is the reasonable expectation of violence, in the terms of reasonable fear*

Case: *A points a gun at B, which A knows to be unloaded, though B does not, and it is so near that it might produce injury if it were loaded and went off, this constitutes an assault.*

Trespass to the person – Battery

- Battery is the **direct** and **intentional application of physical force** to another person without lawful justification > Any physical contact may constitute *force*
- ***Examples:*** *Spitting at someone, pouring water over him, snatching a chair away as he sits down or throwing a stone at him*
- However, a certain amount of contact in everyday life would not constitute a battery (e.g. jostling in a queue or stepping on someone's foot on a crowd does not constitute battery, because it is considered that one has given implied consent to such things happening)
- On the other hand, mere unauthorised touching would constitute battery, regardless of the motive (e.g. A kiss given by a stranger constitutes battery, as it amounts to intentional bodily contact and a reasonable person would not have consented to the act)

Trespass to the person – Unlawful imprisonment (1)

- Unlawful (or false) imprisonment consists of the infliction of complete bodily restraint on another without lawful justification > this may happen whenever a person is wrongfully deprived of his liberty to go where he pleases
- Thus, there is no need for actual imprisonment such as incarceration in a prison cell > the mere holding of the arm of another against his will is sufficient
- The imprisonment, however, must be for an unreasonable length of time and must be a **total loss of freedom** > thus, to restrain a person from going in three directions but, at the same time, leaving him free to go in a fourth, is not unlawful imprisonment

Trespass to the person – Unlawful imprisonment (2)

Bird vs. Jones (1845)

The case: *Bird, B, wished to cross a section of a public road which was closed off due to a boat race. Two policemen, D, prevented B from passing in the direction he wished to go, but B was allowed to go in the other direction in which he could pass. B refused to go in that direction and stood in the same place. B raised an action against D for false imprisonment.*

The court's decision: *That there was no unlawful imprisonment since B was free to go another way.*

Trespass to the person – Unlawful imprisonment (3)

- The person imprisoned might even be unaware of it at the time > a person can be imprisoned whilst asleep, whilst in the state of drunkenness or whilst in the state of insanity
- There is **no need for the person affected to know** about the constraint *(Example: locking the door of the sleeping room while someone is sleeping inside)*

Trespass to the person – Unlawful imprisonment (4)

Meering vs. Graham-White Aviation (1919)

The case: *An employee was suspected of stealing a keg of varnish from his employer. Two works security officers asked the employee to go with them to the works' office to answer questions. The employee, not realising that he was suspected, agreed to go with them and even suggested a short cut. He remained in the office for some time during which security officers stayed outside the room without his knowledge. He later claimed that he had been unlawfully imprisoned, and the question arose whether the person claiming unlawful imprisonment must actually know the other person restraining his freedom.*

The court's decision: *That the employee has been imprisoned and his* ***knowledge was irrelevant*** *to the question of liability.*

Trespass to the person – Remedies (1)

- **All forms of trespass to the person**, civil assault, battery and unlawful imprisonment, are -unlike negligence- **actionable per se** > that means, that there is no need to prove damage in order to bring a claim
- Liability arises if the defendant commits the relevant act without any requirement that the claimant suffers harm
- The claimant, however, must prove, that the defendant *intended* to do what he did (intention or intent) or was at the very least *reckless* that what he was about to do would have the consequence which happened (recklessness)

Trespass to the person – Defences

- There are primarily three possible defences available in an action for trespass to the person:
  - **Consent** (which may be express or implied > consent with prior knowledge of the risk involved)
  - **Self-defence** (must be proportional to the attack > no more force may be used in defence than is reasonably necessary)
  - **Lawful arrest** (e.g. a more criminal offence has been committed > a private person has certain limited powers to arrest the suspect)

Trespass to goods (1)

- *Trespass to goods* is essentially a **tort against possession,** which means that it is not necessary that the possessor also has to be the owner (ownership) > a **person possesses goods when** he has some **form of control over them (a)**, together with the intention to **exclude others from possession (b)** and to **hold the goods on his own behalf (c)**
- Possession must exist at the moment when the wrongful interference is committed > however, possession does not necessarily involve an actual grasp of the goods; often a lesser degree of control will be sufficient

Trespass to goods (2)

The Tubantia (1924)

The case: *The claimant, marine salvage company, was trying to salvage the cargo of the SS Tubantia which had sunk in the North Sea. He had discovered the wreck and marked it with a marker buoy. His divers ware already working in the hold, when the defendant, a rival salvage company, appeared on the scene and started to send divers down to salvage the cargo from the wreck.*

The court's decision: *That irrespective of who was the owner of the property salvaged, the claimant was sufficiently in possession of the wreck to found an in action in trespass.*

Trespass to goods (3)

- *Wrongful interference by trespass to goods* must be **direct** and effected **by force**
  Examples: *Moving an object or throwing something at it; snatch someone's hat; kick someone's dog; to erase a tape-recording; to throw another's book out of the window or to scratch the panel of a car*

Trespass to goods (4)

- Another form would be **wrongful interference by conversion**
- Arises when the defendant intentionally interferes with goods in a way that they may be regarded as *complete denying* the claimant's right of possession or use

Example: *If, for example, a car –subject to a hire-purchase agreement- is sold to a private person, the seller would, in such a case, have given the buyer a good title and at the same time denied the hire-purchase company the right of ownership of the car. In that case, the hire-purchase company can sue the seller for* ***conversion****.*

Trespass to goods (5) – Remedies and defences

- The common remedy is damages, which may be awarded regardless of if any actual harm is suffered
- Valid defences are those of *statutory authority*, *consent*, where it is *necessary* to interfere with the goods

Trespass to land (1)

- *Trespass to land* is the **unlawful entry** of a person or thing **onto land** or into buildings **in the possession of another**
- **Definition:** *"Entering upon land in the possession of the claimant or remaining upon such land or placing any object upon it, in each case without lawful justification."*

