ACCA

PAPER LW

Corporate and Business Law

(LW-ENG)

FOR EXAM UNTIL JUNE 2024

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Introduction of LW

1. Aim 课程目标

The aim of the syllabus is to develop knowledge and skills in the understanding of the general legal framework, and of specific legal areas relating to business, recognising the need to seek further specialist legal advice where necessary.

2. Syllabus 课程大纲

A Essential elements of the legal system

- Law and the legal system
- Source of law

B The law of obligations

- Formation of contract
- Content of contracts
- Breach of contract and remedies
- The law of torts and professional negligence

C Employment law

- Contract of employment
- Dismissal and redundancy

D The formation and constitution of business organisations

- Agency law
- Partnerships
- Corporations and legal personality
- The formation and constitution of a company

E Capital and the financing of companies

- Share capital
- Loan capital
- Capital maintenance and dividend law

F Management, administration and the regulation of companies

- Company directors
- Other company officers
- Company meetings and resolutions

G Insolvency law

- Insolvency and administration

H Corporate fraudulent and criminal behaviour

- Fraudulent and criminal behaviour

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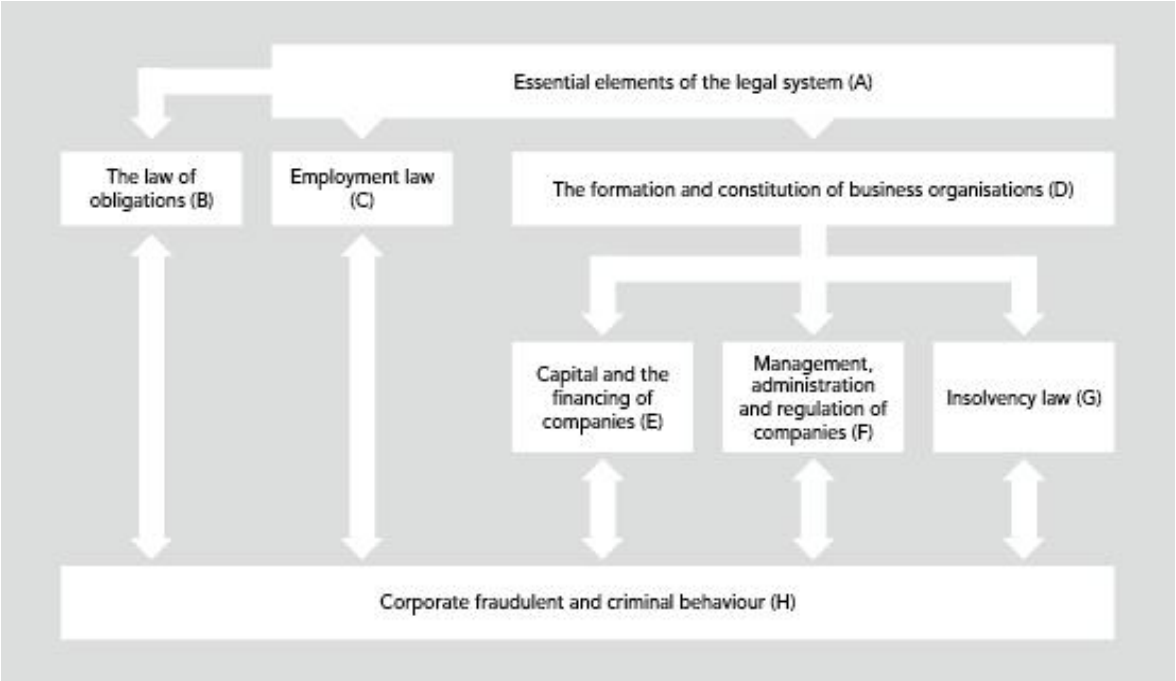

3. Exam format 考试形式

The syllabus is assessed by a two-hour computer-based examination.

The examination consists of:

Section A

- 25 x 2 mark objective test questions 50%
- 20 x 1 mark objective test questions 20%

Section B

- 5 x 6 mark multi-task questions 30%

100%

All questions are compulsory.

4. Pass rate 历年考试通过率

Jun 19	Dec 19	Sep 20	Dec 20	Jun 21	Dec 21	Jun 22	Dec 22	Jun 23
84	83	88	86	86	83	82	82	80

Success can be achieved through hard work.

Surpass yourself, challenge yourself!

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Contents

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PART A ESSENTIAL OF THE LEGAL SYSTEM

Chapter 1 Law and the legal system

本课程执行英国法律体系，例如法院系统、法律的来源等，大纲涉及财务相关的一些法律范围领域，这些法律领域包括：劳动合同法和公司法。同时还涉及公司的形成和训立，公司的融资和资本的种类，和经营上的管理，公司的管理和规范和公司在法律方面将会面临的危机。以及公司治理、道德和民法相关的道德行为。通过学习本章节，你会了解英国法律的种类以及法院体系等相关内容。

Learning outcomes

- Define law and distinguish types of law.
- Explain the structure and operation of the courts.

1. TYPES OF LAW

1.1 Private law and public law

- Private law: the law that deals with relationships and interactions between private parties, i.e. private individuals and business organizations.
- Public law: the law that deals with functions of public organization and their interactions with the general public.

1.2 Purpose

	Civil Law	Criminal Law
Definition	Civil law sets out the **rights and duties of persons as between themselves**. The person whose rights have been infringed can claim a **remedy** from the wrongdoer.	Criminal law is concerned with the **conduct that is considered so undesirable** that the State **punishes** persons who **transgress**.
Aim	To provide compensation for an injured party	To regulate society by the threat of punishment
Parties	In a civil action, the claimant **sues** the defendant.	In a criminal action, the State **prosecutes** the defendant.
Burden of Proof	The necessity of proof normally lies with the person	The burden of proof rests with **the prosecution**.

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	who files charges, i.e. **the claimant**.	
Standard of Proof	If the claimant can prove the wrong **on the balance of probabilities**, his litigation is successful and the defendant is held liable.	If the state can prove the offence **beyond reasonable doubt**, the prosecution is successful and the defendant is found guilty and convicted.
Remedies	Damages, specific performance, injunction etc.	Fine and/or imprisonment

2. ENGLISH COURTS

2.1 The civil court structure

- Structure of the civil courts

Courts of first instance	The High Court The County Court
Appellate Courts	Court of Appeal
	Supreme Court for the UK
Note: Magistrates' Courts have only very limited powers in civil cases, mainly confined to family proceedings, such as matrimonial relief and child custody issues; local authority care or supervision orders; council tax, income tax and VAT arrears enforcement; and alcoholic beverage licensing.	

- Track system: Cases dealt with in the Count Court and High Court are sub-divided into those following a small claims track, fast track or multi-track procedure. Most County Court cases will follow the small claims or fast track procedure, which involves the case being dealt with more simply and quickly, although the County Court has jurisdiction to hear multi-track cases. Cases in the High Court exclusively follow the multi-track procedure.

Small claims track	Any claim for **£10,000 or less** will be allocated to the small claims track
Fast track	Any claim for **more than £10,000, but not more than £25,000**, will be allocated to the fast track, unless the case is too complex.
Multi-track	A case that does not fit into either of the above tracks will be allocated to the multi-track.

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- The burden of the proving the facts of the case normally lies with **the person who lays charges**, generally the claimant.
  - Jurisdiction and appeal

Civil Courts		Jurisdiction	Appeal
County Court		• Actions in contract and tort • Equity claims: e.g. granting of specific performance, administration of a deceased person's estate, and the dissolution of partnership. • Contentious probate • Divorce • Bankruptcy • Patents	• If a district judge heard the case, an appeal will remain in a county court, but will be heard by a circuit judge. • Decisions of circuit judges may be appealed to the High Court. • If the appeal raises important points of principle or practice, decisions of a county court can be appealed directly to the Civil Division of the Court of Appeal. Permission to appeal is normally required.
High Court	**QBD**	Queen's Bench Division deals with: • Contract and tort; • Judicial review; • Some appeals from County Courts and the Magistrates' Courts.	Civil appeals from the High Court may be made to the Court of Appeal (Civil Division) or to the Supreme Court, under what is known as the **leapfrog procedure**.
	ChD	Chancery division deals with: ● Trusts and mortgages; ● Bankruptcy; ● Disputed wills and administration of estates of deceased persons ● Partnership and company matters	

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	FamD	Family division deals with : • Matrimonial cases; • Family property cases; • Proceeding relating to children (custody, guardianship, adoption, legitimacy)	
Court of Appeal (Civil Division)		The Civil Division hears appeals from the High Court, County Courts, and certain other courts and special tribunals. It may uphold or reverse the earlier decision or order a new trial.	Appeals lie to the Supreme Court.
Supreme Court		• The Supreme Court was established by the Constitutional Reform Act 2005 and it replaced the judicial function of the House of Lords (Appellate Committee). • The role of the Supreme Court is to act as the final appeal court in **civil cases** in the UK.	Supreme court decisions may not be appealed.

2.2 The criminal court structure

- Classification of criminal offences

Summary offences	They are **minor offences** that can only be heard in a Magistrates' Court.
Offences triable on indictment only	More **serious offences** that can only be heard in a Crown Court.
Offences triable either way	Some offences are triable either way, meaning they can be heard at either the Magistrates' Court or Crown Court. The magistrates decide if the case is suitable to be heard in the Magistrates' Court.

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◆ Jurisdiction and appeal

Criminal courts	Jurisdiction	Appeal
Magistrates' courts	• They try summarily (without a jury) all minor offences. • They conduct committal proceedings, which are preliminary investigations of the prosecution case, when the offence is triable only on indictment.	• All defendants have the right to appeal their conviction and/or sentence to the Crown Court. Where the defendants feel the magistrates were wrong in law or exceeded their jurisdiction, they may file a "case-stated" appeal to the Divisional Court of the Queen's Bench Division of the High Court.
Crown Court	• It hears indictable offences. • Cases will be heard before a jury, who will decide questions of fact, and judge's role is to decide question of law and impose a penalty.	• From the Crown Court there is a right of appeal on criminal matters to the Criminal Division of the Court of Appeal. • An appeal by way of "case stated" on a point of law may also be made to the Queen's Bench Division, in the High Court.
High Court (Queen's Bench Division)	It hears case stated appeals from Magistrates' Courts and the Crown Court.	Criminal appeals are made directly to the Supreme Court.
Court of Appeal (Criminal Division)	The Criminal Division of the Court of Appeal hears appeals from the Crown Court.	Appeals lie to the Supreme Court.
Supreme Court	The Supreme Court is also the highest court of appeal in **criminal cases** for England, Wales and Northern Ireland.	Supreme court decisions may not be appealed.

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Note: the highest criminal appeal court for Scotland is the Scottish High Court of Justiciary).

2.3 Other courts

- Divisional courts in the High Court of Justice

  Each division has a substantial first-instance jurisdiction, as well as an appellate role via two or three judges sitting as a Divisional Court.

  A divisional court is in fact not a separate court or division of the High Court but essentially refers to the number of judges sitting.
- The European Court of Human Rights and the European Court of Justice
- The Privy Council

  The Judicial Committee of the Privy Council is the final Court of Appeal for **certain Commonwealth countries**.

2.4 Note

- The UK has 3 distinct legal jurisdictions
  - England and Wales
  - Scotland
  - Northern Ireland
- England and Wales follow the legal system known as English law, which is the basis of common law legal systems used in most Commonwealth countries and the US.

Exam focus point **Types of law: Civil law VS Criminal Law** **English courts: Magistrates' court /County court/Crown court/High court /Court of appeal/Supreme Court**

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Private law
Public law
Civil law
Criminal Law
On the balance of probabilities
Beyond reasonable doubt
Appeal
Magistrates' court
County court
Crown court
High court
Court of Appeal
Supreme Court
Indictable offence
Summary offence
Queen's bench division/Chancery division/Family division
Small claim track/Fast claim track/Multi track

2. 必做习题

(1) Chapter 1 Quiz: Q1-5
(2) OT Revision Questions Ch1: English Legal System: Q1-21

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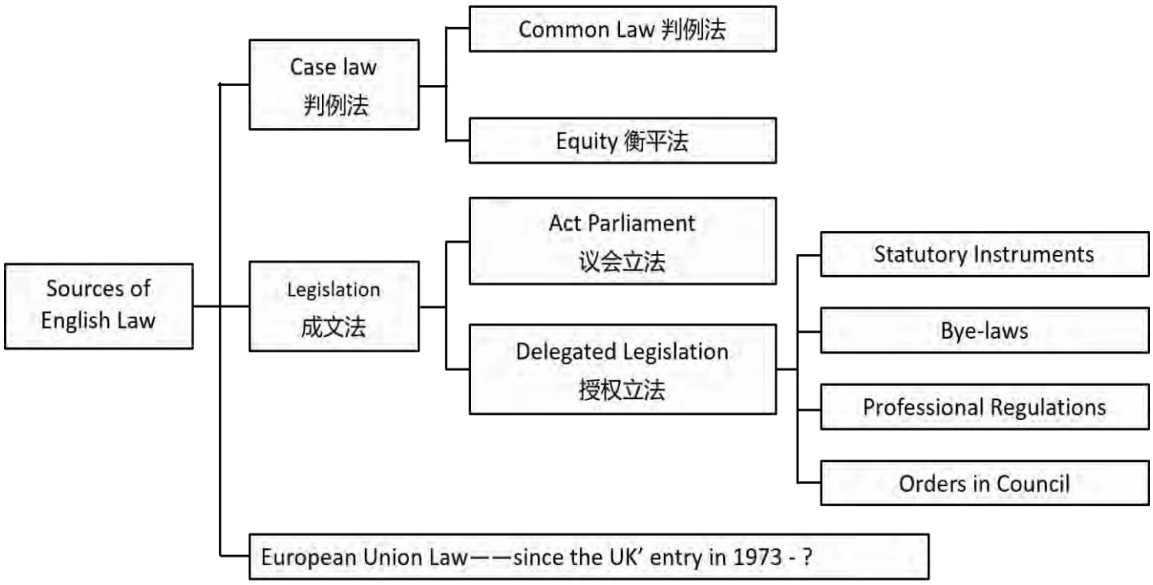
Chapter 2 Sources of law

英国判例法主要分成两部分：普通法和衡平法。这两种判例法都是依照社会的公序良俗，以及法官的自由裁量来对案件进行判决，后者更加强调法官的公平公正，并且其救济手段更加多元化，比如法官可以颁布禁令来更好保障当事人的利益, 而的救济手段只有单一的金钱形式，即当事人只能获得财产上的赔偿。

Learning outcomes

- Define law and distinguish types of law.
- Explain what is meant by case law and precedent.
- Explain legislation and evaluate delegated legislation.
- Illustrate the rules and presumptions used by the courts in interpreting statutes.
- Identify the concept and impact of human rights law.



1. Case law

Case law means legal rules established by judges (i.e. judge-made law) in their judicial decisions based on the underlying principle of consistency.

	Definition	Basis
Common law	Common law is the body of legal rules common throughout the whole country which is embodied in judicial decisions.	It is based on tradition, custom, and precedent.

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Equity	Equity is the name given to the set of legal principles that seek to achieve justice where the application of strict rules of law would be overly harsh or unfair.	It is based on equitable maxims, e.g. he who comes to equity must come with clean hands, he who seeks equity and must do equity.

1.1 Precedence

Where there is conflict, equity prevails over common law.

1.2 Common law and equity distinguished

	Remedies	**Discretion of the court**
Common law	Monetary, e.g. damages	No discretion, must follow statute law and precedents
Equity	Directing a party to do or not to do something, e.g. injunctions, specific performance, rescission or reformation, trust.	Discretionary to achieve justice. Modern equity, however, is limited by substantive and procedural rules.

2. The doctrine of judicial precedent

2.1 Definition

- The principle requires that courts will follow their previous decisions.
- This means similar cases will receive similar treatments.
- In this way, English law rules will **stand the test of time**.
- The doctrine is also frequently referred to as the **"doctrine of consistency"** or **"stare decisis"** (literally means "to stand by decisions and not disturb settled matters"), all means that judges are obliged to respect the precedent established by prior decisions.

2.2 Judicial precedent

When a legal rule is established by an appropriate court in a judgment, it is a precedent that lower courts are bound to follow by deciding similar cases in the same way.

2.3 Types of precedents

- **Binding precedents:** they **must** be followed by a judge.
  有约束力的司法先例：法官必须遵循该先例。
- **Persuasive precedents:** they **may** be followed by a judge.

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有说服力的司法先例：法官可以选择遵循该先例。

2.4 Factors determining whether or not a precedent is binding

Hierarchy of the courts	• Not every decision made in every court is binding as a judicial precedent. The court's status has a significant effect. ▪ In general, **precedents of the higher courts bind the lower ones** but not vice versa. A court of higher status is not only freely to **disregard** the decision of a lower court. It may also **deprive it of authority** and expressly **overrule** it. ▪ A higher court might **hear a case on appeal**, and **reverse** the decision of the lower court **in the same case**. The most common reason for reversing a decision is that the higher court takes the view that the lower court has made a mistake in its decision. ▪ Remember that overruling does not reverse the previous decision, overruling a judgment does not affect its outcome. • **The general rules are as follows** ▪ The Supreme Court, the highest court in the UK, is free to overrule all its own decisions and those of the Appellate Committee of the House of Lords. Supreme Court decisions bind all inferior courts. ▪ The Civil Division of the Court of Appeal is bound by its own decisions, as well as those of the Supreme Court/House of Lords. In **Young v Bristol Aeroplane Co Ltd 1944**, the Court of Appeal stated three exceptions to this principle: · Two of its previous decisions **conflict** and the court must decide which to follow. The other case is automatically overruled. · If the previous decision was **overruled** by a subsequent Supreme Court decision, it need not be followed. · If a Court of Appeal decision is ***per incuriam*** ("through lack of care"), it need not be followed. ▪ The Criminal Division is bound by its own decisions, as well as by those of the Supreme Court/House of Lords. The above exceptions that apply to the Civil Division also apply to the Criminal Division. However, since criminal cases involve the potential to deprive defendants of their liberty, precedent is

	not followed as strictly and the discretion of the Criminal Division to ignore its own decisions is wider. ▪ Decisions of the High Court and the Court of Appeal will be binding on all lower courts and on themselves. ▪ Local courts' decisions, including those of Magistrates' Courts, County Courts and Crown Court bind no one not even themselves.
Ratio decidendi and obiter dicta	**Statements made by judges can be classified as either ratio decidendi or obiter dicta.** • **Ratio decidendi (binding):** the legal reason for the decision. This is the vital element in a judgement that binds future judges. • **Obiter dicta (persuasive):** other things that were said. Everything in a case which does not form the ratio may be said to be obiter dicta. They are not binding on future judges but are merely persuasive.
Material facts of the cases	**It is necessary to consider how far the facts of the previous and the latest case are similar:** • **Same – binding:** if there is little difference, the court is **inclined** to follow the earlier case. • **Similar – persuasive:** if the differences appear significant the court may distinguish the earlier case on the facts and thereby avoid following it.

3. Legislation

Legislation is also called as statute law and may take the form of Acts of Parliament or delegated legislation under the Acts.

3.1 Acts of Parliament

Acts of Parliament are also called as "primary legislation". They are made by the UK Parliament, which is made up of two chambers – the House of Commons and the House of Lords – plus the Queen. All three sections of Parliament must normally agree if a particular law is to be passed.

- Types of acts: Public acts; Private acts; and Enabling Acts.
- Parliamentary procedure

3.2 Parliamentary Sovereignty

Sovereignty: supreme dominion, authority, or rule

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Parliamentary sovereign: the Parliament is the highest power in the UK.

Parliament can make any law in any way it sees fit.	• P can make new law on subjects which have not been regulated by law before. • No one may question the validity of an Act of Parliament • However, High Court judges and above may declare an Act to be "incompatible" with the European Convention on Human Rights, which is now adopted into English Law by the Human Rights Act 1998.
Only Parliament can make new law.	• Parliament may repeal earlier statutes. • Judges' role is to interpret statutes and apply law to specific cases, they may find a meaning in a statute the legislators did not intend. • Parliament is free to overrule or modify case law developed by the courts.
Each Parliament is sovereign.	• No Parliament can legislate so as to prevent a future Parliament changing the law. • Even if it does so, a later Parliament can always repeal a law by an earlier Parliament.

3.3 Delegated legislation

Delegated legislation means rules of law, often of a detailed nature, made by subordinate bodies to whom the power to legislate has been given by an enabling Act.

Delegated legislation may take the following forms:

- Government ministers [Secretary of State] are given statutory powers to make **statutory instruments,** which are the most common form of delegated legislation, around 3,000 of which are produced annually.
- Local authorities may be given statutory powers to make **bye-laws**.
- **Rules of Court** may be made by the judiciary to control court procedures.
- Authorised bodies (such as the Law Society) may be given statutory powers to make **professional regulations** concerning specific occupations (such as the legal profession).
- In instances of national emergency, the government may choose to introduce **Orders in Council** through the Privy Council in the name of the Queen. Because it circumvents the need to go through the full Parliamentary process, the government may quickly bring law into place to

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deal with national emergency. Most orders will be revoked at the end of the emergency, or they may be formalized according to the traditional lawmaking process.

3.4 Advantages of delegated legislation

- It saves time as Parliament does not have to examine matters of detail.
- Much of the content of delegated legislation is technical and is better worked in consultation with professional, commercial or industrial groups outside Parliament.
- They can be enacted quickly;
- If new or altered regulations are required later, they can be issued without referring back to Parliament.

3.5 Disadvantages of delegated legislation

- The system is unrepresentative in that some power is given to civil servants who are not democratically elected.
- Because delegated legislation can be produced in large volumes, both parliament and the public find it difficult to keep up with.
- Different sorts of delegated legislation originated from one statute can greatly confuse users.

3.6 Controls over delegated legislation

Parliament	• Some statutory instruments do not take effect until approved by **affirmative resolution of Parliament**. • Most other statutory instruments must be **laid before Parliament** for 40 days before they take effect. • There are standing **Scrutiny Committees** of both Houses whose duty is to examine statutory instruments from a technical point of view and may raise objections if necessary.
The courts	Delegated legislation can be challenged in the courts on the grounds that **the maker has acted ultra vires in that he exceeded his statutory powers**. The courts will declare anything ultra vires to be illegal and void.
The Human Rights Act 1998	The courts are permitted to **strike out** (i.e. make void) any delegated legislation (**except Orders-in-Council**) that runs contrary to the HRA.

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4. Statutory interpretation

4.1 When interpreting the statute law, judges will consider the following rules:

- **The literal rule**

Words in a Statute must be given their literal and grammatical meaning, even though this may lead to an unjust interpretation or one probably unintended by the Parliament. In **Whitely v Chapell 1868**, a statute made it an offence "to impersonate any person entitled to vote" at an election. The defendant used the vote of a dead person. The defendant was acquitted because he impersonated a dead person, who was clearly not entitled to vote.

- **The golden rule**

If the literal interpretation produces an absurdity, then the court should look for another meaning of the words to avoid that absurd result. In **R v Allen 1872**, Allen had married another woman whilst his existing wife was still alive. He was charged with the crime of bigamy. Allen argued that, because he was already married, it was technically impossible to marry someone else. The court held that, from a literal point of view, Allen was correct, but a literal interpretation would have rendered the statute law useless. Therefore, the court held that the words "shall marry" would be interpreted to mean shall "go through the form and ceremony of marriage with another person". Allen was convicted.

- **The mischief rule**

Under the mischief rule, a judge will consider what mischief or social illness the Act was intended to prevent. If a statute is designed to deal with a social mischief or illness, the correct interpretation is the one which achieves the intended result. In **Corkery v Carpenter 1951**, Corkery was drunk while pushing his bicycle on a street in public. Under statute law, it was an offence to be drunk while in charge of carriage. The court applied the mischief rule and interpreted the purpose of the statute law was to "prevent people from using any form of transport on a public highway whilst in a state of intoxication". Corkery was sentenced to one month's imprisonment. (Mischief: a cause or source of harm, evil or irritation; especially: a person who causes mischief.)

- **The purposive approach**

The words in a statute must be interpreted with reference to the purpose of that statute.

In **Gardiner v Sevenoaks RDC 1950**, a statute law requires that safe storage of film must be provided where it might be stored on premises. The claimant stored film in a cave and argued that the statute was not applicable to his case. The court held that the purpose of the statute was to protect the safety of persons working

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in all places where film was stored. Therefore, if film was stored in a cave, the word “premises” included the cave.

- **The contextual rule**

Under the contextual rule, judges are encouraged to look at the statute law as a whole to interpret the meaning of a word in it.

4.2 Other rules developed by the courts:

- **The eiusdem generis rule**

Statutes often list a number of specific things and end the list with more general words. In that case the general words are to be limited in their meaning to other things of the same kind as the specific items which precede them. In Powell v Kempton Park Racecourse 1899 it was held that a clause referring to a 'house, office, room or other place' excluded a ring at a racecourse.

- **Expressio unius est exclusio alterius**

To express one thing is by implication to exclude anything else.

- **Noscitur a sociis**

It is presumed that words draw meaning from the other words around them. If a statute mentioned 'children's books, children's toys and clothes', it would be reasonable to assume that 'clothes' meant children's clothes.

- **In pari materia**

If the statute forms part of a series which deals with similar subject matter, the court may look to the interpretation of previous statutes on the assumption that Parliament intended the same thing.

4.3 Presumptions of statutory interpretation

It is assumed that the following presumptions of statutory interpretation apply, unless the statute contains express words to the contrary

- A statute does not alter the existing common law, i.e. if a statute law wants to alter existing common law, it must specifically say so.
- A statute does not have retrospective effect to a date earlier than its becoming law.
- A statute generally has effect only in the UK.
- A statute does not bind the Crown.
- A statute cannot impose criminal liability without mens rea, i.e. guilty mind.
- A statute should not exclude the jurisdiction of the court.

4.4 Other aids in interpretation

- **Extrinsic aids**

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The Interpretation Act 1987 Law reports written by official committees Hansard

- **Intrinsic aids:**

Explanatory sections of statutes.

5. Human Rights Act 1998

5.1 Background of the HRA 1998

In the wake of atrocious human rights violations occurred during the World War II, major powers in Europe signed an international treaty on basic human rights – "European Convention for the Protection of Human Rights and Fundamental Freedoms" (commonly referred to as the "European Convention on Human Rights" or "ECHR") in 1951.

Prior to the coming into force of the Human Rights Act 1998 in October 2000, any person who wished to sue the State for breaching his human rights could only bring his action in the European Court of Human Rights ("ECtHR"). Since the Convention rights were not part of English law, the State could ignore any judgement of the ECtHR if it wanted to.

Much of this has now changed because of the HRA 1998. The Act incorporates many of the Convention rights into English law and the overall effect is that persons can now sue the State in the English courts for breach of the incorporated rights. The case can still be taken to the ECtHR – but only after proceedings in the English courts have been exhausted.

5.2 HRA Impact to the English Legal system

The HRA has had an impact on new legislation, statutory interpretation and the common law.

◆ Impact on the common law

Under section 2 of the HRA, judges are required to take into account precedents of the ECtHR when analyzing previous precedents of the UK courts, they must refuse to follow any pre-2000 UK precedent that is in conflict with the HRA 1998 and the ECHR.

◆ Impact on statutory interpretation

Under section 3 of the HRA, judges are required to interpret UK law in a way compatible with the ECHR and the protection of convention rights. However, if this is not possible, then High Court judges and above may make a declaration of incompatibility.

◆ Impact on new legislation

Section 19 of the HRA requires the person responsible for a Bill must make a

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written declaration to state that:

- the Bill is thought to be compatible with the HRA 1998; or
- that it is incompatible but it is wished to proceed with the Bill anyway.

In this way the doctrine of sovereignty of Parliament is preserved – in that Parliament can still make any law it wishes.

Bill: a draft of a law presented to a legislature for enactment

Wake: the track left by a moving body (as a ship) in a fluid (as water); broadly: a track or path left.

Exam focus point **Case law/The doctrine of judicial precedent/Legislation/Statutory interpretation/Human Rights Act 1998**

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Precedent
Binding precedent
Ratio decidendi
Obiter dicta
Legislation=statute law
Parliament
Delegated legislation
Orders in council
Statutory instrument
Bye-laws
Statutory interpretation
The literal rule
The golden rule
The mischief rule

2. 必做习题

(1) Chapter 1 Quiz: Q1-5
(2) OT Revision Questions Ch1: English Legal System: Q1-21

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Part B THE LAW OF OBLIGATIONS

Chapter 3 Formation of contract

合同是当事人或当事双方之间设立、变更、终止民事关系的协议。依法成立的合同 ，受法律保护。通过学习本章节，你会了解到合同的性质、合意、对价、缔约意图以及合同的相对性。

Learning outcomes

- Analyse the nature of a simple contract.
- Explain the meaning of an offer and distinguish it from an invitation to treat.
- Explain the termination of an offer.
- Explain the meaning and consequence of acceptance.
- Explain the need for consideration.

1. Nature of a contract

1.1 Definition and elements of a contract

A contract is legally binding agreement between two or more parties. There are three key elements of a simple contract

Agreement	Consideration	Intention to create legal relations
合意	对价	缔约意图

- There must be an **agreement** reached by offer and acceptance.
- There must be an exchange of **consideration** between the parties.
- The parties must have an **intention** to create legal relations between themselves.

1.2 Forms of a contract

As a general rule, a contract may be made in any form. Contrary to common belief, not all contracts need to be made in writing, except in the following circumstances

- Some contracts must be by **deed**
  - Leases for three years or more;
  - Transfer of legal estate in land;
  - Promise not supported by consideration (donative contracts).
- Some contracts must be **in writing**

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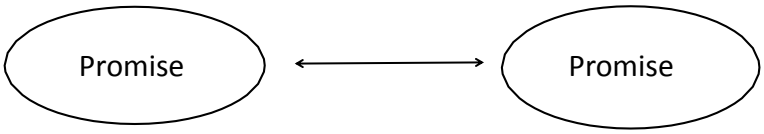
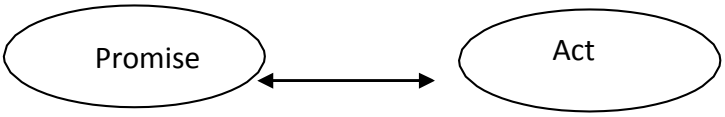
- A transfer of shares in a limited company;
- The sale or disposition of an interest in land;
- Bills of exchange and cheques;
- Consumer credit contracts.

◆ Some contracts must be **evidenced in writing** (meaning certain contracts may be made orally, but are not enforceable in a court of law unless there is written evidence of their terms), such as the contract of guarantee.

1.3 Types of contract

Bilateral contract	A contract that creates mutual obligations, i.e. both parties promise to do, or refrain from doing something in exchange for the other party's promise. 
Unilateral contract	A contract in which one party promises to do something in the future if the other party does something as requested, but the promisee does not promise to do or refrain from doing that thing. 

2. Agreement

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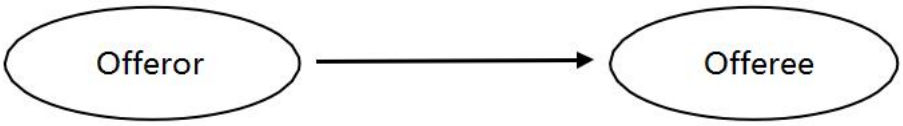
2.1 Offer

Definition

- It is a **promise**.
- It has specific terms
- It indicates the offeror wishes **to do or refrain from doing** something
- There must be a **signal** that acceptance of the promise by the offeree will conclude the deal, i.e. it creates a power of acceptance



2.2 Requirements of a valid offer

- Definiteness
  要约内容明确具体
  - An offer must be sufficiently definite so as to be capable of acceptance. A statement which is too vague cannot be an offer.
  - However, an apparently vague offer may be made definite by reference to previous dealings or customs.
- Communication
  要约已送达受要约人
  - An offer is not effective unless and until it has been communicated to the offeree, i.e. it must be delivered from the offeror and received by the offeree.
  - An offer can be made to a particular person, to a class of persons or even to the whole world: **Carlill v Carbolic Smoke Ball Co 1893.**

2.3 What is not an offer

2.3.1 Invitation to treat 要约邀请

An invitation to treat ("ITT") may be defined as an invitation to the other party to make an offer. ITT is not an offer and is not capable of being accepted.

