

Legal aspects in purchasing and supply

Level 6 - 04

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Session 1

Contract law - the application



Learning objectives

At the end of this session candidates will be able to:

- describe the elements of offer and acceptance
- explain the principles of consideration
- explain what is meant by the battle of the forms
- assess the validity of letters of intent and letters of comfort
- electronic contracting.



Contract law

- Governed largely by the common law:
 - that is, the body of law established by judges and followed by the rules of judicial precedent applied in the civil courts
- Statutory legislation is increasingly regulating contract law by:
 - primary legislation (acts of parliament)
 - secondary legislation (statutory instruments and regulations)
- A contract is:
 - an agreement enforceable by law between two or more parties to do, or abstain from doing, some act or acts
- The courts decide if there is a contract by reference to the essential elements



Essential elements (1)

- There must be an offer:
 - an expression of a willingness to enter into a contract with the intention that it shall become binding on the offeror
 - distinguished from an invitation to treat which is not a binding offer but merely an invitation to another party to make an offer
- There must be an acceptance:
 - which is a clear, unequivocal and unqualified acceptance of the offer
 - any qualification means it is a counter-offer which 'destroys' the original offer
 - acceptance must be communicated
 - silence cannot amount to acceptance
 - acceptance can be by conduct
 - note the postal rule
 - note the exception of unilateral offers

- *Partridge v Crittenden*
- *Fisher v Bell*
- *Pharmaceutical Society v Boots*
- *British Car Auctions v Wright*

- *Brogden v Metropolitan Railway*
- *Scammel v Ouston*
- *Hillas v Arcos*

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Essential elements (2)

- There must be consideration:
 - both parties must give or promise something of value as consideration for any benefit derived from the agreement
 - value can be goods, service or money
 - value can be a promise of future performance or future payment
- There must be an intention to create legal relations:
 - to enter into a binding contract
 - compare with domestic or social agreements
- There must be a *consensus ad idem* or “meeting of the minds” as to the essential terms and conditions of the contract

- *Stilk v Myrick*
- *Hartley v Ponsonby*
- *Atlas Exp v Kafco*
- *Williams v Roffrey*
- *D&C Builders v Rees*
- *High Trees House*

- *Rose & Frank v JR Crompton*
- *Coward v MIB*
- *Balfour v Balfour*
- *Merritt v Merritt*
- *Edwards v Skyways*

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Essential elements (3)

- In general there is no need for formalities:
 - does not have to be in writing to be valid
 - can be oral or by conduct
 - note statutory requirements for certain contracts to satisfy formalities, for example, credit, sale of land
- The parties must have the legal capacity to enter into the contract
- The contract must have been entered into freely
- The purpose of the contract must not be illegal or contrary to public policy.



Battle of the forms

- In a typical commercial transaction there will be several offers and counter offers:
 - Price list - invitation to treat
 - Order - offer by the buyer
 - Acknowledgement – counter-offer
 - Despatch note – counter-offer
 - Signature on delivery - acceptance
 - Seller's or buyer's terms prevail?
- Sometimes the parties are so careful
 - A contract is never concluded but goods are delivered and paid for
 - Quasi contract based on the equitable principle of *quantum meruit*
- Employ a tendering process if it is feasible.



E-contracts

- Apply the essential elements of contract formation in the same way
 - previously applied to telex and fax
 - pointer to likely legal position in e-contracts
 - the essential elements of an e-contract is the same as any other contract
 - take more care with battle of the forms
- Electronic Communications Act 2000
 - permits contractual negotiations and documents to be exchanged by email
 - permits electronic signature to confirm authenticity
- EU E-commerce Directive requires Member States to allow contracts to be concluded electronically
- Important exceptions in consumer credit.



Session 2

Common law and statutory contractual terms



Learning objectives

At the end of this session candidates will be able to:

- distinguish between express and implied contract terms
- classify contractual terms into conditions, warranties and innominate terms
- assess the validity of exclusion and limitation clauses
- explain *force majeure* clauses
- distinguish between penalties and liquidated damages
- assess the legality of Retention of Title clauses.



Representation or term

- Statements made during negotiations
 - are representations inducing but not forming part of the contract
 - or promises or undertakings that are terms of the contract
- Whether a representation or a term depends on
 - the intention of the parties
 - the manner in which the statement is made
 - the timing of the statement
 - the importance of the statement
 - specialist knowledge or skill of the party making the statement
- Collateral contract
 - contract based on a statement
 - must have all the essential requirements of a contract.



Express and implied terms

- Express terms are formally written into a contract or verbally agreed
 - conditions - an important term; breach entitles injured party to discharge the contract and damages
 - warranties - less important; breach entitles injured party to damages
 - innominate term - the remedy depends on the nature of the breach
- Whether a condition or warranty depends on
 - the intention of the parties
- Implied terms are not written in the contract but
 - implied by the courts
 - to give business efficacy to the contract
 - the parties must have intended it
 - it is so obvious it goes without saying
 - implied by statute, for example, Sale of Goods Act
 - implied by custom.

- *Poussard v Spiers & Proud*
- *Bunge Corp v Tradax Export*
- *Bettini v Gye*
- *Cehave NV v Bremer H*
- *Hong Kong Fir v Kawasaki*
- *Reardon Smith v Yngvar Hanse-Tangen*
- *Champagne CS&D v Czarnikov*
- *The Mihalis Angelos*

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Interpretation

- Assumption: the parties mean what they say and say what they mean
- Words are given their ordinary and natural meaning
- More than one interpretation, the court will
 - favour the one giving effect to the contract
 - sever the one which may nullify the contract
 - and only so far as to give efficacy to the contract
- If a term is unclear or ambiguous, the court will
 - apply the *contra proferentum* rule
 - the clause is interpreted against the party seeking to rely on it.



Exclusion and limitation clauses

- The purpose is to exclude or limit a party's liability for breach, negligence and so on
- Regulated by statute, for example, Unfair Contract Terms Act and Unfair Terms in Consumer Contracts Regulations
 - cannot exclude liability for death and/or personal injury caused by negligence
 - subject to the test of reasonableness
 - strictly regulated where one party is a consumer
- Restricted by the courts
 - has the clause been incorporated and drawn to the attention of the other party
 - interpretation of an incorporated clause by *contra proferentum* rule
 - but note two business parties of equal standing entering freely into a contract.

- *Interfoto v Stiletto*
- *Olley v Marlboro Court Hotel*
- *Parker v SE Railway*
- *Chappleton v Barry UDC*
- *Spurling v Bradshaw*
- *Hollier v Rambler Motors*
- *George Mitchell v Finney Lock*
- *Photo Productions v Securicor*
- *Smith v Eric Bush*

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Force majeure

- English law provides for contracts that cannot be performed under the doctrine of frustration
 - has to be impossible to perform
 - drastic solution - contract is terminated
- *Force majeure* clauses are far more flexible
 - deal with events that may prevent obligations under a contract ... act of God
 - can allocate losses, suspend the contract ...
 - no limit on what can be included subject to rules of limitation clauses
- Scope of *force majeure* not defined in English law
- Important to define it clearly in the contract.