Examples: *Leaving parcels on the wrong person's doorstep; leaning a ladder against the wall of the neighbour's house; throwing something into or entering oneself into another's forecourt and removing a dustbin*

Trespass to land (2)

- To *trespass on land*, one does not even need to step onto the land > putting one's hand through a window would be enough
- Every invasion of property, however small, is a *trespass to land*

Trespass to land (3)

Kelson vs. Imperial Tobacco (1957)

The case: *The claimant was the tenant of a one-storey tobacconist's shop and brought an action against the defendants, seeking an injunction requiring them to remove, from the wall above the shop, a large cigarette advertising sign displaying the words "Players Please". The sign projected into airspace above the claimant's shop to the extent of some eight inches. The claimant claimed that the defendants, by fixing the sign in that position, had trespassed on his airspace.*

The court's decision: *That the invasion of airspace by a sign of this nature constituted a trespass and,* ***although the claimant's injury was small****, it was an appropriate case in which to grant an injunction for the removal of the sign.*

Trespass to land (4)

- It is, however, important to note that if a person is pushed or thrown onto land, he is not there voluntarily so cannot be held liable
- On the contrary, it is the person who pushed him there who may be liable
- The defendant need not to be aware that he is trespassing
  Example: *If you mow grass thinking it is yours when, in fact, it belongs to your neighbour, you would be committing a trespass to land.*

Trespass to land (5)

- Trespass to land can even be committed without physically touching the land > moreover, one should also note that, with regard to ownership of land, the air above it also belongs to it
  Examples: *it constitutes an actionable wrong to fly a kite, or send a message by carrier pigeon, or ascend in an aeroplane, or fire a bullet over it;*
  As in the so called "Tasmanian cat case": Davies vs. Bennison (1927), where the defendant shot a cat on the claimant's roof. The claimant was entitled to damages for trespass of land as well as for the value of the cat.

Trespass to land (6)

- The **four elements of trespass to land** can be summarised as follows:
  - **Direct** interference with the land
  - **Voluntary** interference
  - **No need of awareness** of trespass on the part of the defendant and
  - **No requirement of harm or damage**
- The last element shows that this kind of tort is also **actionable *per se*** in the same way as *trespass to the person* (no harm or damage required!)

Trespass to the land – Defences

- Entry onto land does not constitute the tort of trespass to land if it is justifiable. There are four main defences to *trespass to land*:
  - **Consent:** a person who has permission to enter is not a trespasser (e.g. visitors)
  - **Contractual licence:** such as a payment of any entry fee or purchase of tickets for a sporting event
  - **Lawful authority:** particular persons may have permission to enter such as court bailiffs and the police
  - **Necessity:** this justifies trespass in emergency situations to deal with perceived threat

Trespass to the land – Remedies

- The following remedies are available to a claimant:
  - **Damages:** this is, in general, the amount by which the value of the land is diminished as a result of the trespass (costs for reinstatement limited > limitation betterment)
  - **Injunction:** this may be used to stop the defendant from continuing or repeating the trespass; the claimant may apply to the court for both damages and an injunction
  - **Self-help:** the occupier of the land may eject a trespasser after first requesting him to leave and giving him reasonable time to do so; no more force may be used than is reasonable in the circumstances; self-help can also be used to remove objects placed on or over one's land (e.g. cut down branches from overhanging trees)
  - **Possession order:** if a trespasser has full possession of land, an order for possession must be obtained to restore possession of the land to its rightful owner

Trespass

Trespass to the person

Civil assault…
… is intentionally to cause someone reasonably to expect the infliction of harm or violence

Battery…
… is the direct and intentional application of physical force to another person without lawful justification

Unlawful imprisonment…
… consists of the infliction of complete bodily restraint on another without lawful justification

Defences
- Consent
- Self-defence
- Lawful arrest

Trespass to goods

… is a tort against the possession of goods:
- Direct
- Intentional
- By force

Defences
- Consent
- Lawful authority
- Necessity

Trespass to land

… is an unlawful entry of a person or a thing onto land or buildings in the possession of another:
- Direct
- Voluntary
- No need of awareness
- No requirement of damage

Defences
- Consent
- Contractual licence
- Lawful authority
- Necessity

Remedies
- Damages
- Injunction
- Self-help
- Possession order

Nuisance - Types

- There are two types of nuisance: *public nuisance* and *private nuisance*
  - *Public nuisance* consists of an unlawful act or omission endangering or interfering with the lives, comfort, safety, property, or common rights of the public > required is that **a class of people is materially affected**
  - *Private nuisance* consists of unlawful interference with person's land or his use or enjoyment of it > here a **person with a proprietary right or interest must be affected**

Nuisance – Public nuisance (1)

- Examples of the tort (and crime) of public nuisance are:

  - **Organising a pop music festival which generates large-scale noise and traffic**
  - **Obstructing a highway or making it dangerous for traffic**
  - **Selling unhygienic food**
  - **Throwing fireworks into the street**
  - **Erecting a factory which emits excessive smoke**

Nuisance – Public Nuisance (2)

R. vs. Shorrock (1993)

The case: *The defendant let a field on his farm for a weekend for 2000 Pounds. He did not know for what purpose the field was let and he went away for the weekend. The field was used for a "house party" which was attended by more than 3000 people and created a deal of noise. The police received nearly 300 complaints. The defendant was convicted of causing a public nuisance and fined.*

The court's decision: *That it was necessary for the Crown (Prosecution) to prove that the defendant had actual knowledge of the nuisance, as he ought to have known that there was a real risk that the consequences of letting the field would be to create this sort of nuisance.*

Nuisance – Public Nuisance (3)

Attorney-General vs. Gastonia Coaches (1976)