Examples of ITTs include:

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Auction notices 拍卖公告	• Auction notices are generally regarded as ITTs. When the person bids at the auction, he is making an offer to the auctioneer, who is free to accept or reject. • **In Harris v Nickerson 1873**, an auctioneer advertised that he would sell certain furniture on a specified date, the claimant arrived at the sale but the goods had been withdrawn. Was there a contract? The court said because an auction notice was an ITT only, so the parties could not had reached an agreement starting from an ITT. • Auction with reserve: • Auction without reserve:
Advertisements 广告	• An advertisement of goods for sale is usually an attempt to induce offers. In **Patridge v Crittenden 1968**, Mr Partridge placed an advertisement in a periodical "Cage and Aviary Birds" that "Bramblefinch cocks, bramblefinch hens, 25s each". Under the Protection of Birds Act 1954, it was an offence to offer for sale a brambling. Mr Partridge was convicted at first instance, he then appealed. The court held that the advertisement only constituted an ITT, therefore Mr Partidge's conviction was quashed. • An exception to the preceding general rule may be found in the case of **Carlill v Carbolic Smoke Ball Co 1893**: The defendant company invented a smoke ball which it believed to be a cure for influenza and other similar illnesses. It ran an advertising campaign. The advertisements (on posters) promised to pay £100 to any person who used the smoke ball in accordance with the instructions and subsequently caught flu. Mrs Carlill read the poster, acquired a smoke ball, used it as directed, and caught flu. The defendant refused to pay Mrs Carlill arguing that there was no contract obliging it to do so. The court held that there was a contract and therefore the defendant must pay.

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	 **Source: Wikipedia**
Exhibition of goods for sale 商品展示	• Displaying goods in a shop window is normally regarded as an ITT. • In **Fisher v Bell 1961**, a shopkeeper displayed a flick knife in the window of his shop. Under statute law, it was provided that it was illegal to sell or offer to sell such knives. The court held that the display of an article with a price on it in a shop window is merely an ITT, • In **Pharmaceutical Society of Great Britain v Boots Cash Chemists 1952**, the court held that it displaying goods on open shelves in shops may only be regarded as an ITT. **Why?**
Invitations to tender 招标	A tender is an estimate given in response to a request. An invitation for tenders is an ITT – it is not an offer to use the person quoting the lowest price. The offer comes from the person making the tender, which can then be accepted or rejected.

2.3.2 Supply of information

A mere statement of selling price in response to a request for information is not an offer.

In **Harvey v Facey 1893**, the following communications were exchanged between the parties.

Claimant: "Will you sell us Bumper Hall Pen, telegram lowest price".

Defendant: "Lowest price for Bumper Hall Pen £900".

Claimant: "We agree to buy Bumper Hall Pen for £900 as asked by you".

To this last telegram there was no reply from the defendant.

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Is there a contract?

2.3.3 A statement of intention

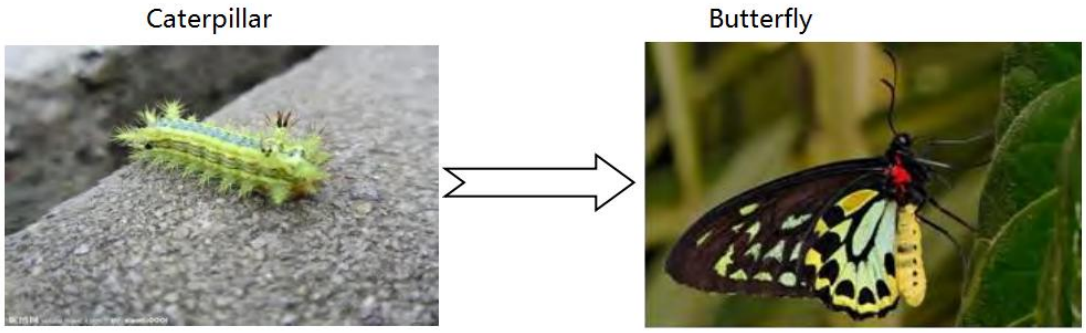
A statement of intention indicating an event, such as an auction will take place, is not an offer to sell, such was the case in Harris v Nickerson 1873.

However if a statement of intention satisfies the requirements of an offer, it will be regarded as an offer capable of being converted by acceptance into in binding contract,

e.g. in **Hawkins v McGee 1929**, the court held that the doctor's statement of intention to "give the patient an 100% good hand" was an offer because it was sufficiently definite.

3.Termination of offer

An offer may only be accepted while it is open or effective. In absence of an acceptance, an offer may be terminated in any of the following ways.



3.1 Revocation by the offeror

要约人撤销

An offer may be revoked or withdrawn by the offeror at any time before it is accepted. This is so even if the offeror has promised the offeree to keep the offer open for a specified period of time.

In **Routledge v Grant 1828**, the defendant offered to buy the claimant's horse for a fixed sum, requiring acceptance within six weeks. Within the six weeks specified, the defendant withdrew his offer. The court held the defendant may revoke his offer at any time before acceptance, even though the time limit had not expired.

The revocation is not effective until and unless it is communicated to the offeree

If the offeree pays the offeror to keep a separate offer open, the offeree and offeror is said to have entered into an **option contract**. If the offeror chooses to

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revoke the separate offer, he will be liable for breach of the option contract. So although the offeree still could not accept the revoked offer, he could claim damages for the loss of opportunity to accept.

Also, in unilateral contracts, the offeror may not revoke his offer once the offeree has begun to perform the act which, if completed, would amount to a valid acceptance.

3.2 Rejection by the offeree

受要约人拒绝

Rejection, whether express or implied, or in the form of a counter offer, terminates the offer.

A counter-offer is a response which does not accept all the terms of the offer but proposes some changes. It is a rejection to the offer and it itself is a new offer capable of acceptance.

In **Hyde v Wrench 1849**, the defendant offered to sell his farm for £1000, but the claimant offered £950. The defendant considered the new proposal and refused to accept. Subsequently, the claimant agreed to give £1000, to which the defendant made no reply. The court held that there was no contract because the counter offer was an implied rejection of the original offer to sell at £1000.

A request for more information in response to an offer is not a counter-offer, i.e. it does not terminate the offer.

3.3 Lapse of time

时间经过

If an offer is made for **a definite period** only: the offer will automatically come to an end at the end of that period if it has not been accepted.

If **no definite time** is stated: the offer will lapse after a reasonable time. This would depend on the circumstances, e.g. an offer to sell land will not lapse as quickly as an offer to sell perishable goods.

3.4 Failure of a condition on an offer

要约的条件未成立

An offer may be conditional, e.g. I will buy your house for £1,000 if a green feathered parrot flies atop the house and quack three times. If that condition is not satisfied, the offer is not capable of acceptance.

3.5 Death of either party before acceptance

一方当事人死亡

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If the offeree knows of the offeror's death, he cannot accept.
If the offeree does not know that the offeror has died, the offer continues in existence and can be accepted provided that the contract is capable of being carried out by the offeror's personal representatives.
On the other hand, if the offeree dies before acceptance, the offer probably comes to an end.

4.Acceptance

4.1 Definition

Acceptance is an unqualified and unconditional assent to all the terms of the offer.

The contract comes into effect/being once the offeree has accepted the terms presented to them. After acceptance, the offeror cannot revoke/withdraw their offer and both parties will be bound by the terms that they have agreed.

4.2 Requirements of a valid acceptance:

- Mirror-image rule

镜像规则

Acceptance must be unqualified and unconditional, i.e. acceptance must conform to all the terms of an offer otherwise it is a rejection.

- **Communication**: acceptance must be communicated by the offeree to the offeror

4.3 Acceptance must be communicated:

Acceptance may be oral, written or by conduct. The offeror may call for communication of acceptance by specified means. Communications of acceptance by some other means equally expeditious generally constitutes a valid acceptance unless specified otherwise. If no method of communication is specified, the offeree may use any method.

However, the offeror may not insist that silence constitutes acceptance. In **Felthouse v Bindley 1862**, the claimant wrote to his nephew offering to buy the nephew's horse and stating "if I hear no more about him I consider it mine for £30 15s". The nephew did not reply. The court held that silence did not amount to acceptance. The reason for this rule is a practical one – the offeror should not be permitted to impose on the offeree an obligation to communicate rejection.

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4.4 When does acceptance take effect?

- Receipt rule

到达主义规则

The general rule is that acceptance is not effective until and unless it has been received by the offeror. The contract will be concluded **at the time and place of the receipt** of communication of acceptance.

- Postal rule

邮箱规则/投邮规则

There is however an important exception to the general rule where the so-called "postal rule" operates. This rule states that, where acceptance is by post, communication takes place as soon as the acceptance is posted: **Adams v Lindsell 1818** (D made an offer letter to C on 02/Sep/1817 requiring an answer "in course of post". It reached C on 05/Sep/1817. C immediately posted a letter of acceptance, which reached D on 09/Sep/1817. D expected a reply by 07/Sep/1817, so D assumed the absence of a reply by that date indicated non-acceptance and sold the goods to another buyer on 08/Sep/1817.).

Question: the contract between claimant and defendant was formed on_____?

This rule applies even if the post might never reach the offeror, i.e. the offeror may be unaware that a contract has been made: **Household Fire and Carriage Accident Insurance Co v Grant 1879** (Grant made an offer to apply for shares in a company. The company posted an acceptance letter of allotment to Grant but Grant never received it. The company went into liquidation and Grant was sued for the balance outstanding on his shares.).

Question: was Grant obligated to pay the balance outstanding on his shares?

Thus the postal rule can operate harshly on an offeror. Because of this there are various limits on its operation. The postal rule does not automatically apply simply because the post is used.

A number of conditions must be satisfied

- It must be **reasonable** to use the post;
- Contractual parties **must not have excluded** it;

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- The letter of acceptance must be **properly addressed and stamped**.

Why postal rule?

- This is more a rule of convenience, reflecting the fact that, while letters often get delayed or lost, if an offeror indicates that he is willing to negotiate by post, he is indicating his willingness to bear the risks involved.
- It is also easier to keep accurate records of the date and time at which a letter was posted than the moment when it was delivered, or the time when the offeror actually became aware of its existence.
- Hence, in the interests of certainty as to the time when the contract was formed, the time of acceptance should be the time of posting, especially as the offeror can always safeguard himself by stipulating in the offer that the acceptance must actually be communicated to him, in which case the postal rule

4.5 Instantaneous forms of electronic communication

- Communication is instantaneous means that it is as if **the parties were in each other's presence**. Thus, acceptance is effective when it is communicated to the offeror.
- What if electronic communication proves to be not instantaneous? [Entores vs. Miles Far East Corporation 1955]

5.Consideration

5.1 General rule about exchange of consideration

Each party to an agreement must give consideration to the other, otherwise the contract is not enforceable. If, however, the agreement is contained in a special form of written agreement known as a deed, the agreement is enforceable by either party, because English law regards a deed as equivalent to consideration.

5.2 Definition

A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other

It may also be defined as one party's act or forbearance (promised or actual) in exchange for the other party's act or forbearance (promised or actual).

5.3 Types of consideration

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Executory consideration 待履行的对价	A promise to do something in the future.	In a bilateral contract for the supply of goods whereby A promises to deliver goods to B at a future date and B promises to pay on delivery, both A and B's promises to do something in the future are executory consideration.
Executed consideration 已履行的对价	An actual or completed action.	In a unilateral offer where A offers a reward of £10,000 to anyone who can swim across the English Channel, A's promise to pay is an executory consideration, and anyone's act of swimming across the Channel is an executed consideration.
Past consideration 过去的行为	Something already completed before the promise is made is a past consideration, which does not constitute a valid consideration.	You save me from drowning and I then promise to pay you £10,000, your act of kindness is already completed before my promise, therefore is a past consideration, which is not a valid consideration for my promise to pay £10,000.

5.4 Rules for valid consideration

5.4.1 Consideration must pass from the promisee:

Only the party who provides consideration can enforce the contract: **Tweddle v Atkinson 1861**.

在 Tweddle v Atkinson 一案中，新娘之父向新郎之父许诺给新郎£200。新娘之父未及付款即去世， 其遗产管理人拒绝付款。新郎之父起诉要求强制执行。法院认为，新郎之父不得强制执行新娘之父的许诺，除非他提供了对价。

5.4.2 Consideration must not be past

- Anything which has been done before a promise in return is given is a past consideration, which is not sufficient (see below) to make the promise enforceable: **Re McArdle 1951**.

在 Re MrArdle 一案中，在母亲生前，其一子和媳妇与母亲同住。媳妇为婆婆（母亲）装修了婆婆（母亲）居住的房屋。其他诸子“考虑到她进行的装修行为”随后许诺补偿媳妇一笔钱。在母亲死后，其他诸子拒绝付款。

- When a request is made for a service, it may be treated as carrying an implied promise to pay, the later actual promise of payment is treated as fixing the amount to be paid: **Re Casey's Patents 1892**.

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在 Re Casey's Patents 一案中，一项专利的两名共有人请求凯西为他们进行专利推广。凯西苦苦地干了两年的活儿。在这之后，两名共有人“考虑到凯西辛勤的工作”，承诺给予凯西专利三分之一的所有权。之后，二人反悔，主张凯西针对他们的许诺仅提供了过去的对价，所以他们无须履行承诺。法院认为，在当事人请求他人为其服务时，法院将推定其做出请求时即承诺付款（给予对价），在这之后实际的承诺付款行为将被视为是在确定付款金额。

5.4.3 Consideration must be sufficient

◆ Definition

Consideration is sufficient if it has some legally identifiable value. In **White v Bluett 1853**, the court held that a son's promise to his father that he would cease complaining to him is not a sufficient consideration.

在 White v Bluett 一案中，父借给子一笔钱。父过世后，父的遗产管理人起诉子要求其还钱。子拒付并抗辩其父生前许诺“只要你别再抱怨我是怎么分财产的，借你的钱就不用还了”。法 院认为，子必须还钱，因为不抱怨并非充足的对价——这是一种纯粹虚无缥缈的利益。

◆ Pre-existing duty rule

- **Performance of an existing statutory duty is not sufficient: Collins v Godefroy 1831** (testifying in exchange of cash is merely a performance of an existing statutory duty). If the promisee does more than his existing duty, the more is a sufficient consideration: **Glasbrook Bros v Glamorgan CC** (providing extra police officers to protect against striking miners is a sufficient consideration).

原则：履行先前存在的成文法义务的行为，并非为充足的对价。在 Collins v Godefroy 一案中，高德佛请柯林斯为其出庭作证，并许诺付给柯林斯 6 基尼（旧货币单位）作为报酬。法院认为，根据成文法柯林斯本来就有义务出庭作证，所以柯林斯未就 6 基尼（高德佛的对价）提供充足的对价。

例外：如果一方当事人的行为超过了成文法的既定要求，那么超过的部分是充足的对价。在 Glasbrook Bros v Glamogan County Council 一案中，GB 要求警方提供更多警力保护其产业不受罢工者的侵害。GB 就此许诺支付警方费用，但随后拒付并主张警方所作所为未超过其先前存在的成文法义务。法院认为，GB 必须付款，因为警方提供更多警力的行为已经超过成文法所规定的义务，超过的部分是充足的对价。

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- **Performance of an existing contractual duty is not sufficient: Stilk v Myrick 1809** (the contract stated "to exert themselves to the utmost", two seamen deserted and the captain promised to divide the wages of the two among the remaining seamen). However, there are three exceptions to this rule

履行先前存在的约定（合同）义务的行为，并非为充足的对价。在 Stilk v Myrick 一案中，船长与水手之间的合同约定"（水手）必须尽全力工作"。航行过程中，两名水手弃船逃亡。 船长就此许诺只要剩余的水手可以将船开回家，船长会将两人的工资在剩余的水手之间均 分。法院认为，剩余的水手不得强制执行船长的许诺，因为他们仅做了本来根据合同就需要做的事情，所以他们并未提供充足对价。

  - If the promisee does more than his existing contractual duty, the more (i.e. extra service) is a sufficient consideration: **Hartley v Ponsonby1857** (the facts were similar to **Stilk v Myrick 1809** except that so many sailors deserted that the ship was rendered unseaworthy).

如果一方的行为超过了合同约定的义务，超过的部分是充足的对价：Hartley v Ponsonby 一案的事实和 Stilk v Myrick 相似，区别在于本案中太多的水手逃亡导致船只完全不适航。法院认为，剩余的水手将不适航的船开回港，他们的行为已经超过了先前合同的约定。所以，剩余的水手针对船长的许诺已经提供了充足的对价。因此，他们可以向船长主张其许诺的额外工资。

  - Performance of an existing contractual duty is sufficient to support a promise from a third party: **Shadwell v Shadwell 1860** (Nephew and Nicole were engaged and uncle promised to pay allowance if nephew were to proceed with the wedding).

履行先前约定义务的行为对于第三方的许诺而言是充足的对价：在 Shadwell v Shadwell 一案中，侄与艾伦定婚（在当时，婚约是合法有效的合同）。叔向侄许诺，如果继续与艾伦完婚，将给侄一大笔零用钱。法院认为，侄子与艾伦完婚的行为针对叔的许诺（第三方的许诺）而言是充足的对价。

  - Performance of existing contractual duty may be sufficient if this confers some benefit of a practical nature on the promisor: **Williams v Roffey Bros 1990**.

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履行先前约定的义务的行为如果可以给作出许诺的一方带来实质性利益，该行为将可能被认为是充足的对价：在 Williams v Roffey Bros 一案中，RB 与住房建设协会签署合同为后者装修 27 间公寓。合同约定，如果 RB 未能如期交付，将向住房建设协会支付罚金。RB 将合同的部分内容转包给威廉斯。开工后，威廉斯发现其定价过低（将导致其不能按期完成转包合同的内容）RB 提出只要威廉斯如期完工，将支付威廉斯一笔额外款项。威廉斯完工后，RB 拒绝付款并主张先前存在的义务规则。法院认为，RB 必须付款。虽然威廉斯仅在履行其约定的义务，但该行为却给 RB 带来了实质性的利益：其一，RB 无须支付罚金；其二，RB 无须聘请替代工人完全装修任务。

5.4.4 Consideration need not be adequate

- Definition

  It means that there is no requirement that each party's consideration should match in value.
- Adequacy test
  - It is presumed that each party is capable of serving his own interests, and the courts will not seek to weigh up the comparative value of the promises or acts exchanged.
  - Therefore, it is up to the contracting parties to assess the economic value of their bargains and, there is no remedy at law for someone who simply makes a poor bargain.

5.4.5 Consideration must be legal:

Performance of an act must be legal. The courts will not enforce payments for illegal acts.

5.4.6 Consideration must be possible:

Agreeing to perform an impossible act is not a basis for a binding contract.

6. Part-payment problem – waiver of existing rights

6.1 Definition

Payment of a smaller sum does not discharge the whole debt. In **the Pinnel's case**, the court stated "there was no possibility that a lesser sum can be a satisfaction to the creditor for a greater sum, but an additional gift of a horse, hawk or robe etc. in satisfaction of a greater sum can provide such accord and satisfaction."

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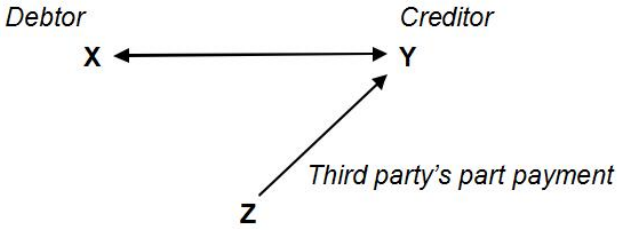
定义：债务的部分支付不可以解除债务的全部。在 Pinnel 一案中，法院认为，“欠款的部分支付不可能令人满意的解除债权人的债权全部，但一项额外的利益，如一匹马、一只鹰或一件袍子等，可以令人满意地解除更大金额的债权全部”。（这里的额外是指，债权人本无权请求该项利益。）

举例：甲（债务人）欠乙（债权人）1,000 磅，乙现在同意接受 500 磅并解除债务全部，即乙同时作出许诺放弃 500 磅债权。甲的债务部分支付不可以解除债务的全部，这是因为甲必须（就乙的许诺）提供其他对价，否则甲不得强制执行乙的许诺。

6.2 Exceptions:

- **Alternative consideration:** if debtor offers and creditor accepts anything creditor is not already entitled, the extra thing is sufficient consideration for the waiver.
  - Goods or performance of service instead of cash;
  - Payment at an earlier date.
- **Bargain between the creditors:** if X arranges with creditors that they will each accept part payment in full settlement, that is bargain between the creditors. X has given no consideration but he can hold the creditors individually to the agreed terms.
- **Third party payment:** if a third party, Z, offers part payment and Y agrees with Z to release X from Y's claim to the balance, this part payment discharges the debt from all concerned.



- Promissory estoppels

Definition: where one party has made to the other a promise which was intended to affect the legal relations between them, then, once the other party has relied on the promise and acted on it, the one who gave the promise is estopped from retracting his promise, even though it is not supported by any consideration but only his word: **Central London Property Trust Ltd v High Trees House Ltd 1947**.

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在 Central London Property Trust Ltd v High Trees House Ltd 一案中，1937 年，原告 CLPT 将一幢公寓租给了被告 HT，租金为£2,500/年，双方同意被告 HT 可以转租。因为随后二战爆发及德军的空袭，被告 HT 很难将公寓转租他人。1940 年，原告 CLPT 同意租金减半，被告 HT 也相应降低了其转租的价格。在战后，原告 CLPT 起诉要求被告 HT 支付战争期间（未付清的）一半租金。原告 CLPT 的请求被驳回。法院认为，被告 HT 诚实地相信

-Promise: one party has made a promise which is unsupported by consideration from the promisee.

-Alteration: the promise has altered the legal relations between the promisor and the promisee;

-Reliance: the promisee relied on the promise and acted upon it;

-Effect: the promisor is estopped from retracting his promise.

Rules for promissory estoppel

- **The doctrine only applies to a promise of waiver which is entirely voluntary:** the debtor must have acted fairly, and promissory estoppel only applies to a promise of waiver which is entirely voluntary: **D & C Builders v Rees 1966**.

该许诺必须是自愿做出的：在 D&C Builders v Rees 一案中，债务人提出，债权人必须接受部分付款（£300）并解除债务的全部（£482），否则债权人一个子儿都拿不到。债权人无奈下同意该安排，但在收到部分付款后立即起诉债务人要求支付尾款。法院认为，债务人必须支付未付清部分，因为债权人的放弃债务的许诺并非自愿做出。

- The doctrine is suspensive, not extinctive: the doctrine does not discharge the debtor forever, it only suspends the duty to pay. Once the conditions for the promise cease to exist and the promisor gives notice that he wants full payment, the duty to pay the full amount revives.

禁止反言仅可以暂时悬置但不可以灭除债权人的请求权：该原则并不永久解除债务人的付款义务，而只是暂时悬置付款义务。一旦许诺的前提灭失，且许诺一方通知付全款的，付全款的义务完全恢复。所以，在 Central London Property Trust Ltd v High Trees House Ltd 一案中，原告 CLPT 自战争结束后即可以开始主张全部租金，因为禁止反言仅具有悬置效力，并不灭除债权人的请求权。

- The doctrine is “a shield and not a sword”: you can use it as a defence when sued, but you cannot use it to bring an action for breach of contract: Combe v Combe 1951 (Mr and Mrs Combe were a married couple. Mr Combe promised Mrs Combe that he would pay her an annual maintenance. After they divorced, Ms Combe sued Mr Combe to enforce the promise. As there was no consideration in exchange for the promise, She argued promissory estoppels.
- The court held that promissory estoppels could not be applied, it was available

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only as a defence not a cause of action).

禁止反言仅可作为（被告一方当事人）被诉时的抗辩理由，而不得用为（原告）起诉时的诉讼理由。在 Combe v Combe 一案中，Combe 先生和 Combe 太太为夫妻。先生向太太承诺每年付其一笔生活费。在离婚后，Combe 女士起诉强制执行 Combe 先生的许诺。因为 Combe 女士未提供对价，Combe 女士主张禁止反言。法院认为，禁止反言在本案中不适用，因为禁止反言仅可以用作抗辩的理由而不得用作起诉的理由。
为什么？当事人可以引用禁止反言作为被诉时的抗辩理由，即不付全款的理由，因为允许作出许诺的一方许诺后又食言不公平。但是，当事人不得引用禁止反言去强制执行对方的许诺，因为这与对价的基本规则——“仅有提供对价的一方才可以强制执行对方的许诺”相互冲突。

7. Intention to create legal relations

7.1 Definition

An agreement will only become a legally binding contract if the parties intend this to be so. The common law makes the following rebuttable presumptions:
Where an agreement is made in a social, domestic or family context the law presumes that the parties do not intend the agreement to be legally bound: Balfour v Balfour 1919.
Where an agreement is made in a business or commercial context the law presumes that the parties do intend to be legally bound.

Balfour 先生将前往斯里兰卡工作。启程前，Balfour 先生向其太太许诺每月给£30。不久后，两人关系恶化。Balfour 太太向法院起诉要求 Balfour 支付许诺的每月£30。法院没有支持 Balfour 太太的诉讼请求，因为双方的签约背景为社交或内部非正式背景，且没有任何证据推翻这种推定。

7.2 Rebuttals

In both situations the appropriate presumption may be rebutted (changed, reversed, shown to be different) by evidence to the contrary.
Rebuttal evidence could be express words or surrounding circumstances

- Social, domestic or family context: Merritt v Merritt 1889.

Merritt 夫妇正在闹离婚。丈夫提议，如果妻子以个人财产还清婚房上的贷款，丈夫会将全部房屋所有权无偿转让给妻子个人。妻子还清贷款后，丈夫主张双方处于非正式缔约背景之下，所以其许诺不具有约束力，合同不成立。法院认为，丈夫的许诺可以被强制执行，因为夫妻二人正在闹离婚，该特殊的事实说明妻子的丈夫处于一个正常公平的交易背景之中。

- Commercial context: Rose and Frank v Crompton 1923.

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原被告签署经销协议，合同约定原告为被告经销商品，但合同中某条款约定“该协议不受任何国家的法律管辖”。法院认为，该协议无法律约束力，因为合同条款明确表示该合同不产生法律上约束力。

8. Privity of contract

8.1 Common law general rules

1.1 Obligation under the contract: only a party to a contract can have an obligation, or burden, under it.	**Dunlop v Selfridge 1915** Dunlop 为轮胎生产商，其与 Dew（批发商）签署协议，由 Dew 进行经销 Dunlop 的产品，合同明确约定 Dew 不得以低于 Dunlop 确定的牌价进行转售。Dew 将轮胎转售给 Selfridge 后，再由 Selfridge 进行零售轮胎，但是 Selfriddge 的零售价低于了 Dunlop 的牌价。
1.2 Benefits under the contract: only a party to a contract can benefit from the contract.	**Tweddle v Atkinson 1861** 在 Tweddle v Atkinson 一案中，新娘之父向新郎之父许诺给新郎£200。新娘之父未及付款即去世，其遗产管理人拒绝付款。新郎之父起诉要求强制执行。法院认为，新郎之父不得强制执行新娘之父的许诺，除非他提供了对价。法院同时认为，新郎也不得主张要求新娘之父兑现承诺， 因为新郎不是合同相对方之一。
1.3 Harshness: this is so even if both parties agree in the contract that there will be a benefit for a third party.	**Beswick v Beswick 1968** Peter Beswick（叔叔）将自己的产业全部转让给自己的侄子。作为对价，侄子承诺向叔叔每年支付一笔年金，叔叔百年后将尾款支付给婶 婶。叔叔死后，侄子拒绝向婶婶付款。婶婶向法院起诉后，法院认为： 婶婶不得以个人名义起诉，因为婶婶不是合同的相对方之一，但婶婶作为叔叔的（遗嘱指定的）继承人，婶婶可以以继承人的身份向侄子主张尾款。注意：该普通法规定已经被下述 1999 年《合同（第三方权利） 法》所否决。

8.2 The Contracts (Rights of Third Parties) Act 1999:

The Act provides that a third party will be able to enforce a benefit promised under a contract where a clause either expressly, or on a proper construction, confers such a benefit on them. (*Construction: the arrangement and connection of words or groups of words in a sentence, syntactical arrangement. Confer: to give.*) The third party must be expressly identified in the contract by name, but need not be in existence when the contract is entered into (e.g. unborn child, or a future spouse).

Rights or interests, once conferred to a third party, may not be varied or rescinded without their consent. The Act enables a third party to take advantage of exclusion clauses or limitation clauses.
Parties to a contract can exclude the operation of the Act if they wish to do so.
As against the third party, the promisor may **plead any defences** available to him or her under the contract. The Act is not applicable to employment contracts or a company's constitution.

8.3 Other exceptions to the doctrine of privity:

8.3.1 Statutory exception: Road Traffic Act 1988 allows the victim of road accident to recover compensation from insurer of driver whom he has sued.

8.3.2 Suing to obtain damages on behalf of another: where A contracts with B for the benefit of another party or a whole group, A can claim damages from B on their behalf: Jackson v Horizon Holidays 1975.

杰克逊为其及全家订购了豪华旅行住宿套餐。不过杰克逊全家实际得到的服务及住宿条件与套餐宣传单上的内容大相径庭。杰克逊要求被告赔偿时，被告仅同意赔偿杰克逊一人的损害赔偿，因为只有杰克逊作为合同相对方提供了对价。法院认为，既然杰克逊代表其全家签约，杰克逊也有权利代表全家要求支付损害赔偿金。

8.3.2 Bills of exchange and other negotiable instruments: the law allows the payee to transfer the right to recover the sums due to a third party by indorsing it (signing it and handing it over). Most cheques today are issued "Account Payee Only" which means that they cannot be indorsed and transferred to a third party.

8.3.3 Law of agency: under the rules of agency, a third party and the principal may enforce a contract which was concluded on its behalf by a duly authorized agent.

8.3.4 Law of assignment: at common law, the benefit of a contract could always be assigned, i.e. rights under the contract can be transferred by one party, the assignor, to another party, the assignee, subject to any necessary formalities, except where this had been excluded by the parties.

8.3.5 Collateral contracts: it means a subsidiary contract that induces a person to enter into a main contract:

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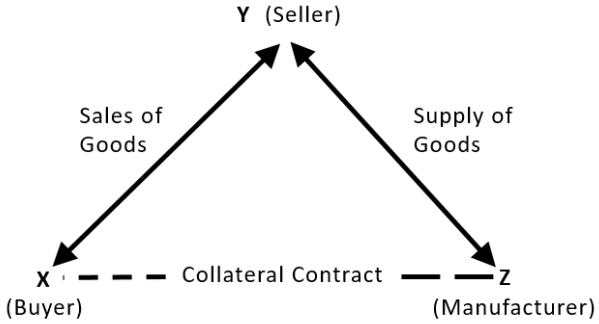
Shanklin Pier Ltd v Detel Products Ltd 1951.



For example, if X agrees to buy from Y goods made by Z, and does so on the strength of Z's assurance as to the high quality of the goods, X and Z may be held to have made a collateral contract consisting of Z's promise as to quality given in consideration of X's promise to enter into the main contract with Y.