Penalties and liquidated damages

- Liquidated damages
 - genuine attempt to estimate likely losses in the event of a breach
 - court will be guided if reflect actual losses
- Unliquidated damages in the event of breach
 - compensate by putting a party in the position he would have been in
- Penalties are viewed restrictively by the courts
 - must be a genuine pre-estimate of loss
 - otherwise a Penalty clause and void
- Does not matter what description is used in the contract
 - courts will determine what it is in reality
- Construed using *contra proferentum* rule.

• *Cellulose Acetate v Widnes Foundry*
• *Kemble v Farren*
• *Dunlop v New Garage*



Retention of title

- Known as Romalpa Clause
 - a retention of title over the goods until the goods are paid for
 - a right to finished goods into which the goods supplied had been mixed
 - clause is effective in relation to original goods and proceeds of their resale
- s19 Sale of Goods Act (SGA) 1979
 - covers the situation where no Romalpa clause exists
- 'Rolling' Romalpa
 - title does not pass until all outstanding accounts settled
 - s25 SGA provides protection to the buyer of goods that are subject to Romalpa.

• *Aluminium IV v Romalpa Aluminium*
• *Borden v Scottish Timber*
• *Armour & Carron v Thyssen*



Session 3

Vitiating factors –
termination of contract and remedies
available



Learning objectives

At the end of this session candidates will be able to:

- distinguish between duress and undue influence
- distinguish between misrepresentation and mistake and describe the effects of each
- apply the legal rules and remedies where there are vitiating factors
- describe different methods of contract termination
- explain frustration of a contract and the effects of *force majeure* clauses
- explain breach of contract and the effects
- identify restrictions on claims for unliquidated damages
- equitable remedies



Duress and undue influence

- Common law doctrine of duress - coercion of the will of one party by physical duress
 - covers actual or threatened physical violence to a party or his immediate family
 - covers threats of imprisonment
 - threat must be to the person
 - effect was to make the contract void
 - new rule - the injured party's choice whether he wants to continue or not
- Doctrine of undue influence
 - contract made under pressure
 - influence not amounting to duress but the exercise of free will has been prevented
 - presumption in certain agreements
 - solicitor and client
 - parent and child
 - trustee and beneficiary
 - NOT husband and wife.

•*Skeate v Beale*
•*Kaufman v Gerson*
•*Barton v Armstrong*
•*Pau On v Lau Yiu Long*

•*Re Craig*
•*Williams v Barley*

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Economic duress

- Rule of Duress extended to cover economic duress
 - a threat to the contract rather than the person
 - applies to business contracts
 - improper pressure by inequality of bargaining power
 - a coercion of the weaker party
 - main remedy is rescission
- Note the potential effect of delay
 - may affirm the contract.

•*Atlas Express v Kafco*
•*Universe Tankships v ITWF*

•*North Ocean Shipping v Hyundai Construction*

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Misrepresentation

- Representation a pre-contract statement of fact that induces the other party into the contract
 - not an opinion ... note exceptions
 - not non-disclosure or silence ... note exceptions requiring full disclosure
 - later falsification may require correction
- Fraudulent misrepresentation
 - false representation of a material fact
 - made knowing it to be false or without belief in its truth
 - or recklessly not caring if true or false
- Negligent misrepresentation
 - false statement made without dishonesty
 - made without reasonable grounds for believing it to be true
 - Misrepresentation Act 1967
- Innocent misrepresentation
 - false statement with reasonable grounds for believing it to be true.

• *Attwood v Small*
• *Bissett v Wilkinson*
• *Edgungton v Fitzmaurice*
• *With v O'Flanagan*

• *Derry v Peek*

• *Hedley Byrne v Heller*
• *McCullough v Lane Fox*

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Effect of misrepresentation

- Contract becomes voidable
 - until injured party elects to rescind
- Innocent misrepresentation
 - rescission and indemnity under s2(2) MA
 - court discretion to award damages if equitable to do so
- Negligent misrepresentation
 - right to rescind but court has power to refuse and award damages instead
 - can claim damages under s2(1) MA
 - onus on the person making false statement to show grounds for believing it to be true
 - damages do not need to be foreseeable
- Fraudulent misrepresentation
 - main remedy is rescission
 - can also claim damages under tort of deceit
.... not under contract.

•*William Sindall v
Cambridgeshire CC*

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Rescission

- Main remedy for all types of misrepresentation
 - equitable and so discretionary remedy
 - takes effect when notified to the other party
 - releases aggrieved party from obligations
 - sets contract aside as though never made
- Injured party may lose right to rescind
 - accept some benefit under the contract
 - affirm the contract in some other way
 - wait too long before taking action
 - may not be possible to restore parties to original position
 - goods have passed to a third party
- Final point exclusion or restriction of liability or a remedy for misrepresentation
 - s3 of MA ... any such clause is subject to a test of reasonableness.



Mistake

- Most mistakes have no effect unless induced by fraud or misrepresentation
- *Caveat emptor*
- Common mistake sufficient to void a contract
 - common misunderstanding - both parties
 - material and fundamental
- Mutual mistake also sufficient to void
 - negotiations at cross purposes
 - specific performance may be ordered by equity if no ambiguities in terms
- Unilateral mistake may affect validity
 - mistake as to identity, usually fraudulent
 - unlikely in commercial purchasing
 - mistake as to attributes
 - mistake as to document signed
 - *non est factum*

- *Atlas Express v Kafco*
- *Leaf v International Galleries*
- *Solle v Butcher*

- *Couturier v Hastie*

- *Raffles v Wichelhaus*

- *Cundy v Lindsay*
- *Lewis v Averay*
- *L'Estrange v Graucob*
- *Lewis v Clay*
- *Joscelyn v Nissen*

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Termination of a contract

- Performance
 - both parties do what they undertook to do
 - complete and unconditional performance
 - doctrine of substantial performance may intervene if remainder is insignificant
 - part and staged contracts may be used to avoid problems in large contracts
 - *quantum meruit* claim if performance prevented by the purchaser
- Agreement
 - both parties agree to terminate
 - there must be consideration (not past consideration)
 - not the same as agreement to vary (which still requires consideration).