The case: *Gastonia were coach operators and owned 22 coaches, of which 16 were parked in residential roads adjoining to Gastonia offices. No matter how carefully these coaches were parked, they inevitably interfered with the free passage of other traffic.*

The court's decision: *That Gastonia was committing a public nuisance. An injunction was issued preventing Gastonia from parking the vehicles on the highway. Damages were also awarded to Gastonia's neighbours who has suffered from emissions of exhaust gases, excessive noise and obstruction of their drives.*

Nuisance – Public Nuisance (4)

Castle vs. St. Augustine's Links (1922)

The case: *On 18th August 1919, a taxi was driving along the road from Deal to Ramsgate (in the south-east England, not far from Canterbury and Dover). The road led past a golf course. A golf ball was hit off the course and struck the windscreen of the taxi, breaking it. A piece of glass from the broken windscreen of the taxi, breaking it. A piece of glass from the broken windscreen injured the driver's eye and he had to have his eye removed. The driver claimed against the owner of the golf course.*

The court's decision: *That the proximity of the hole to the road constituted a public nuisance, and so the owner of the gold course was liable for the injury caused. The injured driver was awarded damages of 450 Pounds.*

Nuisance – Public nuisance (5)

- There are two requirements that must be satisfied regarding public nuisance:
  - **(1)** the nuisance has affected **a class of people** and
    - **(2)** the claimant has suffered **special damage**

Nuisance – Private nuisance (1)

- The Tort of private *nuisance consists* of unlawful interference with a person's land or his use or enjoyment of it
- A **person with a proprietary right or interest must be affected** *(proprietary rights = those rights which go with ownership of real property or a business)*

Nuisance – Private nuisance (1a)

Different rights of the property owner:

- The **right to possess** is the right to occupy the property
- The **right to control** is the right to determine interests and uses for others
- The **right to enjoy** is the right to use the property without outside interference **(!)**
- The **right to exclude** is the right to refuse others' interests or uses for the property.
- The **right to dispose** is the right to determine how and if the property is sold or given to another party.

Nuisance – Private nuisance (2)

- There are three requirements for private nuisance
  - (1) **the protection of land or property**
  - (2) from **unreasonable interference**
  - (3) **damage**
- In contrast to trespass, private nuisance is **not actionable *per se*** > some **damage** must have occurred to enable the claimant to sue

Nuisance – Private nuisance (3)

- There are many ways of interfering with someone's enjoyment of his land ("*right to enjoy*") which may amount to nuisance
- Examples:
  - Excessive noise (e.g. Neighbour listen to loud music all the time)
  - Offensive smells (e.g. Dumping ground in Neighbour's yard; Chicken/ pig barns near a residential area)
  - Factory pollution leaving dirty marks on washing
  - Sewage collection on land
- The basic rule is that you should **use your property without causing harm to any other person**

Nuisance – Private Nuisance (4)

Kennaway vs. Thompson (1980)

The case: *The defendants represented a club at which motor-boat racing and water-skiing were carried on. In 1972 the claimant moved into a house which she had built near the lake on which the above activities were carried out, as they had been since the early 1960s. After the claimant moved in, the nature of the club's activities increased in frequency and noise because large powerboats took part in international meetings. Those were preceded by periods of noisy practice. The claimant sought damages for nuisance and an injunction.*

Nuisance – Private Nuisance (4a)

Kennaway vs. Thompson (1980)

The court's decision: *That at the* ***first instance*** *only damages were awarded – 1000 Pounds for the past nuisance and 15000 Pounds in respect of future nuisance – since the court regarded it as oppressive to issue an injunction to prevent the club from continuing its activities on the ground that this was contrary public interest.*
The ***court of appeal*** *allowed the claimant's appeal and awarded an injunction, stating that the public interest should not prevail over the private interest of a person affected by a continuing nuisance. Accordingly the claimant was entitled to an injunction under which the club was ordered to curtail its activities restricting noisy meetings to a limited number of occasions!*

Nuisance – Private Nuisance (4b)

- In the case above the court stated: ***"The question is whether the neighbour (here the defendant) is using his property reasonably, having regard to the fact that he has a neighbour (here the claimant). The neighbour who is complaining must remember, too, that the other man can use his property in a reasonable way and there must be a measure of give and take, <u>LIVE AND LET LIVE</u>."***

Private Nuisance – Reasonable use of land (1)

- Circumstances which need to be considered:
  - **Health and comfo**rt > it is sufficient that a person has been prevented, to an appreciable extent, from enjoying the ordinary comforts of life (no direct injury of health necessary)
  - **Character of the neighbourhood** > standard of comfort varies from area to area; one is entitled to expect that it will remain that way; (e.g. Event centres and churches in residential areas can be problematic)

Private Nuisance – Reasonable use of land (2)

- Circumstances which need to be considered:
  - **(Excessive) sensitivity of the claimant** > a person cannot take advantage of his special sensitivity to noise and smells (objective = reasonable person)
  - **Public benefit** > e.g. Pig barns, breweries and mines etc. can be useful and necessary for the community, but if their operations causes discomfort to the claimant, they constitute a nuisance; the fact that the trade or industry is of public benefit is not a defence in law

Private Nuisance – Reasonable use of land (3)

- Circumstances which need to be considered:
  - **Duration** > Generally a single event is not a nuisance and a temporary interference may be too trivial to constitute a nuisance; the claimant must show that there is some degree of repetition of the offending act
  - **Several wrongdoers** > a nuisance may result from the act of several wrongdoers ***Example:*** *A, B and C are the persons involved, any of them may be proceeded against. The claimant may sue all jointly or separately, for example A, for the total damage. If this is done, A will have the right to a contribution from B and C.*