In this situation, the courts will infer the existence of a contract without the formalities of offer and acceptance. (Formality: an established form or procedure that is required or conventional.)

Exam focus point **Nature of a contract/Agreement/Consideration/Intention to create legal relations/Privity of contract**

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Consideration
Invitation to treat
Termination of offers
Counter-offer
Revocation of an offer
Unilateral contract
Collateral contract
Executed consideration
Executory consideration
Past consideration
Promissory estoppel

2. 必做习题

(1) Chapter 3 Quiz: Q1-5
(2) OT Revision Questions Ch3: Elements of Contract Law: Q1-16

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Chapter 4 Content of contracts

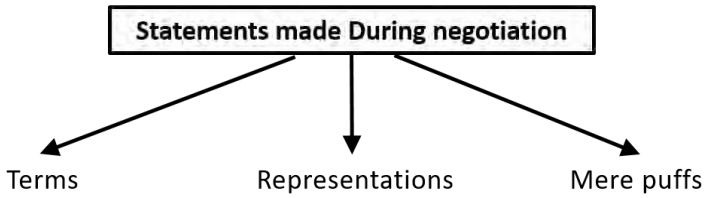
合同(Contract)，又称为契约、协议，是平等的当事人之间设立、变更、终止民事权利义务关系的协议。合同作为一种民事法律行为，是当事人协商一致的产物，是两个以上的意思表示相一致的协议。只有当事人所作出的意思表示合法，合同才具有法律约束力。依法成立的合同从成立之日起生效，具有法律约束力 。通过学习本章节，你会了解到合同的条款和免责条款的相关内容。

Learning outcomes

- Distinguish terms from mere representations.
- Define the various contractual terms.
- Explain the control over terms in consumer contracts and the operation of exclusion clauses in non-consumer contracts.

1. Terms and representations

1.1 Background of the distinction



The particular provisions of a contract are called terms, whereas a representation is something that induces the formation of a contract but which does not become a term of contract.

1.2 The importance of the distinction

Importance: remedies

If a term is broken, the innocent party may sue for breach of contract, whereas if a mere representation is broken, the party misled can claim misrepresentation.

1.3 Distinguishing between terms and representations:

Timing of statement:	The court will consider **when the statement was made** to assess whether it was designed as a contract term or merely as an incidental statement.

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Importance of statement:	The court will also look at **the importance** the recipient of the information attached to it.
Special knowledge of statement maker:	If the statement is made by a person with **special knowledge**, it is more likely to be treated as a contract term.

2. Sources of terms

2.1 Express terms:

An express term is a term expressly agreed by the parties to a contract during the course of negotiations.

2.2 Implied terms

Certain terms will be deemed to form part of a contract even though not expressly mentioned.

2.3 Terms implied by custom

The parties may enter into a contract subject to customs of their trade. The court stated in **Hutton v Warren 1836** that "in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts matters with respect to which they are silent."

2.4 Terms implied by parties' past course of dealing:

If two parties have regularly conducted business on certain terms, the terms may be assumed to be the same for each contract made, if not expressly agreed to the contrary. The parties must have dealt on numerous occasions and been aware of the terms purported to be implied. In **Hollier v Rambler Motor Ltd 1972**, four occasions over five years was held to be insufficient.

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原告将其轿车拖至被告的车库进行维修。修理过程中，被告公司员工因过失引发火灾，原告的轿车被烧毁。事发前五年内原告先后 4 次在被告处修车，每次原告均签署了一张确认单，确认单中规定“我司不对存放在公司场所内的车辆因火灾造成的损失负责”。被告主张，虽然原告此次未签署确 认单，但过去的交易行为已经使得有关免责条款进入到此次订立的合同之内，成为合同的条款，被告进一步据此免除违约赔偿责任。法院认为，五年中仅有 4 次交易并不足以构成持续的交易行为。

2.5 Terms implied by statute law:

Terms may be implied by statute, e.g. section 12 of the Sale of Goods Act 1979 incorporate into the contract a term that the seller either has legal title to the property to be sold or that he will have title at the time when property is to pass.

2.6 Terms implied by the courts:

Obviousness: terms may be implied by the courts if such terms are so **obvious** that the parties did not bother to express them: **The Moorcock 1889** (The court implied a term that the wharf must be safe for the purpose of the contract.).

经营者将其所有码头租赁给船主。船主将退潮时将船只驶入码头后船只搁浅，船体受到严重破坏。法院审理本案时，在合同中默视增加了码头必须可以供船只安全使用这一默视条款。

Necessary incidents: the court may also imply terms because the court believes such a term to be a **necessary incident** of this type of contract: **Liverpool City Council v Irwin 1977** (Tenants withheld rents alleging the landlord had breached implied terms to maintain lifts and stairs in good order, there was no formal tenancy agreement though. The court held that tenants could only occupy the building with access to stairs or lifts, so terms needed to be implied on these matters.).

被告因欠缴房租被房东诉至法院。被告辩称，不付房租的原因是因为电梯楼梯年久失修不堪使 用。原告房东主张，双方之间并没有正式租赁合同，也未约定房东有义务维修电梯楼梯。法院认为，将电梯和楼梯保持在可使用状态应为合同的必要条款。

3.Classification of contract terms

3.1 Background

Up until 50 years ago all terms were classified as either being a condition or being a warranty. Now there is a third possibility - innominate terms.

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	Definition	Remedies for breach
Condition	A condition is a **vital term**, going to the **root** of the contract.	Breach of a condition entitles the injured party to decide to treat the contract as discharged and/or to claim damages.
Warranty	A warranty is a term **subsidiary** to the main purpose of the contract.	Breach of warranty only entitles the injured party to claim damages.

3.2 Distinguishing between conditions and warranties

3.2.1 Legislation

Statute often identifies implied terms specifically as either conditions or warranties, e.g. section12 of the SGA 1979.

3.2.2 Case law

Case law may also identify particular types of clauses as conditions

Poussard v Spiers	Bettini v Gye
Poussard 是某知名女高音，与被告约定在 1874 年 11 月 28 日参加由被告组织的歌剧会。Poussard 直到 12 月 4 日方才赶到剧场，被告因此拒绝原告继续参加演出。Poussard 随后将被告诉至法院。	Bettini 是某知名男高音，就于 1875 年 3 月 30 日在伦敦举行的演出与 Gye 签署合同。合同约定，Bettini 必须提前 6 天到达伦敦进行排练，但 Bettini 直到 3 月 28 日才赶到伦敦。Gye 因此拒绝让 Bettini 参加演出，并视其未到场参加排练为对合同条件的违约。Bettini 随后将 Gye 诉至法院。
法院认为，女高音未能参加演出将构成对于合同条件的违反。	法院认为，男高音未能参加演出前的排练仅将构成对于合同保证的违反。

3.2.3 Intention of the parties

The court will look at the intention of the parties at the time the contract was made.

3.3 Innominate terms

3.3.1 Definition

An innominate term is an **intermediate** term which cannot be defined as either a “condition” or a “warranty”.

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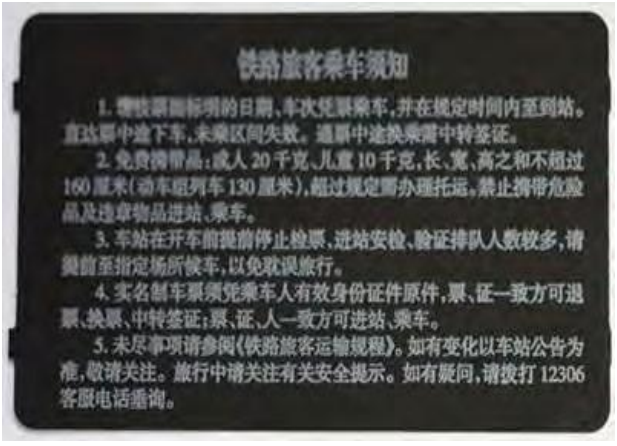
3.3.2 Remedies for breach

- **If the effect of the breach is serious:** if the breach deprives the injured party of **substantially the whole benefit** of the contract, the injured party is entitled to discharge the contract and/or to claim damages.
- **If the effect of the breach is trivial:** the injured party can only claim damages.

3.3.3 Illustration: Hong Kong Fir Shipping Co Ltd v Kawasaki Kisa Kaisha Ltd 1962.

被告自原告处租赁船只，租期 24 个月。合同约定，原告必须在租赁期内保证船只“适合用于货运服务”（“in every way fitted for ordinary cargo service”）。由于引擎老化及水手的不当处理，船只由利物浦出航时已耽误 5 个月，在到达大阪后又进行了约 2 个月整修，被告因此决定解除合同。原告认为被告无权解除合同，故将被告诉至法院。

4.Exclusion clauses



《铁路旅客运输规程》第一百零一十四条 在运送期间因承运人过错给旅客造成身体损害或随身携带品损失时，身体损害赔偿金的最高限额为人民币 40000 元，随身携带品赔偿金的最高限额 800 元。经承运人证明事故是由承运人和旅客或托运人的共同过错所至，应根据各自过错的程度分别承担责任。

4.1 Definition

An exclusion clause is a clause in a contract which purports (claims) to exclude liability (arising from breach of contract) altogether or to restrict it by limiting damages or by imposing other onerous conditions.

4.2 Incorporation rule

Exclusion clauses must be incorporated into a contract before they have legal

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effect. It can be incorporated by signature, notice, or previous dealings.

4.2.1 Signature

Obtaining signature is enough. The party who renders his or her signature on a written contract is deemed to have agreed to all terms stated in it, even though he or she did not read or understand them: **L'Estrange v Graucob 1939.**

咖啡店经营者（买方）与卖方签署合同购买一台自动售卖机，合同内容中约定了免责条款。买方在签字时既没有看合同，也不知道其中有约定免责条款。问题：该免责条款是否为买卖合同的一部分（即合同内容之一）？

4.2.2 Notice

- **Reasonableness:** reasonable steps must be taken to bring the clause to the attention of the other party. What are 'reasonable steps' depends on circumstances:**Thompson v LMS Railway 1930**.

  Thompson大字不识一字，前往火车站购火车票一张。火车票正面书有“具体条款条件请见反面”，火车票反面书有“更多条款条件请参见火车站时刻表”。这些条款条件中规定了免责条款，免除公司就人身损害所应承担的责任。问题：该免责条款是否为原被告合同的内容之一？法院认为，被告已经采取合理步骤向原告提示免责条款的存在，所以该免责条款是合同的一部分。

- **Timing of notice:** the giving of notice must occur before or at the time of making the contract: **Olley vMarlborough Court 1949.**

  原告 Olley 在被告酒店处办理住宿手续后，在酒店房间内发现免责条款，规定旅客在酒店丢失任何财物，酒店概不予以赔偿。问题：该免责条款是否为合同的内容之一？

4.2.3 Previous dealing

There must be a consistent course of dealings: **Spurling v Bradshaw 1956**.

在 Spurling v Bradshaw 一案中，原告的货物存放于被告的仓库内。双方签署仓储合同后，被告向原告送达一纸文件，文件条款包括一条免责条款，规定存储期间的任何财产损失，被告概不负责。经法院查明，原被告之间在过去 10 年中，有着持续的交易行为，且原告每次交易均收到类似的文件。法院认为，尽管原告是在合同签署后才收到该文件，该文件仍可以通过以往持续的交易进入合同，成为合同的一部分。

4.2.4 Red-hand rule for onerous terms:

Where a term is particularly unusual and onerous it should be highlighted; failure to do so means that it does not become incorporated in to the contract:

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Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd 1988.

被告自原告处租用 47 块幻灯片，合同中有一段小字规定被告如未能按期返还，则每块幻灯片每天需向原告支付£5 及增值税。被告迟了 14 天，原告起诉要求支付全额滞纳金。

4.3 The contra proferentem rule:

4.3.1 Definition

Liability can only be excluded or restricted by clear words. In deciding what an exclusion clause means, the court will interpret any ambiguity against the person who relies on the exclusion clause.

4.3.2 Illustration

In **Hollier v Rambler Motors 1972**, the exclusion clause on the invoice stated that "company is not responsible for **damage caused by fire** to customers' cars on the premises", the court held that it should be interpreted against the garage in the narrower sense so that it did not give exemption from fire damage due to negligence. If a person wishes successfully to exclude or limit liability for loss caused by negligence the courts require that the word "negligence", or an accepted synonym for it, should be included.

原告将他的轿车拖至被告的车库进行维修。在修理过程中，被告员工过失引发火灾，原告的轿车被烧毁。事发前五年内，原告先后 4 次在被告处修车，每次原告均签署了一张确认单，确认单中规定"本公司不对存放在公司场所内的车辆因火灾造成的损失负责"。法院认为，即使该免责条款是合同一部分，在解释该免责条款的适用范围时，由于该条款中有不确定模棱两可之处，法院必须做出对被告不利的解释，并限制被告将该条款用于免除因过失引发火灾造成的损失。法院同时认为，如果合同一方试图免除因过失而造成的损失，当事人必须在合同条款中写明将免除因"过失"造成的损失或过失的同义词。

4.3.3 Dilemma:

Despite the common law rules designed to mitigate the potential harshness of exemption clauses, there is no doubt that a properly drafted exclusion clause can cover any breach of contract:

Photo Productions v Securicor 1980.

在 Photo Productions v Securicor 一案中，原被告签署合同，约定由被告向原告提供安保服务，包括在夜间进行巡夜。被告员工在巡夜时，故意引发火灾烧毁了原告厂房及仓库。在诉讼中，被告引用合同中的免

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责条款“在任何情况下，Securicor（被告）均不对其员工的任何故意和过失行为负责”免除所有违约责任。法院认为，该条款是合同一部分，措辞足够清楚，完全覆盖了已经发生的损失。但是，该案件带来的进退两难的问题是，只要一方提供的免责条款足够清晰非常完整，那么根据相关普通法的规定，该提供免责条款的一方是可以免责其违约责任的。

5.Unfair Contract Terms Act 1977 (“UCTA”)

5.1 Application

- In general, the Act only applies to Business-to-Business contract. Business-to-Consumer contracts are regulated by the Consumer Rights Act 2015.
- Therefore, the Act takes an “at will” approach to contracts between private individuals.
- The Act is not applicable to certain contracts, e.g. insurance contracts or contracts relating to the transfer of an interest in land.

5.2 Main provisions of the UCTA

The UCTA 1977 aims to protect **parties** when they enter contracts by stating that some exclusion clauses are void, and considering whether others are reasonable.

- Clauses exempting liability for **DEATH** or **PERSONAL INJURY** caused by negligence are **VOID**.
- Clauses in sale of goods or hire purchase of goods contracts excluding the condition that the seller has a right to sell are VOID.
- Clauses exempting liability for **OTHER LOSS** (i.e. damage to property and economic loss) caused by negligence are **VOID UNLESS IT CAN BE SHOWN TO BE REASONABLE**.
- Clauses exempting liability for breach of contract are **VOID UNLESS IT CAN BE SHOWN TO BE REASONABLE**.

5.3 The reasonableness test

- Burden of proving reasonableness is on the party seeking to rely on the clause.
- The Court will consider all the surrounding circumstances: **Green (RW) v Cade 1978** (defective seed potatoes).
- 买方自卖方处购入一批土豆苗，合同约定“买方关于合同标的物的质量异议必须在收货后3天内提出，否则卖方一概不予赔偿”。问题：该免责条款是否合理？

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- In assessing whether a term is unreasonable, the court will consider the following:
  - The relative strength of the parties' bargaining positions.
  - Whether any inducement (for example, a reduced price) was offered to the customer to persuade him to accept limitation of his rights
  - Whether the customer knew or ought to have known of the existence and extent of the exclusion clause.
  - Whether the goods is custom-made for the customer.
  - Whether it is reasonable to exclude liabilities for failure to comply a condition.
  - Whether the parties were able to insure against loss or damage the exclusion clause intended to exclude:_
  - **St Albans City Council v International Computers Ltd 1995**.关于合同一方以保险方式转嫁免责条款试图免除的损害赔偿的能力：在 St Albans City Council v International Computers Ltd 一案中，原告自被告购入一套软件，合同约定被告所提供的软件有质量问题，被告损害赔偿的上限为£100,000。在软件使用过程中，软件的质量问题实际给原告带来£1,300,000 的经济损失。在案件审理过程中，法院查明，被告购买的产品质量保险的最大赔偿限额为£50,000,000。问题：基于上述背景，该免责条款是否合理？

6.The Consumer Rights Act 2015

6.1 Application

The Act only applies to Business-to-Consumer contracts. It provides that terms in Business-to-Consumer contracts will only be binding on the consumer if they are "fair".

6.2 Fairness

The Act states: "a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."

The Act further requires

Language of the terms must be plain, intelligible and prominent.

Courts will consider whether an average well-informed, ordinary pedestrian consumer with circumspection would have been aware the term.

The following 2 types of terms are exempt from the rule on fairness:

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- Price;
- Subject matter of the contact.

6.3 Courts consider the following factors in determining whether a term is fair:

- Nature of contract
- Contracting circumstances
- Whether it disadvantaged consumers' interest

6.4 Scope of consumers:

A business will be acting as a consumer if it engages in an activity which is merely incidental to the business, the activity will not be in the course of the business unless it is an integral part and carried on with a degree of regularity.

Exam focus point **Terms and representations/Sources of terms/Classification of contract terms/Exclusion clauses**

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Express terms

Implied terms

Conditions

Warranties

Innominate term

Exclusion clause

2. 必做习题

(1) Chapter 4 Quiz: Q1-5

(2) OT Revision Questions Ch4: Contract Law-Terms: Q1-15

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Chapter 5 Breach of contract and remedies

合同违约是指违反合同债务的行为，亦称为合同债务不履行。这里的合同债务，既包括当事人在合同中约定的义务，又包括法律直接规定的义务，还包括根据法律原则和精神的要求，当事人所必须遵守的义务。

Learning outcomes

- Explain the ways in which a contract may be discharged.
- Explain the meaning and effect of breach of contract.
- Explain the rules relating to the award of damages.
- Analyse the equitable remedies for breach of contract.

1. Discharge of contract

Discharge means **the contract comes to an end**. Contracts may be discharged in the following ways

- **Agreement.** Where both parties agree to terminate the contract and the agreement is supported by consideration.
- **Frustration.** A contract, possible to perform when it is formed, will be discharged for frustration if it subsequently becomes impossible to perform due to circumstances not attributable to either party.
- **Performance.** Where all contract terms are performed, the contract will be discharged.
- **Breach of contract.** Where one party fails to meet his contractual obligations.

2. Breach of contract

2.1 Definition

A party is said to be in breach of contract where, without lawful excuse, he does not perform his contractual obligations precisely.

Lawful excuses for non-performance include

- A **force majeure** that makes performance impossible.
- One party to the contract has tendered performance but this has been **rejected**.
- The other party has made it **impossible** for him to perform.
- The contract has been discharged through **frustration**.
- The parties have **permitted** non-performance.

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A breach of contract itself will not discharge the contract **AUTOMATICALLY**. It will give rise to a secondary obligation to pay damages to the innocent party, and the primary obligation to perform the contract's terms remains. However, if the party in default has repudiated the contract, the innocent party may choose to discharge the contract and sue for remedies.

2.2 Types of breach

2.2.1 Repudiatory breach

Repudiation means rejection. At contract law, repudiation occurs where a contracting party's words or actions indicate an intention not to perform the contract in the future.

Repudiatory breach occurs

where one party indicates, either by words or by conduct, that he does not intend to perform his contractual obligations	Where one party commits a breach of condition	Where one party commits a breach of innominate terms which has serious consequences for the innocent party.

When there is a repudiatory breach, **the innocent party** has a **choice**

- He may choose to treat the contract as repudiated by the other, recover damages and treat himself as being discharged from his primary obligations under the contract.
- He has the right not to accept the breach and carry on with his performance in order to claim the full price under the contract once the due date for performance arrives.

2.2.2 Actual and anticipatory breach

Actual breach may be non-performance or defective performance or some statement in the contract turning out to be untrue. It usually occurs on the due date for performance.

Anticipatory breach occurs where one party, prior to the due date for performance, shows an intention (expressly or impliedly) to repudiate the contract.

Express anticipatory breach: it occurs where a party actually states that he will not be performing his contractual obligations: **Hochster v De La Tour 1853** (The defendant agreed in April to employ the claimant as his courier for a foreign tour commencing on June 1. On May 11 he wrote to him saying that he had changed his mind about the tour and therefore would not require a courier).

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被告在四月同意聘请原告作为其六月一日开始的外国游的导游。在五月十一日，被告写信通知原告，“主意已改不需要你的服务了”。被告的行为构成明示预期违约，原告有权立即解除合同并要求被告支付损害赔偿金。

Implied anticipatory breach: it occurs where a party carries out some acts which make performance impossible: **Omnium Enterprises v Sutherland 1919** (The defendant agreed to hire a ship to the claimant. Before the hire period was due to commence, the defendant sold the ship).

被告同意将船租给原告。在租期开始前，被告将船售出（给第三方）。法院认为，被告售船的行为构成默示预期违约，原告可以立即起诉主张损害赔偿，无须继续等到租期开始之时。

2.2.3 Remedies for anticipatory breach

- When anticipatory breach takes place the innocent party can treat the contract as discharged and sue for damages **immediately** on receipt of the notification of the other party's intention to repudiate the contract, **without waiting** for the actual contractual date of performance: **Hochster v De La Tour 1853**.
- Alternatively, the injured party may **at his option allow the contract to continue** until there is an actual breach. In the latter instance, he is entitled to perform the contract and claim the agreed contract price:
  White & Carter v McGregor 1962 (The claimant agreed to advertise the defendant's business for three years on plates attached to litter bins. The defendant cancelled the contract on the same day that it was made. The claimant nevertheless manufactured and displayed the plates as originally agreed, and claimed the full amount due under the contract. The court held that the claimant was entitled to do so.).
  原告同意为被告提供 3 年广告服务。被告当日签约当日就取消了合同（违约）。原告继续按约定履行了合同，并向被告主张合同约定的应付价款。法院认为，原告有权继续履行合同，因为被告的预期违约行为本身并不导致合同终止。

3. Common law remedies

3.1 Damages

Damages are a common law remedy intended to **restore** the party who has suffered loss to **the same position** he would have been in if the contract had been performed.

The purpose of damages is **compensatory**. It is not designed to punish the contract-breaker by depriving him of his ill-gotten gains: **Surrey County Council v**

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Bredero Homes (SCC sold some land to BH and in the contract of sale BH covenanted to build no more than 72 houses on the plot. In deliberate breach of contract BH built 77 houses. SCC claimed damages equal to the profit BH had made on the extra houses. The court held that since SCC had not suffered any loss, the damages recoverable had to be nominal.).
SCC 将一块地出售给 BH，合同约定 BH 在地上建造的房屋不得超过 72 幢，但 BH 故意违约建造了 77 幢房屋。SCC 在向法院诉讼向 BH 主张违约责任时，要求 BH 赔偿相当于 BH 在 5 间房上所取得利润的损害赔偿金。法院认为，因为 SCC 未受到任何实际损失，所以损害赔偿金将是一个象征性的数字。

3.2 Liquidated damages and penalty clauses

3.2.1 Background

To avoid later complicated calculation of loss, or disputes over damages payable, the parties usually include up-front in their contract a formula for determining the damages payable for a breach of contract.

3.2.2 Definitions

- **Liquidated:** it means settled or determined by the contracting parties.
- **Liquidated damages:** a sum fixed in advance by the parties to a contract as the amount to be paid in the event of a breach.
- **Unliquidated damages:** they are damages fixed by the court.

3.2.3 Distinction

	Definition	Key Distinction	Enforceability
Liquidated Damages Clauses 违约金条款	A contractual provision that determines in advance the measure of damages if a party breaches the agreement.	They are a **genuine pre-estimate** of the expected loss on breach.	They are **enforceable**.
Penalty Clauses 罚金条款	It is a contractual provision that assesses against a defaulting party an **excessive** monetary charge **unrelated to actual harm** as a result of the breach.	They are in the nature of a **threat** and the amount is often **very large** in relation to the expected loss.	They will be held **void** and the court will proceed to assess unliquidated damages.

3.3 Assessment of unliquidated damages:

3.3.1 Remoteness of damage – the rule in Hadley v Baxendale 1854:

In Hadley v Baxendale 1854, the claimants owned a mill whose engine parts had

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broken. They contracted with the defendant for the transport of the broken engine to engineers to serve as a pattern for making a new one. The delivery was delayed and the mill was out of action for a longer period. The defendant did not know that the mill would be idle during this interval, and he was only informed that he had to transport a broken engine. The claimants sued for loss of profits of the mill during the period of delay.

The court held that although the delay in delivery was the direct cause of the stoppage of the mill for an unnecessarily long time, the claim must fail because the defendant did not know that the mill would be idle until the new engine was delivered. Also, it was not natural consequence of delay in transport of a broken engine that the mill would be out of action. The miller (claimant) might have a spare.

The court's rulings in **Hadley v Baxendale 1854** may be summarised as follows:

Types of Losses	Definition	Recoverability
Normal losses	Losses that arise naturally from the breach	Recoverable
Abnormal losses	Losses that arise outside the usual course of events	Recoverable **only if** the losses should have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.

Thus everything depends on the knowledge which the defendant should have had and actually did have at the time the contract was made. A good application of the rule in **Hadley v Baxendale 1854** may be found in **Victoria Laundry v Newman Industries**.

在 Victoria Laundry v Newman Industries 一案中，原告自被告处订购锅炉，被告违反合同约定推迟了 5 个月才发货。原告在违约诉讼中要求被告赔偿：一，未能正常使用锅炉期间的日常业务损失； 二，未能正常使用锅炉期间，原告曾有机会签署两个获利颇丰的大额订单，但因硬件设施不过关未能签约而受到的经济损失。法院查明，在签署合同之时，双方均没有预见到原告可以得到上述两个大额订单。问题：哪项赔偿主张将得到法院支持？

3.4 Measure of damages:

The **measure** of damages is that which will compensate for the losses incurred.

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	Definition	Cases
General rule - expectation interest: this is aimed at protecting the **expectation interest** of the claimant. 赔偿受害方预期利益	The amount of damages is calculated on an expectation (interest) basis – the amount awarded is what is needed to put the claimant in the position he would have achieved if the contract had been performed.	In **Hawkins v McGee 1929**, the court held that the amount of damages should be equal to the difference between the value of what Hawkins was promised to receive and what he in fact received, as well as any incidental losses he incurred as a result of the breach.
Exception - reliance interest: this compensates for **wasted expenditure**. 赔偿受害方信赖利益	When the claimant's expectation interest under the contract may not be correctly estimated, the claimant may alternatively seek to have his reliance interest protected. The amount awarded is what is needed to put the claimant in the position he would have been in had he not relied on the contract.	In **Anglia Television v Reed 1972**, the claimants engaged an actor in a film. The actor pulled out at the last moment and the project was abandoned. Damages were awarded for the wasted preparatory expenditure.

3.5 Common law restrictions on the measure of damages:

Non-financial loss	Non-financial loss, e.g. mental distress generally are not recoverable.
Mitigation of loss	**Definition**: the principle requires that a claimant, after an injury or breach of contract, to make reasonable efforts to alleviate the effects of the injury or breach. If the defendant can show that the claimant failed to mitigate damage (arising from breach of contract), the claimant's recovery may be reduced. **Burden of proof**: the burden of proving the claimant's failure rests on the defendant.
Nominal damages	If there is no actual loss, the **damages** will be **nominal: Surrey CC v Bredero Homes**.

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Market price rule 市价规则	The measure of damages for **breaches for the sale of goods** is usually made in relation to the **Market Price** of the goods. For example, when a seller defaults by not selling the agreed goods, the buyer can go into the market and purchase equivalent goods instead and recover from the seller **any additional cost** incurred as damages. Whereas if the buyer defaults by failing to purchase the goods, the seller can sell the goods on the open market and recover any **loss of income** incurred as damages.
Cost of cure 治疗（违约造成缺陷）的成本	Where there has been a breach and the claimant is seeking to be put in the position he would have been in if the contract had been performed, by **seeking a sum of money to "cure" the defect which constituted the breach**, s/he may be denied the cost of cure if it is **wholly disproportionate** to losses arising from the breach. 针对违约行为，原告将向被告主张一笔损害赔偿金(cost of cure)去治疗违约所造成的缺陷，并试图将自己恢复到合同正常履行可以达到的状态。如果原告主张的治疗（违约造成缺陷）的成本大大超过违约造成的损失，原告的主张可能会被法院驳回。 In **Ruxley Electronics and Construction Ltd v Forsyth 1995**, the claimant discovered that the swimming pool he had ordered to be built was shallower than specified. He sued the defendant, the builder, for damages, including the cost of demolition of the pool and construction of a new one. During trial, it was found that the pool was perfectly serviceable and safe to dive. The House of Lords held that the expenditure involved in rectifying the breach was out of all proportion to the benefit of such rectification. The claimant was awarded a small sum to cover loss of amenity. 在 Ruxley Electronics and Construction Ltd v Forsyth 一案中，原告发现其订购的游泳池比合同约定要浅，原告因此起诉被告建造商，要求其赔偿包括拆除游泳池及重新建造新游泳池的成本作为损害赔偿金。庭审过程中，法院查明该游泳池完全可以使用，法院因此认为，（原告主张的）治疗违约的成本大大超出了治疗违约所得到的收益，所以仅判决给予原告小额赔偿，作为对其造成的不便的赔偿。

3.6 Other common law remedies

3.6.1 Action for the price

要求支付货款

- **Definition:** a simple action for the price to recover the agreed sum should be brought if breach of contract is failure to pay the contractually agreed price due under the contract.
- For an action for the price to stand, two conditions must be present:
  - Property must have passed from seller to buyer;
  - The price must have become due.

3.6.2 Quantum meruit

支付合理报酬

A quantum meruit is a common law remedy. As an alternative to damages, it literally means "how much it is worth". It is a measure of the value of contractual work which has been performed.

Quantum meruit is likely to be sought where one party has already performed part of his obligations under the contract and the other party then repudiates the contract.

The purpose of quantum meruit is restitutory – to restore the claimant to the position he would have been in if the contract had never been made.

4. Equitable remedies

4.1 Specific performance

继续履行

It is an order of the court directing a contractual party to perform an obligation (to do something) under the contract. It is an equitable remedy awarded at the discretion of the court when damages would not be an adequate remedy.

Its principal use is in contracts for the sale of land but may also be used to compel a sale of tangible and intangible property. It will never be used in the case of employment or other contracts involving personal services.

4.2 Injunction

法庭禁令

It is an order of the court requiring the defendant to observe a negative restriction stated in the contract. An injunction may be made to enforce a contract of personal service for which an order of specific performance would be refused.

4.3 Mareva or "freezing" injunctions

财产保全

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Under section 37 of the Supreme Court Act 1981, if the claimant can convince the court that he has a good case and that there is a danger of the defendant's assets being exported or dissipated, he may be awarded an injunction which restricts the defendant's dealing with the assets.

4.4 Rescission

撤销合同

Rescinding a contract means that the contract is cancelled and the parties are restored to their pre- contractual conditions. Its primary usage is where the contract is voidable (e.g. because of fraud, duress, mistake of facts etc.).

The following conditions must be met:

- It must be possible for each party to be restored to the pre-contract condition.
- If an innocent party has acquired rights in the subject matter of the contract, then the original transaction may not be rescinded.
- The injured party must exercise her right to rescind within a reasonable time.
- Where a person affirms a contract expressly or by conduct it may not then be rescinded.