• *Cutter v Powell*

• *Hoening v Isaacs*

• *Bolton v Mahadeva*

• *Planché v Colburn*

• *Williams v Roffey*

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Termination by frustration

- At inception the contract was feasible
- Doctrine of frustration applies when
 - contract becomes impossible to perform
 - impossibility was not foreseen by either party when the contract was made
 - impossibility is beyond the parties' control
- Frustration must not self-induced by an act or election of a party
- Effect of *force majeure* clauses
 - frustration and *force majeure* are mutually exclusive
 - *force majeure* ... events are foreseeable
- Law reform (Frustrated Contracts) Act 1943
 - all money paid is recoverable
 - all money due ceases to be due
 - parties may deduct/claim reasonable expenses.

•*Taylor v Caldwell*
•*Krell v Henry*
•*Hutton v Herne Bay Steamboat Co*

•*Maritime National Fish v Ocean Trawlers*

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Termination by breach

- Failure to perform a contractual obligation
- Anticipatory breach before date of performance •*Hochster v De La Tour*
- Remedies for breach
 - damages - compensation for loss, places a party in same position as if contract had been performed
 - general damages - loss proved but not precise, assessed by the court
 - special damages - precisely calculated and must be directly caused by the breach
 - specific performance compelling a party to perform his obligations •*Hadley v Baxendale*
•*Victoria Laundry v Newman Industries*
 - injunction preventing a party from breaching •*Warner Bros v Nelson*
•*Page One v Britton*
•*Warren v Mendy*
- Breach of condition or warranty discussed in session 2
- Limitation of actions
 - 6 years after cause of action arises.



Breach: sale of goods contract

- Rights of buyer when seller is in breach
 - of duty to deliver
 - buyer can sue for damages
 - buyer can reject if time is of the essence
 - buyer can waive right to terminate but may set a new date for delivery
 - no agreement to, but goods delivered in instalments
 - reject and sue for damages
 - but accept first delivery = implied acceptance
 - of duty to deliver by instalments
 - may reject an instalment and sue for damages
 - possibly rescind the whole contract
 - of a condition
 - buyer can reject the goods
 - can lose the right by whole or partial acceptance
 - treated as breach of warranty if trivial
- specific performance if goods unique.

• *Hartley v Hymans*
• *Charles Rickards v Oppenheim*

• *Maple Flock v Universal Furniture*

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Breach: sale of goods contract

- Rights of unpaid seller against the goods if buyer fails to pay
 - property passed to buyer but seller in possession
 - lien against the goods, s41 SGA
 - goods with a carrier, buyer insolvent
 - stoppage in transit, s45/46 SGA
 - seller gives notice but buyer fails to pay
 - resale with good title, s48 SGA
- Rights of seller against the buyer if buyer refuses to accept or pay, s49/50 SGA
 - action for price of the goods if property has passed - claim full price
 - action for damages if property has not passed - requires proof of actual loss.



Session 4

Commercial dispute resolution –
distinction between sale of goods and
supply of goods and service



Learning objectives

At the end of this session candidates will be able to:

- identify and evaluate litigation as a method of commercial dispute resolution
- distinguish between mediation and conciliation
- differentiate between adjudication, arbitration and expert determination
- understand the sale of goods act 1979 (as amended)
- understand the supply of goods and services act 1982
- distinguish between contracts for the sale of goods, contracts for work and materials, contracts for services and contracts of hire.



Litigation

- Civil procedure rules
 - encourage alternative forms of dispute resolution and out of court settlements
 - litigation is a last resort
- Claim in contract or tort
 - adversarial
 - solutions limited to those defined by law
 - outcome is binding and enforceable
- The civil court system
 - small claims <£5,000
 - no substantial pre-hearing preparation
 - less formality and low cost
 - fast track <£15,000
 - 30 week timetable
 - restriction on experts and court time
 - Multi-track >£15,000
 - litigation in the traditional sense
- Money claim online: low cost alternative.

Mediation and conciliation

- Mediation
 - an independent third party helps to define common ground and resolve disputes
 - mediator actively participates in the discussions
 - advantage of an independent third party who can see both sides of the dispute
 - voluntary participation by the parties
 - commercial not a legal resolution
 - wider range of solutions available
 - potentially non-adversarial and preserves business relationship
- Conciliation
 - conciliator acts as a go-between the parties
 - presents and discusses offers with the parties
 - helps to avoid confrontation and overcome misunderstandings.



Adjudication

- Adjudicator appointed by authority of legislation
 - independent of all parties
- Provides judgement as would a court
 - faster and lower cost, usually within 28 days of a referral
 - must abide by the rules laid down
- In some contracts (for example, construction) legislation lays down the procedure if the contract does not comply with adjudication provisions
- Adjudicator may take the initiative in ascertaining the facts and the law
- Adjudicator's decision is binding
 - at least until the dispute is finally determined by legal proceedings, arbitration or agreement between the parties
 - courts seem minded to uphold adjudicator's decision.



Arbitration

- Decided by a non-legal independent arbitrator
- Fast and inexpensive alternative to litigation
- Aim is to effect a settlement rather than impose a judgement as to who is right or wrong
- Rules of natural justice apply governed by Arbitration Act 1996
 - allows parties to define in the contract how and when arbitration will take place
 - restrict the jurisdiction of the court
 - Scott/Avery clause
 - parties can apply to the court
 - on appeal on a question of law by consent of both parties or in the interests of justice
 - for the arbitrator to give his reasons in greater detail by leave of the court
 - to determine a preliminary point of law by agreement of both parties.

• *Scott v Avery*
• *Balfour Beatty v Channel Tunnel*

• *Antaios Compania v Salen Rederierna*

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International arbitration

- Growth in cross-border commerce
 - international arbitration is increasingly important in international dispute resolution
- International recognition and support
 - United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958
 - widespread acceptance
 - agreements to refer disputes to arbitration should be upheld by the courts
 - awards enforced regardless of jurisdiction
 - recognised by Arbitration Act 1996
 - main body applies to all arbitrations
- Arbitration in England and Wales has high reputation
 - many disputes involving non-UK parties are resolved in this country.



Contracts for the sale of goods

- General law of contract applies
- Sale of Goods Act 1979 (amended by 1994 Act)
 - applies only to contracts for the sale of goods
 - contract of sale defined in s2(1)
 - consideration must be in money
 - Does not cover gifts, free offers, exchange of goods, exchange of tokens, hire purchase
 - uses 'title' and 'property' interchangeably
 - definition of goods s61(1)
- Categories of goods
 - existing goods s5(1)
 - future goods s5(2)
 - specific goods s6(1)
 - unascertained goods - no statutory definition
 - ascertained goods s16.

• *Helby v Mathews*
• *Esso v Customs & Excise*

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Supply of goods and services

- Supply of Goods and Services Act 1982
 - covers the transfer of goods other than by sale or hire purchase
 - temporarily or permanently without a sale
 - hire goods
 - goods supplied as part of a contract for services
 - effectively extends provisions of SGA 1979 to situations other than pure sale of goods
- Part 1 of the Act
 - contracts for work and materials
 - barter transactions
 - contracts for the hire of goods
- Part II of the Act
 - supply of services, whether goods transferred or not.