Nuisance – Defences

- **Consent of the claimant**, which is a general defence always applicable to each type of tort
- **Statutory authority**, which means that it is a defence to show that the statute authorises the act or omission in question
- **Prescription** (***note***: applicable to private nuisance only): It is possible to acquire the right to commit a private nuisance by *prescription*
Example: *When a person has been carrying on an activity continuously for at least 20 years, he may be considered to have acquired the right to continue to do so and the activity will not then constitute a nuisance.*
However, this defence will rarely succeed, since what the defendant must prove is 20 years tolerance of the interference.
- **Triviality**, where the damage caused was minute or minimal, or perhaps amounted to only temporary interference (the maxim in *latin* here is ***"de minimis con curat lex"*** = the law does not concern itself with trifles)

Nuisance – Remedies (1)

- **Damages**
  - the usual common law remedy for a breach of the civil law is to award damages to the claimant to compensate him for his loss
  - if the claimant can establish that a nuisance has been committed, he has a right to damages as monetary compensation
  - the principle is that the award of damages should return the claimant to the position that he would have been in, if the tort had not occurred

Nuisance – Remedies (2)

- **Injunction**
  - an injunction is an order of the court that the **defendant must stop the activity** which constitutes the nuisance
  - although that is usually one of the orders which the claimant wants from the court, an injunction is an *equitable remedy* and is therefore only available only at the discretion of the court
  - the claimant must show that the nuisance is likely to recur and do irreparable damage to him

Nuisance – Remedies (3)

- **Abatement/ reduction**
  - the injured party may abate the nuisance himself (e.g. by removing it, provided that no unnecessary damage is caused and that no injury arises to an innocent third party, e.g. tenant)
  - this remedy is the exercise of the right of self-help, which can be invoked when the nuisance can be terminated without entering another person's land (*it applies e.g. to overhanging trees or roots, however, the branches which are cut off still belong to the owner of the tree and so should be returned to him*)

Differences between *trespass to land* and *nuisance*

Trespass to land

- Actionable per se
- Unlawful entry of a person or a thing on another's land
- May consist of one act only
- Trespass is only a civil tort

Nuisance

- Requires proof of damage (not actionable per se)
- No entry necessary
- Usually more than one act is necessary
- Public nuisance is a tort and a crime

Negligence

- Negligence firstly is a ***type of fault*** – besides of intention and recklessness and secondly it is a **separate tort on its own right**, consisting of the following four elements:
  - **Legal duty to care** > (1) in ***special relationships*** and (2) ***"Neighbour principle"***
  - **Breach of the duty** > (1) when the defendant has ***not come up to standard of care*** (objective = reasonable person) and (2) ***Special standards of care*** exists when the defendant has particular skill or professional expertise
  - **Factual causation** > **"but for" test**: if damage would not have happened ***but for*** a particular fault, that fault is the cause of the damage
  - **Remoteness** > is the damage too *remote*, the breach of the duty of care is not considered *in law* to have caused the damage (*legal causation*); the test is ***the reasonable foreseeability of the kind or type of damage*** happening as a result of the negligent act

Negligence – Legal duty of care (1)

- The first element of negligence is the *legal duty of care* owed to the injured party > this means that, due to the particular relationship between the defendant and the claimant, there is an obligation for the defendant to take proper care to avoid causing injury to the claimant in all the circumstances of the case

"A man is entitled to be as negligent as he pleases towards the whole world, if he owes no duty to the them."
(Lord Esher in *Le Lievre vs. Gould*, 1895)

Negligence – Legal duty of care (2)

- In real life it can be difficult to decide whether such a *legal duty of care* exists
- There are two ways in which *a duty of care* may be established:
  - There is a **special relationship** between the defendant and the claimant which gives rise to a duty of care (e.g. one road-user and another; solicitor and client; doctor and patient; employer and employee; manufacturer and consumer), or
  - Outside of these recognised duty situations, the duty must be established according to the **principles developed by case l**aw ("*Neighbour principle*" established in **Donoghue vs. Stevenson, 1932**)

Negligence – Legal duty of care (3)

- "***The Neighbour principle***":

In the case Donoghue vs. Stevenson (1932) the House of Lords formulated the "neighbour principle" to address the question of when a duty of care is owed between a defendant and a claimant (the case is also known as the case of **"The Paisley Snail"**) > this case is of fundamental importance for the development of negligence as an independent tort as such and for the evolution of the English law of tort…

Negligence – Legal duty of care (4a)

Donoghue vs. Stevenson (1932) – "The Paisley Snail"

A woman drank some ginger beer which had been bought for her by a friend. The beer was in an opaque bottle and, when the last of it was poured out, it was found to contain what were thought to be the decomposed remains of a snail. The woman suffered shock and became ill. The House of Lords decided that the manufacturer owes ***a duty of care*** *to the consumer of his products when they are marketed in the form in which the consumer will receive them. The snail was in an opaque bottle, and there was no reasonable possibility of its being discovered between leaving the manufacturer and reaching the consumer. The manufacturer could therefore be liable for negligence.*

> This rule has become more important in recent times, particularly with goods which are technically complex and/or pre-packaged by a producer, so that they reach the eventual user unopened and unchecked

Negligence – Breach of the duty (1)

- Once it has been established that there is a duty of care owed by the person who caused the injury or damage (the defendant), to the person who suffered it (the claimant), the next question is whether there has been *a **breach of that duty***? > In other words, whether the defendant has not come up to the ***standard of care*** required by law
- To distinguish are (1) standard of care – the reasonable person and (2) special standards of care

Negligence – Breach of the duty (2) – Standard of care

- A defendant will be in a *breach of duty* if he has acted *negligently*, which means that he has not acted in a reasonable way, but carelessly > The question which arises is then how a reasonable person would have acted in the defendant's position?
- Standards of a reasonable person, of course, varies with each individual situation but, as a general rule, the standard is that of a person who uses ordinary care and skill > in other words: all our actions are compared to those of an *ordinary reasonable man*, who is neither careless nor overly careful > **The reasonable person is average, not perfect!**