Exam focus point
Discharge of contract/Breach of contract/Common law remedies/Equitable remedies

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1. 重点词汇

Discharge of contract
Breach of contract
Repudiatory breach
Anticipatory breach
Remedies for breach of contract
Damages
Remoteness of damages
Measure of damages
Liquidated damages
Penalties
Specific performance
Injunction
Rescission

2. 必做习题

(1) Chapter 5 Quiz: Q1-5
(2) OT Revision Questions Ch5: Contract Law-Breach: Q1-21

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Chapter 6 The law of torts and professional negligence

侵权行为是一种行为人实施的过错行为，是一种侵害他人权益的行为，因此侵权行为也可以称为一种侵害行为，这可以从词源学上得到一定程度的印证。在英语中，侵权行为一词称作tort，来源于拉丁文tortus，原意是指扭曲和弯曲，它也用于将某人的手臂或腿砍掉的情形,以后该词逐渐演化为错误Wrong的意思。

Learning outcomes

- Explain the meaning of tort.
- Explain the tort of 'passing off'.
- Explain the tort of negligence including the duty of care and its breach
- Explain the meaning of causality and remoteness of damage.
- Discuss defences to actions in negligence.

1. Types of tort

1.1 Tort

A tort is a civil wrong that causes damage to a person and the injured person sues in a civil court for compensation or an injunction.

1.2 Types of tort

1.2.1 Passing-off

Definition: passing-off is the use of a name, mark or description by one business that misleads a consumer to believe that their business is that of another:

Ewing v Buttercup Margarine Company 1917.

Three elements must be proved

- **Act:** that the defendant's business is using a name (or selling products) which is similar to that of the claimant.
- **Confusion:** the general public is misled into believing that the defendant's business (or products) is theclaimant's business (or products).
- **Damage:** that this has caused damage to the claimant's business, or will probably do so.

Remedies: if the tort is proved, the court may issue an **injunction** stopping the defendant from using the name or selling the products. It may also award **damages**.

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1.2.2 Negligence

Negligence arises when one person suffers damage or injury through the negligent act (or omission to act) of another person.

To succeed in an action for negligence the claimant must prove that:

- **Duty of care:** the defendant had a **duty of care** to avoid causing injury, damage or loss.
- **Breach:** there was a **breach** of that duty by the defendant.
- **Loss:** in consequence the claimant suffered **injury**, **damage** or **loss**.
- **Causation:** the loss must be **caused** by the defendant's actions.

2. Tort of negligence

2.1 Duty of care

At common law, a person had a duty of care to avoid causing injury, damage or loss to others. That is to say, an injured party may claim damages from another who owed him a duty of care and harmed him through a breach of that duty.

2.1.1 The position before 1932

Prior to the landmark case of **Donoghue v Stevenson 1932**, the question of whether or not a duty of care exists in any situation was generally decided by the courts on a case by case basis, with each new case setting a precedent based on its own particular facts.

This means if an earlier case had found a duty of care existed, the courts will impose a duty of care in subsequent cases of similar facts. However, the obverse was also true that where in previous cases the courts had found no duty of care existed, the courts will be bound to follow the precedents and would not find a duty of care.

2.1.2 The neighbour principle established by Donoghue v Stevenson 1932

In **Donoghue v Stevenson 1932**, the court held that we owe a duty of care to our neighbours…that "you are to love your neighbour becomes in law you must not injure your neighbour", and "a person must take reasonable care to avoid acts or omissions which he reasonably foresees would be likely to injure his neighbour".

The neighbour principle has two limbs

Who is our neighbour?	They are "persons who are so closely and directly affected by my act…."

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What are we supposed to do to our neighbour?	We should contemplate the consequences of our acts or omissions to a reasonable extent so as to avoid causing injury, damage or loss to our neighbours.

2.1.3 Two-stage test established by Anns' case

The neighbour principle has been refined over the years since the snail made its celebrated appearance. For any duty of care to exist, it was stated in **Anns v Merton London Borough Council 1977**, that two stages must be tested:

- Is there "sufficient relationship of proximity based upon foreseeability", such that the harm suffered was reasonably foreseeable?
- And secondly, should the duty be restricted or limited for reasons of economic, social or public policy? (This means a duty of care is not owed to complete strangers. The court states that even if we foresee something bad will happen to strangers close to us, we do not have a duty to help or prevent those dangers, unless the dangers are created or influenced by us.)

2.1.4 Three stage test established by Caparo Industries plc v Dickman 1990

The latest stage in the doctrine's development came in **Caparo Industries plc v Dickman 1990**, which established a **three stage test** for establishing a duty of care that still stands:

- Was the harm reasonably foreseeable?
- Was there a relationship of proximity between the parties?
- Considering the circumstances, is it fair, just and reasonable to impose a duty of care?

2.2 Breach of duty of care

2.2.1 Definition

Having established how a duty of care may arise, it is necessary to then consider whether there has been a breach of the duty of care – the fault element of negligence. It involves showing that the defendant's conduct has fallen below the standard of care required in all the circumstances.

What was the standard of care expected of the defendant? In other words, how ought the defendant to have behaved?

The approach taken by the courts is to compare the standard of behaviour of a hypothetical reasonable man with the behaviour of the defendant. Thus if the defendant acted less skillfully or prudently than a reasonable man would do will result in the fault element being established.

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2.2.2 Factors in determining whether a duty of care has been breached

What is reasonable would depend objectively on the circumstances. The courts have identified the following factors in deciding whether a duty of care has been breached:

Probability of injury	It is presumed that a reasonable man takes greater precautions when the risk of injury is high. Therefore when the risk is higher the defendant must do more to meet his duty: **Glasgow Corporation v. Taylor 1992** (A local authority was held to be negligent when children ate poisonous berries in a park. A warning notice was not considered to be sufficient to protect children.) 法院推定合理第三人在损害发生的可能性越高时应更加注意自己行为可能有的影响：Glasgow Corporation v Taylor （小孩摘食有毒的浆果后中毒，地方管理部门被法院认定有过错，因为树上的警示标志不足以保护孩童）。
Seriousness of the risk	Where the risk to the vulnerable or weak is high, the level of care required is raised: **Paris v Stepney Borough Council 1951** (Claimant, the employee, had already lost one eye. During the course of his employment, a chip of metal flew into his eye and blinded him; the court held that there was a higher standard of care owed to the employee because an injury to his remaining eye would blind him). 这是指某些行为的风险对弱者的影响更加严重，所以当事人对他们的注意义务应随之提高：Paris v Stepney Borough Council（用人单位要对工作中受伤失明的独眼员工负责）。
Issues of practicality and cost	It is not always reasonable to ensure all possible precautions are taken. This means if the cost to eliminate the danger far exceeds the risk of it occurring, it is likely that defendants will be found not have breached their duty if they do not fully implement all precautions: **Latimer v AEC Ltd 1952** (the claimant had suffered injury when he slipped on a floor that had become contaminated with oil during a recent flood; the Court held that the only way the injury could be prevented was to close the plant, and there was no evidence that a “reasonable employer” would have taken such a drastic step, the claim was dismissed). 如果排除风险所需的成本或损失大大超过风险本身，法院有可能认定被告如果未能采取相应排除风险的措施并非未尽到注意义

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	务：Latimer v AEC Ltd （法院认为，唯一可以避免伤害发生的办法就是关闭工厂。但这种办法并不合理，所以被告被认定无须承担责任）。
Common practice	Where an individual can prove their actions were in line with common practice or custom it is likely that they would have met their duty of care. This is unless the common practice itself is found to be negligent.
Social benefit	Where an action is of some benefit to society, defendants may be protected from liability even if their actions create risk.
Professions and skill	Persons who hold themselves out to possess a particular skill, e.g. a qualified lawyer or accountant, should be judged on what a reasonable person possessing the same skill would do in the situation rather than that of a reasonable man: Nettleship v Weston 1971 (The standard of care for a learner driver would be the usual standard applied to all drivers: that of an experienced and skilled driver. The court held that lack of training or the peculiarities of the defendant are not relevant.). 如果被告拥有特殊的技能，例如被告为执业律师或会计师，那么被告的注意义务应达到合理的具有该技能的人的标准。在 Nettleship v Weston 一案中，法院认定每一名专业人士（本案中为驾车人）均应像一名有经验有技能的专业人士一样作出行为，法院将不考虑特定当事人的教育经历或个人因素。

2.2.3 Res ipsa loquitur:

- **Definition**

  It can be defined as **"the thing speaks for itself"**. If an accident occurs which appears to be most likely caused by negligence, the court may apply this maxim and **infer** negligence from mere proof of the facts. The burden of proof is then reversed and the defendant must prove that s/he was not negligent.

- **The claimant must demonstrate the following to rely on this principle**
  - The thing which caused the injury was **under the management and control** of the defendant;
  - The accident was such as would not occur if those in control used **proper care**.
- **Illustration**

Mahon v Osborne 1939 (A surgeon was required to prove that leaving a swab inside a patient after an operation was not negligent).

2.3 Loss

2.3.1 Definition

The claimant must prove that he has suffered actual loss, injury, damage or harm as a consequence of another's actions.

2.3.2 Types of loss:

- **Personal injury:** e.g. physical or mental injury to the body, death.
- **Damage to property:** e.g. a wrecked car.
- **Economic loss**
  - **Definition:** it refers to financial loss and damage suffered by a person that can only be seen in balance sheets rather than physical injury to the person or destruction of property.
  - Types of economic loss
    - **Consequential economic loss:** loss that arises directly from some physical damage or injury,
      e.g. loss of earning from having your arm cut off.
    - **Pure economic loss:** loss that arises in an indeterminate (i.e. not definitely or precisely determined or fixed) amount, for an indeterminate time, to an indeterminate class.

Importance of this distinction: pure economic loss is rarely recoverable, e.g. Spartan Steel and Alloys Ltd v Martin & Co. Ltd.

2.4 Causation

2.4.1 Definition

The loss must have been caused by the defendant's negligent act.

2.4.2 The "but for" test

The claimant must prove that if it was not "but for" the other's actions they would not have suffered damage. The claimant is unable to claim for any harm that would have happened to them anyway.

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2.4.3 Multiple causes – the "substantial cause" test

Where there are a number of possible causes of injury including the negligent act, the courts must decide on the facts if the negligent act was the one that **most likely** caused the injury or the act was the substantial cause of the injury.

2.4.4 Novus actus interveniens

- **Definition:** where loss is caused by an intervening act which **effectively breaks** the chain of events, the defendant is not liable for the loss.
- There are three types of intervening act that will break the chain of causation
  - **Act of the claimant:** the actions of the claimant themselves may break the chain of causation. However, where the claimant's act is reasonable and in the ordinary course of things, an act by the claimant will not break the chain.
  - **Act of a third party:** where a third party intervenes in the course of events the defendant will normally only be liable for damage until the intervention.
  - **Natural events:** the chain of causality is not automatically broken due to an intervening natural event. In situations where the breach puts the claimant at risk of additional damage caused by a natural event, the chain will not be broken. However, where the natural event is unforeseeable, the chain will be broken.

2.4.5 Remoteness of damage

- **Definition:** even where causation is proved, a negligence claim can still fail if the damage caused is "too remote".
- **The Wagon Mound 1961**: **the test of reasonable foresight** developed out of the Wagon Mound case states that liability is limited to damage that a reasonable man could have foreseen. The court thus held pollution subsequent to the oil leak was foreseeable, fire was not. 在 Wagon Mound 一案中，法院认为即使因果关系成立，损害赔偿的请求仍可能被驳回，如果该损伤损害过于遥远，损害赔偿责任将限定在当事人可以合理预见的范畴之内。在该案中，因漏油造成的污染损失是可以被预见的，而火灾不可以，故火灾造成的财产、经济损失不予赔偿。
- **Jolley v London Borough of Sutton 2000**: the defendant should have removed a boat which had been dumped two years previously; a

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teenage boy was injured while playing in it; the court held that this does not mean the **exact event** must be foreseen in detail, just that the **eventual outcome** is foreseeable, and the remoteness test can be passed **if some harm is foreseeable** even if the exact nature of injuries could not be foreseeable. The defendant was thus held liable. 在 Jolley v London Borough of Sutton 一案中，一名男孩试图用千斤顶将一条废弃的船只撑起来并进行修理，千斤顶未能支撑住已经腐坏的木质船体，船体砸在男孩身上造成严重人身损坏。被告辩称，他们不能预见该男孩会试图用千斤顶支撑起船体并试图修好船只。但法院认为，当事人只要可以预见某些损失损害将可能发生，损害的遥远性测试即可通过，即使损害的具体性质无法被预见。被告因此被判决承担赔偿责任。

2.5 Defences

2.5.1 Volenti non fit injuria:

This defence means that if the claimant, knowing the risk of injury, freely consented to run the risk, then the defendant will be able to escape liability entirely – volenti is a complete defence.

The consent must be without any pressure. In **Smith v Charles Baker & Sons1891,** quarryman was held not to have consented merely because they continued to work on quarry floor whilst a crane was swinging nets of stones over their heads Also, an awareness of the risk is not sufficient to establish consent, for this defence to be successful the defendant must prove that the claimant was fully informed of the risks and that they consented to them.

2.5.2 Contributory negligence:

A court may reduce the amount of damages paid to the claimant if the defendant establishes that they contributed to their own injury or loss, this is known as contributory negligence.

The percentage reduced is calculated according to what is established as the claimant's share of the blame. In **Sayers v Harlow UDC 1958,** the claimant was injured whilst trying to climb out of a public toilet cubicle that had a defective lock; the court held that the claimant had contributed to her injuries by the method by which she had tried to climb out.

3. Vicarious liability

At common law, employers are vicariously liable for their employees' negligence if the employees were acting on their employer's business at the time of the incident. The

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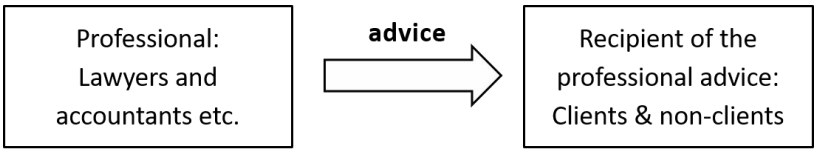
acts employees carried out must be closely connected with the nature of their work, and therefore it is just and fair to hold the employer liable.

4. Professional negligence

4.1 Background



Cases involving negligent misstatement are usually concerned with establishing whether or not a duty arises. This area of law has developed through the operation of precedents, which took a step-by-step approach and gradually refined the neighbour principle in **Donoghue v Stevenson 1932.**

4.2 Development of the common law

Common Law	Whether a duty of care would arise?
Before 1963 – "contractual or fiduciary relationship"	Before 1963, it was held that any liability for careless statements was limited in scope and depended upon the existence of a **contractual** or **fiduciary** relationship between the Parties: **Candler v Crane, Christmas & Co 1951**. (A fiduciary is a person who is required to act for the benefit of another person. For example, the corporate officer is a fiduciary to the corporation.) 投资者信赖了由审计人员审计的公司财务报表并决定向公司进行投资。被审计的报表实际存在错报并误导了投资者，投资者在公司破产解散后丧失了全部投资。投资者随后起诉了审计人员追究他们的职业过失责任。

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1963 – "special relationship"	• The House of Lords decided (as obiter dicta) in **Hedley Byrne & Co Ltd v Heller and Partners Ltd 1963** that, professionals would be liable to those who had a special relationship with them. • 在 HB 准备和某客户进行交易之前，HB 曾向 HP 咨询客户当时的财务状况，HP 为该客户的开户银行。HP 回复"在本行不承担责任的前提下…（该客户）就其日常运作而言信用状况良好"。HB 信赖了上述声明后并与客户进行交易。客户随后破产，HB 损失了£17,000，随后起诉 HP 追究他们的职业过失责任。 • A **special relationship** exists where a professional person advises a known person who relies on the statement for a known purpose. • The court, at the time, did not extend the duty of care to those users who the advisor might merely **foresee as a possible user** of the statement.
The Caparo Industries plc v Dickman and others1990 – Three stage test	• **Ratio decidendi** · Auditors do not owe a duty of care to the public at large or shareholders trying to increase shareholding. Auditors only owe a duty of care to the company, i.e. shareholders of the company as a whole, not to any individual shareholder. 法院认定，审计人员不对社会公众或被审计公司内试图增持的股东负有注意义务。审计人员对公司负有注意义务，即对全体股东负责，而不对某一名 或某些股东负责。 · The purpose the audited accounts was to assess the performance of managers so the general meeting may decide whether the company should appoint or remove directors. It was not for the purpose of making investment decisions. 对公司财务报表进行审计的目的在于（帮助全体股东）评估管理者的业绩。在此基础上，股东会可以决定是否任免董事。审计报告并无帮助投资者评估投资价值之目的。 • Whether a duty of care exists, the court will consider the following · **Foreseeability**: whether the professional could reasonably foresee that his or her opinions would be relied by the claimant(s). · **Proximity**: there will be proximity, i.e. a special relationship – close and direct relations between the advisor and recipient, if the statement is made to a known person or persons for a known purpose and the recipient uses the statement for that purpose. · **Fairness**: is it fair, just and equitable to ask the professional advisor to be responsible for what s/he says for the claimant.

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The Law since Caparo	There are occasions where the courts held auditors liable for what they had stated to the shareholders of the audited company, as in the **ADT Ltd v Binder Hamlyn 1995**. The key distinction was that the advisor in the ADT Ltd case assumed liability for its statements at a meeting held to discuss the audited results. 在某些情形中，审计人员可能需要对被审计公司的股东及潜在投资者负有注意义务。本案与 Caparo 一案的区别在于，ADT 一案中的审计人员单独在投资者公司的董事会上就特定的问题发表了意见（因此，两者之间具有特殊的关系）。

Exam focus point
Types of tort/Tort of negligence/Vicarious liability/Professional negligence

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

The tort of negligence

Duty of care

Contributory negligence

Vicarious liability

Professional negligence

2. 必做习题

(1) Chapter 2 Quiz: Q1-5

(2) OT Revision Questions Ch2: Tort Law: Q1-19

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PART C EMPLOYMENT LAW

Chapter 7 Contract of employment

劳动法作为维护人权、体现人本关怀的一项基本法律，在西方甚至被称为第二宪法。其内容主要包括：劳动者的主要权利和义务；劳动就业方针政策及录用职工的规定；劳动合同的订立、变更与解除程序的规定；集体合同的签订与执行办法；工作时间与休息时间制度；劳动报酬制度；劳动卫生和安全技术规程等。

Learning outcomes

- Distinguish between employees and the self-employed.
- Explain the nature of the contract of employment and common law.
- Explain statutory duties placed on the employer and employee.

1. TWO TYPES OF WORKERS

1.1 Definition

Employee	Independent contractor
• A worker who works under a **contract of service**, which is also called an employment contract. • S/he works under the direction of another in return for a salary.	• A worker who works under a **contract for services**, s/he is frequently referred to as a self-employed. • An independent contractor is his or her own master, bound to do the job s/he has contracted to do but having discretion as to how to do it.

1.2 Importance of the distinction

	Employees	Independent contractors
Employment Rights Act 1996 protection	There is legislation which confers protection and benefits upon employees, including: • minimum periods of notice	Employment protection is not available for contractors.

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	• remedies for Unfair dismissal and redundancy	
Insolvency of employer	Employee rank as **preferential creditors** re a certain amount of unpaid wages.	Independent contractors rank as **ordinary unsecured creditors**.
Tax	Deductions must be made by an employer for income tax under PAYE from salary paid to its employees.	The self-employed are taxed under self-assessment for income tax and are directly responsible to the HM Revenue and Customs for tax due.
Vicarious Liability	Employers are generally vicariously liable for tortious acts of employees, committed in the course of employment	The general rule is that a person who hires an independent contractor is not liable for his negligence.
Implied terms	There are rights and duties implied by both statute and common law for employers and employees.	These implied rights and duties do not apply to such an extent to a contract for services.

1.3 How to make the distinction – common law tests

The control test	The court will consider whether the employer has control over the way in which the employee performs his duties. If the employer controls not only when and where the work is done but also how it is done, the person concerned is an employee. This test, however, is inappropriate for skilled workers.
The integration test	Under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, a man's work, although done for the business, is not integrated into it, but is only accessory to it.

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The multiple test (aka. Economic reality test)	Here the court takes into account, not simply control and integration, but all the surrounding circumstances such as: • **Provision of tools**: does the worker use his or her own tools and equipment or does the employer provide them. ; • **Regularity of hours**: does the worker go to work on a routine, such as on a 9-5 schedule? • **Regularity of payment**: does the worker receive remuneration on a set timeline or only occasionally? • **Number of employers**: working for a number of different people certainly points to the fact of self-employment. • **Employer's discretion**: does the employer have the power to select or appoint its employees? • **Ability to delegate**: generally, employees have a fiduciary duty to render personal services, i.e. they cannot delegate their works assigned by employers; • **Degree of financial risk (profit motive)**: self-employed usually has stronger profit motives; • **Opinion of the parties**: how the parties, i.e. workers and their bosses, think of their work relationship is only one of the factors, and an indecisive one, the court will take into account all surrounding circumstances.

2. EMPLOYMENT CONTRACT

Employer **Employee**

2.1 Formation of employment contracts

There are no particular legal rules relating to the commencement of employment. ⇒ The rules are the same as those for making ordinary contracts. So, what are they?

2.2 Requirement for written particulars

Within **two (2) months** of the beginning of the employment, the employer must give to an employee a **written statement of prescribed particulars of his**

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employment. (**Prescribe:** to lay down a rule, to dictate; **particulars:** an individual fact, point, circumstance, or detail)

The statement should identify issues such as:

- names of employer and employee;
- commencement date of employment;
- whether any previous service would be regarded as the employee's continuous period of employment;
- pay;
- hours of work;
- holiday and holiday pay etc.
- Sick leave and sick pay entitlement
- Pensions and pension schemes
- Length of notice of termination to be given on either side
- The title of the job which the employee is employed to do

A **'principal statement'**, which must include the **first six items** above and the **title** of the job, must be provided. If the employee has a **written contract of employment** covering these points and has been given a copy, it is not necessary to provide him or her with separate written particulars.

Under Employment Act 2002, the written particulars must also contain details of **disciplinary procedures** and **grievance procedures** or reference to where they can be found

If the employer fails to comply with these requirements the employee may apply to an employment tribunal for a declaration of what the terms should be.

2.3 Common law duties

2.3.1 Common law duties of employees

- **Personal service:** the contract of employment is of a personal nature, so that the employee may not delegate his/her duties without the employer's express or implied consent.
- **Reasonable care and skill:** the employee must be reasonably careful and skillful in the performance of his work.
- **Obedience:** the employee has a duty to obey the employer's **lawful** and **reasonable** instructions.
- **Fidelity: this means a duty of good faith and honesty.**

Not to profit: the employee has a duty not to profit from his or her job capacities apart from the agreed-on remuneration: **Sinclair v Neighbour 1967** (An employee secretly borrowed from the shop till. He repaid the money the

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next day. Has the employee breached the duty of honesty? Is the breach serious?).

- **Not to compete** with their employer's business.
- **Not to disclose** to others or use confidential information for your own purposes.

- **Mutual co-operation:** the employee must cooperate with the employer's instructions in a reasonable manner.

2.3.2 Common law duties of employers

- **Pay:** to pay **reasonable** remuneration;
- **Indemnification:** to indemnify employee for **properly** incurred expenses;
- **Notice:** to give **reasonable** notice of termination of employment;
- **Workplace:** to provide a **reasonably** safe and healthy workplace;
- **Mutual respect (aka. Mutual trust and confidence):** the employer must also act **reasonably** and respect the employees. Examples where this duty have been breached include
  A director calling their secretary 'an intolerable bitch on a Monday morning';
  Failure to investigate a sexual harassment claim
- **Reference:** there is **no common law** implied duty to give a reference;
- **Work:** there is **no common law duty** to provide work, though the employer might have a duty to provide work (if)
  If the contract contemplates developments of skills, e.g. apprenticeship ;
  If employee is remunerated on a piece work or commission basis, a reasonable amount of work must be provided.

2.4 Continuous employment

Many rights given to employees under the Employment Rights Act 1996 are only available if an employee has a specified period of continuous employment. In order for continuous employment to be broken the employee must fail to work for the employer for at least one week.

- Weeks when an employee is off work on account of pregnancy, childbirth, **service in the armed forces**, sickness or injury, time between unfair dismissal and an employee being reinstated count as continuous employment. (Source: www.gov.uk)
- If an employee is on strike this does not break the continuity of employment, but the period on strike does not count as continuous employment. Example: an employee works for 20 days, but for 5 of

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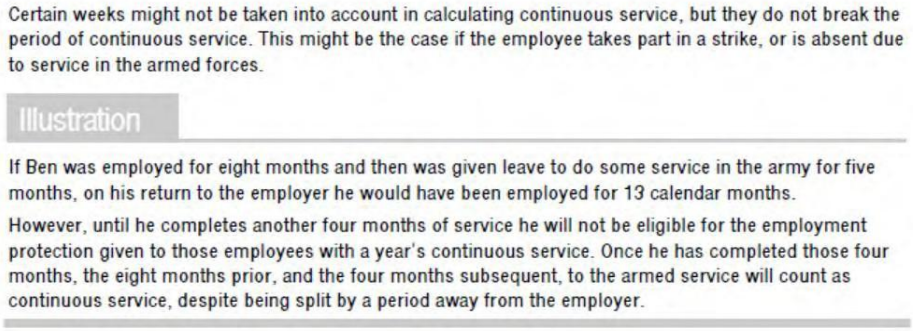
these days the employee is on strike - this only counts as 15 days' continuous employment.

- It is presumed that a person's employment is continuous unless the contrary is proved.
- Transfer of undertaking:

  Section 218 ERA 1996 provides that employment with the old employer will count as continuous employment with the new employer, and there will be no break in the continuity of the employment, if a trade or business is transferred from one employer to another employer as a going concern.

  Source: p138-139, BBP F4 Textbook



Certain weeks might not be taken into account in calculating continuous service, but they do not break the period of continuous service. This might be the case if the employee takes part in a strike, or is absent due to service in the armed forces.

Illustration

If Ben was employed for eight months and then was given leave to do some service in the army for five months, on his return to the employer he would have been employed for 13 calendar months.

However, until he completes another four months of service he will not be eligible for the employment protection given to those employees with a year's continuous service. Once he has completed those four months, the eight months prior, and the four months subsequent, to the armed service will count as continuous service, despite being split by a period away from the employer.

Source: https://www.gov.uk/continuous-employment-what-it-is

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Continuous employment

Continuous employment is when an employee has worked for one employer without a break.

The length of continuous employment gives certain rights to employees, including:

- maternity pay
- flexible working requests
- redundancy pay

Continuous employment is calculated from the first day of work.

What's included

Some breaks in normal employment still count towards a continuous employment period. These are:

- sickness, maternity, paternity, parental or adoption leave
- annual leave
- employment overseas with the same company
- time between unfair dismissal and an employee being reinstated
- when an employee moves between associated employers
- military service, eg with a reserve force
- temporary lay-offs
- employer lockouts
- when a business is transferred from one employer to another
- when a corporate body gets taken over by another because of a legal change

Strikes

Days when employees are on strike don't count towards continuous employment, but this isn't treated as a break.

> **Example**
>
> An employee works for 20 days, but for 5 of these days the employee is on strike - this only counts as 15 days' continuous employment.

Exam focus point

Two Types of Workers/Employment Contract

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

The control test

The integration test

The multiple test (aka. Economic reality test)

2. 必做习题

(1) Chapter 6 Quiz: Q1-5

(2) OT Revision Questions Ch6: Employment Law: Q1-11

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Chapter 8 Dismissal and redundancy

解雇往往是组织主导型的，由于员工个人方面的原因导致的雇佣关系的解除。解雇原因可能由于工作绩效不合要求、行为不当、违反规定、业务水平不合格、不服从等员工个人方面的原因。或者不服从。这时常是解雇的原因，虽然它比其他解雇原因更难证明。

Learning outcomes

- Termination of employment by notice.
- Types of dismissal.
- Legal remedies for dismissed employees.
- Wrongful dismissal.
- Unfair dismissal.
- Wrongful dismissal or unfair dismissal.
- Redundancy.

1. Termination of employment by notice

Either party can terminate an employment contract by notice. If the employer gives notices of termination, this will constitute **dismissal,** and if the employee gives notice, this will constitute resignation.

The minimum notice period is normally stated in the employment contract. However, whatever the contract may specify, the period of notice given must not be less than the statutory minimum.

Under Section 86 of the Employment Rights Act, the minimum notice period depends upon **the length of service**

- Employees employed for less than 1 month are not entitled to notice under the ERA 1996, but will be entitled to reasonable notice under the common law.
- Employees employed for 1 month or more, but less than 2 years, are entitled to no less than 1 week's notice.
- Employees employed for over 2 years, but less than 12 years, are entitled to an additional week's notice for every additional year of their employment (for example, an employee with nine years' service would be entitled to nine weeks' notice.)
- Employees employed for over 12 years are entitled to no less than 12 weeks' notice.

If the employee gives notice, the minimum period required is 1 week if he has been employed for at least 1 month.

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These constitute the minimum notice periods, the parties are free to provide for a longer period if they so wish. If they do so, the minimum notice period will be the longer period contained in the employment contract.

2. Types of dismissal

2.1 Actual dismissal:

- **Dismissal with notice,** e.g. an employer might give an employee notice that he is being dismissed.
- **Dismissal without notice,** e.g. "you are fired, get out!", also called summary dismissal.

2.2 Deemed dismissal

The employee's fixed term of employment comes to an end and the employer does not renew it.

2.3 Constructive dismissal

- **General rule:** in principle, an employee who resigns cannot sue for wrongful dismissal, unfair dismissal or redundancy.
- **Exception:** constructive dismissal occurs where employer has committed a serious breach of contract such that the employee is entitled to treat the contract as discharged. If the employee chooses to treat
  the contract as at an end by resigning, he has been constructively dismissed.
- To establish a constructive dismissal, an employee must show that
  - his employer has committed a **serious breach** of contract;
  - the employee left because of the breach;
  - the employee has not **"waived"** the breach: if the employee does not resign in the event of a breach by the employer, the employee will be deemed to have accepted the breach and waived any rights.
- **Remedies:** the employee may claim for remedies as available for unfair dismissal or wrongful dismissal.

3. Legal remedies for dismissed employees

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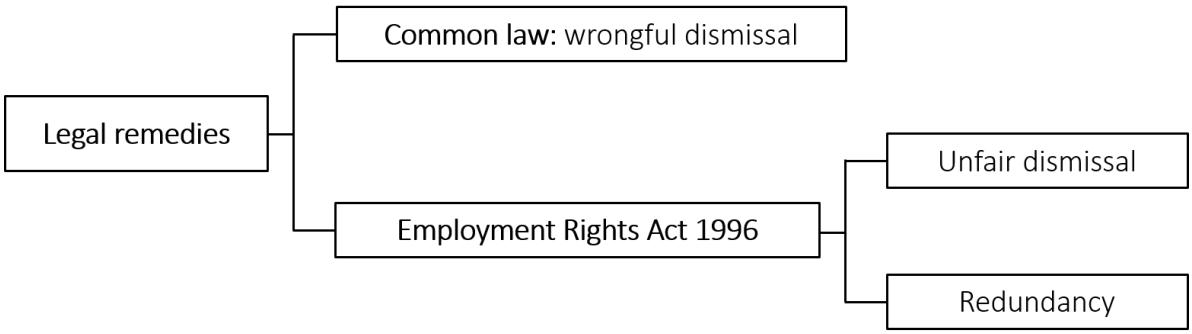

4. Wrongful dismissal

An action for wrongful dismissal is an action for breach of contract. The employee does not need to prove that the employer acted unreasonably, but only that the contract was in fact breached.

Examples of such breaches could include:

- Terminating the employee's contract without providing sufficient notice;
- Terminating a fixed-term contract before the expiry of the contract; and
- Summarily dismissing an employee without sufficient justification (e.g. dishonesty, gross misconduct, willful disobedience of a lawful order).