Session 5

Implied terms under SGA and SOGAS
Transfer of property, risk and title



Learning objectives

At the end of this session candidates will be able to:

- recognise the implied terms under SGA 1979 (as amended)
- interpret and apply Part I of SOGAS 1982
- interpret and apply Part II of SOGAS 1982
- distinguish between the different categories of goods for example specific, unascertained and so on
- interpret and apply ss16-20 of SGA 1979
- understand delivery including instalment deliveries
- understand the statutory definition of acceptance of goods.



Implied terms: SGA 1979

- Conditions and warranties
 - fundamental definitions as per contract law
 - seller transfers or agrees to transfer the property in goods in return for money
- Seller's right to sell, s12
 - seller has, or will have at the appropriate time, the right to sell the goods
 - goods are free and will remain free from any charge or encumbrance not disclosed or known to the buyer pre-contract
 - buyer has an exclusive remedy
- Sale by description of the goods, s13
 - the goods will correspond with the description.

• *Rowland v Divall*
• *Lewis v Averay*

• *Moore v Landauer*
• *Arcos v Ronaasen*

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Implied terms: SGA 1979

- Fitness for purpose and quality of goods, s14
 - only applies to goods sold in the course of a business, not private sales
 - rules of satisfactory quality (1994 Act)
 - objective test
 - rules of fitness for purpose
- Sales by sample, s15
 - bulk of the goods must correspond with the sample
 - buyer will have reasonable opportunity to compare the bulk and the sample
 - goods will be free from any defect that would render them unsatisfactory
 - defect would not be obvious from a reasonable examination of the goods.

• *Bernstein v Pamson*
• *Rogers v Parish*
• *Shine v General Guarantee Corp*

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Implied conditions: SOGAS

- Part 1 of the Act
 - implied conditions applying to contracts other than sale of goods
 - title
 - satisfactory quality
 - fitness for purpose
 - compliance with samples
 - identifies whether implied terms are conditions or warranties
 - contracts for work and materials ss 2-5
 - hire contracts ss 7-10
- Part II of the Act
 - covers supply of services
 - reasonable care and skill s13
 - time for performance, within a reasonable time if not specified s14
 - reasonable price if not specified s15
 - test of condition or warranty is whether it goes to the root of the contract.



Transfer of property

- Property means legal ownership of goods
 - property does not need possession of the goods
 - can have possession without property of the goods
- Passing of property
 - unless otherwise agreed, s20(1) SGA
 - seller can normally only sue after property has passed, s49 SGA
 - buyer insolvent, seller may be able to take possession if property not passed
 - buyer resells immediately, good title only passes if property had passed to original buyer
- Risk usually passes with title
 - avoid risk entirely or limit?
 - reasonable to exclude or limit?
 - indemnity clause or *force majeure*?
 - Romalpa clause.

Specific and unascertained goods

- Specific goods, s61 SGA
 - actual item to be used in the contract is identified at the time contract is made
 - property passes when parties intend it to pass, s17(1) and s19
 - parties intention not explicit
 - determined by contract, conduct and circumstances of the transaction, s17(2)
 - contract silent, s18 applies
 - property does not pass unless sale is unconditional, s18 rule 1
- Unascertained goods
 - goods are not identified at the time the contract is made
 - when finally identified become ascertained goods
 - property will not pass unless goods ascertained and unconditionally apportioned to the contract, s18 rule 5.



s18 Rules for passing of title

- Rule 1 (specific goods)
 - has to be an unconditional contract
 - no conditions to be fulfilled by the buyer
 - goods should be in a deliverable state
 - parties can override by mutual agreement
- Rule 2 (specific goods)
 - goods not in a deliverable state
 - buyer must have notice the goods have been put in a deliverable state
- Rule 3 (specific goods)
 - deliverable state, seller bound to weigh, measure, test or otherwise check
 - property will not pass until completed
 - only applies if seller to ascertain the price
 - buyer to ascertain the price - rule 1 applies
 - subject to contrary intention by the parties

- *Kursell v Timber Operators*
- *Reid Properties v Shultz*
- *Underwood v Burgh Castle Brick & Cement*
- *Ward v Bignall*

- *Underwood v Burgh*

- *Nanka-Bruce v Commonwealth Trust*

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s18 Rules for passing of title

- Rule 4 (specific goods)
 - goods delivered to buyer on approval or sale or return
 - property passes if:
 - Rule 4(a) - buyer indicates approval or acceptance or an act adopting the goods
 - Rule 4(b) - retains the goods beyond the time limit fixed for return
 - subject to contrary intention by the parties
- Rule 5 (unascertained goods)
 - sales of wholly unascertained goods
 - unascertained goods from particular source
 - future goods by description
 - subject to overriding requirements of s16
 - no property can pass until goods ascertained
 - buyer is co-owner of identified bulk, s20A
 - goods must be unconditionally apportioned to the contract.

• *Ferrier*
• *Poole v Smith Car Sales*
• *Weiner v Gill*

• *Wait v Baxter*
• *Pignataro v Gilroy*

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Delivery

- Delivery
 - voluntary transfer of possession s61
 - seller's duty to deliver per the contract, s 27
 - at seller's place of business unless otherwise agreed
 - delivery to another place than where they are sold is at buyer's risk of deterioration s33
 - delivery to a carrier is delivery to buyer s32(1)
 - payment at the same time unless otherwise agreed s28
 - no time fixed .. within a reasonable time 29(3)
- Delivery of wrong quantity s30
 - materially less than required - buyer may reject, if accepted must pay at contract rate
 - materially more than required - buyer can reject the whole or just the excess
 - Buyer not a consumer - cannot reject if shortfall/excess so slight it would be unreasonable to do so (seller to show)

Acceptance and payment

- Acceptance
 - statutory right to examine the goods s34
 - unless an agreement to the contrary
 - clear and unequivocal acceptance s35(1)
 - NOT signing of a delivery note
 - buyer done something inconsistent with seller's continued ownership s35(2)
 - by reasonable period elapsing s35(4)
 - agreeing to a repair is not an acceptance s35(6)(a)
 - acceptance of one item in a unit is acceptance of all items s35(7)
 - may lose right to reject by acceptance s11(4)
- Payment
 - time is not of the essence s10
 - breach does not justify repudiation
 - right to sue for damages.

• *Bernstein v Pamson Motors*

• *Sabir v Tiny Computers*

• *Truk v Tokmakidis*

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Session 6

Passing of title - exceptions to the rule
Privity of contract and potential
problems



Learning objectives

At the end of this session candidates will be able to:

- describe the *nemo dat* rule
- describe exceptions to the *nemo dat* rule
- explain the doctrine of privity of contract
- assess the legal validity of collateral contracts and warranties
- analyse the rules of Negligence
- describe the Consumer Protection Act 1987 (Part 1) and the Contract (Rights of Third Parties) Act 1999
- understand indemnity clauses and agency arrangements
- provide a brief overview of assignment and novation of contractual rights.