Negligence – Breach of the duty (3) – Standard of care

- ***Example:*** *During a football match, the defendant recklessly tackled the claimant, breaking his leg. The defendant was sent off by the referee. The defendant is liable in negligence, the foul falling below the standard of care reasonably expected in any match.*

Negligence – Breach of the duty (4) – Special standards of care

- There are certain situation in which the courts apply a different standard of care from that of the reasonable person, since the application of the latter would not be suitable > such a situation is when the defendant has a particular skill or professional expertise

Negligence – Breach of the duty (5) – Special standards of care

- ***Example:*** *A patient agreed to undergo electro-convulsive therapy (E.C.T.). During the treatment he suffered a fracture to the pelvis. The issue was whether the doctor was negligent in failing to give a relaxant drug before the treatment, or in failing to provide means of restraint during the procedure. Evidence was given of the practices of various doctors in the use of relaxant drugs before E.C.T. treatment. One body of medical opinion favoured the use of relaxant drugs, but another body of opinion took the view that they should not be used because of the risk of fractures.*

  The patient's claim failed. A defendant is not negligent if he acts in accordance with the practice accepted at the time as proper by a responsible body of professional opinion skilled in a particular form of treatment.

Negligence – Breach of the duty (6) – Special standards of care

Paris vs. Stepney Council (1951)

The case: *The Council employed Mr. Paris as a low-grade mechanic in one of their garages, and knew that he was blind in one eye. He was working in conditions which involved some risk of eye injury but the likelihood of this injury was not sufficient to call upon the Council to provide protection glasses to a normal two-eyed workman. Mr. Paris was hammering on a rear axle when a chip of metal came flew off and into his good eye. He became blind in that eye, too.*

The court's decision: *That the duty of employers was owed to each particular employee. The council, as employer, were negligent in failing to provide protection glasses to this particular employee. In this case, the risk to a two-eyed workman was the loss of one eye but this employee risked the much greater injury of total blindness.* > *this decision shows that the obligations of a potential defendant may increase where the risk to a particular claimant is greater than normal (!)*

Negligence – Factual causation (1)

- Firstly the court must decide that the defendant *owed a duty of care* to the claimant
- Secondly, the claimant must prove *that the duty was breached*
- **Finally in order to establish his claim, the claimant must show that he or his property has suffered *damage***

Negligence – Factual causation (2) – The “but for” test

- The “but for” test: The claimant must prove that the ***damage was caused by the negligent act*** of the defendant > the breach of the duty must be the factual cause of the damage

*“If the damage would not have happened **but for** a particular fault, then that fault is the cause of the damage. If it would have happened just the same, fault or no fault, the fault is not the cause of the damage.”*

Negligence – Factual causation (3) – The “but for” test

Barnett vs. Chelsea Hospital (1968)

The case: *Mr. Barnett drank tea which had, unknown to him, been contaminated with arsenic. He attended at the casualty department of a hospital saying that he had been vomiting for some three hours after drinking the tea. The casualty doctor failed to examine him but sent a message that he should report to his own doctor. Some five hours later Mr. Barnett died and his widow claimed for damages.*

The court’s decision: *That the hospital authority owed a duty of care and that the doctor was negligent in failing to examine and admit Mr. Barnett to the hospital. Accordingly there had been a breach of that duty. However, on the facts the deceased’s condition was such that he would have died despite any medical attention which the hospital could have given, so* ***causation*** *was not established and the widow’s claim failed.*

Negligence – Factual causation (4) – The “but for” test

Ogwo vs. Taylor (1988)

The case: *Mr Ogwo, a fireman, called to put out a fire which Mr. Taylor had negligently caused in the loft of his house by using a blowlamp to remove paint from the fascia board behind the guttering of his terraced house. The fireman had to go into the roof space in order to put out the fire, which he did with water. Whilst he was spraying the water onto the fire, heat of the fire caused some of the water to turn to steam and scalded the fireman underneath his protective clothing.*

The court’s decision: *Mr. Taylor was liable as his negligence had created a foreseeable risk that a fireman would come to put out the fire, and there had been no break in the* ***chain of causation****.*

Negligence – Remoteness – Legal causation (1)

- A defendant is only liable for damage which a reasonable man could have foreseen > otherwise the damage is considered *too remote*, and so the breach of the duty of care is not considered *in law* to have caused the damage (the principle of **legal causation or causation of law**)
- Therefor the last question in the context of negligence is:

For how much of the claimant's loss should the defendant be responsible?

Negligence – Remoteness – Legal causation (2)

The Wagon Mound (1961)

The case: *Owing to the carelessness of the defendant, a large quantity of fuel oil was discharged from their ship into Sydney Harbour. The oil was carried by wind and tide onto a wharf about 600 feet away, where welding on another ship was being carried out. After making enquiries, the wharf owners were advised that it was safe to continue with the welding operations on their wharf. Two days later, the oil caught fire and the wharf and the ships being repaired were damaged in the blaze. The oil also congealed on the slipways and interfered with the use of the slips. The wharf owners claimed in negligence against the person who had discharged the oil into the water.*

Negligence – Remoteness – Legal causation (2a)

The Wagon Mound (1961)

The court's decision: *The damage by the oil to the slipways was foreseeable. However, the defendant was not liable for the fire damage, because the oil would have had to be heated to a very high temperature in order to catch fire, and it was not reasonably foreseeable that that would happen. The* ***correct test for remoteness of damage*** *was whether the* ***kind or type of damage*** *sustained was* ***reasonably foreseeable****.*

> this leading case establishes the **test of remoteness** for liability in negligence and is based, inter alia, on the **reasonable foreseeability of the damage** happening as a result of the negligent act