As a common law remedy for breach of contract, the dismissed employee may sue either in a civil court, or in an employment tribunal (where the claim is less than £25,000), for damages measured on the basis of loss of earnings.

5. Unfair dismissal

Under the Employment Rights Act 1996, certain qualified employees have a statutory right not to be unfairly dismissed. Breach of that right allows an employee to claim compensation from an employment tribunal.

The Employment Rights Act 1996 is highly **prescriptive** - employees **must follow** clearly set-out statutory procedural rules. Otherwise their claims will be **dismissed**.

5.1 Eligibility	Before an individual can claim for unfair dismissal, he will need to meet three eligibility requirements: • He must have been an "employee" of the employer • He must have been continuously employed by the employer for no less than two years • He must have been dismissed (actual, deemed or constructive)
5.2 Time limit	Section 111 ERA 1996 requires a claim for unfair dismissal to be brought within 3 months of the effective date of termination.

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5.3 Grievance procedure	• Before taking legal actions, the employee must set out his grievance in writing and send it to the employer. • Failure to go through this procedure or causing undue delays by either party will be taken into account by employment tribunals in calculating any award.
5.4 Automatically unfair reasons	A dismissal for certain reasons is automatically regarded as unfair: • that the employee took some form of family leave (e.g. maternity or parental leave); • that the employee carried out activities designed to prevent or reduce risks to health and safety; • that the employee refused to work hours that contravened the statute law; • that the employee brought proceedings against the employer to enforce statutory rights (e.g. written particulars, minimum wages etc.); • that the employee made a "protected disclosure" (i.e. whistleblowing). • that the employee did not disclose the existence of a spent conviction; • that the employee is involved in trade union activities or because he is a member of a trade union. • that the employee was dismissed on transfer of an undertaking. #Dismissal on grounds of **pregnancy** or **pregnancy-related illness** is automatically unfair, **regardless of length of service as** it amounts to **gender discrimination**.

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5.5 Rebuttal by the employer： If the employer wishes to defend the action, burden of proof is on the employer to prove otherwise.	• **The employer must prove that he had a reason for the dismissal: Devis v Atkins** (Mr. Devis was dismissed. Later the employer discovered that Mr. Devis had been embezzling funds). • **The employer must prove that his reason related to one or more of the following 5 fair reasons as set out in the ERA 1996** ▪ **Capability or qualification:** the employee did not have the capability or the qualification to do the work for which he was employed. ▪ **Misconduct:** any act of **gross** misconduct will be regarded as a fair reason for the dismissal. ▪ **Redundancy:** when an employee is made redundant, he has different rights under the law on redundancy. However, the employee may claim remedies for unfair dismissal if he can show that **he was unfairly selected for redundancy.** ▪ **Legality of continued employment:** if the continued employment of the person dismissed would be a breach of some statutory provision (e.g. if the employee was a driver who was banned from driving,). ▪ Retirement. • **Automatically fair reasons for the dismissal:** there are several reasons designated as being automatically fair by statute law: ▪ **Taking part in unofficial industrial action:** an employee who strikes or refuses to work normally may be fairly dismissed unless the industrial action has been lawfully organised. ▪ B**eing a threat to national security (to be certified by the government).**

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5.6 Reasonableness of employer	Once the employer has proved a fair reason, the employment tribunal is required to review the circumstances and to decide whether it was reasonable to dismiss the employee for the reasons given. **The tribunal will consider:** • Was the reason given sufficiently serious? • Has the correct procedure been applied? · Grievance process; · Prior warnings about the likely dismissal. • Did the employer take all the circumstances into consideration? • What would a reasonable employer have done?

5.7 Remedies for unfair dismissal	• **Reinstatement:** it means arranging the employee to return to the same job without any break of continuity. • **Re-engagement:** it means that the employee is given new employment with the employer on terms specified in the order. • **Monetary award** ▪ **Basic award** · **Duration of service, weekly pay and age** 1½ weeks' pay for each complete year aged 41, plus; 1 week's pay for each complete year aged 22 < 41, plus; ½ week's pay for each complete year aged < 22. · **Statutory caps** **Duration of service:** maximum of 20 year's service; **Weekly pay:** maximum of GBP 450 per week. ▪ **Compensatory award:** the amount of the compensatory award shall be such amount as the tribunal considers **just and equitable** in all the circumstances. The maximum compensatory award which can be awarded is currently £74 200. ▪ **Punitive additional award:** non-compliance with re-instatement or re- engagement order; inadmissible reasons and discrimination. • **The tribunal may reduce the amount of the award in any of the following circumstances** If the employee contributed in some way to his own

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	dismissal. If the employee has unreasonably refused an offer of reinstatement.

6. Wrongful dismissal or unfair dismissal?

In general, a dismissed employee would prefer to sue for the statutory remedy of unfair dismissal rather than for wrongful dismissal. However, in case the **damages** for wrongful dismissal would be **higher** than the compensation for unfair dismissal or **where the employee is unable to sue for unfair dismissal**, it would be advantageous for that particular employee to sue for wrongful dismissal.

7. Redundancy

7.1 Definition:

An employee is redundant if the dismissal is attributable wholly or mainly to:

- The fact that the employer **ceases to trade** (either altogether or at the employee's place of work); or
- The fact that **work** of the particular kind the employee contracted to do **ceases or diminishes** (either altogether or at the employee's place of work).

Every employee who is dismissed by reason of redundancy is entitled to receive a redundancy payment from his employer.

7.2 Procedures - what the employee must go through to win a redundancy claim:

- **Complaint:** Complaint must be made to an ET within 6 months of the dismissal.
- **Qualifying employee:** The employee must have been continuously employed for two years.
- **Dismissal:** The employee must prove that he has been dismissed. Same as UFD.
- **Statutory presumption of redundancy:** it is presumed that the employee was dismissed by reason of redundancy.
- **Calculation of payment:** the calculation of the amount is the same as the UFD basic award.
- Loss of the right to a redundancy payment:
  - The right to a redundancy payment is lost if the employee unreasonably refuses an “offer of suitable alternative employment”.

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- An employee who is dismissed for misconduct is not entitled to redundancy pay even though he may become redundant.

7.3 Consultation with employees:

If more than **20 employees** at **1 establishment** are to be dismissed as redundant within a **90 day period**, the employer must consult representative of the employees concerned about the redundancies.

Exam focus point **Types of dismissal/Wrongful dismissal/Unfair dismissal/Redundancy**

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Termination of employment by notice

Types of dismissal

Legal remedies for dismissed employees

Wrongful dismissal

Unfair dismissal

Wrongful dismissal or unfair dismissal

Redundancy

2. 必做习题

(1) Chapter 6 Quiz: Q1-5

(2) OT Revision Questions Ch6: Employment Law: Q1-11

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Part D THE FORMATION AND CONSITUTION OF BUSINESS ORGANIZATIONS

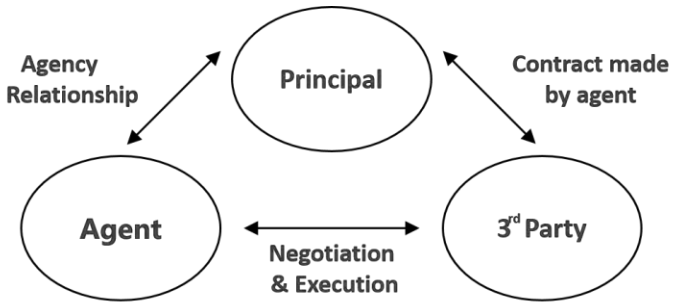
Chapter 9 Agency Law

Learning outcomes

- Agent and agency relationship.
- Formation of agency relationship.
- Authority of the agent.
- Termination of agency.
- Liability of the agent for contracts formed.

1. Agent and agency relationship

Agency is a relationship which exists between two persons (the principal and the agent) in which the function of the agent is to form contracts between his principal and a third party.



2. Formation of agency relationship

2.1 Express agreement

This is where the agent is expressly appointed by the principal. The agreement may be orally, or in writing.

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2.2 Implied agreement

An agency relationship between two people may be implied by their relationship or by their conduct.

2.3 Agency by necessity:

In some rare situations, it may be necessary for a person to take action in respect of someone else's goods in an emergency situation. That person can become an agent of necessity of the owner of the goods, as he takes steps in respect of the goods: **Great Northern Railway v Swaffield 1874**.

Four conditions must be present:

- P's property is entrusted to A;
- An emergency arises making it necessary for A to act;
- A acts in P's interests;
- It is not possible to communicate with P.

2.4 Ratification of an agent's act: retrospective agreement

An agency relationship may be created retrospectively, by the "principal" ratifying the act of the "agent". The effect of ratification is to backdate A's authority to act as agent.

The conditions for ratification are:

- the principal must have existed at the time of the contract made by the agent;
- the principal must have had legal capacity at the time the contract was made and at the date of ratification;
- the ratification must take place within reasonable time;
- the principal ratifies the contract in its entirety;
- he communicates his ratification to the third party sufficiently clearly.

2.5 Agency by estoppel

When the principal holds out to third parties that a person is his agent, the principal will be estopped or prevented from denying that an agency agreement exists.

In this situation, the agent has "ostensible authority" or "apparent authority" to act for the principal, even though he does not have actual authority to act as an agent.

3. Authority of the agent

3.1 General rule:

If an agent acts within the limits of his authority, any contract he makes on the

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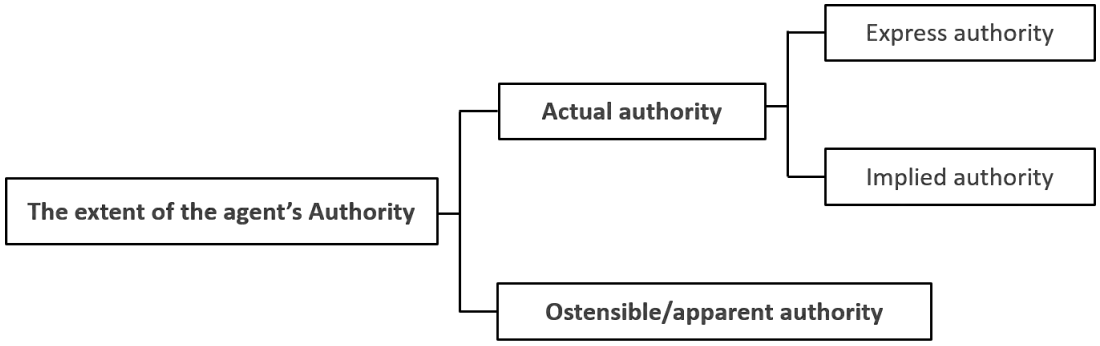
principal's behalf is binding on both principal and third party.

The extent of the agent's authority may be express, implied or ostensible. Express and implied authorities are both forms of actual authority.



3.2 Express authority:

This is authority explicitly given by the principal to the agent to perform particular tasks, along with the powers necessary to perform those tasks.

3.3 Implied authority:

Where there is no express authority, an agent has implied authority to do things:

- Which are reasonably incidental to the performance of an express authority; or
- Which an agent occupying the position or office would usually have the authority to do.

3.4 Apparent authority:

Apparent authority is the authority which an agent appears to have to a third party.

Apparent authority arises in two ways:

- Where the principal has represented (described through words or conduct) to third parties that another person has the authority to act as his agent, even if that person has not actually been appointed as agent.

- Where the principal has revoked the agent's authority but the third party has not had notice of this.

  It must be shown that the third party **relied** on the representation. If the third party did not believe that the agent had authority, or if they positively knew they did not, then ostensible authority cannot be claimed.

  Where a principal has represented to a third party that an agent has

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authority to act, and has subsequently revoked the agent's authority, the principal **must inform** third parties who have previously dealt with the agent of the change in the circumstances.

4. Termination of agency

Agency is terminated

- When the parties agree that the relationship should end.
- When principal or agent dies or becomes insane.
- When principal or agent becomes bankrupt.

5. Liability of the agent for contracts formed

5.1 General rule:

An agent contracting for his principal within his actual and/or apparent authority generally **has no liability** on the contract and is not entitled to enforce it.

5.2 Exceptions:

However, there are circumstances when the agent will be personally liable or can enforce the contract:

- When he intended to undertake personal liability – for example where he signs a contract as party to it without signifying that he is an agent. In this instance, the principal and agent are usually held jointly liable.
- Where it is usual business practice or trade custom for an agent to be liable and entitled. Where the agent is acting on his own behalf even though he purports to act for a principal.

Exam focus point

Agent and agency relationship/Formation of agency relationship/Authority of the agent/Termination of agency/Liability of the agent for contracts formed

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Agent

Agency relationship

Formation of agency relationship

Authority of the agent

Termination of agency

Liability of the agent for contracts formed

2. 必做习题

(1) Chapter 7 Quiz: Q1-5

(2) OT Revision Questions Ch7: Agency: Q1-13

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Chapter 10 Partnerships

合伙企业是指由各合伙人订立合伙协议，共同出资，共同经营，共享收益，共担风险，并对企业债务承担无限连带责任的营利性组织。合伙企业分为:普通合伙企业和有限合伙企业。其中，普通合伙企业又包含特殊的普通合伙企业。

Learning outcomes

- Demonstrate a knowledge of the legislation governing the partnership.
- Discuss the formation of a partnership.
- Explain the authority of partners in relation topartnership activity.
- Analyse the liability of various partners for partnership debts.
- Explain the termination of a partnership, and partners' subsequent rights and liabilities.

1. UNLIMITED PARTNERSHIPS – PARTNERSHIP ACT 1890

1.1 Definition:

A partnership is the relation which subsists between persons carrying on a business in common with a view of profit - ***s1 Partnership Act 1890***.

- **A relation that subsists between persons:** there must be two partners, who can be a registered company as well as an individual living person.
- **Carrying on a business:** a business is a form of activity, which may include every trade, occupation or profession.
- **In common:** this means that partners must be associated in the business as joint proprietors.
- **With a view of profit:** if persons enter into a partnership with a view of making profits but they actually suffer losses, it is still a partnership.

1.2 Forming a partnership:

There are **no legal formalities** (forms or procedures) for setting up a partnership. A partnership is formed when two or more people agree to run a business together. The formality for such an agreement can be as informal as a handshake. It may also take a much more complex form of written partnership agreement.

1.3 Liability of the partners for partnership debts:

The liability of the partners for partnership debts is joint and several.

- **Joint liability:** every partner is responsible for the full amount of the firm's

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liability.

- **Several liability:** third parties have the choice of taking action against the firm collectively, or against individual partners.
- **Reimbursement:** where debts/damages are recovered from one partner only, the other partners are under a duty to contribute equally to the amount paid (or proportionately as required by the partnership agreement).

1.4 Liability to third parties of incoming and outgoing partners:

1.4.1 Incoming partners:

- The incoming partner is **not liable** for debts incurred **before** he became a partner unless they explicitly agree so;
- The incoming partner becomes **liable** for debts incurred **after** he becomes a partner.

1.4.2 Outgoing partners:

- The outgoing partner **remains liable** for debts incurred **while** he was partner;
- The outgoing partner will still be **liable** for debts incurred **after** he has ceased to be a partner **unless** the third party has been given notice of his retirement.

1.5 Agency position of the partners:

1.5.1 Authority of partners – s 5 PA 1890:

- Every partner is an agent of the firm for the purpose of the firm's business.
- The firm is liable for contracts made by a partner if the partner was acting within his actual or apparent authority.
- The extent of a partner's actual authority (both express and implied) is generally defined by partners in the partnership agreement when forming the partnership.
- An act falls within a partner's apparent authority if it appears to the outside world to be the firm's business. This test means that the court will look at the appearance of the firm's business, not what the partners have agreed what the firm should do. Even if the partners have agreed that they would not undertake certain activities, this would not be binding on third parties: **Mercantile Credit v Garrod 1962**. 显而易见的授权：即看起来有的授权，该授权可以通过合伙业务的表相来判断： Mercantile Credit v Garrod（合伙协议中的条款

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明确将买卖车辆排除在合伙事务之外。该合伙经营汽车修理业务（Garage）。一名合伙人在无实际授权的情况下将车辆以£700 卖给第三方，但该合伙人对车辆没有所有权。事发后，原告起诉要求所有合伙人连带赔偿£700。法院认为，出售车辆的合伙人有显而易见的授权，这是因为，只要某行为看起来像是合伙业务之一，那么该行为将成为合伙人的显而易见的授权之一。因此，全体合伙人均要对该项债务承担连带责任）。

- The firm is not bound by the apparent authority of a partner if:
  - the third party knows the partner has no actual authority, or;
  - the third party does not know or believe him to be a partner.

1.5.2 Liability of a person who is not a partner as if he were – s 14 PA 1890:

Every person who by words or by conduct represents himself (or knowingly suffers himself to be represented) as a partner is liable as if he is a partner to anyone who thereby gives credit to the firm.

1.6 Termination of partnership

The Partnership Act 1890 states that the partnership is terminated in the following instances:

- Passing of time, if the partnership was entered into for a fixed time
- Termination of the venture, if entered into for a single venture
- The death or bankruptcy of a partner (partnership agreement may vary this)
- Subsequent illegality
- Notice given by a partner if it is a partnership of indefinite duration
- Order of the court granted to a partner
- Agreement between the partners

1.7 Distribution of assets when the partnership is terminated

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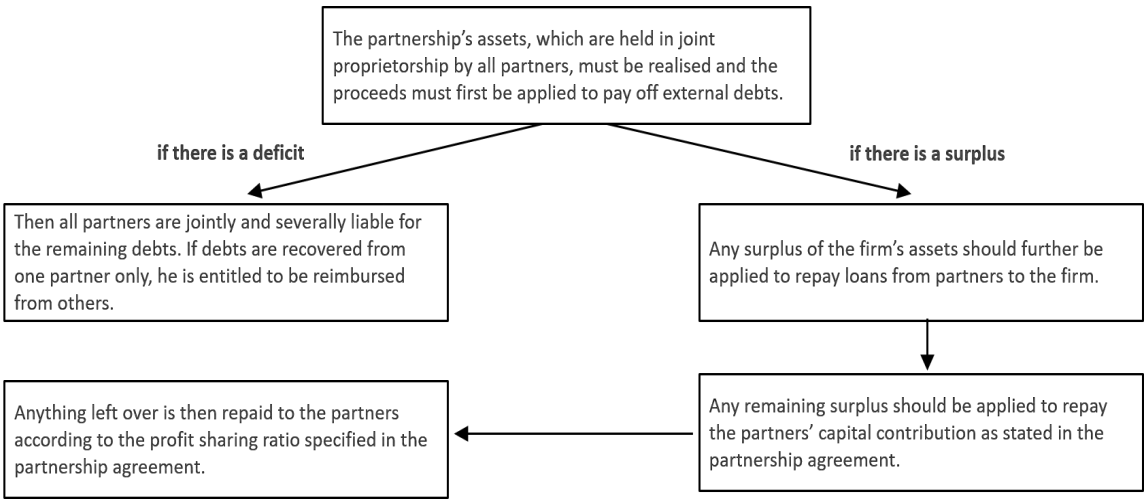

2. LIMITED PARTNERSHIPS – LIMITED PARTNERSHIPS ACT 1907

2.1 Definition:

A limited partnership is a variant of the ordinary partnership: i.e. it is a partnership where the liability of **limited partners** (also called sleeping partners) is limited to his capital contribution, and its **general partners** remain jointly and severally liable for the firm's debts.

2.2 Statutory rules for limited partnerships:

- In the ordinary course of events, limited partners are not allowed to withdraw their capital from the partnership.
- There must be at least one general partner (i.e. one with unlimited liability).
- A limited partner cannot take part in the management of the partnership business.
- A limited partner cannot bind the partnership in any transaction. If a limited partner breaches this rule, he loses his limited liability.
- The limited partnership must be officially registered with the Companies House ("Registrar of Companies").

3. LIMITED LIABILITY PARTNERSHIPS - LIMITED LIABILITY PARTNERSHIP ACT 2000

3.1 Background:

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LLP is a distinct type of business form made possible by the Limited Liability Partnership Act 2000.

3.2 The main features of LLP include:

- An LLP is an incorporated body separate from its individual partners.
- To create an LLP, It must be registered with the Companies House.
- The liability of all members is limited to their capital contribution.
- Each member of the LLP is an agent and can bind the LLP.
- The rights and duties of the partners will usually be set out in a partnership agreement. In the absence of a partnership agreement, the rights and duties are set out in regulations under the Act.
- LLPs must have two designated members, who take responsibility for the publicity requirements of the LLP: e.g.
  - Filing certain notices with the Registrar, such as when a member leaves
  - Signing and filing accounts
  - Appointing auditors if appropriate
- The business name of the LLP must end with the words Limited Liability Partnership or LLP.
- An LLP does not dissolve when a member leaves in the same way that a traditional partnership does. Where a member has died or (for a corporate member) been wound up, that member ceases to be a member, but the LLP continues in existence.
- An LLP must therefore be wound up when the time has come for it to be dissolved.

Exam focus point
Unlimited Partnerships – Partnership Act 1890/Limited Partnerships – Limited Partnerships Act 1907/Limited Liability Partnerships - Limited Liability Partnership Act 2000

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Unlimited Partnerships

Limited Partnerships

Limited Liability Partnerships

2. 必做习题

(1) Chapter 8 Quiz: Q1-5

(2) OT Revision Questions Ch8: Partnerships: Q1-12

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Chapter 11 Corporations and legal personality

本章你会学习到重点内容是揭开公司面纱，公司人格否认制度，指为阻止公司独立法人人格的滥用和保护公司债权人利益及社会公共利益，就具体法律关系中的特定事实，否认公司与其背后的股东各自独立的人格及股东的有限责任，责令公司的股东(包括自然人股东和法人股东)对公司的债权或公共利益直接负责，以实现公平、正义目标之要求而设置的一种法律措施。

Learning outcomes

- Distinguish between sole traders, partnerships and companies.
- Explain the meaning and effect of limited liability.
- Analyse different types of companies, especially private and public companies.
- Illustrate the effect of separate personality and the veil of incorporation.
- Recognise instances where separate personality will be ignored (lifting the veil of incorporation.

1. DISTINGUISH BETWEEN SOLE TRADERS, PARTNERSHIPS AND COMPANIES

	Source of Law	Incorporation	Investors	Liabilities of Investors	Legal Formalities
Sole trader	None	×	Sole trader	Personally Liable	None
Partnership	Partnership Act 1890	×	Partners		
Limited Partnership	Limited Partnerships Act 1907	×	General partners; Limited partners	LPs have the protection of limited liability	Registration at the Companies House
Limited Company	Companies Act 2006	√	Shareholders or members	Limited liability	Extensive
Limited Liability Partnership	Limited Liability Partnership Act 2000	√	Members	Limited liability	Less extensive than companies

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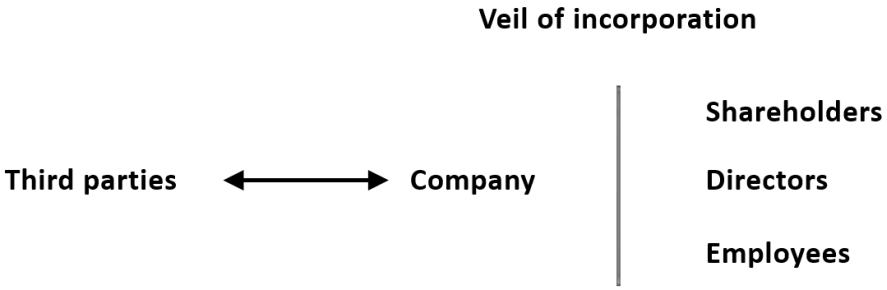
2. DOCTRINE OF INCORPORATION

2.1 Definition

A company is a **separate legal person**. Upon incorporation of a company, a veil of incorporation is assumed to drop between the company and its shareholders, and the acts of the company are not regarded, from that moment on, as the actions of its shareholders, so that shareholders are exempt from liability for the company's actions.



2.2 Advantages of incorporation:

Limited liability	• **Definition:** the liability of the members is limited to the amount, if any, unpaid on the shares held by them. • **The company itself is liable without limit for its own debts:** limited liability is a benefit to members in that creditors of a limited company cannot demand payment of the company's debts from its members. • **There are some amounts that members are required to pay, in the event of a winding up** ▪ Companies limited by shares If the member's shares are **partly paid up**, s/he may be required to pay outstanding amount unpaid on his or her shares. If the member's shares are **fully paid up**, s/he does not have to contribute anything in the event of a winding up. ▪ **Companies limited by guarantee:** members will be required to pay the amount they guaranteed to pay in the event of a winding up.
Perpetual succession	A company has a separate existence independent from its shareholders and directors.

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Personal identity	A company can, by its own name own property, make contracts and incur liabilities, sue and be sued.
Better access to funding	• **Capital finance:** limited companies can issue shares which are freely transferable in exchange for consideration from investors. • **Debt finance:** limited companies can create floating charges.
Separation of ownership from management	Owners of a company, i.e. members, may turn the management of the company over to outside professional managers, thereby separating ownership of the company from its management.

2.3 Disadvantages of incorporation:

2.3.1 Subject to the requirements of the Companies Act 2006:

- Public inspection of accounts and loss of privacy for the business;
- There are various administrative costs, e.g. filing fees for documents.
- Cost of a compulsory audit.

2.3.2 Double taxation.

3. LIFTING THE VEIL OF INCORPORATION

3.1 Definition

- company is a separate legal person. **Exceptionally** the corporate veil will be lifted to:
- Identify the company with its members and/or directors;
- Treat a group of companies as a single commercial entity.

3.2 Statutory examples:

3.2.1 Public companies trading without a trading certificate

A public company must obtain a trading certificate from the Registrar before it may commence trading. Failure to do so leads to personal liability of the directors for any loss or damage suffered by a third party resulting from a transaction made in contravention of the trading certificate requirement. They are also liable for a fine.

3.2.2 Fraudulent trading and wrongful trading – sections 213 and 214, Insolvency Act 1986

Under the Insolvency Act ("IA") 1986, if the court decides, in insolvency

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proceedings, that persons (usually the directors) were parties to fraudulent trading or wrongful trading, they shall be personally responsible under civil law for debts or other liabilities of the company.

3.2.3 Disqualified directors – Company Directors Disqualification Act 1986

Directors who participate in the management of a company in contravention of a disqualification order under the Company Directors Disqualification Act ("CDDA") 1986 will be jointly or severally liable along with the company for the company's debts.

3.2.4 The phoenix company and abuse of company names – section 217, Insolvency Act 1986

If a director of a company that has gone into insolvent liquidation re-uses its name or a name similar enough to suggest a connection within 5 years, s/he is personally liable for the debts of the phoenix company.

3.3 Common law examples:

3.3.1 Watershed case:

In **Woolfson v Strathclyde 1978**, the Court held that veil will be lifted only where special circumstances exist indicating the veil is a mere facade concealing the true facts.

3.3.2 Cases where veil of incorporation was lifted:

Jones v Lipman 1962: veil lifted to prevent seller of land evading specific performance.

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Gilford Motor Company v Horne 1933: veil lifted to prevent the employee from evading an injunction.

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3.3.3 Other common law examples:

- Public interest
- Evasion of liabilities
- Evasion of taxation
- Quasi-partnership

3.3.4 Group situations:

- Subsidiary acting as agent for the holding company
- The group is to be treated as a single economic entity
- The corporate structure is being used as a sham

4. TYPES OF COMPANY

4.1 Registered company

4.1.1 Public company:

A public company is a company whose constitution states that it is a public company and that has complied with the regulatory requirements for registering as a public company.

4.1.2 Private company:

A private company is a company which has not been registered as a public company under the Companies Act. The **major practical distinction** between a private and public company is that the former may not offer its shares to the general public.

Exam focus point
Sole traders, partnerships and companies/Doctrine of incorporation/Lifting the veil of incorporation/Types of company

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Unlimited companies	• A company in which members do not have limited liability; in the event of business failure, the liquidator can require members to contribute as much as may be required to pay the company's debts in full. • This liability only arises if the company is wound up; it is not direct liability to creditors of the company. But if the company, on winding up, has insufficient assets to pay all of its debts the members of an unlimited company will have unlimited liability to supply the company with money so that it can pay its debts. • If the company has a share capital, the liability of members to contribute to the debts of the company, and to the costs of winding up, is in proportion to the nominal value of the shares held. If there is no share capital then the members are obliged to contribute equally. If one member is unable to pay his share, the other members assume liability to pay it. • The compensating benefit enjoyed by such companies is that they do not have to submit their accounts and make them available for public inspection.
Private company limited by guarantee	• A company may be limited by guarantee. Its constitution states the amount which each member undertakes to contribute in a winding up. • A creditor has no direct claim against a member against his guarantee, nor can the company require a member to pay up under his guarantee until the company goes into liquidation. • This type of companies is usually restricted to non-trading enterprises such as charities and professional and educational bodies.
Private company limited by shares:	• It is a type of company incorporated under the Companies Act. • It has shareholders, and that the liability of the shareholders to creditors of the company is limited to the capital originally invested, including nominal value of the shares and any share premium. • Unlike a public limited company, its shares may not be offered to the general public.

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Sole traders

Partnerships

Doctrine of incorporation

Lifting the veil of incorporation

2. 必做习题

(1) Chapter 9 Quiz: Q1-5

(2) OT Revision Questions Ch9: Corporations and Legal Personality: Q1-11

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Chapter 12 The formation and constitution of a company

通过本章的学习，你会了解到公司的设立相关流程，需要掌握公司发起设立人， 公司成立前所订立的合同，公司登记设立程序，公司宪法，变更公司章程，目的条款、经营范围，公司名称以及法定登记簿、会计记录及申报等相关内容。

Learning outcomes

- Explain the role and duties of company promoters, and the breach of those duties and remedies available to the company.
- Explain the meaning of, and the rules relating to, pre-incorporation contracts.
- Describe the procedure for registering companies, both public and private, including the system of streamlined company registration.
- Describe the statutory books, records and returns, including the confirmation statement and the register of people with significant control, that companies must keep or make.

1. PROMOTERS

1.1 Definition

A promoter is one who undertakes (attempts) to form a company and takes the necessary steps to accomplish that purpose.

A person who merely provides professional services relating to the company formation is not on that account a promoter. This means that solicitors and accountants who are used by a promoter are not themselves promoters of the company.

1.2 Duties of a promoter

1.2.1 General duty

At common law, promoters have a general duty to exercise reasonable skill and care.

1.2.2 Fiduciary duty

A promoter has a fiduciary duty to the company he is forming. This mean that a promoter may not make a profit out of his promotion activities unless:

- He discloses his interest in any transaction from which a profit has arisen
- He is permitted to take the personal profit if approved.

The promoter must declare his profit to either an independent board of directors (after

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the company has been formed) or to the existing or prospective shareholders. If a promoter fails to disclose a profit, or if he discloses the profit but is not allowed to keep it, he becomes liable to surrender the profit to the company.

2. PRE-INCORPORATION CONTRACTS

2.1 Definition

A pre-incorporation contract is a contract made by a promoter of a new company naming the company as a party to the contract before the date of incorporation, and so before the company actually exists as a separate legal person.

2.2 Privity of the pre-incorporation contracts

- A company can never ratify a contract made on its behalf before it was incorporated, because it did not exist when the pre-incorporation contract was made.
- If this is so, a company cannot be bound by the terms of the pre-incorporation contract, even if it has been named as a party to the contract.