Nemo Dat rule

- s12 SGA implied good title
- Seller may not have good title
 - *Nemo dat quod non habet*
seller cannot pass better title than he has
 - presumption contained in s21 SGA
 - seller's title to goods defective .. same will be true for buyer's title
 - but there are several exceptions to the rule
- 1st exception is estoppel, s21 SGA
 - owner of goods precluded by his conduct from denying seller's authority to sell
 - innocent purchaser may obtain good title if
 - owner represents that the seller has authority to sell the goods
 - representation made intentionally or negligently
 - buyer acts on the representation in good faith.

•*Eastern Distributors v Goldring*
•*Mercantile Credit v Hamblin*

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More exceptions to *Nemo Dat*

- Sale under a voidable title, s23 SGA 1979
 - Seller has a voidable title but title not avoided at time of sale
 - *Colwyn Bay Motorcycles v Poole*
 - buyer in good faith acquires good title
- Sale by seller in possession, s24 SGA 1979
 - buyer allows seller to remain in control and possession of goods after sale
 - *Worcester Works Finance v Cooden Engineering*
 - innocent purchaser from seller gets good title
 - goods must transfer to innocent party
 - buyer can sue seller for conversion or in contract
 - *Nicholson v Harper*
 - *Gerson v Wilkinson*
- Sale by buyer in possession, s25 SGA 1979
 - buyer is allowed possession but title reserved by seller, for example, Romalpa clause
 - *Lewis v Averay*
 - innocent purchaser from buyer gets good title
 - seller can sue buyer for conversion or in contract



More exceptions to *Nemo Dat*

- Sale by mercantile agent, s2 Factors Act 1889
 - independent agent buys and sells goods or raises money on security of goods
 - protects *bona fide* purchasers if
 - seller has possession as a mercantile agent
 - possession with consent of the owner
 - acting in normal course of business of an agent
- Hire Purchase Act 1964
 - hirer does not have ownership of goods
 - hirer does not have right to dispose during hire
 - one exception in s27
 - where hirer of motor vehicle disposes of it, the 1st private purchaser in good faith acquires good title
- Sale under court order, seizure of property
 - third party owner must notify the bailiff who will apply to the court for a decision on ownership
 - jointly owned property, proceeds apportioned.

•*Stadium Finance v Robbins*



Privity of contract

- Doctrine of Privity - only a party to the contract may sue or be sued upon it
 - since only the contracting parties provided consideration *•Dunlop v Selfridges*
 - even if a third party was intended beneficiary *•Tweddle v Atkinson*
 - thus subcontractor cannot sue purchaser and vice versa
 - only actual seller can be held liable
 - original manufacturer escapes liability
- Circumvent by Collateral Contracts
 - separate from main contract .. *•Shanklin Pier v Detel Products*
 - limited to “strong representations” *•Lambert v Lewis*
- Circumvent by Collateral Warranty
 - given by subcontractor to main purchaser
 - warrants workmanship and materials
 - courts may imply a warranty *re* materials suitability if purchaser specifies materials.



Other methods to circumvent

- Contracting on behalf of a group
 - restricted to situations where there is a clear presumption one party is acting on behalf of a group
- Assignment
 - contracting party agrees to transfer rights and liabilities to a third party
 - not strictly privity issue
 - still two parties to contract
 - identity of one has changed
- Agency
 - agent contracts with third party on behalf of principal
 - third party may not even know of the principal
 - privity of contract between third party and principal
- Contract (Rights of third Parties) Act 1999

• *Jackson v Horizon Holidays*



Contract (Rights of Third Parties) Act 1999

- Third party may enforce a term of the contract if
 - contract expressly provides that he may
 - a benefit is conferred on him
 - he is identified by name, class or description but need not exist at the time of the contract
- Third party must enforce his rights
 - enforcement is subject to contract terms
 - parties may limit or place conditions
 - all remedies of contract and rules of mitigation apply to third party
- Parties cannot rescind or vary the contract if
 - third party communicated his acceptance
 - and promisor aware, or should be, that third party has relied on it
- Exclusion and limitation clauses apply
 - same rules of reasonableness.

•*Panatown v McAlpine*



Liability in tort

- A tort is a civil wrong ... not founded in contract
- Tort of Negligence ... manufacturer's liability
 - duty of care ... exists between the parties
 - owed to all neighbours ... person so closely affected that you ought reasonably to have them in mind
 - standard of ordinary reasonable adult
 - professional standards where appropriate
 - breach of that duty
 - duty of care must be broken
 - loss or damage must result
 - attributed directly to the breach
 - no need to be the only cause of the damage
 - unbroken chain of causation
 - recoverable damage
 - must be foreseeable *the Wagon Mound*
 - nervous shock *White v CC Sth Yorks, Page v Smith*
 - economic loss *Spartan Steel and other cases*
 - negligent misstatement *Hedley Byrne v Heller.*

• *Donoghue v Stevenson*

• *Wilson & Clyde Coal v English*

• *Mansfield v Weetabix*

• *Bolam, Bolitho cases*

• *Daniels v R Whites*

• *Barnett v Chelsea & Kensington Hospital*

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Subcontractor liability

- Duty of care direct to purchaser
 - any loss of a physical nature
 - possibly damage to reputation if affect by subcontractor's acts or omissions
 - no duty in respect of pure economic loss
 - purchaser's inability to earn profit
 - subcontractor nominated by purchaser
 - closer relationship
 - duty of care exists for economic loss
 - but considered to be limited effect
- Contract (Rights of Third Parties) Act
 - third party rights granted in the contract to the purchaser
 - may not always be possible to hold main contractor responsible
- Collateral contract.

• *Simaan General Contracting v Pilkington*

• *Junior Books v Veitchi*

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Product liability

- Consumer Protection Act 1987 Pt 1 product liability
 - product: goods, electricity, raw materials
 - defects: manufacturing, design, 'duty to warn'
- Strict liability, cannot be excluded or limited
 - the manufacturer of the product
 - the importer of the product into the EU
 - anyone holding out as a producer of a product
 - the supplier of the product
- Any of the above may be liable
 - death, personal injury or damage to property
 - minimum claim of £275 .. note limitation period
- Defences s4
 - defect due to compliance with legislation
 - product not supplied to another
 - not in the course of a business
 - defect did not exist at the relevant time
 - controversial "development risk" defence
 - component part defence.