Contributory negligence as a partial defence

- Besides the general complete defences such as **consent** and **illegality**, there is a defence which is *partial* only
- In these cases, the defendant's liability for damages (e.g. the level of damages payable to the claimant) will be reduced if the defendant can show the claimant did not, in his own interest, take reasonable care of himself and therefore contributed to his own injury (!)
  Example: *The claimant, a motor-cyclist, suffered head injuries as a result of the defendant's negligent driving. The claimant's crash helmet, which was unfastened, fell off before his head hit the road. The court decided; that although the sole responsibility for the accident lay with the defendant, the claimant's failure to secure his helmet had contributed to the injury.*
- In this context, it is important to note that a distinction is drawn, in law, between the *blame for an accident itself* and *blame for the injuries* that result from the accident

Occupier's Liability Act (Chapter 70 of the Laws of Zambia)

- Occupier's liability is an important topic > we are all confronted with situations of everyday life when entering land or premises belonging to others: shops, university, pubs, the gym and even friend's houses
- The **occupier of premises** owes a **common duty of care** to see that all **lawful visitors** will **be reasonably safe** when using the premises
- **Unlawful visitors** are persons on the premises without the occupier's consent (burglars, trespassers, but also persons wandering around and became lost) > an occupier still owes some duty of care to such persons (lower level!)

Negligence

…firstly is a ***type of fault*** – besides intention and recklessness
…secondly it is a ***separate tort on its own right***, consisting of the following four elements:

Legal duty of care

(1) … in special relationships

(2) "Neighbour principle": a duty of care was owed when…

- The harm was reasonably foreseeable
- The relationship between the parties was sufficiently proximate
- It was fair, just and reasonable to impose a duty of care

Exceptions

Breach of the duty

(1) …when the defendant has not come up to the ***standard of care***: The question is how a ***reasonable person*** would have acted in the defendant's position

(2) Special standards of care exist when the defendant has a particular skill or professional expertise

Factual causation

"But for" test: If the damage would not have happened ***but for*** a particular fault, the fault is the cause of the damage

Multiple causes of damage

Remoteness

Is the damage too *remote*, the breach of the duty of care is not considered *in law* to have caused the damage *(legal causation).*

The test is ***the reasonable foreseeability*** of the kind of type of ***damage*** happening as a result of the negligent act

Defamation – Definition and meaning

- Defamation is the publication of a statement which reflects badly on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally (limitation of the fundamental human right "freedom of speech"!)
- In order to establish the tort of defamation, **three preconditions** are necessary:
  - (1) There must be a **defamatory (false) statement of fact** (not opinion)
  - (2) Statement must be **published to a third party**
  - (3) Statement must **refer to the claimant**

Defamation – Defamatory statement

- "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" ***Example:*** *"Sam stole 1000 ZMW from the corner store last week."*

Defamation – Innuendo

- It is possible that words are not defamatory at first sight and only appear as such when surrounding circumstances have been considered > thus, the statement may be **defamatory by implication**
- It is sufficient if the statement was understood by others to have defamatory meaning > in such a case, the claimant must show that the words contain an *innuendo/ hidden meaning* and that a reasonable person could, and in fact would, interpret the words used in a defamatory sense

  *Examples: **(1)** Imagine a friend is dating someone in secret. A possible use of innuendo would be to say: "Mark's been spending a lot of time with Allison, if you know what I mean." **(2)** Imagine a friend is preparing to cheat on a test with a stolen answer key. He says: "I've found a way to get some 'extra help' on the test."*

Defamation – Publication of the statement

- This means that there is no defamation if the statement is published only to the claimant > it is defamation, however, if a third party hears the defamatory words, even by accident (e.g. postcards can be easily read by other people)

Defamation – Reference to the claimant

- The defendant's statement must be shown to be referring to the person claiming he has been defamed, but need to be specific reference (e.g. name)

Libel and slander

- Tort of defamation is divided into two categories, **libel** and **slander >** they differ in two ways (1) the manner in which the statement is publicised, and (2) the consequences that are required before damages are paid

Libel

- Libel is a defamatory statement which is **published in some permanent form** > the usual form is writing or printing; it also can be broadcasted on radio or television; could be in painting or as a cartoon, on record or as an audio tape; CD or on the Internet
- Libel is **actionable *per se***, which means that it is the conduct which is wrong, irrespective of whether or not any harm is caused to the claimant as a result > thus, he does not have to prove special damage

Slander

- Slander is the publication of a **defamatory statement in non-permanent form**, usually by spoken words (but not of they are broadcasted as that falls within libel), gestures and facial mimicry
- Slander is **not actionable *per se***; Slander requires special damage > thus, the claimant must establish some loss or harm that is quantifiable in financial terms, such as loss of a job or damage to business interests

Defamation - Defences

- There is range of defences:
  - **Consent**
  - **Justification** (evidence of truth) is a complete defence > the defendant has to prove that the allegations are true in substance
  - **Privilege** > there are situations in which freedom of expression of facts or opinions prevail over private interests of an individual (***absolute privilege***/carry complete protection > e.g. statements made in Parliament or in judicial proceedings;
    qualified privilege/ limited protection > fair and accurate reports in newspapers of parliamentary proceedings or public judicial proceedings or various public matters of public interest and importance)
  - **Innocent publication** reproduction of material where there was no believe that it contained a defamatory comment
  - **Fair comment** people in public life (politicians, sport and film) receive praise and must accept criticism

Defamation

…is the publication of statement which reflects badly on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally

Three preconditions:

Publication of the statement

Defamatory statement

Reference to the claimant

Innuendo
... is a statement which is defamatory by implication. It is sufficient if the statement was understood by others to have a defamatory meaning.

Libel
… is a defamatory statement published in some permanent form
… is actionable per se and requires no proof of special damage

Slander
… is a defamatory statement published in a non-permanent form
… is generally not actionable per se. The claimant must prove special damage.