2.3 Liability of promoters for pre-incorporation contracts – s51(1) CA 2006:

Subject to any agreement to the contrary. the promoter himself is personally liable on the contract,

2.4 Ways of avoiding liabilities arising from pre-incorporation contracts

- **Novation:** a company may enter into a new contract on identical or similar terms after it has been incorporated. However, there must be sufficient evidence that the company has made a new contract.
- **Condition precedent:** a pre-incorporation contract might include a condition precedent that the contract should be subject to adoption by the new company after its formation. The contract then does not create obligations for both parties until the new company is formed, and then if the new company agrees to adopt it.

2.5 Pre-incorporation expenses

- Promoters have **no automatic right** to be reimbursed pre-incorporation expenses by the company.
- This, however, can be expressly agreed with the company's first directors or in the company's constitution in the form of a special article of indemnity.

3. COMPANY REGISTRATION PROCEDURES

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3.1 General rule:

To incorporate a registered company, s9 CA 2006 requires an application for registration to be made and submitted to the Registrar.

Documents required for the application

3.1.1 Application for registration:

- The company's proposed name;
- Whether the company's registered office is to be situated in England and Wales (or in Wales), In Scotland or in Northern Ireland;
- Type of the company;
- A statement of the intended address of the registered office.

3.1.2 Memorandum of association

- This is a prescribed form signed by the subscribers.
- The memorandum states that:
  - The subscribers wish to form a company and they agree to become members of it.
  - If the company has share capital, each subscriber agrees to subscribe for at least one share.

3.1.3 Articles of association

- This is a document setting out the internal rules relating to the management and administration of the company.
- Articles shall be signed by the same subscriber(s),
- There are model articles provided by statute which may be adopted by a new company.

3.1.4 Statement of proposed officers:

- The statement gives the particulars of the proposed director(s) and company secretary if applicable.
- When the company is incorporated they are deemed to be appointed.

3.1.5 Statement of compliance:

this document simply states that all requirements of the Companies Act in respect of registration have been complied with.

3.1.6 Statement of capital and initial shareholdings / Statement of Guarantee:

- It must be delivered to the Registrar by all companies with share capital.
  - It must be filed at the Registrar when the company is incorporated and thereafter annually, and indeed whenever the company's share capital is altered, e.g. when the company issues news shares to investors.
  - It must contain the following details:
    - Total number of shares

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- Nominal value of shares
- Different classes of shares and their rights, number of shares, nominal values and paid up amount.
- Paid up capital and the amount unpaid;
- Information relating to subscribers to the memorandum and shares held by them.

◆ If the company is limited by guarantee, a statement of guarantee is required instead.

3.1.7 Registration fee: a registration fee (currently £20) is also payable on registration.

3.2 Certificate of incorporation:

If the Registrar is satisfied with the documents delivered, the Registrar will issue a certificate of incorporation.

The immediate effect of incorporation includes:

- The company has been duly registered under the Act.
- The subscribers to the memorandum become members of the company and become holders of the shares set out in the statement of capital and initial shareholdings.
- The proposed directors and secretary are deemed to have been appointed.
- The company may enter into contracts with third parties on its own name.

3.3 Model Articles

Different types of model articles, suitable for different types of companies, have been drafted by the Secretary of State. Section 20(1) provides that these articles will apply by default to all companies formed after 1 October 2009, unless alternative articles are registered. It also provides that if other articles are registered, the model articles will still apply to the extent that they are not excluded or modified by the articles which are registered.

3.4 Trading certificate

3.4.1 Commencement of business rule:

Under s761 of the CA 2006, a public company may not do business or exercise any borrowing powers unless it has obtained a trading certificate from the Registrar. This is obtained by sending an additional application to the Registrar. A private company may do business and exercise its borrowing powers from the date of its incorporation.

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3.4.2 The application made to the Registrar must state:

- The company has issued shares totaling at least £50,000 in nominal value;
- The particulars of preliminary expenses and payments or benefits to promoters
- The application must be accompanied by a statement of compliance that all statutory requirements for registering as a public company have been complied with. These include:
  - The company must be limited by shares.
  - Issued and allotted share capital minimum: it must have allotted share capital of at least £50,000 in nominal value.
  - Name of the company: the name of the company identifies it as a public company by ending with the words "public limited company" or "plc".
  - The company must have two directors and a qualified company secretary.

3.4.3 If a public company commences trading without a trading certificate:

- The TPs is protected in that any contract entered into by the company is valid.
- Under s767 CA 2006, the company and any officer who is in default are liable to a fine, and they may also have to indemnify the third party.
- Under s122 of the Insolvency Act 1986, a court may wind-up a public company which does not obtain a trading certificate within one year of incorporation.

4. CONSTITUTION OF A COMPANY

4.1 Memorandum of association:

4.1.1 Statutory alteration: while it is still necessary to file a memorandum of association to incorporate a new company, it no longer forms part of the company's constitution and it contains limited information compared to the memorandum that was required prior to 1 October 2009.

4.1.2 Current status:

- **Content:** it is now a memorandum stating that the subscribers -
  - wish to form a company under this Act, and
  - agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each.
- **Form:** the memorandum must be in the prescribed form and must be authenticated by each subscriber.
- **Major legislative change:** it is no longer required to state the name of the company, the type of company, the location of its registered office, the objects of the company, and its authorised share capital.

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4.2 A company's constitution:

4.2.1 Definition: according to s17 CA 2006, the constitution of a company consists of:

- **The Articles of Association**
  - This is a document setting out the **internal rules** relating to the management and administration of the company.
  - The need for such a document is based on the assumption that a company is incorporated as a separate person and its owners (members or shareholders) may disassociate themselves from the management of the company.
  - So there should be some rules and regulations regarding:
    - the management of the company's affairs;
    - conduct of its business; and
    - the relation between members and the company.
- Resolutions and agreements that affect the constitution
  - Such resolutions are decisions passed by members to introduce, amend, or remove provisions in the articles.
  - Agreements made, for example, between the company and members, are also deemed as amending the constitution. If any shareholders' agreement are concerned with the running of the company, they are deemed to supplement the company's constitution.
  - Copies of such resolutions or agreements must be sent to the Registrar within **15 days** of being passed or agreed. Otherwise, every company officer commits an offence punishable by fine.
  - **Effect of a company's constitution – s33 CA 2006:** the constitution constitutes a statutory contract.

Effect	Definition	Common Law
A. It is a contract between members and the company.	The contract binds members to the company, i.e. if a member breaches the articles, then the company can sue him for breach of the contract.	**Hickman's case 1915** 公司章程规定，股东与公司之间的任何争议必须通过仲裁方式解决。公司股东 Hickman 因被公司开除一事与公司产生争议，Hickman 将公司诉至法院。法院认为，Hickman 作为公司股东受到公司章程的约束，所以公司有权要求 Hickman 终止诉讼，并另行提起仲裁。

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B. It is a contract between the company and members.	The contract binds the company to its members, i.e. if the company breaches the articles, then any member can sue the co for breach of contract.	**Pender v Lushington 1877** 公司章程规定，公司股票每十股有一票投票权，每名股东最多有 100 票。公司某股东持有数千股该公司股票，将部分股票转让给其指定的受让人(nominee)。在公司召开股东会时，董事会主席拒绝承认受让人的投票权。法院认为，受让人可以追究公司违约责任，并要求公司在有关决议中计入他的投票。
C. It is a contract between members and members.	The contract binds members to any other members, i.e. if a member breaches the articles, any other member can sue him for breach of contract.	**Rayfield v Hands 1960** 公司章程规定，准备转让股份的公司股东必须通知公司董事，公司董事必须进行股份回购。同时，公司章程规定公司董事必须同时是公司股东。原告股东通知被告董事进行回购时，董事拒绝回购。法院认为，章程中的董事是指“同时是公司股东的董事”，因为公司章程构成股东与股东之间的合同，所以董事必须回购。
D. The privity of the statutory contract does not extend to third parties.	The constitution does not bind the company to third parties (including directors, company lawyers and accountants), or to members in a capacity other than as members.	**Eley v Positive Government Security Life Assurance Co 1876** 公司章程规定，Eley 可以终身担任公司律师（PS：章程就是 Eley 自己草拟的）。Eley 同时也是公司的股东。若干年后，Eley 被公司解雇，不再担任公司律师一职。Eley 根据章程起诉公司违约。法院认为： ①公司章程将股东约束于公司，将公司约束于股东， 也将股东约束于其他股东； ②虽然 Eley 是公司股东，但公司章程仅赋予 Eley 有关股东的权利； ③章程并不构成主张非股东权利的 Eley 和公司之间的合同，所以也不将公司约束于主张非股东权利的股东 Eley。

5. AMENDMENT OF THE ARTICLES

5.1 Basic rule – s21 CA 2006

A company may amend its articles by passing a special resolution.

5.2 Statutory restrictions on alteration

- The alteration is void if it conflicts with the Companies Act or with other general law.

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- A member is not bound by an alteration that increases his liability (e.g. to subscribe for additional shares), unless he agrees to it in writing.
- **Entrenched provisions**
  - Section 22(1) CA allows the articles to contain entrenched provisions.
  - Under such a provision certain entrenched articles can be amended or repealed only **if conditions are met, or procedures complied with**, that are **more restrictive** than those applicable in the case of a special resolution.
  - The Act **does not specify** what these conditions might be. However, since a special resolution can be passed only by a 75 per cent majority of those voting on it, the procedures might require procedures such as a unanimous vote or a vote passed by a 90 per cent majority of all company members.
  - Entrenched provisions may not be drafted so that the articles can never be amended or removed.
  - Section 22 CA 2006 states that entrenched provisions may only be included in the articles:
    - If they are included in the articles on formation of the company;
    - If they are introduced by an amendment to the articles with the agreement of all the members of the company.
- Contracts contained in the articles
  - A person whose contract is contained in the articles cannot obtain an injunction to prevent the articles being altered, but they may be entitled to damages for breach of contract.
  - Alteration cannot take away rights already acquired by performing the contract.

5.3 Common law restrictions on alteration

- An alteration may be declared by the court as void if the majority shareholders who approve it are not acting bona fide in what they deem to be the interests of the company as a whole.
- In **Allen v Gold Reefs of Africa**, the court states the alteration is valid if its purpose is to benefit the co as a whole even if some members suffer special detriment due to the alteration.
- In the Greenhalgh case, the court states that "the company as a whole" means "the general body of shareholders", the court will ask whether an "individual hypothetical member" would honestly believe the majority of shareholders would benefit from the alteration.

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- The court held that "when a man comes into a company, he is not entitled to assume that the articles will always remain in a particular form, and an alteration will be valid if the proposed alteration does not unfairly discriminate and the resolution is bona fide passed".
- The court further explained that "a special resolution would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give to the former an advantage of which the latter were deprived".

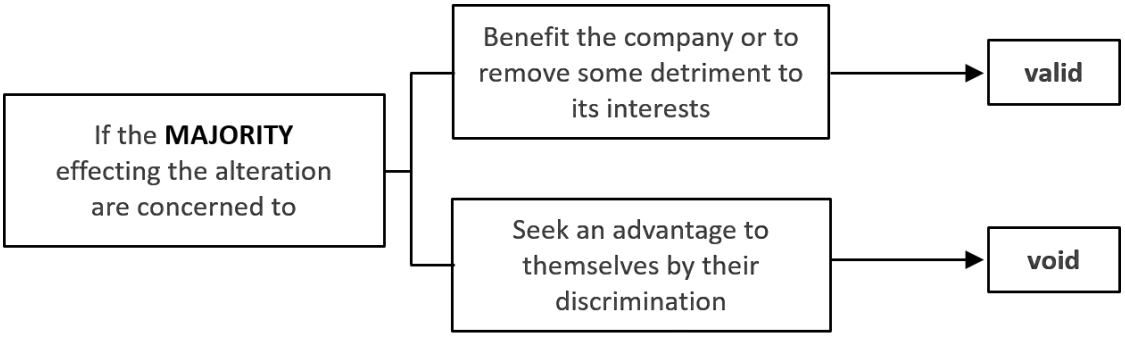
5.4 Expulsion of minorities

Expulsion: the act of expelling; the act of forcing out someone or something

5.4.1 Amendment of the articles to achieve "expulsion"

There are two testable areas where you are required to decide:	Valid	Invalid
Alteration of the articles for the purpose of **removing** a **director from office**		
Alteration of the articles to permit a majority of members to **enforce** a **transfer** to themselves of the shareholding of a minority		

5.4.2 Common law rule



5.4.3 Illustration

Cases	Facts	Valid or not	Ratio
Sidebottom v Kershaw, Leese & Co Ltd 1920	The articles were altered to enable the directors to purchase at a fair price the shareholding of any member who competed with the	Valid	It was a valid alteration because it was made bona fide in the interests of the company as a

%

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	company in its business.		whole.
Brown v British Abrasive Wheel Co 1919	The company needed further capital. The majority who held 98% of the existing shares were willing to provide more capital but only if they could buy up the 2% minority. As the minority refused to sell, the majority proposed to alter the articles to provide for compulsory acquisition on a fair value basis. The minority objected to the alteration.	Invalid	The alteration was invalid since it was merely for the benefit of the majority.
Dafen Tinplate Co Ltd v Llanelly Steel Co (1907) Ltd 1920	The articles were altered to enable the majority shareholders to compel any shareholder to transfer his shares.	Invalid	The alteration was invalid because the wide power to compel any shareholder to transfer his shareholder may not said to be for the benefit of the company.

6. OBJECTS CLAUSE

- A company's objects are its aims and purposes.
- A company may alter its objects by a special resolution.
- The new Companies Act introduced a major overhaul to this area of law, in that the objects clause is relocated in the articles rather than in the memorandum, but most articles will not mention any objects, only where the company wishes to restrict its activities is there an inclusion of those restrictions in the articles.
- If a company enters into a contract which is outside its objects, that contract is ultra vires.

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7.COMPANY NAMES

1.1 Statutory rules

7.1.1 Endings – company names must end with the following words:

A. Public company: public limited company or plc;

B. Private limited company: limited or ltd.

C. Welsh equivalents of A and B.

7.1.2 No Identical names: no company may have a name which is the same as any other company appearing in the statutory index at the Registrar.

7.1.3 No offensive or sensitive names: no company may have a name, the use of which would be a criminal offence or which is considered 'offensive' or 'sensitive' as defined by the Secretary of State.

7.1.4 Condition for suggestive names: official approval is required for a name which in the Registrar's opinion suggests a connection with the government or a local authority or which is subject to control.

7.2 Change of name

7.2.1 Methods for the alteration

- A company may decide to change its name by passing a **special resolution**
- By any other means provided for in the articles.

7.2.2 Notification to the Registrar: the Registrar should be **notified;**

7.2.3 Effective date for the alteration: The change is effective when a new incorporation certificate is issued.

7.3 Tort of passing-off: a company can be prevented by **an injunction** issued by the court in a passing- off action from using its registered name, if in doing so it causes its goods or services to be confused with those of the claimant.

7.4 Company name disputes - appeal to the company names adjudicators

- A company which feels that another company's name which is too similar to its own may object to the Company Names Adjudicators.
- The adjudicator will review the case and, within 90 days, make their decision and provide their reasons for it in public.
- An appeal against the decision may be made in court. The court may reverse the Adjudicator's decision, affirm it and may even determine a new name.

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8. STATUTORY BOOKS, RECORDS AND RETURNS

8.1 Registers:

companies are required by law to keep certain statutory registers. These are usually kept at the registered office of the company. Member of the company may inspect free of charge and the general public may inspect after paying a fee. They include:

- **Register of members**
- **Register of directors and records of directors' service contracts and indemnities**
- **Register of secretaries**
- **Register of debenture holders (not mandatory under statute law)**
- **Register of charges**
- **Register of meetings and resolutions**

8.2 Annual returns

8.2.1 Definition: under s854 CA 2006, every company must deliver an annual return to the Registrar of Companies. The return must be made within 28 days of the return date, which is the anniversary of incorporation.

8.2.2 The information that has to be returned is as follows:

- Address of the registered office.
- What type of company it is and the principal business activities.
- Particulars of directors and company secretary.

Details about share issued.

8.3 Accounting records

8.3.1 Requirement	• Under s386 CA2006, companies are required by law to keep accounting records containing sufficient information to show and explain the company's transactions and its financial position. • Accounting records must be kept for three years in the case of a private company and six years in that of a public company. • Failure to keep sufficient accounting records is an offence by the officers in default.

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8.3.2 Contents	• Daily entries of all money received and spent; • A record of assets and liabilities; • Statement of stocks at end of the financial year; • Statement of stocktaking to back up the above; • Statements of all goods sold and purchased, showing the goods and the buyers and sellers (except in the retail trade).

8.4 Annual accounts

A registered company must prepare annual accounts showing true and fair view, lay them and various reports before members, and file them with the Registrar following directors' approval.

A company must file its annual accounts and its report with the Registrar. The standard permitted interval between the end of the accounting period and the filing of accounts is six months for a public and nine months for a private company.

Exam focus point

Promoters/Pre-incorporation contracts/Company registration procedures/Constitution of a company /Amendment of the articles /Objects clause/Statutory books, records and returns

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Promoters

Pre-incorporation contracts

Company registration procedures

Constitution of a company

Amendment of the articles

Objects clause

Statutory books, records and returns

2. 必做习题

(1) Chapter 10 Quiz: Q1-5

Chapter 11 Quiz: Q1-5

(2) OT Revision Questions Ch10: Company Formation: Q1-21

OT Revision Questions Ch11： Memorandum and Articles:Q1-10

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Part E CAPITAL AND THE FINANCING OF COMPANIES

Chapter 13 Share capital

资本是指企业的所有财产。在公司设立之时，资本来自于股东及债权人。在此基础上，借贷资本是指公司向债权人取得的长期负债。股份资本的概念要更加复杂一些。仅有股份有限公司才有股份资本。股份资本指公司的资本被划分成等票面价值的股份。股份是指股东在公司内享有的可以用金钱衡量的利益，股份的票面价值是指股份的面值。

Learning outcomes

- Examine the different types of capital.
- Illustrate the difference between various classes of shares, including treasury shares, and the procedure for altering class rights.
- Explain allotment of shares, and distinguish between rights issue and bonus issue of shares.
- Examine the effect of issuing shares at either a discount, or at a premium.

1. CAPITAL EXPLAINED

Capital means the total assets of a business. They either come from members or from creditors. From this basis, **loan capital** means long-term debts owed by the company to creditors. The concept of share capital is more problematic.

- Only companies limited by shares have a **share capital**. It means that the capital of the company is divided into shares with a fixed nominal value. A share is the interest of a shareholder in the company measured by a sum of money, whereas a share's **nominal value** is its face value.
- Share capital of a company may be divided into several different classes, e.g. **ordinary shares** and **preferential shares**, or there may be just one class of ordinary shares. There may also be **redeemable shares**, which are shares issued on terms that they may be bought back by a company either at a future date or at the shareholder's or company's option.

公司的股份可以被分成不同的种类，例如普通股和特别股，当然公司内也可

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以仅有一类普通股。公　　司也可以发行可赎回的股份，公司或公司股东可以选择在将来某一特定时刻将该类股份赎回。

◆ Those shares must be issued and allotted to allottees, who, after the allotment is completed and their names entered in the register of members, become a shareholder of the company. **Issued and allotted share capital** therefore means the shares issued and allotted to specified shareholders.

公司的股份必须发行和分配给被分配人。被分配的投资者在股份分配完成后，其名称登记在公司股东登记簿上时，即成为公司的股东。因此，已发行分配的股份资本指将股份发行分配给特定的股东所募集的资本。

◆ Not all shares need to be issued at once, if a company retains a part, this is **unissued share capital**.

并非所有公司的股份均需一次性发行完毕，如果公司保留一部分股份，该股份为未发行的股份。

◆ The Companies Act allows shares to be issued at more than or at least equal to their nominal value, these are called **issue at a premium** or **issue at par value**.

公司法允许以高于或等于票面价值的发行价格发行公司股票，上述发行方式叫作平价或溢价发行。

◆ The shares must be paid for either in cash or other considerations. Allottees may pay for their shares in several installments. For public companies, there is a **one-quarter rule** that a share may not be allotted unless it is paid up to at least one quarter on the nominal value plus the whole of any premium.

股东必须就其认购的股份支付现金或其他形式的对价。被分配股份的投资者可以分期支付出资。而就公营公司而言，除非投资者已经实际缴纳股份上票面价值的四分之一及全部的溢价，否则该股份不得分配给投资者。

◆ For the unpaid amount on issued and allotted shares, the company may call for the shares to be paid.

Called up capital therefore means the amount that the company has required shareholders to pay now or in the future on the shares issued. **Paid-up share capital** is the amount which shareholders have actually paid on the shares issued and called up. The amount of unpaid share capital that has not yet been called for from shareholders is named uncalled share capital.

对于已发行分配股份上的未付清出资，公司可以根据章程的规定向股东催缴。已催缴股本是指公司要求股东现在或未来必须支付的出资。实缴股本则是指股东就其持有的已发行分配的股份实际缴纳的出资。未付清并未催缴

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的股东出资则被称为未催缴的股本。

- Holders of **partly paid-up shares**, therefore, are liable for the unpaid amount, whereas for **fully paid-up shares**, their holders do not have to contribute anything in the event of a winding up.

在公司清算时，部分缴清出资的股份持有者，应向公司支付未付清的出资，而对于完全缴清出资的股份持有者则无须继续向公司出资。

- A share is a form of personal property, carrying rights and obligations. It is by its nature transferrable. Shares of a public company are freely transferable and therefore be subsequently sold by some or all of the shareholders. The sale price, i.e. the **market value** of shares, will not necessarily be the nominal value. Instead it will reflect the prospects of the company and therefore may be greater or less than the nominal value.

股份是一种权利和义务一体的个人财产。股份从其性质而言是可以被转让的。公营公司的股份则可以自由的转让，从而可以被现有股东转让给不特定的社会公众。股份的市场价格不一定和股份的票 面价值对应。相反，股份的市场价格会反映公司的前景，从而可能高于或低于股份的票面价值。

2. ILLUSTRATION

- To be lawfully incorporated, a public company must issue and allot 50,000 £1 (face value) shares.

公众公司必须发行及分配 5 万股票面价值为£1 的股份才可以合法成立。

- Although all 50,000 shares must be issued at more than or at least equal to £1, payment for shares may be made in installments.

虽然所有 5 万股的发行价格必须等于或大于票面价值£1，股东就股份上的出资可分期缴纳。

- On allotment public companies must receive at least one quarter of the nominal value of the shares, plus the whole of any premium. So if the company issues shares at £1, it must receive at least 25p per share on application.

分配股份时，公营公司就每股最少要实际收到四分之一的票面价值及全部溢价。如果公司股票发行价格为£1，股东认购时最少每股要实际缴纳 25p。

- The rest 75p may be called by the company in accordance with the company's original prospectus or at the discretion of the directors.

就每股上其余 75p，公司可以根据其招股说明书规定或根据董事会的自由裁量（如招股说明书有相应规定）进行催缴。

- If the company has called on members for a second 25p, then its called

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up share capital is £25,000. When members pay the call, the paid up share capital is then £25,000 also. Capital not yet called is uncalled capital which is £25,000.

如果公司现在向成员催缴 25p 出资，此时该公司的已催缴股本为£25,000。成员支付了被催缴的出资后，公司此时的实缴股本为£25,000。公司尚未催缴的股本则为未催缴股本，也为£25,000。

3. TYPES OF SHARES

3.1 Classes of shares

3.1.1 It is common to find companies issuing different classes of shares

- Ordinary shares;
- Preference shares.

3.1.2 If the constitution of a company states no differences between shares: it is assumed that they are all ordinary shares with parallel rights and obligations.

3.1.3 Ordinary shares and preference shares compared

	Preference shares	Ordinary shares
Definitions	They are shares carrying a prior right ahead of ordinary shares to receive a dividend or to receive a repayment of capital in the event that the company is wound up.	They are shares which entitle the holders to the remaining divisible profits, and residual assets in liquidation, after prior interests (creditors and preferential shareholders) have been satisfied.
Voting rights	Generally have no or restricted voting rights	Full
Dividend rights	Prior fixed right to dividend which is cumulative	Fully participating, after payment of dividend on preference shares
Surplus on winding-up	Prior return of nominal value, but no further participation	Fully participating after return of nominal value to preference shareholders

3.2 Class rights

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3.2.1 Definition: rights attaching to different classes of shares.

3.2.2 Types of class rights

- Dividends;
- Return of capital;
- Voting;
- The right to appoint or remove a director.

3.2.3 Variation of class rights: an alteration in the position of shareholders with regard to those rights or duties which they have by virtue of their shares.

3.2.4 How are class rights varied?

- if the method is set out in the articles, it must be followed;
- otherwise class consent must be obtained by special resolution at a meeting of that class.

3.2.5 When variation rules apply?

It is only necessary to follow the variation of class rights procedure if what is proposed amounts to a variation of class rights. There are many types of transaction that do not actually constitute a variation of class rights:

- To issue shares of the same class to allottees who are not members of the class;
- To subdivide shares of another class with the incidental effect of increasing the voting strength of that other class;
- To return capital to the holders of preference shares;
- To create and issue a new class of preference shares with priority over an existing class of ordinary shares.

3.2.6 Minority protection – s633

A dissenting minority holding 15% or more of the issued shares of the class in question may apply to the court within 21 days of class consent to have the variation cancelled as "unfairly prejudicial".

To establish that a variation is "unfairly prejudicial", the minority must show that the majority was seeking advantage to themselves as members of a different class instead of considering the interests of the class in which they were then voting.

3.3 Treasury shares:

3.3.1 Definition: s724 CA 2006 provides that treasury shares are created when limited companies purchase their own shares out of distributable profits.

3.3.2 Exercise of any right attached to the treasury shares: s726 CA 2006

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provides the company must not exercise any right (e.g. voting, dividend, return of capital etc.) in respect of the treasury shares, and any purported exercise of such a right is void.

3.3.3 Disposal of treasury shares: s727 of the Companies Act provides that where shares are held as treasury shares, the company may at any time:

A. sell the shares (or any of them) for a cash consideration
B. transfer the shares (or any of them) for the purposes of or pursuant to an employee's share scheme.

4. ISSUE AND ALLOTMENT OF SHARES

4.1 Directors' powers to allot shares

4.1.1 Private companies with one class of shares: directors have the authority to allot shares unless restricted by the articles.

4.1.2 Public companies and private companies with more than one class of shares: directors may not allot shares without authority from members. Any director who allots shares without authority commits an offence under s549 of the Companies Act 2006 and may be fined. The allotment, however, remains valid.

4.2 Methods of allotment

4.2.1 Private companies: they cannot sell shares to the public. Therefore, investors must submit their applications to the directors directly. After that shares are allotted and issued, and a return of allotment should be made to the Registrar.

4.2.2 Public companies

- **Public offer:** where members of the public subscribe for shares directly to the company.
- **Offer for sale:** the company may make an offer to the public to apply for shares based on conditions in a prospectus.
- **Placement:** where shares are offered to designated persons, e.g. existing or new investors, or directors, at a predetermining price.

4.3 Special circumstances

4.3.1 Rights issues – s561 CA 2006

- When the company chooses to allot **equity securities** (including ordinary shares and convertible debts) for cash, it has a **statutory obligation** to offer those shares to existing shareholders of the same class in proportion to their holdings and on the same or more

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favourable terms as the main allotment.

- Shares subscribed in this manner are called **rights issues**.

4.3.2 Pre-emption rights

- They are the rights of **existing ordinary shareholders** to be offered new shares issued by the company pro rata to their existing holding of that class of shares.
- For example, if a company has 200,000 shares in issue, and decides to issue another 50,000 shares, pre-emption rights would give existing shareholders the right to buy new shares, i.e. existing shareholders may apply for 1 new share for every 4 shares they hold.
- Existing shareholders may **transfer** their right to buy to another person. Alternatively, they can simply **do nothing**, i.e. choosing not to buy or transfer their rights.

4.3.3 Bonus issues

- A bonus issue is the **capitalization of the reserves** of a company by the issue of additional shares to existing shareholders, in proportion to their holdings.
- Such shares are normally fully paid-up with no cash called from the shareholders.

5. PAYMENT FOR SHARES

5.1 Common law rules

- Payment for shares can be **any form of consideration**.
- It is **for the company to value** any non-cash consideration.

5.2 Statutory rules

5.2.1 Rules for all companies	**The no-discount rule – s580**	• **Definition:** it is unlawful for a company to issue and allot a share at less than its nominal value. • **Effect of breach:** the shares are treated as if they had been issued at nominal value and the allottee must pay up the discount with interest.

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	Share premiums – s610	• **Definition:** share premium is the excess received, either in cash or other consideration, over the nominal value of the share issued. • **Statutory rule:** if a company issues shares at a premium…the sum…shall be transferred to an account called 'the share premium account'. • **Status of the account:** it may not be reduced except for the following purposes: ▪ to pay for bonus issues; ▪ to pay for expenses of an issue of shares.
5.2.2 Additional rules for PLCs	More **stringent** rules apply to public companies: • **Subscribers' shares – s584:** subscribers to the memorandum of a plc must pay cash for their subscription shares. • **Work or services – s585:** an undertaking to do work or perform services cannot be accepted as consideration. A public company may, however, allot shares to discharge a debt in respect of services already rendered. • **The one-quarter rule – s586:** PLCs must not allot a share unless it is paid up to at least one quarter on the nominal value plus the whole of any premium. • **5 year rule – s587:** non-cash consideration must be received within 5 years. • **External evaluation of payment – s593:** non-cash consideration must be independently valued and reported on.	

Exam focus point
Capital explained/Illustration/Types of shares/Issue and allotment of shares/Payment for shares

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Preference shares

Ordinary shares

Class rights

Treasury shares

Rights issues

Pre-emption rights

Bonus issues

2. 必做习题

(1) Chapter 12 Quiz: Q1-5

(2) OT Revision Questions Ch12: Share Capital: Q1-9

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Chapter 14 Loan Capital

借贷资本是指货币资本所有者为了取得利息而贷给职能资本家使用的 货币资本。它的形成同资本主义再生产的循环过程有着密切的关系。在资 本主义再生产的循环过程中，产业资本或者商业资本往往会有暂时闲置的货币资本，这就成为借贷资本的主要来源。

Learning outcomes

- Define companies' borrowing powers.
- Explain the meaning of loan capital and debenture.
- Distinguish loan capital from share capital, and explain the different rights held by shareholders and debenture holders.
- Explain the concept of a company charge and distinguish between fixed and floating charges.

1. The Borrowing powers of the company

All companies registered under the Companies Act 2006 have an implied power to borrow for purposes incidental to their trade or business.

A public company cannot borrow until it has obtained a trading certificate from the Registrar of Companies.

The company's powers to borrow are delegated to its directors in the company's constitution, which may impose a maximum amount that the directors may borrow in the name of the company without first obtaining the approval of members in a general meeting of the company.

2. Debenture

A debenture is a document stating the terms on which a company has borrowed money.

This written acknowledgement of a debt by the company will normally include the following provisions:

- Parties to the loan;
- Interest;
- Date of repayment;
- Whether secured or not.

Debentures may be created in any of the following ways

- A single debenture:

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- It is created when the company obtains a loan from a third party.
- The creditors could be any third parties, although most often creditors will be banks, therefore, the debenture will invariably take the form of the bank's standard form, which will give the bank all possibilities of securities over the loan in case the company defaults.

◆ Debenture in series
- Different lenders may provide different amounts on different dates.
- Although each transaction is a separate loan created on different occasions, all lenders rank pari passu (equally) in their right to repayment.
- This ranking order may, however, be disrupted by charges.
- Each lender will receive a debenture in identical form in respect of his loan.

◆ Debenture stock
- A public company may raise capital by issuing debentures to the public.
- In a debenture issue, a number of investors lend money to the company by acquiring debenture securities, with each holding a specified fraction (in money terms) contributed by the lender.
- Each lender has a right to be repaid his capital at the due time and to receive interest on it until repayment.
- This form of borrowing is treated as a single loan "stock" (stock here means the amount of money the company receives through selling debentures) in which each debenture stockholder has a specified fraction which is also freely transferable subject to the terms of the issue.