•*St Albans CDC v ICL*
•*Roe v Minister of Health*
•*Worsley v Tambrands*

•*Murphy v Brentwood DC*

•*Kent CC v Price*
•*EC Commission v UK*
•*Abouzaid v Mothercare*

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Session 7

Agency and bailment

Tendering and E-tendering procedures



Learning objectives

At the end of this session candidates will be able to:

- understand how an agency is created
- describe the rights and duties of agents and principals
- describe the relationship between principal, agent and third parties
- explain the responsibilities arising from bailment
- explain the tendering process
- describe the types of tenders and the collateral obligations that arise from the tendering process
- explain pre- and post-award obligations
- explain how tendering should avoid the battle of the forms.



Agency role and relationships

- Agent (A) represents Principal (P) in law
 - affects P's legal position *re* third parties
 - making contracts and disposition of property
 - P bound by A's actions
 - A is not bound contractually by the deal
 - subject to exceptions
- P/third party relationship
 - normal contractual relationship
 - P undisclosed to third party
 - contract enforceable third party - A
 - third party free to choose if P becomes known
 - P may exercise limited right to enforce
 - parties may not settle contract debt with A
- A/third party relationship
 - P undisclosed as above
 - A liable if P non-existent
 - can be in breach of warranty of authority and liable for misrepresentation or deceit

•*Humble v Hunter*



Creation: agency agreements

- Creation by consent or agreement
 - A authorised by P to act on his behalf
 - actual authority - express or implied, usual
- Creation by necessity
 - necessary to do something in an emergency
 - impossible/impracticable to contact P
- Creation by ratification
 - P accepts A acting without or outside authority
 - A contracted as an agent
 - P exists, has contractual capacity and can ratify the contract, which is capable of ratification
 - P must have knowledge of all material facts
 - ratification must happen in reasonable time
- Doctrine of apparent authority
 - third party does not know limits of A's authority
 - third party relies on A's ostensible authority
 - P bound by A's apparent authority.

• *Hely Hutchinson v Brayhead*

• *Gt Northern v Swaffield*

• *Maxted v Durant*
• *Kelner v Baxter*
• *Metropolitan Asylums*

• *Freeman & Lockyer v Buckhurst Park*

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Agent's rights and duties

- Agent's rights (Principal's duties)
 - indemnity for expenses *re* work done unless otherwise agreed
 - not for unauthorised acts unless ratified
 - not for own fault or negligence
 - remuneration depending on agreement
 - lien on goods as security for debt
- Agent's duties, *uberrimae fidei* relationship
 - obey P's instructions
 - exercise reasonable care and skill
 - perform his acts personally unless authorised to delegate or purely administrative
 - act in good faith to P
 - account for money received on behalf of P
- Commercial Agents Regulations 1993
 - restates and strengthens common law
 - P's duties exceed common law
 - enhances A's rights and provisions re commission

•*Duncan v Hill*

•*Richmond Gate Property*

•*Fraser v Furnam*
•*Cohen v Kittel*
•*Chaudry v Prabhaker*
•*McPherson v Watt*
•*Robb v Green*
•*DeMattos v Benjamin*

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Breach and termination

- P's remedies for breach of duty by A
 - sue A for damages for breach of contract
 - sue A for conversion if A refuses to return P's property
 - sue A to recover a bribe, secret profit or any money received by A on P's behalf
 - sue A for an account if A fails to keep proper accounts of agency transactions
 - dismiss A without compensation
- Termination, 1993 Regulations
 - by agreement between the parties
 - P revoking A's authority
 - A renouncing his authority
 - completion of the duties and obligations of the agreement
 - lapse of time
 - frustration
 - death, insanity or bankruptcy of A or P.



Bailment responsibilities

- Bailee holds goods on condition of return to bailor
 - bailee to keep goods safe on behalf of owner
 - reasonable care of goods bailed
 - exclusion clauses subject to UCTA
 - liable for loss if not restored to bailor under contract
 - may sue third party for loss on behalf of bailor
 - normally may not use the goods
 - unpaid bailee may sell the goods with reasonable notice to bailor
 - bailor remains the owner
- Bailment by operation of law
 - Hotel Proprietors Act 1956, hotel owner is bailee of guest's property
 - involuntary bailment without bailor's consent
- Contracts of bailment
 - wide range of transactions: left luggage
 - commercial examples: loan of special tools.

•*Woodman v Photo Trade Processing*

•*Olley v Marlborough Court Hotel*

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The tendering process

- Tendering procedure
 - establish list of tenderers
 - specification, contract terms and conditions,
 - bid by specific deadline in specified form
 - wording of tender is crucial
 - invitation to treat, the tender is a contractual offer open for acceptance or rejection *•Spencer v Harding*
 - unilateral offer, binding contract on acceptance by the tenderer satisfying the terms *•Harvela Investments v Royal Trust Co*
- Standing offer
 - each call-off creates a separate contract on terms of the tender *•Gt Northern Railway v Witham*
- Letter of intent
 - intention to enter into a contract with the successful tenderer *•British Steel v Cleveland Bridge*
 - work may commence before formal contract
 - supplier is entitled to payment *quantum meruit*
- Avoiding battle of the forms
 - compare process to session 1 issues.



The tendering process

- Implied obligation to consider all tenders
 - providing complied with all the terms of the tendering process
- No obligation to accept highest/lowest bid or any tender submitted
 - as long as the tender is not a unilateral offer
- Implied obligation that the tender will remain open for acceptance for the stated period
- Other obligations of fairness
 - equal treatment of all tenderers
 - timely access to information
 - all tenderers notified of changes
 - all bids unsuccessful ... possible obligation to allow all bidders the opportunity to negotiate
- Post tender negotiations with successful tenderer
- e-tendering
 - same rules of offer and acceptance
 - issues of instantaneous nature of bids.

•*Blackpool & Fylde Aero Club v Blackpool Borough Council*

•*Spencer v Harding*
•*Harvela Investments v Royal Trust*

•*R v National Lottery Commission*
(*exp Camelot*)

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Session 8

Implications of EU Public Sector Directive – Legal Impact of Freedom of Information Act 2000



Learning objectives

At the end of this session candidates will be able to:

- examine the impact of the Public Contract Regulations 2006 (transposing the EU Public Sector Consolidated Directive)
- identify and describe the open, restricted, negotiated and competitive dialogue procedures
- identify new procurement provisions i.e. e-procurement mechanisms, central purchasing bodies, standstill procedure and framework agreements
- discuss thresholds, time limits and advertising requirements
- explain evaluation criteria including social and environmental considerations.
- distinguish between pre-qualification evaluation criteria and award criteria.
- evaluate the impact of the FOIA 2000 on procurement
- explain a publication scheme
- distinguish between absolute and qualified exemptions.