Defences

Justification

Privilege

Innocent publication

Fair comment

Strict liability

- A person is generally liable in tort when his act is done *intentionally*, *recklessly* or *negligently*
- In some cases, however, a person may be ***liable for his act merely for having done it***, whether or not he acted intentionally, recklessly or negligently > this is called **strict liability** (!)
- Strict liability can be imposed by duties created by statute
  Example: *Manufacturer of consumer products is liable for any harm which the product causes, whether he was at fault or not. (CCPA)*
- A common law instance of strict liability, which is more than hundreds years older, is generally known as the rule in *Rylands vs. Fletcher* (1868)

Strict liability - The rule in *Rylands vs. Fletcher*

- It provides that, if a person brings on to his land and keeps there something likely to do damage if it escapes, he keeps it there at his risk and will be strictly liable for any damage which follows from an escape, even if there has been no negligence.
- In *Rylands vs. Fletcher (1868)*, the defendant was liable when water ***leaked/escaped (3)*** from his reservoir and flooded a neighbour's mine/ ***caused harm (4)*** > the rule applies only where ***keeping the collected dangerous thing (1)*** constitutes a ***"non-natural" use of land (2)*** *+* the potential harm was ***foreseeable (5)***

Strict liability - The rule in *Rylands vs. Fletcher* – Guidelines (1)

- **(1) Collecting and keeping:** something is brought artificially onto land by the defendant and is collected and kept on the land > liability cannot be established of something that occurs naturally on the land escapes and causes harm
- **(2) Non-natural use of land:** the defendant has to be using his land for a *non-natural purpose* > that means that the things collected on the land by the defendant for his own purposes are used in a special – not *ordinary*- way which brings with it an increased danger to others
  Examples: *Minor or common domestic uses of water or fire have some potential of danger, but they are considered an ordinary use of land, so there is no claim under Rylands vs. Fletcher for water entering a flat in a block of flats where the water comes from the flat above, or for a fire which escapes from domestic grate*

Strict liability - The rule in *Rylands vs. Fletcher* – Guidelines (2)

- **(3) "Likely to do mischief if it escapes":** it is necessary to have a dangerous thing or –and this is also sufficient- a thing which is likely to cause harm if it escapes > obviously dangerous things are: gas, oil, chemicals, or blasting which, if they escape, will cause damage (in the case of water it depends)
- **(4) Escapes and causes harm:** the thing must escape and cause harm to the claimant's *property* (Claims for recovery of personal injury should be brought under negligence and <u>not</u> under the rule *Rylands vs. Fletcher* !)

Strict liability - The rule in *Rylands vs. Fletcher* – Guidelines (2)

- **(5) Foreseeability:** the potential for harm needs to be foreseeable > it has to be having been reasonably foreseeable that damage of the relevant type would occur as a result of the escape > this precondition cannot be found in the original case and has been added in more recent times

Case 1: *An old established leather manufacturer used PCE, a chemical solvent in their tanning process. PCE evaporates quickly in the air but is not readily soluble in water. In the course of the process, before a change of method in 1976, continual small spillages had gradually built up a pool of PCE under the factory. The solvent seeped into the soil below and contaminated the aquifer from which Cambridge Water Co drew their water to provide the public water supply in the area.*
There was not liability under Rylands vs. Fletcher because the factory operator had not known, and ***could not reasonably*** *have* ***foreseen****, that the spilled chemical would get into the aquifer or, even if it did, that it would be found in detectable quantities downstream where the water was drawn.*

Strict liability - The rule in *Rylands vs. Fletcher* – Guidelines (2a)

Case 2: *The government arranged for an independent contractor to remove two derelict bungalows and all materials and rubbish from a site owned by the defendant Council. The contractors started a fire to burn unwanted materials. Sparks blew onto the neighbouring property and the resulting fire caused damage.*
The Council, as occupier, was strictly liable under the rule in Rylands vs. Fletcher for the escape of fire. The contractors were on the land with the Council's permission, and although the contractors were forbidden by the terms of their contract from starting fires on the land, the Council could ***reasonably*** *have* ***anticipated*** *that they might start a fire.*

Strict liability - The rule in *Rylands vs. Fletcher*

Defences

- The claimant had **consented** to the collecting and keeping of the dangerous thing that escaped
- The escape was due to the **act of a stranger**
- The event was an **act of God**, which could not have been foreseen or prevented
- The defendant's actions were **authorised by statute**, in which case he will not be liable, provided that he has acted in line with the statutory requirements and he had not been negligent in carrying out his duty
- If the claimant was partly to blame for the damage to his property, e.g. by failing to take proper precautions against the sort of harm, which occurred, any award of damages may be reduced to reflect this: **contributory negligence**

Strict liability

General rule of liability in tort:

> Generally a person is liable in tort when his act is done intentionally, recklessly or negligently – i.e. the person must be at fault

> An exception to this rule is strict liability: The person is liable for the act merely for having done it regardless of his fault

The rule in *Rylands vs. Fletcher*

Preconditions for strict liability

- collecting and keeping of a thing
- Non-natural use of land
- "likely to do mischief if it escapes"
- The thing escapes and causes harm to the neighbour's property or interests in property
- Foreseeability

Defences

- Consent
- Act of a stranger
- Act of God
- Statutory authority
- Contributory negligence

The Competition and Consumer Protection Act (2010)

…establishing strict liability for defective products.