3. Distinguish loan capital from share capital

	Shareholder	Debentureholder
Role	Owner of the company	Creditor of the company
Voting Rights	May vote at GMs	May not vote
Cost of Investment	Shares may not be issued at a discount	Debentures may be offered at a discount to nominal value
Return	Dividends are only paid: (1) out of distributable profits; (2) when directors make such recommendation	Interest must be paid when it is due.

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Redemption	Share capital is only returned to shareholders when the company is wound up.	No restriction on redeeming debentures.
Liquidation	Shareholders are the last people to be paid in liquidation.	Debentures must be paid back before shareholders are paid.

4. Charge

4.1 Definition

A charge is an **encumbrance** upon the property of the company granting its holder a **prior claim** over other creditors.

Creditor **Debtor**

Charged assets

Chargee **Chargor**

4.2 Types of charge

	Fixed charge	**Floating charge**
Definition	A form of protection given to secured creditors relating to specific assets of a company.	A charge on a class of assets, present and future, which in the ordinary course of the company's business, changing from time to time,
Attachment to assets	Fixed charge attaches to a specific asset as soon as it is created.	Floating charge attaches to assets until **crystallization**.
Disposal of assets	If co disposes of the charged asset, it will either repay the secured debt out of proceeds or pass the asset over to the buyer still subject to the charge.	Until the holders enforce the charge, co may carry on business and deal with the assets charged.

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4.3 Crystallisation of floating charge

- **Definition:** the floating charge becomes attached to the assets then within the charge and the company can no longer deal freely with the assets.
- **Events causing crystallisation**
  - Cessation of business;
  - Liquidation;
  - Crystallisation events provided by the charge contract, e.g. default on the loan.

5. Advantages and disadvantages of floating charges

Advantages to the company	Disadvantages to the creditors
• The company is **free to use** the assets in the ordinary course of its business. • A wider class of assets can be charged.	• The **value** of the security is **uncertain** until crystallisation. • A floating charge is **invalid** by the liquidator if it was created within the **12 months** immediately preceding commencement of winding up and at a time when the company was **unable to pay its debts** – s245 IA 1986. • Statute requires certain **unsecured claims** to be paid out of floating charge assets prior to the floating charge holders. • **Priority** of charges.

6. Priority of charges

6.1 Ranking sequence:

If more than one charge exists over the same class of property then legal rules must be applied to see which takes priority in the event the company goes into liquidation.

- **Two charges of the same type:** the first (created) in time takes priority;
- **Two charges of different types:** a fixed charge takes priority over a floating charge.
- **Registered and unregistered charges:** a registered charge takes priority over an unregistered charge.

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Order of creation	Order of registration

6.2 Negative pledge clauses

A floating chargeholder may seek to protect themselves against losing their priority by including in the terms of their floating charge a prohibition against the company creating a fixed charge over the same property (sometimes called a '**negative pledge clause**').

If the company breaks that prohibition the creditor to whom the fixed charge is given nonetheless obtains priority, unless at the time when their charge is created they have actual knowledge of the prohibition.

7. Registration of charges at the Companies House

7.1 Basic rule - s860 CA 2006:

- To be valid and enforceable, prescribed particulars of charges must be delivered to the Registrar within 21 days.
- The 21 days runs from the creation of the charge. Creation of a charge is usually effected by execution of a document.

7.2 Registration by whom?

- The company
- Any person interested

7.3 Failure to deliver particulars will have the following legal consequences – s874 CA 2006

- An unregistered charge is **void** as against a liquidator;
- The sum being secured is **payable forthwith** (i.e. immediately) **on demand**;
- The company and its officers are **liable to a fine**.

Prejudice: to injure or damage by some judgment or action (as in a case of law).

Non-delivery	Late delivery
	↓
	● **Court order** is required
	● A charge can only be registered late if it does not **prejudice** the creditors or shareholders of the company

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Exam focus point

The Borrowing powers of the company/Debenture/Distinguish loan capital from share capital/Charge/Advantages and disadvantages of floating charges/Priority of charges/Registration of charges at the Companies House

以下内容可以帮助你进行本章复习及自测

1. 重点词汇

The Borrowing powers of the company

Debenture

Distinguish loan capital from share capital

Charge

Advantages and disadvantages of floating charges

Priority of charges

Registration of charges at the Companies House

2. 必做习题

(1) Chapter 14 Quiz: Q1-5

(2) OT Revision Questions Ch14: Loan Capital: Q1-14

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Chapter 15 Capital maintenance and dividend law

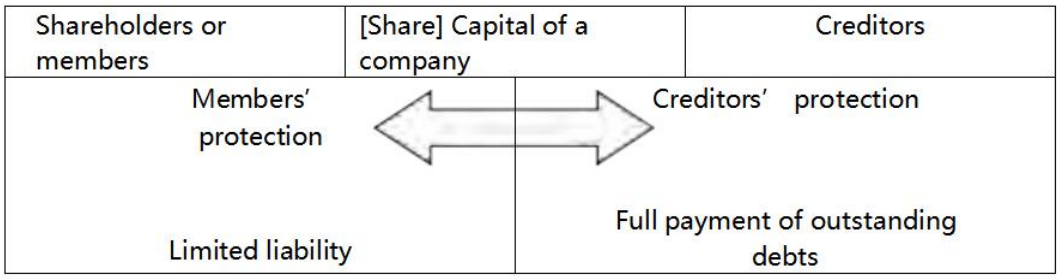
减资是股份公司减少注册资本额的行为。其主要目的在于：一次性偿付债务；调整过多的资本；分派股利;；公司合并；分离部门。分为实质性减资和名义性减资两类。实质性减资，是在减少公司账面资本的同时，减少与此等额的公司资产，并将这些资产返还股东或划转他人。名义性减资，只是减少账面资本数额，而公司财产并不相应减少，故不能向股东作任何返还，也无法向他人划转资产。减资的操作方法有两种：减少股份数量和减少股票面额。

Learning outcomes

- Explain the doctrine of capital maintenance and capital reduction.
- Explain the rules governing the distribution of dividends in both private and public companies.

1. The maintenance principle

This principle requires that a company shall not make payments [to shareholders or members] out of capital to the detriment of company creditors. Why capital must be maintained?



- Limited liability means that, if shareholders have paid for their shares in full, they may not be required to contribute more money to enable the company to pay its debts
- The capital of a company can be seen as a capital fund out of which debts to unpaid creditors will be payable.
- Creditors face the risk that the company may be unable to pay its debts. Therefore, creditors should expect that:
  - A company's shares will be paid for in full.
  - The company will not return any capital to its shareholders.

To protect creditors' interests, the Companies Act include regulations:

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- Preventing a company from issuing shares at a discount.
- Placing restrictions on the ability of a company to return capital to its shareholders.
  - Share premium rule.
  - Reduction of share capital rule.
  - Dividend rule.

2. Reduction of share capital

2.1 s641: any company may reduce any capital at any time, for any reason.

- **Unissued shares:** a limited company is permitted without restriction to cancel unissued shares as that change does not alter its financial position;
- **Issued share capital:** if a limited company with a share capital wishes to reduce its issued share capital it may do so if it has such power in its articles. If it does not, the articles may be amended by a special resolution.

2.2 Why reduce share capital:

- The company now has more capital than it needs, and wants to return unwanted capital to shareholders.
- The company is changing its capital structure, and wants to cancel some shares and replace them with loan capital.
- The company has suffered losses and its net assets are worth less than the nominal value of its shares, and it wants the share capital to reflect this lower value.

2.3 Situations envisaged by s641:

- Pay off part of paid-up share capital out of surplus assets;
- Extinguish or reduce liability on partly paid shares;
- Cancel paid-up share capital which is lost or unrepresented by net assets.

2.4 Procedures for limited companies to reduce issued share capital as required by s641:

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Public company	Private company
• **Resolution:** the company passes a special resolution. • **Court confirmation:** an application is made to the court for its sanction. The court considers: **The interests of creditors:** the court will require that creditors be invited by advertisements to state their objections to the reduction. **The interests of members:** the second concern of the court, where there is more than one class of shares, is whether the reduction is fair in its effect on different classes of shareholders. • **Restriction:** the court will not approve a reduction that takes the issued capital below 50,000 pounds, unless it also orders conversion to a private company. • **Registration:** if the court is satisfied that the reduction is in order, it confirms the reduction by making an order to that effect. A copy of the court order and a statement of capital, approved by the court, to show the altered share capital must be delivered to the Registrar which will issue a certificate of registration.	• **Solvency statement:** the directors must first make a solvency statement: ▪ A solvency statement is a declaration by the directors, provided 15 days in advance of the meeting where the special resolution is to be voted on; ▪ It states there is no ground to suspect the company is currently unable or will be unlikely to be able to pay its debts for the next 12 months. ▪ All possible liabilities must be taken into account and the statement should be in the prescribed form, naming all the directors. • **Resolution:** the company passes a special resolution. • **If no solvency statement is made:** if the directors are unable to make a solvency statement, the sanction of the court must be obtained in the same way as for a public company. • **Registration:** the company will register details of the proposed reduction and the special resolution with the registrar.

3. Dividend rule

3.1 Definition

◆ Dividends are payments made to shareholders by a company, only out

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of its distributable profits or other distributable reserves. A company may not pay a dividend out of capital.

- The power to declare a dividend should be specified in the company's articles of association.

3.2 Model Articles specify the following procedures:

- **Directors** may recommend an amount of dividend for payment.
- The recommendation is made to the **shareholders at the AGM** of the company, and the shareholders may vote to declare a dividend, which may not exceed the amount recommended by directors.
- Dividends are normally declared payable on the **paid up amount of share capital**.

3.3 Distributable profit – s830 CA 2006: accumulated realized profits less accumulated realized losses.

- **Accumulated:** it means that any losses of previous years must be included in reckoning the current distributable surplus.
- **Realised:** a profit or loss is deemed to be realized if it is treated as realized in accordance with generally accepted accounting principles.

3.4 Additional restriction on plcs- s831 CA 2006: before and after the distribution the company's net assets must be at least equal to the aggregate of its called up share capital and undistributable reserves. Undistributable reserves are defined as:

- Share premium account;
- Capital redemption reserve;
- Revaluation reserve;
- Other undistributable reserves required by statute, constitution or any law.

3.5 What are the consequences of the payment of an unlawful dividend?

- Members
  - A member may obtain an injunction to restrain a company from paying an unlawful dividend;
  - The company can recover from members an unlawful dividend if the members knew or had reasonable grounds to believe that it was unlawful;
  - Members knowingly receiving an unlawful dividend may not bring an action against the directors.

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- **Directors:** the directors are liable,
  - If they declare a dividend which they know is paid out of capital.
  - If, without preparing any accounts, they declare or recommend a dividend which proves to be paid out of capital.
  - If they make some mistakes of law or interpretation of the constitution which lead them to recommend or declare an unlawful dividend.
- **Auditors:** If an unlawful dividend is paid by reason of error in the accounts the company may be unable to claim against either the directors or the members. The company might then have a claim against its auditors if the undiscovered mistake was due to negligence on their part.

Exam focus point
The maintenance principle/Reduction of share capital/Dividend rule

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1. 重点词汇

The maintenance principle

Reduction of share capital

Dividend rule

2. 必做习题

(1) Chapter 13 Quiz: Q1-5

(2) OT Revision Questions Ch13: Capital Maintenance and Dividends: Q1-16

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Part F MANAGEMENT, ADMINISTRATION AND THE REGULATION OF COMPANIES

Chapter 16 Company directors

通过本章的学习，你会了解到公司董事的类型，职能和角色。重点了解执行董事和非执行董事的区别，以及董事的任命和罢免的相关内容。

Learning outcomes

- Discuss the ways in which directors are appointed, can lose their office and the disqualification of directors.
- Distinguish between the powers of the board of directors, the managing director/chief executive and individual directors to bind their company.
- Explain the duties that directors owe to their companies, and the controls imposed by statute over dealings between directors and their companies, including loans.

1. THE OFFICE OF DIRECTOR

1.1 Role of directors

The Companies Act 2006 provides that every company must have at least 1 director, and PLCs must have at least 2 directors. There are no statutory maximum for the number of directors, the articles may impose a limit.

A director is a person who is responsible for the overall direction of the company's affairs. The directors' function is to take part in **making decisions** by **attending meetings** of the board of directors. Anyone does that is a director whatever they may be called in the company.

Companies are run by the directors collectively in the board of directors. The board is the elected representatives of the shareholders acting collectively in the management of a company's affairs. The board meeting is the proper place for the exercise of the powers, unless they have been validly passed on, or "sub-delegated", to committees or individual directors.

1.2 De jure and de facto directors:

1.2.1 De jure directors

They are directors formally appointed by a company and are known as de jure

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directors.

1.2.2 De facto directors

A de facto director is anyone who is held out by a company as a director, performs the functions of a director and is treated by the board as a director although they have never been formally appointed.

1.3 Executive, non-executive directors and managing directors:

	Definition	Authority
Executive Directors	An executive director is a director who performs a specific role in a company under a service contract which requires a regular, possibly daily, involvement in management.	• Their actual authority is whatever the board tells them to do. • They do not have the apparent authority to make general contracts which attaches to the position of MD, but they have apparent authority attaches to their management position.
Non-executive Directors	A non-executive director does not have a function to perform in a company's management, s/he is usually an external part-time contractor who is supposed to: • Provide supervision over executive directors; • Bring in outside expertise; • Sit on various committees of the board, e.g. nomination, audit, remuneration; • Serve as a check and balance on executive directors therefore ensuring effectiveness and accountabilities of the board.	• No actual authority • The extent of their apparent authority generally depends on the representations made by the company or previous dealings.

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Managing director/Chief Executive Officer	A managing director (also known as the Chief Executive Officer) is one of the directors of the company appointed to carry out overall day-to-day management functions.	• His actual authority is whatever the board gives them. • The CEO/MD has apparent authority to make general business contracts on behalf of the company.

1.4 Shadow director:

Under section 251 CA 2006, shadow directors are defined as directors for legal purposes if the board of directors is accustomed to act in accordance with their directions and instructions. This rule does not apply to professional advisers who merely provide advice in a professional capacity.

A shadow director is therefore someone who is not "officially" a director of the company but who in practice has control over other directors.

Statutory provisions regarding directors' duties also apply to shadow directors.

2. APPOINTMENT AND DISQUALIFICATION OF DIRECTORS

2.1 Disqualification

2.1.1Articles: the company's constitution may provide grounds for disqualification: e.g. when directors become of unsound mind.

2.1.2 Age limit: there is a minimum requirement of 16 years under CA 2006.

2.1.3 Bankrupts: Company Directors Disqualification Act ("CDDA") 1986 provides that undischarged bankrupts are automatically disqualified nor can they be directly or indirectly involved in the management of the company, if they continue to act, they become personally liable for the company's relevant debts.

2.1.4 Disqualification orders – CDDA 1986

- **Legal effect:** a court may disqualify a person from being concerned, directly or indirectly, in the management of any company.
- Breach of the order:
  - Criminal offence (fine and imprisonment).
  - Personal liability for the debts of the company.
- Grounds and length of the order

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Length of the order	Grounds for the disqualification order
Maximum 5 years	Where a director has been **persistently in default** in relation to the provisions of company legislation. Three defaults in five years are conclusive evidence of persistent default.
Maximum 15 years	• Where a person is convicted of a **serious offence** in connection with **management** of a company; • Where a person has been guilty of **fraudulent trading**; • Where a director of an insolvent company has participated in **wrongful trading**; • Where a director was involved in certain **competition violations**; • Where a director is **unfit** to be concerned in the **management** of a company as shown after a government investigation.
Minimum 2 years, Maximum 15 years	Where the director is shown to be **unfit** to be concerned in the management of a company as shown by a liquidator's report.

2.2 Appointment and reappointment of directors:

2.2.1 First directors: they are appointed by the promoters on application for registration of the company.

2.2.2 Subsequent directors: they are appointed in accordance with the articles.

The statutory model for plcs allows for the appointment of directors by:

- The members by ordinary resolution;
- A decision of the board.

2.3 Retirement of directors by rotation

The model articles for public companies provide the following rules for the retirement and re-election of all directors at AGMs.

2.3.1 First AGM: at first AGM all directors shall retire.

2.3.2 Subsequent AGMs - at every subsequent annual general meeting

- Any directors who have been appointed by the board since the last annual general meeting shall retire;
- Who were not appointed or reappointed at one of the preceding two annual general meetings shall retire.

2.3.3 Reappointment: retiring directors are eligible for re-election, i.e. they may be reappointed by ordinary resolution.

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2.4 Vacation of office

A director may leave office in the following ways, and a form must be filed with the Registrar whenever and however a director vacates office.

- **Death;**
- **Dissolution of company;**
- **Disqualification;**
- **Retirement;**
- **Resignation;**
- **Removal:**
  - Articles may provide;
  - s168 – Statutory power of members to remove directors

2.5 Removal of directors – s168 CA 2006

Statutory power of the members: in addition to provisions in the articles for removal of directors, a director may be removed from office under s168 CA 2006.

Statutory procedure

- Special notice of 28 days of the resolution must be given by whoever is proposing the resolution (removal of director) to the company.
- The company must forthwith send a copy to the director concerned.
- The director concerned has right to require the company to circulate his representations amongst members.
- The director has the right to address the meeting at which the resolution is considered.
- Members can remove the director concerned by an ordinary resolution.

Do members need a reason to remove directors?

- s168 CA 2006 can be used to remove a director despite anything provided in the service contract the director may have or anything specified in the company's constitution.
- The dismissal may incur substantial damages arising from the outgoing director's claim for breach of contract.

3. GENERAL DUTIES OF DIRECTORS

3.1 To whom are the duties owed – s170 CA 2006

The general duties are owed by a director of a company to the company. This means that only the company itself can take action against a director who breaches them: **Percival v Wright 1902**.

董事到底对谁负责？《2006 年公司法》第 170 条规定，董事应对公司负有义

务。如董事未尽其成文法所规定的义务，只有公司才可以起诉董事：Percival v Wright（董事收购股东股票之时未告知他们正在与投资者谈判出售公司，公司即将被出售的消息将使得公司股价大涨。法院认为，董事应对公司负有义务，而不对某一名股东负责）。

3.2 Duty to exercise reasonable skill, care and diligence – s 174 CA 2006

This is a dual standard distinct from the reasonable care discussed in tort law:

3.2.1 Objective standard: a director must show such care that could reasonably be expected from a competent director in the same role.

3.2.2 Subjective standard: the director must further show the degree of skill which may reasonably be expected from a person of his knowledge and experience.

3.2.3 Why CA 2006 imposes a dual standard for directors?

3.3 Duty to act within powers – s171 CA 2006

Directors owe a duty to act in accordance with the company's constitution.

Directors may only exercise powers for the purposes for which they were conferred, i.e. they may not use their powers for ulterior or improper motives: **Hogg v Cramphorn 1967**. (Directors were held in breach of duty where shares were issued in order to block a takeover bid)

董事仅可将授权用于授权的目的，而不得用于其他目的：Hogg v Cramphorn（为了阻止公司被恶意收购，董事会根据章程授权开始发行新股，董事会的目的在于他们选择的新股东持有的股份将稀释收购者的控股比例，从而阻止收购。法院认为，董事会控制公司发行股票的行为是将授权用于不当的目的， 因此股东有权撤销该项行为）

Any shareholder may apply to the court to declare that a transaction in breach of s171 should be setaside. In practice, the courts generally will remit the issue to the members in general meeting to see if the members wish to confirm the transaction.

3.4 Duty to promote the success of the company – s172 CA 2006

A director must act in the way he considers, in good faith, what would be most likely to promote the success of the company for the benefit of its members as a whole.

3.5 Duty to exercise independent judgment – s173 CA 2006

Directors should not delegate their powers of decision-making or be swayed by the influence of others, they may delegate their functions to others, but they must continue to make independent decisions.

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3.6 Duty to avoid conflicts of interests – s175 CA 2006

Directors have a duty to avoid circumstances where their personal interests conflict, or may possibly conflict with the company's interests. A director, therefore, must not make a profit from his/her knowledge or position as a director.

This duty applies to the exploitation of any property, information or opportunity, e.g. **Percival v Wright 1902**.

It is immaterial whether or not the company could take advantage of the property, information or opportunity: **Regal (Hastings) v Gulliver 1942**.

法院将不考虑公司是否可以利用该信息、机会及财产营利：Regal (Hastings) v Gulliver（Regal 在当时未能筹集到相应资金。董事通过购买股票方式向公司注入资本，以便于公司将资金用于经营影院。该投资大获成功，董事出售股票后赚得盆满钵溢。公司控制权变更后，新董事会代理公司起诉几名已经离任的董事，追究他们未尽诚信义务之责任。法院认为，董事如果利用公司感兴趣但不能利用的商业机会谋取个人利益的话，则该董事违反了其诚信义务，即法院并不关注公司利用某项机会的可行性或能力，只讨论董事有无利用其职位所获取的信息、机会和财产来谋取个人利益。

However, the duty is not infringed if the matter has been authorised by the directors at a board meeting, or by the members of the company.

This duty continues to apply to an ex-director as regards any matter s/he became aware of while s/he was a director: **Industrial Development Consultants Ltd v Cooley 1972**.If a director makes a profit from such an interest he is accountable to the company.

已经离职的董事仍需就董事任职期间所获得的信息、机会和财产对先前的任职公司负责：Industrial Development Consultants Ltd v Cooley（库利是 IDC 的董事长，其与东方燃气理事会商讨建筑合同一事，理事会决定不与 IDC 签约。随后，理事会私下接洽库利，并提出愿意与其个人签约。库利之后开始装病，其离开公司后单独与理事会签约。法院认为，虽然 IDC 不能得到签约机会，但库利违反了其对公司的诚信义务。库利因此必须将已经或将要获得的合同上的利润返还给公司。

3.7 Duty not to accept benefits from third parties – s176 CA 2006

This duty prohibits the acceptance of benefits (e.g. bribes) from third parties conferred by reason of them being director, or their doing (or not doing) anything as directors.

3.8 Duty to declare interests in proposed transaction or arrangement with the company – s177 CA 2006

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If a director has an interest, directly or indirectly in a proposed transaction with the company, he must **declare** the nature and extent of that interest to the other directors **before** the company enters into the transaction: **Aberdeen Railway v Blaikie 1854**.

The declaration may be made at a meeting of the directors or by notice to the other directors. Any declaration required must be made before the company enters into the transaction or arrangement.

3.9 Declaration of an interest in an existing transaction or arrangement – s182 CA 2006

Directors have a statutory obligation to declare any direct or indirect interest in an existing transaction entered into by the company to other directors. This obligation is almost identical to the duty to disclose an interest in a proposed transaction or arrangement under s177. However, this section is relevant to transactions or arrangements that have already occurred. Failure to make the declaration is a **criminal offence** under s182 CA 2006.

3.10 Consequence of breach of duty

The company itself must initiate a civil action against the director for his breach of duty. This usually means the other directors starting proceedings. Consequences for breach include:

- **Damages** payable to the company where it has suffered loss;
- **Restoration** of company property;
- **Repayment** of any profits made by the director;
- **Rescission** of contract (where the director did not disclose an interest).

3.11 Derivative claims for breach of the general duties

A derivative action may be brought by shareholders in respect of "acts involving negligence or breach of duties by a director of a company". A shareholder would have to bring the action against the director in the name of the company. So if the action is successful, it is the company would benefit not the individual shareholders.

4. AGENCY POSITION OF DIRECTORS

- When directors act for a company, they are acting as its agents.
- Most companies' articles delegate the entire running of the business to the board, and allow the board to sub-delegate to individual directors and others.

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- MD & EDs will usually be given actual authorities to carry out transactions for the co.
- MDs & EDs have apparent authorities attached to their management positions. If a company (its shareholders or the board) allow a third party to believe that an individual has authority to bind the company, that individual is said to have an apparent authority to act for the company. So even when actual authority does not exist, it must be bound by obligations entered into by the individual who uses that authority: Freeman & Lockyer v Buckhurst Park Properties (Two directors of a company left X, the third director, for some years to run the company's business. X engaged some architects on the company's behalf although he had no express authority to do so. Later the company refused to pay the architects on the ground that X had no authority. The court held that even though X was not managing director the company had led third parties to believe that he was, thus the company was estopped from denying that X had authority as if he were managing director.)
- When directors act outside the scope of his actual authorities, contracts are ultra vires.
- Section 39 CA 2006 states the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution.
- Section 40 CA 2006 states in favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution.
- TPs are presumed to be in good faith and they will be able to enforce ultra vires contracts against the company. To escape liability, co must prove lack of good faith, i.e. third parties knew directors had no actual authority went ahead signing the ultra vires contract with the directors.
- In theory, if members know in advance that directors will step outside their authorities, they may seek a court injunction.
- In most other instances, the company may hold directors liable for breaching duty to act within powers.

Exam focus point
The office of directo/Appointment and disqualification of directors/General duties of directors/Agency position of directors

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1. 重点词汇

De jure directors

De facto directors

Appointment and disqualification of directors

General duties of directors

Agency position of directors

2. 必做习题

(1) Chapter 15 Quiz: Q1-5

(2) OT Revision Questions Ch15: Company Directors: Q1-16

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Chapter 17 other company officers

通过本章的学习，你会了解到公司秘书和审计师的要求，职能，任命等相关内容。

Learning outcomes

- Discuss the appointment procedure relating to, and the duties and powers of, a company secretary.
- Discuss the appointment procedure relating to, and the duties and rights of a company auditor, and their subsequent removal or resignation.

1. COMPANY SECRETARY

1.1 Requirement to have a company secretary

- Every public company must have a company secretary.
- Private companies are not required to have a company secretary.
- The roles of the company secretary may be done be one of the officers (including directors) of the company.
- A sole director of a private company cannot also be the company secretary of that company.

1.2 Duties of a company secretary

There are no statutory duties for a company secretary. The specific duties of each company secretary are decided by the board of directors. Typical examples of his or her duties would include:

- Establishing and maintaining the company's statutory registers.
- Filing accurate returns with the Registrar on time.
- Organising and minuting company and board meetings;
- Ensuring that accounting records meet statutory requirements.
- Ensuring that annual accounts are prepared and filed in accordance with statutory requirements.
- Monitoring statutory requirements of the company.
- Signing company documents as may be required by law.

1.3 Appointment of a company secretary

The company secretary is normally appointed by the board of directors in accordance with the company's articles of association.

Under s273 CA 2006, the board must ensure that the company secretary for a

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PLC has one of the following qualifications:

- **Experience qualification:** has been secretary of a public company for at least 3 of the preceding 5 years
- **Paper qualification:** possesses certain designated professional qualifications (e.g. ACCA, CIMA, ICAEW etc.)
- **Appearance qualification:** in the opinion of the directors, appears to the board to be capable of discharging the functions of secretary.

1.4 Agency position of a company secretary

A company secretary is an agent of the company and may enter certain contracts on behalf of the company, and the company will be bound by those contracts. However, the contracts must relate to matters that would seem to be within the area of responsibility for a company secretary. The authority of a company secretary may include:

- **Actual authority:** the company secretary can do whatever the board delegates to him;
- **Apparent authority: in Panorama Developments v Fidelis Furnishing Fabrics 1971**, the court held that "(the company secretary) is no longer a mere clerk…he is entitled to sign contracts connected with the administrative side of a company's affairs, such as employing staff, ordering cars, or purchasing office equipment etc."

A company secretary cannot enter contracts on behalf of the company where the matter is clearly outside his or her area of responsibility, e.g. borrowing money or starting litigation in the name of the company.

2. AUDITORS

2.1 Legal requirement – s475 CA 2006

2.1.1 General rule: every company must have auditors.

2.1.2 Exceptions

A. Private companies [to be exempted from the audit requirement, it must satisfy two or more of the following requirements]

- turnover not more than £10.2 million.
- Balance sheet total not more than £5.1 million.
- number of employees not more than 50.

B. Dormant companies which has passed a special resolution dispensing with the need.

2.2 Eligibility as auditor

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2.2.1 The auditors must be

- A member of a recognised supervisory body (e.g. ACCA, ICAEW) and authorised to audit by that body
- Holding an approved overseas qualification.

2.2.2 The auditors must be independent of the company.

2.3 Duties of auditors

2.3.1 When preparing their report, the auditors are required to carry out investigations that will enable them to form an opinion about the following matters:

- Whether the company has kept proper accounting records.
- Whether the financial statements of the company are consistent with the accounting records.

2.3.2 If auditors reach the opinion that the company has not kept accounting records, or that the financial statements are not consistent with the accounting records, they must state this in their report.

2.3.3 If the auditors fail to obtain the information or explanation they need to form an opinion, they must state this in their report.

2.4 Statutory rights

2.4.1 Access to records: they have a right of access at all times to the books, accounts and vouchers of the company.

2.4.2 Information and explanation

- They have a right to require from the company's officers, employees or any other relevant person, information and explanations necessary for the performance of their duties as auditors.
- The Companies Act makes it an offence for a company's officer knowingly or recklessly to make a false, misleading or deceptive statement in any form to an auditor.

2.4.3 Attendance at general meetings: a right to attend any general meetings of the company and to receive all notices of and communications relating to such meetings which any member of the company is entitled to receive.

2.4.4 Right to speak at general meetings: a right to be heard at general meetings which they attend on any part of the business that concerns them as auditors.

2.4.5 Right in relation to written resolutions: a right to receive a copy of any written resolution proposed.

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2.5 Appointment of auditors

2.5.1 First auditors: may be appointed by directors to hold office until the first general meeting;

2.5.2 Subsequent auditors: are appointed by members by ordinary resolution.

- **Public company:** the auditors hold office until the next AGM;
- **Private company:** the auditor need not be appointed or re-appointed ever year. He is deemed to be re- appointed.

2.5.3 Casual vacancy: any casual vacancy (as the result of resignation or removal) may be appointed by both the general meeting and the board of directors.

2.6 Termination of office

2.6.1 Resignation

- An auditor may resign at any time by notice in writing to the company.
- A resigning auditor has a statutory right to requisition a general meeting, s/he can, of course, attend and speak at that general meeting.
- A resigning auditor must send to the company a statement of no circumstances/circumstances that should be brought to the attention of the members and creditors.

2.6.2 Removal

- Auditors may be removed from office at any time for any reason by ordinary resolution in general meeting of which special notice has been given.
- The auditor concerned must send to the company a statement of no circumstances/circumstances.

2.6.3 Remember: a statement of circumstances/no circumstances (whether there is anything that should be brought to the attention of members or creditors) must be deposited however the auditors leave office.

Exam focus point **Company secretary/Auditors**

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Company secretary

Auditors

2. 必做习题

(1) Chapter 16 Quiz: Q1-5

(2) OT Revision Questions Ch16: Other Company Officers: Q1-11

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Chapter 18 Company meetings and resolutions

通过本章学习，你会了解到公司会议的不同类型以及相关决议。

Learning outcomes

- Distinguish between types of resolutions: ordinary, special, and written.
- Explain the procedure for calling and conducting company meetings.

1. COMPANY MEETINGS

1.1 Types of meetings

Annual general meetings / General meetings / Class meetings

1.2 General meetings

1.2.1 The right to call general meetings

- The **board of directors** are given the power to call general meetings by the AoA. Under s656 CA 2006, directors of a public company must convene a GM if the net asset fall below half of the called up share capital, so that the members may discuss the state of affairs of the company.
- **Shareholders** holding at least 10% of the voting shares can require the directors to call a general meeting; if the BoD fails to hold a meeting shareholders demanded, the shareholders themselves then have the right to call the meeting.**"Required percentage"** under s303 Companies Act 2006

Public and private companies	In the case of a private company, more than 12 months has elapsed since the end of the last GM
10% voting shares	5% voting shares

- **The auditors** of the company have a right to require the directors to call a general meeting, if they resign as auditors.
- In some cases, the **court** may order the company to hold a general meeting to resolve a corporate deadlock.