Consolidated procurement directive

- EU Consolidated Procurement Directive
 - implemented in the UK by the Public Contracts Regulations 2006
 - consolidated existing public procurement legislation for works, supplies and services
 - addresses environmental issues and e-procurement
- Consolidated procedures for tendering and awarding of contracts in the public sector
 - financial thresholds, subject to periodic review
 - new rules on shortlisting
 - tendering procedures: open, negotiated, restricted and new competitive dialogue
 - framework agreement defined for the first time
 - central purchasing bodies recognised
 - award criteria and right to feedback
 - exclusions no longer include voice and mobile telephony and satellite services
 - new exclusion for telecoms operators.



Framework agreement

- Agreement to establish terms governing a contract
 - over a given period, not exceeding four years
 - in respect of price and quality
 - to be called off for specific purchases through the term of the agreement
- Single supplier and multi-supplier frameworks are acceptable and regulated
- Substantial changes must not be made
 - to any terms of the agreement/call-off contract
 - terms must remain as agreed at the outset
- Must not be used to distort competition
- Purchasers entitled to benefit must be identified at the outset
- Criteria for awarding places on the framework must be identified at the outset
- choosing suppliers from framework at call off
 - by mini-bids (criteria defined at outset)
 - applying framework, for example, strict rotation.



Dynamic purchasing system

- Multi-supplier collection
 - standing electronic offers
- Admission to DPS
 - indicative tenders from suppliers
 - standard open procedure including notice
 - all suppliers passing selection criteria must be admitted
 - latecomers may join subsequently
 - offers can be improved at any time
- Particular need arises
 - supplementary notice and time for any last suppliers to gain admission
 - everyone on DPS asked to bid
 - awarded on criteria formulated when DPS was established
- All communications must be done electronically
- DPS only operated for four years
- No fees charged to participants.



Public tendering procedures

- Existing procedures
 - Open procedure
 - publication of indicative notice: EU Journal
 - publication notice seeking tenders
 - time limits defined for all stages of process
 - post-tender negotiations not permitted, only clarifications are allowed
 - Restricted procedure
 - essentially same as open procedure
 - limited to those invited to tender by the contracting authority
 - Negotiated procedure
 - only two stages: publication of the notice, receipt of request to negotiate
 - adapt tenders to contracting authority requirements
- New procedure
 - Competitive dialogue
 - limited circumstances
 - procurement of particularly complex contract.



Competitive dialogue

- Particularly complex contract
 - cannot define technical specification
 - or cannot specify legal/financial aspects
 - develop specification with input of participants
- Procedural rules
 - advertise in the usual way
 - shortlist minimum of three candidates
 - may discuss all aspects of contract individually with participants
 - tenders based on each participant's individual solution are invited
 - post tender, tenders can be clarified, specified or fine-tuned but no substantial changes
 - preferred tenderer may only clarify aspects of his tender and confirm commitments.



E-procurement and purchasing

- E-procurement
 - contracting authorities encouraged to send contract notices electronically
 - encouraged to make contract documents available online
 - shorter time limits for procurement
 - electronic communications available at all stages of procurement
 - system must
 - prevent staff from early access of tenders
 - record exactly when tenders received
 - e-auctions may be used
- Central purchasing
 - procurement by central purchasing body (CPB) is expressly recognised
 - contracting body may thus purchase from CPB
 - CPB must acquire goods externally not goods made itself or its own services
 - private sector bodies cannot be CPBs.



Freedom of Information Act

- Enables access to information held by public authorities
 - publication scheme
 - public commitment to make information available
 - guide to obtaining that information
 - general rights of access
 - any person has right to make a request
 - must respond within 20 days (usually)
 - duty to provide access and assistance so far as reasonable s16
- Exemptions - 23 laid out in the Act
 - grounds for withholding information such as
 - s41 information provided in confidence
 - s43 prejudicial to someone else's commercial interests
- Tendering to a public body could expose confidential information to competitors under FOIA.



Session 9

Legal implications of outsourcing competition law



Learning objectives

At the end of this session candidates will be able to:

- explain the implications of TUPE
- describe redundancy law
- describe the alternatives to redundancy
- describe the Competition Act 1998
- explain Article 81 of the EC Treaty
- explain Article 82 of the EC Treaty
- describe the Enterprise Act 2002.



Transfer of undertakings

- Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE)
 - outsourcing or compulsory competitive tendering with transfer of business
 - TUPE protects the employment rights of employees when there is a transfer of a business/undertaking if
 - transfer of an economic entity, change of ownership
 - employees were employed by old employer immediately before the transfer
 - employment was in the economic entity being transferred and not elsewhere
 - employee in situation where their contract of employment would otherwise have been terminated by the transfer
 - length of service and terms and conditions of employment preserved
 - pension scheme transferred.

• *Suzen v ZGK & L*

• *Secretary of State for Employment v Spence*

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Transfer of employees

- New employer does not have the right to pick and choose employees he wishes to take
 - New employer employs all staff
 - employment rights protected under TUPE
 - Some employees lose their jobs as a result of the transfer, no legitimate reason, reg 8
 - claim compensation for unfair dismissal under Employment Rights Act 1996
 - monetary compensation and re-instatement on same conditions or re-engagement on different terms
 - New employer needs fewer employees, reg 8
 - economic, technical or organisational reason (ETO) is a legally accepted reason
 - those employees are made redundant
 - subject to normal redundancy rules
 - Employee chooses not to transfer under reg 5
 - contract terminates automatically
 - no right to compensation.
- Harris v Bulmas Plastics*
• *Crawford v Swinton Insurance*
• *Safeway v Burrell*



Redundancy

- Voluntary redundancy
 - employee agrees to leave
 - dismissed
 - voluntary severance does not have to comply with Employment Rights Act 1996
 - no formalities *re* consultation and so on
 - actually voluntary severance
- Compulsory redundancy
 - employee dismissed because
 - employer ceases or intends to carry on the business for which he was employed or
 - carry on the business in the place he was employed
 - requirements of the business for employees to carry out work of a kind have ceased or diminished.



Redundancy procedures

- Consultation with trade unions or elected representatives
 - minimum consultation periods
 - depending on numbers to be made redundant
 - not negotiations, unions have no rights in law to negotiate numbers or selection process
 - employer duty to inform and receive comments
 - failure to consult may render any dismissal unfair
- Selection process
 - objective, fair, reasonable and consistent
 - unfair grounds include pregnancy, health and safety, employee representatives
- Redundancy payments
 - statutory minimum payments
 - no automatic right, must have at least one year service
 - may lose entitlement on refusing reasonable alternative employment



Competition Act 1998

- Chapter 1 prohibitions: anti-competitive practices
 - directly or indirectly fixing purchase or selling prices or other trading conditions
 - limiting or controlling production, markets, technical development or investment
 - sharing markets (>25%) or sources of supply
 - applying dissimilar conditions to equivalent transactions with other trading parties
 - contracts subject to acceptance of supplementary obligations with no connection with the subject of the contract
 - not exclusions in Schedules 1 - 4
 - exemptions may be granted
 - individual, block or parallel
- Must have an appreciable effect upon competition
 - Director General of Fair Trading investigates
 - usually where shared market >25%.