Vicarious liability (1)

- ***Vicarious liability*** is the liability of one person for torts committed by another person > in such a case both persons are liable as joint tortfeasors
  Example: *A is driving his company's truck, and negligently collides with B'S car. B can sue A in negligence. As A was driving on company business, and the company employs A as its employee, the principle of* ***vicarious liability*** *makes A's employer equally liable to B for the negligence which was committed by A in the course of A's employment.*

Vicarious liability (2)

- **Employment** is the most common situation where *vicarious liability* arises as a result of the relationship between the person who commits the tort (the *employee* or servant) and a third party (*employer* or master)
- There are certain other instances, because the principle applies whenever the common law holds that there is a particular legal relationship between the person who actually committed the tort, and the person whom the law also holds liable for it

    > such relationships have been established *inter alia* between principal and agent, business partners or vehicle owners and delegated drivers

Vicarious liability (3)

- In the case of *employer* and *employee*, **three preconditions** must fulfilled for vicarious liability:
  - (1) The person committing the tort has **to be an employee** as opposed to an independent contractor
  - (2) The employee must have **committed a tort**
  - (3) The tort must have been committed **in the course of employment**

Vicarious liability – Who is an employer? (1)

- The person who engages an *independent contractor* is not vicariously liable if the contractor commits a tort > therefore, the **distinction between employee and independent contractor** is very important
- Relationship of *employer/employee*: Sales assistants, apprentices, teachers etc.
- *Independent contractors*: Electricians, carpenters, architects etc. > these are mainly self-employed skilled workers

Vicarious liability – Who is an employer? (2)

- (1) the employee must provide work or skill in return for payment of a wage or some other remuneration
- (2) the employee agrees, expressly or impliedly, that he will work under the control of the employer
- (3) all other circumstances (e.g. method of payment, tax and national insurance, working hours, equipment, level of independence) are consistent with the situation being characterised as a *contract of service = employment*

Vicarious liability – Has a tort been committed?

- Second requirement is often overlooked

  > it is essential because there cannot be vicarious (secondary) liability without a direct (primary) liability of the employee

- Vicarious liability can apply to any tort, often it will be *negligence*
- Before holding the employer liable, it must be established that the employee had actually committed the tort in question, by applying all the relevant law relating to that tort, including whether any particular defences are open to the employee (!)

Vicarious liability – In the course of employment

- Of course an employer cannot be made liable for every tort which his employees commit > the tort must have been committed whilst the employee *was in the course* of carrying out the employer's business

  Example: (Limpus vs. London General Omnibus Co, 1862) *London General's Instructions to its drivers were that they "must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof." One of their drivers did in fact drive his bus in such a way as to obstruct a bus operated by Limpus and prevent it passing. His action caused injury to one of Limpus' horses and severe damage to the bus itself.*
  Despite the instruction, London General as employer were liable, as their driver's conduct had occurred within the course of his employment.

Vicarious liability – Employer's indemnity

- As mentioned above, the employee and employer are **joint tortfeasors** > the employer who has been held vicariously liable for an employee's tort may be able to recover from the employee the damages which he has had to pay the person who has suffered the injury or damage > the employer is entitled to seek such an indemnity from the employee

Vicarious liability

- **…**means to be liable for torts committed by *another* person, i.e. a third person
- The person who is vicariously liable is called the *master* (mostly an employer), and the person who committed the tort is called the *servant* (mostly an employee)

Three preconditions:

The person acting must be a servant (**employee**), as apposed to an independent contractor.

The economic reality test:

- Work or skill in return for payment of a wage or some other remuneration
- Works voluntarily under the control of the employer
- Other circumstances are consistent with the situation being characterised as a contract of service (e.g. method of payment, tax and national insurance, working hours, equipment etc.)

This person must have **committed a tort.**

- Any tort is possible
- However, all elements of the respective tort need

The tort must have been committed **in the course of employment**.

Term of business torts

- *Business torts*, also called "*economic torts*“, are wrongful acts committed against business entities (companies, partnerships etc.) that cause or are likely to cause in the future some kind of financial loss (e.g. loss of business opportunity, damaged reputation, ability to stay in business)

“an unlawful act that prevents a business from operating as it otherwise would”

- Businesses that are financially injured through the intentional or negligent act of another business or individual may seek monetary damages in civil courts

Business torts – Overview

- Since many **business torts** involve damage to business relationships, public reputation, or the ability to function in the marketplace in general, financial losses are often based on future projections

  Example: *A tortious interference claim often will focus on the actual losses suffered by the interference of the contract. If the company lost a client, then damages will be based on that specific loss. But if the loss of the client through tortious interference hurts the company's ability to attract new clients, a more general restraint of trade claim may be filed. In such a case, the plaintiff will try to recover for the profits they believe will be lost in the future.*

Types of business torts (1)

Some **common business torts** are:

- **Tortious Interference -** This occurs when one party intentionally interferes with a contract (or, less formally, an *economic expectancy*) between the plaintiff and another party, causing damages to the plaintiff. Even something as nuanced as silence or the nod of one's head, if in reply to a valid inquiry, can be construed as tortious interference in some instances.
- **Restraint of Trade -** While restraint of trade is a common law doctrine and not a specific tort, it refers to claims in which the defendant's act itself may not have caused the plaintiff's immediate economic loss, but a much broader hindrance in its ability to conduct business as usual. Some "reasonable" restraints of trade, such as non-compete clauses, are valid.

Types of business torts (2)

- **Theft of Trade Secrets -** Just as it sounds, theft of trade secrets occurs when one party unlawfully obtains proprietary information from a business with the intent of gaining an unfair competitive advantage
- **Fraudulent Misrepresentation -** Two parties entering into an agreement, whether it's contractual or sealed with a handshake, must do so in good faith. If you misrepresent your position, intentions, or a material aspect of the deal - and it causes financial harm to the other party - it may give rise to a civil claim

Remedies for business torts

- **Remedies for Business Torts** - calculating such losses is quite difficult > Economic losses are often projections, but damages for any tort must be "*calculable with reasonable certainty*“ > So while it's impossible to predict the future, courts will generally accept estimations of losses that seem reasonable and calculated in good faith. If the defendant is still committing the unlawful act at issue, the court may issue an injunction.