1.2.2 Quorum for a general meeting

The articles of association may specify the minimum number of members who

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must attend a general meeting in order to have a quorum. If no quorum is present, the meeting is adjourned.

In absence of any other specification in the articles, a quorum consists of two members. However, there are situations where a GM can be held with a quorum of just one member. These include:

- When the company only has one member.
- The court makes an order that a GM be held with a quorum of one.

1.2.3 Business at a GM

- No set statutory agenda;
- In general, it is for the person who requisitions/convenes the GM to set the agenda.

1.2.4 The Chair (chairman)

The meeting should usually be chaired by the **chairman** of the board of directors. They do not necessarily have a casting vote (unless the Articles give them one).

1.3 Annual general meetings (AGMs)

1.3.1 Mandatory requirement – s336 CA 2006

Every public company must hold an AGM within 6 months of the end of the financial year. Private companies are no longer required to hold an AGM unless they wish to do so.

1.3.2 Notice of an AGM – s337 CA 2006

Members must receive a minimum 21 days' notice. Although the articles may require longer, shorter notice is permitted if every member is entitled to attend and vote so agrees.

1.3.3 Resolutions at AGMs

The resolutions at an AGM are usually proposed by the BoD and voted on by the members.

However, under s388 CA 2006, members can force a resolution onto the agenda if they hold 5% of voting rights or at least 100 members holding shares with an average paid up of £100 per member**.**

1.3.4 Business at an AGM – no statutory agenda, but would normally include:

- Election/re-election of directors;
- Election of auditors;
- Declaration of a dividend.

2. RESOLUTIONS

2.1 Types of resolutions

2.1.1 Ordinary resolution

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- It requires a simple majority of the votes cast: 50% +1
- It is the default type of resolution
- Examples:
  - Removal of directors;
  - Removal of auditors.

2.1.2 Special resolution

- **It requires a three-fourths majority of the votes cast:** 75%
- It is used **where the company's constitution or statute specifies** a special resolution
- All special resolutions **must be filed** at Companies House
- **Examples**
  - A change of the registered name;
  - Alteration of the Articles;
  - Reduction of share capital;
  - Winding up the company.

Exam focus point **Annual general meetings / General meetings / Class meetings**

2.2 Methods of voting at GMs

Resolutions are passed at a general meeting by means of a vote on each resolution individually. There are two methods that may be used to vote on resolutions at GMs

- By a show of hands of the members present at the meeting
- By a poll vote

It is for the chairman to decide how the business of the meeting should be conducted. Normal procedure is for the chairman to take a vote on a show of hands. If the vote is divided, the chairman will then go on to take a poll vote.

Poll: the casting or recording of the votes of a body of persons.

2.3 Proxies

A member of a company who is entitled to attend and vote at a GM has the right to appoint an agent, called a "proxy", to attend and vote for him.

2.4 Written resolution

2.4.1 Definition

A resolution signed by company members and treated as effective even though it is not passed at a properly convened company meeting.

2.4.2 Application

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- A written resolution may be passed by a private company only.
- A written resolution cannot be used to remove a director or auditor from office, since such persons have a right to speak at a meeting.

2.4.3 Who can initiate a written resolution

- It can be proposed and circulated by the directors whenever they wish.
- The directors must circulate it if members holding at least 5% of the voting rights so require.

2.4.4 How is a written resolution passed

- Copies of the resolution must be sent to each member eligible to vote by hard copy, electronically or by a website. Alternatively, the same copy may be sent to each member in turn.
- A written resolution is passed when the company has received agreement (in writing) from the required majority of the members.
- The required majority is the same as for special and ordinary resolutions.

2.4.5 Lapse of the written resolution

Proposed written resolution lapses 28 days after the circulation date (or whatever period is stated in the company's articles). Agreement after this period is ineffective.

2.4.6 Registration

- A copy of any proposed written resolution must be sent to auditors.
- Auditors do not have the right to object to written resolutions. If the auditors are not sent a copy, the resolution remains valid. However, the director and secretary will be liable to a fine.
- The purpose of this provision is to ensure auditors are kept informed about what is happening in the company.
- The company must enter all written resolutions in a Register of Written Resolutions, which must be kept at the registered office.

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Annual general meetings

General meetings

Class meetings

Special resolution

Ordinary resolution

2. 必做习题

(1) Chapter 17 Quiz: Q1-5

(2) OT Revision Questions Ch17: Company Meetings and Resolutions: Q1-11

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Part 4 INSOLVENCY LAW

Chapter 19 Insolvency and administration

破产清算是指宣告股份有限公司破产以后，由清算组接管公司，对破产财产进行清算、评估和处理、分配。清算组由人民法院依据有关法律的规定，组织股东、有关机关及有关专业人士组成。所谓有关机关一般包括国有资产管理部门、政府主管部门、证券管理部门等，专业人员一般包括会计师、律师、评估师等。

Learning outcomes

- Explain the meaning of and procedure involved in voluntary liquidation, including members' and creditors' voluntary liquidation.
- Explain the meaning of, the grounds for, and the procedure involved in compulsory liquidation.
- Explain the order in which company debts will be paid off on liquidation.
- Explain administration as a general alternative to liquidation.

1. WINDING UP AND LIQUIDATION

1.1 A company in financial difficulty has two options

1.1.1 Liquidation

Liquidation means the dissolution or winding up of a company. The winding up of a company may be either voluntary or compulsory.

- **Voluntary liquidation:** it means the company chooses to go into liquidation, it is initiated by the BoD and approved by shareholders. There are two types of voluntary winding up:
  - Members' voluntary winding up: it is a solvent liquidation
  - Creditors' voluntary winding up: it is an insolvent liquidation
- **Compulsory liquidation:** the court orders the company to be wound up.

1.1.2 Administration

1.2 Distribution of the company's assets in liquidation

When a company is put into liquidation, the liquidator will realize the assets of the company. The money obtained is then used to settle the liabilities of the company, in the following order of priority:

- **Fixed charge holders:** they will appoint a receiver to take charge of the charge assets to realise them, and use the proceeds to pay the debt.

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- **The liquidator's remuneration and expenses.**
- **Preferential debts:** unpaid wages not exceeding 800 pounds per employee during the 4 months preceding the date of commencement of winding up.
- **Floating charge holders.**
- **Unsecured creditors.**
- **Member's dividends declared but not paid.**
- Any **surplus** is returned to **shareholders**, but preference shareholders are repaid in full before any capital payment is made to ordinary shareholders.

1.3 Compulsory liquidation

1.3.1 Application for winding up

Under s124 Insolvency Act 1986, an application to the court for the winding up of a company may be made by unpaid creditor, its directors, its members or a liquidator.

1.3.2 Reasons why the court may order the winding up of a company

- **The company cannot pay its debts:** a company will be deemed "unable to pay its debts" in any of the following circumstances
  - A creditor has served a written notice at the company's registered office demanding payment of a debt (more than £750), and the company has failed to pay it within 21 days of the notice being served.
  - It is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities.
  - The creditor has obtained a court judgement for the company to pay a debt and has tried but failed to collect the debt.

B. A plc has **failed to obtain a trading certificate** within a year of incorporation.

C. The company has not started business within the year of incorporation or has suspended its business for over a year.

D. The court is of the opinion that it is **just and equitable** that the company be wound up: e.g. the substratum of the company has gone. In this instance, it is usually the dissatisfied members of the company who will petition for the compulsory winding up of the company: **Re German Date Coffee 1882**.

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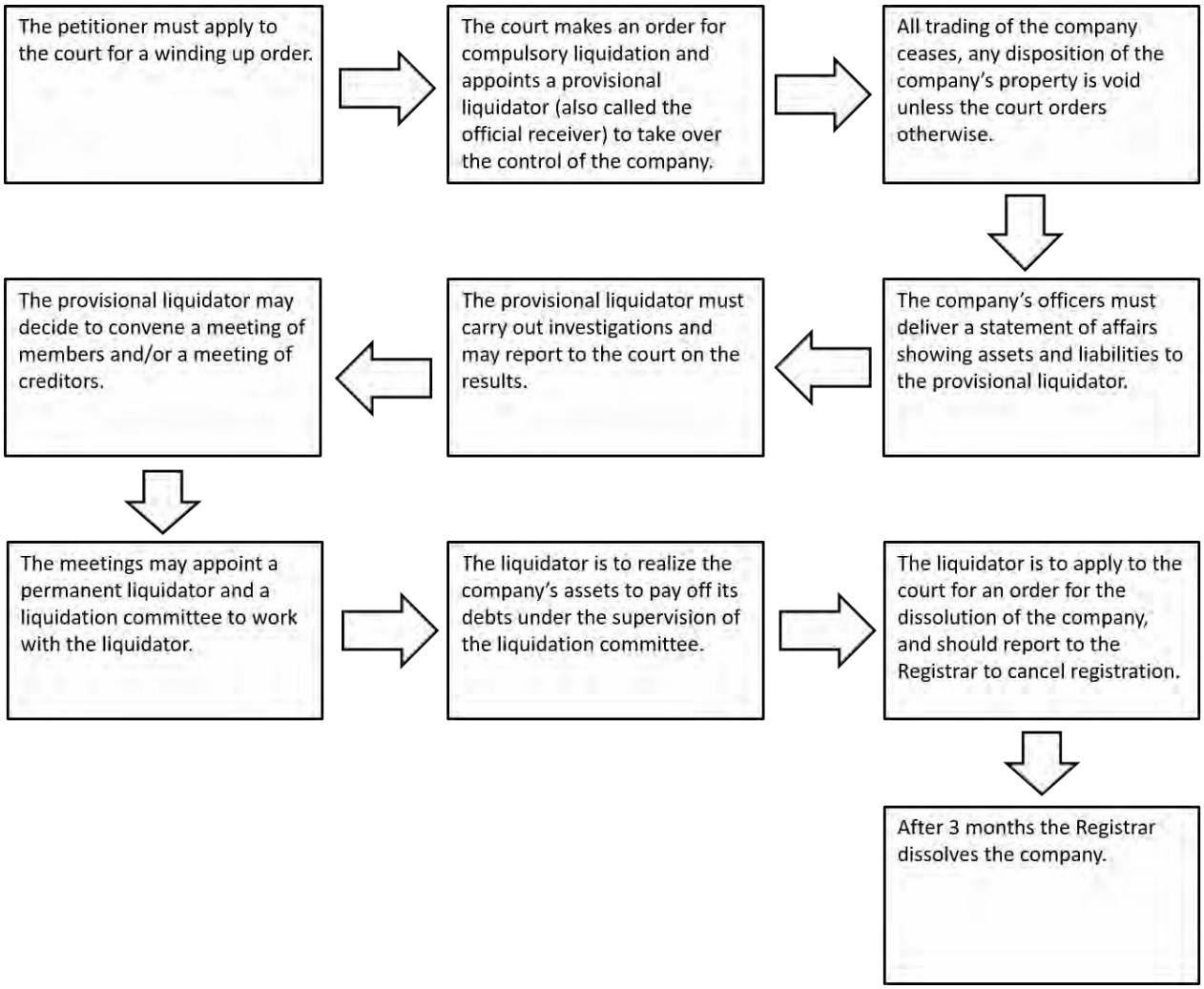
1.3.3 Procedures for a compulsory winding up



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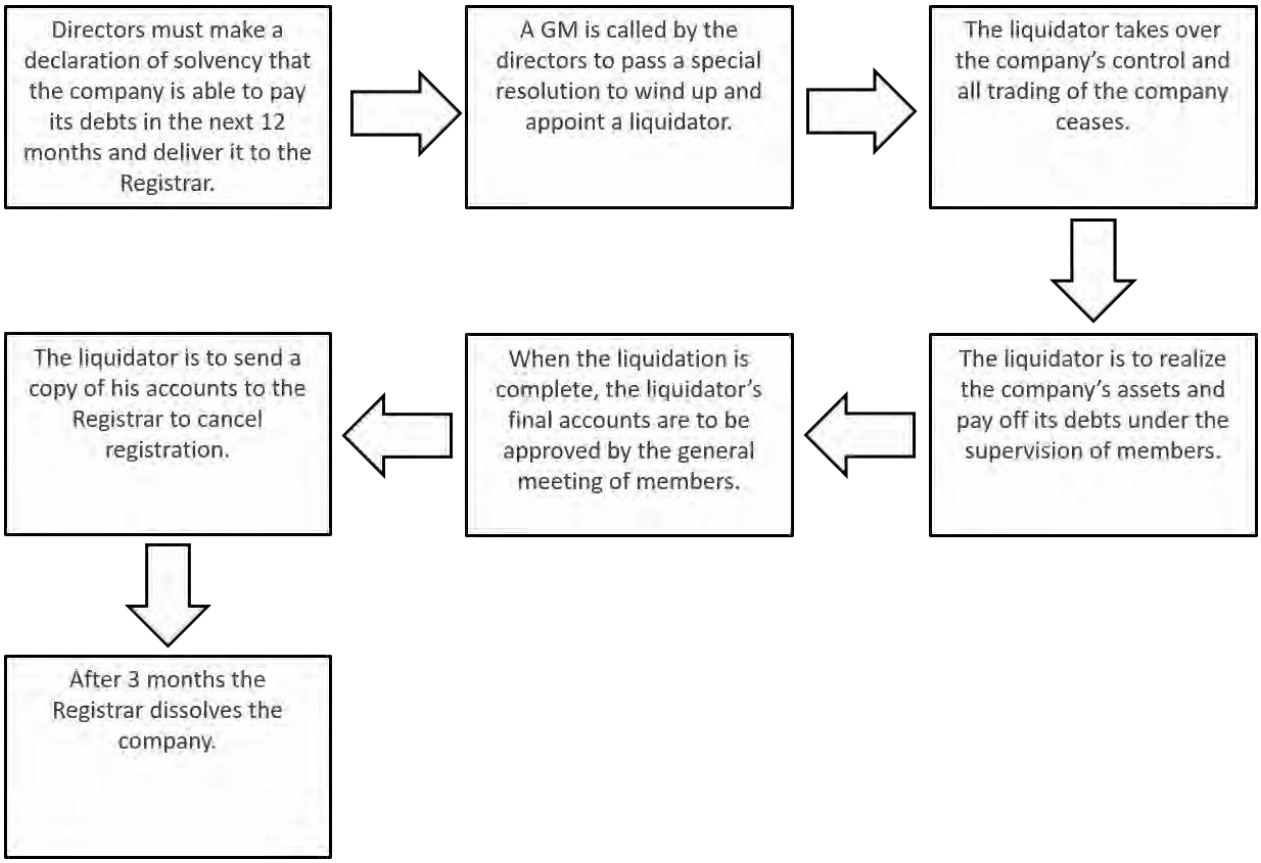
1.3.4 Members' voluntary liquidation



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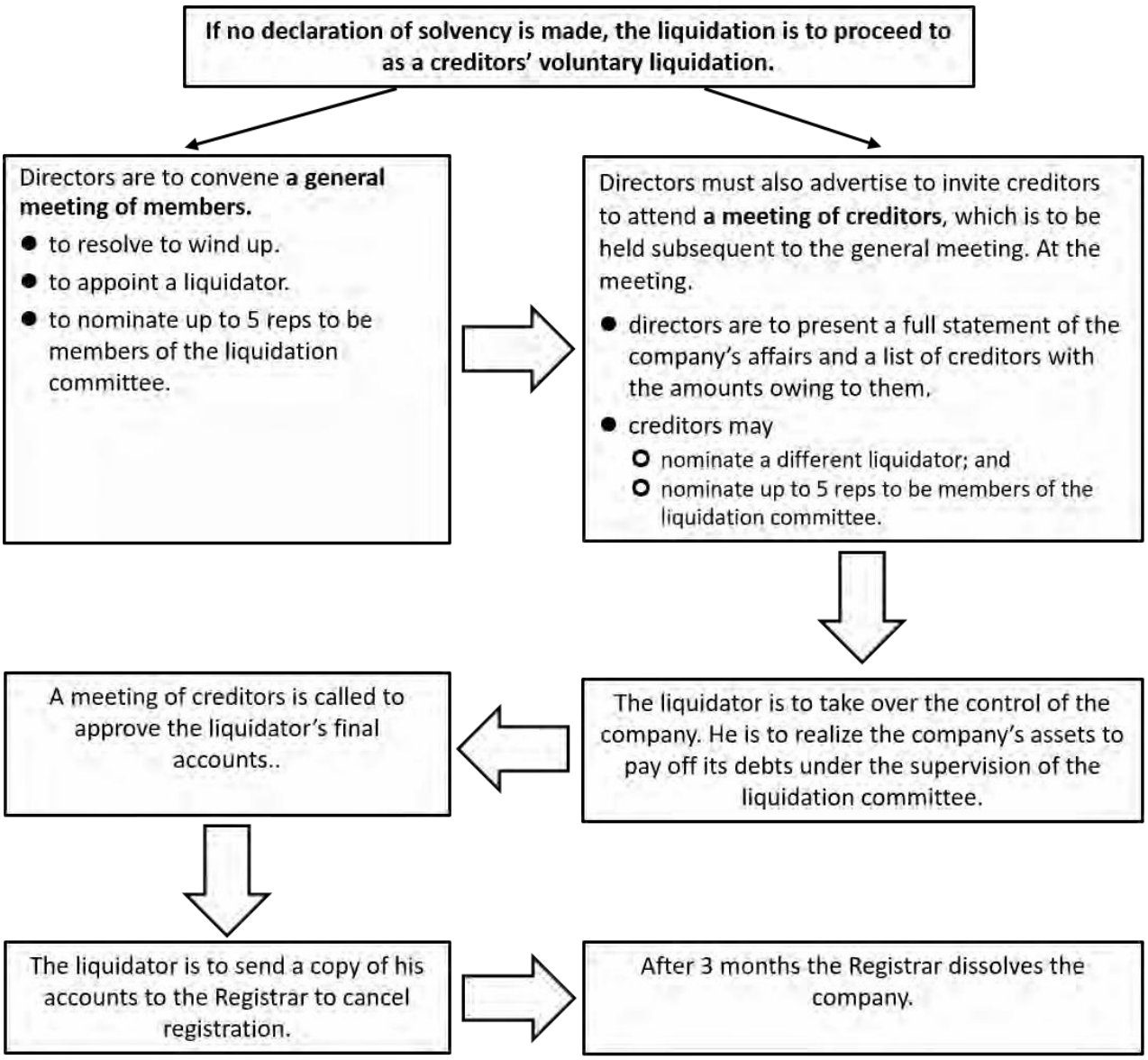
1.3.5 Creditors' voluntary winding up:



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2. ADMINISTRATION

2.1 Definition

Administration is a method of saving a company from liquidation. It puts an administrator in control of the company with a defined programme so that the company may eventually:

- pay its creditors in full
- continue its business

2.2 Appointment of administrator

An administrator may be appointed by:

- Order of the court (following an application by the company, its directors or a creditor)
- The holder of a floating charge
- The company and its directors

2.3 Legal effects of appointing an administrator

- No one may apply to the court for the company to be wound up.
- The company cannot pass a resolution for a voluntary winding up.
- No creditors may enforce their debt during the administration period without the court's permission.
- The administrator must, within 8 weeks of his appointment, either propose a rescue plan or state the company cannot be rescued.

2.4 Role of the administrator

A. Duties:	The administrator is an agent of the company and the creditors as a whole. S/he therefore owes a fiduciary duty to them and has the following duties: • Send notice of appointment to the company and Registrar. • Publish notice of appointment. • Obtain a list of company creditors and send notice of appointment to each. • Require certain relevant people to provide a statement of affairs of the company. This statement, which has a prescribed form, contains: · Details of the company's property; · The company's debts and liabilities; · Names and addresses of the company's creditors;

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	· Details of security held by any creditor. • Manage the affairs of the company; • Consider the statement of affairs submitted to him and set out his proposals for achieving the aim of administration.
B. Powers:	The administrator may do anything necessarily expedient for the management of the affairs, business and property of the company. S/he may have the same powers as those granted to directors and the following **specific powers** to: • Remove or appoint a director; • Call a meeting of members or creditors; • Apply to court for directions, such as making payments to unsecured creditors; • Make payments to secured or preferential creditors.

2.5 Creditor and member's objection to the administrator's activities

Any creditor or member of the company may apply to the court to object if they feel that the administrator has acted or will act in a way that has harmed or will harm his interest.

2.6 End of administration

Administration can last up to 12 months. It ends when

- ◆ The administration has been successful.
- ◆ 12 month have elapsed since the appointment of administrator. This time period may be extended by court order or by consent from the appropriate creditors.
- ◆ The administrator or a creditor applies to the court to end the administration.

Exam focus point
Winding up and liquidation/Administration

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Winding up

Liquidation

Administration

2. 必做习题

(1) Chapter 18 Quiz: Q1-5

(2) OT Revision Questions Ch18: Insolvency and Administration: Q1-21

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Part H CORPORATE FRAUDULENT AND CRIMINAL BEHAVIOUR

Chapter 20 Fraudulent and criminal behavior

通过本章的学习，你将会了解到内幕交易罪，洗钱罪，欺诈交易罪及过错交易罪，贿赂和市场操纵等相关内容。

Learning outcomes

- Recognition the nature and legal control over bribery.
- Discuss potential criminal activity in the operation, management and liquidation of companies, including the failure to prevent the facilitation of tax evasion and the meaning of relevant body.
- Recognise the nature and legal control over fraudulent and wrongful trading.

1. INSIDER DEALING

1.1 Definition

Under the Criminal Justice Act 1993, **insider dealing** may be defined as dealing in securities, encouraging others to do so, or disclosing inside information without proper cause, while in possession of inside information as an insider, the securities being price-affected by the information.

1.2 To prove the criminal offence of insider dealing, the prosecution must prove the possessor of insider information – s52 CJA

- **Deal:** has dealt (whether acquiring or disposing of or agreeing to do so) in securities on a regulated market whether directly or through an agent.
- **Encourage:** has encouraged another person to deal, it is irrelevant whether any dealing takes place;
- **Disclose:** has disclosed the information other than in the proper performance of their employment, office or profession.

1.3 The offence can only be committed by an insider in possession of inside information:

1.3.1 Inside information

It may be defined as price-sensitive information relating to a particular issuer of

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securities that are specific and precise and has not been made known to the general public.

1.3.2 Types of insiders

- **Primary insider:** a person who obtains inside information, either through being a director, employee or shareholder of an issuer of securities, or through access made available because of employment, office or profession.
- **Secondary insider:** anyone who directly or indirectly receives inside information from a person within the previous category is a secondary insider.

1.4 Defences

1.4.1 General defences

- The defendant did not expect the dealing to result in a profit (or the avoidance of a loss).
- The defendant believed on reasonable grounds that the information had been widely disclosed.
- The defendant would have done what he did even if he had not had inside information.

1.4.2 Specific defence for the disclosure offence

A person prosecuted for the disclosure offence has a defence if he can prove that he reasonably believed that the recipient would not deal etc.

1.5 Penalty

The CJA 1993 makes insider dealing a criminal offence punishable by an unlimited fine and/or a maximum of 7 years' imprisonment.

2. MONEY LAUNDERING

2.1 Basics

2.1.1 The process of money laundering

- **Placement:** getting the money obtained from criminal activities into the banking system.
- **Layering:** transferring the money between bank accounts so that the trail becomes difficult to follow.
- **Integration:** it is the final stage in the process where the money is made to seem as if it has come from a legitimate business or source.

2.2 There are 3 categories of offence

2.2.1 Laundering

- **Definition:** acquisition, possession or use of the proceeds of criminal

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conduct, or assisting another to retain the proceeds of criminal conduct and concealing, disguising, converting, transferring or removing criminal property.

- **Penalty:** a maximum of 14 years' imprisonment and/or an unlimited fine.

2.2.2 Failing to report

- **Definition:** it means failure to disclose knowledge or suspicion of money laundering, this applies to professionals in the Regulated Sectors (including banking, accountants and solicitors);

B. Penalty: a maximum of 5 years' imprisonment and/or an unlimited fine.

2.2.3 Tipping off

- **Definition:** professionals must not make any disclosure which is likely to prejudice any criminal investigation (into, e.g. terrorism, drug and laundering criminal proceeds) under the legislation.
- **Penalty:** a maximum of 5 years' imprisonment and/or an unlimited fine.

2.3 Defences

2.3.1 Laundering

Money laundering has not been committed, if a person makes a disclosure to the authorities as soon as possible after the transaction or before the transaction takes place.

2.3.2 Failure to report

A professional in the regulated sectors must disclose their knowledge or suspicion of money laundering to a nominated money laundering reporting officer ("MLRO") within their organization, or alternatively directly to the National Crime Agency ("NCA").

2.3.3 Tipping off

A defence against an accusation of tipping off is that the individual did not know or suspect that the disclosure to the suspected person would prejudice an investigation into the money laundering activity.

3. FRAUDULENT AND WRONGFUL TRADING

3.1 Fraudulent trading – s213 Insolvency Act 1986

3.1.1 General rule

A person is liable for fraudulent trading if s/he carries on the business of a company with intent to defraud creditors or for any fraudulent purpose, e.g. ordering goods knowing they will not be paid for.

- **Who can commit this offence?** Only persons who take the decision to carry on the company's business in a fraudulent manner or play some active part

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are liable.

- **The extent of fraudulent trading activities:** it includes not only defrauding creditors, but also carrying on a business for the purpose of any kind of fraud.

3.1.2 Exception

A person is not liable where there is an honest belief that the debts owed to creditors will eventually be paid for.

3.1.3 Legal consequences

- **Lifting the corporate veil:** on the application of liquidator, the court will order the defendant to make contribution to company's assets.
- **Disqualification order:** Under the CDDA 1986 a director can be disqualified for up to 15 years.
- **Criminal offence:** the defendant is punishable by an unlimited fine and/or up to 10 years in prison.

3.2 Wrongful trading - s214 Insolvency Act 1986

3.2.1 Background

In practice, it may be difficult to obtain a decision by a court that fraudulent trading has occurred. This is because it is exceptionally difficult to prove the necessary fraud "beyond reasonable doubt". Therefore, a further civil liability for 'wrongful trading' was introduced.

3.2.2 To establish wrongful trading, the liquidator must prove that

- **Knowledge:** the directors of a company decided to keep the company in business when they knew, or should have known, that there was no reasonable prospect of the company avoiding becoming insolvent and going into insolvent liquidation
- **Due diligence:** the directors did not take sufficient steps to minimize the potential loss for the company's creditors.

3.2.3 The court will assume that a director should have known that the company would have to go into insolvent liquidation

A. **Reasonable diligent standard:** if that knowledge would have been the conclusion of a reasonably diligent person;

B. **Higher skill standard:** if the director has greater than usual skill then he will be judged with reference to his own capacity.

3.2.4 Defence

The defendant has a defence if he can prove, "s/he took every step he ought to have taken with a view to minimising the potential loss to creditors".

3.2.5 Legal consequence

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A. **Civil liability:** wrongful trading is not a criminal offence.
B. **Lifting the corporate veil:** On the application of liquidator, the court will order the defendant to make contribution to company's assets.
C. **Disqualification order:** under the CDDA 1986, a director may be disqualified for up to 15 years.

4. BRIBERY

4.1 Offences provided by the Bribery Act 2010

The Bribery Act 2010 was passed in April 2010 and will be examinable from June 2012. There are four offences of bribery under the Act:

4.1.1 s.1 Offences of bribing another person

It is an offence to offer a financial or other advantage to another person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity.

4.1.2 s.2 Offences relating to being bribed

It is an offence where a person receives or accepts a financial or other advantage to perform a relevant function of a public nature or activity connected with a business improperly.

4.1.3 s.6 Bribery of foreign public officials

- It is an offence directly, or through a third party, to offer a financial or other advantage to a foreign public official (FPO) to influence them in their capacity as a FPO, and to obtain relevant business, or an advantage in the conduct of business.
- 'FPO' means an individual who holds a legislative, administrative or judicial position of any kind outside the UK, or who exercises a public function outside the UK, or is an official or agent of a public international organisation.

4.1.4 s.7 Failure of commercial organisations to prevent bribery

- It is an offence for a commercial organisation (a UK company or partnership) if a person associated with it bribes another person intending to obtain or retain business, or to obtain or retain an advantage in the conduct of the business for the organisation. This could take place outside the UK.
- Section 8 defines associated persons as someone who performs services for – or on behalf of – the commercial organisation, and, therefore, could be an employee, agent or subsidiary.

4.2 Defences

4.2.1 Defence for individual offences

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It is a defence for an individual charged with a bribery offence if they can prove that their conduct was necessary for the proper exercise of any function of an intelligence service or the proper exercise of any function of the armed forces when engaged on active service.

4.2.2 Defence for organizations

An organisation does, however, have a defence under s.7 if it can prove it had in place adequate procedures designed to prevent bribery. The procedures taken by an organisation should be proportionate to the risks it faces and the nature, scale and complexity of its activities.

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles:

- Proportionate procedures
- Top-level commitment
- Risk Assessment
- Due diligence (an investigation of a business or person prior to signing a contract, or an act with a certain standard of care.)
- Communication (anti-bribery policies and procedures should be embedded in the fabric of the organisation and communicated both internally and externally. This is likely to include relevant training if proportionate to the risk.)
- Monitoring and review

4.3 Penalties

4.3.1 Individuals

An individual found guilty is liable to imprisonment for a maximum of 10 years, or to a fine, or to both.

4.3.2 Organisations

An organisation found guilty is liable to an unlimited fine. The obvious further damage to the organisation is reputational damage and the consequences of this, as well as potential civil claims against directors for the failure to maintain adequate procedures.

5. MARKET ABUSE

5.1 Definition

Section 118 of the Financial Services and Markets Act 2000 creates civil penalties for market abuse. It relates to behavior which amounts to abuse of a person's position regarding the stock market. Examples of market abuse:

- **Misuse of information**

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This is any behaviour by an individual that is based on information that is not publically available, but if it was, it would influence an investor's decision.

- **Market distortion**

It means interfering with the normal process of share prices moving up and down in accordance with supply and demand for the shares. For example, a CEO who increases the activities of their business in order to make the company appear busier than it actually is.

- **Manipulating transactions**

It refers to the situation in which an individual who trades, or places orders to trade, that create a misleading impression of the supply or demand of securities that has the effect of raising the price of the investment to an abnormal or artificial level.

- **Manipulating devices**

This behaviour is the same as manipulating transactions except that the trading is followed by the creation of false statements so that other investors make incorrect trading decisions. For example an individual buys a large number of shares to artificially raise the share price and then makes false statements to the market that encourage other investors to buy the shares, driving the price up further.

- **Publication of false or misleading information**

5.2 Penalties

If s.118 is breached, a wide range of penalties can be imposed. These include financial penalties and the making of a public statement about the offending behaviour. The FSMA 2000 also creates criminal offences of making a misleading statement and engaging in a course of misleading conduct. The maximum penalty for these offences is seven years imprisonment or an unlimited fine.

Exam focus point
Insider dealing /Money laundering /Fraudulent and wrongful trading/Bribery /Market abuse /Winding up and liquidation/Administration

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以下内容可以帮助你进行本章复习及自测

1. 重点词汇

Insider dealing

Money laundering

Fraudulent and wrongful trading

Bribery

Market abuse

2. 必做习题

(1) Chapter 19 Quiz: Q1-5

(2) OT Revision Questions Ch19: Fraudulent and Criminal Behaviour: Q1-20

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