Competition Act 1998

- Chapter 2 prohibitions: abuse of monopoly position
 - directly or indirectly imposing unfair purchase or selling prices or other trading conditions
 - limiting production, markets or technical development to the prejudice of consumers
 - applying dissimilar conditions to equivalent transactions with other trading parties
 - supplementary obligations with no connection with the subject of the contract
- Dominant position
 - behaviour independent of its competitors and customers but excluding
 - agreements regulated by other legislation
 - agreement exempted by EC
 - agricultural products
 - agreement complying with earlier legislation
 - only need to notify DGFT if claiming exemption
 - DGFT can enter any premises with a warrant
 - fine up to 10% of parent company turnover.



Competition

- Monopoly investigation
 - DGFT may investigate complex monopolies
 - most of the investigative role lies here
 - refer the investigation to Competition Commission
 - Commission hears appeals against the decisions of the DGFT
- Restraint of trade
 - clauses attempting to restrain a party from trading or engaging in business
 - contracts for sale of a business
 - contracts of employment
 - solus agreements
 - such clauses must be reasonable
 - nothing more than reasonably needed to ensure limited risk from unfair competition
 - competition is not unlawful, only if it is unfair.

- *Morris v Saxelby*
- *Attwood v Lamont*
- *Fitch v Dewes*
- *Mason v Provident*
- *Home Counties*
- *Diaries v Skilton*
- *Dairy Crest v Wise*
- *Briggs v Oates*

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Treaty of Rome

- Articles 81 and 82 have direct application in the UK
- Article 81 covers same area as Chapter 1 Competition Act - anti-competitive practices
 - covers all agreements between undertakings
 - horizontal and vertical so no need to be in competition with each other
 - must affect trade between Member States
- proactive enforcement
 - likely effect of the agreement in preventing, restricting or distorting competition in EU
- only applies where effect is sufficiently serious
 - products must constitute more than 5% of products available in the areas affected
 - turnover of undertakings must exceed €200m
- EC can grant block exemptions
- no need to register agreements but may be advisable to submit agreement for a ruling
- financial penalties up to 10% of annual turnover.



Treaty of Rome

- Article 82 covers same area as Chapter 2 Competition Act - monopolies and merger control
 - prevention of abuse of dominant position which may distort trade between Member States
 - merger regulation to concentrations with a Community dimension
 - turnover of undertakings must exceed €250m
 - worldwide turnover of enterprises exceeds €5b
- Differences between EU and UK law
 - Arts 81 and 82 only relate to position where distortion is between Member States
 - if not between Member States then dealt with by UK law
- World Trade Organisation and competition
 - deals with tariff and trade barriers worldwide
 - deals with disputes between countries over unfair trading practices
 - EU represents all Member States

• *Commission v Hugin
Kassregister*
• *Brasserie de Haecht v
Wilkin & Wilkin*

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Enterprise Act 2002

- Largely complementary to Competition Act
 - Chapter I and II provisions remain in place
- Office of Fair Trading
 - DGFT powers transferred to Office of Fair Trading (OFT)
 - OFT's general functions
 - obtain information
 - make the public aware
 - promote good consumer practice
 - consumer bodies may make 'super complaints'
- Criminal offence for persons engaged in cartel agreements
 - price fixing, market sharing, bid rigging and limiting production
 - power to apply to court to disqualify directors
- Repeal of the exclusion for professional rules
 - no rules have ever been designated.



Session 10

Intellectual property rights
Confidentiality and trade secrets
International trade
International trade documents

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Learning objectives

At the end of this session candidates will be able to:

- explain patents
- explain trade marks
- explain design rights and copyright
- distinguish between registerable and non- registerable intellectual property rights
- explain the tort of passing off
- explain breach of confidentiality
- identify and discuss contractual terms that protect IPR's.
- explain the impact of restraint of trade clauses.



Intellectual property rights

- Patents as governed by Patents Act 1977
 - used to protect inventions
 - must be novel and involve an inventive step
 - capable of industrial application
 - not within an excluded category, for example. discovery, method of surgery
 - employee invention usually property of the employer, may be due fair compensation
 - registerable: country or EU protection
 - 20 year monopoly right
 - may succeed in action for patent infringement
 - action falls within scope of the invention
 - person uses the process or uses or imports an infringing product
 - may licence the right to use a patent
 - exhaustion of rights means cannot prevent importation of goods into a Member State if they are already on the market in another State.



Intellectual property rights

- Trade marks governed by Trade Marks Act 1994
 - consists of words, designs, letters, numerals or shape of goods or their packaging
 - includes 3D designs, slogans, colours, sounds but must be sufficiently distinctive
 - so not generic brands, for example aspirin
 - registered in classes of goods or services
 - can have similar mark with different owners in different classes so long as no risk of confusion
 - country registered mark or community mark
 - 10 year registration, renewable every 10 years
 - grounds for non-registration in ss 3-5
 - devoid of distinctive character
 - certain signs or indications
 - shape derived from nature of the goods
 - contrary to public policy
 - may licence a third party to use
 - infringement if third party uses an identical sign or mark in course of trade, takes unfair advantage or causes confusion.

• *Re Coca Cola*
• *Reckitt & Coleman v Borden*
• *Smith Kline v Stirling Winthrop*

• *Baywatch Production v Home Video Channel*

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Intellectual property rights

- Copyright
 - unregistrable right created automatically
 - lasts for life of creator plus 70 years
 - literary, dramatic, artistic or musical creations
 - plans, drawings, photos, manuals, instructions
 - not merely functional items of mass production
- Design rights
 - created by Copyright Designs and Patents Act 1988 to cover items not caught by copyright
 - unregistrable right created automatically
 - need to establish you created the item and date of creation
 - 15 year total protection
 - others may apply for a licence after ten years - not to be unreasonably refused
 - generic spares are excluded.

•*BL Cars v Armstrong*
Patents



Confidentiality and trade secrets

- Tort of passing off
 - common law national protection of products
 - on the market
 - which have acquired a reputation and goodwill
 - alternative protection to expensive registration of a trade mark
 - passing off may be localised
 - irrelevant if accidental
 - requires a deception to take place
- Trade secret and protection of confidentiality
 - by explicit contractual protection
 - action for breach of confidentiality
 - information must be confidential
 - recipient under obligation to maintain so
 - breach of confidence not necessarily deliberate
 - individuals and the State enforceable right to maintenance of confidence
 - link back to restraint of trade in Session 9 and confidentiality in employment contracts.

•*George Outram v London Evening Newspaper*

•*Wright v Wright Layman & Umney*
•*Hodgkinson & Corby v Wards Mobility*

•*Seager v Copydex*
•*Ackroyds v Islington Plastics*
•*AG v Guardian Newspapers*

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